Making a federal case out of it: Expert witness discovery under proposed Civ.R. 26

Proposed amendments to Civ.R. 26 seek to align the scope of expert witness discovery in Ohio with the scope of expert witness discovery permitted by the Federal Rules of Civil Procedure. The 2010 amendments to the federal rules scaled back the broad scope of expert discovery authorized by the 1993 amendments. The proposed amendments to Civ.R. 26 similarly clarify that work-product protection extends to the draft reports of testifying experts and, with limited exceptions, to communications between retaining counsel and the testifying expert witness. However, the proposed amendments to the Ohio rules largely move the sidewalk to where many Ohio practitioners are already walking.

2010 amendments to the Federal Rules of Civil Procedure

To place the proposed amendments to Civ.R. 26 in context, a brief review of the genesis and purpose of the 2010 amendments to Fed.R.Civ.P. 26 may be helpful. Prior to the 1993 amendments to Fed.R.Civ.P. 26, the balance of authority held that discovery of draft expert reports and communications between retaining counsel and testifying experts were generally not discoverable, absent a showing by the opposing party sufficient to defeat the work product doctrine. In 1993, however, Fed.R.Civ.P. 26 was amended to permit discovery of, among other things, the "data or other information considered" by the testifying expert—regardless of whether the information was actually relied on by the expert in forming an opinion.

Finding support in the advisory committee notes, many courts interpreted "other information considered" to permit discovery of at least some of the communications between retaining counsel and the testifying expert, as well as drafts of reports by experts expected to testify at trial. This resulted in an often expensive and burdensome discovery process with parties battling over communications between retaining counsel and the testifying expert and every iteration of the testifying expert's opinion. In some cases, expert depositions became protracted affairs where testifying experts were examined concerning each piece of information the expert had "considered" in forming an opinion, as well as each revision to the expert's report. Courts also had to spend much time managing expert discovery.

In response, federal practitioners adopted countermeasures of varying degrees of elegance and efficiency. At one end of the spectrum, practitioners reached stipulations that such discovery would not be had between the parties in a given case. At the other end of the spectrum, parties retained two sets of experts: a "consulting expert," generally shielded from discovery, who worked with counsel to develop theories and opinions and a "testifying expert," who was fed a restrictive diet of information and deployed to testify only as to the final opinion and rationale. Practitioners also strategized to avoid creating "draft" expert reports. Most federal practitioners agreed that the effect of the 1993 amendments was to make expert discovery expensive and burdensome. Many in the expert community contended that the effect of the amendments degraded the quality of expert opinions by inhibiting the flow of information between retaining counsel and testifying experts. On the other hand, others supported the broader discovery authorized by the amendments as providing the means by which to challenge the validity and credibility of an expert's opinion and testimony.

The 2010 amendments to the federal rules sought to reign in the scope of expert discovery that had expanded under the 1993 amendments by extending work-product protection to the draft reports of testifying experts and, with limited exceptions, to communications between retaining counsel and the testifying expert witness. These exceptions provide that discovery of communications between an attorney and the testifying expert witness may be had only if the communications: (a) relate to the

expert's compensation, (b) identify facts or data that the attorney provided to the expert and the expert considered in forming the opinions or (c) identify assumptions the attorney provided and the expert relied on in forming opinions. The exceptions were thought to strike the appropriate balance between curbing excessive expert discovery and protecting opposing counsel's ability to explore retaining counsel's influence on the expert's opinions and testimony. The 2010 amendments received broad support from the ABA and others. Further, according to the Committee on Rules of Practice and Procedure, a similar rule in effect in New Jersey had been favorably received by practitioners in that state and had had a positive impact on expert discovery. It is against this backdrop that we now turn to the proposed amendments to Civ.R. 26.

Civil Rule 26 Amendments

The proposed amendments to Civ.R. 26 provide that work-product protection extends to the draft reports of testifying experts and, with limited exceptions, to communications between retaining counsel and the testifying expert witness. To this end, the first proposed amendment to Civ.R. 26 adds division (B)(5)(c), which, similar to the 2010 amendments to Fed.R.Civ.P. 26, extends work-product protection to draft reports of an expert expected to be called at trial. The proposed division provides: "Drafts of any report provided by any expert, regardless of the form in which the draft is recorded, are protected by division (B)(3) of this rule."

The second proposed amendment to Civ.R. 26 adds division (B)(5)(d), which provides:

> Communications between a party's attorney and any witness identified as an expert witness under division (B)(5)(b) of this rule regardless of the form of the communications, are protected by division (B)(3) of this rule except to the extent that the communications:
>
> (i) relate to compensation for the expert's study or testimony;
> (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
> (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

The staff notes to proposed Civ.R. 26 explain that these amendments are designed to "clarify" the scope of expert discovery under Civ.R. 26 rather than to redefine it. The staff notes also indicate that the intent of the amendment is to provide "work product protection" to such communications. Of course work-product protection can still be defeated with a showing of "good cause" under Civ.R. 26(B)(3).

Practice pointers

Practitioners should bear in mind that the proposed amendments to Civ.R. 26 are not categorical bars to discovery, but instead are qualified protections that can be defeated in appropriate circumstances. Consequently, caution must still be exercised when communicating with testifying experts and in composing expert reports. In addition, practitioners should consult the advisory committee notes accompanying the 2010 amendments to Fed.R.Civ.P. 26, which may inform the interpretation of an amended Civ.R. 26. Those committee notes, for example, identify a variety of areas of expert discovery that the 2010 amendments were not intended to restrict, which may be helpful in tracing the contours of expert discovery under an amended Civ.R. 26.

Next steps

The proposed amendments to Civ.R. 26 were open to public comment until March 6, 2012. Assuming the Ohio Supreme Court files the proposed amendments with the General Assembly without modifications prior to May 1, 2012, these amendments would take effect on July 1, 2012, unless the General Assembly adopts a concurrent resolution of disapproval before then. ◆

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Litigation News is produced by the Ohio State Bar Association Litigation Section. The OSBA publishes 10 committee and section newsletters.

For more information about *Litigation News*, contact editors Andrew Holford at aholford@ahlawltd.com or Meredith Mercurio at mercurio@cklpa.com.

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