

Ohio Business Litigation Blog

A blog about Ohio business litigation and beyond.

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Sunday, November 7, 2010

Amendments To Federal Rule Of Civil Procedure 26 To Take Effect Soon - New Rules Regarding Work Product Protections For Communications Between Expert Witnesses And Lawyers

A recent blog post by the [North Carolina Business Litigation Report](#) provides an important reminder that on December 1, significant changes to the rules governing civil practice in the federal courts will take effect. (the post incorrectly states that the rules change occurs [Dec. 10](#).) Most significant among the changes are revisions to Federal Rule of Civil Procedure 26, which governs the discovery of information from expert witnesses retained to testify at trial.

Under the current and soon to be the old version of FRCP 26, when a lawyer retains an expert witness for trial, any communications a lawyer makes with the expert, or any draft reports prepared by the expert, are considered discoverable information. As described by the revisers of the rule, the old rule tends to inhibit robust communications between lawyers and experts and has had the effect of leading attorneys to "take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications [with its experts]." [Committee on Rules of Practice and Procedure](#). The new rules are supposed to better protect the work product of testifying experts and help reduce the costs of litigation



Under the revisions to FRCP 26, draft reports prepared by expert witnesses and any other communications between expert witnesses and a party's attorney are given the same protection already provided to other types of communication under the Work-Product Doctrine. Specifically, the new rule provides that the Work-Product Doctrine applies to "drafts of any report or disclosure required under Rule 26(a), regardless of the form in which the draft is recorded." The rule also applies to employee's and assistants of the expert witness. In other words, communication and drafts fully discoverable under the old rule are protected and not discoverable by opposing counsel any more.

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However, there are some limited exceptions to the new rule. The following categories of expert-attorney communications would continue to be subject to full discovery under revised FRCP 26 and will not garner work-product protection:

(1) Data or facts provided by the lawyer that the expert used in forming opinions; (2) Assumptions the attorney provided and the expert relied on in forming opinions; (3) Communications related to an expert's compensation.

I've personally had to deal with the difficulties of expert-attorney communications under the old rule and welcome these changes. The changes are going to save a lot of time and money for litigants. However, communications between lawyers and expert witness remain discoverable until December 1, 2010. So continue to be careful until that date.

Posted by Aaron Minc at 10:18 PM    

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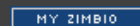
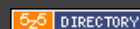
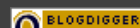
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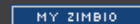
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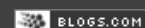
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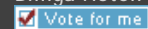
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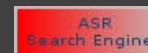
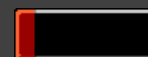
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