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DISCLOSURE AND DISCOVERY OBLIGATIONS FOR EXPERT OPINIONS

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Experts have become an integral part of litigation. As a result, jurisdictions have developed specific, detailed rules concerning not only the use of experts but also the disclosure and discovery obligations associated with expert opinions. These obligations vary depending upon whether the jurisdiction is federal or state, and depending on whether the expert will testify, and whether the expert was specifically obtained for purposes of providing opinions in connection with the litigation.

In light of the specific rules concerning the disclosure and discovery obligations associated with expert opinions, counsel should have little difficulty determining which experts must be disclosed, when a formal report is required, and the information necessary to adequately afform an opposing party of the experts opinions and the basis for those opinions.

A more difficult question is the extent to which a litigant must disclose all communications with and information provided to an expert. For experts retained specifically for litigation, most jurisdictions have concluded that discovery is virtually unlimited, concluding that anything shared with the experts by way of documents or communications is fair game for discovery. The issue is more difficult for non-retained experts, particularly those who are employed by a party and may be the "contact" person in connection with the litigation. Under such circumstances, communications between counsel and the expert often involves privileged matters covering such sensitive areas as trial strategy and case valuation. While the use of such in-house, non-retained experts is widespread, counsel must consider the consequences of using

the expert generally and of sharing with the expert specific information that the court may consider "fair game" for discovery.

This article addresses the automatic disclosure and general discovery obligations associated with expert opinions and specifically examines the circumstances under which communications with and information provided to experts may be discovered.

A. Automatic Disclosure Obligations.

Rule 26 (a)(2) of the Federal Rules of Civil Procedure governs the required disclosures for expert testimony. Unlike general discovery obligations which must be met in response to formal discovery requests, the disclosures are automatic, and required under the Federal Rules without the necessity of a formal discovery request.

Rule 26 (a)(2) requires a party to disclose the identity of any person "who may be used at trial to present evidence under Rule 702, 703 or 705 with the Federal Rules of Evidence." These three rules address evidence typically provided by experts, including expert testimony generally (Rule 702), the basis of opinions offered by experts (Rule 703) and the facts and data underlying an experts opinion (Rule 705). In essence, the Federal Rules require that a party identify any expert who will be offering opinions at trial, or who will testify concerning data underlying opinions.

The disclosure obligations are much more extensive with regard to opinions provided by experts who are "retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involved getting expert testimony…" For these "professional experts," Rule 26 (a)(2)(B) required a formal written report, prepared and signed by the expert:

> The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all

> publications authored by the witness within the proceeding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the proceeding four years.

Federal Rules of Civil Procedure 26 (a)(2)(B)

The timing of the disclosures required by Rule 26 usually is governed by a scheduling order. If no such order is entered, then the disclosure of the identity and, if necessary, the formal report of an expert must be made ninety days prior to trial if it is the initial disclosure. If the disclosure is of rebuttal testimony only, the Rule requires that disclosure be made within thirty days of the disclosures by the opposing party of the material to be rebutted. Federal Rules of Civil Procedure 26 (a)(2)(C)

The party making the necessary disclosures under the Federal Rules bears all costs and fees associated with the experts study, report and testimony.

The rules of the Supreme Court of Virginia have no corresponding disclosure obligations for expert testimony. Any exchange of information concerning experts is accomplished through the formal discovery process, which is discussed above.

B. Discovery Requirements for Experts Testimony.

In addition to the general disclosure obligations, Rule 26 of the Federal Rules of Civil Procedure addresses the overall discovery obligations with regard to expert testimony. Rule 4:1(b)(4) of the Rules of the Supreme Court of Virginia essentially tracks the Federal Rule. The discovery obligations vary dramatically depending upon whether or not the expert will be testifying at trial, as opposed to merely consulting concerning the litigation.

1. Testifying Experts.

    a. Rule 26 (b)(4) of the Federal Rules of Civil Procedure.
    b. Rule 4:1 (b)(4)(a)(i) of the Rules of the Supreme Court of Virginia.

2. Consulting Experts.

    a. Rule 26 (b)(4) of the Federal Rules of Civil Procedure.
    b. Rule 4:1 (b)(4)(a)(i) of the Rules of the Supreme Court of Virginia.

As appeared in Norfolk Portsmouth Bar Association Bulletin, Summer 2003

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