

Ohio Business Litigation Blog

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Friday, December 10, 2010

Southern District Rules on the Retroactive Application of the New Changes to Federal Rule of Civil Procedure 26

In a previous post, I discussed one of the important changes to the Federal Rules of Civil Procedure that took effect on December 1, 2010 regarding the [discoverability of Attorney-Expert Communications](#) under FRCP 26. The topic of this post covers another important change to Rule 26 that took place on December 1, the new requirement of summary disclosures for non-testifying experts. It also covers a recent ruling by Southern Districts of Ohio, which clarifies whether the new changes to Rule 26 apply retroactively.

The Old Rule

Under old and current FRCP 26(a)(2)(B), expert witnesses retained by a party specifically to testify at trial must disclose a written report containing their opinions and other information. Under the old rule, expert witnesses testifying at trial, but not hired or employed by a party specifically to testify at trial, were not required to submit any written reports. Only the disclosure of these witnesses' identities was required. An example of an expert who would not have to disclose a report under old Rule 26(a)(2)(B) is a "treating physician" (personal injury action, the emergency doctor who treated the plaintiffs injuries after an accident).

New Rule

Under new Rule 26(a)(2)(C), all witnesses who previously may have fallen



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under the non-reporting requirement, like "treating physician," are now required to provide a "summary of the facts and opinions to which the witness is expected to testify." That is the new rule.

No Retroactive Application of New Rule 26(a)(2)(C)

An issue that had yet to be truly known until the new changes took effect on December, 1, 2010, is whether the new changes to the rules apply retroactively. For example, what happens if a party, on 10/15/2010, before the new rule changes took effect, decides to call a "treating physician" to testify in a trial, which would take place on 1/15/2011, after the rule changes occurred? Would the party: (A) have to disclose a summary of what they expected the witness to testify to under the new rule (Rule 26(a)(2)(C), or (B) would the party only have to disclose the identity of the witness (via old Rule 26(a)(2)(B))?

The Southern District of Ohio has answered the issue in the case of William J. Lattuga v. United States Postal Service, Case No. 1:09-cv-416, Doc# 29, Decided on November 29th, 2010. In Lattuga, the Defendant sought to exclude the testimony of two physicians who had been identified as expert witnesses, but had not disclosed summary reports as required by new Rule 26(a)(2)(C). Even though the new rules have taken effect, the court denied the motion because the new rule change "was not in place at the time expert disclosure was required." In other words, the court held that the new rule change did not apply retroactively.

This ruling seems to be in line with what most people were expecting would happen. Although courts have not yet formally ruled on the retroactive application of other rule changes that occurred on December 1st, like the [discoverability of Attorney-Expert Communications](#), it can only be assumed that communications that occurred between attorney's and experts before the rule changes took place remain unprivileged and discoverable. The idea of parties signing agreements to apply the rules retroactively has been suggested to try to get around this procedural loophole.

Posted by Aaron Minc at 12:41 PM    

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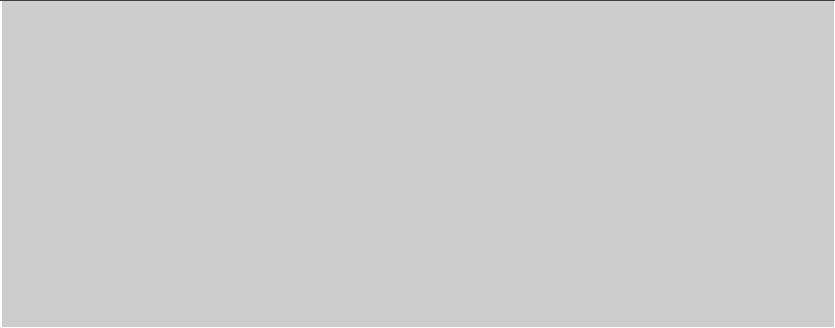
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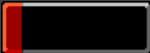
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