

LITIGATION ALERT

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What about my needs? The Ohio Civil Rules amendments seek to keep discovery costs in check with “proportionality”

Although social distancing is all the rage these days, the Ohio Supreme Court amended Rule 26 to bring the Ohio discovery rule closer to its federal counterpart. The stated purpose of the amendments, which went into effect July 1, 2020, is to facilitate a more efficient discovery process, while lessening the time and cost parties expend. Further, while the proportionality considerations serve to limit the scope of discovery, the new initial disclosure requirements and the mandate that the parties confer prior to the scheduling conference, will necessitate an early assessment of the case. Accordingly, those leading and managing litigation in-house will need to be involved in early case assessment and have a refined understanding of the relevant claims and defenses at the beginning of the litigation.

Specifically, the amendments introduce the following concepts:

Proportionality – Keeping a proper perspective

Prior to the amendments, the scope of discovery in Ohio included “information [that] appears reasonably calculated to lead to the discovery of admissible evidence.” As we know, this broad scope often resulted in expensive fishing expeditions – and not the fun kind. Amended Rule 26(B) (1) seeks to alter this so as to facilitate a more “proportional” discovery bill for parties. Almost identical to its federal counterpart, the rule eliminates the “reasonably calculated” language. Further, while “relevant matters” are still discoverable, they must be “proportional to the needs of the case, considering the importance of the issues ..., the amount in controversy, the parties’ relative access to relevant information, the parties’ resources,

the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”

Additionally, Ohio recognized that the pervasiveness of electronically stored information (ESI) increases the costs of discovery and can be used as a strategic excuse to delay proceedings. The amendment reflects the need for closer judicial involvement when parties are not able to effectively manage discovery. Specifically, Rule 26(B)(5) and (6) add new subparagraphs limiting the production of ESI from sources “not reasonably accessible due to undue burden or cost.” Production, however, may still be required upon a showing of good cause and proportionality. The court is also permitted to “limit the number of depositions, requests [for admission], and interrogatories or the length of depositions” and the rule requires courts to limit discovery if they determine that a party is seeking unreasonably cumulative, duplicative, inconvenient, burdensome, expensive, unnecessary or disproportionate discovery. In-house counsel will play a critical role in this evaluation and in determining the true needs of a case and potential expenses involved.

Don't keep it a secret – Initial disclosures

Rule 26(B)(3) features a new requirement for the disclosure of specified information *without being demanded in discovery requests*, including the identity of “individual[s] likely to have discoverable information,” a copy or description of the documents each party might rely upon to prove its case, and a computation of each damage category claimed as requested relief. Initial disclosures should accelerate the exchange of information and help shape the discovery needs of the case without the hindrance of serving formal requests and objections. Further, disclosures will allow parties to tailor their discovery requests to the proportional needs of the case. Initial disclosures must be made before the parties’ first pretrial or case management conference, but the time may be altered through stipulation, court orders and objections.

Also helpful in accelerating the speed of discovery is that other discovery efforts need not be suspended while the parties exchange initial disclosures or wait to conduct the 26(F) conference described below. Rule 26(D) provides that unless the court orders otherwise, the methods of discovery may be used in any sequence and the specific discovery rules provide for prompt deployment. For example, Rule 34, which relates to production of documents among other things, provides that a request can be made on a plaintiff after commencement of the action and on a defendant after service of process.

Let us know your Opinion - Expert witness disclosures

Rule 26(B)(7) was amended to require expert reports. The former rule did not require experts to provide a written report and only select Common Pleas Courts’ local rules governed expert witness disclosures and report exchanges. Amended Rule 26(B)(7) aligns Ohio courts and seeks to reduce the inefficiency in seeking a parties’ expert opinion primarily through

interrogatories and depositions. The new report requirement allows parties to discover a testifying expert's conclusions, and the basis for such conclusions, in order to evaluate whether a deposition of the expert is necessary. Thus, needless discovery may be avoided - saving time, money, and possibly a day stuck in a room with an expert witness. Notably, if a party does want to conduct a deposition of an expert, such deposition is only permissible once each party has exchanged their expert reports.

An exception to the report requirement is that the amended rule allows healthcare providers to testify as experts about matters addressed in medical records without the need for a separate medical report. This change should further reduce the expenses and difficulty in procuring expert opinions.

As with the federal rules, a party may not discover non-testifying expert opinions through interrogatories or deposition unless the requesting party demonstrates "exceptional circumstances under which, it is impracticable for the party to obtain facts or opinions on the same subject by other means" or in the case of physical and mental examinations as provided under Rule 35(B).

Let's get together - Meeting of the parties

A new subparagraph, Rule 26(F), requires the parties to confer at least 21 days in advance of the scheduling conference to discuss "the nature and basis of their claims and defenses[,] the "possibilities for promptly settling or resolving the case;" initial disclosures; and "a proposed discovery plan."

The discovery plan must be filed within 14 days after the conference outlining the parties' views and proposals on several matters including: initial disclosures, discovery deadlines, subjects of discovery, ESI preservation and production, privilege issues, public record disclosures, protective orders, and modifications of any scheduling order. Parties should address the proportionality of discovery in the parties' 26(F) Conference. The thought is, by addressing the particular needs of a case and the expense involved at the outset, discovery disputes can be reduced. Given their unique understanding of the client, in-house counsel can play a crucial role during these communications to help shape the litigation in an advantageous way.

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