

Committee Statement

Introduction

Over the last year, the Committee has studied whether to amend the rules of civil procedure regarding the information about experts which is required to be provided during discovery. The rules currently provide for disclosure, through interrogatory answers, of a testifying expert's identity, the subject matter of the expected testimony, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. Mass. R. Civ. P. 26(b)(4)(A)(i). Upon motion, the court may allow "further discovery," which is usually an expert deposition. Mass. R. Civ. P. 26(b)(4)(A)(ii). As explained in more detail below, in proposed changes to Rule 26, the Committee decided to adopt the federal requirement of expert reports for certain experts, but to retain the current practice of requiring leave of court to depose an expert. The failure to provide proper disclosures will typically lead to the exclusion of the proposed testimony under revisions to Rule 37. The details of the proposed changes to Rules 26 and 37 are discussed next.

Proposed Revisions to Rule 26

The proposed revisions to Mass. R. Civ. P. 26 incorporate in large part the expert disclosure provisions of the Federal Rules of Civil Procedure, with the exception of providing for expert depositions as a matter of right. Rule 26(b)(4) has been revised to incorporate in substantial part the expert disclosure requirements from Fed. R. Civ. P. 26(a)(2). In proposed Rule 26(b)(5)(D), the Committee changed the timing requirement used in the federal rule for such disclosures, absent a stipulation or order, to one sequenced based on the burden of proof. This was done in light of the fact that Rule 16 conferences are less frequent in Massachusetts

practice than federal practice. The federal rule contemplates that the timing of such disclosures will typically be set in a Rule 16(b) scheduling order. Federal Advisory Committee Notes to the 1993 Amendments to Rule 26(a)(2). In addition, the Committee agreed with the observation by the Federal Advisory Committee that “in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue.” *Id.*

The Committee also adopted in substantial part the expert discovery provisions from Fed. R. Civ. P. 26(b)(4), including proposed revisions to that federal rule that were approved by the Supreme Court on April 28, 2010, and should take effect on December 1, 2010.¹ The primary change from current practice is the requirement for a written report for expert witnesses. The written report requirement applies only to an expert witness “if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony.” “A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report.” Federal Advisory Committee Notes to the 1993 Amendments to Rule 26. Another example of such an expert can be found in *Anderson v. Paulo*, 74 Mass. App. Ct. 635 (2009) (plaintiff offered the expert opinion of a Lieutenant of the Cambridge fire department, who investigated the subject fire, as to the cause of the fire). For such witnesses, however, counsel will be required to disclose information similar to that currently provided in answers to interrogatories under Rule 26(b)(4). Such a disclosure is less comprehensive than a report, but prevents the unfair surprise at trial arising from the solicitation of an opinion developed, for

¹ The recent proposed amendments to Fed. R. Civ. P. 26 extend work-product protection to draft reports and, with certain exceptions, to communications between counsel and an expert.

example, in the course of treatment by the treating physician, but not revealed otherwise in discovery. In addition, Rule 26(e) was modified to require the supplementation of expert disclosures under Rule 26(b)(5)(B) and (C), as well as information from an expert deposition.

The major departure from the federal rule is that the Committee kept the current requirement for leave of court to depose an expert witness. The Committee believes that a need to alter the current practice with regard to expert depositions has not been demonstrated, especially in light of the proposed adoption of a requirement that expert reports be provided and of the proposal to strengthen sanctions for inadequate expert disclosures. The majority of the Committee agrees that the appropriate course is to keep the burden on the party seeking an expert's deposition to demonstrate what is inadequate about the expert's report. The requirement of leave of court permits the court to strike the appropriate balance between the parties' need for adequate information to prosecute or defend the matter and the legitimate concerns of the increased expense of litigation and the potential delay that may be engendered by an automatic right to depose all experts.

Proposed Revisions to Rule 37

The Committee's proposed revisions to Mass. R. Civ. P. 37(c) provide a sanction to prevent the disclosing party from offering expert testimony that is not properly disclosed as required by Rule 26, unless such failure was substantially justified or is harmless. An example of a harmless failure would be failing to disclose the basis for an opinion in a report, but the expert provides the basis for the opinion during the course of the expert's deposition (assuming that the timing of the deposition disclosure does not prejudice the opposing party). The modifications to Rule 37(c) are based on the cognate federal rule.

Conclusion

The report requirement, combined with the change to Rule 37(c), should serve to provide more comprehensive expert disclosures than those currently provided, as drafted by counsel. This result will reduce the unanticipated expert testimony that often occurs at trial and should aid the trial court in deciding admissibility issues before trial. The Committee recognizes, however, that further expert disclosures may still be necessary for a number of reasons notwithstanding the report requirement. When counsel believes that further disclosure should be required, the rule provides the opportunity to move for leave of court to depose an expert, as is the current practice.

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