



August 21, 2008

VIA ELECTRONIC MAIL

Diane Strickland, Chair
Boyd-Graves Conference

Re: Expert Witness Disclosures

Dear Diane:

The Committee was formed to study the not-altogether-consistent requirements for expert witness disclosures under Rule 4:1(b)(4)(A)(i) of the Rules of the Supreme Court of Virginia and the deadlines for such disclosures in the Uniform Pretrial Scheduling Order ("PTO") prescribed by Rule 1:18.B. and Rule 3 of Part One's Appendix of Forms.

Members of the Committee, other than I, were John McGavin, Steuart Thomas, Wally Wason, Elaine Bredehoft, John Fletcher and Steve Pearson.

Suppose, early in the litigation, an attorney propounds an interrogatory requesting the opposing party to identify his experts and provide the information the Rules require. We all know that interrogatories are to be (theoretically anyway) answered within 21 days of service. Such an interrogatory is likely to be met with a response that experts and information relating to them will be disclosed pursuant to the PTO in effect for the case. This is invariably the form prescribed by Rule 1:18.B. That provides that "(i)f requested in discovery, plaintiff's, counter-claimant's, thirty-party plaintiff's, and cross-claimant's experts shall be identified on or before 90 days before trial." Defendant's and all other opposing experts are to be identified on or before 60 days before trial "if requested in discovery." "If requested, all information discoverable under Rule 4:1(b)(4)(A)(i) of the Rules of the Supreme Court of Virginia shall be provided or the expert will not ordinarily be permitted to any nondisclosed opinions at trial."

There follows this language: "The foregoing deadlines shall not relieve a party of the obligation to respond to discovery requests within the time periods set forth in the Rules of the Supreme Court of Virginia, including, in particular, the duty to supplement or amend prior responses pursuant to Rule 4:1(e)."

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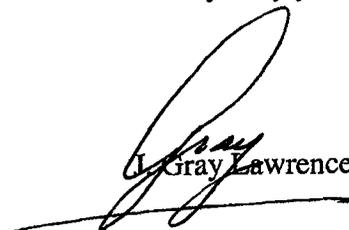
The question arises whether a party is entitled to an expert disclosure in timely response to an interrogatory, or must he wait until the time specified in the PTO. Rule 1:18.B. may be read to support either position; on the one hand, expert disclosure is required a certain number of days before trial pursuant to the PTO and, on the other, those deadlines do not relieve a party of the obligation to timely respond to the expert interrogatory even if expert disclosure is thereby arguably required before it would be under the PTO.

In complex cases the usual PTO time limits can present a problem. The deadlines prescribed in the PTO may create a time crunch. A defendant may not be able to fully ascertain what experts he will need until the plaintiff's expert disclosures have been received. Everyone is scrambling around taking expert depositions, filing motions *in limine*, etc. at the last minute, none of which is conducive to the orderly administration of justice or efficient trial preparation.

The Committee members considered the issue from varying perspectives. We all recognized that the requirement of expert disclosure is limited to persons whom a party "expects to call as an expert witness at trial," Rule 4:1(b)(4), and that until that determination is made there is no expert disclosure requirement. The PTO requires counsel to make that decision by a date certain. As a practical matter, expert disclosures will not be made until required by the PTO.

Several members of the Committee recommended that the PTO's disclosure dates be pushed back, *i.e.*, farther away from the trial date. However, that would require a rule change and is unnecessary, since Rule 1:18.B. presently provides that the court can deviate from the terms of the PTO if (1) counsel for all parties agree or (2) the court, after providing opportunity for counsel to be heard, "makes a finding that the scheduling order... is not consistent with the efficient and orderly administration of justice under the specific circumstances of that case." In other words, a mechanism is already in place for the parties and the court to adjust expert witness disclosure deadlines on a case-by-case basis. While one member of the Committee noted that that section has been inconsistently interpreted, no consensus was reached that changes should, or needed to, be made to the present system. The Committee, accordingly, makes no proposal to the Conference.

Very truly yours,



J. Gray Lawrence, Jr.

JGL

Editor's Note:

The Committee recommended no change and, thus, no action was taken on this report by the Conference.