RECENT DEVELOPMENTS IN CIVIL DISCOVERY

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Agenda

Expert Witness Disclosures & Exclusion

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Remote Depositions

Other 2024 Changes to Civil Rules

EXPERT WITNESS DISCLOSURES & EXCLUSION

Green v. Kootenai Heart Clinics, LLC

34 Wn. App. 2d 216, 567 P.3d 645 (Div. III 2025)

- Wrongful death case
- Involved competing expert opinions on how soon decedent lost consciousness after being hit by a delivery van
- What you are entitled to in expert witness discovery (CR 26(b)(5)(A)(i)):
  - "A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules.
  - May also take expert's deposition (CR 26(b)(5)(B))
- Plaintiff sent written discovery to Defendant asking for expert witness disclosures
- Defendant provided very little information on one expert (did not give bases for opinions, documents reviewed, or expert file)

Green v. Kootenai Heart Clinics (Cont.)

- Plaintiff did not seek to take defense expert's depo before discovery cutoff (although there was plenty of time to do so) or move to compel full responses to written discovery
- Defense expert was deposed after a trial continuance granted on day of trial
- At deposition, defense expert disclosed new opinions re decedent's alleged immediate loss of consciousness
- Plaintiff then moved to supplement with rebuttal expert witnesses based on new opinions of defense expert

Green v. Kootenai Heart Clinics (Cont.)

- Trial court denied request to supplement based on analysis of Burnet factors
  - First factor: No lesser sanction short of exclusion
  - Second factor: Violation was willful or deliberate
  - Third factor: Substantially prejudiced defense's ability to prepare for trial
  - Held Plaintiff responsible for 1) not moving to compel full responses to written discovery re defense expert and 2) not previously deposing defense expert
- Court of Appeals reversed, held 1) no willful or deliberate violation of discovery rules, and 2) even if there was, a lesser sanction would have sufficed

Green v. Kootenai Heart Clinics (Cont.)

- No willful or deliberate violation of discovery rules (main holding):
  - Plaintiff served written discovery and Defendant failed to fully answer it – Defendant is the one that committed discovery violation, not Plaintiff
  - Plaintiff had the ability to take deposition of defense expert earlier or move to compel full discovery responses, but was not required to do so – not Plaintiff's fault Defendant failed to do what they were supposed to do
  - Parties should be able to conduct expert witness discovery entirely be interrogatory
  - "[Plaintiff] should not have been faulted for failing to promptly use every tool in the civil litigator's toolbox to pry discovery out of [Defendant]."
  - "Instead of faulting [Defendant] for spending two years evading its discovery obligation, the court faulted [Plaintiff] for not bringing a motion to compel. This was error."

Green v. Kootenai Heart Clinics (Cont.)

- Lesser sanction would have sufficed (alternative holding):
  - Presumption in favor of admissibility
  - Party seeking to exclude bears burden of rebutting presumption by showing no other possible sanction would suffice (see CR 37(b)(2) for nonexclusive list of possible sanctions)
  - Court could have continued trial (again) and required Plaintiff's counsel to "pay the reasonable expenses, including attorney fees, caused by the failure" – defense deposition costs and other defense costs related to moving the trial date

Oftentimes, attorneys hope to gain an advantage by failing to properly answer discovery. This tactic leads to a series of last-minute motions to exclude evidence. Our jurisprudence makes it extremely difficult and risky for trial judges to exclude important evidence, otherwise admissible.

The lesson for attorneys is this: Comply with your discovery obligations. *The lesson for trial judges is this*: Rather than imposing a severe remedy such as excluding a witness, strongly consider ordering a trial continuance and requiring the at-fault attorney to pay a price for their discovery violation. For example, an attorney charging a percentage-fee can be ordered to charge a lesser percentage. An attorney charging hourly can be ordered to disgorge fees or to not charge for certain tasks associated with future trial preparation. Attorney monetary sanctions may be the surest way to correct attorney behavior.

Footnote 5 – enough is enough

CONTACT WITH NONPARTY TREATING PHYSICIANS (LOUDON RULE UPDATE)

Snyder v. Virginia Mason Medical Ctr.

34 Wn. App. 2d 146, 566 P.3d 873 (Div. I 2025)

- Loudon rule: Defense counsel in personal injury case is prohibited from ex parte contact with Plaintiff's nonparty treating physicians
  - Plaintiff waives doctor/patient privilege when filing personal injury lawsuit, but only as to conditions at issue in lawsuit and there is too much risk that ex parte contact would go into other issues not covered by waiver
- Variation from Youngs v. Peacehealth: What about when the physician is employed by the Defendant? In that case, Loudon rule does not apply and employer is allowed to have ex parte contact with its physicians re direct knowledge of events triggering the litigation, per the Upjohn corporate attorney/client privilege

Snyder v. Virginia Mason Med. Ctr. (Cont.)

- Variation from Hermanson v. Multicare Health Systems: Defendant could have ex parte with its independent contractor physician because physician was "functional equivalent" of employee under particular facts of that case
- Snyder dealt with yet another variation, where physicians were former employees of Defendant – could Defendant have ex parte contact with those physicians?
- Court of Appeals, Division One, said no, it cannot: per Newman v. Highland School District No. 203, 186 Wn. 2d 769, 780, 481 P.3d 1188 (2016), corporate attorney/client privilege does not extend to former employees. Therefore, no exception to Loudon based on competing corporate attorney/client privilege (even though Defendant could still be vicariously liable for former employees' actions)

REMOTE DEPOSITIONS

Any party may take a deposition in person or by remote means. Parties are strongly encouraged to agree to the mode and manner of deposition, in person or remote, before notice is served. The deposition shall proceed as noticed unless within three days of receipt of the notice an objecting party or the deponent files a motion objecting to the notice.

Unilateral notice of remote or in person deposition (CR 30(b)(7))

Must object within three days

Determining objection to remote or in person deposition(CR 30(b)(7))

In determining whether a deposition shall proceed in person or by remote means, the court may consider the following nonexclusive factors and any other factor the court deems appropriate: (a) the role of the witness in the case, (b) the complexity of the case, (c) whether there will be prejudice to any party or the witness if testimony by remote means is permitted, (d) whether the witness is subject to the court's subpoena power and, thus, whether a party will at any point have the opportunity to question the witness in person, and (e) whether the noted mode of deposition serves the purposes of CR 1.

Conduct of remote deposition (CR 30(h)(7))

(7) *Depositions by Remote Means.* In any deposition taken by remote means, in addition to the above rules, the following provisions apply:

(A) The witness's demeanor and appearance shall remain their own as if they were in person and shall not be manipulated or altered.

(B) Each person physically present in the room with the deponent during a remote deposition shall remain audible and visible for the duration of the deposition.

(C) During the deposition, unless specifically requested to do so by the examining attorney, the deponent shall not refer to any notes or any electronic or other means used for communication, such as e-mail and messaging.

(D) No one shall attempt to influence the deponent's response to an examiner's question in any manner, including visually, verbally, and in writing, such as notes, text messages, e-mail, and electronic chat functions.

OTHER 2024 CHANGES TO CIVIL RULES (CR 26)

If an interrogatory is propounded, you cannot wait until case schedule deadline to disclose experts (CR 26(b)(5)(A)(i))

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. Except for special proceedings, a case schedule deadline to disclose experts does not excuse a party from timely responding to expert discovery to the extent responsive information is available. (ii) Unless these rules impose an earlier deadline, and in no event later than the deadline for primary or rebuttal expert witness disclosures imposed by a case schedule or court order, each party shall identify each person whom that party expects to call as a primary or rebuttal expert witness at trial, state the subject matter on which the expert is expected to testify, state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

If there is a case schedule deadline to disclose witnesses, you must include expert witness info even if no interrogatory was propounded (CR 26(b)(5)(A)(ii))

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. Except for special proceedings, a case schedule deadline to disclose experts does not excuse a party from timely responding to expert discovery to the extent responsive information is available. (ii) Unless these rules impose an earlier deadline, and in no event later than the deadline for primary or rebuttal expert witness disclosures imposed by a case schedule or court order, each party shall identify each person whom that party expects to call as a primary or rebuttal expert witness at trial, state the subject matter on which the expert is expected to testify, state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response has a duty to seasonably supplement or correct that response with information thereafter acquired. Supplementation or correction shall clearly set forth the information being supplemented or corrected.~~that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:~~

~~(1) A party is under a duty seasonably to supplement their response with respect to any question directly addressed to:~~

~~(A) the identity and location of persons having knowledge of discoverable matters, and~~

~~(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert witness is expected to testify, and the substance of the expert witness's testimony.~~

~~(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:~~

~~the party knows that the response was incorrect when made, or~~

~~the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.~~

~~A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.~~

Failure to seasonably supplement or correct in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.

General duty to supplement (CR 26(e))

Also, you cannot “hide” new information within old responses

(g) Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by a ~~party~~ represented party ~~by an attorney~~ shall be signed by at least one attorney of record in the attorney's ~~individual~~ name., ~~whose address shall be stated.~~ A ~~party who is not represented by an attorney shall sign the~~ request, response, or objection by a nonrepresented party shall be signed by that party ~~and state the party's address~~. Objections shall be in response to the specific request objected to. General objections shall not be made. A party making an objection based on privilege shall describe the grounds for the objection and, where consistent with subsection (b)(1), shall identify all matters the objecting party contends are subject to the privilege including sufficient information to allow other parties to evaluate the claim of privilege without disclosing protected content. The signature of the attorney or party constitutes a certification that the attorney or the party has read the request, response, or objection, and that to the best of their knowledge, information, and belief formed after a reasonable inquiry it is:

NO GENERAL OBJECTIONS (CR 26(g))

And you must include a privilege log

THANK YOU

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