HEADNOTES

EXPERTS

Your Opponent Can Discover Your Experts

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Your opponent just served you with interrogatories, and one of them asks for the names of every person you've interviewed as a potential or consulting expert. If you're like me, your first thought is, "Ha! Fat chance—there's no way I want to tell you that and no law that says I have to." Well, don't be so sure. It turns out, incredibly, that there is a whole body of case law out there that would force you to turn over information that, among other things, would allow your opponent to benefit from your work tracking down possible experts.

You would think that the Federal Rules of Civil Procedure address this issue head-on. Not so. Rule 26(b)(4)(D)(ii) says that an opposing party cannot discover the facts known or opinions held by non-testifying experts except on a showing of exceptional circumstances. (Note that Rule 26(b)(4)(D) was 26(b)(4)(B) prior to the 2010 amendments.) Unfortunately, neither it nor any other rule says anything about discovering the *identity* of non-testifying or potential experts. Even more unfortunately, a line of cases that started with *Baki v. B.F. Diamond Construction*, 71 F.R.D. 179 (D. Md. 1976), holds that "the names and addresses, and other identifying information, of experts, who have been retained or specially employed in anticipation of litigation or preparation for trial and who are not expected to be called as witnesses at trial, may be obtained through properly framed interrogatories without any special showing of exceptional circumstances." *See id.* at 182.

Another line of cases, led by the Tenth Circuit's decision in *Ager v. Jane C. Stormont Hospital & Training School for Nurses*, 622 F.2d 496 (10th Cir. 1980), takes the opposite (and commonsensical) view, holding that a party seeking the identity of a non-testifying consulting expert must demonstrate "exceptional circumstances" that make it "impracticable" to get "facts or opinions on the same subject by other means." *See id.* at 503.

You might think that *Baki* is an outlier and that courts are likely to follow the much more logical holding of *Ager*, but you'd be wrong. In a relatively recent review of the authorities on this issue, one court concluded that "the case law seems to show that, if anything, it is the rule announced in *Baki*, not *Ager*, that seems to predominate." *In re Welding Fume Prods. Liab. Litig.*, 534 F. Supp. 2d 761, 768 n.8 (N.D. Ohio 2008).

Note that both *Baki* and *Ager* hold that the identities of experts who are only "informally" consulted, not "retained or specially employed in anticipation of litigation," are not discoverable under any circumstances. You might be tempted to dispense with expert consulting agreements in an effort to make the relationship seem as "informal" as possible. That will bring its own set of problems, of course. Plus who wants to get into a fight about whether any given expert was more than

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"informally" consulted? Or suffer sanctions for not giving up the names of non-testifying experts? (When the lawyer in *Ager* refused to comply with the trial court's directive to divulge the names of non-testifying experts, the court found her in contempt and ordered her jailed until she complied—i.e., indefinitely. Luckily for her, the sentence was suspended pending appeal, and the Tenth Circuit reversed the lower court's ruling.)

Knowing that we might have to divulge the identity of any expert we hire, even though that expert won't testify, should make all of us a lot more circumspect about what we tell our consultants about the possibility of being outed. In a recent case, I retained a former coworker of the opposing party as a consultant. Would he have agreed to work for my client if he had known I might have to give up his name? Maybe not; he and his former workmate sent their kids to the same school and still ran into each other once in a while. And the possibility of awkward social encounters isn't the only reason an expert might not want his or her identity revealed. Many nonprofessional expert witnesses (e.g., doctors who continue to practice and scientists who continue to do research) don't want to be identified as having helped make the case against a professional colleague.

If faced with a judge who seems willing to allow your opponent to discover the identities of your non-testifying experts without any special showing, it's a good idea to trot out as many public policy arguments as you can. It's also a good idea to make as many textual arguments as possible. For instance, remember that according to Rule 26(b)(4)(D), "facts known or opinions held" by a non-testifying expert are, absent exceptional circumstances, not discoverable. Rule 26(b)(1) limits the permissible scope of discovery to "the identity and location of persons who know of any discoverable matter." Because the information known to non-testifying experts is not "discoverable matter," the identity of those experts is not discoverable under 26(b)(1)—they are not "persons who know of any discoverable matter." Seems logical, and it's certainly the better approach.

In light of the case law that supports routine discovery requests for consulting experts' names, in the interest of full disclosure—and of helping experts avoid awkward encounters on the golf course or their kids' soccer field—consider making clear that a consultant's retainer agreement is not a shield of anonymity. ■