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EXPERT DISCOVERY AFTER
COOPER V. SCHOFFSTALL

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EXPERT DISCOVERY AFTER COOPER V. SCHOFFSTALL

In a matter of first impression, the Pennsylvania Supreme Court has established guidelines for the scope of permissible discovery directed to non-party experts in Cooper v. Schoffstall, 588 Pa. 505, 905 A.2d 482 (Pa. 2006). Pursuant to Cooper, discovery outside the facts and opinions upon which an expert may be expected to testify is now explicitly permitted. Interpreting the “upon cause shown” exception to Pa. R.C.P. 4003.5, this discovery is allowed upon a showing of reasonable grounds to believe that the witness has entered the “professional witness” category. Cooper, 905 A.2d at 495. This includes “a significant pattern of compensation that would support a reasonable inference that the witness might color, shade, or slant his testimony in light of the substantial financial incentives.” Id.

Previously, this area was guided by the Superior Court’s Cooper memorandum opinion, Cooper v. Schoffstall, 859 A.2d 839 (Pa. Super. 2004), and a separate Superior Court panel’s published opinion in J.S. v. Whetzel, 860 A.2d 1112, 1121 (Pa. Super. 2004). Both cases involved discovery directed to defense medical expert, Perry A. Eagle, M.D. The J.S. panel found sufficient evidence of bias on the part of Dr. Eagle to require him to produce all 1099 forms received from any insurance company or attorney over the previous four-year period. In Cooper, the Pennsylvania Supreme Court has limited J.S. and established a higher burden for production of these financial documents.

In accordance with Cooper, a party must proceed as follows to obtain expert bias discovery:

- **Demonstrate that the expert has engaged in a pattern of expert services for compensation which might reasonably be inferred to color his testimony.**

This may be accomplished by way of written interrogatories to a party regarding the number of times the expert has been retained and/or the amount of compensation the expert has received from the party's attorney and/or law firm. In addition, a party might establish the required showing during cross examination of an opposing party's expert at video deposition or trial.

- **Obtain the trial court's permission to proceed with deposition by written interrogatories per Pa. R.C.P. 4004.**

The Pennsylvania Supreme Court has clearly held that the subject expert discovery is not permitted as a matter of right, but is instead "subject to the trial court's exercise of its sound discretion." Cooper, 905 A.2d at 495. Therefore, the proponent of expert discovery must presumably file a Motion identifying "cause" for expert bias discovery and obtain an Order permitting the same. Subject to the Court's permission and in accordance with Pa. R.C.P. 4004, the proponent may then forward written interrogatories directly to the expert. However, the trial court may require the party seeking discovery to reimburse the expert for his or her costs in answering interrogatories. Interrogatories which are narrowly tailored to the categories enumerated in Cooper would appear to be more likely to withstand judicial review. These include:

the approximate amount of compensation received and expected in the pending case; the character of the witnesses' litigation-related activities, and, in particular, the approximate percentage devoted to specific types of litigation and/or work on behalf of a particular litigant, class of litigant, attorney, and/or attorney organization; the number of examinations, investigations, or inquiries performed in a

given year, for up to the past three years; the number of instances in which the witness has provided testimony within the same period; the approximate portion of the witness's overall professional work devoted to litigation-related services; and the approximate amount of income each year, for up to the past three years, garnered from the performance of such services.

Cooper, 905 A.2d at 495.

The Pennsylvania Supreme Court has not foreclosed additional discovery, including a request for production of tax returns and/or 1099 Forms. However, the party seeking these documents must first obtain the expert's answers to Rule 4004 interrogatories and then demonstrate by way of appropriate Motion that the expert's answers are "evasive or untruthful." Cooper, 905 A.2d at 496. For a sample set of interrogatories along the lines discussed above, please contact the author of this article.