GOOD CAUSE STANDARD PREVENTS EXPERT SUBSTITUTION REGARDLESS OF "DOCTOR'S ORDERS"

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When can a court allow a late substitution of an expert witness?

It is a question that a U.S. district judge faced several weeks ago after an expert witness withdrew due to alleged health problems. And though the case law is somewhat sparse on this particular topic, the analysis includes examining both the reasons for the substitution and the consequences to the litigation.

The Reasons
Several months ago, University of Oklahoma professor Dr. Ronald Keith Gaddie informed the County of Albany that he could no longer testify as an expert witness on its behalf, because his deteriorating health prevented him from doing so.

The professor's physician had recommended that Dr. Gaddie decrease his workload to "a normal 40 hour work week," he said. But Dr. Gaddie only informed the defendants that he could no longer provide them with his expert services after being promoted to chair of the university's political science department, which, the court noted, is a "signifigant additional responsibility" in itself.

U.S. District Court for the Northern District of New York Judge Lawrence E. Kahn found this temporal relationship between the expert's withdrawal and academic promotion "troubling," he said.

"It appears possible that rather than seeking relief from his expert testimony for medical reasons, Dr. Gaddie 'has other work that he wishes to do instead of testifying here,'" Judge Kahn wrote in his Aug. 6 decision and order, partially quoting the Missouri case of *In re Genetically Modified Rice Litigation*. 2010 WL 1292171, at 1 (E.D. Mo. Apr. 5, 2010).

Ultimately, Judge Kahn denied defendants' motion to substitute the expert witness in *Anna Pope, et al. v. County of Albany and Albany Board of Elections*, finding that defendants failed to show "good cause" for Dr. Gaddie's substitution.

The Good Cause/Bad Health Standard
According to both case law and the Federal Rules of Civil Procedure, "a party moving to substitute an expert witness following the close of discovery must show good cause," the court cites, noting that there is little case law for applying such standard to specific instances of expert witness substitution when the alleged reasons are health related.

For guidance, the court in the instant case looked at district court decisions in Ohio and Manhattan to help establish some parameters.

With both cases involving an expert witness with heart problems, the cases and courts seem to turn on how commanding and specific the doctor's directive is.

Providing an example in which "good cause" existed is a Northern District of Ohio federal case where the expert witness suffered a serious heart condition that was worsening. The expert's

cardiologist advised the expert to “cease all work on cases (including this one).” The court found that the substitution of this expert was therefore permitted, but still mandated procedures to limit the prejudice to the opposing party. *Chappel v. City of Cleveland*, No. 06 CV 2135, 2007 WL 3353901, at 1 (N.D. Ohio 2007).

At the other end of the spectrum is the New York federal case of *LNC Investments, Inc. v. First Fidelity Bank*, in which a doctor issued a general order to an expert witness that he should reduce his stress levels in order to control his heart condition. Here the U.S. District Court judge found that this medical condition was not sufficient “good cause” to allow the expert witness to be substituted. No. 92 Civ. 7584, 2000 WL 1290615, at 4 (S.D.N.Y. Sep. 12, 2000).

When denying the substitution motion, the court surely does not force the expert witness to testify against his/her own will; the court simply refuses to allow the substitute.

The Consequences

Judge Kahn also noted that the consequences of substituting an expert witness would be particularly harmful in this Voting Rights Act (VRA) litigation, which Judge Kahn says “brings rigorous statistical analysis to the forefront of a trial.”

Therefore, *Pope v. Albany* is likely to become a “battle of experts,” Judge Kahn wrote, citing various cases that support the categorization of VRA cases as being heavily dependent on statistics and experts.

One case, *McCord v. City of Fort Lauderdale* in a Florida federal court, involved similar VRA issues of racially polarized voting disputes and ruled that such issues are “determined by the court through a battle of the experts.” 617 F. Supp. 1093, 1099 (S.D. Fla. 1985).

When such “a battle” occurs, courts are understandably very hesitant to allow the key players (the expert witnesses) to be swapped and substituted.

“[W]here the new testimony is in the form of a new expert witness opinion, the potential for prejudice is real,” the Vermont District Court stated last year in *Allen et al v. Dairy Farmers of America*, No. 09-230, D. Vt. (*For more on the expert witness analysis in Allen et al v. Dairy Farmers of America, see Feb. 25, 2014, BullsEye Blog article “Of Dairy & Daubert; Judge Must Mull Over Milk Markets.”*)

When the integral considerations for the court substantially depend on expert witness testimony, “courts have been loathe [sic] to allow the late substitution of experts,” Judge Kahn writes in his opinion.

Does there appear to be any bright line rule here for expert witness substitution, or does it seem as though the courts are simply using common sense analysis of the totality of the circumstances? Should there be a more defined rule? If so, will we then possibly need medical experts to testify on other expert witnesses’ health?