

In the Circuit Court of Kanawha County, West Virginia

MOUNTAINEER GAS COMPANY,
Plaintiff,

v.

Case No. CC-20-2023-C-1067
Judge David Hammer

**WEST VIRGINIA-AMERICAN WATER
COMPANY,**
Defendant

Order Adopting Amended Rule 26 Regarding Discovery as to Expert Witnesses

The parties and the Court are aware that the Supreme Court of Appeals of West Virginia, by Order entered January 31, 2024, has adopted certain revisions to the West Virginia Rules of Civil Procedure that shall become effective January 1, 2025. The Rules, as amended, will expressly set forth the scope of discovery with regard to expert witnesses. As this case will likely remain pending once those amended Rules take effect it is the intent of the Court, and the agreement of the parties, that discovery in this case as to expert witnesses shall be governed by the revised Rule 26.

Accordingly, this Court hereby currently adopts revised Rule 26(b)(4) of the West Virginia Rules of Civil Procedure, for these cases, as follows:

Rule 26. General provisions governing discovery.

(b) Discovery scope and limits.

(4) Trial preparation: experts.

(A) *Deposition of an expert who may testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-preparation protection for draft reports or disclosures.* Rules

26(b)(4)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(1), regardless of the form in which the draft is recorded.

(C) *Trial-preparation protection for communications between a party's attorney and expert witnesses.* Rules 26(b)(4)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2), regardless of the form of the communications, except to the extent that the communications:

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert employed only for trial preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

- (i) as provided in Rule 35(b); or
- (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court shall require that the party seeking discovery:

- (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and
- (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

The Court further recognizes that all other revisions to the Rules of Civil Procedure shall apply to these cases as of January 1, 2025.

The Clerk is instructed to provide a copy of this Order to counsel of record and any unrepresented party.

/s/ David M. Hammer
Circuit Court Judge
13th Judicial Circuit

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