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# Retained and Non-Retained Experts: Cases After 2010 Amendments to Rule 26(a)(2)

By
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Since 1993, Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure has made it clear that a detailed written expert report is only required where the expert witness "is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." FED. R. CIV. P. 26(a)(2)(B). In December 2010, Rule 26 was amended to require that other "non-retained experts" also make a disclosure, but a more limited one: They need only disclose "(i) the subject matter on which the witness is expected to present evidence under Federal Rules of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify." FED. R. CIV. P. 26(a)(2)(C). While a non-retained expert "may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705," the Rule 26(a)(2)(C) disclosures need not include "facts unrelated to the expert opinions the witness will present." FED. R. CIV. P. 26 advisory committee's note (2010).

There is no question that an expert specifically hired after the fact by counsel to render an opinion in litigation must provide a detailed report under Rule 26(a)(2)(B). However, where an expert witness has some first-hand involvement in the underlying facts, recent case law suggests that such expert's designation as "retained," and subject to the reporting requirements of Rule 26(a)(2)(B), or as "non-retained," and subject to the less onerous disclosures called for by Rule 26(a)(2)(C),will depend on the sometimes inconsistent application of various factors—including whether the expert opinions to be offered were formed before, during, after, or in anticipation of litigation—even after the 2010 amendments.

### During the Course of Events

The distinction between an expert "retained or specially employed" and a non-retained expert turns, at least in part, on "the difference between a percipient witness who happens to be an expert and an expert who, without prior knowledge of the facts giving rise to litigation, is recruited to provide expert opinion testimony." *Downey v. Bob's Disc. Furniture Holdings*, 633 F.3d 1, 3 (1st Cir. 2011). As the U.S. Court of Appeals for the First Circuit explained in *Downey*:

> Interpreting the words "retained or specially employed" in a common-sense manner, consistent with their plain meaning, we conclude that as long as an expert was not retained or specially employed in connection with the litigation, and his opinion about causation is premised on personal knowledge and observations made in the course of treatment, no report is required under the terms of Rule 26(a)(2)(B). This sensible interpretation is also consistent with the unique role that an expert who is actually involved in the events giving rise to the litigation plays in the development of the factual underpinnings of a case. Finally, this interpretation recognizes that the source, purpose, and timing of such an opinion differs materially from the architecture of an opinion given by an expert who is "retained or specially employed" for litigation purposes. Consequently, where, as here, the expert is part of the ongoing sequence of events and arrives at his causation opinion during treatment, his opinion testimony is not that of a retained or specially employed expert.
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> Id. at 7 (citations and footnotes omitted).

Confusion remains as to whether treating physicians or similar percipient witnesses must always be designated as experts under Rule 26 in the first place.

Consistent with *Downey*, a witness retained to provide a service other than giving expert testimony is more likely to be within Rule 26(a)(2)(C) than Rule 26(a)(2)(B). See, e.g., *Areas USA SJC v. Mission San Jose Airport*, No. C11-04487 HRL, 2012 WL 5383310, at *1 (N.D. Cal. Nov. 1, 2012) (where witnesses "worked for Legends Group…before this litigation began" and were "not retained to provide expert testimony and their duties do not regularly involve giving expert testimony," "the expert testimony of these individuals is governed by Rule 26(a)(2)(C)."); *Empire*

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*Lumber v. Indiana Lumbermens Mut. Ins.*, Civil No. 3:10-cv-00533-REB, 2012 WL 4470876, at *6 (D. Idaho Sept. 27, 2012) ("Mr. Reimer's involvement in this action is that of a witness (albeit with a certain degree of expert knowledge) to his own dealings with Empire Lumber in 2009 and his related replacement cost estimate—nothing more.").

As the 2010 advisory committee note to Rule 26 points out, "[f]requent examples" of such non-retained witnesses subject to Rule 26(a)(2)(C) disclosures "include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony." FED. R. CIV. P. 26 advisory committee's note (2010).

Also consistent with *Downey*, an expert who gives testimony regarding opinions formed during the course of underlying events is likely to be exempted from the written reporting requirements of Rule 26(a)(2)(B). See, e.g., *Goodman v. Staples The Office Superstore*, 644 F.3d 817, 826 (9th Cir. 2011) ("treating physician is only exempt from Rule 26(a)(2)(B)'s written report requirement to the extent that his opinions were formed during the course of treatment"); *Meredith v. Int'l Marine Underwriters*, Civil Action No. GLR-10-837, 2012 WL 3025139, at *5 (D. Md. July 20, 2012) ("to the extent that a witness' opinion is based on facts learned or observations made 'in the normal course of duty,' the witness is a hybrid and need not submit a report"); *Chesney v. Tennessee Valley Auth.*, No. 3:09-CV-09, 2011 WL 2550721, at *3 (E.D. Tenn. June 21, 2011) (holding witnesses who "were participants in [defendant's] ash spill response activities" and "scientists and engineers who used their 'specialized knowledge, etc.' in discharging their employment duties" "specifically excluded from the written expert report requirement" but subject to Rule 26(a)(2)(C)).

It is worth noting that Rule 26(a)(2)(C) was intended to "resolve a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirements." FED. R. CIV. P. 26 advisory committee's note (2010). However, confusion remains as to whether treating physicians or similar percipient witnesses must always be designated as experts under Rule 26 in the first place. Some courts have concluded that the 2010 amendments effectively categorize treating physicians as per se experts. See, e.g., *Romanelli v. Long Island R.R.*, No. 11 CIV. 2028(SAS), 2012 WL 2878132, at *2 (S.D.N.Y. July 13, 2012) ("The Federal Rules of Civil Procedure…now categorize treating physicians as expert rather than lay witnesses."); *Gonzalez v. Rodgers*, Cause No. 2:09-CV-225-JTM-PRC, 2011 WL 5040673, at *5 (N.D. Ind. Oct. 24, 2011) ("Plaintiffs were required to disclose the information identified in Rule 26(a)(2)(C)…for each treating physician that is giving only testimony as to observations, diagnoses, and conclusions reached during the course of treatment."); *Walti v. Toys R Us*, No. 10 C 2116, 2011 WL 3876907, at *6 (N.D. Ill. Aug. 31, 2011) ("[E]ven when an expert witness does not have to provide a full report under Rule 26(a)(2)(B), the party intending to call the witness to testify under Rule of Evidence 702 must serve a formal disclosure of the subject matter, opinions and facts to which the expert will testify. Fed.R.Civ.P. 26(a)(2)(C).").

Other courts continue to permit treating physicians to testify without being declared experts notwithstanding the 2010 amendments, but limit their testimony to personal knowledge concerning consultation, examination or the underlying treatment. See, e.g., *Martinez v. Garcia*, Case No. 08 C 2601, 2012 U.S. Dist. LEXIS 158220, at *4-*5 (N.D. Ill. Nov. 5, 2012) (witnesses who failed to comply "with the mandate of Rule 26(a)(2)(C)" "disqualified themselves from rendering opinion testimony, though they may of course take the stand as occurrence witnesses simply to recount what services they performed"); *Robinson v. Suffolk County Police Dept.*, No. CV 08-1874(AKT), 2011 WL 4916709, at *4-*5 (E.D.N.Y. Oct. 17, 2011) ("[T]he key to what a treating physician can testify to without being declared an expert is based on his personal knowledge from consultation, examination and treatment of the Plaintiff, 'not from information acquired from outside sources.'"); *Crabbs v. Wal-Mart Stores*, No. 4:09-cv-00519-RAW, 2011 WL 499141, at *3 (S.D. Iowa Feb. 4, 2011) ("In the absence of Rule 26(a)(2)(C) summaries, the opinion testimony of treating physicians [ ] will be limited to the subject matter of their treatment as disclosed in the medical records and to opinions formed in the course of the treatment provided by them."). Given that a party's failure to identify a potential expert witness may result in exclusion or other sanctions, see FED. R. CIV. P. 37(c)(1), the safest course is to disclose treating physicians and similar percipient witnesses as experts under Rule 26(a)(2).

### Before and After Treatment

When an expert involved in the underlying events at issue provides opinions that depend on information obtained outside the course of treatment, most courts subject such opinions to Rule 26(a)(2)(B)'s detailed written reporting requirements. For example, the U.S. Court of Appeals for the Ninth Circuit in *Goodman* considered the application of Rule 26(a)(2)(B)'s written reporting requirement to treating physicians who "not only rendered treatment, but after the treatment was concluded…were provided with additional information by plaintiff's counsel and were asked to opine on matters outside the scope of treatment they rendered." *Goodman*, 644 F.3d at 819.

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*Goodman* held "that when a treating physician morphs into a witness hired to render expert opinions that go beyond the usual scope of a treating doctor's testimony," those doctors fell outside the scope of the "'treating physician' exception insofar as their additional opinions are concerned" and "Rule 26(a)(2)(B) required disclosure of written reports." Id. at 819-820, 826. See also *Banister v. Burton*, 636 F.3d 828, 833 (7th Cir. 2011) ("a treating physician who is offered to provide expert testimony as to the cause of the plaintiff's injury, but who did not make that determination in the course of providing treatment…is required to submit an expert report in accordance with Rule 26(a)(2)") (citation omitted). The critical issue is whether

the opinion was "formed specifically in anticipation of litigation, or otherwise outside the normal course of a duty." *Meredith*, 2012 WL 3025139, at *5.

Courts that adhere to this approach require a Rule 26(a)(2)(B) written report for expert causation opinions not necessary to, or reached in the course of, underlying events—even for typical non-retained experts subject to Rule 26(a)(2)(C) disclosures, including "physicians or other health care professionals." FED. R. CIV. P. 26 advisory committee's note (2010). See, e.g., *In re Denture Cream Prods. Liab. Litig.*, Case No. 09-2051-MD-ALTONAGA, 2012 U.S. Dist. LEXIS 152277, at *33-*34 (S.D. Fla. Oct. 22, 2012) ("treating physicians offering opinions beyond those arising from treatment are experts from whom full Rule 26(a)(2)(B) reports are required."); *Allison v. United States*, No. 09-cv-3341, 2011 WL 1627083, at *4-*5 (C.D. Ill. April 28, 2011) (applying "the reporting requirements of Rule 26(a)(2)(B)" to testifying doctor who "did not form his opinion regarding causation during the course of treatment, but rather formed it after treatment had concluded"); *Ghiorzi v. Whitewater Pools & Spas*, No. 2:10-cv-01778-JCM-PAL, 2011 WL 5190804, at *8-*10 (D. Nev. Oct. 28, 2011) (excluding expert's "opinions and conclusions [ ] not formed during the course of treatment of … [but] clearly formed for the purpose of providing medical legal causation testimony and 'opinions regarding the care, appropriateness of care, necessity of care and relatedness of care provided to [plaintiff] as a result of [the] accident.'"). See also *Downey*, 633 F.3d at 7 n.3 ("a few district courts have held that a report is required for causation testimony that was not necessary to the treatment, [but] most courts do not draw such a distinction").

It follows that for expert opinions not essential to the underlying course of treatment, such as causation, the party advancing the expert may avoid the necessity of a Rule 26(a)(2)(B) written report if it has sufficient evidence that the opinion was actually formed during treatment. Compare *Aurand v. Norfolk S. Ry. Co.*, 802 F.Supp.2d 950, 964 (N.D. Ind. 2011) (because "none of the treating physicians is shown to have developed an opinion on causation in the course of their treatment of plaintiffs [ ], plaintiffs were required to disclose a written report from each such 'expert' under Rule 26(a)(2)(B)."); *Kemp v. Webster*, Civil Action No. 09-cv-00295-RBJ-MJW, 2012 WL 5289573, at *2 (D. Colo. Oct. 26, 2012) ("Because plaintiff did not disclose expert reports, … [the] physicians may opine on causation only to the extent that those opinions on the cause of the injury were a necessary part of [ ] treatment."); with *Hair v. Fed. Express Corp.*, No. 11-CV-0209-TOR, 2012 WL 4846999, at *11 (E.D. Wash. Oct. 11, 2012) ("[A] treating physician may be allowed to opine even as to causation if there is sufficient evidence that the opinion was formed during the course of providing treatment, regardless of submission of an expert report."); *Jensen v. Carnival Corp.*, Case No. 10-24383-CIV-GRAHAM/GOODMAN, 2011 U.S. Dist. LEXIS 108727, at *3 (S.D. Fla. Sept. 25, 2011) ("treating physician may testify regarding injury causation, diagnosis, prognosis, and extent of disability, without providing a written report pursuant to Rule 26(a)(2)(B), so long as the treating physician's opinion was formed and based upon observations made during the course of treatment").

Significantly, a minority of courts hold that only the limited Rule 26(a)(2)(C) disclosures are required from hybrid experts, even for opinions formed "after the fact." *O'Leary v. Kaupas*, 08 C 7246, 2012 U.S. Dist. LEXIS 95769, at *3-*4 (N.D. Ill. July 11, 2012), explains:

> The Advisory Committee on the Rules of Civil Procedure recognized the difficulty created by requiring a non-retained expert, such as the treating physicians…to file an expert disclosure under Rule 26(a)(2)(B). The Committee responded in December 2010…by adding Subpart C to Rule 26(a)(2). Subpart C requires less stringent disclosures with respect to expert witnesses who are not retained.…
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> The three witnesses in this case appear to be of the very kind that the Advisory Committee had in mind when promulgating Subpart C—non-retained treating physicians providing expert testimony. In light of Subpart C, the fact that O'Leary's experts formed their opinions after treatment does not require an expert disclosure under Rule 26(a)(2)(B). Rather, they need only provide a disclosure identifying the subject matter on which they intend to present evidence, and a summary of the facts and opinions to which they are expected to testify. Fed. R. Civ. P. 26(a)(2)(C).

*O'Leary*, 2012 U.S. Dist. LEXIS 95769, at *3-*4 (citations omitted). See also *Coleman v. Am. Family Mut. Ins.*, 274 F.R.D. 641, 645 (N.D. Ind. 2011) ("treating physicians are not required to submit a complete expert report," notwithstanding anticipated causation testimony, but "must file a summary report" pursuant to Rule 26(a)(2)(C)). Cf., *Kristensen ex rel. Kristensen v. Spotnitz*, at *4 (W.D. Va. July 3, 2011) (expressing "reservations about the viability" of case law requiring treating physicians to include a Rule 26(a)(2)(B) report "after the implementation of Rule 26(a)(2)(C)"); *Valentine v. CSX Transp.*, 1:09-cv-01432-JMS-MJD, 2011 WL 7784120, at *3 (S.D. Ind. May 10, 2011) ("The Committee uses 'physicians and other health care professionals' as an example of experts not required to provide written reports."); *Carrillo v. Lowe's HIW, Inc.*, Civil No. 10cv1603-MMA (CAB), 2011 WL 2580666, at *3 (S.D. Cal. June 29, 2011) (excluding, inter alia, "opinions as to causation, and the plaintiff's future medical condition" because plaintiff failed to satisfy "the disclosure requirements of Rule 26(a)(2)(C)").

As a matter of policy, the minority approach's main virtue—simplicity in application—is likely outweighed by its potential to thwart the disclosure goals of Rule 26 by allowing parties to circumvent the written reporting requirements by extracting after-the-fact opinions from non-retained experts when they are available.

As case law interpreting the requirements of Rule 26(a)(2) continues to develop, practitioners should err on the side of caution, and disclosure, in designating expert witnesses subject to the requirements of subparts (B) and (C).