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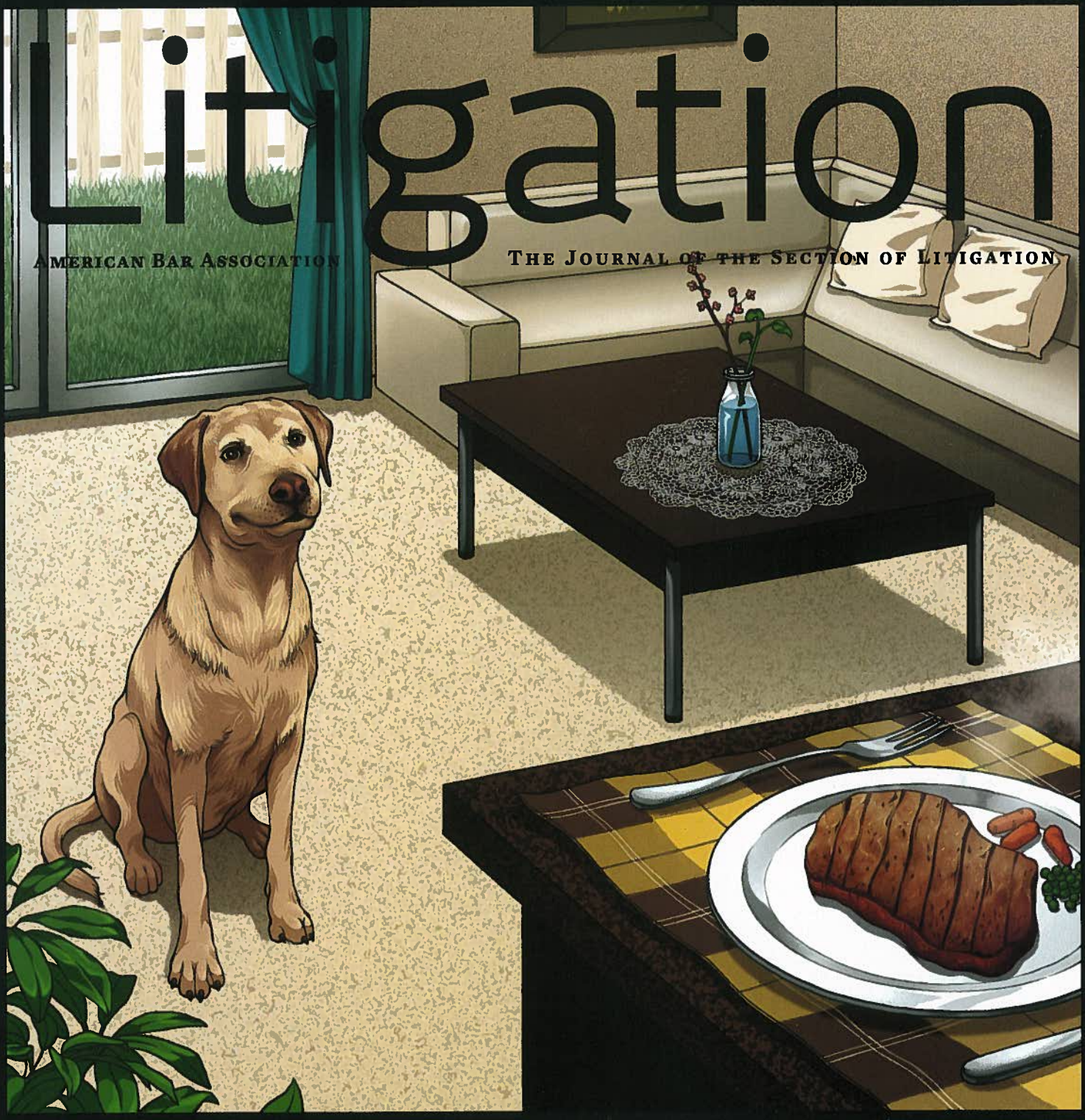

Temptation

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The Temptation to Depose Every Expert

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Eleven years ago in these pages I suggested that we may take expert depositions too routinely and sometimes hurt ourselves in the process (*Expert Approaches*, LITIGATION, Vol. 28, No. 4 (Summer 2002)). That suggestion was based on the mandatory disclosure structure the Federal Rules had introduced less than a decade earlier. The fundamental question raised by the federal rules' detailed reporting requirements—and the presumptive preclusion sanction barring undisclosed expert opinions—is whether and, if so, how to depose an expert. Taking that deposition may open the door to testimony that would otherwise be excluded, and it may dilute rather than enhance your cross.

The expert discovery rules were substantially amended three years ago, and we've now had 20 years' case law experience interpreting and enforcing the rules. Are we better off not succumbing to the temptation of deposing the expert?

There are three fundamental questions about expert depositions:

1. Do you depose?
2. If so, what do you need to learn?
3. Equally important, what don't you want to learn?

New issues revolve around how the answers to these questions are affected by the work-product protection now conferred on draft expert reports and most expert-counsel communications, and the current requirement of summary disclosures for unretained experts.

In 1993, Federal Rule of Civil Procedure 26(a)(2)(B) inaugurated mandatory, detailed reports from the vast majority of experts—all who are "retained or specially employed to provide expert testimony in the case or . . . whose duties as the party's employee regularly involve giving expert testimony." The language of the rule has been restyled to make it more readable (though no one seemed to have had any trouble reading it before), but the requirements haven't changed except, in one discrete, surgical way to protect draft reports and counsel-expert communications, a point I'll come back to.

The mandatory expert report of Rule 26(a)(2)(B) provides that you must disclose the following in writing:

- **All Opinions:** "(i) a complete statement of all opinions the witness will express and the basis and reasons for them"
- **Full Factual Basis:** "(ii) the facts or data considered by the witness in forming them"
- **All Exhibits:** "(iii) any exhibits that will be used to summarize or support them"
- **Qualifications and Publications:** "(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years"
- **Prior Testimony:** "(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition"
- **Compensation:** "(vi) a statement of the compensation to be paid for the study and testimony in the case."

The rules strictly limit the expert's testimony to the four corners of this report. Under Rule 37(c)(1), undisclosed expert opinions or exhibits are presumptively excluded—on a motion, at a hearing, or at trial—"unless the failure was substantially justified or is harmless." The authorities are nearly unanimous that exclusion of undisclosed matter is essentially automatic, unless the nondisclosing party carries the burden of proving justification or harmlessness. *See, e.g., Musser v. Gentiva Health Servs.*, 356 F.3d 751, 758 (7th Cir. 2004) ("automatic and mandatory"); *Vesom v. Atchison Hosp. Ass'n*, 279 F. App'x 624, 631 (10th Cir. 2008) (same); *Vaughn v. City of Lebanon*, 18 F. App'x 252, 263 (6th Cir. 2001) ("required"); *Primus v. United States*, 389 F.3d 231, 234 (1st Cir. 2004) ("mandatory . . . in the ordinary case"). Even where discretion is recognized, exclusion is ordinarily ordered and upheld. *See, e.g., Design Strategy, Inc. v. Davis*, 469 F.3d 284, 296 (2d Cir. 2006). Judges don't like ambushes.

The Risks of Deposing

Given that opinions and exhibits that are not promptly disclosed in a Rule 26(a)(2)(B) report are commonly excluded, *see* Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 48(E)(1) (5th ed. 2013), then if you really intend to try your case, you ought to think long and hard about whether you want to take that expert's deposition. It's not only because the 26(a)(2)(B) report freezes the expert's testimony to the opinions, sources, and exhibits in the report—eliminating the need for a deposition to accomplish that—but also because taking a deposition can actually liberate the expert to range far beyond the bounds of his or her report.

If an expert volunteers new or different opinions, data, or exhibits in a deposition, that can cure his or her omission from the 26(a)(2)(B) report. The automatic preclusion remedy of Rule 37(c)(1) does not apply if the omitted expert material has "otherwise been made known to the other parties during the discovery process or in writing," under Rule 26(e)(1). An expert deposition is a prime example of "ma[king] known" the expert's opinion "during the discovery process."

This is a real risk. It's not necessarily fatal if it happens. Some judges will exclude the new material anyway to guard against "sandbagging." *E.g., Stuhlmacher v. Home Depot USA, Inc.*, 2012 U.S. Dist. LEXIS 164722 (N.D. Ind. Nov. 19, 2012) ("It is disingenuous to argue that the duty to supplement under Rule 26(e)(1) can be used as a vehicle to disclose entirely new expert opinions after the deadline established by the court under Rule 26(a)(2)(C)."); *Eiben v. Gorilla Ladder Co.*, 2013 U.S. Dist. LEXIS 59961 (E.D. Mich. April 22, 2013) ("Although Fed. R. Civ. P. 26(e) requires a party to 'supplement or correct' disclosure upon information later acquired, that provision does not give license to sandbag one's opponent with claims and issues which should have been included in the expert witness' report."). But that exclusion is highly discretionary and unpredictable—a lot less certain than the virtually automatic preclusion if you don't depose and the expert attempts to go beyond his or her report at trial.

There are four lessons in this. First, you may well be better off not deposing the adverse expert. You have the report. It must set forth all facts and opinions the expert plans to testify to. If he or she attempts to add facts or opinions that are not contained in the report, those new items are presumptively excluded under Rule 37(c)(1). Experts may even be barred from getting on the stand altogether if their reports are substantively deficient—*see, e.g., Campbell v. United States*, 470 F. App'x 153 (4th Cir. 2012)—raising the question whether you need the deposition even for a *Daubert* motion.

Second, there are tactical considerations to weigh. Leaving the expert better prepared to withstand your cross at trial is a serious risk if you depose. If you do not depose, you will be much more an unknown quantity to the expert. You will have given no prior signals about where your cross-examination is likely to go. Experts cannot bone up on, or anticipate, questions based on a cross they haven't suffered through.

Third, since the 2010 amendments to Rule 26(a), there is less to ask about than before. Rule 26(a)(2)(B)(ii) was amended to eliminate the phrase "data or other information" and substitute "the facts or data or other information considered by the witness in forming [the opinions]." I referred earlier to the surgical amendment conferring work-product protection on draft expert reports and most expert-counsel communications, and this is it. The accompanying advisory committee note tells us that this amendment "is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports." This amendment, plus Rule 26(b)(4)(C) (also added

Illustrations by Phil Foster

in 2010), cloaks draft expert reports and communications between the expert and counsel with work-product protection, 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 to the expert and that the expert considered in forming the opinions to be expressed; or
(iii) identify assumptions that the party's attorney provided to the expert and that the expert relied on in forming the opinions to be expressed.

Fed. R. Civ. P. 26(b)(4)(C).

There are a few nuances to the second and third of these exceptions, and they restrict the scope of potential deposition questioning even further than might appear. Note that subpart Rule 26(b)(4)(C)(ii) (like Rule 26(a)(2)(B)(ii)) uses the verb "considered" while subpart (iii) uses the phrase "relied on." There is a world of difference in meaning between those words under the case law. "Considered" was the word used in the 1993 version of Rule 26(a)(2)(B), and the courts interpreted it as extending to all material reviewed by an expert that "related to the subject matter of the litigation." *See Karn v. Ingersoll Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996) (noting that the Advisory Committee in 1993 substituted "considered" for the more restrictive "relied" in an earlier draft of Rule 26(a)(2)(B)). This might strike you as a broad opening to march through in a deposition. Not so.

To begin with, under Rule 26(b)(4)(C), "considered" is confined to "facts or data" provided by counsel and does not apply to counsel-supplied "assumptions"—those must actually be "relied on." Further, both facts and assumptions need only be identified. In discussing subpart (ii), the advisory committee note stresses that, once they are identified, "further communications about the potential relevance of the facts or data are protected." As to assumptions, the committee note also makes it clear that, once they've been identified, "[m]ore general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception." Given that all you're going to get is identification of facts and assumptions, you will have what you need, and perhaps all you can get, in the report itself.

Fourth, if you decide to take the expert's deposition, you must be careful what you ask. You don't want to open the door inadvertently to testimony that is otherwise precluded by Rule 37(c)(1). There is, to be specific, considerable downside in asking common deposition questions designed to ensure that no unexplored opinions exist—like the traditional catchall question: "Do you have any other opinions as to this case that we haven't discussed?" You generally don't want to know the answer to that question. If you don't ask it and the opinions are not provided either in the report, in the deposition, or otherwise in a timely fashion "in writing" (per Rule 26(e)(1)), the undisclosed opinions are presumptively excluded under Rule 37(c)(1).

Additional Questions

At the same time, there are some additional questions you definitely ought to think about posing at the beginning of any expert deposition:

- *I am going to ask you questions about the opinions in your report. I am not asking you any questions about any opinions or theories you may have that are not contained in your report. Do you understand that?*
- *I am also not asking you about any facts or tests or analyses that you haven't disclosed in your report. Do you understand that?*
- *I am asking you to listen to my questions and answer only the questions I ask, OK?*

If the expert wanders out of bounds anyway—and never underestimate the ingenuity and disingenuousness of an opposing expert—then object (throw in the word sandbagging), move to strike, admonish the witness, even call the court (the time for supplemental expert reports has presumably passed). Whatever you do, don't acquiesce, unless you've decided it's in your client's interest to do so.

If your opponent inquires or otherwise tries to justify new opinions or facts from his or her expert during the deposition

based on the cant recitation buried in the conclusion of most expert reports—"This report is based on information received to date; I reserve the right to change or amend my opinion, after receipt of further information through discovery"—don't yield the point. Unless the supplementation has been made in a timely fashion in writing, courts have rejected this kind of rote "hedge." *See, e.g., Goesel v. Boley Int'l (HK) Ltd.*, 2012 U.S. Dist. LEXIS 152524, at *5 (N.D. Ill. Oct. 24, 2012).

From this perspective, the answer to the question of whether you really want to depose that expert is often *No*. But there are, of course, risks. There are things that the expert may testify to at trial that you do not know and may not expect. The judge may allow the expert more latitude than you would prefer. You may be less comfortable confronting the witness for the first time at trial, just as the witness is more uncomfortable confronting you. There may be inconsistent testimony that could have been elicited on deposition for use at trial and that has been forgone. Maybe you are uncomfortable about a *Daubert* motion without a deposition, even though Rule 37(c)(1) applies to every "motion" and "hearing." But by not deposing, you will not have opened the door to additional testimony through the deposition testimony; you will not have signaled your cross or the weaknesses in the expert's analysis that render it vulnerable to a *Daubert* attack; and you will not have left a sterling cross-examination in the deposition room and allowed the witness to arm himself or herself with a series of plausible explanations that undercut the progress you thought you made by taking the testimony in the first place.

In the context of experts, we too often think of discovery as being synonymous with expert depositions. But that isn't correct. You may decide not to depose and still conduct expert discovery. It is well settled that you can serve opposing parties with a Rule 34 document request and adverse experts with Rule 45 subpoenas to obtain unprotected expert material. The 1993 advisory committee note to Rule 26(a) recites that "parties are not precluded from using traditional discovery methods to obtain further information regarding these matters" (i.e., matters that are subject to mandatory disclosure, which includes expert-related information).

There is a surprisingly large amount of unprotected expert material even after the 2010 amendments, in addition to unprivileged materials relied on or reviewed:

- Expert notes. *Dongguk Univ. v. Yale Univ.*, 2011 U.S. Dist. LEXIS 157690 (D. Conn. May 19, 2011).
- Expert communications with members of their staff. *Republic of Ecuador v. Bjorkman*, 2013 U.S. Dist. LEXIS 60739 (D. Colo. Apr. 26, 2013).
- Expert communications with consulting experts. *Apple Inc. v. Amazon.com, Inc.*, 2013 U.S. Dist. LEXIS 47124 (N.D. Cal. Apr. 1, 2013).
- Expert communications with other non-lawyers, including the lawyer's client. In *re Application of Republic of Ecuador*, 2012 U.S. Dist. LEXIS 157497 (N.D. Fla. Nov. 2, 2012).
- The expert's invoices for services rendered. Rule 26(a)(2)(B)(vi). If the invoices or other evidence reflect that the lawyer has "commandeered the expert's function or used the expert as a conduit for his or her own theories," that may open the door to discovery of communications between counsel and the expert. *Gerke v. Travelers Cas. Ins. Co.*, 289 F.R.D. 316, 328 (D. Or. 2013).

You have to prepare a long time in advance if you are going down this road because, if you do, the other side will reciprocate—the unspoken détente to avoid mutual assured destruction will have been breached. And if you cannot produce all of the unprotected material your expert generated or received, your client—and you—face the specter of spoliation sanctions. There is a lot to say for striking an agreement early in a case—before you and your adversary have begun infuriating each other—that there won't be any expert discovery outside the report and depositions.

If you do intend to pursue this discovery, though—or there is any possibility your opponent might—you must take steps to ensure that your own experts are required to maintain all unprotected material; you should monitor their written communications with others, particularly consulting experts; and you have to try to control what kind of nonreport material they generate. To protect your client, you should consider including in your engagement letters with testifying experts language such as the following:

> [Expert] will preserve all written materials, including emails, generated or received by [expert] in connection with this engagement, as such materials are potentially discoverable in litigation.

And your engagement letter with any consulting experts should provide as follows:

> [Consulting expert] will not communicate in writing or share any written material, including notes, relating to this engagement with any other person without [counsel's] consent.

You should also discuss with any testifying expert whether he or she really needs notes. There is a great deal to say for having the expert focus from the outset on drafting a report; beginning with his, her, or your template; inserting relevant biographical, testimonial, and compensation disclosures; summarizing the pertinent pleadings, claims, or defenses; inserting facts as he or she receives them and tentative opinions as they are developed; and never going beyond version one of the report. Notes? What notes?

The 2010 amendments to the expert witness rules, together with the 2000 amendment to Federal Rule of Evidence 701, raise some nettlesome questions about whether and how to handle depositions of experts who are not required to file 26(a)(2)(B) reports and yet are permitted to testify. (We'll call them "unretained experts.")

Before December 1, 2010, the federal rules did not include mandatory disclosure requirements for unretained experts (e.g., a treating physician, an employee whose duties do not regularly involve giving expert testimony, or a percipient witness with substantive expertise). In those years, Rule 26(a)(2)(A) simply required the proponent of the testimony to "disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." The 2010 version of Rule 26(a)(2)(C) added mandatory, counsel-prepared disclosures for nonreporting experts, setting forth:

> (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
>
> (ii) a summary of the facts and opinions to which the witness is expected to testify.

This requirement is similar in substance to the pre-1993 version of Rule 26(b)(4)(A), which allowed expert discovery primarily by means of interrogatories requiring each party "to identify each person whom the . . . party expects to call as an expert witness at the trial, to state the subject matter on which the expert is expected to testify and a summary of the grounds for each opinion."

The new disclosure requirement applies to all unretained witnesses giving expert evidence, including parties. *See, e.g., Martinez v. Garcia*, 2012 U.S. Dist. LEXIS 158220 (N.D. Ill. Nov. 5, 2012). It is conceivable that the same expert may be subject to a Rule 26(a)(2)(B) report for a portion of his or her testimony and a 26(a)(2)(C) disclosure for the remainder (*see, e.g., In re Denture Cream Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 152277 (S.D. Fla. Oct. 22, 2012)), although in practice it would almost always be more expedient to place all opinions in the 26(a)(2)(B) report rather than file two documents.

Just who is subject to this disclosure requirement? Treating physicians, for sure. And party employees who work as experts (e.g., scientists) but aren't regularly called on to give expert testimony. But the universe is much broader than that, thanks to the 2000 amendment to Federal Rule of Evidence 701. This amendment converted lay witnesses into experts to the extent their testimony is, in substance, expert testimony, and it obliterated the old notion of a "lay expert." Rule 701(c) treats as expert opinion all testimony "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." This is a subject matter test, and it is the same subject matter set forth in Rule 702(a). Even if the witness is otherwise offering lay testimony as to facts he or she learned as a percipient witness to relevant events, to the extent that he or she gives an opinion "based on scientific, technical, or other specialized knowledge within the scope of Rule 702," that witness is offering an expert opinion and must satisfy *Daubert*. Thus, the chief financial officer who is also a certified public accountant (CPA) cannot give an opinion on generally accepted accounting principles without passing

through the same judicial gatekeeping as the CPA retained to give the same testimony. Nor can the broker who sold a home or business testify as to value without satisfying the four-part test of Rule 702.

Failure to file a compliant Rule 26(a)(2)(C) disclosure for an unretained expert leads to the same presumptive preclusion under Rule 37(c)(1) as failure to file a compliant expert report under Rule 26(a)(2)(B). But it is counsel, not the unretained expert, who prepares the new 26(a)(2)(C) disclosure, and it is only a "summary of the facts and opinions to which the witness is expected to testify." Nothing about credentials. No mandated detail. The advisory committee note observes that "[t]his disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B)"—to state the blindingly obvious—and instructs that "[c]ourts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have."

Is this 26(a)(2)(C) disclosure enough to substitute for a deposition? That depends. Rule 26(a)(2)(C) is still new, and some courts require significant detail. *See, e.g., Martinez v. Garcia*, 2012 U.S. Dist. LEXIS 158220 (N.D. Ill. Nov. 5, 2012) ("No party may fairly require an adversary to engage in guesswork, rather than particularizing the witness' proposed testimony."); *Meredith v. Int'l Marine Underwriters*, 2012 U.S. Dist. LEXIS 100972 (D. Md. July 20, 2012) (interpreting "'facts' to include those facts upon which the witness' opinions are based, and 'opinions' to include a precise description of the opinion"). *But see Chesney v. TVA*, 2011 U.S. Dist. LEXIS 68274 (E.D. Tenn. June 21, 2011) (early decision; simple statement of topics sufficient); *Gilster v. Primebank*, 2012 U.S. Dist. LEXIS 114447 (N.D. Iowa Aug. 14, 2012) (minimal disclosure adequate where supplemented by allegations in complaint). The more detailed the disclosure, the less the need for a deposition.

Detail may also be provided in other ways—e.g., reports prepared by the witness in the ordinary course of business—which may fill in the gaps of a 26(a)(2)(C) disclosure. *See, e.g., Shepeard v. Labette Cnty. Med. Ctr.*, 2013 U.S. Dist. LEXIS 31381 (D. Kan. Mar. 7, 2013) (reports generated in ordinary course of business detailing specific tasks performed by medical experts sufficient to support high-level summary disclosures).

As these cases teach, before deciding whether to depose, it is important to obtain as much detail as possible about the substance of the proposed testimony. More in the way of specificity may reasonably be demanded of a 26(a)(2)(C) disclosure for a party employee or agent than for an unaffiliated third party like a treating physician. Thus, unretained experts in *Martinez* were parties, and an unretained expert in *Meredith* was an agent. Even a third party may have provided a report or generated records in the ordinary course of business, supplying needed detail, as in *Shepeard*. Because unretained experts not infrequently are percipient witnesses, you may even have deposed the unretained expert in fact discovery on the subject matter later summarized in the 26(a)(2)(C) disclosure. *See, e.g., Ira Green, Inc. v. J.L. Darling Corp.*, 2012 U.S. Dist. LEXIS 113746 (W.D. Wash. Aug. 13, 2012) (barebones 26(a)(2)(C) disclosure adequate where supplemented by expert's testing results and 30(b)(6) deposition).

In deciding whether to depose, bear in mind that communications between an unretained expert and counsel are not protected under Rule 26(b)(4)(C)—work-product protection extends only to counsel's communications with experts "required to provide a report under Rule 26(a)(2)(B)"—but, depending on the identity of the witness, they may be shielded by attorney-client privilege. *Graco, Inc. v. PMC Global, Inc.*, 2011 LEXIS 14717 (D.N.J. Feb. 14, 2011) (communications between counsel for corporate party and employee-unretained experts held privileged).

If you do decide to depose the unretained expert, you will want to do so in the same way you depose a retained expert, limiting his or her testimony to the subject matter of the summary and not exposing yourself to other testimony by asking broad questions.

We return to the question of whether, or to what extent, to depose the expert, and how broadly to cross-examine. Think hard before you decide in each case. Ultimately, like all trial judgments, it is a facts-and-circumstances call. Remember the following points:

Inquiring in deposition may open the door to Rule 702 testimony that would otherwise be precluded under Rule 37(c)(1) and may dilute, rather than enhance, your cross at trial. This can be mitigated to some extent by the way you question, but opposing experts are clever and are rarely well-intentioned.

Not inquiring in deposition leaves you subject to potentially greater uncertainty as to the potential scope and content of the expert's testimony. This is cabined by the four corners of a 26(a)(2)(B) report and to a lesser degree by a 26(a)(2)(C) disclosure, but there is always the variable of judicial discretion. It's your call. ■