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Expert testimony without an expert report

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Some practitioners may be surprised to learn that not all experts are required to submit expert reports.

Rule 26 of the Federal Rules of Civil Procedure only requires that expert reports be submitted by experts who are "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."[1]

Courts have found Rule 26(a)(2)(C) disclosures improper where the "summary of the facts and opinions" is submitted with an unworkable volume of information.

This language implies that some experts are not required to prepare reports; specifically, an employee of a party whose duties do regularly involve giving expert testimony or someone who is not specially retained by a party to provide expert testimony.

The rule goes on to clarify what is expected of this category of "witnesses who do not provide a written report."[2]

Unlike the more stringent disclosure requirements for specially-retained experts (sometimes referred to as "non-retained" or "non-reporting" experts), this provision allows for experts who are not required to submit written reports to disclose only (1) the "subject matter" they expect to give opinion testimony on and (2) "a summary of the facts and opinions to which the witness is expected to testify."[3]

Courts are not uniform as to the level of detail required, however, though the trend appears to require a clear statement of the expert's opinion.

TOO LITTLE DISCLOSURE

As noted, courts have differed about how much disclosure is required under Rule 26(a)(2)(C).

In *Little Hocking Water Association, Inc. v. E.I. DuPont de Nemours and Co.*, an Ohio district court addressed the parties' dispute regarding the "degree of detail required of the disclosures relating to non-specially retained experts."[4]

DuPont's disclosure for one such expert stated, e.g., that she may provide "opinions related to air dispersion modeling."[5]

Little Hocking took the position that, under Rule 26(a)(2)(C), DuPont was still required to provide a "precise description" of its non-retained experts' opinions rather than "vague generalizations," as well as a statement of the facts upon which those opinions relied, rather than leaving them to "guess" what the opinions would be and upon what facts they relied.[6]

DuPont disagreed, arguing that "the prevailing view"[7] was that Rule 26(a)(2)(C) requires only a "simple statement of who was going to testify as to what."[8]

In support of its position, DuPont relied on case law (specifically, *Chesney v. Tennessee Valley Authority and Saline River Properties LLC v. Johnson Controls Inc.*) that allowed for disclosures that do not contain a description of the "opinions to which the witness is expected to testify."[9]

The *Little Hocking* court "decline[d] to follow *Chesney* and *Saline*," instead finding that Rule 26(a)(2)(C) requires that a non-retained expert's disclosure include a description of the opinion to be offered.[10]

In the right circumstances, there is merit to considering the use of a party employee expert.

The alleged "opinions" in DuPont's disclosures, which "merely state[d] the topics of the opinions to which the expert will testify, without stating any view or judgment on such topics-e.g., an actual opinion," therefore did not satisfy the requirements of Rule 26(a)(2)(C).[11]

In light of this ruling, at least one district court in the same circuit as the *Chesney* and *Saline* courts has treated those cases as implicitly overruled.[12]

Other district courts have interpreted the rule similarly to the *Little Hocking* court and rejected disclosures that merely stated a topic and did not include any description of the non-retained expert's actual view or opinion.[13]

TOO MUCH INFORMATION

Providing too much information in a non-retained expert's disclosure can also be problematic. Courts have found Rule 26(a)(2)(C) disclosures improper where the "summary of the facts and opinions" is submitted with an unworkable volume of information.[14]

In other words, what is required is a clear but concise statement of the facts and opinions to which the non-retained expert will testify. Drowning the opposing party with information or data is not a substitute.

WHEN NON-RETAINED EXPERTS MAY BENEFIT A CASE

The normal practice in most lawsuits is to retain expert witnesses who are not affiliated with a party so that the witnesses can claim independence and a lack of bias. However, in the right circumstances, there is merit to considering the use of a party employee expert.

> Parties using non-retained experts should be mindful, though, that the rules do not provide the same work product protections for attorney-expert communications as with retained experts.

This is especially so if the individual is personally familiar with the facts of the case and counsel believes he or she would otherwise be a strong and credible witness. Common examples of useful non-retained experts include a treating physician or a party's principal or accountant.[15]

Since these non-retained experts often have percipient knowledge or some connection to the facts, Rule 26(a)(2)(C) relieves them from having to disclose the usual level of detail with respect to the specific facts or data on which their opinion testimony is based.[16]

There are also potential cost savings, as the cost of a full-blown expert report can be avoided.

The lead author has used non-retained experts to good effect in several bench trials.

Where a case is tried to an experienced judge, there is typically less concern about the need for an expert to claim independence, as judges are well familiar with the tendency of some ostensibly "independent" experts to act as advocates for their client.

Judges have no problem finding interested witnesses to be credible, and this can translate to non-retained experts too notwithstanding their affiliation with one of the parties.

Parties using non-retained experts should be mindful, though, that the rules do not provide the same work product protections for attorney-expert communications as with retained experts.[17]

The scope of that protection could change, but when the 2010 Advisory Committee on Rules of Civil Procedure considered extending work product protection to communications between attorneys and non-retained experts for their client, including party employees, it ultimately declined to do so.[18]

That said, if the witness is an employee of a party, the attorney-client privilege may still apply to protect communications between the party's counsel and the witness about the witness's expert opinions.[19]

Notes

[1] Fed. R. Civ. P. 26(a)(2)(B).

[2] Fed. R. Civ. P. 26 (a)(2)(C).

[3] *Id.*

[4] No. 09-cv-1081, 2015 WL 1105840, at *5 (S.D. Ohio Mar. 11, 2015).

[5] *Id.* at *4.

[6] *Id.*

[7] *Little Hocking Water Ass'n Inc. v. E.I. Du Pont de Nemours & Co.*, No. 09-cv-1081, 2013 WL 6843058, at *4 (S.D. Ohio Dec. 27, 2013).

[8] *Little Hocking Water Ass'n Inc. v. E.I. DuPont de Nemours and Co.*, No. 09-cv-1081, 2015 WL 1105840, at *5 (S.D. Ohio Mar. 11, 2015).

[9] *Id.*; *Chesney v. Tennessee Valley Authority*, No. 09-cv-09, 2011 WL 2550721, at *3 (E.D. Tenn. June 21, 2011) (finding that disclosures generally describing the topics of testimony without setting forth the actual opinion of the non-retained expert complied with Rule 26(a)(2)(C)); *Saline River Properties LLC v. Johnson Controls Inc.*, No. 10-cv-10507, 2011 WL 6031943, at *9-10 (E.D. Mich. Dec. 5, 2011) (citing *Chesney* with approval).

[10] *Id.* at *7.

[11] *Id.* at *6.

[12] *Russ v. Memphis Light, Gas, & Water Div.*, No. 14-cv-2365, 2016 WL 8312040, at *3–4 (W.D. Tenn. Feb. 24, 2016) (disclosures were found to be "insufficient under *Little Hocking*").

[13] *Compare Gonzalez v. City of McFarland*, No. 13-cv-86, 2014 WL 5781010, at *9-10 (E.D. Cal. Nov. 5, 2014) (holding Rule 26(a)(2)(C) disclosure deficient and excluding physicians' expert testimony where, "from the disclosure, there is no way to determine what the opinions are that the doctors will express or the facts upon which they rely to form these opinions"); *Slate v. Massachusetts Mut. Life Ins. Co.*, No. 13-cv-02118, 2014 WL 4699595, at *2-3 (W.D. Tenn. Sept. 19, 2014) (finding that merely disclosing witness's name, telephone number, the fact that witness was plaintiff's treating chiropractor since 2005, and stating witness had "first hand knowledge" of plaintiff's condition, failed to satisfy Rule 26(a)(2)(C)'s requirement that a party disclose "the subject matter on which the witness is expected to present evidence and a summary of the facts and opinions to which the witness is expected to testify") (internal quotation marks omitted); and *Tyler v. Pacific Indem. Co.*, No. 10-cv-13782, 2013 WL 183931, at *3 (E.D. Mich. Jan. 17, 2013) (rejecting disclosure that "fails to even intimate 'the facts and opinions to which the witness is expected to testify'" concerning the insurance company defendant's loss estimate (quoting Fed. R. Civ. P. 26(a)(2)(C))); *with Owens-Hart v. Howard Univ.*, 317 F.R.D. 1, 4 (D.D.C. 2016) (rejecting defendant's challenge to the sufficiency of a non-retained expert's report where "Plaintiff's disclosure did not involve or reference a large body of material; instead, it referenced 123 pages of Plaintiff's medical records —

hardly an overwhelming quantity, and far short of the more than 1,000 pages presented in *Little Hocking*.")

[14] *See Vanderberg v. Petco Animal Supplies Stores Inc.*, 906 F.3d 698, 702-03 (8th Cir. 2018) (finding that the plaintiff did not properly disclose his treating physician as an expert despite "his production of hundreds of pages of medical records, which included operative notes and a letter by [his treating physician]," as this did not meet the requirements of Rule 26(a)(2)); *SEC v. Nutmeg Grp. LLC*, No. 09-cv-1775, 2017 WL 4925503, at *4 (N.D. Ill. Oct. 31, 2017) (finding disclosures "do not satisfy Rule 26(a)(2)(C)'s disclosure requirement because they are lengthy, complicated, convoluted, and in some ways incomplete or at least works in progress that stretch to 96 pages and include 303 pages of exhibits," and noting that "[a] party cannot comply with Rule 26(a)(2)(C) by dumping a large volume of documents on an opposing party and leaving it to try to guess what a witness will say about the information contained in the documents.").

[15] *See, e.g.*, *United States v. Sierra Pac. Indus.*, No. 09-cv-2445, 2011 WL 2119078, at *9 (E.D. Cal. May 26, 2011) ("For example, party employees and former employees, in-house counsel, independent contractors, treating physicians, and accident investigators might all be non-reporting expert witnesses."); *United States v. 269 Acres, More or Less, Located in Beaufort Cty. S.C.*, No. 09-cv-2550, 2018 WL 542225, at *2 (D.S.C. Jan. 24, 2018) (noting that "Rule 26(a)(2)(C) witnesses typically are treating physicians or party employees, but the rule is not confined to such witnesses."); *In re Prograf Antitrust Litig.*, No. 11-md-2242, 2014 WL 4745954, at *5 (D. Mass. June 10, 2014) (discussing Rule 26(a)(2)(C) disclosure for treating physicians); *Cantu v. Wayne Wilkens Trucking LLC*, No. 19-cv-1067, 2020 WL 5558094, at *3 (W.D. Tex. Sept. 16, 2020) (same); *Montana Connection Inc. v. Moore*, No. 12-cv-824, 2015 WL 9307283, at *4 (M.D. Tenn. Dec. 21, 2015) (discussing Rule 26(a)(2)(C) disclosure for defendants' business manager/accountant).

[16] *See* Fed. R. Civ. P. 26 advisory committee's note (2010) (noting that "[c]ourts must take care against requiring undue detail" with respect to Rule 26(a)(2)(C)); *see also Flynn v. FCA US LLC*, No. 15-cv-855, 2017 WL 5531065, at *3 (S.D. Ill. Nov. 17, 2017) (denying motion to strike and bar non-retained expert witness from testifying, and noting that he "would not be introducing new facts into the record; rather, he would be offering opinions on facts already introduced.").

[17] *See* Fed. R. Civ. P. 26 advisory committee's note (2010) (the work-product protections in Rule 26(b)(4)(C) are "limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying," and the rule "does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C).").

[18] *See United States v. Sierra Pac. Indus.*, No. 09-cv-2445, 2011 WL 2119078, at *7 (E.D. Cal. May 26, 2011) (discussing the 2010 Advisory Committee Note to Rule 26, which indicated that "the time has not yet come to extend the protection for attorney expert communications beyond experts required to give an (a)(2)(B) report."). The committee expressed concerns with potential line-drawing problems, including that "a party's employee might be an important fact witness as well as an expert witness, leading to 'obvious opportunities for mischief,'" such as:

> [I]f an employee engineer designed a product that was the subject of a product liability case, it would be difficult to separate the engineer's sense impressions leading up to the design of the product with his expert opinions at trial, and to distinguish between attorney communications regarding the former from those regarding the latter.

Id. at *6; *see also Luminara Worldwide LLC v. RAZ Imports Inc.*, No. 15-cv-3028, 2016 WL 6774231, at *2-5 (D. Minn. Nov. 15, 2016) (where plaintiff designated an inventor — who was named on one of the asserted patents underlying the action — as a non-reporting expert under Rule 26(a)(2)(C), the court ordered that privilege was waived and that any documents and information considered by the witness "including communications with attorneys are discoverable.").

[19] *See United States v. Sierra Pac. Indus.*, No. 09-cv-2445, 2011 WL 2119078, at *5 (E.D. Cal. May 26, 2011) (acknowledging that "the advisory committee notes explain that the new rule does not provide protection for communications between non-reporting experts and counsel, but does not disturb any existing protections.").

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