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# EXPERT TESTIMONY DISCLOSURE UNDER FEDERAL RULE 26: A PROPOSED AMENDMENT

KEITH H. BEYLER\*

## INTRODUCTION

Federal Rule of Civil Procedure 26 requires each party to disclose the identity of its expert witnesses and to provide written reports prepared by some of those experts.<sup>1</sup> This Article proposes an amendment that extends the written report requirement to all employee experts and party experts, and requires opinion disclosure for independent experts.

Part I compares Federal Rule of Civil Procedure 26's disclosure and discovery procedure with state court expert witness information exchange procedures. Part II reviews federal court decisions about the written report requirement's coverage of employee experts, party experts, and independent experts. Part III then explains why the proposed changes should be made. The Appendix contains the proposed amendment.

## I. A COMPARATIVE ANALYSIS OF FEDERAL RULE OF CIVIL PROCEDURE 26

Federal Rule 26 was amended in 1970 to permit discovery of the facts and opinions that expert witnesses acquire or develop in anticipation of litigation or for trial.<sup>2</sup> The 1970 Amendment overcame privilege and work product objections to expert witness discovery.<sup>3</sup> Under the Amendment's two-step expert witness discovery procedure,<sup>4</sup> a party first served a standard interrogatory

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1. FED. R. CIV. P. 26(a)(2).

2. FED. R. CIV. P. 26(b)(4).

3. See FED. R. CIV. P. 26, advisory committee's note (discussing subdivision (b)(4)(A) of the 1970 Amendment).

4. This two-step expert witness discovery procedure did not apply to expert witnesses who acquired or developed facts and opinions for non-

that essentially asked another party to identify its expert witnesses and to state the substance of their expected testimony.<sup>5</sup> With court permission, a party then could depose the experts and take other expert witness discovery.<sup>6</sup>

Federal Rule 26 was further amended in 1993 to substitute expert testimony disclosure for some expert witness discovery.<sup>7</sup> Part A reviews the current expert testimony disclosure and expert witness discovery procedure. Part B then compares that procedure with state court expert witness information exchange procedures.

### A. *Federal Rule 26's Disclosure-Discovery Procedure*

Since 1993, Federal Rule 26 has required each party to make a series of disclosures to other parties – an initial disclosure, an expert testimony disclosure, and a pretrial disclosure.<sup>8</sup> Having each party disclose information automatically, rather than wait for another party to make discovery requests, accelerates the exchange of information and eliminates the paperwork involved in making the discovery requests.<sup>9</sup>

As part of the required expert testimony disclosure, each party must identify all of its expert witnesses.<sup>10</sup> In addition, each party must provide a written report prepared by any expert who is either a retained expert witness (a person “retained . . . to provide expert testimony in the case”) or the equivalent of a retained expert witness (a person “specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony”).<sup>11</sup> The expert’s report must contain a complete statement of all opinions the expert will express, the basis and reasons for the opinions, the data or other information the expert considered, and any exhibits the expert will use to summarize or support the opinions.<sup>12</sup> The report also must

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litigation purposes, such as an expert witness who was an “actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit.” *Id.* A discovering party treated the actor or viewer expert as an ordinary witness for discovery purposes. *Id.*

5. FED. R. CIV. P. 26(b)(4)(A)(i).

6. FED. R. CIV. P. 26(b)(4)(A).

7. FED. R. CIV. P. 26(a)(2).

8. FED. R. CIV. P. 26(a)(1)-(3).

9. *See* FED. R. CIV. P. 26, advisory committee’s note (discussing subdivision (a) of the 1993 Amendment).

10. *See* FED. R. CIV. P. 26(a)(2)(A) (requiring identification of all witnesses who testify under Rules 702, 703, or 705 of the Federal Rules of Evidence – the rules applicable to expert testimony).

11. FED. R. CIV. P. 26(a)(2)(B).

12. *Id.*

reveal the expert's qualifications, compensation, and prior testimony.<sup>13</sup>

This written report requirement demands more detailed information than typically was elicited by the 1970 Amendment's standard expert witness interrogatory. In the judgment of the Advisory Committee on the Federal Rules of Civil Procedure, the answer to the 1970 Amendment's interrogatory "was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness."<sup>14</sup> Therefore, the Advisory Committee designed the written report requirement to yield "a detailed and complete [statement of] the testimony the witness is expected to present during direct examination."<sup>15</sup>

The written report requirement meshes with expert witness discovery in the following way: the deposition of any expert witness can be taken as a matter of right, but the deposition of an expert who is covered by the written report requirement must await the expert's report.<sup>16</sup> This deposition-timing requirement is designed to make expert witness deposition-taking more efficient.<sup>17</sup>

The duty to disclose expert testimony continues after the expert is deposed. If a party later learns of a material omission or error in its expert's written report or its expert's deposition testimony, the party must apprise the other parties of the addition or correction through a supplemental disclosure.<sup>18</sup> The part of this supplemental disclosure requirement that covers deposition testimony applies uniquely to experts who are covered by the written report requirement – i.e., a party ordinarily has no duty to supplement its other witnesses' deposition testimony.<sup>19</sup> If a party

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13. *Id.*

14. See FED. R. CIV. P. 26, advisory committee's note (analyzing subdivision (a)(2)(B) of the 1993 Amendment).

15. *Id.*

16. FED. R. CIV. P. 26(b)(4)(A).

17. See FED. R. CIV. P. 26, advisory committee's note (exploring subdivision (b) of the 1993 Amendment and acknowledging that "the information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument of delay or oppression").

18. FED. R. CIV. P. 26(e)(1). A party does not have to supplement, however, if the information already has been made known to other parties during discovery or in writing. *Id.*

19. FED. R. CIV. P. 26(e)(1)-(2). The Advisory Committee has said the following about the duty to supplement under Federal Rule 26(e):

[T]he obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production and requests for admissions, *but not ordinarily to deposition testimony*. However, *with respect to experts from whom a written report is required under*

fails to supplement its expert's written report or its expert's deposition testimony, the party generally cannot elicit the undisclosed information from the expert at trial.<sup>20</sup>

Because the written report requirement covers only retained expert witnesses and experts equivalent to retained expert witnesses,<sup>21</sup> parties do not provide written reports for most employee experts, party experts, and independent experts.<sup>22</sup> These non-retained expert witnesses are identified in the expert testimony disclosure, but the disclosure reveals nothing else about them.<sup>23</sup> A party obtains more information about another party's non-retained expert witnesses by taking expert witness discovery.<sup>24</sup>

Expert witness discovery might include serving a non-retained expert witness interrogatory. For example, the following six-part interrogatory asks for the same six types of information that must be contained in written reports prepared by retained expert witnesses:

For each person identified in your expert testimony disclosure who is not covered by Federal Rule 26's written report requirement, set forth: (1) a complete statement of all opinions the expert will express and the basis and reasons for these opinions; (2) the data or other information the expert considered in forming the opinions; (3) any exhibits the expert will use to summarize or support the opinions; (4) the expert's qualifications, including a list of the expert's publications in the past ten years; (5) the expert's compensation for the study and testimony; and (6) a list of cases in which the expert

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*subdivision (a)(2)(B)*, changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1).

FED. R. CIV. P. 26, advisory committee's note (highlighting subdivision (e) of the 1993 Amendment) (emphasis added).

20. FED. R. CIV. P. 37(c)(1). The party can elicit the undisclosed expert testimony only if the failure to supplement was substantially justified or harmless. *Id.*

21. FED. R. CIV. P. 26(a)(2)(B).

22. See *infra* Part II.A-C.

23. FED. R. CIV. P. 26(a)(2)(A)-(B). The term "non-retained expert witnesses" is used in this article to refer collectively to all expert witnesses who are not covered by the written report requirement – i.e., who are neither retained expert witnesses nor the equivalents of retained expert witnesses.

24. FED. R. CIV. P. 26(b)(4)(A) gives a party the right to depose any person who has been identified as an expert whose opinions may be presented at trial. A party also can serve interrogatories and use other appropriate discovery tools. *Rogers v. Detroit Edison Co.*, 328 F. Supp. 2d 687, 690 n.3 (E.D. Mich. 2004).

has given expert testimony at trial or by deposition in the past four years.<sup>25</sup>

This six-part interrogatory might be improper. Answering the interrogatory seems equivalent to providing written reports, and parties do not have to provide written reports for non-retained expert witnesses. Yet, the Advisory Committee never said whether, or to what extent, a party can get information about another party's non-retained expert witnesses through an interrogatory.<sup>26</sup> Capitalizing on the Committee's silence about the proper way to get this type of information, the parties could make the following arguments for and against a protective order quashing the above interrogatory.<sup>27</sup>

*For:* The Advisory Committee rightly judged that parties should not have to incur the high cost of preparing written reports that preview the trial testimony of their non-retained expert witnesses. While retained expert witnesses and equivalent experts are "professional" witnesses who can be hard to pin down at a deposition without having a written report, non-retained expert witnesses are "amateur" witnesses who are relatively easy to pin down. When an interrogatory calls for the same information contained in written reports, the cost of preparing the answer is essentially the same as the cost of preparing the written reports. To honor the Committee's judgment that this cost is unjustified for non-retained expert witnesses, the interrogatory must be quashed.

*Against:* The Advisory Committee instead made a judgment about witness control. Without control over an expert witness, a party cannot require the expert to prepare a written report, and therefore the party cannot be expected to provide the report. Unlike retained expert witnesses and equivalent experts, non-retained expert witnesses such as treating physicians are not controlled by the parties. Answering the above interrogatory does not require witness control, however, because a responding party prepares an interrogatory answer based on available information.<sup>28</sup> Therefore, the interrogatory honors the Committee's judgment that the way to get information about non-retained expert witnesses cannot depend on witness control.

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25. A responding party must supplement interrogatory answers to the same extent as required disclosures. FED. R. CIV. P. 26(e)(1)-(2). Accordingly, this hypothetical interrogatory automatically calls for additions and corrections just like the additions and corrections that are required for written reports.

26. See FED. R. CIV. P. 26, advisory committee's note (discussing subdivision (a) of the 1993 Amendment).

27. See FED. R. CIV. P. 26(c)(3) (stating that a protective order may be issued to ensure that discovery is obtained in a method besides the one selected by the party seeking discovery).

28. FED. R. CIV. P. 33(a).

*For:* The argument against quashing the interrogatory is flawed. While parties may lack control over independent experts such as treating physicians, the non-retained expert witness category also includes employee experts and party experts. Because the parties have control over these employee experts and party experts, the only possible reason for not requiring a party to provide a written report for these experts is that the cost is unjustified. The Advisory Committee probably thought this cost is unjustified for independent experts, too.<sup>29</sup>

*Against:* Federal Rule 26 bases cost justification decisions on the needs of each case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the proposed discovery in resolving these issues.<sup>30</sup> The interrogatory asks for information that is needed to depose non-retained expert witnesses efficiently. The interrogatory should be quashed only in the unusual case where this need is outweighed by the other cost justification factors.<sup>31</sup>

The above back-and-forth arguments reveal the following problem. Because Federal Rule 26 does not contain a standard interrogatory about non-retained expert witnesses, parties do not know for sure how much information a non-retained expert witness interrogatory can properly request. Parties know only that, like all discovery requests, this type of interrogatory must be "not unreasonable."<sup>32</sup>

A district court can head off most arguments about what is reasonable by requiring a standard exchange of non-retained expert witness information. Federal Rule 26 states that the written report requirement covers retained expert witnesses and equivalent experts "[e]xcept as otherwise . . . directed by the court."<sup>33</sup> In its discussion of how Federal Rule 26 applies to treating physicians, the Advisory Committee indicated that this power to "otherwise direct" includes the power to require written reports for non-retained expert witnesses.<sup>34</sup> The Committee first explained that Federal Rule 26 by its terms does not require a

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29. See *Indem. Ins. Co. of N. Am. v. American Eurocopter LLC*, 227 F.R.D. 421, 425 n.4 (M.D.N.C. 2005) (the rule makers probably thought the report obligation would be "too onerous" for a participant witness such as a treating physician).

30. FED. R. CIV. P. 26(b)(2)(C).

31. One federal district court has expressed general approval of interrogatories that require "the same level of opinion disclosures as are contemplated by Rule 26(a)(2)." *Duluth Lighthouse for the Blind v. C.G. Bretting Mfg. Co.*, 199 F.R.D. 320, 326 n.8 (D. Minn. 2000)

32. FED. R. CIV. P. 26(g)(2)(C).

33. FED. R. CIV. P. 26(a)(2)(B).

34. FED. R. CIV. P. 26, advisory committee's note.

party to provide a written report for a treating physician who is testifying as an expert witness.<sup>35</sup> The Committee then added: “By local rule [or] order . . . the requirement of a written report may

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35. See *id.* (commenting on paragraph (a)(2)(B) of the 1993 Amendment and stating that “A treating physician . . . can be . . . called to testify at trial without any requirement for a written report.”). These words did not address Federal Rule 26’s expert witness identification requirement. In treating a patient, a physician generally derives medical facts and medical opinions from a combination of personal observation and medical knowledge. Because of the personal observation component, some courts thought a treating physician gives lay testimony under Rule 701 of the Federal Rules of Evidence, making it unnecessary under Federal Rule 26 for the party eliciting such testimony to identify the physician as an expert witness. See *Davoll v. Webb*, 194 F.3d 1116, 1138 (10th Cir. 1999) (holding that “A treating physician is not considered an expert witness if he or she testifies about observations based on personal knowledge, including the treatment of the party.”); see also *Richardson v. Consol. Rail Corp.*, 17 F.3d 213, 218 (7th Cir. 1994) (holding that “a doctor is not an ‘expert’ if his or her testimony is based on . . . observations during the course of treating . . . and personal knowledge”); *Tzoumis v. Tempel Steel Co.*, 168 F. Supp. 2d 871, 876 (N.D. Ill. 2001) (stating that “[a] treating physician that has not been previously disclosed as an expert may still testify regarding his observations made during the course of treatment and on matters of personal knowledge”); *Rebolledo v. Herr-Voss Corp.*, 101 F. Supp. 2d 1034, 1039 (N.D. Ill. 2000) (permitting the treating physician to testify without first being disclosed as an expert). Because of the medical knowledge component, however, other courts thought a treating physician gives expert testimony under Rule 702 of the Federal Rules of Evidence, making it necessary under Federal Rule 26 for the party eliciting such testimony to identify the physician as an expert witness. See *Zarecki v. National R.R. Passenger Corp.*, 914 F. Supp. 1566, 1572-73 (N.D. Ill. 1996) (concluding that a treating physician had to be identified as an expert witness in order to testify about the cause of the plaintiff’s carpal tunnel syndrome); see also *Pedigo v. UNUM Life Ins. Co. of Am.*, 145 F.3d 804, 807 (6th Cir. 1998) (confirming that a pathologist had to be identified as an expert witness in order to testify about entry and exit wounds).

In 2000, Rule 701 of the Federal Rules of Evidence was amended to clarify the difference between lay testimony and expert testimony. Under amended Rule 701, only an expert witness can state opinions and inferences “based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” FED. R. EVID. 701. This amendment was designed partly to prevent evasion of the expert testimony disclosure requirements of Federal Rule of Civil Procedure 26. See FED. R. EVID. 701 advisory committee’s note (discussing the 2000 Amendment). Since the 2000 Amendment took effect, courts generally have required a party to identify a treating physician as an expert witness. *Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875, 882-83 (5th Cir. 2004); *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 756-58 (7th Cir. 2004); *Rogers v. Detroit Edison Co.*, 328 F. Supp. 2d 687, 689-90 (E.D. Mich. 2004); *Brandon v. Vill. of Maywood*, 179 F. Supp. 2d 847, 858-59 (N.D. Ill. 2001). But see *Hawkins v. Graceland*, 210 F.R.D. 210, 211 (W.D. Tenn. 2002) (stating that “the law is not settled on whether a treating physician who might testify on causation is to be considered an ‘expert’ for purposes of Rule 26(a)(2)(A).”).



be . . . imposed upon additional persons who will provide [expert] opinions.”<sup>36</sup>

A few district courts have adopted this type of local rule or scheduling order. In two districts, a local rule requires disclosure of “the facts known and opinions held by the treating physician(s) and a summary of the grounds therefor.”<sup>37</sup> In a third district, a similar local rule requires disclosure of “the substance” of the expert evidence to be given by “hybrid fact/expert witnesses such as treating physicians.”<sup>38</sup> In at least two additional districts, a district judge’s standard scheduling order extends the written report requirement to treating physicians.<sup>39</sup> The standard exchanges of expert witness information in these seven districts are more comprehensive than the exchange specified in Federal Rule 26.

### B. State Court Procedures

Forty-nine states have adopted procedures for exchanging expert witness information.<sup>40</sup> All of these states provide for expert witness discovery, and some of the states follow the federal model of substituting expert testimony disclosure for some expert witness discovery. Table I divides the states into four categories according to the procedure used in each state to exchange expert witness information.

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36. FED. R. CIV. P. 26, advisory committee’s note; *see also* *Applera Corp. v. MJ Research, Inc.*, 220 F.R.D. 13, 18 (D. Conn. 2004) (interpreting the exception, in light of the Advisory Committee’s note, to permit a scheduling order that requires written reports for all expert witnesses).

37. N. & S.D. MISS. LOCAL R. 26.1(2)(d). This local rule does not fully extend the written report requirement to treating physicians, because it requires only some of the information required in a written report, and it does not require the treating physician to prepare and sign the disclosure. *Id.*

38. E.D. WIS. CIV. LOCAL R. 26.1(a).

39. *See Benoit v. Nintendo of Am., Inc.*, No. Civ. A. 01-674, 2001 WL 1524510, at \*2 (E.D. La. Nov. 28, 2001) (requiring a treating physician to submit a written report before his deposition); *Mendez v. UNUM Life Ins. Co. of America*, No. 04-01312 JW, 2005 WL 1865426, at \*3 (N.D. Cal. Aug. 2, 2005) (requiring the treating physician to submit a written report).

40. The Oregon Rules of Civil Procedure do not authorize expert witness discovery. OR. R. CIV. P. 36; *Stevens v. Czerniak*, 84 P.3d 140, 144-47 (Or. 2004). The opponents of expert witness discovery successfully argued that it greatly increases the cost of litigation, and that disclosure of an expert witness’s name before trial generates peer pressure against testifying. *Id.* at 146.

Table I. State Procedures for Exchanging  
Expert Witness Information

TWO-STEP DISCOVERY	OPEN DISCOVERY	DISCLOSURE ON PARTY DEMAND OR COURT ORDER	AUTOMATIC DISCLOSURE
Alabama	Florida	California	Alaska
Arkansas	Georgia	Louisiana	Arizona
Delaware	Hawaii	Maine	Colorado
Idaho	Illinois	New Hampshire	Connecticut
Indiana	Iowa	New York	Kansas
Kentucky	Maryland	Texas	Nevada
Massachusetts	Michigan		Utah
Minnesota	Missouri		
Mississippi	New Jersey		
Montana	North Dakota		
Nebraska	Ohio		
New Mexico	Oklahoma		
North Carolina	South		
Pennsylvania	Carolina		
Rhode Island	Tennessee		
South Dakota	Vermont		
	Virginia		
	Washington		
	West Virginia		
	Wisconsin		
	Wyoming		

The first column lists the sixteen states that have a two-step expert witness discovery procedure.<sup>41</sup> Under this procedure –

41. ALA. R. CIV. P. 26(b)(4)(A); ARK. R. CIV. P. 26(b)(4)(A); DEL. SUPER. CT. R. CIV. P. 26(b)(4)(A); DEL. CHAN. CT. R. 26(b)(4)(A); DEL. COMM. PL. CT. CIV. R. 26(b)(4)(A); DEL. FAM. CT. CIV. R. 26(g)(3)(A); IDAHO R. CIV. P. 26(b)(4)(A); IND. R. TRIAL P. 26(B)(4)(a); KY. R. CIV. P. 26.02(4); MASS. R. CIV. P. 26(b)(4)(A); MINN. R. CIV. P. 26.02(d)(1); MISS. R. CIV. P. 26(b)(4)(A); MONT. R. CIV. P. 26(b)(4)(A); NEB. CT. R. DISC. 26(b)(4)(A); N.M. R. CIV. P. 1-026(B)(5); N.C. R. CIV. P. 26(b)(4)(A); PA. R. CIV. P. 4003.5(a)(1)-(2); R.I. SUPER. R. CIV. P. 26(b)(4)(A); S.D. CODIFIED LAWS § 15-6-26(b)(4)(A) (Michie 2006).

identical to that in the 1970 version of Federal Rule 26 – a party first serves a standard expert witness interrogatory. With court permission, a party then can depose the experts and take other expert witness discovery.

The second column lists the twenty states that have an open expert witness discovery procedure.<sup>42</sup> Like the states in the first group, these states have a standard expert witness interrogatory. Unlike the states in the first group, however, these states do not require court permission to take other expert witness discovery.<sup>43</sup>

The third and fourth columns list states that substitute expert testimony disclosure for some expert witness discovery. In the six states listed in column three, a standard expert testimony disclosure is required only when demanded by a party or ordered by the court.<sup>44</sup> In the seven states listed in column four, a standard expert testimony disclosure is automatically required, as it is under Federal Rule 26.<sup>45</sup>

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42. FLA. R. CIV. P. 1.280(b)(4)(A); GA. CODE ANN. § 9-11-26(b)(4)(A) (2006); HAW. R. CIV. P. 26(b)(5); HAW. DIST. CT. R. CIV. P. 26(b)(4)(A); ILL. SUP. CT. R. 213(f)-(g); IOWA CT. R. 1.508(1); MD. R. CIV. P. 2-402(f)(1); MICH. R. CIV. P. 2.302(B)(4)(a); MO. SUP. CT. R. 56.01(b)(4); N.J. SUPER. TAX SUR. CTS. R. 4:10-2(d)(1)-(2) & 4:17-4(e); N.D. R. CIV. P. 26(b)(4)(A); OHIO R. CIV. P. 26(B)(4)(b); OKLA. STAT. ANN. tit. 12, § 3226(B)(3)(a) (West 2006); S.C. R. CIV. P. 26(b)(4)(A); TENN. R. CIV. P. 26.02(4)(A); VT. R. CIV. P. 26(b)(4)(A); VA. SUP. CT. R. 4:1(b)(4)(A); WASH. SUPER. CT. CIV. R. 26(b)(5)(A); W. VA. R. CIV. P. 26(b)(4)(A); WIS. STAT. ANN. § 804.01(2)(d)(1) (West 2005); WYO. R. CIV. P. 26(b)(4)(A). The Hawaii circuit court and district court provide for two different discovery processes. Compare HAW. R. CIV. P. 26(b)(5) (providing an open discovery rule, applicable in cases that meet the circuit court's amount in controversy threshold), with HAW. DIST. CT. R. CIV. P. 26(b)(4)(A) (providing a two-step discovery rule, applicable in cases that fall below the amount in controversy threshold). In Table I, Hawaii is classified based on the circuit court rule.

43. All twenty states' open expert witness discovery rules eliminate the court-permission requirement for expert witness depositions, but five of these states' rules retain the court-permission requirement for other methods of expert witness discovery. FLA. R. CIV. P. 1.280(b)(4)(A); MICH. R. CIV. P. 2.302(B)(4)(a)(iii); VA. S. CT. R. 4:1(b)(4)(A)(iii); WIS. STAT. ANN. § 804.01(2)(d)(1) (West 2004 Supp.); WYO. R. CIV. P. 26(b)(4)(A)(ii).

44. CAL. CIV. PROC. CODE § 2034.210(a) (West 2006) (party demand); LA. CODE CIV. PROC. ANN. art. 1425(B) (2005) (court order); ME. R. CIV. P. 16(a) & 26(b)(4)(A) (court order); N.H. R. SUPER. CT. 35(f) (party demand or court order); N.Y. C.P.L.R. § 3101(d) (Consol. 2002) (party demand); TEX. R. CIV. P. 194.2(f) (party demand). Although the Maine discovery rule (Rule 26) states that a party obtains expert witness information by interrogatory, the Maine pre-trial procedure rule (Rule 16) calls for a scheduling order, which, as a practical matter, requires disclosure. ME. R. CIV. P. 26, advisory committee's notes of 1999.

45. ALASKA R. CIV. P. 26(a)(2); ARIZ. CIV. P. R. 26.1(2)(6); COLO. R. CIV. P. 26(a)(2); CONN. R. SUPER. CT. CIV. 13-4(4); KAN. CIV. PROC. CODE ANN. § 60-226(b)(6) (West 2003 Supp.); NEV. R. CIV. P. 26(a)(2); UTAH R. CIV. P. 26(a)(3).

The states' procedures for exchanging expert witness information vary in another way. Though almost all of the standard expert witness interrogatories and standard expert testimony disclosures cover expert witness opinions, the interrogatories and disclosures differ in the types of expert witnesses whose opinions are covered. Table II divides the states into four groups based on the differences in coverage.

Table II. Differences in Expert Witness Opinion Coverage

IN ANTICIPATION OF LITIGATION OR FOR TRIAL		RETAINED EXPERT OR EQUIVALENT	PARTY, EMPLOYEE OR RETAINED EXPERT	UNLIMITED COVERAGE
Alabama	Montana	Alaska	California	Arizona
Arkansas	Nebraska	Kansas		Colorado
Delaware	New Jersey	Louisiana		Connecticut
Florida	New Mexico	Nevada		Illinois
Georgia	North Carolina	Utah		Maryland
Hawaii				New Hampshire
Idaho	North Dakota			Hampshire
Indiana	Oklahoma			New York
Iowa	Pennsylvania			Rhode Island
Kentucky	South Carolina			Texas
Maine				Vermont
Mass.	South Dakota			
Michigan	Tennessee			
Minnesota	Virginia			
Mississippi	Washington			
Missouri	West Virginia			
	Wisconsin			
	Wyoming			

The first column identifies the thirty-two states where the standard expert witness interrogatory requires a party to set forth an expert witness's opinions if developed "in anticipation of litigation or for trial."<sup>46</sup> This litigation-purpose specification –

46. ALA. R. CIV. P. 26(b)(4); ARK. R. CIV. P. 26(b)(4); DEL. SUPER. CT. R. CIV.

identical to the specification in the 1970 version of Federal Rule 26 – prevents the standard expert witness interrogatory from covering the opinions of many employee experts, party experts, and independent experts. The following examples illustrate these three coverage gaps.

*Example #1.* In a personal injury suit alleging negligent design of an outdoor metal stairway, the defendant design firm plans to elicit expert testimony from an employee who helped design the stairway. This design engineer will opine that the stairway meets all professional standards.

*Result:* Because the professional standards opinion was developed for a non-litigation purpose – designing the stairway – the design firm’s answer to the standard expert witness interrogatory will not include this opinion.<sup>47</sup>

*Example #2.* In a medical malpractice suit alleging negligent treatment of a spider bite, the defendant physician plans to read from a medical text that cautions against early excision and repair of spider bites. The defendant physician will opine that the medical text is a reliable authority.

*Result:* Because the reliable authority opinion was developed for a non-litigation purpose – treating patients – the defendant

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P. 26(b)(4); DEL. CHAN. CT. R. 26(b)(4); DEL. COMM. PL. CT. CIV. R. 26(b)(4); DEL. FAM. CT. CIV. R. 26(g)(3); FLA. R. CIV. P. 1.280(b)(4); GA. CODE ANN. § 9-11-26(b)(4) (2006); HAW. R. CIV. P. 26(b)(5); HAW. DIST. CT. R. CIV. P. 26(b)(4); IDAHO R. CIV. P. 26(b)(4); IND. R. TRIAL P. 26(B)(4); IOWA CT. R. 1.508(1); KY. R. CIV. P. 26.02(4); ME. R. CIV. P. 26(b)(4); MASS. R. CIV. P. 26(b)(4); MICH. R. CIV. P. 2.302(B)(4); MINN. R. CIV. P. 26.02(d)(1)(A); MISS. R. CIV. P. 26(b)(4); MO. SUP. CT. R. 56.01(b)(4); MONT. R. CIV. P. 26(b)(4); NEB. CT. R. DISC. 26(b)(4); N.J. SUPER. TAX SUR. CT. R. 4:10-2(d); N.M. R. CIV. P. 1-026(b)(5); N.C. R. CIV. P. 26(b)(4); N.D. R. CIV. P. 26(b)(4); OKLA. STAT. ANN. tit. 12, § 3226(B)(3)(a) (2006); PA. R. CIV. P. 4003.5(a); S.C. R. CIV. P. 26(b)(4); S.D. CODIFIED LAWS § 15-6-26(b)(4) (2006); TENN. R. CIV. P. 26.02(4); VA. SUP. CT. R. 4:1; WASH. SUPER. CT. CIV. R. 26(b)(5); W. VA. R. CIV. P. 26(b)(4); WIS. STAT. ANN. § 804.01(d) (West 2006); WYO. R. CIV. P. 26(b)(4). Hawaii’s circuit court and district court have different rules for standard expert witness interrogatories. Compare HAW. R. CIV. P. 26(b)(5) (providing no standard expert witness interrogatory), with HAW. DIST. CT. R. CIV. P. 26(b)(4)(A) (providing a standard expert witness interrogatory covering opinions of experts if developed in anticipation of litigation or in preparation for trial). In Table II, Hawaii is classified based on the district court rule.

47. The example is based on *Smith v. Cent. Ill. Pub. Serv. Co.* See *Smith*, 531 N.E.2d 51, 59 (Ill. App. Ct. 1988) (holding that design engineer was not a “retained” expert under ILL. REV. STAT. 1985, ch. 110A, para. 220 (repealed 1995)).

physician's answer to the standard expert witness interrogatory will not include this opinion.<sup>48</sup>

*Example #3.* In a medical malpractice suit alleging that the defendant emergency room physician negligently failed to diagnose the plaintiff patient's brain hemorrhage, the plaintiff patient plans to elicit expert testimony from a neurologist who later treated the plaintiff. This treating neurologist will opine that the standard of care required an immediate CT scan or neurological consultation, yet the defendant emergency room physician took neither step.

*Result:* Because the standard of care opinion was developed for a non-litigation purpose – determining the cause of the patient's medical problems in order to treat these problems – the plaintiff patient's answer to the standard expert witness interrogatory will not include this opinion.<sup>49</sup>

The second column identifies the five states in which the standard expert testimony disclosure covers an expert witness's opinions if the expert witness is a person “retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony.”<sup>50</sup> This specification – identical to the specification appearing in Federal Rule 26's written report requirement – yields coverage gaps similar to the coverage gaps in the first group of states.<sup>51</sup> In the outdoor metal stairway suit, example one, the

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48. The example is based on the facts, but not the result in *Karr v. Noel*. See *Karr*, 571 N.E.2d 271, 275 (Ill. App. Ct. 1991) (stating that the defendant physician had not identified the medical text at the deposition, so the trial court should have excluded the defendant physician's opinion about the medical text under ILL. REV. STAT. 1985, ch. 110A, par. 220 (repealed 1995)).

49. The example is based on *Boatmen's Nat'l Bank of Belleville v. Martin*. See *Boatmen's Nat'l Bank of Belleville*, 614 N.E.2d 1194, 1199 (Ill. 1993) (finding that neurologist's opinion was properly admitted under ILL. REV. STAT. 1985, ch. 110A, par. 220 (repealed 1995)).

50. ALASKA R. CIV. P. 26(a)(2)(B); KAN. CIV. PROC. CODE ANN. § 60-226(b)(6)(B) (West 2006); LA. CODE CIV. PROC. ANN. art. 1425(B) (2006); NEV. R. CIV. P. 16.1(a)(2)(B); UTAH R. CIV. P. 26(a)(3)(B).

51. The coverage of expert witness opinions differs slightly in the two groups of states. For example, in the outdoor metal stairway suit, suppose the design engineer's employment duties happen to include giving expert testimony on a regular basis. Based on this employment duty, a Federal Rule 26-type rule would require the design firm to include the design engineer's professional standards opinion in its expert testimony disclosure. Yet, because of the non-litigation purpose for developing the opinion, a litigation-purpose type rule would not require the design firm to include the opinion in its answer to the standard expert witness interrogatory. As a further example, suppose the defendant physician in the spider bite suit develops the reliable authority opinion for trial. Based on that purpose for developing the opinion, a litigation-purpose type rule would require the defendant physician to include

design engineer was hired to do design work, he developed the professional standards opinion while doing this type of work, and he does not regularly give expert testimony. In the spider bite suit, example two, the defendant physician developed the reliable authority opinion as part of his medical education. In the brain hemorrhage suit, example three, the treating neurologist was seen for medical treatment and developed the standard of care opinion while giving this treatment. Therefore, the expert testimony disclosures in the three suits will not include, respectively, the professional standards, reliable authority, and standard of care opinions.

The third column identifies the one state – California – in which the standard expert witness declaration covers the general substance of an expert witness's testimony if the expert witness is a party expert, an employee expert, or a retained expert.<sup>52</sup> Assuming the general substance includes the expert's opinions, the declaration in the outdoor metal stairway suit, example one, will include the professional standards opinion of the design engineer – who is an employee expert. The declaration in the spider bite suit, example two, will include the reliable authority opinion of the defendant physician – who is a party expert. Yet, the declaration in the brain hemorrhage suit, example three, will not include the standard of care opinion of the treating neurologist – who is neither an employee expert, nor a party expert, nor a retained expert.<sup>53</sup>

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the opinion in his answer to the standard expert witness interrogatory. Yet, the defendant physician might not be the in-house equivalent of a retained expert witness. Whether the defendant physician would be an in-house equivalent whose reliable authority opinion must be disclosed in these circumstances depends on whether the term “specially employed” to provide expert testimony in the case refers to an expert specially hired for this purpose or an expert specially used for this purpose. See *infra* Part II.A. (discussing in great detail employee experts). A Federal Rule 26-type rule would require the defendant physician to include the opinion in his expert testimony disclosure only if “specially employed” means specially used, because the defendant physician obviously did not specially hire himself.

52. CAL. CIV. PROC. CODE §§ 2034.210(a)(2), 2034.260(c)(2) (West 2006).

53. The California Supreme Court has rejected the argument that a treating physician becomes a retained expert just by testifying about the standard of care. In *Schreiber v. Estate of Kiser*, the Court said the following:

to the extent a physician acquires personal knowledge of the relevant facts independently of the litigation, . . . no expert witness declaration is required, and he may testify as to any opinions formed on the basis of facts independently acquired and informed by his training, skill, and experience. This may well include opinions regarding causation and standard of care because such issues are inherent in a physician's work.

989 P.2d 720, 726 (Cal. 1999).

The fourth column identifies the ten states in which the standard expert witness interrogatory or expert testimony disclosure has no (or almost no) limit on its coverage of expert witness opinions.<sup>54</sup> In this group of states, the interrogatory answers or disclosures in the three examples will include, respectively, the professional standards, reliable authority, and standard of care opinions.<sup>55</sup>

Tables I and II together make two contrasting points. Table I shows that only seven states have streamlined their standard exchanges of expert witness information as fully as Federal Rule 26's automatic expert testimony disclosure feature. Table II shows, however, that eleven states have standard exchanges that cover the opinions of more expert witnesses than are covered by Federal Rule 26's written report requirement. In other words, Federal Rule 26's standard exchange is on the leading edge in streamlining, but is behind the leading edge in coverage.

## II. WRITTEN REPORT REQUIREMENT COVERAGE DECISIONS

Since 1993, federal courts have filed a substantial number of written report coverage decisions. Subpart A examines the decisions concerning employee experts. Subparts B and C examine the decisions concerning party experts and independent experts.

### A. *Employee Experts*<sup>56</sup>

Federal Rule 26 uses a special employment test and a regular testimony test to single out the employees who are covered by the

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54. ARIZ. CIV. P. R. 26.1(2)(6); COLO. R. CIV. P. 26(a)(2); CONN. R. SUPER. CT. CIV. 13-4(4); ILL. SUP. CT. R. 213(f)-(g); MD. R. CIV. P. 2-402(f)(1); N.H. R. SUPER. CT. 35(f); N.Y. C.P.L.R. § 3101(d) (Consol. 2002); R.I. SUPER. CT. R. CIV. P. 26(b)(4)(A); TEX. R. CIV. P. 194.2(f)(3); VT. R. CIV. P. 26(b)(4)(A). Maryland is listed in this fourth group of states because the standard expert witness interrogatory in the Maryland rule is nearly as comprehensive in its expert witness opinion coverage – the only kind of expert witness whose opinions are not covered is a party expert. MD. R. CIV. P. 2-402(f)(1)(A). Ohio is listed neither in this fourth group of states nor in any other group, because its rule's standard interrogatory requires a statement of the "subject matter" on which the expert is expected to testify and does not require a statement of the expert's opinions. OHIO R. CIV. P. 26(B)(4)(b).

55. In Maryland, however, the interrogatory answer in the spider bite suit will omit the reliable authority opinion, because the defendant physician is a party expert. MD. R. CIV. P. 2-402(f)(1)(A).

56. For another analysis of the decisions on employee experts, see George V. Mickum & Luther L. Jajek, *Guise, Contrivance, or Artful Dodging?: The Discovery Rules Governing Testifying Employee Experts*, 24 REV. LITIG. 301 (2005) [hereinafter *Artful Dodging*] (providing another analysis of the decisions on employee experts).



written report requirement.<sup>57</sup> The special employment test covers an employee who is “specially employed to provide expert testimony in the case.”<sup>58</sup> The regular testimony test covers an employee “whose duties as an employee of the party regularly involve giving expert testimony.”<sup>59</sup> A party must provide a written report prepared by any employee expert who meets either test.<sup>60</sup>

The regular testimony test raises the obvious question of how often an employee must give expert testimony for the employee to be considered “regularly” giving this type of testimony. The special employment test raises the more difficult question of what it means for an expert to be “specially employed” to provide expert testimony in a case. The word “employed” can mean either “hired” or “used.”<sup>61</sup> If specially employed means “specially hired,” an employee who was hired for an ordinary purpose never has to prepare a written report when giving expert testimony. If specially employed instead means “specially used,” an employee who was hired for an ordinary purpose, but who was assigned special work when the case arose, must prepare a written report when giving expert testimony based on this special work.

The special employment test was first used in Federal Rule 26 to identify a type of non-testifying expert whose work is generally shielded from discovery.<sup>62</sup> Since 1970, Federal Rule 26 has required a showing of exceptional circumstances that justify discovery of the facts known by, and opinions held by, a non-testifying expert who was “retained or *specially employed* . . . in anticipation of litigation or preparation for trial.”<sup>63</sup> According to the Advisory Committee, Federal Rule 26 does not require this showing when the expert is “simply a general employee of the party not specially employed on the case.”<sup>64</sup> The Committee did not say, however, whether a “specially employed” expert differs from a “general employee” expert based on special hiring or special use.<sup>65</sup> During the interval between the 1970 and 1993 amendments to Federal Rule 26, some federal courts equated

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57. FED. R. CIV. P. 26(a)(2)(B).

58. *Id.*

59. *Id.*

60. *Id.*

61. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 466 (4th ed. 1999).

62. FED. R. CIV. P. 26(b)(4)(B).

63. *Id.* (emphasis added).

64. See FED. R. CIV. P. 26 advisory committee's note (discussing subdivision (b)(4)(B) of the 1970 Amendment).

65. See *id.* (noting only that the rule “deals with an expert who has been retained or specifically employed by the party in anticipation of litigation or preparation for trial . . . but who is not expected to be called as a witness”).

“specially employed” with “specially hired,” while other federal courts equated “specially employed” with “specially used.”

A leading decision that equated “specially employed” with “specially hired” was *Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.*<sup>66</sup> The *Virginia Electric* court said:

“[S]pecially employed” refers only to the manner by which the services of the expert are obtained; that is to say, that the expert is put on the payroll for the specific purpose of deriving facts and opinions for use in trial preparation or anticipated litigation. The distinction between “retained” and “specially employed” is the difference between hiring the expert as an independent contractor and hiring him as an employee *pro hac vice*.<sup>67</sup>

A leading decision that equated “specially employed” with “specially used” was *Seiffer v. Topsy’s International, Inc.*<sup>68</sup> In this securities fraud suit, an auditing firm’s attorney asked the auditing firm’s partner to assess the relevant working papers and audit reports.<sup>69</sup> Because the partner had not worked on the challenged audits, the *Seiffer* court ruled that the partner was a specially employed non-testifying expert whose work was shielded from discovery.<sup>70</sup> The *Seiffer* court explained, “an in-house expert may be specially employed as well as an expert drawn from personnel other than the party’s own.”<sup>71</sup>

The two competing interpretations advanced different Federal Rule 26 purposes. The “specially hired” interpretation advanced Federal Rule 26’s truth-seeking purpose by opening up to discovery the work of all employee experts except for the handful who are hired *pro hac vice*.<sup>72</sup> The “specially used” interpretation advanced Federal Rule 26’s case evaluation and expense reduction purposes by encouraging attorneys to have scientific, technical, and other specialized matters assessed by employee experts,

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66. 68 F.R.D. 397 (E.D. Va. 1975).

67. *Id.* at 407; accord *Dallas v. Marion Power Shovel Co., Inc.*, 126 F.R.D. 539, 541 (S.D. Ill. 1989); *Kansas-Nebraska Natural Gas v. Marathon Oil Co.*, 109 F.R.D. 12, 15-16 (D. Neb. 1983) (referring to the court’s analysis of the term “specifically employed”).

68. 69 F.R.D. 69 (D. Kan. 1975).

69. *Id.* at 72.

70. *Id.*

71. *Id.* at 73 n.3; accord *Marine Petroleum v. Champlin Petroleum Co.*, 641 F.2d 984, 992-93 (D.C. Cir. 1979); *In re Shell Oil Refinery*, 132 F.R.D. 437, 441-42 (S.D. La. 1990); *In re Sinking of Barge*, 92 F.R.D. 486, 489 (S.D. Tex. 1981) [hereinafter *Ranger I*] (discussing the application of Federal Rule 26(b) to in-house experts).

72. See *Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 408 (E.D. Va. 1975) (discussing the distinction between a general employee and an employee specifically retained in anticipation of litigation).

whose work generally costs less than work done by outside experts.<sup>73</sup>

During the 1980s, legal commentators urged clarification of Federal Rule 26's non-testifying expert provision.<sup>74</sup> The clarification, however, was not made.<sup>75</sup> Then, in 1993, the words "specially employed" were used to single out a type of expert witness who must prepare a written report.<sup>76</sup> For a second time, the Advisory Committee did not say whether "specially employed" meant "specially hired" or "specially used."<sup>77</sup> In this second context, the "specially hired" versus "specially used" controversy has reappeared.

A leading decision that equates "specially employed" with "specially hired" is *Navajo Nation v. Norris*.<sup>78</sup> In *Navajo Nation*, a Native American tribe planned to elicit testimony about tribal customs and traditions from employees who did not regularly give expert testimony for the tribe.<sup>79</sup> The *Navajo Nation* court ruled that these tribal employees were not "specially employed" expert witnesses covered by Federal Rule 26's written report requirement because:

[Federal Rule 26(a)(2)(B)] explicitly identifies two categories of experts from whom reports are required; one comprising non-employees of a party especially retained or employed for the

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73. In *Marine Petroleum*, the Court of Appeals gave the following reason for shielding from discovery the work done by a consultant who originally was hired for a non-litigation purpose and then was assigned special work for a litigation purpose:

Rule 26(b)(4)(B) implicitly recognizes that a party might well be deterred from thorough preparation of his case were it possible for his opponent to freely discover information from a hired expert whose assistance is important but not yet so vital as to require his testimony at trial. The rule's tacit acknowledgment of the necessity of meticulous preparation has equal force whether the expert is one originally and exclusively retained for anticipated litigation or one whose employment responsibilities are expanded to encompass consultation and advice in expectation of litigation.

641 F.2d at 992-93.

74. James R. Pielemeier, *Discovery of Non-Testifying "In-House" Experts Under Federal Rule of Civil Procedure 23*, 58 IND. L. J. 597, 625 (1983); Sheila E. McDonald, Comment, *The In-House Expert Witness: Discovery Under the Federal Rules of Civil Procedure*, 33 S.D. L. REV. 283, 301 (1988).

75. See FED. R. CIV. P. 26(b)(4)(B) (retaining current form without clarification).

76. FED. R. CIV. P. 26(a)(2)(B).

77. See FED. R. CIV. P. 26, advisory committee's note (analyzing subdivision (a)(2)(B) of the 1993 Amendment).

78. 189 F.R.D. 610 (E.D. Wash. 1999).

79. *Id.* at 611.

particular case and one comprising employees of a party who regularly testify for the employer party.<sup>80</sup>

By referring to “especially retained or employed” expert witnesses as “non-employees” apart from their involvement in the case, the court indicated that “specially employed” means “specially hired.”

A leading decision that equates “specially employed” with “specially used” is *KW Plastics v. United States Can Co.*<sup>81</sup> In this breach of contract suit, the can company planned to have its vice president give expert testimony supporting its damage claim.<sup>82</sup> The *KW Plastics* court ruled that the vice president was a specially employed expert witness covered by Federal Rule 26’s written report requirement because:

An employee is “employed” when she is “put to use or service.” . . . The adverb “specially” is “used with reference to a particular purpose” that is “surpassing what is common or usual.” . . . When a corporate party designates one of its employees as an expert, it typically authorizes the employee to perform special actions that fall outside of the employee’s normal scope of employment.<sup>83</sup>

Just as the “specially hired” and “specially used” interpretations advanced different Federal Rule 26 purposes with non-testifying experts, these competing interpretations advance different Federal Rule 26 purposes regarding testifying experts. The “specially hired” interpretation advances Federal Rule 26’s expense reduction purpose by requiring written reports for only the handful of employee experts who are “professional” witnesses.<sup>84</sup> The “specially used” interpretation advances Federal

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80. *Id.* at 611-12. (emphasis added); *accord* *Adams v. Gateway, Inc.*, No. 2:02 CV 106, 2006 WL 644848, at \*3 (D. Utah Mar. 10, 2006); *Duluth Lighthouse for the Blind v. C.G. Bretting Mfg. Co., Inc.*, 199 F.R.D. 320, 324-25 (D. Minn. 2000) (citing *Navajo Nation* for the proposition that in-house employee experts are not subject to the automatic disclosure requirement).

81. 199 F.R.D. 687 (M.D. Ala. 2000).

82. *Id.* at 688.

83. *Id.* at 690 (citations omitted); *accord* *Minnesota Mining & Mfg. Co. v. Signtech USA, Ltd.*, 177 F.R.D. 459, 460-61 (D. Minn. 1998); *Day v. Consol. Rail Corp.*, No. 95 CIV. 968, 1996 WL 257654, at \*2-3 (S.D.N.Y. May 15, 1996); *Prieto v. Malgor*, 361 F.3d 1313, 1318-19 (11th Cir. 2004) (stating in dictum that a written report is required when an employee expert “provid[es] a technical evaluation of evidence he [has] reviewed for trial”).

84. The *Adams* court justified equating “specially employed” with “specially hired” as follows:

The 1993 amendments added a general requirement that a party taking an expert witness’s deposition would pay “the expert a reasonable fee for time spent in responding to discovery.” This expense is only a concern as to experts specially employed or retained, since persons “generally employed” are not charging their employer an additional fee for the

Rule 26's truth-seeking and efficiency purposes by requiring written reports for all employee experts except for those whose testimony is basically factual.<sup>85</sup>

If a court thinks that Federal Rule 26's truth-seeking purpose generally outweighs its other purposes, having the words "specially employed" apply both to non-testifying experts and to testifying experts creates a dilemma. With non-testifying experts, the court should equate "specially employed" with "specially hired" in order to maximize the number of employee experts whose work is open to discovery. With testifying experts, the court should equate "specially employed" with "specially used" in order to maximize the number of employees who must prepare written reports when giving expert testimony. The court cannot have it both ways if it gives effect to Federal Rule 26's amendment history. When words are copied from one Federal Rule 26 amendment to another Federal Rule 26 amendment and are used in both amendments to single out a type of expert to whom special rules apply, the words presumptively have the same meaning in both amendments.<sup>86</sup> So, does the court sacrifice Federal Rule 26's truth-seeking purpose with non-testifying experts or with testifying experts?

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work as an expert witness. Presumably, the traditional tools of deposition and interrogatory available for expert witnesses who are "generally employed" don't incur any extraordinary out of pocket costs for the employer-party. The 1993 Notes hint at the interplay between reports and expenses, suggesting cost avoidance is a reason reports are required when expert expenses are in play . . . . The plain language of the rule facilitates a party's use of an employee for expert witness testimony without the burden of a formal report. Such a report might be a heavy burden for a technician or manager familiar with a sophisticated process or practice, but unaccustomed to the burden of communication . . . . But for an employee who is essentially an "in-house" expert witness, the burden of a report is not great and prevents use of employment status to protect those who are truly "professional" witnesses.

2006 WL 644848, at \*2 (footnotes omitted).

85. See *Signtech*, 177 F.R.D. at 461 ("requiring testifying experts to submit written reports . . . not only . . . will serve to streamline or even eliminate the need for deposition testimony, but . . . will undoubtedly serve to minimize the element of surprise"); see also *Prieto*, 361 F.3d at 1318 (stating, "the Rule exclude[s] at least some employees but . . . that exception [is] limited to experts who are testifying as fact witnesses, although they may also express some expert opinions") (internal quotation omitted).

86. See *Environmental Defense v. Duke Energy Corp.*, 549 U.S. \_\_\_, 127 S. Ct. 1423, 1432 (2007) (reasoning that there is a presumption that identical words used in the same act have the same meaning).

### B. Party Experts

Parties sometimes testify as expert witnesses on their own behalf, such as a defendant physician who gives expert testimony in a medical malpractice case.<sup>87</sup> Whether party experts must prepare written reports depends, as it does with employee experts, on the meaning of the words “specially employed.”<sup>88</sup> If “specially employed” means “specially hired,” party experts never have to prepare written reports, because parties never hire themselves to give expert testimony. If “specially employed” instead means “specially used,” parties must prepare written reports when they do special work for the purpose of giving expert testimony.

A court should choose the same meaning for party experts that it has chosen for employee experts. For both types of experts, a court can advance either Federal Rule 26’s expense reduction purpose or Federal Rule 26’s truth-seeking and efficiency purposes.<sup>89</sup> For both types of experts, a court must consider the effect its choice will have on discovery of the work done by non-testifying experts of the same type.<sup>90</sup>

Moreover, if a court chooses different meanings for party experts and employee experts, the court will enter conflicting orders when an expert is both a party expert and an employee expert. For example, in a medical malpractice case brought against a physician and the medical clinic that employs the physician, the physician might testify on her own behalf and also on the clinic’s behalf. The physician’s dual role makes her both a party expert and an employee expert. Suppose she bases part of her testimony on special work she did for the purpose of giving expert testimony. If the court equates “specially employed” with “specially hired” for party experts, but equates it with “specially used” for employee experts, the physician will not have to provide her own written report as a party expert, but the clinic, oddly

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87. See, e.g., *Laplace-Bayard v. Battle*, 295 F.3d 157, 165 (1st Cir. 2002) (holding that the physician could give an expert opinion without a written report, where the opinion testimony was elicited on plaintiff’s cross-examination); see also *Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1042 (7th Cir. 1988) (holding that a party can testify on its own behalf as an expert).

88. FED. R. CIV. P. 26(a)(2)(B).

89. See *supra* notes 84-85 (equating special employment with special hiring advances Federal Rule 26’s expense reduction purpose by never requiring written reports for party experts, while equating special employment with special use advances Federal Rule 26’s truth-seeking and efficiency purposes by requiring written reports for all party experts except those whose testimony is basically factual). As explained earlier, courts also face this policy choice with employee experts. *Id.*

90. See *supra* notes 72-73 (discussing the implications of a court ordering discovery of non-testifying experts).

enough, will have to provide the written report prepared by the physician as an employee expert.

Assuming that each court chooses the same meaning for both types of experts, the “specially hired” versus “specially used” controversy will spread from employee experts to party experts. Perhaps because parties give expert testimony less often, however, the controversy has not spread as yet. In the two written report coverage decisions that have involved party experts, the courts resolved the written report coverage issue without spreading the controversy.

In *Laplace-Bayard v. Battle*,<sup>91</sup> a medical malpractice case, the defendant physician gave expert testimony only about his actions and decisions during his treatment of the plaintiff.<sup>92</sup> The physician obviously did not specially hire himself to provide this testimony, and he did not specially use himself for this purpose either, having developed his opinions in the ordinary course of treatment. Therefore, without choosing between the “specially hired” and “specially used” interpretations, the court of appeals ruled that Federal Rule 26’s written report requirement did not cover the defendant physician.<sup>93</sup>

In *Applera Corporation v. MJ Research, Inc.*,<sup>94</sup> a patent infringement case, the defendant co-founders of the defendant corporation thought they could give expert testimony about patent invalidity without having to provide their own written reports.<sup>95</sup> The district court’s scheduling order, however, required written reports “from all trial experts.”<sup>96</sup> Therefore, without choosing between the “specially hired” and “specially used” interpretations, and without determining whether the co-founders had developed their patent invalidity opinions in the ordinary course of business, the district court ruled that the scheduling order required the co-founders to provide written reports.<sup>97</sup>

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91. 295 F.3d 157 (1st Cir. 2002).

92. *Id.* at 165.

93. *See id.* (noting that no written report was required where defendant physician testified to his opinion on cross-examination).

94. 220 F.R.D. 13 (D. Conn. 2004).

95. *Id.* at 14-16. The corporation employed the two co-founders, making them employee experts as well as party experts. *Id.* at 16. The defendants identified sixteen other employees of the corporation as expert witnesses on patent invalidity. *Id.* In addition to the written report violation discussed in the text, the defendants violated Federal Rule 26’s expert witness identification requirement. *Id.* at 18-19.

96. *Id.* at 17-18.

97. The district court cited the conflicting interpretations of the special employment test without indicating which interpretation it favored. *Id.* at 19 n.6.

### C. Independent Experts

Independent experts of various types testify as expert witnesses. Among them are health care providers who have treated the injured party<sup>98</sup> and government investigators who have examined the scene, the wreckage, or other relevant evidence.<sup>99</sup> When a party calls an independent expert as a witness, the party usually has no control over the expert, and therefore, cannot require the expert to prepare a written report.

The Advisory Committee made the following statement about the application of the written report requirement to treating physicians: “A treating physician . . . can be deposed or called to testify at trial without any requirement for a written report.”<sup>100</sup> This stated policy makes sense. If the party that calls a treating physician usually cannot get the physician to prepare a written report, requiring this party to provide the report will lead to the exclusion of treating physician testimony in most personal injury trials – a serious interference with the search for truth.

Some courts require the party that calls a treating physician to provide a written report in certain exceptional circumstances. These exceptions are: (1) the attorney referral exception,<sup>101</sup> (2) the attorney-supplied information exception,<sup>102</sup> and (3) the causation-prognosis exception.<sup>103</sup> These exceptions make sense only to the extent that they are based on effective control over the treating physician, so the party can get the physician to prepare a written report.

The attorney referral exception is illustrated by *Hall v. Sykes*.<sup>104</sup> In this personal injury case, the district court required the injured party to provide a written report for every medical care provider to whom she was referred by her attorney.<sup>105</sup> The district

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98. See, e.g., *Knorr v. Dillard's Store Services, Inc.*, No. Civ.A. 04-3208, 2005 WL 2060905, at \*2 (E.D. La. Aug. 22, 2005) (allowing a treating physician to testify to the treatment rendered and the opinion derived therefrom); *Rogers v. Detroit Edison Co.*, 328 F. Supp. 2d 687, 692 (E.D. Mich. 2004) (finding that the psychologist could testify as a treating physician); *Kirkland v. Union Pacific R.R.*, 189 F.R.D. 604, 608 (D. Nev. 1999) (mentioning that a treating physician can testify to information obtained during treatment).

99. See, e.g., *Brandt Distr. Co., Inc. v. Fed. Ins. Co.*, 247 F.3d 822, 825 (8th Cir. 2001) (discussing a situation where the fire department captain testified that the fire in question was a “fraud fire”).

100. FED. R. CIV. P. 26, advisory committee note.

101. *Hall v. Sykes*, 164 F.R.D. 46 (E.D. Va. 1995).

102. *Mohney v. USA Hockey, Inc.*, 300 F. Supp. 2d 556 (N.D. Ohio 2004).

103. *Thomas v. Consol. Rail Corp.*, 169 F.R.D. 1 (D. Mass. 1996).

104. 164 F.R.D. 46 (E.D. Va. 1995); *Navrude v. United States*, No. C01-4039-PAZ, 2003 WL 356091, at \*7 (N.D. Iowa Feb. 11, 2003).

105. *Hall*, 164 F.R.D. at 49.



court explained, “when an attorney selects the physician for treatment as well as testimony it is presumed the physician was selected for expert testimony.”<sup>106</sup>

This exception is based on the referring attorney’s influence over the treating physician. When an attorney, the attorney’s law firm, and other law firms refer injured parties to the same physicians case after case, these referrals are usually due to the physicians’ reputation for high quality litigation work rather than high quality medical care. If a referring attorney asks one of these physicians for a written report, the physician will almost surely honor the attorney’s request in order to protect this significant source of income.

The attorney-supplied information exception is illustrated by *Mohney v. USA Hockey, Inc.*<sup>107</sup> In this products liability case, an ice hockey player sued the manufacturer of the helmet and mask that he was wearing when he fractured his spine.<sup>108</sup> The medical records contained the treating physician’s causation opinion, along with the medical history and physical findings on which this opinion was based.<sup>109</sup> In a summary judgment affidavit reaffirming this causation opinion, the treating physician further stated that the injuries were consistent with the events shown on a tape of the accident that the physician viewed at the request of the injured party’s attorney.<sup>110</sup> The district court struck this reference to the accident tape on the ground that the hockey player had not provided a written report for the treating physician.<sup>111</sup> The district court explained that a written report is required for a treating physician unless the “physician’s opinions derive from information learned during the actual treatment of the patient – as opposed to being subsequently supplied by an attorney.”<sup>112</sup>

This exception seems to be based on the attorney’s or the injured party’s influence over the treating physician. When a

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106. *Id.* Although the district court’s stated presumption concerns attorney referral to a “physician,” the attorney referral in question was to a chiropractor. *Id.*

107. 300 F. Supp. 2d 556 (N.D. Ohio 2004).

108. *Id.* at 558-59.

109. *Id.* at 561-62.

110. *Id.* at 561.

111. *Id.* at 561-62.

112. *Id.* at 560 (quoting *Sullivan v. Block, Inc.*, 175 F.R.D. 497, 501 (D. Md. 1997)); accord *Knorr*, 2005 WL 2060905, at \*3; *Hawkins*, 210 F.R.D. at 211-12; *Tzoumis*, 168 F. Supp. 2d at 876; *Lewis v. Triborough Bridge & Tunnel Auth.*, No. 97 CIV. 0607(PKL), 2001 WL 21256, at \*1 (S.D.N.Y. Jan. 9, 2001) (determining that the plaintiff’s physician’s testimony cannot extend beyond the opinions formed during the course of treatment).

treating physician develops an opinion based on a review of attorney-supplied treatment records, deposition transcripts, and other information, the physician is doing substantial litigation-related work. Whether the physician does this work for a fee or to help the injured party, a court can presume that an attorney or an injured party who can get a treating physician to do this much work on a case also can get the physician to prepare a written report.

This presumption is not necessarily justified, however, if the physician developed the opinion in the ordinary course of treatment and is reviewing the attorney-supplied information for the limited purpose of defending this opinion at trial. Reviewing the attorney-supplied information might require just minutes of the physician's time, but preparing a written report might require hours of the physician's time – depending, of course, on its contents.

A Federal Rule 26 written report normally addresses an expert witness' entire direct testimony.<sup>113</sup> If the written report for a treating physician who has reviewed attorney-supplied information must address the physician's entire direct testimony, the report will have to address such matters as the relevant parts of the patient's medical history, the relevant physical findings, the physician's diagnosis, the physician's causation and prognosis opinions, the physician's qualifications, and so forth. A court should not presume that the attorney or the injured party can get the treating physician to set aside the hours required to prepare this type of written report. A court should presume, however, that the attorney or the injured party can get the physician to set aside the minutes required to prepare a streamlined written report covering just the testimony based on attorney-supplied information.<sup>114</sup>

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113. See FED. R. CIV. P. 26, advisory committee's note (discussing paragraph (a)(2)(B) of the 1993 Amendment and requiring a complete report of expert testimony).

114. *Mohney* illustrates why a court should interpret Federal Rule 26 to require only a streamlined written report covering the testimony based on attorney-supplied information. By asking the treating physician to review the accident tape, the hockey player's attorney perhaps hoped to diffuse a line of cross-examination designed to show that the physician relied on an inherently unreliable description of the accident.

Q. You didn't see the position of the plaintiff's head when it hit the boards, did you?

Q. You relied on what X told you about the position of the plaintiff's head when it hit the boards?

Q. X appeared to be upset about his friend's injury, didn't he?

The physician's review of the tape apparently confirmed that the accident happened as described. A streamlined written report covering the testimony

*Thomas v. Consolidated Rail Corp.* illustrates the causation-prognosis exception.<sup>115</sup> In this personal injury case, the district court said that a treating physician steps into the shoes of a retained expert when the treating physician develops opinions “beyond what was necessary to provide appropriate care.”<sup>116</sup> On the theory that opinions about causation and prognosis are unnecessary to provide appropriate care, the district court required the plaintiff to provide written reports for three treating physicians who had these types of opinions.<sup>117</sup>

This causation-prognosis exception is, however, a minority interpretation of Federal Rule 26.<sup>118</sup> In *Zurba v. United States*,<sup>119</sup>

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based on attorney-supplied information essentially would say: I've viewed the accident tape and it doesn't change my causation opinion. The description of the accident given to me was accurate. This written report might require less time to prepare than the time required to review the accident tape, so requiring it probably will not lead to exclusion of the treating physician's testimony about the tape.

Despite the practical importance of requiring the right type of written report, the written report coverage decisions generally do not discuss what a written report must contain when a treating physician's testimony is based partly on attorney-supplied information. For example, in *Mohney* the injured hockey player had provided no written report of any type for the treating physician, so the district court had no reason to discuss whether a streamlined written report would have supported admission of the parts of the affidavit that referred to the accident tape. *Mohney*, 300 F. Supp. 2d at 561.

115. 169 F.R.D. 1.

116. *Id.* at 2.

117. *Id.*; accord *Brandon v. Vill. of Maywood*, 179 F. Supp. 2d 847, 859 (N.D. Ill. 2001) (holding that opinions about plaintiff's prognosis required a written disclosure); *Zarecki v. National R.R. Passenger Corp.*, 914 F. Supp. 1566, 1573 (N.D. Ill. 1996) (ruling that the physician should have been disclosed as an expert because her opinion including information relating to the causation of plaintiff's injuries). An injured party's medical records sometimes do not include a treating physician's causation and prognosis opinions. See, e.g., *Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875, 883 (5th Cir. 2004) (stating, “those [medical] records did not address causation and thus did not alert State Farm that [the treating physician] might give expert testimony about that subject”). In addition, these opinions sometimes change based on further tests, treatment, or study. See, e.g., *Peck v. Hudson City Sch. Dist.*, 100 F. Supp. 2d 118, 121 (N.D.N.Y. 2002) (stating, “[i]f [the physician] is testifying solely about Plaintiff's treatment and care, then Plaintiff had no obligation under Fed. R. Civ. P. 26(e) to supplement its responses to Defendants' discovery demands, as [the Defendant] contends”). By requiring causation and prognosis opinions to be stated in a written report that must be updated if the opinions change, a court protects other parties from the prejudice that might result from surprise testimony about causation and prognosis. See, e.g., *Hamburger*, 361 F.3d at 883 (noting, “State Farm would have been prejudiced if [the physician's] lately identified expert testimony about causation had been allowed”).

118. See, e.g., *Martin v. CSX Transp., Inc.*, 215 F.R.D. 554, 556-57 (S.D. Ind. 2003) (discussing the decisions that recognize or reject the exception);

for example, the district court did not require a written report when a treating physician testified to causation and prognosis opinions, because “it is common for a treating physician to consider his patient’s prognosis as well as the cause of the patient’s injuries.”<sup>120</sup> If treating physicians commonly develop causation and prognosis opinions – which seems likely – a court should not presume that an attorney or an injured party can persuade a physician who has expressed these types of opinions to prepare a written report.

### III. A PROPOSED AMENDMENT

Two years ago, the Advisory Committee began considering whether to recommend that Federal Rule 26’s expert written report disclosure requirement should cover all employee experts.<sup>121</sup> The Committee rightly has focused on federal court experience with this requirement,<sup>122</sup> but the Committee also should consider state court experience with more comprehensive exchanges of expert witness information.<sup>123</sup> In particular, the Committee should consider the Illinois courts’ application of its expert witness interrogatory rule.<sup>124</sup>

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McCloughan v. City of Springfield, 208 F.R.D. 236, 241-42 (C.D. Ill. 2002) (discussing why the majority rule applied in this case); Kent v. Katz, No. 2:99-CV-189, 2000 WL 33711516, at \*1-2 (D. Vt. Aug. 9, 2000) (concluding that a physician’s testimony may include statements about causation and prognosis as long as those opinions were derived from treating the patient, without preparing a written report); Shapardon v. West Beach Estates, 172 F.R.D. 415, 416-17 (D. Haw. 1997) (holding that since the physician was not disclosed as an “expert,” any testimony based on information gathered outside of the treatment would be excluded).

119. 202 F.R.D. 590 (N.D. Ill. 2001).

120. *Id.* at 592.

121. Minutes of the Civil Rules Advisory Committee, Oct. 27-28, 2005, lines 459-559, available at <http://www.uscourts.gov/rules/Minutes/CV11-2005-min.pdf> [hereinafter Advisory Committee Minutes 2005].

122. The Committee minutes do not indicate, however, that the Committee has surveyed judges or attorneys in districts with local rules or scheduling orders that require more comprehensive standard exchanges of expert witness information. *Id.*

123. See *supra* notes 46-55 and accompanying text (discussing the categorization of states based on how courts apply their rules regarding expert disclosure).

124. ILL. SUP. CT. R. 213(f). This rule also requires the exchange of information about lay witnesses, but the text discusses only the parts of the rule covering expert witnesses. The author has discussed the rule’s background and drafting history in a previous law review article. Keith H. Beyler, *Witness Disclosure in Illinois*, 28 S. ILL. U. L.J. 225 (2004) [hereinafter *Witness Disclosure*].

The Illinois rule divides expert witnesses into two mutually exclusive categories.<sup>125</sup> The “controlled” expert witness category includes all employee experts, party experts, and retained experts.<sup>126</sup> The “independent” expert witness category includes all experts who are neither employee experts, nor party experts, nor retained experts.<sup>127</sup>

Each category determines what information parties must exchange about their expert witnesses. For controlled expert witnesses, the standard expert witness interrogatory requires information comparable – but not identical – to the information contained in a Federal Rule 26 written report.<sup>128</sup> For independent expert witnesses, the standard expert witness interrogatory requires a statement of “the opinions the party expects to elicit.”<sup>129</sup> An answer sufficiently states these opinions if it gives “reasonable notice” of an independent expert witness’s testimony, taking into account the limitations on the party’s knowledge of the facts known by and opinions held by the expert.<sup>130</sup>

Drawing on the Illinois courts’ experience in developing and applying their expert witness interrogatory rule, the Advisory Committee should recommend that Federal Rule 26 require parties to provide written reports for controlled expert witnesses, and written statements disclosing the opinions they expect to elicit from independent expert witnesses. Parts A and B explain why the two changes should be made. The Appendix shows how to make the changes via a Federal Rule 26 amendment.

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125. ILL. SUP. CT. R. 213(f)(2)-(3).

126. *Id.* at 213(f)(3).

127. *Id.* at 213(f)(2).

128. The party calling a controlled expert witness must identify: “(i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case.” *Id.* at 213(f)(3). The core of a Federal Rule 26 written report – the opinions the expert will express and the basis and reasons for these opinions – is covered by the Illinois rule in (ii) above. A Federal Rule 26 written report requires the following information not covered by the Illinois rule’s standard expert witness interrogatory: the data or other information the expert *considered* in forming the opinions (as opposed to *relied on* as a basis for the opinions); the exhibits the expert will use to summarize or support the opinions; the expert’s compensation; and a list of cases in which the expert has testified at trial or deposition in the past four years. *See* FED. R. CIV. P. 26(a)(2)(B) (listing the additional requirements not present in the corresponding Illinois rule).

129. ILL. SUP. CT. R. 213(f)(2). The interrogatory also requires a statement of the “subjects” (i.e., the topics) on which the independent expert will testify. *Id.*

130. *Id.*

### A. *Controlled Expert Witnesses*

Federal Rule 26 should require written reports for all employee experts, party experts, and retained experts for three reasons. First, the extension of the written report requirement to the employee experts and party experts who have been excused until now from preparing these reports will advance Federal Rule 26's truth-seeking and efficiency purposes. Second, the extension will eliminate the interpretation and application problems associated with Federal Rule 26. Third, the extension will discourage improper expert witness preparation by making more of that preparation discoverable.

#### 1. *Truth-Seeking and Efficiency*

During the revision of the Illinois expert witness interrogatory rule, the Illinois Supreme Court Rules Committee ("Illinois Committee") considered the issue the Advisory Committee is now considering. Just as Federal Rule 26 has a written report requirement that was developed primarily for retained experts, the Illinois rule has a standard interrogatory that was developed primarily for retained experts. Just as the Advisory Committee is considering whether this written report requirement should cover all employee experts instead of a select group of employee experts, the Illinois Committee considered whether the retained expert interrogatory should cover all employee experts instead of a select group of employee experts. The Illinois Committee considered whether this interrogatory also should cover all party experts, but party experts raise virtually the same issue as employee experts.<sup>131</sup>

The Illinois Committee initially proposed following the Federal Rule 26 limited exchange model.<sup>132</sup> Borrowing almost verbatim from Federal Rule 26, the Illinois Committee proposed rewriting the Illinois rule so the retained expert interrogatory covered a select group of employee experts and party experts.<sup>133</sup>

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131. Of the eleven states with standard expert witness information exchanges more comprehensive than the Federal Rule 26 exchange, only Maryland treats employee experts and party experts differently. *See supra* notes 52 and 54 (discussing the differences in the exchange of witness information).

132. *Witness Disclosure*, *supra* note 124, at 244 n.96.

133. Specifically, the Illinois Committee proposed that the interrogatory cover any expert "specially employed to provide expert testimony in the case or whose duties as an employee of the party involve giving expert testimony." *Id.* The initial proposal deleted the word "regularly" from Federal Rule 26's words so the interrogatory's coverage did not hinge on how often the employee gives expert testimony. *Id.*

Illinois judges and Illinois attorneys criticized this part of the initial proposal, however, on two grounds. First, a party has no trouble providing detailed information about the testimony to be given by any employee expert or party expert; therefore, limiting the interrogatory's coverage to a select group was unnecessary.<sup>134</sup> Second, other parties need detailed information about the testimony to be given by any employee expert or party expert, so limiting the interrogatory's coverage to a select group was unwise.<sup>135</sup> These criticisms of the initial proposal led the Illinois Committee to ask whether a comprehensive exchange that provides detailed information about the opinions of all employee experts and party experts would better serve the Illinois rule's truth-seeking and trial preparation efficiency purposes without substantially increasing litigation cost.

The comprehensive exchange does, of course, better serve the truth-seeking purpose. The comprehensive exchange includes information needed to prepare for cross-examination of, and to rebut testimony from, all employee and party experts. The limited exchange includes information needed to prepare for cross-examination of, and to rebut testimony from, only a select group of employee and party experts.<sup>136</sup> True, parties can get most of this additional information by taking depositions and asking the right questions. If an employee expert or party expert revises an opinion between deposition and trial, however, the expert's deposition testimony does not provide all of the information needed to prepare to cross-examine or rebut the expert. The comprehensive exchange ensures that this deposition testimony will be supplemented; the limited exchange does not.<sup>137</sup>

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134. *Id.* at 247.

135. *Id.* As one trial judge commented, an employee expert often becomes the cornerstone of the case by helping the jury understand the factory, the hospital, or the accident scene. Transcript of the Special 2001 Mid-Year Public Hearing of the Illinois Supreme Court Rules Committee, at 109-10 (June 18, 2001) (statement of Judge Susan Zwick), available at <http://legalrecclamations.blogspot.com/2007/03/annual-report-of-illinois-supreme-court.html>. Many attorneys share the judge's opinion about the influence of experts who have direct experience and who are not professional witnesses. See Mark Hansen, *Everyday Heroes*, A.B.A. J., Aug. 2005, at 23 (illustrating how non-professional witnesses are more credible than professional witnesses).

136. See FED. R. CIV. P. 26, advisory committee's note (stating in reference to subdivision (b)(4)(A) of the 1970 Amendment, "Effective cross-examination of an expert witness requires advance preparation. . . . Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side.").

137. See FED. R. CIV. P. 26(e)(1) (requiring a party to supplement or correct the previous disclosure when that party learns that the information disclosed is not complete); see also *supra* notes 18-19 (describing when a party is not

The comprehensive exchange better serves the trial preparation efficiency purpose. The comprehensive exchange includes information needed to take better-focused depositions of all employee experts and party experts. The limited exchange includes information needed to take better-focused depositions of only a select group of employee experts and party experts.<sup>138</sup> The comprehensive exchange has the added advantage of providing information at the right time and in the right sequence under a court-ordered schedule designed for the entire expert witness component of trial preparation.<sup>139</sup>

Whether the comprehensive exchange substantially increases litigation cost is unclear. The comprehensive exchange is more expensive than the limited exchange, but the comprehensive exchange leads to more efficient trial preparation. The net change in litigation cost is hard to determine. An empirical study of the impact of Federal Rule 26's written report requirement suggests, however, that the number of cases in which the comprehensive exchange decreases litigation cost might equal the number of cases in which the comprehensive exchange increases litigation cost.<sup>140</sup>

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under an obligation to supplement previous disclosures).

138. See FED. R. CIV. P. 26, advisory committee's note (discussing subdivision (a)(2)(B) of the 1993 Amendment and stating, "Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition.").

139. Making all employee experts and party experts subject to the written report requirement would require one adjustment in Federal Rule 26's timing requirements. Under Federal Rule 26(b)(4)(A)'s deposition timing requirement, a party cannot depose an expert covered by the written report requirement until the expert's report is provided. FED. R. CIV. P. 26(b)(4)(A). This deposition timing requirement makes sense for experts who have no involvement in the occurrence on which the suit is based, but the requirement does not make sense for experts who have this type of involvement. Written reports usually are exchanged as the trial date approaches – long after an employee or party who was involved in the occurrence must be deposed in order to uncover the facts. For the employee expert or party expert who was involved in the occurrence, the sensible solution is to permit two non-repetitive depositions, the second of which is limited in scope to the contents of the written report.

140. When attorneys were surveyed a few years after the written report requirement was added to Federal Rule 26, a slightly greater percentage of the surveyed attorneys (31% versus 27%) reported decreased litigation expense rather than increased litigation expense. Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 536 (1998). The proposed Amendment covers different experts than the 1993 Amendment, of course, so the study's conclusion about the effect of the 1993 Amendment might not apply here.



The Illinois Committee ultimately recommended the comprehensive exchange – i.e., that all employee experts and party experts should be covered by the standard interrogatory designed for retained experts.<sup>141</sup> Acting on this recommendation, the Illinois Supreme Court approved a revised interrogatory rule adopting the comprehensive exchange feature.<sup>142</sup> During the years the revised rule has governed expert witness discovery in the Illinois courts, the Illinois Committee has not received any complaints of substantially increased litigation costs.<sup>143</sup> Other states have also adopted comprehensive exchanges, and litigation cost problems have not led those states' rule-makers to return to the Federal Rule 26 limited exchange model.<sup>144</sup>

## 2. *Interpretation and Application Problems*

The proposed extension of the written report requirement to all employee experts and party experts will eliminate the interpretation and application problems associated with Federal Rule 26. As a result of the extension, federal courts will not have to decide whether “specially employed” means “specially hired” or “specially used,”<sup>145</sup> whether an employee expert or party expert did work for the purpose of providing expert testimony; and whether an employee “regularly” gives this type of testimony. Federal courts will focus instead on a single question: Does the employee's testimony or the party's testimony count as expert testimony

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141. *Witness Disclosure*, *supra* note 124, at 253.

142. *Id.* at 256.

143. The author serves as the Illinois Committee's Professor-Reporter. The only problem brought to the Illinois Committee's attention related to the disclosure required in advance of the evidence deposition of a treating physician. Transcript of the 2006 Annual Public Hearing of the Illinois Supreme Court Rules Committee, at 92-95, 107-14, & 127-32 (Jan. 24, 2006) (statements of Steven Pietrick, Patrick Dwyer & Michael Hyman), available at <http://legalreclamations.blogspot.com/2007/03/annual-report-of-illinois-supreme-court.html>.

144. *See supra* notes 54 and 55 (providing a list of states adopting comprehensive exchanges).

145. The proposed amendment does not remove the words “specially employed” from the part of Federal Rule 26 that protects work done by non-testifying experts, so the “specially hired” versus “specially used” controversy will remain unresolved for non-testifying experts. *See supra* text accompanying notes 62-74.

under the Federal Rules of Evidence?<sup>146</sup> If so, a written report will be required.

### 3. *Expert Witness Preparation Issues*

When the Advisory Committee first discussed whether to extend the written report requirement to all employee experts, some members of the Advisory Committee expressed concern that this extension would cause additional waivers of the protections given to attorney-client communications, work product, and work done by non-testifying experts.<sup>147</sup> The source of these members' concern is the obligation to include in a written report all data or other information "considered by" the expert in forming opinions.<sup>148</sup> According to the Advisory Committee's note to the 1993 Amendment, this obligation means:

[L]itigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied on by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.<sup>149</sup>

Assuming this Advisory Committee note will cause courts to reject arguments they otherwise would have accepted,<sup>150</sup> the extension of the written report requirement proposed here – to all employee experts and party experts – will cause additional waivers. Legal commentators rightly have urged the Advisory Committee to recommend a Federal Rule 26 amendment that better addresses the waiver issue.<sup>151</sup> Attorneys deserve advance notice of the effect of sharing documents and information with all expert witnesses – including the employee experts and party experts who have been excused until now from preparing written reports. For documents and information protected as attorney-client communications, work product, or work done by non-

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146. See *supra* note 35 (reviewing the decisions on the related question of whether a treating physician's testimony counts as expert testimony). If an attorney is uncertain whether employee testimony or party testimony counts as expert testimony rather than as lay opinion testimony, the attorney may have to provide a written report in order to ensure admission of the employee's or party's testimony. *Advisory Committee Minutes 2005, supra* note 121, at lines 502-05. In this way, unfortunately, the attorney's uncertainty leads to increased litigation cost.

147. *Id.* at lines 490-96, 506-59.

148. FED. R. CIV. P. 26(a)(2)(B).

149. See FED. R. CIV. P. 26, advisory committee's note (evaluating subdivision (a)(2)(B) of the 1993 Amendment).

150. As Mickum and Jajek have shown, this assumption is not necessarily correct. *Artful Dodging, supra* note 56, at 361-63.

151. *Id.* at 360.

testifying experts, this sharing might cause no waiver of any of these protections, waiver of all three protections, or waiver of just some of the protections.

The American Bar Association (“ABA”) promotes the no-waiver result for the sharing of attorney work product.<sup>152</sup> In its Standards For Civil Discovery, the ABA calls for rules that limit the content of expert witness reports and protect attorney-expert witness communications.<sup>153</sup> The ABA’s report-content recommendation is that reports contain only the data or information that an expert witness is “relying on” in formulating opinions.<sup>154</sup> The ABA’s attorney-expert witness communications recommendation is that communications revealing an attorney’s mental impressions, opinions, or trial strategy should be protected.<sup>155</sup> In the ABA’s judgment, the other party’s need for these communications is outweighed by the attorney’s need to exchange ideas with an expert witness; the party’s legitimate expectation about the expert’s adversary role; the party’s interest in avoiding the added cost of hiring one expert for consultation and another expert to testify; and the other attorney’s ability to cross-examine the expert effectively based on everything upon which the expert actually relied.<sup>156</sup> Separately, the ABA has urged federal and state courts to adopt rules that prevent discovery of draft expert witness reports, and rules that protect communications between attorneys and expert witnesses about these draft reports.<sup>157</sup>

Most of the states with comprehensive expert witness information exchange rules agree with the ABA report-content recommendation.<sup>158</sup> For example, the Illinois rule’s standard

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152. STANDARDS FOR CIVIL DISCOVERY §§ 20(a), 21(b)(iii), and 21(e) (2004), available at <http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf> [hereinafter CIVIL DISCOVERY STANDARDS].

153. The ABA Section on Litigation developed the standards. *Id.* The ABA approved these Standards. Resolution of the ABA House of Delegates, Aug. 9-10, 2004, available at <http://www.abanet.org/leadership/2004/annual/dailyjournal/103B.doc>.

154. CIVIL DISCOVERY STANDARDS, *supra* note 152, at § 21(b)(iii). Further, the expert report should contain a description of where the data or information can be found if it is not a part of the record or has not been produced during discovery. *Id.*

155. *Id.* § 21(e).

156. *Id.* § 21(e) cmt.

157. ABA Recommendation, adopted by A.B.A. H.D. Res. 120A, at 17 (Aug. 7-8, 2006), available at [http://www.abanet.org/leadership/2006/annual/DAILY\\_JOURNAL.pdf](http://www.abanet.org/leadership/2006/annual/DAILY_JOURNAL.pdf).

158. The Colorado rule differs substantially from the Civil Discovery Standards. Under the Colorado rule, the required disclosure for experts of the types who are covered by the Federal Rule 26 written report requirement is a

interrogatory for retained experts, employee experts, and party experts requires a statement of the “bases” of these experts’ opinions.<sup>159</sup> Several other states’ rules similarly require a statement of the “grounds” for the experts’ opinions<sup>160</sup> or the “general substance of the testimony.”<sup>161</sup> Data or information must be relied on for it to be among the bases or grounds for an expert’s opinion or part of the general substance of the expert’s testimony.

The courts in states that agree with the report-content recommendation do not necessarily agree, however, with the attorney-expert witness communications recommendation. Contrary to the ABA’s recommendation, Arizona courts treat an attorney’s sharing of documents and information with an expert witness as a waiver of the protection given to attorney work product – and also of the protection given to work done by a consulting expert.<sup>162</sup> Illinois courts have not yet taken a position, but Illinois attorneys assume this sharing of information waives the work product and consulting expert protections.<sup>163</sup> Similar to the ABA recommendations, California courts permit an attorney to

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Federal Rule 26-type written report or summary that includes the data or other information “considered by” the expert. COLO. R. CIV. P. 26(a)(2)(B)(I). For other experts, the Colorado rule requires a simpler written report or summary that includes only the “basis” for the expert’s opinions. *Id.* at 26(a)(2)(B)(II). Based on the first quoted provision of the Colorado rule, the Colorado Supreme Court has concluded that sharing material with a testifying expert waives the protection for opinion work product. *Gall ex rel. Gall v. Jamison*, 44 P.3d 233, 235-41 (Colo. 2002). The Colorado Supreme Court did not indicate whether sharing material with an expert witness covered by the simpler written report requirement waives this protection. *Id.*

159. ILL. SUP. CT. R. 213(f)(3).

160. ARIZ. R. CIV. P. 26.1(2)(6); CONN. R. SUPER. CT. CIV. 13-4(4); MD. R. CIV. P. 2-402(f)(1); N.H. R. SUPER. CT. 35(f); N.Y. C.P.L.R. § 3101(d) (Consol. 2002); R.I. SUPER. CT. R. CIV. P. 26(b)(4)(A); VT. R. CIV. P. 26(b)(4)(A).

161. CAL. CODE CIV. P. §§ 2034.210(b) & 2034.260(c)(2) (West 2006).

162. In *Emergency Card Dynamics, Ltd. v. Superior Court*, 932 P.2d 297, 299-302 (Ariz. Ct. App. 1997), the court permitted discovery of an expert witness’s entire case file, despite a claim that this file contained protected hypotheses, mental impressions, and litigation strategies that attorneys had explored with him as a consulting expert. The Arizona court acknowledged that this approach can require parties in some cases to hire two experts instead of one, but the court emphasized the state’s support of free-ranging cross-examination of experts and suggested that the added cost of hiring separate consulting and testifying experts is probably lower cumulatively than “the systemic costs of innumerable discovery battles over expert witness files.” *Id.* at 302.

163. The author bases this conclusion on discussions with several Illinois Committee members who practice in different parts of the state. E-mails from Mary Farmer, John Nicoara, Nicholas Motherway, Donald Peterson & Edward Wagner to Keith Beyler (May 9, 2007) (on file with author). Of course, the Illinois Committee takes no official position on the waiver issue.

share documents or information with an expert witness without waiving these protections.<sup>164</sup>

Texas disagrees with the report-content recommendation, and perhaps, with the attorney-expert witness communications recommendation, as well.<sup>165</sup> For any expert witness who is retained by, employed by, or otherwise subject to a party's control, the Texas rule's expert witness disclosure includes documents, tangible things, reports, models, or data compilations that have been "provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony."<sup>166</sup> Based on this quoted provision, Texas courts have ruled that sharing documents or information with an expert witness waives the protections for work product and work done by a consulting expert.<sup>167</sup>

Based on the experience in Illinois, Arizona, and Texas, the Advisory Committee should not let concern about additional work product and consulting expert protection waivers stop it from recommending an extension of the written report requirement to all employee experts and party experts. If losing these two protections crippled attorney discussions with experts, the Illinois Committee likely would have received complaints by now, and the Arizona and Texas rule-makers likely would have changed their states' rules.

The no-waiver rule is, of course, workable, too. If it were not, the California rule-makers likely would have changed their state's rule.<sup>168</sup> In 1993, however, the Advisory Committee decided to

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164. In *Nat'l Steel Products Co. v. Superior Court*, 210 Cal. Rptr. 535, 541-44 (Cal. Ct. App. 1985), where an expert witness had prepared a report while acting as an expert advisor in an earlier case, the state's policy of protecting attorney work product and work done by expert advisors required an in camera review of this report to determine the extent to which it should be protected from discovery. The California court concluded that the protection given to an attorney's impressions, conclusions, and theories is not lost when an attorney shares them with an expert who is later identified as an expert witness; that the protection given to work done in the expert's advisory capacity is also not lost; but that the conditional protection given to other types of work product might be overcome by the report's impeachment value and uniqueness. *Id.* at 543-44.

165. TEX. R. CIV. P. 194.2(f)(4)(A).

166. *Id.*

167. See *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 437-45 (Tex. 2007) (holding that there was a waiver of work product protection, even though the material was inadvertently given to an expert, when the expert remained designated to testify); see also *Vela v. Wagner & Brown, Ltd.*, 203 S.W.3d 37, 57 (Tex. App. Ct. 2006) (demonstrating a waiver of protection for work done by a consulting expert).

168. The Advisory Committee also has received information that Massachusetts and New Jersey follow the no-waiver rule, which reportedly works well in those states. Minutes of the Civil Rules Advisory Committee, at

require disclosure of materials shared by an attorney with retained expert witnesses and equivalents so that an opposing attorney can expose any improper expert witness preparation.<sup>169</sup> The need to share an attorney's or consulting expert's theories and conclusions with employee experts and party experts does not seem to be fundamentally greater than the need to share these theories and conclusions with retained experts and equivalents, and the risk of improper expert witness preparation seems to be equally great. Therefore, the amendment proposed here treats this sharing as a waiver of the work product and consulting expert protections.<sup>170</sup>

The Advisory Committee should make a different recommendation, however, about the effect of expert witness preparation regarding the protection for attorney-client communications. As some members of the Advisory Committee have correctly stated, the need for attorneys to communicate with employee experts under the shield of privilege may be compelling.<sup>171</sup> These employees may have the facts the attorneys need in order to give legal advice about the litigation, and the attorneys may need to explain legal decisions to them. The need for attorneys to communicate freely with party experts, who are clients, is even more compelling.

Further, the Advisory Committee should treat the attorney-client privilege differently because Congress treats privilege objections and other objections differently. When Congress adopted the Federal Rules of Evidence, Congress chose to defer to state privilege law when state substantive law applies.<sup>172</sup> For example, in a suit filed under diversity jurisdiction and based on Illinois law, Rule 501 of the Federal Rules of Evidence calls for the application of the Illinois attorney-client privilege.<sup>173</sup> Illinois uses

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lines 1546-68 (May 22-23, 2006), available at <http://www.uscourts.gov/rules/minutes/CV05-2006-min.pdf>.

169. See FED. R. CIV. P. 26, advisory committee's note (evaluating subdivision (a)(2)(B) of the 1993 Amendment); *Advisory Committee Minutes 2005*, *supra* note 121, at lines 1569-71.

170. If the Advisory Committee disagrees, it should recommend the Colorado approach of requiring a simpler written report for the employee experts and party experts who have been excused until now from preparing written reports. See *supra* note 157 and accompanying text. Additionally, it should recommend a waiver provision that treats sharing with retained experts and equivalents as a waiver but does not treat sharing with other experts as a waiver.

171. *Advisory Committee Minutes 2005*, *supra* note 120, at lines 509-11.

172. FED. R. EVID. 501; Edward J. Imwinkelried, *The New Wigmore, A Treatise on Evidence: Evidentiary Privileges*, § 4.2.2 (Aspen Law & Business 2002).

173. FED. R. EVID. 501.

the control group test to identify which employees' confidential communications with a corporation's attorney are privileged communications.<sup>174</sup> The typical employee expert does not belong to a corporation's control group, so the Illinois attorney-client privilege often does not protect communications between a corporation's attorney and an employee expert.<sup>175</sup> In a suit based on another state's law, however, that other state's attorney-client privilege applies and might extend beyond the control group.<sup>176</sup> In a suit based on federal law, the federal attorney-client privilege applies<sup>177</sup> and extends beyond the control group.<sup>178</sup>

Honoring these state-to-state and state/federal differences in privilege law will not cause a significant problem. If other attorneys can allow for these differences when developing and providing legal advice to their corporate clients about issues of substantive law, trial attorneys can allow for these differences in preparing their corporate clients' employee experts for trial. Therefore, the amendment proposed here refers courts to Rule 501 of the Federal Rules of Evidence on attorney-client privilege issues that arise out of expert witness preparation.

The amendment proposed here accepts the ABA recommendation on protecting draft expert witness reports. The ABA surely is right that requiring production of draft reports often will lead to no draft being produced. Instead, the attorney and expert will have detailed oral discussions followed by the preparation of a final report with no drafts.

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174. *Consolidation Coal v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 257-58 (Ill. 1982).

175. *See id.* (discussing a non-testifying employee expert). If a privileged document is shown to someone outside the control group, moreover, the privilege is lost. *See Sterling Fin. Mgt., L.P. v. UBS Paine Webber, Inc.*, 782 N.E.2d 895, 905 (Ill. App. Ct. 2002) (concluding that under Illinois' attorney-client privilege law, the materials at issue are not protected); *Midwesco-Paschen Joint Venture for Viking Projects v. IMO Indus., Inc.*, 638 N.E.2d 322, 329 (Ill. App. Ct. 1994) (expanding on what documents are privileged in attorney-client situations). Illinois attorneys do not necessarily insist, however, on discovery of attorney communications with employee experts who are outside of the control group. The attorneys referred to in note 162 indicated to the author that Illinois attorneys may respect the confidentiality of attorney communications with employee witnesses in preparation for deposition or trial without regard to whether an employee is part of the control group. *See supra* note 163 and accompanying text.

176. *See Sterling Fin. Mgt., L.P.*, 782 N.E.2d at 901-02 (discussing New York privilege law, though not in the expert witness preparation context).

177. FED. R. EVID. 501.

178. *Upjohn v. United States*, 449 U.S. 383, 395-97 (1981).

### *B. Independent Expert Witnesses*

Independent experts – especially treating physicians – pose the greatest problem when designing a standard exchange of expert witness information.<sup>179</sup> In the opinion of many trial judges and trial attorneys, jurors consider treating physicians to be relatively unbiased experts whose medical opinions deserve extra weight. For this reason, an attorney preparing either to depose or to cross-examine a treating physician undeniably needs disclosure of the physician's opinions. The need for disclosure increases when the medical records do not contain the physician's opinions, or when the injured party has seen several physicians, and the treating physician might or might not be testifying about causation and prognosis. The need for disclosure peaks when the physician has an opinion that is not in the medical records and might not be anticipated, such as the opinion in a medical malpractice suit that the defendant physician breached the standard of care.

While these needs favor a full disclosure requirement, the party that calls a treating physician sometimes can get the physician's cooperation only by paying a large consulting fee and other times might not be able to get the physician's cooperation at any price.<sup>180</sup> As a result, the party might be unable to disclose some of the physician's opinions before the physician's deposition. The Illinois expert witness interrogatory rule was designed for these situations.

The Illinois rule's standard expert witness interrogatory for independent expert witnesses requires a statement of the subjects on which the expert will testify and the opinions the party expects to elicit.<sup>181</sup> A party does not need to know all of the opinions held by an independent expert in order to state the opinions it expects to elicit, and the rule's reasonable notice standard takes into account the limitations on a party's knowledge.<sup>182</sup> In other words, a party will provide a less detailed statement of opinions when an independent expert does not cooperate, and a more detailed statement when an independent expert does cooperate.<sup>183</sup> Since the Illinois rule was revised in 2002, the Illinois Supreme Court

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179. See *Witness Disclosure*, *supra* note 124, at 227-29, 246-47 and 250-53 (summarizing the information presented to the Illinois Committee on disclosure problems with treating physicians).

180. See *Witness Disclosure*, *supra* note 124, at 227-29, 246-47 & 250-53 (summarizing the information presented to the Illinois Committee on disclosure problems with treating physicians).

181. ILL. SUP. CT. R. 213(f)(2).

182. *Id.*

183. ILL. S. CT. R. 213(f) cmt.



Rules Committee has received no reports of problems caused by requiring the exchange of independent expert witness opinions under a reasonable notice standard.<sup>184</sup>

Drawing on the Illinois courts' experience, the Federal Rule 26 amendment proposed here requires that parties provide a written statement of the opinions they expect to elicit from each of their independent expert witnesses. This written statement will require far less information than a written report, so courts still will have to decide whether exceptional circumstances require them to count a treating physician as a retained expert witness from whom a written report is required.<sup>185</sup> Yet, the decision about what exceptions to recognize, and whether the circumstances fit an exception, will become less important. Even if no exception applies, the party that calls a treating physician must still set forth the opinions it expects to elicit and will have to update this information if it later learns that an opinion has changed. The proposed amendment's distinction between "controlled" and "independent" expert witnesses also helps direct attention to the proper basis for deeming a treating physician to be a retained expert for whom a written reports is required – i.e., the circumstances indicate that the party (or its attorney) has effective control and can get the physician to prepare the report.

#### IV. CONCLUSION

Federal Rule 26's expert testimony disclosure and expert witness discovery procedure should be revised to provide for a better-defined and more comprehensive standard exchange of expert witness information. In its latest round of discussions, the Advisory Committee appears to be moving in the direction advocated in this Article.<sup>186</sup> The Advisory Committee's discussion

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184. The only controversial effect of the amendment related to the shift it caused regarding which party pays to obtain information about a treating physician's opinions. *Witness Disclosure*, *supra* note 123, at 262-63. The former rule had required such detailed information that an injured party often had to pay to depose the treating physician in order to provide this information. *Id.* The amendment freed the injured party from taking these depositions. *Id.* As a result, the defendant pays for more treating physician depositions than before. *Id.* Of course, the Federal Rule 26 amendment proposed here will cause no such cost shift to the defendant because Federal Rule 26 has not required the injured party to include a treating physician's opinions in its expert testimony disclosure. Instead, the proposed amendment will cause plaintiffs to incur some additional cost in disclosing treating physician opinions.

185. See *supra* notes 101-20 and accompanying text.

186. Memorandum from Judge David G. Campbell, Chair of the Subcommittee on Rule 26, to the Advisory Committee on Civil Rules on April

draft, however, does not extend the written report requirement to all employee experts and party experts.<sup>187</sup> The draft also fails to clarify the special employment test, which it will continue using to identify persons who must prepare written reports.<sup>188</sup> The changes set forth in the Appendix which follows will eliminate the need to clarify the test, and will make Federal Rule 26 in all respects a leading-edge rule on the exchange of expert witness information.

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18, 2007, Meeting on Expert Disclosure Issues, at 308 (undated), *available at* <http://www.uscourts.gov/rules/Agenda%20Books/CV-2007-04.pdf>.

187. *See id.* at 5-6 (requiring disclosure of subject matter, opinions, and grounds for opinions for expert witnesses not covered by the written report requirement).

188. *Id.*

## APPENDIX: PROPOSED AMENDMENT TO FEDERAL RULE 26

## (a) REQUIRED DISCLOSURES.

...

## (2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of its expert witnesses. An “expert witness” is any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. A “controlled expert witness” is an expert witness who is a party, a party’s current employee, or a party’s retained expert. An “independent expert witness” is an expert witness who is neither a party, nor a party’s current employee, nor a party’s retained expert.

(B) Written Report or Written Statement. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by the written reports and written statements described in (i) and (ii) below. ~~a written report — prepared and signed by the witness — if the 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. The report must contain:~~

(i) Each controlled expert witness must prepare and sign a written report containing (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the data or other information considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness’s qualifications, including a list of all publications authored in the previous ten years; (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case.

(ii) For each independent expert witness, a party must provide a written statement of the subjects on which the expert will testify and the opinions the party expects to elicit. This written statement is sufficient if it gives reasonable notice of the expert’s testimony, taking into account the limitations on the party’s knowledge of the facts known by and the opinions held by the expert.

(E) An expert witness's consideration of data or other information in forming opinions waives any protection of the data or other information under Rule 26(b)(3) or Rule 26(b)(4)(B). Federal Rule of Evidence 501 determines whether communications between an attorney and an expert witness are privileged. The drafts of a written report required by Rule 26(a)(2)(B)(i) are discoverable only on a showing of exceptional circumstances that make it impracticable to cross-examine the expert effectively without the drafts.

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(b) DISCOVERY SCOPE AND LIMITS.

...

(4) Trial Preparation; Experts.

(A) 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 the expert is a retained expert ~~Rule 26(a)(2)(B) requires a report from the expert~~, the deposition may be conducted only after the report is provided.

...

(e) SUPPLEMENTING DISCLOSURES AND RESPONSES.

...

(2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B)(i), or for whom a written statement is required under Rule 26(a)(2)(B)(ii), the party's duty to supplement extends both to information included in the report or written statement and to information given during the expert's deposition. Any additions or other changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

