Expert Witness Disclosure Rules: They Are A-Changin'

By Michael P. Lowry

Expert testimony almost always has a significant role in the outcome of many litigated cases. Recently both the federal and Nevada state courts have substantively revised their rules concerning expert witnesses. The revised federal rules addressed in this article took effect on December 1, 2010, and changed the manner in which communications with experts are handled. The revised Nevada rules discussed below will take effect October 1, 2012, and clarify the classification of treating physicians' testimony and the distinction between initial and rebuttal experts.

The federal revisions

The federal rules were revised in three areas. The first revision created FRCP 26(a)(2)(C), which concerns so-called "no report" experts, such as treating physicians. Where an expert is not required to produce a written report, the mandatory expert witness disclosure is now required to state "the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705" and "a summary of the facts and opinions to which the witness is expected to testify."

The two other revisions are more substantive. FRCP 26(b)(4) now provides work-product protection to "draft" reports prepared by expert witnesses. It also extends this same protection to communications between attorneys and experts, except in three areas:

1. The expert's compensation for her study or testimony; 2. Communications identifying facts or

data that attorney provided and that the expert considered in forming opinions to be expressed; 3. Communications identifying assumptions attorney provided and that the expert relied upon in forming the opinions to be expressed.

The drafting committee noted that expert discovery under the current rule is largely a waste of effort and "inhibits robust communications between attorney and expert trial witness, jeopardizing the quality of the expert's opinion." Report of Civil Rules Committee (Rev'd June 15, 2009), at p.3 (available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Supreme%20Court%202009/Excerpt-CV.pdf, last visited Aug. 22, 2012). The drafting committee further explained that

> The argument for extending work-product protection to some attorney-expert communications and to all drafts of Rule 26(a)(2) disclosures or reports is profoundly practical. It begins with the shared experience that attempted discovery on these subjects almost never reveals useful information about the development of the expert's opinions. Draft reports somehow do not exist. Communications with the attorney are conducted in ways that do not yield discoverable events. Despite this experience, most attorneys agree that so long as the attempt is permitted, much time is wasted by making the attempt in expert depositions, reducing the time available for more useful discovery inquiries. Many experienced attorneys recognize the costs and stipulate at the outset that they will not engage in such discovery.

By revising the rule it appears the committee's goal is to increase the quality and utility of expert witness reports and to narrow the scope of discovery inquiries, thereby reducing the burden of expert discovery. These revisions seem consistent with that goal. As to the "no report" experts, litigants are now required to disclose a summary of the facts and opinions to which the expert is expected to testify. Prior disclosures, such as with treating physicians, might simply have indicated the physician would testify concerning the facts and opinions contained in his medical records. This description is effectively a "non-description" as there could be many facts and opinions within those records to which the party does not anticipate calling the expert. The revisions concerning protection of draft reports and certain communications also seem consistent with the stated goal.

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The Nevada revisions

On August 1, 2012 the Supreme Court of Nevada filed its order on ADKT 472 concerning proposed revisions to NRCP 16.1(a)(2). These revisions take effect October 1, 2012. Notably, the court did not adopt the federal revisions concerning work-product protection of draft reports and communications with experts.

The first revision is to NRCP 16.1(a)(2)(B) and largely mirrors the revisions to FRCP 26(a)(2)(C) concerning "no-report" experts. The revised rule provides as follows:

> Unless otherwise stipulated or ordered by the Court, if the witness is not required to provide a written report the initial disclosure must state the subject matter on which the witness is expected to present evidence under NRS 50.275, 50.285 and 50.305; a summary of the facts and opinions to which the witness is expected to testify; the qualifications of that witness to present evidence under NRS 50.275, 50.285 and 50.305, which may be satisfied by the production of a resume or curriculum vitae; and the compensation of the witness for providing testimony at deposition and trial, which is satisfied by production of a fee schedule.

Another revision creates NRCP 16.1(a)(2)(C)(ii), which addresses when a disclosed expert is designated as an initial or rebuttal expert:

> If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), the disclosures shall be made within 30 days after the disclosure made by the other party. This later disclosure deadline does not apply to any party's witness whose purpose is to contradict a portion of another party's case in chief that should have been expected and anticipated by the disclosing party, or to present any opinions outside of the scope of another party's disclosure.

During the second public hearing as to this proposed change, questions were raised as to the meaning of the latter part of the rule which states, "[t]his later disclosure deadline does not apply to any party's witness whose purpose is to contradict a portion of another party's case in chief that should have been expected and anticipated by the disclosing party . . . ." In reading the rule, it seems this language is intended to prevent a party from circumventing the intent by designating an initial expert "through the backdoor" by calling an initial expert a "rebuttal" expert. For instance, to

meet the burden of proof in a personal injury case, a plaintiff must typically present competent medical evidence in the case in chief. This also requires the disclosure of expert testimony, usually through treating physicians. If, however, the plaintiff failed to initially disclose appropriate testimony, it seems this language is designed to prevent the plaintiff from disclosing the treating physicians as "rebuttal" testimony to any medical expert disclosed by the defense. Practitioners should be wary of this language when assessing when and how to disclose experts.

The court also added drafter's comments specifically addressing repeated questions concerning treating physicians:

> A treating physician is not a retained expert merely because the patient was referred to the physician by an attorney for treatment. These comments may be applied to other types of non-retained experts by analogy. In the context of a treating physician, appropriate disclosure may include that the witness will testify in accordance with his or her medical chart, even if some records contained therein were prepared by another healthcare provider. A treating physician is not a retained expert merely because the

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> witness will opine about diagnosis, prognosis, or causation of the patient's injuries, or because the witness reviews documents outside his or her medical chart in the course of providing treatment or defending that treatment. However, any opinions and an facts or documents supporting those opinions must be disclosed in accordance with subdivision (a)(2)(B).

Tension between NRCP 16.1(a)(2)(B) and the drafter's comments?

There appears to be tension between NRCP 16.1(a)(2)(B) and the drafter's comments. Treating physicians are typically "no report" experts, meaning "if the witness is not required to provide a written report the initial disclosure must state the subject matter on which the witness is expected to present evidence under NRS 50.275, 50.285 and 50.305." The comment, using conditional language, states, as to a treating physician, that an "appropriate disclosure may include that the witness will testify in accordance with his or her medical chart." However, if the only disclosure is a statement like "the treating physician may testify according to a chart," as the comment seems to acknowledge, this could be problematic. Such a statement leaves open the possibility that there may or may not be numerous records and a variety of opinions, which does not provide a "summary of the opinions expected at trial" as required by NRCP 16.1(a)(2)(B). Such a disclosure would not succinctly identify "the subject matter on which the witness is expected to present evidence under NRS 50.275, 50.285 and 50.305."

The federal courts have recognized this tension as NRCP 16.1(a)(2)(B) nearly mirrors FRCP 26(a)(2)(C). The federal advisory committee's notes provide that

> Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

Federal district courts interpreting the rule thus far conclude that "a document dump" such as indicating a no report expert "will testify consistent with their records" is insufficient. "It follows that Plaintiffs cannot comply with the rule by disclosing the complete records of the treating physicians in issue." *Kristensen v. Spotnitz*, 2011 U.S. Dist. LEXIS 59740, 2011 WL 5320686 (W.D. Va. 2011). In *Nicastle v. Adams County Sheriff's Office*, the defendant merely stated an expert investigator would testify consistently with a 963-page file which also contained audio recordings and transcripts. 2011 WL 1674954 (D. Colo. 2011). The court ruled "[d]esignation of such a prodigious volume of material does not constitute a summary of the facts to which the witnesses will testify within the meaning and requirements of Rule 26(a)(2)(C)." Another court agreed with that analysis, holding:

> Plaintiffs' medical records go beyond a mere summary and discuss facts unrelated to the treating physicians' opinions, such as [plaintiff]'s height, weight, age, and the details of her medical procedure. Moreover, while the medical records touch on the subject matter of a treating physician's testimony, the records do not necessarily provide an accurate or complete summary of expected testimony since medical records are not typically created in anticipation that those records would be used as a witness disclosure. Furthermore, allowing a party to "go beyond" the requirements of Rule 26(a)(2)(C) by providing medical records in lieu of a summary would invite a party to dump a litany of medical records on the opposing party, contrary to the rule's attempt to extract a "summary." . . . Accordingly, medical records alone do not comply with Rule 26(a)(2)(C).

Zenaida v. Casey's Gen. Store, Inc., 2012 U.S. Dist. LEXIS 45024 (S.D. Ind. 2012).

If you are in Nevada's state courts, the conditional language of the drafter's comment indicating that a party may rely upon the files of a no-report expert without providing the NRCP 16.1(a)(2)(B) summary may be insufficient.

These substantive changes will have a direct impact upon the utilization of expert witnesses. They may also add yet another factor to consider when evaluating potential removal to federal court. C

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