Uncertainties of Federal Disclosure Requirements for Employee Experts

By John Sear and Ryan McCarthy

Product liability litigation is waged through battles of the experts. Hotly contested disputes over expert testimony arise early and often, from discovery through trial and even appeal. Disputes intensify when parties use their own employees as experts because the law governing employee expert disclosure remains undeveloped.

A party may designate an employee as an expert for many reasons. Most companies employ people with varied education, training, and experience in fields relevant to their business. Companies may designate one of their own as an expert to minimize expense. However, designating an employee as an expert may derive from the more lofty belief that a person possessing expertise and knowledge of the company's product is better equipped than a "hired gun" to provide reliable, persuasive expert testimony. After all, an overriding objective of the rules governing expert testimony "is to make certain that an expert ... employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). How better to achieve that goal than to use experts practicing in the relevant field, in the real world, not the often artificial world of litigation?

Disclosure of employee experts commonly evokes challenges from opponents who assert that the employee is used merely as a ploy to evade the rules of expert discovery. Courts tasked with resolving those challenges face some rather thorny questions. For example, must employees submit expert reports? If so, must employees divulge privileged or confidential work product material they have received? If the scientific, technical, or other specialized knowledge comes from the employee's personal observation and experience, may the employee avoid expert disclosure requirements altogether by giving lay testimony about that knowledge? The seemingly clear answers offered by the Rules themselves become quite murky when courts attempt to apply them in practice, leaving parties and employees alike in a state of uncertainty.

Necessity of Expert Report

Fed. R. Civ. P. 26(a)(2)(B) requires that disclosure of expert witnesses must include reports "prepared and signed by the witness." The plain language of the Rule requires reports from only two discrete subgroups of experts: 1) experts "retained or specially employed to provide expert testimony in the case"; and 2) experts "whose duties as the party's employee regularly involve giving expert testimony."

Courts must adhere to the plain language of the Rule, according to conventional principles of statutory construction. *See Harris v. Nelson*, 394 U.S. 286, 298 (1969); *Duluth Lighthouse for the Blind v. C.G. Bretting Mfg. Co.*, 199 F.R.D. 320, 325 (D. Minn. 2000). That plain language should foreclose any construction obligating all employee experts to submit reports. *See Navajo Nation v. Norris*, 189 F.R.D. 610, 612 (E.D. Wash. 1999) ("... the rule has a specific category of employee experts who must provide a report: those who regularly testify").

The Second Circuit squarely addressed this issue in *Bank of China v. NBM LLC*, 359 F.3d 171 (2d Cir. 2004), a bank loan default case. The plaintiff introduced the testimony of an employee about international banking transactions and terms. The defendant objected, claiming that the employee was testifying as an expert and should have been disclosed in compliance with Rule 26(a)(2). Although the Second Circuit agreed that Rule 26(a)(2)(A) required the plaintiff to identify the employee as an expert, it held that Rule 26(a)(2)(B) did not require the employee to submit a report. The court reasoned that, because the employee "was not specially retained to provide expert testimony, and his duties as an employee of Bank of China do not regularly include giving expert testimony, Rule 26(a)(2)(B) does not apply." *Id.* 182 n.13. *See also Duluth Lighthouse*, 199 F.R.D. at 324-25; *Navajo Nation*, 189 F.R.D. at 613.

The court in *Minnesota Mining & Mfg. Co. v. Signtech USA, Ltd.*, 177 F.R.D. 459 (D. Minn. 1998), reached the opposite conclusion, and in the process blurred the line between employee experts and other types of experts. The plaintiff in *Signtech* disclosed six employees as experts, but refused to produce reports for any of them, prompting the defendant to move to compel production of reports. The plaintiff argued that the employees were exempt from the report requirement because the "witnesses do not have duties which regularly involve giving expert testimony." *Id.* at 461. The district court rejected the plaintiff's argument and ordered the production of reports from all of the employees. *Id.* at 460-61 (quoting *Day v. Consolidated Rail Corp.*, No. 95 CV 968 (PKL), 1996 WL 257654 (S.D.N.Y. May 15, 1996)). Although the employees' duties did not regularly involve giving expert testimony, the court agreed that they should be considered experts who were

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"retained" or "specially employed to provide expert testimony." *Id.* at 461. *See also K.W. Plastics v. United States Can Co.*, 199 F.R.D. 687, 689-90 (M.D. Ala. 2000) (citing *Signtech* and holding that the employer "typically authorizes the employee [expert] to perform special actions that fall outside of the employee's normal scope of employment" and therefore "specially employ[s]" the employee to provide expert testimony).

Signtech is difficult to reconcile with the language of the Rule. Quoting *Day*, *Signtech* concludes, for example, that "exemption [for employee experts] is apparently addressed to experts who are testifying as fact witnesses, although they may also express some expert opinions." *Signtech*, 177 F.R.D. at 461. That contention finds no support anywhere in the text of the Rule or its Notes, and the court cites no authority for it either. *Navajo Nation*, 189 F.R.D. at 613 ("This Court finds that the absence of such an explanation together with the plain language of the rule make [*Signtech* and *Day*] unpersuasive as contrary to the plain language of FRCP 26(a)(2)(B).").

Signtech correctly acknowledges that the expert disclosure requirements seek to streamline discovery and minimize the element of surprise, but its pursuit of those objectives goes too far. The court in *Duluth Lighthouse* agreed with the goals of the *Signtech* court, but found that it was "not at liberty to read out of a procedural Rule, or ignore unambiguous language, that those drafting the Rule expressly included." *Duluth Lighthouse*, 199 F.R.D. at 325, 325 n.7. As between the "spirit" and plain language of the Rule, the language should prevail every time.

Waiver of Privilege and Work Product Immunity

Companies usually designate employees who have earned reputations as trusted sources to whom company leaders — including lawyers — may turn for advice about some aspect of the company's products. Requiring those employees to submit reports, when their duties may not regularly involve giving expert testimony, jeopardizes the confidentiality of the work product and privileged material the employee may have received. That jeopardy seems unwarranted when employees only infrequently provide expert testimony for their employers.

The implementation of Rule 26's automatic disclosure procedures puts to rest any doubt about the discoverability of material a testifying expert receives. "Given this obligation of disclosure, litigants 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 upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." Fed. R. Civ. P. 26(a)(2), 1993 Advisory Committee Notes. Courts have held that this broad disclosure obligation applies to employee experts required to submit reports under Rule 26(a)(2)(B).

Any report required by Rule 26(a)(2)(B) must include "the data or other information considered by the witness in forming" his opinions. Fed. R. Civ. P. 26(a)(2)(B)(ii). Courts have broadly construed the term "considered" to include material that may otherwise constitute protected work product or privileged material. *E.g., Dyson Technology, Ltd. v. Maytag Corp.*, 241 F.R.D. 247, 251 (D. Del. 2007) (interpreting "Rule 26(a)(2)(B) as requiring the disclosure of all material considered by Dyson's experts, including [its employee expert], regardless of Dyson's claims of attorney-client privilege or work-product privilege."). Fortunately, the potential waiver probably extends only to those materials having some connection to the report, but courts will resolve any ambiguity in what is protected in favor of the party seeking discovery. *See B.C.F. Oil Refining Co. v. Consol. Edison Co. of New York,* 171 F.R.D. 57, 62 (S.D.N.Y. 1997).

Lay Versus Expert

As a way to avoid the disclosure requirements of Rule 26(a)(2)(B), parties should consider whether the employees' lay testimony will serve the same purpose as their expert testimony. Expert testimony conveys the expert's opinions "derived from information — even inadmissible information — that the expert did not personally perceive, but that was made known to the expert before or at trial." 4 Joseph M. McLaughlin *et al.*, WEINSTEIN'S FEDERAL EVIDENCE §701.03[4][a] (2d ed. 2002). Lay testimony, on the other hand, conveys the witnesses' own first-hand knowledge "gleaned from factual information that they personally perceived." *Id.*

Employees gaining scientific, technical, or other specialized knowledge from their personal experience and observations ordinarily may testify about that knowledge without triggering the Rule's disclosure requirements. *E.g., Long v. Cottrell, Inc.*, 265 F.3d 663, 668-69 (8th Cir. 2001) (holding that the defendant's vice-chairman's testimony about product design and testing, feasible alternative designs, state of the art, industry custom and practices, and product misuse based on "first-hand experience working in the industry" did not trigger Rule 26(a)(2)(B) because it "was factual and not expert in nature"). Employees may testify based upon "first-hand experience" even if they frequently testify for the employer.

Conclusion

Employees can be effective expert witnesses for their employers, but designating them as experts under Rule 26(a)(2) comes with risk. Although the value of an employee's expert testimony may be worth the risk, the party may choose to avoid the risk altogether, and accomplish the same litigation purpose, simply by having the employee give lay testimony grounded in the employee's firsthand experience, observations, and specialized knowledge.

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