

## EXPERT DISCLOSURES FOR TREATING PHYSICIANS IN FEDERAL COURT

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May 1, 2015

### EXPERT DISCLOSURES FOR TREATING PHYSICIANS IN FEDERAL COURT

Rule 26(a)(2)(A): All expert witnesses must be disclosed to the opposing party.

Rule 26(a)(2)(B) requires a written report, prepared and signed by the witness, if the witness is "retained or specially employed to provide expert testimony in the case."

The report must contain:

- (i) A complete statement of the expert's opinions and the basis and reasons for them;
- (ii) The facts or data considered by the witness in forming the opinions;
- (iii) The exhibits that will be used to summarize or support the opinions;
- (iv) The expert's qualifications and a list of publications authored in the last ten years;
- (v) A list of cases in which the witness has testified as an expert in the last four years; and
- (vi) A statement of the expert's compensation in the case.

## DISCLOSURES FOR TREATING PHYSICIANS IN FEDERAL COURT

Rule 26(a)(2)(C) requires that summary disclosures be made for an expert witness who is not required to provide a written report.

The disclosure must state:

- (i) The subject matter on which the expert will present evidence, and
- (ii) A summary of the facts and opinions to which the expert is expected to testify.

Added to Rule 26 in December of 2010. No counterpart in the New Mexico Rules of Civil Procedure.

D.N.M. LR-Civ. 26.3(b) Exemption from Expert Report Disclosure:

“Treating physicians need not prepare an expert report as required by Fed. R. Civ. P. 26(a)(2)(B).”

### A. Treating Physicians are Expert Witnesses

Treating physicians are experts, and a treating physician may not testify as a lay witness to his:

1. diagnosis,
2. treatment,
3. causation of the injury, or
4. prognosis.

Such opinions would be based on scientific, technical, or other specialized knowledge and would also be derived from professional experience, which falls within the scope of Rule 702.

*United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011); *Collins v. Prudential Inv. & Ret. Servs.*, 119 F. App'x 371, 379-80 (3d Cir. 2005) (unpublished); *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 756-57 n.2 (7th Cir. 2004); *Montoya*, 286 F.R.D. at 620; *Aumand v. Dartmouth Hitchcock Med. Ctr.*, 611 F. Supp. 2d 78, 88-89 (D.N.H. 2009).

## B. Written Reports from Treating Physicians

Rule 26(a)(2) does not mention treating physicians and does not define when experts have been “retained or specially employed,” which would require them to prepare a written report.

Treating physicians learn about their patient’s injuries and medical history through their care and treatment of the patient, and have a relationship to the subject matter of the action independent of the litigation itself.

*Am. Prop. Constr. Co. v. Sprenger Lang Found.*, 274 F.R.D. 1, 4 (D.D.C. 2011).

Treating physicians are generally excused from preparing a Rule 26 written report because they are not retained to provide expert testimony but are percipient witnesses of the treatment they rendered using their expertise.

*Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 824 (9th Cir. 2011); *Downey v. Bob’s Disc. Furniture Holdings, Inc.*, 633 F.3d 1, 6 (1st Cir. 2011).

## B. Written Reports from Treating Physicians

### **Opinions Formed During Treatment:**

As long as a physician testifies to opinions he developed during treatment, the physician is not one “retained or specially employed” as an expert.

Thus, a treating physician generally may testify to matters within the scope of the treatment he rendered—based on what he learned during actual treatment of the patient—without preparing a written report.

*Goodman*, 644 F.3d at 824; *Downey*, 633 F.3d at 6.

B. Written Reports from Treating Physicians

**Opinions Formed During Treatment:**

What is the scope of a treating physician's testimony?

Some courts state that the traditional scope of a treating physician's testimony is the physician's personal observations, diagnosis, and treatment of the patient, and does not address causation, prognosis, and impairment or disability, which are "matters that cross the line into classic expert testimony."

*Kirkham v. Societe Air France*, 236 F.R.D. 9, 11 (D.D.C. 2006).

B. Written Reports from Treating Physicians

**Opinions Formed During Treatment:**

Widely divergent views have developed in federal court about what opinions a treating physician normally forms during the course of treatment.

Some courts find that physicians develop opinions on causation during the ordinary course of treatment.

*Fielden v. CSX Transp., Inc.*, 482 F.3d 866, 867 (6th Cir. 2007); *Bartlett v. Mut. Pharm. Co.*, 742 F. Supp. 2d 182, 200 (D.N.H. 2010).

Other courts have reached the opposite conclusion.

*Scholl v. Pateder*, No. 09-cv-02959-PAB-KLM, 2011 WL 2473284, at \*4 (D. Colo. June 22, 2011) (unpublished); *Bynum v. MVM, Inc.*, 241 F.R.D. 52, 53-54 (D.D.C. 2007).

## B. Written Reports from Treating Physicians

### **Opinions Formed During Treatment:**

The Reference Manual on Scientific Evidence states that:

Physicians are trained to diagnose and treat medical problems without determining causation to a legal standard.

Clinical medicine is primarily concerned with the prevention, diagnosis and treatment of disease, and the cause of a patient's condition is generally of little concern to a treating physician, unless it relates to treatment.

John B. Wong et al., *Reference Guide on Medical Testimony*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 687, 694 (FED. JUDICIAL CTR. ed., 3d ed. 2011); Bernard D. Goldstein & Mary Sue Henifin, *Reference Guide on Toxicology*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 633, 676.

## B. Written Reports from Treating Physicians

### **Opinions Not Formed During Treatment:**

Many courts hold that a treating physician who will offer expert testimony on an issue not determined during the course of treatment is deemed to be retained or specially employed to provide expert testimony on that issue and must submit an expert report.

*Goodman*, 644 F.3d at 825-26; *Meyers v. Nat'l R.R. Passenger Corp.*, 619 F.3d 729, 733-35 (7th Cir. 2010); *Fielden*, 482 F.3d at 870-71.

## B. Written Reports from Treating Physicians

### Materials Not Reviewed During Treatment:

Similarly, many courts hold that a treating physician must prepare a written report if the physician reviews materials she did not review during the course of treatment.

A treating physician who reviews materials she did not review during the course of treatment no longer testifies as a percipient witness of the treatment she rendered but has “morphed” into a witness hired to render expert opinions that go beyond the scope of a treating doctor’s testimony and must prepare a written report.

*Goodman*, 644 F.3d at 819-20; *Fielden*, 482 F.3d at 871-72; *Mohney v. USA Hockey, Inc.*, 138 F. App’x 804, 810-11 (6th Cir. 2005) (unpublished).

## C. Summary Disclosure of Treating Physician Testimony

Rule 26 was amended in 2010 to add subsection (a)(2)(C), which requires summary disclosures:

*Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

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

### C. Summary Disclosure of Treating Physician Testimony

Rule 26(a)(2)(C) makes two important changes to expert discovery:

1. The party calling the expert prepares the disclosure instead of the expert.
2. The disclosure required is less extensive than for a written report and courts are cautioned "against requiring undue detail." FED. R. CIV. P. 26 advisory committee's note (2010 amendments).

### C. Summary Disclosure of Treating Physician Testimony

What is the proper scope of testimony from a treating physician who is subject to the summary disclosure requirement?

Some courts have found that Rule 26(a)(2)(C) supersedes prior case law on the scope of a treating physician's testimony, and have allowed a treating physician to testify to opinions formed after treatment concluded.

*Piskowski v. Target Corp.*, No. 12 CV 8865, 2014 WL 321436, at \*2 (N.D. Ill. Jan. 29, 2014) (unpublished); *Coleman v. Am. Family Mut. Ins. Co.*, 274 F.R.D. 641, 644-45 (N.D. Ind. 2011).

Other courts have found that the rule did not alter prior case law regarding when treating physicians must prepare written reports, and simply created a new disclosure requirement for treating physicians who are not required to prepare a written report.

*Kondragunta v. Ace Doran Hauling & Rigging Co.*, No. 11-cv-01094-JEC, 2013 WL 1189493, at \*12 (N.D. Ga. Mar. 21, 2013) (unpublished); *Southard v. State Farm Fire & Cas. Co.*, No. 4:11-cv-243, 2013 WL 209224, at \*3 n.1 (S.D. Ga. Jan. 17, 2013) (unpublished).

### C. Summary Disclosure of Treating Physician Testimony

Can you file summary disclosures when a treating physician has reviewed medical records from other providers or other documents to form an opinion?

Did the physician review medical records during the course of treatment or were they reviewed in anticipation of litigation?

A chiropractor who reviewed records of other physicians in anticipation of litigation was required to file a written report, but a neurologist who reviewed medical records during the course of treatment was not required to file a written report.

*Hermann v. Hartford Cas. Ins. Co.*, No. 11-cv-03188-REB-MEH, 2012 WL 5569769, at \*5-6 (D. Colo. Nov. 15, 2012) (unpublished).

Did the physician review documents prepared in anticipation of litigation?

Rule 26 requires an expert report from a treating physician who offers opinion testimony based on information that has been provided to him for the purposes of the lawsuit, as opposed to opinions based on personal knowledge obtained through his treatment of the plaintiff.

*Frietze v. Safeco Ins. Co. of Am.*, 12-cv-0584 SMV/CG, 2013 WL 7141739, at \*6 (D.N.M. Apr. 8, 2013) (slip copy).

### C. Summary Disclosure of Treating Physician Testimony

There is confusion about whether a written report is necessary from a treating physician who:

1. Testifies to opinions about causation or prognosis;
2. Testifies about opinions formed after treatment is concluded; or
3. Reviews materials he/she did not review during treatment.



### C. Summary Disclosure of Treating Physician Testimony

My view: With proper summary disclosures, a treating physician should be able to testify:

1. To opinions about causation and prognosis;
2. To opinions formed after treatment was concluded; and
3. About medical records of other physicians.

When a treating physician reviews materials prepared in anticipation of litigation (*i.e.*, pleadings, depositions, or IME reports) a written report is required.

William P. Lynch, *Doctoring The Testimony: Treating Physicians, Rule 26, and the Challenges of Causation Testimony*, 33 REV. LITIG. 249, 292-97 (2014).

### C. Summary Disclosure of Treating Physician Testimony

Most summary disclosures are inadequate:

Dr. Jones will testify about his treatment of the plaintiff.

Dr. Jones will testify consistent with his medical records.

Dr. Jones will testify about the injuries Plaintiff received in the accident, the causation of those injuries, whether those injuries are permanent and will limit Plaintiff's opportunities for employment, and Plaintiff's future medical treatment and expenses.

Compare to:

Dr. Jones will testify that Mr. Smith sustained a herniated disc at the L4-5 level and underwent surgery as a result of the June 12, 2013, motor vehicle accident. Dr. Jones will also testify that Mr. Smith will be unable to return to work as an over-the-road truck driver, and that his medical bills are reasonable, necessary, and related to the accident.

### C. Summary Disclosure of Treating Physician Testimony

Reference to medical records for the physician's facts and opinions is not sufficient:

The burden is not on the opposing party to sift through the medical records in an effort to discern the facts and opinions to which the treating physician will testify; rather, the burden is on the party calling the physician.

*Brown v. Providence Med. Ctr.*, No. 8:10CV230, 2011 WL 4498824, at \*1 (D. Neb. Sept. 27, 2011) (unpublished).

"[W]hatever the precise meaning of the requirement, a 'summary' is ordinarily understood to be an 'abstract, abridgment, or compendium . . . .' It follows that plaintiffs cannot comply with the rule by disclosing the complete records of the treating physicians in issue."

*Kristensen ex rel. Kristensen v. Spotnitz*, No. 3:09-CV-00084, 2011 WL 5320686, at \*2 (W.D. Va. June 3, 2011) (citations omitted) (unpublished).

### C. Summary Disclosure of Treating Physician Testimony

#### **Sanctions:**

The court may preclude the physician from testifying if a written report or summary disclosures are not provided or are not adequate.

FED. R. CIV. P. 37(c)(1); *Meyers*, 619 F.3d at 734-35; *Pineda v. City & Cnty. of S.F.*, 280 F.R.D. 517, 522-23 (N.D. Cal. 2012) (court precludes ten of plaintiff's witnesses from testifying but allows for amended summary disclosures for three other witnesses).

#### **Work-Product Protection:**

Communications between an attorney and an expert required to prepare a written report receive work-product protection, except to communications that relate to the expert's compensation or identify facts, data or assumptions the attorney provided and the expert relied upon in forming his opinions.

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

Rule 26 does not provide work-product protection for communications between an attorney and a treating physician subject to the summary disclosure requirement.

### C. Summary Disclosure of Treating Physician Testimony

**Caution:**

Even adequate summary disclosures have the potential to mislead. Rule 26(a)(2)(C) does not require disclosure of the facts and data considered by the physician when forming his/her opinions.

So you could receive summary disclosures for a treating physician which cover the subject matter, facts and opinions to which the physician will testify – and there will be no indication that the physician reviewed medical records from other health care providers or materials prepared in anticipation of litigation.

Solution: Send an interrogatory that asks for all documents, facts, data, or assumptions that were provided to the witness.