NAVIGATING THE RULES FOR NON-RETAINED EXPERTS

BY LYNN RIVERA, ESQ. AND PAUL CALEO, ESQ.

The purpose of discovery is to take the "surprise out of trials of cases so that all relevant facts … may be ascertained in advance." *Washoe Cnty. Bd. of Sch. Trustees v. Pirhala*, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968). To further this essential purpose, retained experts must produce written reports. FRCP 26(a); NRCP 16(a)(1). However, a non-retained expert, including a treating physician, is generally exempt from the written report requirement. *Id.*

The justification for the exemption is that the witness is not employed to provide expert opinions, but instead to provide medical treatment. The treating physician is therefore a hybrid percipient witness on the plaintiff's course of treatment. *Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817, 826 (9th Cir. 2011); *FCH1, LLC v. Rodriguez*, 335 P.3d 183, 189-190 (Nev. 2014). This legal principle sounds relatively simple. However, in litigation practice, it is often a matter of dispute. Frequently, a plaintiff will identify a treating physician as a non-retained expert and elicit opinions that were formed in anticipation of litigation. In doing so, the treating physician morphs into an expert witness and, absent a timely expert report, the testimony is inadmissible. *Goodman*, 644 F.3d at 826.

"The failure to appreciate the distinction between a hybrid witness and retained expert can be a trap for the unwary." *Sullivan v. Glock*, 175 F.R.D. 497, 501 (D. Md. 1997). A defense attorney should challenge a physician's impermissible expert testimony given the potential for juries to rely on it. Treating physicians are often portrayed to the jury as "disinterested witnesses," in contrast to the defendant's highly paid "hired gun." William Lynch, *Doctoring the Testimony*, 33 Rev. Litig. 249, 267 (Spring 2014) ("*Lynch*"); *but see Khoury v. Seastrand*, 377 P.3d at 94, 132 Nev. __ (Nev. 2016) (evidence of medical liens admissible to show treating physician bias). Likewise, a plaintiff's attorney should avoid inviting error into the trial by eliciting inadmissible expert opinion testimony, which could result in reversal of the judgment. It is important for litigators to understand the rules governing admissibility of non-retained expert testimony.

Non-Retained Expert Testimony Rules

In 2004, NRCP 16 was amended to conform to FRCP 26 requiring written reports for retained experts. Subsequently, in 2010, FRCP 26 was amended to clarify that non-retained expert witnesses, including treating physicians,[1] are subject to the disclosure requirement in section (a)(2)(C). The rule requires a party to disclose "the subject matter" and a "summary of facts and opinions" of the witnesses' testimony. In 2012, NRCP 16 was amended again to mirror its FRCP 26 counterpart. The 2012 Drafter's Note provides guidelines for determining the scope of permissible non-retained treating physician testimony.

Recently, on May 6, 2016, the Nevada Supreme Court filed ADKT 511, amending NRCP 16.1 and adding a Drafter's Note regarding non-retained experts (effective July 6, 2016). The Drafter's Note states:

> A ***non-retained expert***, including but not limited to a ***treating physician***, who is not identified at the time the expert disclosures are due, may be subsequently disclosed in accordance with NRCP 26(e), without first moving to reopen the expert disclosure deadlines or otherwise seeking leave of court, if such disclosure is made in accordance with NRCP 16.1(a)(2)(B), within a reasonable time after the non-retained expert's opinions become known to the disclosing party and not later than 20 days before the close of discovery. Otherwise, the disclosing party must move to reopen the discovery deadlines or otherwise seek leave of court in order to disclose the non-retained expert. In re Amendment of NRCP 16 et. al. NRCP 2016 Nev. Lexis 613 (emphasis in original).

The plain language of the note, which has no federal counterpart, contemplates a subsequent disclosure of a *new treatment provider* in a "reasonable time" for 70 days after expert disclosures are served and 20 days before discovery closes. The "reasonable time" requirement has not been further quantified, but should be construed narrowly to avoid prejudice. *Derosa v. Blood Sys.*, 298 F.R.D. 661, 664 (D. Nev. 2014) ("court will not allow plaintiff to game the court by waiting till the eleventh hour to designate an expert"). Given the short time period and the underlying policy of avoiding unfair surprise, the subsequent disclosure would be "reasonable" if the plaintiff acted in good faith in disclosing the new treater as soon as practicable with sufficient time for the defendant to review the records and depose the witness. If there is insufficient time, and the subsequent disclosure is allowed, a defendant should move to re-open discovery. Additionally, where a plaintiff has been treating for years with many providers, a defendant can challenge the subsequent disclosure as facially unreasonable, because the plaintiff should have known about the new treatment earlier.

The new disclosure exception presents a potential for abuse. An overzealous plaintiff's attorney could use the "reasonable time" requirement tactically to deny a defendant adequate time to rebut a new opinion. Additionally, the exception could be used as a mechanism to "witness shop" by replacing a witness who testifies unfavorably with a new treating physician. Where the subsequent disclosure is allowed, litigators should carefully analyze the treating physician opinions to determine admissibility.

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Course of Treatment Requirement

A treating physician's opinion is admissible only if formed during the plaintiff's treatment. The courts have construed the "course of treatment" broadly to include opinions on causation and the reasonableness of other doctor's treatment. *FCH1*, 335 P.3d at 189; *Khoury*, 377 P.3d at 91 (physician can opine on "work-up" of another doctor). However, a non-retained doctor must testify *specifically* that the opinions were formed during plaintiff's medical treatment. For example, a doctor's testimony that he reviewed "thousands of pages" of medical records "in Plaintiff's case" was held to be insufficient to support a finding that the opinion was formed during medical treatment. *FCH1*, 335 P.3d at 189; *Ghiorzi*, 2011 U.S. Dist. LEXIS at 125329 (testimony that opinion formed to determine "appropriateness of care, necessity of care and relatedness of care" insufficient to prove course of treatment). A treating doctor's opinion is generally not admissible if it is formed based on litigation materials provided by the plaintiff's counsel, because the opinion was formed for litigation. *Goodman*, 644 F.3d at 826. Moreover, where a treating physician reviews another medical provider's records in forming opinions, the doctor must produce all records reviewed during treatment for the opinion to be admissible. *FCH1,* 335 P.3d at 189 (opinion inadmissible where doctor's file produced only contained 21 pages of the "thousands" he reviewed).

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Adequacy of the Disclosures

Another potential basis for exclusion of a treating physician's opinion testimony is a defective summary disclosure. *Lynch Article*, at 282-97. The non-retained expert disclosure obligations are less extensive than the written report requirements, but must be specific enough to provide the defendant with notice. Generic disclosures that do not provide specific facts regarding each non-retained expert's opinion are inadequate. *Langermann v. Prop. & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 105378 (D. Nev. Aug. 10, 2015); *Lynch*, at 282-83 (identifying treaters, medical records and that treater would testify regarding "Plaintiff's medical treatment" or "causation, prognosis and treatment" insufficient).

It is noteworthy that an inadequate disclosure might not render opinions inadmissible, and some courts have extended discovery, providing the non-compliant party an opportunity to amend the disclosures. *Carrillo v. B & G Andrews Enters., LLC*, 2013 U.S. Dist. LEXIS 12435 (D. Nev. Jan. 29, 2013) (opinion permissible where medical records not voluminous and defendant not prejudiced). The justification for allowing the amendment is that the defendant is not prejudiced or had the ability to advise about the non-compliance but elected "to gamble" the opinion would be excluded instead. *Kondragunta v. Ace Doran Hauling & Rigging Co.*, 2013 U.S. Dist. LEXIS 39143 (N.D. Ga. Mar. 20, 2013). Given the inconsistent rulings, a defense attorney who opts to rely on a technical error in the summary disclosure risks a ruling extending discovery.

Other Challenges to Admissibility

The non-retained physician's opinion may be challenged on grounds governing admissibility of expert testimony. The defendant can argue that the physician is not sufficiently qualified to testify, or that the methodology used was unreliable. *See Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (Nev. 2008); *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (U.S. 1993). For example, a federal court held that a treating physician was not qualified to testify to the standard of care in phlebotomy because he had no training or experience. *See Derosa v. Blood Sys.*, 298 F.R.D. 661, 664 (D. Nev. 2014). Moreover, a treating physician's causation opinion may be unreliable if based solely on plaintiff's self-report or incomplete information. *Lynch*, at 287-309. Finally, treating physician testimony, even if relevant, may be excluded if there are numerous experts testifying on the same issues as unnecessarily cumulative. NRS 48.035; FRE 403. NL

1. Non-retained experts include nurse practitioners, pharmacists, dentists, and mental health professionals. *Lynch Article*, at 265.

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LYNN RIVERA is an attorney at Burnham Brown, where she practices in civil defense with an emphasis on complex tort, personal injury and large loss cases. She represents businesses and public entities defending claims of products liability, premises liability and negligence. She has practiced law in Nevada and California for 18 years and previously served as a law clerk to Chief Justice Rose, a supervising staff attorney at the Nevada Supreme Court and prosecuted felony cases as a deputy district attorney. Rivera is an active member of DRI, CLM, Las Vegas Defense Lawyers and the ADC Northern California/Northern Nevada and regularly speaks and publishes for these organizations.

PAUL CALEO is a partner at Burnham Brown, where he practices in civil defense with an emphasis on complex tort, personal injury and large loss cases involving claims of products liability, premises liability, public entity defense and trucking/motor carrier accidents. He has substantial jury trial experience, including defending large loss claims of wrongful death and traumatic brain injury. Caleo has practiced law in California for 25 years and has practiced in Nevada with Rivera on a *pro have vice* basis. He also practiced law in his native Australia for more than four years as a criminal defense attorney with one of the country's leading trial lawyers. Caleo is an active member of DRI, CLM, RIMS, the Harmonie Group and NRRDA, and frequently speaks and publishes for these organizations.