Turning the Tables: Non-Retained Experts for Defendants

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FOR most litigators, first exposure to the concept of non-related experts comes through treating physicians or first responders who examined or investigated an accident. Plaintiff attorneys routinely designate these individuals as experts as a method of limiting litigation costs while surviving dismissal challenges based on a lack of expert testimony.

Defendants in product liability cases—particularly cases involving life sciences products—have been slower to implement this practice. Rather, defendants generally

develop their case strategy around engaging and employing traditional retained experts. While these experts are useful in defending against claims of specific causation, their opinions and testimony are frequently largely devoted to more general issues like product design, engineering, and regulatory matters. These general opinions are useful tools in the defense of the case, but they come at a price. Retained experts who convey these opinions carry baggage such as biases and expensive fees—fees that can be great in the mass tort context and almost cost prohibitive in smaller "one-off" cases.

Just like the treating physicians, product manufacturers have a bench of experts with front-line, ground-level involvement with the product who, by the nature of their positions, have spent years developing first-hand, fact-based opinions about the product's safety. While these employee-experts, also known as non-retained experts, come with a natural loyalty and a bias to stand behind the product, they can present opinion testimony with little additional cost. In fact, many of these same professionals may already be filling the role of the corporate 30(b)(6) representative during fact discovery, and some may be the best face for the company to sit at counsel table during trial.

Potential non-retained experts range from the patent holder or chief designer of the product to the company's regulatory affairs specialist who navigated the regulatory process to get the product to market. Although traditional retained experts can testify about the underlying studies or strategies used to support the product, non-retained experts provide first-hand opinion testimony about what they actually did, saw, or thought as the study was being performed. This front-line experience can tip the scale as much or more than a traditional retained expert. While the bias to defend the product or company might be a line of attack for a non-retained expert, most juries expect that degree of loyalty, and it can be countered by the passion the expert brings to defend their product. Employees are generally proud of their work, and when a product they worked on is the focus of litigation, there is natural buy-in and "skin in the game" that bolsters their passion and credibility—something that cannot be replicated by traditional retained experts.

I. Who are Non-Retained Experts?

The rules and case law involving retained experts is generally well-established, but the same is not always true with respect to non-retained experts. Non-retained experts exist in a grey

area; they are hybrid experts who have knowledge of the underlying facts but can offer opinion testimony because of their specialized knowledge. Their opinion testimony, however, is generally limited to "opinions that were formed during the course of their participation in the relevant events of the case, and only to those opinions which were properly disclosed."[1]

Federal Rule of Civil Procedure 26 addresses disclosure requirements for experts. For witnesses who are "retained or specifically employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony"—*i.e.*, traditional retained witnesses—the parties must submit a comprehensive report containing a complete statement of all opinions to be offered, the basis for the opinions, and the facts or data supporting the opinions.[2] The rules also require thorough statements regarding the witness's qualifications, publications and compensation information.[3] These reports can be extensive, and producing reports meeting these requirements can be costly in product liability cases.

The rules create different disclosure requirements for experts who fall outside the "retained or specifically employed" category. For these non-retained witnesses, the disclosure requirements found in Rule 26(a)(2)(C) are much less onerous. Rule 26(a)(2)(C) requires only (i) the subject matter on which the witness is expected to present opinion evidence; and (ii) a summary of the facts and opinions to which the witness is expected to testify.[4]

A retained expert witness is an expert who, without prior knowledge of the facts giving rise to litigation, "is recruited to provide expert opinion testimony."[5] In contrast, a non-retained expert witness' testimony "arises not from his enlistment as an expert but, rather, from his ground-level involvement in the events giving rise to the litigation."[6] As the First Circuit described in *Downey v. Bob's Disc. Furniture Holdings, Inc.*, non-retained experts are "actor[s] with regard to the occurrences from which the tapestry of the lawsuit was woven."[7] Courts consider factors including whether the expert holds himself or herself out for hire as a purveyor of testimony,

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[1] Guarantee Tr. Life Ins. Co. v. Am. Med. & Life Ins. Co., 291 F.R.D. 234, 237 (N.D. Ill. 2013).

[2] *See* FED. R. CIV. P. 26(a)(2)(B).

[3] *Id*.

[4] FED. R. CIV. P. (a)(2)(C).

[5] Downey v. Bob's Discount Furniture Holdings, Inc., 633 F.3d 1, 6 (1st Cir. 2011).

[6] *Id*.

[7] *Id.* (quoting Gomez v. Rivera Rodríguez, 344 F.3d 103, 113 (1st Cir. 2003)).

whether the expert charges for the testimony, and whether the expert forms the opinion from facts supplied by others or first-hand observation.[8]

Downey offers a prime example of how to utilize non-retained experts. After noticing skin irritation and an infestation of insects, plaintiffs hired an experienced exterminator to investigate and treat the infestation. The exterminator discovered bedbugs living in the frame of a recently purchased bed, and plaintiffs filed a lawsuit against the furniture store for damages relating to the infestation. During the litigation, plaintiffs designated the exterminator as a non-retained expert to proffer his opinions on causation. The furniture store moved to strike the exterminator on the basis that he failed to submit a report, and the trial court agreed and granted judgment as a matter of law for lack of evidence. The First Circuit reversed the decision and remanded the case.[9] In finding that the exterminator qualified as a non-retained expert, the court noted that the exterminator did not hold himself "out for hire as a purveyor of expert testimony," and there was no evidence that he was charging a fee for his time.[10] In analyzing the "retained or specifically employed" language in the rule, the court noted the following:

> In order to give the phrase "retained or specially employed" any real meaning, a court must acknowledge the difference between a percipient witness who happens to be an expert and an expert who without prior knowledge of the facts giving rise to litigation is recruited to provide expert opinion testimony. It is this difference, we think, that best informs the language of the rule.
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> This point is most aptly illustrated by the distinction that courts have drawn between treating physicians and physicians recruited for the purpose of giving expert opinion testimony. . . .
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> Like a treating physician—and unlike a prototypical expert witness—[the exterminator] was not retained or specially employed for the purpose

[8] *Id*. at 6-7.
[9] *Id.* at 11.
[10] *Id.* at 6.

> of offering expert opinion testimony. . . [H]is opinion testimony arises not from his enlistment as an expert but, rather, from his ground-level involvement in the events giving rise to the litigation. Thus, he falls outside the compass of Rule 26(a)(2)(B). . . .
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> Interpreting the words "retained or specially employed" in a common-sense manner, consistent with their plain meaning, we conclude that as long as an expert was not retained or specially employed in connection with the litigation, and his opinion about causation is premised on personal knowledge and observations made in the course of treatment, no report is required under the terms of Rule 26(a)(2)(B). This sensible interpretation is also consistent with the unique role that an expert who is actually involved in the events giving rise to the litigation plays in the development of the factual underpinnings of a case. Finally, this interpretation recognizes that the source, purpose, and timing of such an opinion differs materially from the architecture of an opinion given by an expert who is "retained or specially employed" for litigation purposes.
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> Consequently, where, as here, the expert is part of the ongoing sequence of events and arrives at his causation opinion during treatment, his opinion testimony is not that of a retained or specially employed expert. If, however, the expert comes to the case as a stranger and draws the opinion from facts supplied by others, in preparation for trial, he reasonably can be viewed as retained or specially employed for that purpose, within the purview of Rule 26(a)(2)(B).[11]

Like the exterminator in *Downey*, defendants have many of their own employees who are "actors from which the tapestry of the lawsuit was woven." These employees can offer opinions in the litigation without the increased expense associated with studying materials and drafting expert reports. These experts who are not "retained or specifically employed"

[11] *Id.* at 6-7 (internal citations omitted).

to testify in the case are a valuable tool that might significantly reduce time and expenses associated with the defense.

II. *Daubert* and Non-Retained Experts

While reporting requirements differ between retained experts and non-retained experts, the same admissibility rules apply.[12] Under Federal Rule of Evidence 702, a "witness who is qualified as an expert by knowledge, skill, experience, training, or education" may give testimony only if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles or methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."[13] In *Daubert v. Merrell Dow Pharmaceuticals, Inc*., the Supreme Court held that Rule 702 requires the district court to act as a "gatekeeper" to ensure that "any and all scientific evidence admitted is not only relevant, but reliable."[14] While cases involving *Daubert* and its progeny oftentimes evaluate the admissibility of a traditional expert's opinions, courts have also applied *Daubert* to Rule 26(a)(2)(B) non-retained experts—particularly in cases involving treating physicians.[15] Treating physicians are subject to challenges on causation opinions because "although a doctor may have experience diagnosing and treating [an illness] . . . that does not make him qualified to assess its genesis."[16] Because any assessment by a treating physician is made during treatment and not with an eye on litigation, it may also be harder to establish that a reliable methodology was used in forming the opinion.[17]

In *Higgins v. Koch Development Corp.*, after a primary retained expert was disqualified based on unreliable methodology, the plaintiff attempted to defeat summary judgment due to lack of a causation expert by arguing that a

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[12] Tajonera v. Black Elk Energy Offshore Operations, L.L.C., 2016 WL 3180776, at *7 (E.D. La. June 7, 2016) ("[E]ven 'if the expert testimony is properly disclosed, the testimony must also be determined to be admissible under Federal Rules of Evidence Rule 702.'") (quoting Rea v. Wis. Coach Lines, Inc., No. 12-1252, 2014 WL 4981803, at *3 (E.D. La. Oct. 3, 2014)).

[13] FED. R. EVID. 702.

[14] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993).

[15] Higgins v. Koch Dev. Corp., 794 F.3d 697 (7th Cir. 2015); *see also Downey*, 633 F.3d at 8 (indicating that an exterminator who inspected plaintiff's home and found an infestation of bedbugs could be challenged under *Daubert* on the basis that he was unqualified to render the opinion).

[16] *Higgins*, 794 F.3d at 705.

[17] *Id*.

treating physician (non-retained expert) could fill the role.[18] *Higgins* arose after a patron at an amusement park was exposed to pool chemicals—bleach and hydrochloric acid.[19] Months after exposure, the plaintiff visited a pulmonologist who diagnosed him with reactive airways dysfunction syndrome and chronic asthma.[20] When the original retained expert was disqualified, plaintiff argued that the pulmonologist could offer the same opinions—defeating summary judgment.

Setting aside that the plaintiff failed to timely identify the treating physician as a non-retained expert, the court found that even if the expert had been designated, plaintiff failed to demonstrate the pulmonologist's fitness as an expert.[21] The court applied *Daubert* at noted that "[t]reating physicians are no different than any other expert for purposes of Rule 702; before proffering expert testimony, they must withstand *Daubert* scrutiny like everyone else."[22] The Seventh Circuit ultimately agreed with the trial court's finding that the pulmonologist's causation opinion could not be offered on the basis that the pulmonologist lacked qualifications and reliable methodology.[23]

Although non-retained experts are granted some leeway in the reporting and designation requirements, their opinions can still be subject to admissibility challenges. Nevertheless, since parties challenging a non-retained expert do not have the benefit of a lengthy report, a *Daubert* challenge might be less likely—provided the non-retained expert offers opinions that are within the expert's area of expertise. Accordingly, the deposition of a non-retained expert is critical for both sides. Expect non-retained expert's qualifications and opinions to be thoroughly vetted. Counsel should prepare these witnesses for a *Daubert* line of questioning, and during the deposition, consider laying the groundwork for the expert's qualifications and opinions.

III. Expert Communications

Another key distinction between traditional retained experts and non-retained experts is

[18] *Id.* at 701.
[19] *Id.* at 700.
[20] *Id.*
[21] *Id.* at 704.
[22] *Id.* (citing O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1105 n.14 (7th Cir.1994)).
[23] *Id.* at 705.

the level of protection given to communications between counsel and the witness. When the Federal Rules were amended in 2010, "[t]he amendment provided work product protection for drafts of expert reports or disclosures and protection for communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B)."[24] Some courts have found that this protection is not afforded to "hybrid non-reporting" experts designated under Rule 26(a)(2)(C) and "have taken the position that the designation of a witness as a non-reporting expert generally waives applicable privileges for all communications between the expert and the designating party's attorney."[25] However, courts have not consistently found that disclosure creates an automatic and complete waiver.[26] The court in *Sierra Pacific*—the seminal case that first analyzed the issue after the 2010 amendments—declined "to hold that designating an individual as a non-reporting expert witness waives otherwise applicable privileges and protections in all cases, or even for all cases involving non-reporting employee expert witnesses."[27] Courts have described the reasoning behind the distinction "because of difficulties separating a

[24] United States ex rel. Rigsby v. State Farm Fire & Cas. Co., 2019 WL 6792774, at *2 (S.D. Miss. Dec. 12, 2019) (citing DiSalvatore v. Foretravel, Inc., 2016 WL 7742996, at *2 (E.D. Tex. May 20, 2016)); *see also* United States v. Sierra Pacific Industries, 2011 WL 2119078, at *2 (E.D. Cal. May 26, 2011).

[25] Ramaco Res., LLC v. Fed. Ins. Co., 2020 WL 5261320, at *3 (S.D. W. Va. Sept. 3, 2020) (citing Luminara Worldwide, LLC v. Liown Electronics Co. Ltd., 2016 WL 6914995, at *6 (D. Minn. May 18, 2016)).

[26] Pipeline Prods., Inc. v. Madison Companies, LLC, 2019 WL 3973955, at *7 (D. Kan. Aug. 22, 2019).

[27] *Id.* at *7 (citing *Sierra Pacific*, 2011 WL 2119078 at *8-*10); *see also* Garcia v. Patton, 2015 WL 13613521, at *4 (D. Colo. July 9, 2015) (finding waiver "in this particular case"); PacifiCorp v. Nw. Pipeline GP, 879 F. Supp.2d 1171, 1213 (D. Ore. 2012) (observing that, in *Sierra Pacific*, "the Court fashioned a somewhat flexible rule about the effect of designating a non-reporting witnesses, based on policy considerations voiced during the debate over the 2010 amendments"); City of Wyoming, Minn. v. Procter & Gamble Co., 2019 WL 245607, at *5 (D. Minn. Jan. 17, 2019) ("[D]esignating an individual as Rule 26(a)(2)(C) expert may not waive any and all protections in every case and under all circumstances.").

hybrid witness' sense impressions from his expert opinions and because of a concern for 'attorney-caused bias.'"[28] The risk of having to disclose communications to non-retained experts remains a possibility depending on particular jurisdictions. Accordingly, counsel should take care when communicating with any possible non-retained experts.

IV. Best Practices

Use of current or former employees as non-retained experts is not widespread, and the case-law surrounding some of the aspects of this practice is not well-developed. Nonetheless, the following are several practice points and considerations regarding litigating with non-retained experts.

1. **Identify experts early.** In every litigation, the parties make a concerted effort to locate and retain experts. Likewise, defendants should identify non-retained experts as soon as there is any indication of a pending claim. Having a bench of potential non-retained experts from within current and former employees can help in case planning and might limit the scope on the number of topics covered by retained experts—resulting in reduced litigation costs.

2. **Maintain contact.** When a key employee who is well suited for testifying leaves the company, whether for another position or retirement, keep updated contact information on the employee. Not only might that employee be the ideal corporate witness, he or she might be able to fill in evidentiary gaps that require expert testimony. Retired employees are a great resource—they have time, grey hair, first-hand experience, and are often inexpensive.

3. **Thoroughly vet the witness.** When identifying possible non-retained experts, conduct a thorough background check on the witness. Identify all documents that might be used during the deposition or trial; ensure that the witness has fully formulated their opinions at the outset; and verify

[28] *Rigsby*, 2019 WL 6792774, at *3 (citing City of Mankato, Minnesota v. Kimberly-Clark Corp., No. 15-2010 (JRT/TNL), 2019 WL 4897191, at *11 (D. Minn. May 28, 2019); *Garcia*, 2015 WL 13613521, at *4; *PacifiCorp*, 879 F. Supp.2d at 1213; *Sierra Pacific*, 2011 WL 2119078, at *6-*7, *10).

their first-hand experience with the product at issue. Be sure to assess any potential bad documents that can be linked to your witness that might question the witness's support for the product at issue.

4. **Complete a thorough designation.** Comply with the 26(a)(2)(C) disclosures requirements. Just as plaintiff attorneys occasionally reference medical records from a treating physician as part of the physician's designation, consider attaching or referencing any key documents or studies as part of the designation that the witness authored or reviewed. Also, since the "purpose of the expert disclosure rule is to provide opposing parties reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses[,]"[29] consider designating a non-retained expert before the witness's "fact witness" deposition to possibly avoid a second (expert) deposition.

5. **Make sure they are qualified to avoid *Daubert* challenges.** While many employees might have opinions on the product, not every employee can offer admissible opinions.[30] They must still be qualified and their opinions must "have a reliable basis in the knowledge and experience of the witness's discipline" under *Daubert*.[31] To avoid

[29] Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc., 725 F.3d 1377, 1381 (Fed. Cir. 2013) (citation omitted).

[30] *See* Arch Specialty Ins. Co. v. BP Inv. Partners, LLC, 2020 WL 5848317, at *5 (M.D. Fla. Oct. 1, 2020) ("While a hybrid witness may not have to provide a written report to pass Rule 26 muster, to the extent that the witness seeks to offer expert testimony, he must still be deemed admissible under *Daubert*.").

[31] Avendt v. Covidien Inc., 314 F.R.D. 547, 561 (E.D. Mich. 2016) (involving a treating physician, Rule 26(a)(2)(C) witness) (citing Gass v. Marriott Hotel Servs., Inc., 558 F.3d 419, 426 (6th Cir.2009) (noting that "a treating physician's testimony is still subject to the requirements of *Daubert*"));

challenges, make sure the witness "stays in their lane" and refrains from opining on areas outside of their expertise. Consider a re-direct examination at the deposition that directly addresses the witness's qualifications, and prepare the witness for a potential *Daubert* line of questioning.

6. **Converting to a report-required witness.** Non-retained expert opinions are generally reliable because they were formed outside the litigation and without the influence of attorneys.[32] Accordingly, care must be taken to limit the opinions to those formed pre-litigation. Otherwise, you risk converting the witness to someone who should have furnished a comprehensive report.

7. **Be mindful of communications.** Because discovery of communications between counsel and non-retained experts is a risk, care should be taken during exchanges with any witness who may be designated under Rule 26(a)(2)(C). Operate as if any communication is discoverable, and be mindful when sending any witness documents that were created after the witness's involvement in the underlying product as this could taint the expert's opinions.

8. **Use "key language" when designating.** Since not all courts and attorneys may be familiar with using non-retained experts—especially ones other than treating physicians—

Higgins, 794 F.3d at 704–705 ("Treating physicians are no different than any other expert for purposes of Rule 702; before proffering expert testimony [as to causation], they must withstand *Daubert* scrutiny like everyone else."); *In re* Aredia and Zometa Prods. Liab. Litig., 483 F. App'x 182, 187 (6th Cir. 2012) ("[A] treating physician's testimony is subject to *Daubert*.").

[32] *See In Re* Cook Med., Inc., IVC Filters Mktg., Sales Pracs. & Prod. Liab. Litig., 2017 WL 9251216, at *1 (S.D. Ind. Oct. 19, 2017) ("[A] former employee may be a non-retained expert for the purposes of Rule 26(a)(2) if he is a percipient witness and is testifying based upon his personal knowledge of the facts or data at issue in the litigation.' Guarantee Tr. Life Ins. Co. v. Am. Med. & Life Ins. Co., 291 F.R.D. 234, 237 (N.D. Ill. 2013). If he testifies beyond the scope of his observation, however, he is treated as a retained expert and must provide a written report pursuant to Rule 26(a)(2)(B). Martin v. Stoops Buick, 2016 WL 4088132, at *1 (S.D. Ind. 2016)").

consider adding clear language to your designation that mirrors the rules and gives the background into how the witness arrived at the opinions before the litigation. Also state that the opinions will be offered to the requisite level of certainty, and that the opinions will be consistent with the witness's experience with the product.

Overall, non-retained experts are a valuable tool in litigation, and while these techniques have traditionally been employed by plaintiffs through using treating physicians as a tactic to limit costs while avoiding dismissal, the same tactics can be employed by defendants in litigation. The scientists, engineers, and professionals involved in the development and monitoring of products are generally highly-qualified and considered leaders in their field. Although the use of non-retained company witness experts is still somewhat novel and does not have the benefit of well-established universal bright line rules, it can be an effective tool for companies in defending their products and controlling costs.