A Disclosure Primer

Non-Retained Experts in Federal Court

By Thomas W. Lyons and Rhiannon S. Huffman

There can be considerable advantages to using an in-house or non-retained expert in commercial litigation.

Among the advantages to using a non-retained expert in commercial litigation are three that are particularly worth mentioning: the client will not have to pay the fees and expenses of an outside expert (which can be substantial, in some cases); the in-house expert may already be conversant with the relevant facts and applicable methodologies and may not have to get "up to speed"; and the client may already feel comfortable with the in-house expert. Further, there can be a significantly less burdensome disclosure requirement for the in-house expert, which can also reduce the expenses. On the other hand, the in-house expert may not be an experienced witness. Further, counsel's communications with the employee-expert are probably *not* subject to the attorney–client privilege or the work-product doctrine. Accordingly, those communications can be discovered.

Sophisticated Opinion, or Lay Opinion?

The first consideration is whether the witness's opinion may constitute a "lay" opinion under Federal Rule of Evidence 701, or an expert opinion subject to Rules 702 and 703. Rule 701 states that lay opinions are admissible if they are rationally based on the perception of the witness and helpful to achieving a clear understanding of the witness's testimony or a determination of a fact in issue. Courts generally agree that lay opinions require no disclosure. *See Innovation Ventures, LLC v. NVE, Inc.*, 90 F. Supp. 3d 703, 734 (E.D. Mich. 2015); *Hillery v. Allstate Indemnity Co.*, 705 F. Supp. 2d 1343, 1348 (S.D. Ala. 2010); *Looney Ricks Kiss Architects, Inc. v. Bryan*, No. 07-572, 2010 WL 5393864, at *2 (W.D. La. Dec. 22, 2010).

However, Rule 701 was arguably subject to abuse by parties who sought to admit sophisticated opinions though it. Accordingly, the rule was amended in 2000 to add subpart (c), which bars the admission of lay opinions "based on scientific, technical or other specialized knowledge within the scope of Rule 702." Accordingly, courts may be more reluctant to admit some employees' lay opinions. *See Bank of China, New York Branch v. NBM, LLC*, 359 F.3d 171, 182 (2d Cir. 2004). In *Bank of China*, the Second Circuit held that some of the opinions of a bank employee who had performed an internal investigation were subject to Rule 702 to the extent that they dealt with "typical international banking transactions," "definitions of

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banking terms," and "any conclusions that were not the result of his investigation." *Id. See also Fish v. Kobach*, No. 16-2105, 2018 WL 1116534, at *3 (D. Kan. Feb. 27, 2018) (holding that testimony about the results of a consumer survey was not a lay opinion and the witness should have prepared a report). *See also Indemnity Ins. Co. of N. Am. v. Am. Eurocopter, LLC*, 227 F.R.D. 421, 424–25 (M.D.N.C. 2005) (holding that the plaintiff could depose employees identified as having lay opinions and warning that if their opinions were subject to disclosure requirements, defendants may "face the consequences of failing to do so"). Nonetheless, the owner or officer of a business may offer a lay opinion pertaining to the value or projected profits of the business. The advisory committee's notes state that most courts have permitted this kind of testimony because of the witness's particularized knowledge of the business, and the 2000 amendment did not change this. *See Innovation Ventures,* 90 F. Supp. 3d at 733–34 (holding that the business's officers could offer lay opinions about the harm to the business caused by the defendant's actions); *Duluth Lighthouse for the Blind v. C.G. Bretting Mfg., Co., Inc.*, 199 F.R.D. 320, 326 (D. Minn. 2000) (holding that the plaintiff's CEO was a lay opinion witness with respect to the damages incurred by the plaintiff as a result of the defendant's allegedly defective product, so no Rule 26 disclosure was required). *Cf. HM Hotel Properties v. Peerless Indemnity Ins. Co.*, No. CV12-0548, 2013 WL 4507602, at *4 (D. Ariz. Aug. 23, 2013) (holding that an independent insurance adjuster could not offer lay opinion about the cost to repair the roof of a hotel). Similarly, a business's accountant may be able to offer lay opinion testimony about lost profits and other financial harm. *See Teen-Ed, Inc. v. Kimball Intern., Inc.*, 620 F.2d 399, 403–04 (3d Cir. 1980).

Expert Opinion, or Key Fact?

Further, an expert's report may be a "key fact" in the underlying case and not an expert opinion subject to disclosure requirements. *See Felix v. Wis. Dept. of Transp.*, 104 F.Supp.3d 945, 955 (E.D. Wisc. 2015). In *Felix,* the plaintiff engaged in violent and suicidal behavior during her employment. The plaintiff's fitness for work was evaluated by a doctor who rendered a report that the plaintiff remained at increased risk for more such behavior and that she could not safely and effectively resume her position. The defendant terminated the plaintiff's employment. The plaintiff filed suit, alleging that her employment termination by the defendant violated various federal employment and discrimination statutes. The defendant moved for summary judgment, in part because the plaintiff's behavior in the workplace was unacceptable, and attached the doctor's report. The plaintiff objected to the use of the report because the defendant had not disclosed the doctor as an expert. The district court held that the report was a "key fact in the case" and not a report of expert testimony intended for use as such at trial. The court permitted the use of the report and granted summary judgment.

So, for example, the opinion of an in-house quality inspector that resulted in the rejection of a shipment of goods may not be subject to any disclosure requirement. However, it should be discoverable as a relevant fact.

Report Required?

Prior to 2010, Federal Rule of Civil Procedure 26(a)(2)(B) recognized employee-experts but did not require them to provide any kind of report. The advisory committee's note to the 1970 amendment said:

> [The disclosure requirement did] not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to the transactions or occurrences that are part of the subject matter of the lawsuit. Such a witness should be treated as an ordinary witness.

Historically, courts split over the extent of disclosure required for employee-experts. Some courts held that the employee-expert must provide a report. *See, e.g., Applera Corp. v. MJ Research Inc.*, 220 F.R.D 13, 18–19 (D. Conn. 2004); *Day v. Consol. Rail Corp.*, No. 95-cv-968, 1996 WL 257654, at *2 (S.D.N.Y. May 15, 1996) (holding that employee-experts must provide a full disclosure). In *Applera*, the court held that its scheduling order required full disclosure, including a report, for all experts, regardless of whether they were retained. Moreover, it interpreted Rule 26(a)(2)(B) and Rule 701 to require a report from non-retained experts whenever they would provide opinions subject to Rules 702, 703, or 705. Other courts held that the party had to identify the employee-expert as an expert but did not have to provide a report for him. *See, e.g., Bank of China,* 359 F.3d at 182 n.13.

The provision in Rule 26 exempting employee-experts from providing expert reports was the subject of discussion and criticism in legal periodicals, in addition to the disagreements in the caselaw. *See* Alex Reese, *Employee and Inventor Witnesses in Patent Trials: The Blurry Line between Expert and Lay Testimony*, 16 Stan. Tech. L. Rev. 423 (2013); Katherine A. Rocco, Note, *Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure: In The Interest of Full Disclosure?*, 76 Fordham L. Rev. 2227 (2008); George Brent Mickum IV & Luther L. Hajek, *Guise, Contrivance, or Artful Dodging: The Discovery Rules Governing Testifying Employee Experts*, 24 Rev. Litig. 301 (Spring 2005); Matthew R. Wildermuth, Note, *Blind Man's Bluff: An Analysis of the Discovery of Expert Witnesses Under Federal Rules of Civil Procedure 26(b)(4) and a Proposed Amendment*, 64 Ind. L.J. 925 (1989); James L. Hayes and Paul T. Rider, *Rule 26(b)(4) of the Federal Rules of Civil*

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Procedure: Discovery of Expert Information, 42 U. Miami L. Rev. 1101 (1988).

These criticisms prompted the amendment to the rule in 2010 to reduce the possibility of ambush by employee-expert testimony. The advisory committee's note states:

> 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.

Disclosure Standards

Assuming the opinion must be disclosed, Rule 26 provides two different standards for disclosure of an expert's testimony: one for those who must provide a comprehensive report and related materials, and one for those who do not, depending on whether the witness has been "retained or specially employed to provide expert testimony." Fed. R. Civ. P. 26(a)(2)(B).

If the expert has been retained or specially employed to provide expert testimony, then the party must provide a full, and often expensive, expert disclosure, including a report, a curriculum vitae, a list of prior testimony, and the expert's compensation. Fed. R. Civ. P. 26(a)(2)(B); *Salgado by Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998). Courts will exclude the opinion of a retained expert for failure to provide the full disclosure required by Rule 26(a)(2). *See*, *e.g.*, *Lenzen v. Workers Comp. Reinsurance Ass'n*, 843 F. Supp. 2d 981, 985 n.1 (D. Minn. 2011) (excluding the expert's affidavit and granting summary judgment where the plaintiff never disclosed expert).

Caselaw Defining "Retained or Specially Employed" Experts

Accordingly, the extent of disclosure usually hinges on whether the in-house expert has been "retained or specially employed" for expert testimony. Rule 26 does not define this phrase, so the federal courts have created caselaw to define that role. In a nutshell, most courts say that when a party's employee or other witness proposes to provide expert opinions based on facts and analysis developed separately from his or her day-to-day involvement in the relevant events, then he or she must provide a written report on those additional opinions. Conversely, when the proposed expert "is a percipient witness and is testifying based on his [or her] personal knowledge of the fact and data at issue in the litigation," he or she need not provide the detailed report required by Rule 26(a)(2)(B). *Guarantee Life Trust Ins. Co. v. Am. Med. and Life Ins. Co.*, 291 F.R.D. 234, 237 (N.D. Ill. 2013).

If the witness has not been retained or specially employed for expert testimony, the party needs to disclose only the subject matter on which the expert will present evidence and a summary of the facts and opinions to which the expert's testimony will apply. Fed. R. Civ. P. 26(a)(2)(C). Notably, such an expert need not be an employee. The most frequent example in personal injury cases are physicians who can often meet this standard with respect to their treatment of a patient. *See*, *e.g.*, *Owens-Hart v. Howard Univ.*, 317 F.R.D. 1, 4–5 (D.D.C. 2016) (permitting a treating physician to opine about causation and the prognosis respecting a plaintiff's occupational asthma where his opinions were "premised on observations of the patient made during treatment and not for purposes of litigation."). One court has permitted the treating physician to testify where some of his opinions were included in the report of a retained expert. *Anders v. Hercules Offshore Servs., LLC*, 311 F.R.D. 161, 164 (E.D. La. 2015).

Disagreement Among Federal Courts on Topics Requiring Full Disclosure

Nonetheless, courts disagree over the topics on which a physician can testify without a full disclosure. In *Westerdahl v. Williams*, 276 F.R.D. 405, 409 (D.N.H. 2011), the court held that the treating physician could not testify without a full disclosure that the plaintiff's condition may require surgery, what the surgery might cost, and the plaintiff's levels of permanent impairment where "[t]here [was] no indication that [the doctor] reached those opinions in the course of treating" the plaintiff. However, in *Salas v. United States*, 165 F.R.D. 31, 33 (W.D.N.Y. 1995), the court said that a treating physician could testify whether his treatment was causally related to the accident without providing a report.

An outside accountant who routinely reviews her or her client's books may qualify as a non-retained expert. *See Teen-Ed, Inc.*, 620 F.2d at 403–04. Other examples of decisions finding that non-employee, non-retained experts would qualify as non-retained experts include the following:

- *Indianapolis Airport Auth. v. Travelers Prop. Cas. Co. of Am.*, 849 F.3d 355, 369 (7th Cir. 2017) (permitting employees of companies that did business with the plaintiff to testify as non-retained experts on the costs of a repair project);
- *Am. Prop. Const. Co. v. Sprenger Lang Found.*, 274 F.R.D. 1, 3, (D.D.C. 2011) (permitting the defendant's contractors to testify as experts without full disclosures about construction work that they did, or proposed to do, on the defendant's property);
- *Southard v. State Farm Fire & Cas. Co.*, No. 4:11-cv-243, 2013 WL 209224, at *3 (S.D. Ga. Jan. 17, 2013) (permitting two persons to testify as experts without full disclosures about water damage remediation that they performed at the plaintiff's house); and
- *Saucedo v. Gardner*, No. 17-cv-183, 2018 WL 1175066, at *2 (D.N.H. Mar. 5, 2018) (permitting the New Hampshire deputy secretary of state to testify without full disclosure about the purpose, history, and application of a state statute that he administered).

Federal courts also disagree about whether an employee-expert must ever provide a full disclosure. Some courts have held that an employee-expert is never retained or specially employed under the plain language of the rule and is never required to provide a report. *See Allstate Ins. Co. v. Nassiri*, No. 2:08-cv-00369, 2011 WL 2975461 (D. Nev. July 21, 2011). In *Nassiri*, Allstate alleged that the defendant chiropractors had engaged in unreasonable, unnecessary, and fraudulent treatment of claimants who were injured in car accidents with its insureds. Allstate retained a chiropractor to review the defendants' records to determine whether the treatment was reasonable and necessary. Allstate's employee, named Patterson, then

reviewed each file to assess the amounts that Allstate should have paid, based on both liability and damages, compared that to what Allstate did pay, and then determined the amount of overpayment. The defendants moved to exclude Patterson's testimony because Allstate did not produce a report for him. The district court reviewed the various decisions, including those holding that when an employee-expert reviews facts and develops opinions for litigation, he or she must provide a report. It called this the "majority" position. Nonetheless, it adopted the "minority" position, based on the "plain language" of the rule, that the employee-expert never has to produce a report. *Id.* at *9.

Other courts have mandated that all experts prepare reports regardless of whether they are retained. *See, e.g.*, *Applera Corp.*, 200 F.R.D. at 18; *DataCarrier, S.A. v. WOCCU Servs. Group, Inc.*, No. 16-cv-122, 2018 WL 1514456, at *4 (W.D. Wis. March 27, 2018) ("Summaries of expert testimony tend to lead to disputes about whether the expert has properly disclosed her opinions, which is why the court requires a full written report from employee experts."). These mandates appear to contradict the spirit of "proportionality" that should now guide discovery in federal court. Fed. R. Civ. P. 26(b)(1). Regardless, counsel would be well advised to check the district court's local rules and scheduling orders before filing their expert disclosures.

Other courts have held that an expert may be a "hybrid" of a fact witness and a non-expert, or even a retained expert, where part of the expert's opinions are based on personal knowledge and part on informed knowledge. *See Indianapolis Airport Auth.*, 849 F.3d at 371 (7th Cir. 2017) (holding that the plaintiff's contractors' employees were hybrid fact and non-retained expert witnesses); *Clark v. City of Tucson*, No. CV 08-300, 2009 WL 10673474, at *9 (D. Ariz. July 14, 2009) (holding that a police officer was the defendants' non-retained expert to the extent that his opinions were based on facts that he knew respecting the defendant-officer's training before suit, but he was a retained expert with respect to facts of which he had no personal knowledge and which he learned for the litigation, such as those pertaining to the encounter between the plaintiff and the defendant-officer).

Many courts conduct a fact-specific comparison of the expert's personal knowledge with his or her opinions to determine whether a full disclosure is required. In *Downey v. Bob's Discount Furniture Holdings, Inc.*, the plaintiffs were afflicted with bedbugs. 633 F.3d 1, 7–8 & n. 5 (1st Cir. 2011). The exterminator who came to their house told them that the bedbugs came from the bed frame that they had purchased from the defendant. The plaintiffs sued the defendant and disclosed the exterminator's opinion as a non-retained expert pursuant to Rule 26(a)(2)(B). The district court excluded his opinion because he had not provided the report required of a retained expert.

On appeal, the First Circuit considered various factors indicating the exterminator was not a retained expert, including that he did not hold himself out as an expert, and he did not charge a fee for his testimony. His testimony was based on his "ground level involvement in the events giving rise to the litigation." *Id.* at 6. The First Circuit said that an expert is not "retained or specially employed" when, similar to a physician, his opinion is based on personal knowledge and observations made in the course of treatment. *Id.* at 7.

> [W]here, 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. [citations omitted]. 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 a retained or specially employed for that purpose, within the purview of Rule 26(a)(2)(B).

Id. at 7. The First Circuit held that the district court improperly excluded the expert's opinion. *Id.* at 8. The court noted, "Conceivably, in some cases an on-the-scene expert whose views are not subject to the written report requirement of Rule 26(a)(2)(B) might also be retained or specially employed to develop *additional* opinions for purposes of trial (and would, to that extent, trigger the written report requirement)." *Id.* at 8 n.5 (emphasis original).

The First Circuit's hypothetical note was precisely the situation in *Wai Feng Trading Co. v. Quick Fitting, Inc.*, No. 13-33WES, 2018 WL 6726557 (D.R.I. Dec. 21, 2018). There, the court addressed the expert disclosure of such a "hybrid" employee-expert. Wai Feng sued Quick Fitting for failing to pay for plumbing parts that it sold to Quick Fitting pursuant to contracts and specifications that Quick Fitting had provided. Quick Fitting alleged two main defenses and counterclaims: the products were defective because they had excessive lead content, and Wai Feng had breached various contractual provisions by allegedly transferring Quick Fitting's technology to a nonparty company that was allegedly making plumbing products that infringed on Quick Fitting's intellectual property.

After the close of fact discovery, Quick Fitting disclosed as an expert witness its director of engineering named Ochoa. Quick Fitting said that Ochoa would testify on two topics: the plumbing products supplied by Wai Feng exceeded the lead content specified in the parties' contract, and the plumbing products being made by the nonparty company were so similar in appearance to Quick Fitting's products that they must have been made from molds based on Quick Fitting's design. Quick Fitting did not provide a full expert disclosure for Ochoa, but it asserted that it need only set forth the subject matter of his testimony. The magistrate judge held that since Ochoa supervised Quick Fitting's quality control department and was routinely involved in testing products for lead content, he could testify as an expert about lead content. However, since he was not routinely involved in comparing Quick Fitting's products to those designed and made by other companies, he could not provide an opinion that the nonparty's products were so similar to Quick Fitting's that they must have been made from the same technology because Quick Fitting did not provide a full disclosure.

In *Window Specialists, Inc. v. Forney Enters., Inc.*, 47 F. Supp. 3d 53 (D.D.C. 2014), the court held that a contractor hired by the defendant to repair the plaintiff-contractor's allegedly negligent work could testify as an expert on a variety of topics related to his repairs, including the quality, timeliness, and reasonableness of the cost of the plaintiff's work, without preparing a report because the witness's opinions

were based on his personal knowledge of the facts. *Id.* at 59–60.

In *Beechgrove Redevelopment, L.L.C. v. Carter & Sons Plumbing, Heating & Air-Conditioning, Inc.*, No. 07-8446, 2009 WL 981724 (E.D. La. Apr. 9, 2009), the court addressed a classic use of employee-experts. The plaintiff was a nonprofit entity that acquired an apartment complex to renovate into affordable housing. The defendant's employees allegedly caused a fire that damaged the project. In the ensuing litigation, the plaintiff identified as non-retained experts an architect, an engineer, and two accountants that it employed to testify about the project, the damages, and repair costs. The defendant moved to exclude their testimony because the plaintiff had not produced reports pursuant to Rule 26(a)(2)(B). The court held that they could testify as non-retained experts only to the extent that their testimony was based on "their factual observations and professional analyses rendered during the renovation project and post-fire operations." *Id.* at *6. However, the court directed, "to the extent the witnesses may stray into opinions that they may have developed in preparation for the litigation of this matter, that testimony should be stricken." *Id.*

Other courts have held that an expert may be a "hybrid" of a fact witness and a non-expert, or even a retained expert, where part of the expert's opinions are based on personal knowledge and part on informed knowledge.

In *Doctors Licensure Group, Inc. v. Continental Cas. Co.*, No.: 3:10-cv-98, 2011 WL 13182969, at *6 (N.D. Fla. Sept. 26, 2011), the court excluded expert testimony by an accountant and a lawyer respecting insurance coverage issues to the extent that they developed those opinions in preparation for the litigation because the plaintiff did not provide full disclosures for them.

Notably, in *Beane v. Utility Trailer Mfg. Co.*, No. 2:10 CV 781, 2013 WL 1344763, at *3 (W.D. La. Feb. 25, 2013), the court discounted one factor that the *Downey* decision had considered: whether the party was compensating the experts. It excluded as experts nine different witnesses who did not have first-hand knowledge of facts at issue and for whom the plaintiff did not provide full disclosures even though the plaintiff had not "retained," i.e., paid, them.

With respect to the actual disclosure, district courts have held that the disclosure of the non-retained expert's opinions does not require "undue detail" or a "precise description." *See, e.g.*, *Little Hocking Water Ass'n, Inc. v. E.I. Dupont de Nemours and Co.*, No. 2:09-CV-1081, 2015 WL 1105840, at *5 (S.D. Ohio Mar. 11, 2015) (affirming the magistrate judge's decision that a general description of anticipated opinions was sufficient). However, courts disagree over how specific the description of facts supporting the opinions must be, or the extent to which they can refer to other materials. *Id.* at *7–11 (holding that the defendant's general description of the facts was insufficient). *Contra Saline River Props., LLC v. Johnson Controls, Inc.*, No. CIV.A. 10-10507, 2011 WL 6031943, at *7 (E.D. Mich. Dec. 5, 2011) (holding that the rule requires only "the simple statement as to who is going to testify as to what"); *Chesney v. Tennessee Valley Auth.*, No. 3:09-cv-09, 2011 WL 2550721 at *3 n.3 (E.D. Tenn. June 21, 2011) (same). Counsel may be well advised to err on the side of offering a more specific disclosure rather than a less specific disclosure.

Regardless of whether the expert is "retained," if the expert's opinions involve scientific or technical conclusions, the testimony must meet the requirements of Federal Rules of Evidence 702, 703, and 705 and either *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and its legal progeny, or the *Frye* standard, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *See, e.g.*, *Meds. Co. v. Mylan*, No. 11-cv-1285, 2014 WL 1227214, at *4 (N.D. Ill. Mar. 25, 2014) (excluding the opinion of an employee-expert under *Daubert*); *Sloan Valve Co. v. Zurn Indus., Inc.*, No. 10-cv-00204, 2014 WL 806452, at *4–6 (N.D. Ill. Feb. 28, 2014) (same).

Summary

In sum, it seems that three protections largely ameliorate the potential dangers to a party opposing employee-expert discovery and testimony: (1) the employee-expert's opinions are based only on evidence of which he or she has firsthand knowledge; (2) the employee-expert is identified as a fact witness and is subject to deposition as a fact witness respecting his or her and/or his or her employer's factual knowledge; and (3) the facts upon which the expert bases his or her opinions are consistent with that factual testimony.

As a general example, suppose that your client purchased supplies from a supplier pursuant to contractual specifications. Your client's quality control engineer, as a matter of his or her routine duty, inspects the supplies, concludes that they failed to meet the contractual specifications, and rejects them. The supplier asserts that the supplies do meet the specifications and sues for failure to pay its invoices. If you want the design engineer to testify about conclusions, you probably do not need to provide the full expert disclosure. However, if you want your client's design engineer to inspect the supplies and provide a similar opinion (perhaps, because the design engineer is a better witness), and that is not something that he or she ordinarily does, then you probably will have to provide the full disclosure for that expert witness. On the other hand, the design engineer may be able to testify pertaining to the technical necessity for the specification without a full disclosure.

In short, assuming that your opponent can depose the potential expert as a fact witness during fact discovery, you probably do not have to provide the full expert disclosure if the employee will provide an opinion about the significance of the facts about which he or she has personal knowledge. If, on the other hand, the proposed expert is not also a fact witness, then he or she is generally considered retained or specially employed as an expert witness, and you do have to provide the full expert disclosure.

The usual remedy for failing to disclose an expert witness properly is to preclude his or her testimony pursuant to Rule 37(c). However, the rule permits courts to allow the testimony if the violation of the rule is substantially justified or harmless. Accordingly, some courts have declined to exclude the testimony of a purportedly non-retained expert even when they subsequently determined that the expert was retained. *See, e.g.*, *Chambers v. Fike*, No. 13-1410, 2014 WL 3565481, at *5 (D. Kan. July 18, 2014). In that case, the court found that the plaintiff's damages expert was retained but noted that the plaintiff had produced the expert's report as his damages computation pursuant to Rule 26(a)(1). The court said that there was no evidence of bad faith in the disclosure and discovery was ongoing. It ordered the plaintiff to produce a full disclosure within fourteen days. *Id.*

One final, very important caveat: some courts hold that counsel's communications with the employee-expert are not protected by the attorney–client privilege or the work-product doctrine. *United States v. Sierra Pacific Indus.*, No. CIVS-09-2445, 2011 WL 2119078, at *10 (E.D. Cal. May 26, 2011) (reviewing the advisory committee notes and holding that counsel's communications with the employee-expert were discoverable); *City of Mankato, Minn. v. Kimberly-Clark Corp.*, No. 15-2101, 2019 WL 4897191, at *11 (D. Minn. May 28, 2019) (citing *Sierra Pacific* and compelling counsel to produce all communications with the defendant's employee-expert); *cf. Cadence Education, LLC v. Vore*, No. 17-cv-2092, 2018 WL 2926442, at *4 (D. Kan. June 7, 2018) (holding that the plaintiff could not subpoena work product from a "hybrid" expert witness). Accordingly, unless the district has taken a clear position to the contrary, counsel should proceed cautiously in communications with the employee-expert and should assume that those communications are discoverable. FD