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## **RULE 26(a)(2)(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE: IN THE INTEREST OF FULL DISCLOSURE?**

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*This Note examines the varying interpretations of Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, an issue currently dividing the nation's circuit courts of appeal and district courts. Interpreting the Rule for its plain meaning yields an exemption for expert witnesses who are either treating physicians or employees of a party in the case. While some courts have followed this textualist approach, more have opted for a broader interpretation, imposing the expert report requirements of Rule 26 on employee experts and treating physicians under certain circumstances. In keeping with the spirit of the Rules, courts should interpret the Rule broadly so as to encourage full disclosure while the Advisory Committee on the Federal Rules of Civil Procedure considers potential amendments.*

### INTRODUCTION

Expert reports required by Rule 26 of the Federal Rules of Civil Procedure are an important and useful litigation tool. Rule 26 reports serve to reduce litigation costs and surprise at trial by encouraging full disclosure.<sup>1</sup> These reports also assist judges in evaluating whether expert testimony should be admitted under the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>2</sup> Not all types of experts are required to submit expert reports. According to Rule 26(a)(2)(B), only those experts who are “retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony” must provide expert reports to the other parties in the case.<sup>3</sup>

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1. See Fed. R. Civ. P. 26(b)(4)(A) advisory committee's note (1993) (“Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition.”); *Fielden v. CSX Transp., Inc.*, 482 F.3d 866, 871 (6th Cir. 2007) (quoting *Sowell v. Burlington N. & Santa Fe Ry., Co.*, No. 03-C-3923, 2004 U.S. Dist. LEXIS 24738, at \*17 (N.D. Ill. Dec. 6, 2004)); Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345, 1371 (1994).

2. 509 U.S. 579 (1993).

3. Fed. R. Civ. P. 26(a)(2)(B).

Rule 26 works in concert with Rule 37 of the Federal Rules of Civil Procedure to eliminate the element of unfair surprise that can affect the outcome of a case.<sup>4</sup> By barring the use of any opinion not in the report, Rule 37 encourages full disclosure.<sup>5</sup> Since expert opinions are known prior to depositions and trial, attorneys are aware of potentially harmful or surprising opinions that may be presented and can gather additional facts and witnesses as necessary.<sup>6</sup> Furthermore, since Rule 26 reports disclose the issues about which an expert plans to testify,<sup>7</sup> depositions are more effective and efficient, thus reducing time spent and attorneys' fees.<sup>8</sup> Expert reports can even eliminate the need for depositions entirely, further reducing costs since the party taking the expert deposition must usually pay a fee for the expert's time.<sup>9</sup>

While it is generally accepted that expert reports decrease costs and help eliminate unfair surprise,<sup>10</sup> other policy considerations weigh against requiring every expert witness to submit a report. For instance, treating physicians are often called to testify. Some argue that this takes time away from treatment and patient care and that requiring treating physicians to write and submit reports may deter them from testifying altogether.<sup>11</sup> Therefore, the drafters of Rule 26 determined that these policy considerations outweighed the benefits of requiring a report from treating

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4. See *B.H. v. Gold Field Mining Corp.*, No. 04-CV-0564-CVE-PJC, 2007 U.S. Dist. LEXIS 4612, at \*8–9 (N.D. Okla. Jan. 22, 2007); *Fielden*, 482 F.3d at 871 (“Rule 26(a) generally serves to ‘allow[] both sides to prepare their cases adequately and efficiently and to prevent the tactic of surprise from affecting the outcome of the case.’” (alteration in original) (quoting *Sherron v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000))); Gregory P. Joseph, *Expert Approaches*, 25 Litig. 20, 21 (2002) (explaining that judges utilize Rule 37 to enforce the requirements of Rule 26); see also *Reed v. Binder*, 165 F.R.D. 424, 429 (D.N.J. 1996) (“The reason for requiring expert reports is ‘the elimination of unfair surprise to the opposing party and the conservation of resources.’” (quoting *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir. 1995))).

5. Fed. R. Civ. P. 37(c)(1) (“A party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.”).

6. See *Reed*, 165 F.R.D. at 429 (“The test of a report is whether it was sufficiently complete, detailed and in compliance with the Rules so that surprise is eliminated, unnecessary depositions are avoided, and costs are reduced.”).

7. Fed. R. Civ. P. 26(a)(2)(B) (stating that a report must contain “a complete statement of all opinions to be expressed and the basis and reasons therefore”).

8. Fed. R. Civ. P. 26(b)(4)(A) advisory committee’s note; *Berger*, *supra* note 1, at 1371.

9. See *Fielden*, 482 F.3d at 871; see also Fed. R. Civ. P. 26(b)(4)(A) advisory committee’s note (1993) (“The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions.”).

10. See *supra* notes 1–8.

11. Memorandum from David G. Campbell, U.S. Dist. Judge, to the Advisory Comm. on the Fed. Rules of Civil Procedure 3 (Mar. 26, 2007) (on file with the Fordham Law Review) (explaining that “discussions with various lawyers have persuaded us that requiring treating physicians to prepare expert reports would significantly reduce the number of treating physicians willing to testify at trial”).

physicians.<sup>12</sup> Rule 26(a)(2)(B) attempts to balance the benefits of expert reports and the burden of writing a report by requiring reports from only those experts who are “retained or specially employed to provide expert testimony” or “whose duties as an employee of the party regularly involve giving expert testimony.”<sup>13</sup> Drafted in an exclusive nature, the language of the Rule indicates that some experts are not required to file reports.<sup>14</sup> According to the plain meaning of the Rule, a treating physician or an expert who is an employee of a party,<sup>15</sup> and whose job does not regularly involve giving testimony, is not required to submit a report. However, some courts have required reports from both treating physicians<sup>16</sup> and employee experts,<sup>17</sup> even though not required by the plain meaning of Rule 26(a)(2)(B).<sup>18</sup>

The conflicting interpretations of Rule 26 have been at issue in the federal courts, with no clear trend in either the district courts or circuit courts.<sup>19</sup> This Note explores these varying and competing interpretations of Rule 26(a)(2)(B). Part I reviews the history and purpose of the Federal Rules of Civil Procedure and, specifically, Rule 26(a)(2)(B) before and after *Daubert*. Part II discusses and analyzes the interpretations of Rule 26(a)(2)(B) from the courts and the legal community. The analysis in Part II includes an examination of both the plain meaning and liberal interpretations of the Rule. The plain meaning interpretation provides that a court should automatically exempt expert employees and treating physicians from providing an expert report under Rule 26, while a broader interpretation allows courts to require reports. Part III argues that the better

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12. See *id.*; see also Fed. R. Civ. P. 26(a)(2)(B) advisory committee’s note (1993) (“The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report.”).

13. Fed. R. Civ. P. 26(a)(2)(B).

14. See *Watson v. United States*, 485 F.3d 1100, 1107–08 (10th Cir. 2007); George Brent Mickum IV & Luther L. Hajek, *Guise, Contrivance, or Artful Dodging?: The Discovery Rules Governing Testifying Employee Experts*, 24 Rev. Litig. 301, 304 (2005).

15. Several courts have concluded that employee experts are distinct from experts who are either “retained or specially employed” within the meaning of Rule 26. See, e.g., *Funai Elec. Co. v. Daewoo Elecs. Corp.*, No. C 04-1830 CRB (JL), 2007 U.S. Dist. LEXIS 29782, at \*6–8 (N.D. Cal. Apr. 11, 2007); *GSI Group, Inc. v. Sukup Mfg. Co.*, No. 05-3011, 2007 U.S. Dist. LEXIS 18764, at \*5 (C.D. Ill. Mar. 16, 2007). But see *Day v. Consol. Rail Corp.*, 95 Civ. 968 (PKL), 1996 U.S. Dist. LEXIS 6596, at \*5 (S.D.N.Y. May 14, 1996) (holding that an expert employee may be viewed as “retained or specially employed” for the purpose of testifying when his job does not regularly involve giving testimony).

16. *Fielden v. CSX Transp., Inc.*, 482 F.3d 866, 869 (6th Cir. 2007) (determining that the treating physician who testified only as to his personal knowledge was not “retained or specially employed to provide expert testimony” and a Rule 26 report was therefore not required); *Mohney v. U.S.A. Hockey, Inc.*, 138 F. App’x 804, 810–11 (6th Cir. 2005) (finding that a treating physician may not testify on matters outside the scope of treatment).

17. See *infra* Part II.B (discussing *Prieto v. Malgor*, 361 F.3d 1313 (11th Cir. 2004); *Funai*, 2007 U.S. Dist. LEXIS 29782; *Day*, 1996 U.S. Dist. LEXIS 6596).

18. See *infra* Part II.B.

19. See *infra* Part II.

view, for now, is an interpretation requiring reports from employee experts and treating physicians who are retained in anticipation of litigation or who develop opinions outside the scope of treatment. This Note concludes that, in the future, Rule 26 should be revised and amended as proposed in Part III.

## I. HISTORY AND PURPOSE

### A. *History and Purpose of the Federal Rules of Civil Procedure*

In the nineteenth and early twentieth centuries there was little procedural uniformity in the U.S. courts.<sup>20</sup> State procedure was dominated by the British forms of action, and several jurisdictions maintained distinct equity and admiralty procedural processes.<sup>21</sup> The first major step toward procedural reform was with the Field Code of Civil Procedure of New York, which helped to close the chasm between actions in equity and at law.<sup>22</sup> In 1872, the U.S. Congress passed the Conformity Act, which required federal district courts to conform procedures to that of the state of the respective district.<sup>23</sup>

Equity and admiralty cases were not within the scope of the Conformity Act.<sup>24</sup> Consequently, the Conformity Act “balkanized” procedure in the district courts, defeating the ultimate purpose of uniformity.<sup>25</sup> The Act also “preserved the ‘art of pleadings,’ in which the selection of the correct form of action and a party’s pleading skills were as important to the outcome of a case as the merits.”<sup>26</sup> In 1934, Congress passed the Rules Enabling Act in response to pressure from an influential group of leaders from the legal community who pressed for uniformity in the federal courts and outcomes based on merit, rather than pleading skill.<sup>27</sup> Under the Rules Enabling Act,<sup>28</sup> the Congress delegated to the U.S. Supreme Court “the power to prescribe general rules of practice and procedure and rules of evidence for cases” in the federal courts.<sup>29</sup> In the same year, the Supreme Court appointed the Advisory Committee on the Federal Rules of Civil Procedure, charging the Committee with the duty to prepare a “unified system of general rules for cases in equity and actions at law” for the federal courts

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20. 1 James Wm. Moore et al., *Moore’s Federal Practice* § 1.02 n.1 (3d ed. 2007).

21. *Id.* § 1.02

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*; see Act of Jun 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2000)). See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015 (1982).

28. 28 U.S.C. § 2072 (2006); Fed. R. Civ. P. 1 advisory committee’s note; see also Burbank, *supra* note 27, at 1108–09.

29. 28 U.S.C. § 2072.

“so as to secure one form of civil action and procedure for both classes of cases.”<sup>30</sup>

In 1938,<sup>31</sup> the Federal Rules of Civil Procedure were promulgated pursuant to the Rules Enabling Act, abolishing the distinction between suits at law and in equity.<sup>32</sup> Rule 1 of the Federal Rules of Civil Procedure states, “These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty . . . . They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”<sup>33</sup> The words “and administered” were added in the 1993 amendments to Rule 1 so as to “recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay.”<sup>34</sup> This first Rule was intended to serve as guidance for all subsequent rules, and the Federal Rules of Civil Procedure as a whole were meant to streamline procedure within the federal courts.

#### B. *History and Purpose of Rule 26(a)(2)(B)*

Rule 26 began as one of several discovery rules that initially governed only pleadings.<sup>35</sup> The Rule took on its present form and importance in 1993 after a series of amendments to both the Federal Rules of Civil Procedure and *Daubert*. The original discovery rules of the Federal Rules of Civil Procedure “were a striking and imaginative departure from tradition.”<sup>36</sup> These rules encompassed various discovery provisions, but were scattered among Rules 26 through 37.<sup>37</sup> The Advisory Committee found it necessary to produce a “more coherent and intelligible pattern for the discovery rules.”<sup>38</sup> This objective was met with the 1970 and 1993 amendments.

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30. Advisory Comm. on Rules for Civil Procedure, Report, at iii (1937), available at <http://www.uscourts.gov/rules/Reports/CV04-1937.pdf>.

31. Fed. R. Civ. P. 26 advisory committee’s explanatory statement (1970) (“The discovery rules, as adopted in 1938, were a striking and imaginative departure from tradition.”); see also 28 U.S.C. app. at 641 (“The original Rules of Civil Procedure for the District Courts were adopted by order of the Supreme Court on Dec. 20, 1937, transmitted to Congress by the Attorney General on Jan. 3, 1938, and became effective on Sept. 16, 1938.”).

32. Fed. R. Civ. P. 1 advisory committee’s note (1966) (“This is the fundamental change necessary to effect unification of the civil and admiralty procedure. Just as the 1938 rules abolished the distinction between actions at law and suits in equity, this change would abolish the distinction between civil actions and suits in admiralty.”).

33. Fed. R. Civ. P. 1.

34. Fed. R. Civ. P. 1 advisory committee’s note (1993) (“As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.”).

35. Advisory Comm. on Rules for Civil Procedure, *supra* note 30, at 85.

36. Fed. R. Civ. P. 26 advisory committee’s explanatory statement (1970).

37. *Id.*

38. *Id.*

### 1. The 1970 Amendments

In 1970, the Federal Rules of Civil Procedure were amended, substantially and substantively changing the discovery rules.<sup>39</sup> Rules 26 through 37 were rearranged and transferred in order to “establish Rule 26 as a Rule governing discovery in general.”<sup>40</sup> While these amendments did expand discovery, discovery was still limited to “interrogatories demanding identification of the subject on which each expert would testify, the substance of the facts and opinions to be stated, and a summary of the grounds for each opinion.”<sup>41</sup> Furthermore, practice relating to expert witnesses developed differently in various regions of the country: in some states it was common to depose trial experts, but in other states depositions were abnormal.<sup>42</sup> While the 1970 amendments made the Rules more uniform, it was not until after 1993 that Rule 26 took on its current significance.

### 2. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

The 1993 Supreme Court case *Daubert* drastically changed evidentiary standards, affecting all federal rules governing admissibility of expert testimony and relevant discovery practices.<sup>43</sup> The plaintiffs in *Daubert* were born with birth defects, allegedly caused by Bendectin, an antinausea drug marketed by Merrell Dow Pharmaceuticals.<sup>44</sup> The plaintiffs claimed that their mothers’ use of the drug during pregnancy caused the birth defects.<sup>45</sup> Since no study had found a direct link between Bendectin and deformity in humans, the plaintiffs introduced testimony from expert witnesses based on live animal and test-tube studies and reanalysis of human statistical studies that showed the necessary causal link.<sup>46</sup>

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39. *Id.*

40. Fed. R. Civ. P. 26 advisory committee’s note (1970) (“A limited rearrangement of the discovery rules is made, whereby certain Rule provisions are transferred, as follows: Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing Rules 26(d), (e), and (f) are transferred to Rule 32. Revisions of the transferred provisions, if any, are discussed in the notes appended to Rules 30, 31, and 32. In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a Rule governing discovery in general.”).

41. Civil Rules Advisory Comm., Meeting Minutes 15 (Sept. 7–8, 2006), available at <http://www.uscourts.gov/rules/Minutes/CV09-2006-min.pdf>.

42. *Id.* It was also difficult to get experts to agree that their opinions were based on “a learned treatise.” *Id.*

43. See Paul F. Eckstein & Samuel A. Thumma, *Getting Scientific Evidence Admitted: The Daubert Hearing*, 24 Litig. 21 (1998); Linda Greenhouse, *Trial Judges Are Backed on Rulings on Scientists*, N.Y. Times, Dec. 16, 1997, at A25.

44. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 582 (1993).

45. *Id.*

46. *Id.* at 583.

The defendants argued that, under *Frye v. United States*,<sup>47</sup> the plaintiffs could not sustain their burden of proving causation since such scientific methods were not “generally accepted.”<sup>48</sup> The Supreme Court ruled that “the *Frye* test was superseded by the adoption of the Federal Rules of Evidence” and that Rule 702 of the Federal Rules of Evidence governed.<sup>49</sup> The Court determined that federal trial judges should be the “gatekeepers” of scientific or technical evidence.<sup>50</sup> Setting forth a two-part test, the Court held that expert testimony on scientific or technical evidence must both be relevant to the facts of the case at bar and reliable.<sup>51</sup> In fulfilling this “gatekeeping” role, judges should look to four main guidelines in considering whether an expert’s testimony is reliable: (1) whether the theory or technique can be and has been tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) whether there is a known or potential rate of error for a particular technique, and (4) whether there is widespread acceptance within the relevant scientific community.<sup>52</sup>

The Supreme Court explained that, should objections to evidence be raised, “the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.”<sup>53</sup> This type of evidentiary objection is most often raised in a motion in limine and is commonly called a *Daubert* motion.<sup>54</sup>

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47. 293 F. 1013 (D.C. Cir. 1923). The *Frye* court held that [j]ust when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

*Id.* at 1014.

48. *Daubert*, 509 U.S. at 583–84.

49. *Id.* at 587–88. Rule 702 provides that

[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

50. *Daubert*, 509 U.S. at 589 n.7. The dissent also agreed that Rule 702 created a gatekeeping role for judges. *Id.* at 600 (Rehnquist, C.J., dissenting) (“I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony.”).

51. *Id.* at 589, 594–95.

52. *Id.* at 593–95.

53. *Id.* at 592 (citations omitted).

54. 4 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence § 702.05 (Joseph M. McLaughlin ed., 2d ed. 2007); *see also* William W. Schwarzer, Management of

*Daubert* motions and the subsequent *Daubert* hearings highlight the importance of the current debate regarding Rule 26 reports. Judge William Schwarzer of the U.S. District Court for the Northern District of California explains that

[b]y requiring the parties to follow the disclosure procedure under Federal Rule of Civil Procedure 26(a)(2), the court will have before it the complete statement of the opinions to which the expert will testify and their factual basis. This material, supplemented by memoranda addressed to the evidentiary issues, will provide a helpful record for rulings under Rule 104(a).<sup>55</sup>

Moreover, *Daubert* hearings have become an “increasingly well-accepted practice of resolving reliability issues . . . whenever the admissibility of expert testimony is challenged and there are good grounds on both sides of the admissibility question, regardless of whether the trial court’s objective is to determine admissibility for trial or for other purposes.”<sup>56</sup>

Professor Margaret A. Berger of Brooklyn Law School predicted in 1994 that, “[a]lthough *Daubert* seems to be an opinion about evidence, and evidence is commonly thought of as the rules that apply at trial, *Daubert*’s greatest impact, especially in civil cases will be on pre-trial proceedings.”<sup>57</sup> In her article on *Daubert*, Berger discusses at great length the importance of in limine motions and proceedings,<sup>58</sup> and her prediction, it seems, has become reality: *Daubert* hearings have become “the most common method trial courts use to fulfill their gatekeeper function.”<sup>59</sup> Furthermore, Rule 26 reports are perhaps the single most important piece of evidence in a *Daubert* hearing.<sup>60</sup> Since the report must contain a “complete statement of all opinions to be expressed and the basis and reasons therefor,”<sup>61</sup> the report often serves as the cornerstone of reliability analysis under *Daubert*.<sup>62</sup>

### 3. The 1993 Amendments

Following *Daubert*, Rule 26 was amended to assist courts in regulating expert testimony according to the Federal Rules of Evidence.<sup>63</sup> The 1993

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Expert Evidence 29 (n.d.), available at [http://www.fjc.gov/public/pdf.nsf/lookup/3.case\\_mngt.pdf/\\$File/3.case\\_mngt.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/3.case_mngt.pdf/$File/3.case_mngt.pdf).

55. Schwarzer, *supra* note 54, at 30.

56. Weinstein & Berger, *supra* note 54, § 702.05.

57. Berger, *supra* note 1, at 1386.

58. *Id.* at 1373–76.

59. Weinstein & Berger, *supra* note 54, § 702.02.

60. *See, e.g.*, Eckstein & Thumma, *supra* note 43, at 24.

61. Fed. R. Civ. P. 26(a)(2)(B).

62. *Daubert* on the Web, [http://www.daubertontheweb.com/Rule%2026\(a\)\(2\)\(B\).htm](http://www.daubertontheweb.com/Rule%2026(a)(2)(B).htm) (last visited Jan. 24, 2008); *see also* Reed v. Binder, 165 F.R.D. 424, 429 n.9 (D.N.J. 1996) (finding Rule 26 reports “particularly helpful to the court in making rulings limiting or restricting expert testimony pursuant to Evidence Rules 104(a) and 702 and *Daubert v. Merrell Dow Pharmaceuticals*”).

63. Reed, 165 F.R.D. at 429 n.9.



amendments also served to eliminate the use of surprise expert opinions and to reduce litigation costs.<sup>64</sup> As amended, Rule 26 provides,

(a)(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. . . .

(b)(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.<sup>65</sup>

Under Rule 37, the consequences of violating Rule 26 are severe:

[Any] party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.<sup>66</sup>

The Advisory Committee explains that before the 1993 amendments, information disclosed under Rule 26 about the substance of expert testimony “was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness.”<sup>67</sup> Therefore, sanctions under

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64. *Id.* at 429 (citing *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir. 1995)); *see also supra* note 1 and accompanying text.

65. Fed. R. Civ. P. 26. Subsequent amendments to Rule 26 in 2000 and 2006 made no substantive changes to subsection 26(a)(2)(B). *See* Fed. R. Civ. P. 26 advisory committee’s note (2006); Fed. R. Civ. P. 26 advisory committee’s note (2000).

66. Fed. R. Civ. P. 37(c)(1).

67. Fed. R. Civ. P. 26(a)(2)(B) advisory committee’s note (1993).

Rule 37 now “provide[] an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed.”<sup>68</sup>

The 1993 amendments to Rule 26 were meant to “accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information.”<sup>69</sup> The Advisory Committee stipulated that Rule 26 should be “applied in a manner to achieve those objectives.”<sup>70</sup> The 1993 report requirement sought to “focus and expedite the deposition, and even avoid any need for a deposition in some cases.”<sup>71</sup> The Rule “imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement.”<sup>72</sup> Moreover, newly required expert reports ensure “that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses.”<sup>73</sup> Rule 26 therefore helps to “focus the discovery that is needed, and facilitate preparation for trial or settlement.”<sup>74</sup>

The addition of paragraph (a)(2)(B) in 1993 is significant insofar as it requires an expert report from any person identified as an expert witness<sup>75</sup> who is either “retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony.”<sup>76</sup> The plain meaning of the Rule provides that a report is not required from an expert unless he or she is retained or specially employed as an expert or is an employee of the party and regularly gives expert testimony.<sup>77</sup> The Advisory Committee note to Rule 26 provides some interpretive guidance, explaining that a “treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report.”<sup>78</sup> This Rule has been a source of sharp conflict in the federal courts because its plain meaning limits disclosure, thereby running counter to Rule 1.<sup>79</sup> As a result and as discussed below in Part II, courts have issued conflicting opinions as to the correct interpretation of Rule 26(a)(2)(B).

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68. *Id.*

69. Fed. R. Civ. P. 26(a) advisory committee’s note (1993).

70. *Id.*

71. Civil Rules Advisory Comm., *supra* note 41, at 15.

72. Fed. R. Civ. P. 26(a) advisory committee’s note (1993).

73. Fed. R. Civ. P. 26(a)(2) advisory committee’s note (1993).

74. Fed. R. Civ. P. 26(a)(1) advisory committee’s note (1993).

75. Fed. R. Civ. P. 26(a)(2)(A) (“In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.”).

76. Fed. R. Civ. P. 26(a)(2)(B).

77. *See infra* Part II.A.

78. Fed. R. Civ. P. 26(a)(2)(B) advisory committee’s note (1993).

79. *See infra* Part II.

## II. THE CONFLICTING INTERPRETATIONS OF RULE 26(a)(2)(B)

Federal courts are divided as to whether Rule 26 should automatically exempt from the report requirement experts who are not “retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony.”<sup>80</sup> Under a plain meaning interpretation of this Rule, experts who are employees of a party or treating physicians are not required to provide a Rule 26 report.<sup>81</sup> However, some courts have read the Rule to require expert employees and, in some circumstances, treating physicians to submit reports despite the seeming clarity of the Rule.<sup>82</sup>

The effect of the disagreement among the courts is that an employee expert in one circuit would be required to file a Rule 26 report, while in another circuit the same expert would be exempt from the reporting requirement. Similarly, some circuits are now requiring reports from treating physicians who develop opinions in preparation for trial or who testify outside the scope of their treatment.<sup>83</sup> Courts that read Rule 26 for its plain meaning find that any other interpretation would encroach on the legislative power to write the Rules. Alternatively, courts that broadly construe Rule 26(a)(2)(B) cite to public policy and the underlying purpose of the Rules, namely, that expert reports decrease the cost of litigation and eliminate unfair surprise; some rely on the importance of a Rule 26 report within the context of *Daubert* obligations. This part examines the growing rift between and within the federal circuits.

### A. Courts That Adhere to the Plain Meaning of the Rule

Some courts interpret Rule 26 for its plain meaning, giving effect to the normal, everyday usage of the words in the Rule.<sup>84</sup> Proponents of the plain meaning doctrine argue that when the text of a rule or statute is clear and unambiguous, courts must apply the plain meaning of the statute.<sup>85</sup> Justice Antonin Scalia is the most prominent supporter of the plain meaning doctrine, though the Supreme Court has taken no majority position on whether the Federal Rules of Civil Procedure must be read for their plain

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80. Fed. R. Civ. P. 26(a)(2)(B); *see infra* Part II.

81. Fed. R. Civ. P. 26(a)(2)(B); *see infra* Part II.A.

82. *See infra* Part II.B.

83. *See infra* Part II.B.

84. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 656–60 (1990); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 Vand. L. Rev. 533, 543 (1992); *see also* Black’s Law Dictionary 1188 (8th ed. 2004) (defining the plain meaning rule as the “rule that if a writing, or a provision in a writing, appears to be unambiguous on its face, its meaning must be determined from the writing itself without resort to any extrinsic evidence”).

85. Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 Hastings L.J. 1039, 1074 (1993).

meaning.<sup>86</sup> While the U.S. Court of Appeals for the Tenth Circuit is the only circuit court to determine that Rule 26(a)(2)(B) should be interpreted according to its plain meaning, several district courts in other circuits have followed suit.

### 1. The Tenth Circuit

In *Watson v. United States*,<sup>87</sup> the Tenth Circuit determined that Rule 26 should be interpreted according to the plain meaning of the text, thereby automatically exempting any employee expert from the requirements of submitting an expert report. In *Watson*, the guardian of an incapacitated federal prisoner sued the United States under the Federal Tort Claims Act, alleging that the prisoner received negligent care, and that such negligence was the proximate cause of his incapacitation.<sup>88</sup> The clinical director at the prison testified at trial, but was not required to submit an expert report before taking the stand.<sup>89</sup> The plaintiff argued that it was unfair to allow an expert to testify without first providing advance notice of his opinions in an expert report that complied with Rule 26(a)(2)(B).<sup>90</sup> She also explained that at his deposition, the clinical director changed his position on various issues, including whether he was qualified to testify as an expert and whether he had knowledge of the national standard of medical care.<sup>91</sup>

The court acknowledged the policy considerations, weighing them each in turn:

On one hand, the rulemakers were clearly concerned about the fulsome and efficient disclosure of expert opinions when they adopted the report requirement for most cases and experts. On the other hand, it is apparent that the rulemakers did not think reports should be required in all cases and seemed concerned, for example, about the resources that might be diverted from patient care if treating physicians were required to issue expert reports as a precondition to testifying.<sup>92</sup>

The court found this section of the Advisory Committee notes particularly persuasive:

The requirement of a written report in paragraph (2)(B) . . . applies *only* to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example,

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86. *Id.* Judge Karen Nelson Moore of the U.S. Court of Appeals for the Sixth Circuit argues that the U.S. Supreme Court has been leaning toward a “plain meaning approach” in analyzing the Federal Rules of Civil Procedure. *Id.* at 1039.

87. 485 F.3d 1100 (10th Cir. 2007).

88. *Id.* at 1102.

89. *Id.* at 1105–07.

90. *Id.* at 1107.

91. *Id.* at 1105, 1106 n.3.

92. *Id.* at 1107 (citation omitted).

can be deposed or called to testify at trial without any requirement for a written report.<sup>93</sup>

Holding that a report was not required by the plain meaning of Rule 26,<sup>94</sup> the court found that since the Rule “focuses on those who must file an expert report, by exclusion it contemplates that some persons are not required to file reports and that these include individuals who are employed by a party and do not regularly give expert testimony.”<sup>95</sup> Therefore, the court held the clinical director of the prison was not required to submit a report.<sup>96</sup> The court did concede that “the requirement of an expert report has advantages,”<sup>97</sup> but found that “it is our office to apply, not second guess, congressionally approved policy judgments, and that judgment, delineated by the plain terms of Rule 26, did not include a requirement of a report in this case.”<sup>98</sup> The court then went on to say, “If a different balance is to be struck with respect to the costs and benefits of expert reports, it must be accomplished through the mechanisms approved by Congress.”<sup>99</sup>

When *Watson* was before the U.S. District Court for the Western District of Oklahoma, that court found that, even though the clinical director intended to testify about “the delivery of care in a prison setting and . . . give his opinion about whether the United States met that standard of care when it treated” the decedent, the clinical director was not required to submit an expert report under the “plain language of Rule 26.”<sup>100</sup> The district court reasoned that since the plaintiff would have the opportunity to inquire into the clinical director’s opinions and reasons for such opinions at the deposition, the absence of a Rule 26 expert report was not necessarily unjust.<sup>101</sup>

This decision is not an anomaly. The Tenth Circuit recently reaffirmed its plain meaning position in *Nestor Commercial Roofing v. American Builders and Contractors Supply Co.*<sup>102</sup> Citing *Watson*, the court held that a certified public accountant who was an employee of the plaintiff was not subject to the report requirement of Rule 26 since he was not “retained or specially employed to provide expert testimony” for the case.<sup>103</sup> Again, the Tenth Circuit read the Rule strictly for its plain meaning, automatically excusing an expert from providing a report because he was an employee of a party in the case.

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93. *Id.* (quoting Fed. R. Civ. P. 26(a)(2)(B) advisory committee’s note (1993)).

94. *Id.* at 1107–08.

95. *Id.* at 1107.

96. *Id.*

97. *Id.* at 1107 n.4.

98. *Id.*

99. *Id.* at 1107–08.

100. *Watson v. United States*, No. CIV-04-537-C, 2005 U.S. Dist. LEXIS 9242, at \*3 (W.D. Okla. May 5, 2005).

101. *Id.*

102. No. 06-6290, 2007 U.S. App. LEXIS 23829 (10th Cir. Oct. 10, 2007).

103. *Id.* at \*11.

Furthermore, in 2006, a district court in the Tenth Circuit issued a ruling based on a plain meaning interpretation of Rule 26 in *Adams v. Gateway, Inc.*<sup>104</sup> There, the U.S. District Court for the District of Utah ruled that an employee expert was not required to submit a report according to the plain language of the Rule.<sup>105</sup> Gateway allegedly infringed on a patent held by Adams.<sup>106</sup> Phillip Adams, a plaintiff in the case, was both an expert on the technical subject matter of the patents and an employee of Adams & Associates, a coplaintiff in the case.<sup>107</sup> The court ruled that, when an expert employee is “regularly involved in litigation, it is fair to impose the burden of the report because that expert witness, like one specially employed or retained, is in the business of regularly testifying and can become familiar with the routine of report preparation.”<sup>108</sup> However, the court reasoned, it would be unfair to require a report from an employee expert like Adams who is not accustomed to preparing such reports.<sup>109</sup>

Such a report might be a heavy burden for a technician or manager familiar with a sophisticated process or practice, but unaccustomed to the burden of communication. For such a witness, even the experience of testimony and deposition would be out of the norm. A report might be beyond the employee’s ability. But for an employee who is essentially an “in-house” expert witness, the burden of a report is not great and prevents use of employment status to protect those who are truly “professional” witnesses.<sup>110</sup>

Citing *Navajo Nation v. Norris*,<sup>111</sup> the court found that the plain language of Rule 26 did not require a report from an employee expert.<sup>112</sup> The court did acknowledge that “[i]t would be nice for opposing parties if the policy of full disclosure by report were absolute,” but then concluded “that is not what the Rule says.”<sup>113</sup>

## 2. Federal District Courts

### a. District Courts in the First Circuit

Several circuits have not ruled on this question, resulting in some district courts having issued plain meaning rulings similar to *Watson*. In the First Circuit, the U.S. District Court for the District of Rhode Island has held that employee experts are automatically exempt from the report requirement of

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104. No. 2:02-CV-106 TS, 2006 U.S. Dist. LEXIS 14413 (D. Utah Mar. 10, 2006).

105. *Id.* at \*11–16.

106. *Adams v. Gateway, Inc.*, No. 2:02-CV-106 TS, 2005 U.S. Dist. LEXIS 43467, at \*3 (D. Utah Nov. 2, 2005). See *id.* for a more in-depth factual background.

107. *Adams*, 2006 U.S. Dist. LEXIS 14413, at \*4.

108. *Id.* at \*9–10.

109. *Id.* at \*10.

110. *Id.*

111. 189 F.R.D. 610 (E.D. Wash. 1999); see *infra* notes 125–136 and accompanying text (discussing the case).

112. *Adams*, 2006 U.S. Dist. LEXIS 14413, at \*12–13.

113. *Id.* at \*13.

Rule 26. In *Bowling v. Hasbro, Inc.*,<sup>114</sup> two employees of the defendant Hasbro, Inc., sought to testify as experts.<sup>115</sup> The plaintiff moved to preclude this testimony, or alternatively, to compel the production of Rule 26 reports.<sup>116</sup> Citing *McCulloch v. Hartford Life and Accident Insurance Co.*,<sup>117</sup> the plaintiff argued that the court should require reports from the employee experts for public policy reasons.<sup>118</sup> Relying on *Navajo Nation*, the defendant countered that the plain language of the Rule should be strictly construed because if the drafters had intended to impose a reporting requirement on employee experts, they would have done so.<sup>119</sup> After reviewing both lines of cases, the court found the plain meaning interpretation to be more persuasive, holding,

While a Rule requiring full disclosure by report for all experts may be desirable from a policy standpoint, the plain language of the Rule provides otherwise. Parties should have the certainty that the Court will construe the Federal Rules as written and not have to guess as to which line of conflicting authority the Court might follow in construing an unambiguous procedural Rule.<sup>120</sup>

b. *District Courts in the Seventh Circuit*

The U.S. District Court for the Central District of Illinois followed a similar line of reasoning in *GSI Group, Inc. v. Sukup Manufacturing Co.*<sup>121</sup> The defendant, Sukup Manufacturing, attempted to compel the production of privileged documents and in doing so argued that all materials relied on in writing a Rule 26 expert report should be produced.<sup>122</sup> The court held that since reports, even though submitted, were not required by these expert employees, the privileged material could not be compelled.<sup>123</sup> In concluding that employee experts did not have to prepare an expert report, the district court looked to other circuits for guidance as there was no decision on the issue in the U.S. Court of Appeals for the Seventh Circuit. The district court first rejected the broad interpretation offered by the U.S. District Court for the Southern District of New York in *Day v. Consolidated Rail Corp.*, determining that the decision ignored “the plain meaning of the words of the Rule.”<sup>124</sup> The *Sukup* court then found agreement with the

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114. No. 05-229S, 2006 U.S. Dist. LEXIS 58910 (D.R.I. Aug. 10, 2006).

115. *Id.* at \*2.

116. *Id.* at \*2–3.

117. 223 F.R.D. 26 (D. Conn. 2004); *see infra* notes 206–13 and accompanying text.

118. *Bowling*, 2006 U.S. Dist. LEXIS 58910, at \*3.

119. *Id.* at \*4–5 (citing *Navajo Nation v. Norris*, 189 F.R.D. 610, 613 (E.D. Wash. 1999)).

120. *Id.* at \*5–6 (citations omitted).

121. No. 05-3011, 2007 U.S. Dist. LEXIS 18764 (C.D. Ill. Mar. 16, 2007).

122. *Id.* at \*4.

123. *Id.* at \*4–5.

124. *Id.* at \*6 n.1 (citing *Day v. Consol. Rail Corp.*, No. 95 Civ. 968 (PKL), 1996 U.S. Dist. LEXIS 6596 (S.D.N.Y. May 14, 1996)).

District of Rhode Island in *Bowling*, holding that the plain language of the Rule did not require employee experts to prepare Rule 26 reports.<sup>125</sup>

c. *District Courts in the Ninth Circuit*

In *Navajo Nation*, the U.S. District Court for the Eastern District of Washington decided that employee experts were automatically exempt from providing a report under the plain meaning of the Rule.<sup>126</sup> In *Navajo Nation*, three employees of the plaintiff sought to testify about tribal culture and traditions.<sup>127</sup> The plaintiff argued that since the duties of the tribal employees did not regularly require giving expert testimony, they were not required to submit Rule 26 reports.<sup>128</sup> Citing to *Day*, the defendants argued that this reasoning was inconsistent with reducing unfair surprise at trial, a major objective of the Federal Rules of Civil Procedure.<sup>129</sup>

The district court rejected the defendants' argument and the reasoning in *Day*, finding that the plain language of the Rule conflicted with that court's construction.<sup>130</sup> While *Day* determined that the employee expert could have been considered as "retained or specially employed," the expert thus falling within the purview of Rule 26,<sup>131</sup> the *Navajo Nation* court found the *Day* construction was akin to rewriting the Rule.<sup>132</sup> The court then went on to say that, "[i]f the drafters had intended to impose a report obligation on all employee-experts, they could have and would have done so . . . . [But] the plain language of FRCP 26(a)(2)(B) requires the report only of experts in the two explicit categories stated."<sup>133</sup> The court in *Navajo Nation* determined that the Advisory Committee did not adequately explain why some experts were seemingly exempt from Rule 26(a)(2)(B) and that the "absence of such an explanation together with the plain language of the Rule make[s] [*Day*] unpersuasive as contrary to the plain language of FRCP 26(a)(2)(B)."<sup>134</sup> While conceding that requiring a report from employee experts would "admittedly decrease the time and expense of discovering information,"<sup>135</sup> the court determined that the plain meaning of the text should prevail, allowing employee experts to testify without providing an expert report.<sup>136</sup>

This decision has been questioned by other district courts, including one in the Ninth Circuit. As discussed in Part II.B, the District Court for the

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125. *Id.* at \*5.

126. *Navajo Nation v. Norris*, 189 F.R.D. 610, 613 (E.D. Wash. 1999).

127. *Id.* at 611.

128. *Id.* at 612.

129. *Id.* at 611–12 (citing *Day*, 1996 U.S. Dist. LEXIS 6596, at \*2).

130. *Id.* at 611–13.

131. *Id.* at 612.

132. *Id.*

133. *Id.* at 613. In addition, the court noted that, "[i]f a particular District believes such an obligation is wise, it may impose the report requirement on all employee-experts." *Id.*

134. *Id.*

135. *Id.* at 612.

136. *Id.* at 613.



Northern District of California has recently ruled that the plain meaning construction of Rule 26 in *Navajo Nation* should not be followed.<sup>137</sup> Rather, that court found that a broader interpretation serves the purposes of the Federal Rules of Civil Procedure and therefore reports should be required from employee experts.<sup>138</sup>

### 3. Support for Plain Meaning

In addition to the Tenth Circuit and various district courts, some commentators in the legal community have articulated support for a plain meaning interpretation. Supporters of the plain meaning doctrine argue that the Federal Rules of Civil Procedure should be interpreted using the ordinary language or plain meaning of the words that constitute the Rule.<sup>139</sup> Professor Robert S. Summers of Cornell Law School argues that a plain meaning (or formalist) approach should prevail.<sup>140</sup> He asserts that such an approach “serves the values of legitimacy in lawmaking, and of representative democracy” since Congress votes “‘on the language of a bill,’ and that language is often ordinary language.”<sup>141</sup> He argues that judicial interpretations that utilize plain meaning can serve to protect the

reliance on published law, and thus . . . the Rule of law itself. In following ordinary meaning, the court may be (and often will be) protecting the interests of those citizens who appropriately relied on such meaning. To subject them to a special meaning based on unenacted legislative history may be to jerk the rug from beneath them. This is not only unfair, but disserves the rule of law as well.<sup>142</sup>

Furthermore, Professor Summers argues that “judicial adherence to the ordinary meaning of ordinary words in the statute restricts the opportunity for strong-willed judges to substitute their own personal political views for those of the legislature with respect to ends and means.”<sup>143</sup>

Justice Scalia and some courts agree with Professor Summers, finding that the benefits of a bright-line rule far outweigh any benefit that can come from scrutinizing legislative intent.<sup>144</sup> Moreover, supporters of the plain meaning interpretation find that employees are often experts at technical or scientific matters, but are perhaps not capable of preparing a Rule 26 report (or would find that doing so would be a heavy burden).<sup>145</sup> One participant at an Advisory Committee meeting noted “that Rule 26(a)(2)(B) was in fact

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137. *See* *Funai Elec. Co. v. Daewoo Elecs. Corp.*, No. C 04-1830 CRB (JL), 2007 U.S. Dist. LEXIS 29782, at \*8–9 (N.D. Cal. Apr. 11, 2007); *see also infra* notes 229–34 and accompanying text.

138. *See also infra* notes 229–34 and accompanying text.

139. *See, e.g.*, Farber, *supra* note 84, at 543 (citing Robert S. Summers, *Judge Richard Posner’s Jurisprudence*, 89 Mich. L. Rev. 1302, 1320 (1991) (book review)).

140. Summers, *supra* note 139, at 1316–25.

141. *Id.* at 1320 (citation omitted).

142. *Id.* at 1321 (citation omitted).

143. *Id.* at 1320 (citation omitted).

144. *See* Moore, *supra* note 85, at 1074; *see also supra* note 118 and accompanying text.

145. *See supra* text accompanying note 108.

drafted with an eye to excluding the drill press operator from the report disclosure requirement.”<sup>146</sup> Some courts reason that, regardless of whether they agree with the outcome, the plain meaning of the words of Rule 26 simply do not require a report from an employee expert or treating physician. But not all courts agree with this construction. Several federal courts, discussed in Part II.B, have construed the Rule liberally, finding that there should be no automatic exemptions from the expert report requirement.

### B. Courts That Broadly Construe Rule 26(a)(2)(B)

Several federal circuit courts and district courts have interpreted Rule 26 to require reports from persons other than those “retained or specially employed to provide expert testimony in the case or . . . whose duties as the party’s employee regularly involve giving expert testimony.”<sup>147</sup> These courts have looked beyond the language of the Rule, relying on the Advisory Committee notes and the underlying purpose of the Federal Rules of Civil Procedure for guidance.<sup>148</sup> The Supreme Court has determined that, “in ascertaining” the meaning of the Federal Rules, “the construction given to them by the Committee is of weight”<sup>149</sup> and that the explanatory statements of the Advisory Committee should be considered when interpreting a Rule’s meaning.<sup>150</sup> The Advisory Committee notes, therefore, “provide something akin to a legislative history of the Rules.”<sup>151</sup> The U.S. Court of Appeals for the Third, Sixth, and Eleventh Circuits have all issued rulings that support a liberal interpretation of Rule 26, requiring reports from employee experts and in some circumstances treating physicians.

#### 1. The Third Circuit

In *Rodriguez v. Town of West New York*,<sup>152</sup> the Third Circuit ruled that a treating physician, under certain circumstances, was required to prepare a Rule 26 report. The plaintiff brought an action against the town and its officials for claims of unreasonable search and seizure and use of excessive force during an arrest for alleged drunk driving.<sup>153</sup> The plaintiff was injured during the arrest and sought to introduce his physician as an

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146. Civil Rules Advisory Comm., *supra* note 41, at 18.

147. Fed. R. Civ. P. 26(a)(2)(B).

148. *Reed v. Binder*, 165 F.R.D. 424, 427 (D.N.J. 1996) (citing *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 444 (1946) (“[When] interpreting the Rules [of Civil Procedure], the Advisory Committee Notes, though not conclusive, are a very important source of information and should be given considerable weight. They provide something akin to a legislative history of the Rules.”)); *see also* 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1029 (3d ed. 2002).

149. *Murphree*, 326 U.S. at 444.

150. *Id.*

151. *Reed*, 165 F.R.D. at 427.

152. 191 F. App’x. 166 (3d Cir. 2006).

153. *Id.* at 167.

expert.<sup>154</sup> The district court excluded the physician's testimony on the grounds that he was required to submit an expert report under Rule 26(a)(2)(B).<sup>155</sup> The district court determined that since the treating physician had first seen the plaintiff two years after the incident and just a few months before filing the complaint, he was "retained in anticipation of litigation" and was therefore, despite the Advisory Committee notes, required to file an expert report.<sup>156</sup> The Third Circuit affirmed the decision, finding no abuse of discretion.<sup>157</sup>

## 2. The Sixth Circuit

The Sixth Circuit, like the Third Circuit, has required some treating physicians to provide expert reports. In *Mohney v. U.S.A. Hockey, Inc.*,<sup>158</sup> the plaintiff purchased and used an ice hockey helmet made by the defendant.<sup>159</sup> While wearing the helmet, the plaintiff was checked into the boards during an attempt to prevent an icing play.<sup>160</sup> He sustained severe head and spinal injuries that left him paralyzed.<sup>161</sup> The plaintiff filed a lawsuit claiming that the helmet was defective and caused his head to rotate in such a manner that the crown of his head absorbed the force of the blow.<sup>162</sup> The defendant argued that the plaintiff hit the boards with the crown of his head because his head was angled downward, and not because of a defect in the helmet.<sup>163</sup>

The plaintiff submitted an affidavit signed by his treating physician that included the physician's conclusions that the helmet caused the plaintiff's injuries.<sup>164</sup> The court held that paragraphs in the affidavit relating to causation should be excluded since such opinions were formulated after the physician reviewed a videotape of the hockey accident.<sup>165</sup> The court held it dispositive that the physician formed his opinions in anticipation of litigation and not during the course of treatment.<sup>166</sup> This decision, in effect, required an expert report from a treating physician who sought to render an opinion on matters outside the scope of his treatment of the patient.

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154. *Id.* at 168.

155. *Id.* at 169.

156. *Id.*

157. *Id.*

158. 138 F. App'x 804 (6th Cir. 2005).

159. *Id.* at 806.

160. "Icing" occurs when a player hits the puck from behind one goal line across the ice to beyond the other goal line. See NHL.com, NHL Rulebook: Rule 65, <http://www.nhl.com/hockeyu/rulebook/rule65.html> (last visited Feb. 28, 2008). In most leagues, as soon as the puck crosses the line the play is stopped unless a player on offense touches the puck first. *Id.* Icing leads to high-speed races and crashing into the boards, as occurred in *Mohney*. See *id.*

161. *Mohney*, 138 F. App'x at 806.

162. *Id.* at 807.

163. *Id.*

164. *Id.* at 810.

165. *Id.*

166. *Id.* at 810–11.

Although the 1993 Advisory Committee note explicitly says that a treating physician does not have to provide an expert report,<sup>167</sup> the Sixth Circuit has consistently required reports from physicians who testify on matters outside the scope of their personal treatment of the patient.<sup>168</sup>

*Fielden v. CSX Transportation, Inc.*<sup>169</sup> highlights the distinction made by the Sixth Circuit. In *Fielden*, the plaintiff brought suit under the Federal Employers Liability Act against his employer, an interstate railroad company.<sup>170</sup> The plaintiff alleged that the use of a plate jack at work caused his severe and debilitating carpal tunnel syndrome.<sup>171</sup> The plaintiff's physician intended to testify on the issue of causation, but the district court excluded the physician's testimony on the grounds that the physician was required to submit an expert report under Rule 26(a)(2)(B).<sup>172</sup> Finding no genuine issue of material fact, the court granted summary judgment for the defendant.<sup>173</sup>

The court of appeals reversed the district court's decision,<sup>174</sup> reasoning that, since the treating physician was not "retained or specially employed to provide expert testimony,"<sup>175</sup> a report was not required. Moreover, the court determined that a "straightforward reading of the Rule" was consistent with the Advisory Committee note that allows for a treating physician to testify at trial without submitting a report.<sup>176</sup>

The Sixth Circuit in *Fielden* distinguished the case from *Mohney*, finding that a report was required in *Mohney* because the physician in that case, unlike the physician in *Fielden*, developed his opinion on causation after reviewing a videotape of the accident in preparation for trial.<sup>177</sup> "In such circumstances," the court found, "the treating physician is acting like the retained expert who normally reviews materials that the parties provide."<sup>178</sup> *Mohney* was thus distinguishable from *Fielden*, where the physician formed his opinion on causation at the time of treatment and not in preparation for trial or at the request of counsel.<sup>179</sup> Therefore, the treating physician was not "retained or specially employed to provide expert testimony in the case"

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167. Fed. R. Civ. P. 26 advisory committee's note (1993).

168. *Id.*; see also *Ridder v. City of Springfield*, 109 F.3d 288 (6th Cir. 1997).

169. 482 F.3d 866 (6th Cir. 2007).

170. *Id.* at 867.

171. *Id.* at 867–68. A plate jack is a machine that jacks up a rail to permit a railroad equipment operator to slide a tie plate underneath. *Id.* Plaintiff sought to show that, during the normal course of operation, a plate jack vibrates and pounds violently enough that it could cause carpal tunnel syndrome. *Id.*

172. *Id.* at 867.

173. *Id.* at 869.

174. *Id.* at 866, 869.

175. *Id.* at 869 n.2 (quoting Fed. R. Civ. P. 26(a)(2)(B)).

176. *Id.* at 869 ("[The] Advisory Committee Notes also support the conclusion that *Fielden* did not need to file an expert report from Dr. Fischer. The Note to Rule 26 states that '[a] treating physician . . . can be deposed or called to testify at trial without any requirement for a written report.'" (citation omitted)).

177. *Id.* at 871.

178. *Id.* at 872.

179. *Id.* at 869.

and was required to prepare a report. The *Mohney* and *Fielden* decisions depart from the plain meaning of the Rule and the Advisory Committee's note, creating a line of reasoning in the Sixth Circuit whereby a treating physician who forms his or her opinion during the course of treatment does not have to provide a Rule 26 report, but the same physician who forms her opinion in preparation for trial would be required to provide a report.

### 3. The Eleventh Circuit

The Eleventh Circuit, like the Third and Sixth Circuits, has rejected a strict plain meaning interpretation of Rule 26, finding that no expert is automatically exempt from the report requirement. In *Prieto v. Malgor*,<sup>180</sup> Florentino Prieto was arrested for driving with a suspended license, and in the course of his arrest and detention was punched in the face by one of the two arresting officers.<sup>181</sup> The injuries caused impaired vision and "significant psychiatric problems."<sup>182</sup> Prieto claimed the assault was unprovoked, while the officers maintained that Prieto attacked them with his belt and that they acted in self-defense.<sup>183</sup> Prieto filed suit against the two police officers and Miami-Dade County, alleging excessive force and battery.<sup>184</sup>

At trial, the defendants introduced Ivan Rodriguez as an expert on the use of deadly force and police reactionary procedure.<sup>185</sup> Rodriguez was employed by the Miami-Dade Police Department to train officers on the use of force.<sup>186</sup> The plaintiff objected, arguing that Rodriguez did not submit an expert report as required by Rule 26(a)(2)(B),<sup>187</sup> but the district court allowed Rodriguez to testify, seemingly in agreement with the defendants' argument that reports were never required from employee experts according to the plain meaning of the Rule.<sup>188</sup> Prieto died in 2001, and his brother represented his estate before the court of appeals.<sup>189</sup>

The Eleventh Circuit reversed the district court's ruling, finding that Rodriguez, who was employed by the City and whose job did not require that he regularly give expert testimony, must still file an expert report prior to testifying.<sup>190</sup> The court found that, because he simply reviewed materials in preparation for trial and had no personal knowledge of the case,

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180. 361 F.3d 1313 (11th Cir. 2004).

181. *Id.* at 1316. It was uncontested that a police officer struck Florentine Prieto twice in the face. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 1315.

185. *Id.* at 1316–17.

186. *Id.* at 1316.

187. *Id.* at 1316–17.

188. *Id.* at 1317.

189. *Id.* at 1316 n.1.

190. *Id.* at 1318–19. After determining that a report was required under Rule 26, the decision was nonetheless affirmed because the issue was waived at trial. *Id.* at 1319.

Rodriguez functioned “exactly as an expert witness normally does.”<sup>191</sup> Therefore, the court required him to file a report consistent with Rule 26(a)(2)(B).<sup>192</sup> Furthermore, the court determined that “allowing a blanket exception for all employee expert testimony would ‘create a category of expert trial witness[es] for whom no written disclosure is required’ and should not be permitted.”<sup>193</sup> These decisions of the Third, Sixth, and Eleventh Circuits, interpreting Rule 26 broadly, have been echoed in the district courts of other circuits that do not have a clear position on the issue.

#### 4. Federal District Courts

##### a. *Districts Courts in the Second Circuit*

In *Day*, the U.S. District Court for the Southern District of New York held that even though an expert for the defendant was an employee of Consolidated Rail, he was still required to submit a report in accordance with Rule 26.<sup>194</sup> The expert intended to testify on track inspection requirements,<sup>195</sup> and the defendant argued that, since the expert’s job at Consolidated Rail did not “regularly involve giving expert testimony,” the expert did not need to comply with the report requirement.<sup>196</sup> The district court found the interpretation proffered by the defendant created “a distinction seemingly at odds with the evident purpose of promoting full pre-trial disclosure of expert information.”<sup>197</sup> The court further explained that the defendant’s reasoning would lead to the creation of an entire category of expert witnesses “for whom no written disclosure is required.”<sup>198</sup> The court concluded that this categorical and automatic exemption was “a result plainly not contemplated by the drafters of the current version of the rules and not justified by any articulable policy.”<sup>199</sup> The court ruled that an automatic exemption from the report requirement should not be allowed even though it was consistent with the plain meaning of Rule 26.<sup>200</sup>

In reaching this conclusion, the Southern District underscored the importance of the Advisory Committee notes and looked to them for guidance. The court determined that the notes to Rule 26 did not explicitly state or imply that Rule 26(a)(2)(B) should be applied only to certain categories of experts.<sup>201</sup> Rather, the notes imposed broad disclosure

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191. *Id.* at 1318–19.

192. *Id.* at 1319.

193. *Id.* at 1318 (quoting *Day v. Consol. Rail Corp.*, 95 Civ. 968 (PKL), 1996 U.S. Dist. LEXIS 6596, at \*2 (S.D.N.Y. May 14, 1996)).

194. *Day*, 1996 U.S. Dist. LEXIS 6596, at \*7.

195. *Id.* at \*2.

196. *Id.* at \*3–4.

197. *Id.* at \*4.

198. *Id.*

199. *Id.* (citations omitted).

200. *See id.*

201. *Id.* at \*4–5.

requirements on trial experts.<sup>202</sup> However, the court did recognize that Rule 26(b)(4)(A)<sup>203</sup> appeared to exempt some experts, such as treating physicians, from the report requirement, and found that reasons for requiring a report from these experts were “less compelling” and “may unfairly burden a non-party who is appearing principally because he or she witnessed certain events relevant to the lawsuit.”<sup>204</sup>

Finding “little justification for construing the rules as excusing the report requirement,” the court then extended the Rule so that it applied to the employee expert in question.<sup>205</sup> The court reasoned that, because the expert’s duties as an employee do not regularly involve giving expert testimony, “he may fairly be viewed as having been ‘retained’ or ‘specially employed’ for that purpose.”<sup>206</sup>

The U.S. District Court for the District of Connecticut ruled similarly in *McCulloch*. The defendant scheduled three employee experts to testify on the proper procedure for handling insurance claims—none having filed a Rule 26 expert report.<sup>207</sup> The plaintiff asserted that these experts were merely being used to rebut testimony of her expert witness, and since they would be acting outside the scope of employment, they were “retained or specially employed” within the meaning of Rule 26(a)(2)(B) as interpreted by the court in *Day*.<sup>208</sup> The plaintiff argued that it would be unfair to require her experts to provide reports to the defendant, but not require the same from the defendant’s experts.<sup>209</sup> She argued further that the benefit the defendant garnered from her expert’s report amounted to unfair prejudice, since she would incur the added expense of deposing the defendant’s expert employees without the benefit of an expert report.<sup>210</sup> Citing *Navajo Nation*, the defendant responded that the plain language of Rule 26(a)(2)(B) provided that employee experts were exempt from the report requirement.<sup>211</sup> The defendant further argued that the plaintiff already had the opportunity to depose the witnesses and could even depose them again.<sup>212</sup> The court agreed with the plaintiff, ruling that, in this case, reports were required from the employee experts, and that “to find otherwise would risk encouraging corporate defendants to attempt to evade

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202. *Id.*

203. Rule 26(b)(4)(A) states that “[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.” Fed. R. Civ. P. 26(b)(4)(A).

204. *Day*, 1996 U.S. Dist. LEXIS 6596, at \*6.

205. *Id.* at \*7.

206. *Id.*

207. *McCulloch v. Hartford Life & Accident Ins. Co.*, 223 F.R.D. 26, 27–28 (D. Conn. 2004).

208. *Id.* at 28.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

the report requirement by designating its own employees” as expert witnesses.<sup>213</sup>

While the Second Circuit has yet to rule directly on the Rule 26 expert issue, it indicated in *Bank of China v. NBM LLC*<sup>214</sup> that if the issue were before the court it would apply the plain meaning of Rule 26. In *Bank of China*, the defendants engaged in a scheme to defraud the Bank of China of several million dollars.<sup>215</sup> The defendants failed to properly disclose the identity of a key expert who offered specialized knowledge about international banking transactions.<sup>216</sup> With Judge Shira A. Scheindlin of the Southern District of New York sitting by designation, the Second Circuit found that the expert testimony should have been excluded.<sup>217</sup> In a footnote, the opinion also addressed the Rule 26 report requirement, though not at issue in the case:

Notably, although defendants were entitled to *notice*, pursuant to Rule 26(a)(2)(A), that Huang would testify as an expert, they were not entitled to an *expert report* under Rule 26(a)(2)(B). This Rule only requires . . . “a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony” to prepare a signed written report. Where the witness is not specially retained or employed to give expert testimony, or does not regularly give expert testimony in his or her capacity as an employee, no expert report is required.<sup>218</sup>

Though *Bank of China* only contains dicta on the Rule 26 report requirement—and is therefore not binding—this language is important because it is the first time the Second Circuit has addressed the issue. Interestingly, the Second Circuit chose not to discuss *Day*, perhaps the most cited case for its discussion of Rule 26(a)(2)(B) among courts that both adopt and reject its rationale.<sup>219</sup>

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213. *Id.*

214. 359 F.3d 171 (2d Cir. 2004).

215. *Id.* at 174.

216. *Id.* at 182.

217. *Id.* at 183.

218. *Id.* at 182 n.13 (citing *Lewis v. Triborough Bridge & Tunnel Auth.*, No. 97 Civ. 0607, 2001 WL 21256, at \*1 (S.D.N.Y. Jan. 9, 2001) (“It is well established that Fed.R.Civ.P. 26(a)(2) only requires a written report for a witness retained or specially employed to provide expert testimony in the case, or whose duties as a party’s employee regularly involve giving expert testimony.”); *Kent v. Katz*, No. 2:99 Civ. 189, 2000 WL 33711516, at \*1 (D. Vt. Aug. 9, 2000) (“The structure of Rule 26(a)(2) provides a clear distinction between the retained class of experts and the unretained class of experts . . . . This distinction protects experts from preparing reports when they are not retained to do so and when it is outside the scope of their regular duties.”); *Peck v. Hudson City Sch. Dist.*, 100 F. Supp. 2d 118, 121 (N.D.N.Y. 2000) (“The plain language of Fed.R.Civ.P. 26(a)(2) only requires a written report for a witness retained or specially employed to provide expert testimony in the case, or whose duties as a party’s employee regularly involve the giving of expert testimony.”); *Salas v. United States*, 165 F.R.D. 31, 33 (W.D.N.Y. 1995)).

219. *See, e.g., Prieto v. Malgor*, 361 F.3d 1313, 1318 (11th Cir. 2004) (“We also agree with the Southern District of New York that allowing a blanket exception for all employee expert testimony would create a category of expert trial witness for whom no written disclosure is required and should not be permitted.” (internal quotation marks omitted));



b. *District Courts in the Fourth Circuit*

In *C & O Motors, Inc. v. General Motors Corp.*,<sup>220</sup> the U.S. District Court for the Southern District of West Virginia found that a “blanket exception” to Rule 26(a)(2)(B) for employee experts would not be permitted.<sup>221</sup> In *C & O Motors*, plaintiff C & O Motors filed suit against General Motors (GM), alleging that GM failed to supply C & O with an adequate supply of Oldsmobile automobiles.<sup>222</sup> C & O sought to prove lost profits, and in doing so relied on the expert testimony of Gene Walker, C & O’s general manager.<sup>223</sup> Walker proffered spreadsheets of data he compiled that showed loss of profits and testified that such loss was due to GM’s phasing out of the Oldsmobile design.<sup>224</sup> GM moved for the court to strike the evidence and enter judgment in its favor, arguing that Walker failed to provide a Rule 26 expert report.<sup>225</sup> The court found that a report was required even though Walker was an employee expert because he was acting as a traditional expert witness by providing a technical evaluation of the evidence to support an opinion.<sup>226</sup> The court ruled that

an expert report which sets forth the methodology employed in this undertaking is crucial where, as GM has done here, the expert’s principles and methodology are challenged under *Daubert*. Indeed, it would not be feasible for the court to conduct an orderly *Daubert* analysis in advance of trial in the absence of an expert report from Walker. In view of the contents of the report . . . it was particularly propitious that C & O furnish an expert report by Walker for scrutiny prior to trial.<sup>227</sup>

This line of reasoning centered on *Daubert* is supported by scholars like Professor Margaret Berger, who argue that Rule 26 reports should be central to pretrial proceedings.<sup>228</sup>

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Funai Elec. Co. v. Daewoo Elecs. Corp., No. C 04-1830 CRB (JL), 2007 U.S. Dist. LEXIS 29782, at \*9 (N.D. Cal. Apr. 11, 2007); *Dyson Tech. v. Maytag Corp.*, 241 F.R.D. 247, 249 (D. Del. 2007) (“The court finds persuasive the rationale and decision reached by the Southern District of New York in *Day v. Consolidated Rail Corp.*”); *Innogenetics v. Abbott Labs.*, No. 05-C-0575-C, 2007 U.S. Dist. LEXIS 193, at \*26–27 (W.D. Wis. Jan. 3, 2007) (“I am persuaded by the reasoning in *Day* that it would thwart the Rule’s purposes to allow exemptions from the report requirement . . . . The purpose of Rule 26 is to make discovery easier, faster and more efficient, as well as to avoid surprises at trial.”); *Applera Corp. v. MJ Research Inc.*, 220 F.R.D. 13, 19 n.6 (D. Conn. 2004); *McCulloch v. Hartford Life & Accident Ins. Co.*, 223 F.R.D. 26, 28 (D. Conn. 2004) (“This court follows the interpretation of Rule 26(a)(2)(B) set forth in *Day* and *KW Plastics*, and does not recognize an exemption based solely on the fact that Hartford’s witnesses are employees, as suggested by *Navajo Nation*.”).

220. No. 2:05-0835, 2007 U.S. Dist. LEXIS 54388 (W.D. Va. July 25, 2007).

221. *Id.* at \*11–12.

222. *Id.* at \*1.

223. *Id.* at \*1–2.

224. *Id.* at \*2–3.

225. *Id.* at \*7–8.

226. *Id.* at \*12.

227. *Id.*

228. See Berger, *supra* note 1; *supra* notes 55–62 and accompanying text.

*c. District Courts in the Seventh Circuit*

As discussed above,<sup>229</sup> district courts in the Seventh Circuit have recently issued conflicting rulings as to the correct interpretation of Rule 26(a)(2)(B). In *Sukup Manufacturing*, the U.S. District Court for the Central District of Illinois adhered to the plain meaning of Rule 26.<sup>230</sup> However, in *Innogenetics, N.V. v. Abbot Laboratories*,<sup>231</sup> the U.S. District Court for the Western District of Wisconsin set aside the plain meaning of the Rule, choosing instead to interpret the Rule broadly and thus dividing the Seventh Circuit from within. The plaintiff in *Innogenetics*, a patent holder for a particular method of genotyping the hepatitis C virus, filed a patent infringement lawsuit against Abbot Laboratories.<sup>232</sup> At trial, the jury found that the defendant sold genotyping products that unfairly used plaintiff's patented technology and awarded the plaintiff \$7 million in damages.<sup>233</sup>

In later proceedings, the court faced the issue of whether a previous patent application for the genotyping of hepatitis C was sufficient evidence of anticipation.<sup>234</sup> Abbot Laboratories designated Dr. Cha, the owner of the previous patent, as an unpaid expert witness.<sup>235</sup> The court speculated that Dr. Cha likely forwent payment because he had personal incentives to prove that he was the true inventor of the method claimed by Innogenetics.<sup>236</sup> The court ruled that an unpaid expert was still "retained or specially employed" within the meaning of Rule 26 and was required to submit an expert report.<sup>237</sup> Specifically, the judge wrote,

I am persuaded by the reasoning in *Day* that it would thwart the Rule's purposes to allow exemptions from the report requirement for witnesses who will be giving scientific testimony, simply because they are not compensated for their work. The purpose of Rule 26 is to make discovery easier, faster and more efficient, as well as to avoid surprises at trial. It does not advance this purpose to withhold the kind of report that opposing counsel needs in order to conduct an informed deposition or cross examination of a witness, even if the witness is willing to testify without charge for reasons of his own.<sup>238</sup>

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229. See *supra* Part II.A.2.b.

230. *Id.*

231. No. 05-C-0575-C, 2007 U.S. Dist. LEXIS 193 (W.D. Wis. Jan. 3, 2007).

232. *Id.* at \*3–5.

233. *Id.* at \*2, \*5.

234. A patent is invalid for anticipation if another patent application discloses all the features of a claim and enables one of ordinary skill in the art to make and use the claimed invention. 69 C.J.S. Patents § 37 (2007). "Prior art" (also known as state of the art) constitutes all information that has been made available to the public in any form before a given date that might be relevant to a patent's claims of originality. *Id.* If an invention has been described in prior art, a patent on that invention is not valid. *Id.*

235. *Innogenetics*, 2007 U.S. Dist. LEXIS 193, at \*24.

236. *Id.* at \*27.

237. *Id.* at \*24.

238. *Id.* at \*26–27.

The court thus required a report from an expert who was not “retained or specially employed” in the sense that he was not paid for his time. This decision could be interpreted as imposing the requirements of Rule 26 on a broader category of experts than intended by the plain language of the Rule. Moreover, the court’s citation of *Day* indicates that it would interpret Rule 26 broadly in other circumstances (for example, for an employee expert or a treating physician retained in anticipation of litigation).

d. *District Courts in the Ninth Circuit*

In *Funai Electric, Co. v. Daewoo Electronics, Corp.*,<sup>239</sup> the U.S. District Court for the Northern District of California held that an employee expert was not automatically exempt from submitting an expert report under Rule 26(a)(2)(B).<sup>240</sup> Decided in 2007, *Funai*’s broad interpretation was at odds with *Navajo Nation*, a plain meaning decision from another Ninth Circuit district court.<sup>241</sup> *Funai* sued Daewoo for patent infringement relating to the design and manufacturing of a videocassette recorder.<sup>242</sup> The court limited its holding to the facts and did not adopt the view that a report should be required from all employee experts.<sup>243</sup> Instead, the court held that employees who provide “technical evaluations of evidence reviewed solely in preparation for trial, who provide opinion testimony on the merits of the case, or who have no direct and personal knowledge of the facts to which they are testifying” are required to submit Rule 26 reports.<sup>244</sup> Because the expert would testify on matters outside the scope of his employment, he was “acting essentially as an expert witness specially employed for the purpose of providing opinion testimony.”<sup>245</sup> By interpreting the Rule to require reports from employee experts who testify outside the scope of their employment, *Funai* found a middle ground between followers of the plain meaning doctrine and the more liberal courts like *Day* and *Prieto*.

5. Support for a Broad Interpretation

Practitioners George Mickum and Luther Hajek agree that a liberal interpretation of Rule 26(a)(2)(B) should prevail.<sup>246</sup> They argue against an automatic exemption for certain categories of experts.<sup>247</sup> Mickum and Hajek argue that, if courts adopt a plain meaning interpretation of Rule 26, parties would overwhelmingly use employee experts instead of experts

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239. No. C 04-1830 CRB (JL), 2007 U.S. Dist. LEXIS 29782 (N.D. Cal. Apr. 11, 2007).

240. *Id.* at \*2.

241. *See supra* notes 126–38.

242. *Funai*, 2007 U.S. Dist. LEXIS 29782, at \*3.

243. *Id.* at \*15–16.

244. *Id.* at \*15.

245. *Id.* at \*2–3.

246. Mickum & Hajek, *supra* note 14, at 304, 367–68. George Mickum and Luther Hajek argued in 2005 that a clear majority of courts favored liberally construing Rule 26(a)(2)(B). *Id.* at 332. However, currently there is no distinct majority. *See supra* Parts II.A, II.B.1–2.

247. Mickum & Hajek, *supra* note 14, at 368.

retained or hired for that case so as to “dodge” reporting requirements and “sandbag” opposing counsel.<sup>248</sup> Consequently, they predict that “there is likely to be an explosion in the use of employees as testifying experts in litigation” and that “this will impede both the fact-finding process and effective cross-examination.”<sup>249</sup> Moreover, Mickum and Hajek explain that it is

difficult to imagine precisely what the drafters of 26(a)(2)(B) had in mind when the exception for employees whose duties do not regularly “involve giving expert testimony” was created. Frankly, with the possible exception of serial litigation (i.e., tobacco and asbestos litigation), it is difficult to imagine an employee whose duties would regularly require him or her to testify as an expert witness. It is certainly possible that the Advisory Committee viewed employee experts as more akin to treating physicians in the sense that they are likely to be fact witnesses. Still, it is difficult to imagine that the drafters did not anticipate that employee experts might be called to offer testimony under Fed. R. Evid. 701, 703, and 705.<sup>250</sup>

They conclude that “the [employee] exemption appears to be inconsistent with the objectives of Rule 26.”<sup>251</sup> The solution, they find, is to amend the Rule so that employee experts clearly “fall within the purview of Rule 26.”<sup>252</sup>

Professor Berger agrees with Mickum and Hajek that Rule 26(a)(2)(B) is “designed to provide litigants with enough information through the reports so that a subsequent deposition can focus economically and efficiently on points that need elaboration.”<sup>253</sup> Professor Berger concludes that “[c]ourts should extend Rule 26(a)(2)’s requirement of mandatory expert disclosure to all experts utilized in bringing an in limine motion.”<sup>254</sup>

Professor Richard Marcus, of the University of California Hastings College of the Law and Special Reporter to the Advisory Committee on Civil Rules, argues that even some treating physicians should not be exempt from the report requirement of Rule 26.<sup>255</sup> In a memorandum to the Advisory Committee evaluating the contemporary issues of Rule 26, he explained that

it is not true that treating physicians are exempted from the report requirement with regard to *everything* they say from the witness stand. If, in return for payment from counsel, they develop extensive additional analysis solely for purposes of trial, it would seem that they should be

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248. *Id.*

249. *Id.* at 304.

250. *Id.* at 314.

251. *Id.*

252. *Id.* at 304.

253. Berger, *supra* note 1, at 1371.

254. *Id.* at 1372.

255. Memorandum from Rick Marcus, Special Reporter, Advisory Comm. on Civil Rules, to Participants in Jan. 13, 2007, Discussion of Discovery and Disclosure Regarding Expert Witnesses 13–14 (Dec. 11, 2006) (on file with Fordham Law Review).

identified under Rule 26(a)(2)(A) and probably should provide a report—just like any other testifying experts—about that trial-preparation work on which they intend to base their testimony.<sup>256</sup>

Those who argue for a broad interpretation base their analyses and arguments on the premise that the overwhelming purpose of Rule 26 is to decrease litigation costs and limit surprise at trial. A nuanced reading of this line of cases yields the conclusion that there is strong support for requiring reports from employee experts and, in some circumstances, treating physicians.

### III. RULE 26(a)(2)(B) SHOULD BE CONSTRUED BROADLY

The better view, for now, is a broad interpretation of Rule 26(a)(2)(B), extending the expert report requirement to employee experts and treating physicians who testify outside the scope of treatment or who develop opinions in preparation for trial. Case law, scholars, practitioners, and *Daubert* all support a broad interpretation requiring reports from employee experts and physicians. Moreover, the underlying purposes of Rule 26 and of the Federal Rules of Civil Procedure in general support broader disclosure than allowed by the plain meaning of Rule 26(a)(2)(B). Given that the Advisory Committee tends to look at trends in case law when formulating new rules,<sup>257</sup> it should consider the case law discussed above and the arguments discussed below.

#### A. *Support for a Broad Interpretation of and Amendment to Rule 26(a)(2)(B) in Case Law, Public Policy, and Rule 1*

Proponents of a plain meaning approach have several strong arguments for interpreting Rule 26 of the Federal Rules of Civil Procedure according to the ordinary meaning of the language of the Rule.<sup>258</sup> The plain meaning approach has considerable benefits: it legitimizes democracy, provides a bright-line rule for parties to follow, and prevents judges from drawing on their own political views in place of legislative intent.<sup>259</sup> The drafters of Rule 26 carefully weighed the interests of full disclosure with the burdens of preparing such reports, and determined that not all experts should have to file reports. While the Rule is in the interest of full disclosure, the district court explained in *Gateway* that there are some employee experts, like technicians or mechanics, who may be disproportionately burdened by

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256. *Id.* at 14.

257. See Fed. R. Civ. P. 26 advisory committee's note (1993) ("The Rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. . . . Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.").

258. See *supra* Part II.A.

259. See *supra* notes 139–45.

writing such a report.<sup>260</sup> One member of the Advisory Committee pointed out that the Rule was drafted so as to exclude a drill press operator and other technical employee experts from the report requirement.<sup>261</sup> Furthermore, as explained by the district court in *Bowling*, any bright-line rule gives fair notice to all parties of what is required of them.<sup>262</sup> Finally, if the drafters had intended for there to be no automatic exemption from the Rule, they would have written it differently.

Despite the benefits of plain meaning, subscribers of a broad interpretation of Rule 26 have the better view. When the plain meaning of a rule runs counter to the underlying purpose of the rule itself and the Federal Rules in general, the plain meaning approach must be abandoned. Here, the plain meaning of Rule 26 requires that an entire category of experts be exempted from providing expert reports. *Day* and its progeny, as well as commentators in the legal community, articulate how this categorical exemption disserves the objectives for providing such reports. Instead of decreasing litigation costs by increasing efficiency of depositions and eliminating sandbagging, Rule 26 as it stands encourages “corporate defendants to attempt to evade the report requirement by designating its own employees” as expert witnesses.<sup>263</sup>

As illustrated in *Watson*, unfair surprise and sandbagging are a threat to litigation under the current Rule 26. In *Watson*, the trial court judge explained that, although no report was provided, the plaintiff was accorded a fair day in court since she was still able to depose the employee expert.<sup>264</sup> This analysis is unpersuasive and overlooks the well-accepted notion that expert reports make the depositions more effective. Had the clinical director submitted a report, he would have been restricted to testifying on opinions only in that report.<sup>265</sup> Under these hypothetical circumstances, the plaintiff would have had ample notice of precisely what the clinical director intended to testify about and would have been able to restrict his testimony to that certain material under Rule 37.<sup>266</sup> Indeed, the plaintiff did complain to the court that the expert witness was unclear during the deposition and rendered new opinions at trial.<sup>267</sup> Had the plaintiff in *Watson* been on notice as to the contents of the director’s testimony, she would have been able to properly gather experts of her own to counter his assertions. This

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260. *Adams v. Gateway, Inc.*, No. 2:02 CV 106 TS, 2006 U.S. Dist. LEXIS 14413, at \*10 (D. Utah Mar. 10, 2006); *see also supra* note 110 and accompanying text.

261. *See supra* note 146 and accompanying text.

262. *Bowling v. Hasbro, Inc.*, No. 05-229S, 2006 U.S. Dist. LEXIS 58910, at \*5–6 (D.R.I. Aug. 10, 2006); *see also* note 120 and accompanying text.

263. *McCulloch v. Hartford Life & Accident Ins. Co.*, 223 F.R.D. 26, 28 (D. Conn. 2004); *see also* *Mickum & Hajek, supra* note 14, at 368.

264. *Watson v. United States*, No. CIV-04-537-C, 2005 U.S. Dist. LEXIS 9242, at \*3–4 (W.D. Okla. May 5, 2005).

265. *Fed. R. Civ. P.* 37; *see also supra* notes 5–6, 66–68 and accompanying text.

266. *See supra* notes 66–68.

267. *Watson v. United States*, 485 F.3d 1100, 1105 & n.2 (10th Cir. 2007).

sandbagging in *Watson* underscores the shortcomings of a plain meaning interpretation.

The courts in *Watson* and *Navajo Nation* argue forcefully that a broad interpretation would be akin to rewriting the Rule, and that courts simply cannot ignore the plain meaning of the text.<sup>268</sup> This may be true, but it is equally true that any Federal Rule of Civil Procedure must also be interpreted in accordance with other interrelated Federal Rules of Civil Procedure (and Federal Rules of Evidence). Rule 1 of the Federal Rules of Civil Procedure, for example, requires that the Federal Rules of Civil Procedure “be construed and administered to secure the just, speedy, and inexpensive determination of every action.”<sup>269</sup> In 1993, the words “and administered” were added so as to “recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay.”<sup>270</sup> This guidance on construction and administration unmistakably gives courts the authority to liberally construe Rule 26 so as to require reports from employee experts and, where appropriate, treating physicians. In addition, Rule 1 also gives attorneys the legal ammunition to argue on behalf of their clients that Rule 26 should be construed broadly and lends support for an eventual amendment.<sup>271</sup>

Some courts also argue that technicians and mechanics would be unduly burdened by the preparation of an expert report. A participant at an Advisory Committee meeting expounded on this sentiment by explaining that the intent of the drafters was to exclude the drill press operator and other technicians from the burdens of preparing an expert report.<sup>272</sup> But would such a report be burdensome? According to the requirements of 26(a)(2)(b),<sup>273</sup> the drill press operator’s report would include a statement of his or her opinions, the basis and reasons for the opinions, and any data considered when forming such opinions. The drill press operator’s expert testimony would presumably focus on how the drill press functions; the basis and reason for such opinions would likely be on-the-job training or classroom education. If the drill press operator were only testifying about the technicalities of the drill press, it is unlikely he or she would have to consider any data in forming an opinion. The drill press operator, who may

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268. *Id.* at 1107–08; *Navajo Nation v. Norris*, 189 F.R.D. 610, 612 (E.D. Wash. 1999).

269. Fed. R. Civ. P. 1; *see supra* notes 33–34 and accompanying text.

270. Fed. R. Civ. P. 1 advisory committee’s note (1993); *see also supra* notes 33–34.

271. Fed. R. Civ. P. 1 advisory committee’s note (1993).

272. Civil Rules Advisory Comm., *supra* note 41, at 18.

273. Fed. R. Civ. P. 26(a)(2)(B) (“The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.”).

be “unaccustomed to the burden of communication,”<sup>274</sup> would probably have a short list of publications authored within the preceding ten years. His or her prior testimony in other cases would also be limited; if the drill press operator offered testimony more frequently, then maybe his or her duties regularly include giving expert testimony, in which case a report is expressly required anyway.

An expert report from a drill press operator, it seems, would not be very burdensome. In fact, there seems to be no apparent reason why a drill press operator, or a mechanic or technician, should be unable to prepare a report. Moreover, the experts in dispute in the case law are not technicians or drill press operators; they are insurance agents, accountants, clinical directors, tribal employees, and advanced degree holders.<sup>275</sup> Ironically, the most forceful argument made in support of alleviating the burden of preparing a report was in *Gateway* where the expert employee held a Ph.D. There, the judge determined that “a report might be a heavy burden for a technician or manager familiar with a sophisticated process or practice, but unaccustomed to the burden of communication. . . . A report might be beyond the employee’s ability.”<sup>276</sup> It is difficult to imagine that someone who has completed a Ph.D. program would have difficulty in preparing a Rule 26 report.

Therefore, to reduce unfair surprise, to comport with Rule 1, and to decrease the costs of litigation, employee experts and treating physicians who are retained in anticipation of litigation or who develop opinions in preparation for trial should be subject to the report requirement, either through a broad interpretation of the Rule or by amendment. Beyond these public policy and fairness justifications, *Daubert* implications also support a broad interpretation of Rule 26.

#### B. *Daubert Gatekeeping Duties as Support for a Broad Interpretation of and Amendment to Rule 26*

Courts should broadly construe Rule 26 to require reports from almost all expert witnesses in order to properly fulfill their gatekeeping duties under *Daubert*. Professor Berger predicted nearly fifteen years ago that while “*Daubert* seems to be an opinion about evidence . . . *Daubert*’s greatest impact, especially in civil cases will be on pre-trial proceedings.”<sup>277</sup> *Daubert* hearings have become the most common method trial courts use to fulfill their gatekeeping duties.<sup>278</sup> Arguably, Rule 26 reports are the most important piece of evidence in determining admissibility of expert

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274. *Adams v. Gateway, Inc.*, No. 2:02 CV 106 TS, 2006 U.S. Dist. LEXIS 14413, at \*10 (D. Utah Mar. 10, 2006).

275. See *supra* Part II for a discussion of which types of experts are at issue in the case law.

276. *Adams*, 2006 U.S. Dist. LEXIS 14413, at \*10.

277. Berger, *supra* note 1, at 1386.

278. See *supra* notes 54–62 and accompanying text.



testimony,<sup>279</sup> and therefore it does not make sense to permit a categorical and automatic exemption when judges are required to evaluate evidence and can do so most easily and efficiently with such reports. A Rule 26 report contains exactly what the *Daubert* court found were essential factors in determining relevance and reliability: (1) the opinions to be set forth and (2) the reasons and bases for such opinions.<sup>280</sup> These elements are expressly and conveniently required by Rule 26.<sup>281</sup> Since a Rule 26 report must contain precisely what the Supreme Court required in *Daubert*, the report can and should serve as the cornerstone of reliability analysis under *Daubert*.<sup>282</sup> This analysis indicates that a broad disclosure requirement under Rule 26 would serve not only public policy, but also assist judges in fulfilling *Daubert* gatekeeping duties. The court in *C & O Motors* argued effectively that “it would not be feasible for the court to conduct an orderly *Daubert* analysis in advance of trial” absent a Rule 26 report.<sup>283</sup> Though it is rare for courts to require expert reports citing *Daubert* obligations, this rationale is perhaps the best argument for departing from the plain meaning.

### C. Proposed Amendment to Rule 26

While a broad interpretation is an immediate solution to the circuit split, ultimately Rule 26 should be amended to provide greater clarity and guidance to courts and litigants. The decisions that support a plain meaning interpretation do concede that a Rule 26 that requires truly full disclosure would be optimal. The court in *Watson* explained that the “the requirement of an expert report has its advantages,” but “it is our office to apply, not second guess, congressionally approved policy judgments . . . . If a different balance is to be struck with respect to the costs and benefits of experts reports, it must be accomplished through the mechanisms approved by Congress.”<sup>284</sup> The court in *Adams* consented that “[i]t would be nice for opposing parties if the policy of full disclosure by report were absolute” but then concluded “that is not what the Rule says.”<sup>285</sup> This case law and the sometimes reaching interpretations, as in *Day*, support an amendment to Rule 26(a)(2)(B).

This Note proposes an amendment to Rule 26(a)(2)(B) as follows:

Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is an employee of any party or is retained or specially employed to provide expert testimony in the case, ~~or whose duties as an employee of the party regularly involve giving expert~~

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279. See *supra* notes 54–62 and accompanying text.

280. See *supra* notes 51–53 and accompanying text.

281. Fed. R. Civ. P. 26.

282. See *supra* note 65 and accompanying text.

283. *C & O Motors Inc. v. General Motors Corp.*, No. 2:05-0835, 2007 U.S. Dist. LEXIS 54388, at \*12 (S.D. Va. July 25, 2007).

284. *Watson v. United States*, 485 F.3d 1100, 1107–1108, 1107 n.4 (10th Cir. 2007).

285. *Adams v. Gateway, Inc.*, No. 2:02 CV 106 TS, 2006 U.S. Dist. LEXIS 14413, at \*13 (D. Utah Mar. 10, 2006).

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~~testimony~~, be accompanied by a written report prepared and signed by the witness. This provision shall not apply to treating physicians who do not develop opinions in anticipation of trial or in response to a request from counsel.<sup>286</sup>

This amendment, while far from perfect, seeks to embrace the benefits of extending the Rule to employee experts while preserving a modified exception for treating physicians.

#### CONCLUSION

This Note concludes that Rule 26(a)(2)(B) should be construed broadly until it is amended to require a report from employee experts and treating physicians who testify outside the scope of their treatment or who develop opinions in anticipation of trial or at the request of counsel. Rule 26 was designed to encourage full disclosure among litigants, but, as illustrated in the case law, allowing categorical exemptions clearly disserves this purpose. The proposed amendment will serve to eliminate unfair surprise at trial and reduce costs by allowing attorneys to conduct more pointed and efficient depositions, while still ensuring that physicians will not be burdened with a Rule 26 report if testifying within the scope of treatment. In the interest of full disclosure, Rule 26(a)(2)(B) should be interpreted broadly by the courts until an amendment is adopted.

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286. The underscored text indicates additions to and the stricken text deletions from Rule 26(a)(2)(B) as it currently stands. This amendment adds the requirement that all expert employees must submit an expert report and omits the qualification that those employee experts who regularly give testimony as a duty of employment must submit an expert report. The last sentence is added to modify the treating physician exemption. Alternatively, the last sentence could be included as part of an Advisory Committee note.