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FRCP and Physician Testimony: Treating Physicians, Experts, and Hybrid Witnesses

The US Court of Appeals, Ninth Circuit, rules on these matters in the case of Goodman v. Staples the Office Superstore, LLC, on May 3, 2011.

The goals of this article are to review the Federal Rules of Civil Procedure, Rule 26 and 37 as they relate to physician testimony, contemplate the three general types of physician witnesses and to discuss the Ninth Circuit Court's ruling in this case which gives clear direction in the application of Rule 26 (a) (2) to "hybrid expert" testimony, a treating physician who testifies as an expert in his own patient's personal injury case. The Ninth Circuit Court addressed fairness; physician professional organizations and state boards of medicine must address the related ethical issues, especially in psychiatry and neuropsychiatry where a solid foundation of forensic ethics already exists. Related ethical problems in psychiatry/neuropsychiatry are summarized.

Goodman v. Staples

On May 9, 2007, Pamela Goodman experienced a trip and fall on a low empty shelf "end cap" while shopping in a Scottsdale, Arizona, Staples store and complained of head, neck and lower extremity pain along with tingling in her arm. The local emergency department diagnosed an acute closed head injury, neck pain, and various contusions. Six weeks earlier she had undergone a cervical spinal fusion. Nearly three months after the fall an MRI scan and CT study revealed a fracture line adjacent to the fusion plate. Ms. Goodman was admitted to a California hospital for revision of the cervical fusion in late July 2007. When her complaints of neck pain persisted the studies were repeated and in January of 2008 she underwent still another cervical fusion revision.

She filed suit against Staples in Maricopa County Superior Court, and Staples removed the case to federal court. The District Court issued a scheduling order that properly established deadlines for the exchange of disclosures, including expert disclosures. Ms. Goodman's attorneys identified a number of her health care providers as potential witnesses and disclosed the identities and curricula vitae of two experts, a human factors expert and another in store safety. Ms. Goodman's attorneys provided a list of her healthcare providers, including a psychiatrist, whom they intended to call as expert witnesses; however, these disclosures did not include Rule 26 written reports by any of her experts.

By the deadline for defense expert disclosures, Staples provided the identity and written reports of three experts, a radiologist, a spine surgeon, and a human factors expert. A month later, Ms. Goodman's counsel identified a number of rebuttal experts. Staples moved to preclude all of Ms. Goodman's experts from testifying. The District Court ruled that with respect to Ms. Goodman's healthcare providers, their testimony would be limited to opinions that were actually developed during the course of their treatment of Ms. Goodman, as evidenced by and in keeping with their office notes, and hospital records. These witnesses would not be permitted to testify about

anything added to their opinions as a result of information supplied by the plaintiff's attorney when they were hired by plaintiff's counsel to become expert witnesses. The court found that under the Federal Rules of Civil Procedure 26(a)(2), the disclosure of any expert witness must be accompanied by a written report disclosing and discussing the opinions of that expert, including the information relied upon as the basis for those opinions. Ms. Goodman's counsel failed to disclose any Rule 26 written reports by her retained experts.

Staples promptly moved for summary judgment and the District Court granted it. The court ruled that Ms. Goodman had not established a breach of duty by Staples in matters she said were causative in her falling. The District Court also ruled that even if a breach of duty had occurred Ms. Goodman had not produced adequate evidence proving that her injuries were caused by the fall in Staples. This was because her treating physicians had been precluded by the court from expressing opinions on causation due to Goodman's failure to comply with the court's order with regard to disclosure requirements. The District Court did not limit testimony from the treating physicians as to their care of Ms. Goodman or in matters they might reasonably testify about in rebuttal.

Ms. Goodman appealed several issues, including whether the lower court rightly applied Rule 26 and 37 to the proposed testimony of her treating physicians, and the court's summary judgment in favor of Staples. Her attorneys argued that the treating physicians were exempt from the Rule 26 expert report submission requirement, and that the testimony of these physicians should not have been limited. The US Court of Appeals, Ninth Circuit, wrote the following about the precluded testimony of her treating physicians:

Federal rule of civil procedure 26 (a)(2) requires a party to timely disclose a written report of a witness "if the witness is one retained or specially employed to provide expert testimony in the case." Generally speaking, treating physicians are excused from this requirement. They are a species of percipient witness. They are not specially hired to provide expert testimony; rather, they are hired to treat the patient and may testify to and opine on what they saw and did without the necessity of the proponent of the testimony furnishing a written expert report. In this case, the plaintiff's treating doctors not only rendered treatment, but after the treatment was concluded, these very same doctors were provided with additional information by plaintiff's counsel and were asked to opine on matters outside the scope of the treatment they rendered. The District Court ruled that these physicians would be allowed to testify to the opinions they formed in the course of caring for the patient, but because no Rule 26 expert witness report had been provided, the court precluded the treating doctors from testifying to opinions they formed afterward, opinions solicited from them solely for the purpose of the litigation. We hold today that when a treating physician morphs into a witness hired to render expert opinions that go beyond the usual scope of a treating doctor's testimony, the proponent of the testimony must comply with Rule 26(a)(2). However, because the law regarding these hybrid experts was not settled, and because treating physicians are

usually exempt from Rule 26 (a)(2) requirements, we exercise our discretion to apply this clarification prospectively.

Physician testimony was initially conceptualized to include treating physicians who were not required to produce Rule 26 reports, and expert witnesses who were required to do so. The Ninth Circuit Court's decision in this matter was that when treating physicians morph into expert witnesses they become "hybrid expert" witnesses and Rule 26 applies to them as it does for all expert witnesses. Basically, it would have been unfair to Staples to rule otherwise, because the defense needed the disclosures to properly make trial decisions. Rule 37 of the Federal Rules of Civil Procedure "gives teeth" to Rule 26's requirements, by prohibiting the use at trial of testimony that has not been properly disclosed. This makes Rule 37 an automatic sanction which provides a strong inducement for complying with the rules of disclosure. A plaintiff like Ms. Goodman may seek to avoid Rule 37's sanction if she can demonstrate that the failure to disclose was justified or harmless. However, in this case neither of these conditions was found, and the testimony was limited by the District Court accordingly.

The Ninth Circuit Court reversed the lower court's decision to grant summary judgment to Staples because there were triable issues concerning whether Staples breached a duty to Ms. Goodman and whether the fall caused her injuries. The appeals court reviewed photographs of the item that allegedly caused Ms. Goodman to fall and decided that a jury should determine whether the object was open and obvious and whether the business owner should have anticipated that an injury might occur from it. The Ninth Circuit ruled that the District Court erred in concluding that there was no unreasonably dangerous condition at the time of Ms. Goodman's fall. Ms. Goodman's case was remanded back to the District Court for trial. The appeals court's decision about the application of Rule 26 to "hybrid expert" witnesses was made prospectively, because this was the first time the Ninth Circuit Court had ruled on this particular matter, an issue of first impression.

Discussion and Application: The Ninth Circuit joined the Sixth and Seventh Circuit Courts that hold that Rule 26 makes parties to a lawsuit disclose a treating physician's written report in the absence of evidence that his opinions were formed solely during the course of treatment. The Eighth Circuit required disclosure of a treating physician's written report whenever a treating physician may testify as to the causation of a condition, beyond merely noting that condition. The primary lesson from *Goodman v. Staples* for any physician who may testify in a personal injury case is to keep clearly in mind whether he or she is serving solely as a percipient witness limited exclusively to the issues of treatment or whether the physician is in any way crossing over into the territory of an expert witness, including testimony about causation and related damages.

Physicians who testify in court may be expected to know the difference between the testimony of a treating physician and an expert witness, including "hybrid expert" witness testimony. The decision by the Ninth Circuit Court of Appeals in the matter of *Goodman v. Staples* makes it

clear that Rule 26 and all of its requirements, including detailed opinion reports are required of expert witnesses and treating physicians who become hired hybrid expert witnesses. Treating physicians may be guided by the court's rationale in this decision by asking and identifying when the physician became employed to do more than merely treat the patient who brings a personal injury lawsuit. A related question for the treating physician is whether the injured patient's attorney provided any information that was used or integrated into facts that later became the basis of the doctor's opinions and testimony. Forensic psychiatrists need to be able to recognize when a treating psychiatrist or neuropsychiatrist, who is called upon to testify, is becoming a hybrid expert witness which may trigger Rule 37's enforcement of violations of Rule 26.

Ethical Concerns

Ethical guidelines in forensic psychiatry seek to limit, whenever possible, dual role conflicts of interest and bias. The role of a treating psychiatrist or neuropsychiatrist is one of advocacy and appropriate patient benefit, which becomes a powerful source of bias. This role is immediately at odds with the forensic ethical goals of honesty and striving for objectivity addressed in the published ethical guidelines of the American Academy of Psychiatry and the Law (AAPL), regarding expert witnesses. You may ask, "If it is not illegal, as implied in Goodman decision, why is it unethical?" The brief answer is that there are roles a treating psychiatrist may play that while not illegal are unethical, such as going into business with a former patient or dating or marrying a former patient; all are examples of hybrid relationships and all are unethical. The American Psychiatric Association (APA) will one day take seriously and prosecute as ethical violations treating psychiatrists and neuropsychiatrists who avoidably play, for a fee, the prohibited dual roles of treating physician and expert witness when agreeing to become hybrid expert witnesses in their patients' personal injury cases.

The court now recognizes hybrid expert witnesses, at least in part, for what they are – forensic expert witnesses who owe the court a full accounting of their opinions in detailed Rule 26 expert witness reports. Psychiatric and neuropsychiatric hybrid expert witnesses also owe the APA an accounting of why they chose to play the dual role when doing so was avoidable and by definition ethically troubled. The ethical guidelines in psychiatry need to begin to use the court's language and call this conflict by its new name, a hybrid expert witness conflict of interest. Physicians easily avoid this conflict of ethical interest when they make it amply clear to patients and their personal injury attorneys that once treatment begins the role will not be allowed to morph into that of a retained hybrid expert witness, and that if the doctor is called to testify, he or she will only testify as a percipient witness about the diagnosis made and treatment actually provided, to the exclusion of issues of causation and possibly related damages.

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