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Communications With Non-Retained Experts May Be Subject to Disclosure

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In contrast to retained testifying experts, non-retained testifying experts are experts who had personal involvement in the events underlying the litigation, such as consultants or contractors; they are fact witnesses who are also providing expert opinions. Unlike retained experts who are subject to extensive disclosure requirements, non-retained experts need only provide a disclosure of the subject on which they intend to testify and a summary of the facts and opinions they intend to provide. Compare Fed. R. Civ. P. 26(a)(2)(B) with Fed. R. Civ. P. 26(a)(2)(C). In 2010, Federal Rule of Civil Procedure 26(b) was amended to provide express protections for retained experts' draft reports and, with certain exceptions, communications with counsel, but the same protections were not expressly extended to non-retained experts. See Fed. R. Civ. P. 26(b) advisory committee's note to 2010 amendment. The Advisory Committee's notes, however, state that Rule 26(b) "does not exclude protection" for non-retained experts. Therefore, since the 2010 amendment, courts have determined whether counsels' communications with non-retained experts are discoverable on a case-by-case basis.

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In *Ayotte v. National Basketball Association*, 2024 WL 3409027 (S.D.N.Y. July 15, 2024), Southern District Magistrate Judge Robert W. Lehrburger confronted whether counsel's communications with a specific category of non-retained experts—treating physicians—are discoverable. In *Ayotte*, defendant National Basketball Association (the NBA) moved to compel plaintiffs to produce communications between their counsel and a non-retained expert psychologist, Dr. Norman Goldwasser, who treated one of the plaintiffs. After explaining that key distinctions exist between treating physicians and other non-retained experts—including that treating

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physicians typically wear a cloak of independence even though they usually are available to one side but not the other—Lehrburger granted the NBA's motion to compel. Lehrburger reasoned that in the case of a treating physician, the need to determine the extent to which a party's attorney may have influenced the physician's testimony warrants discovery into communications between the attorney and the physician.

'Ayotte v. National Basketball Association'

In *Ayotte*, two former NBA referees and the former Vice President of Referee Operations brought claims against the NBA alleging that plaintiffs were improperly terminated for their refusal to comply with the NBA's COVID-19 vaccine mandates. Plaintiffs disclosed, pursuant to Rule 26(a)(2)(C), that Goldwasser planned to testify that his client, one of the former referees, suffered from emotional distress due to his termination. Plaintiffs' counsel also represented Goldwasser in connection with the case.

On July 10, 2024, the NBA moved to compel plaintiffs to produce all communications between plaintiffs' counsel and Goldwasser. Plaintiffs objected, emphasizing that plaintiffs' counsel represents Goldwasser in connection with the case, and arguing that counsel's communications with Goldwasser were not discoverable both because of his status as a non-retained expert and because of his being independently represented by plaintiffs' counsel.

Relevant Legal Principles

Lehrburger first reviewed the text of the Federal Rules concerning expert disclosure, observing that under Rule 26(a)(2)(C), non-retained experts do not need to provide a written report, but must disclose "the subject on which they intend to testify" and "a summary of the facts and opinions they intend to provide." *Ayotte*, 2024 WL 3409027, at *1 (citing Fed. R. Civ. P. 26(a)(2)(C)(i)-(ii)). Lehrburger noted that the 2010 amendments to Rule 26 expressly provided for work product protection for drafts of retained experts' reports and communications with the party's attorney, but did not expressly extend the same protections to non-retained testifying experts. At the same time, however, the Advisory Committee's notes provided that "[t]he rule does not exclude protection." Fed. R. Civ. P. 26(b) advisory committee's note to 2010 amendment. Lehrburger therefore concluded that whether work product protection or attorney-client privilege applies to a non-retained expert "should be determined on a case-by-case basis." *Ayotte*, 2024 WL 3409027, at *1.

After observing that "[a]mong the dozen or so published decisions analyzing the issue, ones can be found requiring attorney communications with non-retained experts to be produced, and others, though fewer, can be found denying production," Lehrburger noted that "[n]one of these cases, however, involved a treating physician or health care provider." Id. at *2. Lehrburger found that significant because "the Advisory Committee and the courts, including ones finding no waiver of protected communications with respect to certain non-retained experts, have distinguished treating physicians as non-retained experts for whom disclosure of communications between plaintiff's counsel and the witness would be warranted." Id.

Indeed, the Advisory Committee commented that "[t]here are reasonable grounds to believe that broad discovery may be appropriate as to some 'no-report' experts, such as treating physicians who are readily available to one side but not the other." Report of the Civil Rules Advisory Committee (May 8, 2009, amended June 15, 2009, pp.4-5). With respect to treating physicians, Lehrburger observed that the Advisory Committee "expressed concern about making sure discovery would be adequate to 'show the ways in which the expert's fact testimony may have been influenced.'" *Ayotte*, 2024 WL 3409027, at *2.

Application of Legal Principles to 'Ayotte'

Although no prior case had addressed whether a non-retained treating physician's communications with counsel are discoverable, Lehrburger recognized that "a consistent recognition [exists in the case law] that treating physicians typically are hybrid fact-expert witnesses whose communications with counsel are not protected from disclosure." Id. at *3. Three decisions in particular led Lehrburger to concluded that plaintiffs should be required to produce their counsel's communications with Goldwasser.

First, Lehrburger cited *United States v. Sierra Pacific Industries*, 2011 WL 2119078 (E.D. Cal. May 26, 2011), in which the court reasoned that because treating physicians are "hybrid fact and expert opinion witnesses" who will testify concerning their "own personal knowledge of facts," permitting discovery into their communications with counsel could help "prevent, or at any rate expose, attorney-caused bias." Id. at *10. Lehrburger next discussed *Fung-Schwartz v. Cerner Corp.*, 2021 WL 963342 (S.D.N.Y. Jan. 27, 2021), which favorably cited the distinction observed in *Sierra Pacific* between hybrid witnesses like treating physicians and other non-testifying experts. Finally, Lehrburger explained that in *In re Paraquat Product Liability Litigation*, 2022 WL 17688341 (S.D. Ill. Dec. 5, 2022), the court held that a non-retained, former employee toxicologist's communications with counsel remained protected, but in so holding, distinguished that witness from a treating physician "who will opine on the actual causes of an injury in addition to the facts." Id. at *5.

Although Lehrburger recognized that none of the above cases were controlling, he found that "they reflect a consistent recognition that treating physicians typically are hybrid fact-expert witnesses whose communications with counsel are not protected from disclosure." *Ayotte*, 2024 WL 3409027, at *3. Lehrburger reasoned that protecting a treating physician's communications with counsel is particularly not appropriate when, as in *Ayotte*, "in addition to the facts of their treatment of the party, [the physician is] opining as to the cause." Id. Lehrburger explained that unlike retained experts, non-retained treating physicians "wear a cloak of independence and lack of bias" such that "the need for determining the extent to which, if any, the party's attorney may have influenced the witness's testimony is more acute." Id.

Lehrburger was unpersuaded by plaintiffs' argument that Goldwasser's communications with counsel were protected by the attorney-client privilege because plaintiffs' counsel represents him in connection with the case. Lehrburger observed that other "cases requiring disclosure of attorney-retained expert communications have involved relationships where the non-retained expert is represented by the same attorney who represents the party." Id. Lehrburger did, however, find that the outcome "could well have been different" if Goldwasser was represented not by plaintiffs' counsel but by independent counsel. Id.

Conclusion

When a non-retained expert plans to testify in a matter, uncertainty exists regarding whether a court will require counsel to disclose his or her communications with the non-retained expert. To the extent a party intends to elicit from the non-retained expert not only the expert's observation of facts, but also the expert's opinion of the cause of the observed facts—as often occurs with non-retained treating physicians—their communications with counsel likely will be subject to disclosure.