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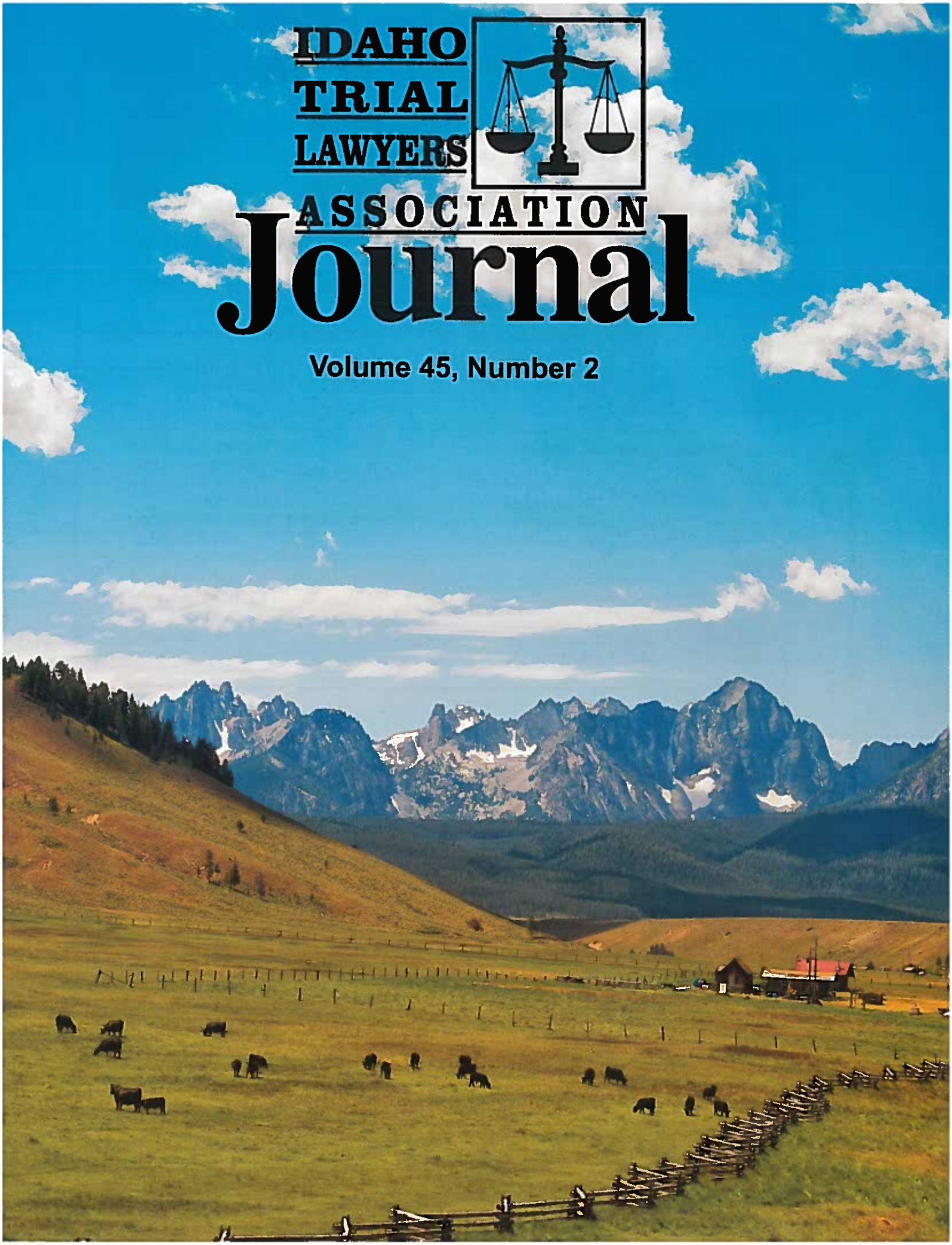

Disclosing Expert Opinions of Treating Physicians: Recognizing the Hybrid Expert Witness

By Michael J. Hanby, II

Treating physicians are a crucial component of many personal injury cases. These witnesses play a unique role in litigation and are used in cases ranging from simple car wrecks to complex medical malpractice actions.

Utilizing a treating physician to his or her full potential can benefit your client in numerous ways. Treating physicians can use their vast expertise to explain complex medical issues to the jury. Because these witnesses are not formally retained by the plaintiff, they can offer their opinions without the perceived financial bias that regularly comes with a retained expert.

Also, treating medical providers may be some of the first witnesses to the aftermath of the defendant's negligence. In a major car wreck case, for example, some of the first witnesses to see and speak to your client after a collision may be emergency room physicians and staff. This unique perspective can provide compelling context and texture to your client's case.

Importantly, the testimony of a treating physician is often used by a plaintiff to establish causation, which is regularly contested. Having first-hand credible testimony from a treating physician can be especially difficult for the defense to overcome.

Finally, because treating doctors are not formally retained by the plaintiff, utilizing their testimony is a cost-effective way of presenting the essential elements of your case. This can be especially important in cases where the potential damages do not justify hiring an out-of-state expert whose initial consultation fee may be greater than the value of the entire case. Without the testimony of treating physicians, many litigants would lose access to the judicial system due to the economics of their case.

For a plaintiff to fully and effectively utilize the testimony of treating experts, a thorough understanding of Idaho's expert discovery rules is required. This article will analyze the recent case of *Easterling v. Kendall*[1] and its effect on the requirements to properly disclose a non-retained expert. It also identifies questions that *Easterling* has left unanswered and proposes a practical solution that will assist in providing clarity to attorneys and courts going forward.

THE DISCLOSURE REQUIREMENTS OF I.R.C.P. 26

The recent amendment to Idaho Rule of Civil Procedure 26(b)(4)(A) draws a much needed distinction between retained experts and non-retained experts. Under this Rule, a party seeking to utilize a retained expert must provide to the opposing party: "a complete statement of all opinions to be expressed and the basis and reasons therefore; 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; any qualifications of the witness, including a list of all publications authorized by the witness within the preceding ten years; the compensation to be paid for the 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."[2]

The requirements in disclosing a non-retained expert, however, are much simpler. Idaho Rule of Civil Procedure 26(b)(4)(A)(1)(ii) requires disclosure as follows:

> For individuals with knowledge of relevant facts not acquired in preparation for trial and who have not been retained or specially employed to provide expert testimony in the case: a statement of the subject matter on which the witness is expected to present evidence under Idaho Rules of Evidence

702, 703 or 705, and a summary of the facts and opinions to which the witness is expected to testify.

The differing requirements for retained experts and non-retained experts recognizes the practical limitations parties regularly encounter when working with a non-retained expert. These difficulties are most pronounced when dealing with a treating physician. As the Civil Rules Advisory Committee noted while discussing the potential amendment: "[I]t is often very difficult to get a treating physical to cooperate in providing the information currently required under this rule, such as information about prior testimony, journal articles, and even a current CV. Many treating doctors simply do not want to be involved in the process and some try to impose barriers to dissuade participation by, for example, charging extraordinary amounts of money for meetings."[3]

SUMMARY OF *EASTERLING V. KENDALL*

Easterling is one of the first cases that analyzed the recent amendment to Idaho Rule of Civil Procedure 26 with respect to non-retained experts. In that case, the trial court granted defendant's Motion for Directed Verdict after plaintiff's anticipated expert testimony regarding causation was excluded on the basis that the expert opinions were not properly disclosed.

The fifteen-year-old plaintiff in that case suffered a fall from a structure in a swimming pool in Twin Falls.[4] She immediately started to experience severe headache, vomiting, and numbness in her left arm.[5] The paramedics that arrived noted an obvious left facial droop and slurred speech.[6] She was flown to Boise because of concerns she may have suffered a stroke.[7]

In the St. Luke's emergency room, plaintiff was examined and treated by defendant Kendall.[8] Upon his examination, he noted facial asymmetry that appeared to "wax and wane."[9] He ordered a CT scan, which did not reveal any abnormalities.[10] An MRI scan was not ordered.[11] The plaintiff was discharged with anti-nausea medication with the belief that she had suffered a concussion.[12]

The plaintiff was rushed to the emergency room in Twin Falls the next morning because of continued headache, nausea, and observations of twitching in her sleep.[13] An MRI was conducted for the first time, which revealed the patient had suffered a dissection of the right internal carotid artery.[14] "A carotid artery dissection is a tear in an artery wall which causes bleeding. To prevent bleeding, the dissection may clot. These clots then may breach off and lodge in the brain, closing off blood flow and causing stroke or stroke-like symptoms."[15]

The attending physician concluded that the dissection had occurred in the last six hours.[16] Again, the plaintiff was air-lifted to Boise where the physicians agreed she had suffered a stroke due to carotid artery dissection.[17]

While in the pediatric intensive care unit, the patient was on and off anticoagulants due to some internal debate among her treating doctors.[18] A few days later, she suffered another

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stroke.[19] Plaintiff was then transferred to the University of Utah where she remained for over a month.[20] Plaintiff suffered permanent neurological damages due to the strokes she suffered.[21]

Plaintiff brought an action for medical negligence alleging the defendant doctor failed to diagnose a carotid artery dissection, and as a result, there was a delay in treatment that resulted in a further stroke, which caused neurological damage.[22]

During discovery, plaintiff disclosed five treating physicians to testify that the defendant's negligence was a substantial factor in causing her injuries.[23] Defendant objected to the disclosure based on an interrogatory which requested plaintiff disclose "the identity of each expert expected to testify and provide a complete statement of each expert's opinions, the facts relied on in forming those opinions, and any exhibits that would be used to support those opinions."[24] Plaintiff supplemented her disclosure by including a statement that the experts would testify constantly with their depositions and by providing a list of quotes taken from their depositions.[25]

The district court found the disclosure inadequate and provided the plaintiff an opportunity to further supplement.[26] Plaintiff supplemented the disclosure, and defendant moved to strike.[27] After a hearing on the motion, the district court excluded the anticipated testimony of the treating physicians.[28] After the plaintiff's presentation of evidence at trial, the district court granted defendant's motion for directed verdict, finding that plaintiff failed to elicit substantial evidence on the element of causation.[29] Plaintiff timely appealed the decision.

In a unanimous decision, the Idaho Supreme Court affirmed the decision of the trial court. The Court agreed that the supplemented response to defendant's interrogatories was insufficient. Specially, the Court expressed concern that the plaintiff "had not actually consulted any of the treating physicians" before drafting the supplemental disclosure.[30] Based on the record, there was no indication that plaintiff's witnesses would testify consistent with the disclosure provided. *Id.*

The plaintiff argued that the requirements of I.R.C.P. 26(b)(4)(A)(1)(ii) require a disclosure of only what the treating expert is "expected to testify" to at trial.[31] The Court noted that there is continuing duty to respond to discovery that request the facts and opinions to which the non-retained expert will testify.[32]

The Court also stated the party disclosing expert opinions must have a "reasonable basis" to support the expectation that a potential witness will testify consistent with the disclosure. *Id.* 367 P.3d, p. 1224. A party's mere "hope" that such testimony will materialize is insufficient. *Id.* The Court found the plaintiff failed to provide adequate basis for claiming that the treating physicians would actually offer opinions regarding causation. The Court recognized that public policy requires the opposing side to have a fair and accurate understanding of the evidence to be presented. Because the plaintiff did not know if the physicians actually held the opinions disclosed, it was found that the district court did not abuse its discretion in excluding such testimony at trial.

BACK TO SQUARE ONE?

The *Easterling* decision raises concerns because it muddles the requirements between I.R.C.P. 26 and the duty to fully respond to discovery requests. It seems to create additional

obligations in disclosing non-retained experts that conflict with the requirements of I.R.C.P. 26.

Specifically, the *Easterling* Court stated that a party must have a "reasonable basis" to disclose that a non-retained expert is going to offer testimony on a particular topic, such as causation.[33] This essentially guts the "expected to testify" language utilized in I.R.C.P. 26.

Beyond stating that a party need not necessarily speak to the treating physician,[34] the Court provides little guidance with what is required for a party to form a "reasonable basis" for its belief that a non-retained expert will testify with respect to a particular issue. Presumably, a party can reasonably expect a physician to testify consistent with her medical records or deposition.

In *Easterling*, the plaintiff's disclosure stated as such. The decision is unclear as to what the medical records and deposition revealed on the issue of causation. Other options exist such as deposing the treating physician or sending written interrogatories.

Further, the Court does not address the problem of uncooperative treaters that the Civil Rules Committee addressed. Imposing a duty to provide the same information required before the amendment was passed through the duty to respond to and supplement discovery allows an opponent to side-step I.R.C.P. 26 by requesting information that may, as a practical matter, be impossible to obtain.

It is important to recognize that the district court did not exclude the opinions of the treating physician based on a failure to comply with I.R.C.P. 26(b)(4)(A)(1)(ii). Rather, the district court determined that plaintiff failed to properly supplement its responses to defendant's interrogatories regarding disclosure of expert opinions, which went beyond the scope of what the rule requires.[35] Allowing litigants to essentially side-step the rule with a basic interrogatory nullifies the benefits of the recent amendment to I.R.C.P. 26.

Given the findings by the Court in *Easterling*, litigants may be faced with many of the same difficulties that they experienced prior to the amendment of I.R.C.P. 26. Without further refinement and clarification, parties who must rely on the testimony of non-retained experts are facing the same problems that existed prior to the amendment of I.R.C.P. 26.

RECOGNITION OF THE "HYBRID" EXPERT WITNESS

Much of the confusion created in *Easterling* can be traced to the dichotomy drawn between retained experts and non-retained experts. Splitting experts into two categories may be an oversimplification as other courts, including those in the Ninth Circuit, have found that there are actually three types of expert witnesses in tort cases: retained; non-retained; and hybrid experts.

Once a treating physician renders and completes treatment, he or she may be asked to render opinions that go beyond their treatment of the plaintiff. The expert may be provided additional information that was not considered during treatment. When treating physicians offer opinions not formed during the relevant course of treatment, they morph into "hybrid" witnesses. These hybrid experts are part fact witness, part expert.[36]

To determine whether a witness is a hybrid expert, the focus is not on whether the witness was retained by a party. Rather, it necessitates analyzing whether the opinion sought to be offered was formed "during the course of treatment."[37] By focusing on the opinion, rather than the expert, the disclosure rules become less chaotic.

If the treating physician is going to offer opinions only formed during the course of treatment, a party would only have to comply with I.R.C.P. 26(b)(4)(A)(1)(ii) as their opinions were not formed in preparation of trial. Moreover, whether an opinion was formed during the course of treatment may be apparent from the medical records or notes. If it is not apparent, it may be determined via correspondence, interrogatory, or deposition.

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If the treating physician is expected to consider additional information and go beyond the opinions formed during the course of treatment, then a full disclosure including pursuant to I.R.C.P. 26(b)(4)(A)(i) would be required. This provides notice to the opposing side of the opinions that, necessarily, would not be included in the medical records or notes of the physician.

Finally, this approach does nothing to prejudice a party who decides to utilize a treating physician as a hybrid expert. If the treating physician is willing to cooperate and assist his or her patient, this can still be a cost-effective way of establishing essential elements of a case. If the doctor is not willing to cooperate, the party is likely better off not relying on this witness and should find other methods of presenting their case.

CONCLUSION

Understanding the unique role hybrid expert witnesses can play in personal injury cases can eliminate some of the concern and uncertainty created by the *Easterling* decision. This approach has been recognized by multiple courts and preserves the benefits of the amendments to I.R.C.P. 26. In addition to providing clarity to litigants and the courts, recognition of hybrid witnesses allows a party to utilize opinions of treating physicians that were formed outside of the course of treatment of the patient while protecting the policy of providing fair notice of the anticipated testimony to all parties.

Michael J. Hanby II (michael@pedersen-law.com) is an attorney with Pedersen Whitehead in Twin Falls, Idaho. His practice focuses on personal injury, medical malpractice, and bad faith. Michael proudly serves on the board of the Idaho Trial Lawyers Association and is a member of American Association of Justice.

Endnotes:
1. 159 Idaho 902, 367 P.3d 1214 (2016).
2. I.R.C.P. 26(b)(4)(A)(i).
3. *Minutes of Idaho Civil Rules Advisory Committee* (December 6, 2013 meeting).
4. *Easterling*, 367 P.3d, p. 1217.
5. *Id.*, 367 P.3d, pp. 1217-18.
6. *Id.*, 367 P.3d, p. 1218.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*, 367 P.3d., pp. 1218-19.
23. *Id.*, 367 P.3d., p. 1219.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*, 367 P.3d, p. 1220.
28. *Id.*
29. *Id.*
30. *Id.*, 367 P.3d, p. 1224
31. *Id.*
32. *Id.*, 367 P.3d, p. 1223.
33. *Id.*, 367 P.3e, p. 1224.
34. *Id.*
35. *Id.*, 367 P.3d, p. 1223.
36. *See Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817 (9th Cir. 2011); *In Fielden v. CSX Transportation, Inc.*, 482 F.3d 866 (6th Cir. 2007); *Meyers v. Nat'l R.R. Passenger Corp.*, 619 F.3d 729, 734-35 (7th Cir. 2010).
37. Id., p. 826