

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ONTARIO A. DAVIS,

Plaintiff,

ORDER

v.

10-cv-674-slc

BARBARA DELAP, SGT. NOVINSKA,
VICKI DORN and PETER HUIBREGTSE,¹

Defendants.

Plaintiff Ontario Davis is proceeding on claims that defendants Huibregtse and Delap violated his Eighth Amendment rights by failing to provide an adequate number of dentists and dental equipment, and that defendants Novinska and Dorn failed to provide plaintiff adequate medical care for his headaches and mouth pain. Now before the court is plaintiff's motion for clarification of the expert witness disclosure rule and for permission to submit the expert report himself, dkt. 55. The motion is GRANTED insofar as the court offers this additional information about expert witness disclosures:

Under Fed. R. Civ. P. 26(a)(2)(B), a witness must provide an expert report "if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." Witnesses who are not required by Rule 26(a)(2)(B) to file a full-boat written report still must disclose "the subject matter on which the witness is expected to present evidence" and "a summary of the facts and opinions to which the witness is expected to testify." Fed. R. Civ. P. 26(a)(2)(C). The requirements of Rule 26(a)(2)(C) apply to treating dentists and physicians who will be offering evidence about how they treated a patient and why they treated him that way. This all that is needed because the dentist's treatment notes and records, prepared at or near the time of treatment, coupled with the limited

¹ I have amended the caption to replace Nurse Jane Doe with the name Vicki Dorn as previously identified by the parties.

disclosures required by Rule 26(a)(2)(C), should provide sufficient notice to the other side about what the dentist did and why. If a dentist or a doctor (or more likely, a nurse or aide under their direction) is only going to testify about what they personally did or saw as part of treatment ordered by someone else and is not going to offer any explanations that require scientific, technical or other specialized knowledge (*see* Fed. R. Ev. 702), then that treatment provider arguably does not have to provide any report at all under Rule 26(a)(2), although fairness and prudence suggests that such witnesses at least be disclosed by the deadline for expert disclosures.

A party does not get to pick and choose between the requirements of Rule 26(a)(2)(B) and Rule 26(a)(2)(C) based on what is convenient for him. If plaintiff has engaged the services of an expert, then plaintiff must not only disclose the name of his expert, he also must provide the defendants with a written report prepared by the expert witness and signed by the expert witness. Plaintiff cannot prepare the report himself. However if plaintiff's expert is not one that plaintiff retained or specially employed to provide expert testimony or is someone whose duties do not regularly involve giving expert testimony, then plaintiff should make that clear in his disclosures. Plaintiff still will be required however to disclose the subject matter and summary of the facts and opinions to which his expert will testify. *See* Rule 26(a)(2)(C). Plaintiff should be careful, however, not to under-disclose, because one reason for expert disclosures is to prevent sandbagging. If a party fails timely to provide the required information about an expert witness, then the most common remedy is for the court to prohibit that witness from testifying.

Entered this 3rd day of October, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge