TREATING PHYSICIANS: FACT WITNESSES OR RETAINED EXPERT WITNESSES IN DISGUISE? FINDING A PLACE FOR TREATING PHYSICIAN OPINIONS IN THE IOWA DISCOVERY RULES

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I. INTRODUCTION

The use of expert testimony is an integral aspect of civil litigation.[1] Experts can be easily found through specialized services or through the classified

1. *See* MARK A. DOMBROFF, EXPERT WITNESSES IN CIVIL TRIALS: EFFECTIVE PREPARATION AND PRESENTATION at v (1987). The importance of expert witnesses is aptly conveyed by the following quote: "'The cost may be high to employ the expert, but it may well be higher not to employ one. Indeed, counsel who chooses to proceed without an expert may be flirting with malpractice.'" DAN POYNTER, EXPERT WITNESS HANDBOOK: TIPS AND TECHNIQUES FOR THE LITIGATION CONSULTANT 14 (2d ed. 1997) (quoting Melvin M. Belli, Sr., *The Expert Witness: Modifying Roles & Rules to Meet Today's Needs*, TRIAL, July 1982, at 35, 35).

sections of various trade periodicals available today.[2] Experts do not come cheap, however, and the costs associated with them, particularly medical experts, can be prohibitive in a low-budget case.[3] But there is often a less expensive and less taxing alternative available to personal injury plaintiffs: the plaintiff's treating physician.[4]

While certainly not as much of a party's instrument as a retained expert might be, a plaintiff's treating physician is a valuable asset. The treating physician has first-hand knowledge of a plaintiff's injuries through her own examination and treatment of the plaintiff. While providing care to a patient, a physician may learn facts and may form opinions concerning the cause of the plaintiff's injuries. The physician may perceive or opine that previous treatment of these injuries was not properly administered; or, especially if treatment spans a period of time, form opinions concerning the prognosis for patient recovery and the percentage of permanent disability.[5] Another advantage to using a treating physician is that the treating physician is *not* the plaintiff's retained expert, giving the treating physician added credibility that a retained expert might lack.[6]

Unfortunately for plaintiffs, however, the use of a treating physician testimony is not as cost- and hassle-free as the above description may have

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2. The preeminent service is Martindale-Hubbell's *Buyer's Guide*, which boasts on its cover: "Thousands of Experts in Thousands of Categories . . . Especially the One You Need." MARTINDALE-HUBBELL, BUYER'S GUIDE 1999 (6th ed. 1999).

3. In addition to the expert's fees, there are costs associated with answering and updating answers to detailed interrogatories, which is an obligatory aspect of discovery when employing experts for use at trial. *See* IOWA R. CIV. P. 125(a) (providing means for discovery of expert witnesses); *see also* FED. R. CIV. P. 26(a)(2)(B) (identifying the disclosures required by a party utilizing an expert witness).

4. There is no apparent reason why a defendant could not also use the testimony of a plaintiff's treating physician should the testimony support that side. *See, e.g.*, Spedick v. Murphy, 630 A.2d 355, 365 (N.J. Super. Ct. App. Div. 1993) (finding the defendant was properly allowed to call plaintiff's treating physicians to testify as to the physical examination and diagnosis of plaintiff shortly after injury); Stark v. Semeran, 665 N.Y.S.2d 233, 233 (App. Div. 1997) (finding preclusion of plaintiff's treating physician's testimony prejudiced defendant); Christensen v. Munsen, 867 P.2d 626, 631 (Wash. 1994) (holding the trial court properly admitted defendant's use of testimony from plaintiff's treating physician regarding "medical facts and causation opinions"). The most common scenario, however, appears to be the use of treating physician testimony by plaintiffs.

5. DOMBROFF, *supra* note 1, § 1.2, at 7; *see also* Piper v. Harnischfeger Corp., 170 F.R.D. 173, 175 (D. Nev. 1997) (finding it "common place for a treating physician during, and as part of, the course of treatment . . . to consider things such as the cause of the medical condition, the diagnosis, the prognosis and the extent of disability"); Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595, 598 (Iowa 1997) (opining the treating physician is the "logical person to evaluate the permanency of the injury").

6. DOMBROFF, *supra* note 1, § 1.2, at 7.

conveyed. A common scenario is as follows: The defendant in a personal injury suit propounds written interrogatories. One interrogatory requests the identity of all expert witnesses expected to be called at trial; the subject matter of their testimony; all facts, mental impressions, and opinions they are expected to provide; and the basis for their expertise for that testimony. The plaintiff answers, indicating the treating physician will be called as a witness, but provides no further information. The defendant voices an exception to this lack of information. When deadlock on the issue is obvious, the defendant enters a motion to compel discovery and to have the treating physician excluded as a witness. Both sides are forced to write briefs and argue the point before the court. If the court agrees that the plaintiff has not made a timely disclosure, the court could restrict or preclude the testimony.

Part II of this Note examines the Iowa discovery rule pertaining to disclosure of expert witnesses in interrogatories, then analyzes the manner in which the Iowa courts have construed the rule in situations similar to the hypothetical described above. Part III of this Note examines the analogous federal discovery rule, and the manner in which the federal courts have construed them. Part IV examines the rules of selected states, and the manner in which the respective courts have construed these discovery rules. This analysis will be used to illustrate the proper course for Iowa courts on this issue. Part V of this Note concludes that treating physicians should be exempt from detailed disclosure requirements of the Iowa rule in all but extreme situations. This Note will also argue that the language of the Iowa rule itself precludes a court from *completely* eliminating a treating physician's testimony as a sanction if portions of the testimony derive from treatment of a patient.

II. DISCLOSURE OF TREATING PHYSICIANS IN IOWA

A. *The Iowa Rule*

Iowa Rule of Civil Procedure 125 (Rule 125) states, in pertinent part:

> [D]iscovery of facts known, mental impressions, and opinions held by an expert whom the other party expects to call as a witness at trial, . . . and *acquired or developed in anticipation of litigation or for trial* may be obtained . . . . Nothing in this rule shall be construed to preclude a witness from testifying as to (1) knowledge of the facts obtained by the witness prior

> to being retained as an expert or (2) mental impressions or opinions formed by the witness which are based on such knowledge.[7]

Rule 125 also permits interrogatory inquiries into the qualifications of the expert witnesses[8] and requires that the experts' signatures accompany such disclosure.[9] Under Rule 125(c), the district courts may excise portions of, or eliminate entirely, expert witness testimony which has not been properly disclosed or updated.[10] A Rule 125 ruling will be overturned only for an abuse of discretion,[11] when made on grounds that are clearly untenable or unreasonable,[12] or when no substantial evidence supports the ruling.[13]

There is obvious tension built into Rule 125 when applied to a party's treating physician who is presented to provide testimony on causation of injury, prognosis, or standard of care.[14] It is clear, a treating physician is an expert of sorts. But what controls the debate is whether the physician comes by facts, mental impressions, or opinions in the ordinary course of treatment—and, therefore, exempt from detailed disclosure—or in "anticipation of litigation"—in which case the physician is subject to detailed disclosure.[15]

B. *Iowa Case Law*

1. Day v. McIlrath:[16] *The Water Is Muddied*

The Supreme Court of Iowa first addressed the applicability of Rule 125 with respect to treating physicians in *Day v. McIlrath*.[17] The court overturned a district court order thereby compelling answers to interrogatories propounded to discover the "subject matter of testimony, qualifications, opinions, and mental

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7. IOWA R. CIV. P. 125(a) (emphasis added).
8. IOWA R. CIV. P. 125(a)(1)(B).
9. IOWA R. CIV. P. 125(a)(1)(C).
10. IOWA R. CIV. P. 125(c).
11. *See* Hantsbarger v. Coffin, 501 N.W.2d 501, 505 (Iowa 1993) (applying an abuse of discretion standard when plaintiff missed deadline for complete designation of an expert by approximately one week).
12. Shook v. City of Davenport, 497 N.W.2d 883, 885 (Iowa 1993).
13. Wagner v. Miller, 555 N.W.2d 246, 249 (Iowa Ct. App. 1996).
14. *See* IOWA R. CIV. P. 125(a).
15. *See id.*
16. Day v. McIlrath, 469 N.W.2d 676 (Iowa 1991).
17. *Id.* at 677. In this case, a passenger injured in a car accident sued the drivers of both vehicles. *Id.* at 676-77. The trial court ordered the plaintiff to answer defendant's detailed interrogatories concerning the treating physician, but did not uphold the signature requirement. *Id.* at 677. The court granted the plaintiff an interlocutory appeal. *Id.*

impressions" of the plaintiff's treating physicians.[18] The court explained a "treating physician ordinarily learns facts in a case, and forms mental impressions or opinions, substantially before he or she is retained as an expert witness, and often before the parties themselves anticipate litigation."[19] It added, however, "a treating physician ordinarily focuses . . . on purely medical questions rather than on the sorts of partially legal questions (such as causation or percentage of disability) which may become paramount in the context of a lawsuit."[20] Despite this last admonishment, the court indicated it did not consider treating physicians' "factual knowledge, mental impressions and opinions [to] stand on precisely the same footing, especially in the early stages of litigation, as those of . . . retained expert [witnesses]."[21] The court held Rule 125's requirement of the expert's signature was not necessary under the facts of the case.[22]

Almost as a parting note, the *Day* court warned the duty to supplement discovery "could become obligatory" when the physician "assumes a role in litigation analogous to the role of a retained expert."[23] The court reasoned "the absence of interrogatory material could, in certain situations, make it more difficult to depose a treating physician."[24] Aside from the holding of *Day* as applied to its facts, the allusion to "purely medical questions" and the court's parenthetical reference to "causation or percentage of disability" as types of "partially legal questions," the court failed to further define what type of testimony or behavior would transform a treating physician into the type of expert envisaged by Rule 125.[25] Guided solely by the dicta of *Day*, the cautious attorney planning to offer treating physician testimony on issues such as causation, prognosis, and standard of care, might wisely abide by the detailed discovery provisions of Rule 125.[26]

Adding to the confusion of *Day* is *Cox v. Jones*,[27] a decision handed down in the same year.[28] The *Cox* case, unlike *Day*, did not deal precisely with the

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18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*; *see also* IOWA R. CIV. P. 125(c) (discussing the duty to supplement discovery).
24. Day v. McIlrath, 469 N.W.2d at 677.
25. *See id.* at 676-77.
26. *See id.* at 677 ("When a treating physician assumes a role in litigation analogous to the role of a retained expert, supplemental discovery rule 125(c) could become obligatory.").
27. Cox v. Jones, 470 N.W.2d 23 (Iowa 1991). In this case the plaintiff, who visited a doctor for cataract removal and later visited another doctor when problems arose with her eye

issue of whether treating physicians fall within the purview of Rule 125. Instead, the issue was whether a plaintiff's treating physician was subject to designation as an expert under section 668.11 of the Iowa Code.[29] The Supreme Court of Iowa rejected the argument that treating physicians are exempt from section 668.11 designation.[30] In doing so, the court indicated that if not designated as an expert, "the opposing party should be able to expect that a treating physician's testimony will not include opinions on reasonable standards of care or causation."[31]

When combined with the dicta in *Day*, the bold language of *Cox* was a strong indication that treating physicians who provide such testimony would be subject not only to designation under section 668.11, but to the detailed disclosure requirements of Rule 125.[32] Any indication of a bright-line requirement for Rule 125 disclosure, or section 668.11 designation was, however, destroyed by the court's explanation in the 1992 case of *Carson v. Webb*.[33]

2. *The Water Clears: The* Carson v. Webb *Retraction*

In *Carson*, an Iowa district court was found to have improperly excluded "all opinion evidence that could not be the subject of lay testimony," because of the plaintiff's failure to disclose her treating physicians as experts.[34] "[T]he paramount criteri[a]," the court expounded, "is whether [the] evidence,

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(allegedly because the first doctor required payment for the initial treatment before seeing her again), attempted to introduce the testimony of the second doctor against the first. *Id.* at 24.

28. *Id.*; *see* Day v. McIlrath, 469 N.W.2d at 676.

29. *Id.* at 23; *see* IOWA CODE § 668.11 (1999). Iowa Code section 668.11 states, in pertinent part:

> A party in a professional liability case brought against a licensed professional . . . who intends to call an expert witness of their own selection, shall certify to the court and all other parties the expert's name, qualifications and the purpose for calling the expert . . . . If a party fails to disclose an expert . . . the expert shall be prohibited from testifying in the action [except] for good cause shown.

IOWA CODE § 668.11. Because section 668.11 entails a similar disclosure requirement for expert witnesses to Rule 125, the two provisions, as well as *Cox*, are relevant to this inquiry. *Compare id.* (requiring disclosure of expert's name, qualifications, and purpose), *with* IOWA R. CIV. P. 125(a) (allowing discovery of facts known, opinions held, mental impressions, name, address, subject matter of testimony, and qualifications), *and* Cox v. Jones, 470 N.W.2d at 25 (deciding to apply section 668.11 to a treating physician).

30. Cox v. Jones, 470 N.W.2d at 25.

31. *Id.*

32. *See id.*; Day v. McIlrath, 469 N.W.2d at 677.

33. Carson v. Webb, 486 N.W.2d 278 (Iowa 1992).

34. *Id.* at 280.

irrespective of whether technically expert opinion testimony, relates to facts and opinions arrived at by a physician in treating a patient or whether it represents expert opinion testimony formulated for purposes of issues in pending or anticipated litigation."[35] The *Carson* court went on to explain how its holding was not inconsistent with the court's interpretation of Iowa Code section 668.11 in *Cox*: "Reasonable standards of medical care, as that subject arose in the *Cox* medical malpractice litigation, was not a matter for which the physician was required to formulate an opinion in treating a patient."[36] However, more significant was a statement the court tucked into a footnote:

> We do not believe . . . the language concerning expert opinion of "causation" in *Cox* . . . or in *Day* . . . was meant in either case to establish that *all* expert opinions of treating physicians as to causation are matters for which disclosure is required [in section 668.11 or Rule 125]. Some conclusions concerning causation relate directly to the treatment . . . and are thus outside the scope of section 668.11 or [R]ule 125. [37]

The court's footnote, while purporting to be a clarification of the earlier cases, in reality, is more of a retraction.[38] In fact, in *Duncan v. City of Cedar Rapids*,[39] the next time the court looked at the treating physician problem, the following parenthetical explanation of the *Cox* holding appeared: "[A] treating physician who will give testimony on standards of care and causation is an expert subject to disclosure under [R]ule 125."[40]

The *Duncan* court held Rule 125(c) did not apply to hospital technicians "called to testify to the procedures employed by the hospital generally in the testing of blood, and to the specific testing for alcohol" in that case.[41] The court reiterated its clarification in *Carson*, explaining *Day* meant "the disclosure

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35. *Id.* at 281.

36. *Id.* Instead of merely considering certain types of testimony, that is, causation, prognosis, and standard of care, to be akin to expert witnesses and thus subject to Rule 125, which is what much of the dicta in *Day* and *Cox* appear to stand for. This court indicates that the factual backdrop in which treatment was rendered is decisive in that determination. *See id.*; Day v. McIlrath, 469 N.W.2d at 677; Cox v. Jones, 470 N.W.2d at 25. There is a difference between a treating physician who *seems* like an expert witness simply because he is on the witness stand answering similar questions, and a treating physician who has, to borrow the court's language in *Day*, "assume[d] a role in litigation analogous to a treating physician" because he is making the same type of after-the-fact analysis made by experts. Day v. McIlrath, 469 N.W.2d at 677.

37. Carson v. Webb, 486 N.W.2d at 281 n.3.

38. *See id.*; Cox v. Jones, 470 N.W.2d at 25; Day v. McIlrath, 469 N.W.2d at 677.

39. Duncan v. City of Cedar Rapids, 560 N.W.2d 320 (Iowa 1997).

40. *Id.* at 323.

41. *Id.*

procedures of [R]ule 125 did not apply to a treating physician with the possible exception of [one] who assumes a role . . . analogous to a retained expert."[42] The court found the knowledge of the technicians "was not 'acquired or developed in anticipation of litigation or for trial'" and thus outside the purview of Rule 125.[43] Considering both *Carson* and *Duncan* effectively reject the strong language of *Cox*—language which appeared to create a bright-line rule that treating physician opinions on causation would automatically subject the physician to detailed disclosure requirements—the language can be defensibly ignored.[44]

The most recent examination of Rule 125 came in *Morris-Rosdail v. Schechinger*,[45] in which the court of appeals overturned a district court ruling excluding videotaped testimony of the treating physician's prognosis as to the extent of impairment and the need for future surgery.[46] The plaintiff had identified her treating physicians as persons expected to provide testimony at trial, but disclosed no other information.[47] The court of appeals advised: "It would be an abuse of discretion to exclude or limit the testimony of a treating physician as a nondisclosure sanction under Rule 125."[48] It emphasized "the reason and time frame in which the underlying opinions and facts were acquired" are the criteria for determining the applicability of Rule 125.[49] The court pointed to the lack of specific findings by the district court to support a conclusion "that the facts and opinions of the [excluded physician witnesses] were acquired or developed in anticipation of litigation or for trial."[50]

3. *Summary of Iowa Case Law*

The standard of when a court should treat a physician as an expert for the purposes of Rule 125 has become the statement articulated by the Supreme Court

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42. *Id.*

43. *Id.* (quoting IOWA R. CIV. P. 125(a)).

44. *See* Carson v. Webb, 486 N.W.2d 278, 281 n.3 (Iowa 1992).

45. Morris-Rosdail v. Schechinger, 576 N.W.2d 609 (Iowa Ct. App. 1998). In this case, the plaintiff, involved in a collision with a bus, sought to include the testimony of her treating physicians, including a physician who examined her nine months before the lawsuit was initiated and another physician who treated and performed surgery upon her less than six weeks before trial. *Id.* at 612.

46. *Id.*

47. *Id.* at 611.

48. *Id.* at 612.

49. *Id.*

50. *Id.* The court appeared to say, without specific findings supporting a conclusion, the facts and opinions were formed while anticipating litigation, a Rule 125(c) ruling would "lack substantial evidence to support a finding," and thus, be an abuse of discretion. *Id.*; *see* Wagner v. Miller, 555 N.W.2d 246, 249 (Iowa Ct. App. 1996).

of Iowa in *Day*: when the physician "assumes a role in litigation analogous to the role of a retained expert."[51] While it appeared from the court's earlier dicta that treating physicians would assume the role of an expert when testimony on causation, percentage of disability, and standards of care was given,[52] the opinion in *Carson* makes clear—at least with respect to the issue of causation—that such testimony does not automatically demand Rule 125 application.[53] The *Carson* court reiterated the holding of *Day*, finding some opinions regarding causation stem directly from treatment.[54]

The apparent message being articulated to the trial courts is that when ruling on a motion to compel, it must look to the factual background in which the treatment took place, "the reason and [the] time frame in which the underlying facts and opinions were acquired by the physician" as well as the nature of the injuries—the what, where, when, and how.[55] Then the trial court must decide whether such facts and opinions were germane to treatment or formed with an eye toward litigation.[56] According to the court of appeals in *Morris-Rosdail*, a district court must make specific findings demonstrating the facts and opinions under attack were "acquired or developed in anticipation of trial."[57]

III. SUMMARY OF TREATING PHYSICIANS UNDER FEDERAL LAW

Like the Iowa rule, the Federal Rules of Civil Procedure distinguish between retained and unretained witnesses.[58] Similarly, the Federal Rules of

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51. Day v. McIlrath, 469 N.W.2d 676, 677 (Iowa 1991); *see also* Duncan v. City of Cedar Rapids, 560 N.W.2d 320, 323 (Iowa 1997) (citing Day v. McIlrath, 469 N.W.2d at 677); Morris-Rosdail v. Schechinger, 576 N.W.2d at 612 (citing Day v. McIlrath, 469 N.W.2d at 677).

52. *See* Cox v. Jones, 470 N.W.2d 23, 25 (Iowa 1991); Day v. McIlrath, 469 N.W.2d at 677.

53. *See* Carson v. Webb, 486 N.W.2d 278, 280-81 (Iowa 1992); *see also* Morris-Rosdail v. Schechinger, 576 N.W.2d at 612 (stating treating physician's testimony does not automatically require application of Rule 125); Duncan v. City of Cedar Rapids, 560 N.W.2d at 323 (stating that Rule 125 does not apply automatically to the witnesses in this case).

54. Carson v. Webb, 486 N.W.2d at 281 n.3.

55. Morris-Rosdail v. Schechinger, 576 N.W.2d at 612.

56. Carson v. Webb, 486 N.W.2d at 280-81; Morris-Rosdail v. Schechinger, 576 N.W.2d at 612.

57. Morris-Rosdail v. Schechinger, 576 N.W.2d at 612.

58. *Id.* *Compare* IOWA R. CIV. P. 125(a)-(b), *with* FED. R. CIV. P. 26(2)(B). Federal Rule of Civil Procedure 26(2)(B) governs disclosure of retained expert witnesses expected to be called at trial. FED. R. CIV. P. 26(2)(B). It states, in pertinent part:

> [D]isclosure 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

Civil Procedure allow the trial court discretion to limit or prohibit the testimony at issue if it finds a failure to make disclosure is done "without substantial justification."[59] The similarities between the Federal Rules' expert report requirement and the requirement of detailed disclosure under Rule 125 create similar incentives for parties and cause similar problems for federal district courts, thereby making the federal case law analogous to Iowa case law for the purpose of this inquiry.[60] The majority of federal courts considering the issue of whether treating physicians are subject to reporting requirements when presented to provide opinion testimony on prognosis, causation, or standard of care, have concluded treating physicians are not subject to these requirements, so long as the opinions stem from treatment.[61]

> prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore . . . .

Id.

59. FED. R. CIV. P. 37(c)(1).

60. *Compare* FED. R. CIV. P. 26(2)(B), *with* IOWA R. CIV. P. 125(a). Both rules provide for discovery of retained expert's written reports. FED. R. CIV. P. 26(2)(B); IOWA R. CIV. P. 125(a).

61. *See* Elgas v. Colorado Belle Corp., 179 F.R.D. 296, 298 (D. Nev. 1998) (finding treating physician opinions "on matters such as 'causation, future treatment, extent of disability and the like' are part of the ordinary care of a patient" and therefore not subject to the report requirement (quoting Piper v. Harnischfeger Corp., 170 F.R.D. 173, 174-75 (D. Nev. 1997))); Sprague v. Liberty Mut. Ins. Co., 177 F.R.D. 78, 81 (D.N.H. 1998) (holding expert opinions stemming from treatment not subject to the report requirement); Shapardon v. West Beach Estates, 172 F.R.D. 415, 416 (D. Haw. 1997) (opining that physicians "commonly consider the cause of any medical condition presented in a patient, the diagnosis, the prognosis and the extent of disability"); Piper v. Harnischfeger Corp., 170 F.R.D. at 175 (finding considerations of causation, diagnosis, and prognosis commonplace in treatment); Brown v. Best Foods, Inc., 169 F.R.D. 385, 388 (N.D. Ala. 1996) (exempting opinions stemming from treatment from the report requirement); Bucher v. Gainey Transp. Serv., 167 F.R.D. 387, 390 (M.D. Pa. 1996) (deciding opinions on causation based on examination, diagnosis, and treatment do not create a requirement of an expert report); Hall v. Sykes, 164 F.R.D. 46, 48 (E.D. Va. 1995) (holding opinions about causation and prognosis based on treatment exempt from the report requirement); Wreath v. United States, 161 F.R.D. 448, 449 (D. Kan. 1995) (exempting opinions stemming from facts known by way of treatment from the report requirement). What cannot be observed from the above parentheticals is that most of the courts examining this issue have not only found such opinions stemming from treatment generally, exempt from the report requirement, but have held the specific testimony at issue in the respective cases, in fact, stemmed from treatment. *See, e.g.*, Piper v. Harnishfiger Corp. 170 F.R.D. at 175 (making the distinction between general and specific physician testimony). For a more extreme case, see *Elgas v. Colorado Belle Corp.*, in which a physician was held exempt from the report requirement, albeit only for factors "learned in the course of his limited treatment," though he merely consulted in the patient's care. Elgas v. Colorado Belle Corp., 179 F.R.D. at 300.

One of the earlier cases to examine the issue of treating physician opinions under the federal rule, *Baker v. Taco Bell Corp.*,[62] has emerged as the preeminent case on the matter. While *Taco Bell* involved the issue of physician billing for preparation of deposition testimony,[63] the court's analysis is germane to this inquiry, and the case has been cited with approval by courts faced with opinion testimony on causation, prognosis, and future treatment.[64] In holding the treating physician's testimony not within the purview of the federal rule, the court opined that:

> Treating physicians are not retained for purposes of trial. Their testimony is based upon their personal knowledge of the treatment of the patient and not information acquired from outside sources for the purpose of giving an opinion in anticipation of trial. They are witnesses testifying to the facts of their examination, diagnosis, and treatment of the patient. It does not mean that the treating physicians do not have an opinion based upon their examination of the patient or to the degree of injury in the future. These opinions are a necessary part of the treatment of the patient.[65]

The *Taco Bell* court examined the advisory committee notes pertaining to Federal Rule of Civil Procedure 26(b)(4)(A), which actually mention that treating physicians are not subject to the report requirement, a fact, no doubt, integral in its decision.[66] The court characterized treating physicians as "ordinary witnesses."[67]

Despite the strong language of the federal decisions, treating physicians will not be exempted from the requirement of the detailed report through title alone; that is, if a physician is "specially retained or employed to render a

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62. Baker v. Taco Bell Corp., 163 F.R.D. 348 (D. Colo. 1995). In *Taco Bell*, the plaintiff sought reimbursement for fees charged by treating physicians for "record review" in preparing for the defendant's deposition. *Id.* at 349.

63. *Id.*

64. *See, e.g.*, Piper v. Harnischfeger Corp., 170 F.R.D. at 175 (holding treating physicians were not subject to strict disclosure requirements).

65. Baker v. Taco Bell Corp., 163 F.R.D. at 349.

66. *See id.* at 349-50; Piper v. Harnischfeger Corp., 170 F.R.D. at 174 (noting the influence of the notes of the advisory committee in deciding exemption of treating physicians from the report requirement). The committee stated:

> [T]he requirement of a written report . . . 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.*

FED. R. CIV. P. 26(b)(4)(A) advisory committee's note (emphasis added).

67. Baker v. Taco Bell Corp., 163 F.R.D. at 351-52.

medical opinion based on factors that were not learned in the course of treatment," the physician can be deemed subject to it.[68] The District Court for the Northern District of Alabama, in *Brown v. Best Foods, Inc.*,[69] for example, opined that a physician "'request[ing] to review medical records of another health care provider in order to render opinion testimony concerning the appropriateness of the care and treatment of the provider'" is the type of activity for which a physician should be considered specially retained, despite the title of treating physician.[70] As was the case in *Brown*, the court in *Hall v. Sykes*[71] found that if an attorney refers a client to a physician for treatment, "it is *presumed* that the physician was selected for expert testimony" and therefore subject to the report requirements.[72]

On the other hand, the federal courts have made clear the fact that engaging in activities similar to those of retained experts will not alone subject treating physicians to the report requirement.[73] For example, the *Sykes* court explained that the compensation for preparation of testimony, as well as time spent in depositions or in trial, will not transform a treating physician into a specially retained expert.[74] Nor will the fact the treating physician must review notes prior to testifying about the treatment transform that physician into an expert.[75] "The incredible effort and expense that such a requirement would cause flies in the face of all attempts to reduce the expense and delay of litigation."[76] A small minority of federal courts addressing the treating physician issue have held that treating physicians who have not presented the detailed report, as required of retained experts, are prevented from providing testimony

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68. Hall v. Sykes, 164 F.R.D. 46, 48-49 (E.D. Va. 1995); *see also* Brown v. Best Foods, Inc., 169 F.R.D. 385, 389 (advising that physicians are subject to the report requirement when their opinions extend "beyond the facts disclosed during care and treatment of the patient and the doctor is specially retained to develop opinion testimony"); Bucher v. Gainey Transp. Serv., 167 F.R.D. 387, 390 (admonishing that treating physicians are subject to the report requirement if testifying to matters not founded upon treatment of the patient).

69. Brown v. Best Foods, Inc., 169 F.R.D. 385 (N.D. Ala. 1996).

70. *Id.* at 389 (quoting Wreath v. United States, 161 F.R.D. 448, 450 (D. Kan. 1995)). For an example of a situation where a court, though holding generally that treating physicians are exempt from the report requirement, ruled that a treating physician, by receiving information stemming from outside of treatment—in this case through the plaintiff's attorney—is subject to the report requirement, see *Shapardon v. West Beach Estates*, 172 F.R.D. 415, 417 (D. Haw. 1997).

71. Hall v. Sykes, 164 F.R.D. 46 (E.D. Va. 1995).

72. Hall v. Sykes, 164 F.R.D. at 49 (emphasis added).

73. *See id.* at 48-49.

74. *Id.* at 48.

75. *Id.* at 49.

76. *Id.*

regarding causation and prognosis.[77] Such testimony was found to be outside the scope of a treating physician's observations during a medical examination.[78]

In *Thomas v. Consolidated Rail Corp.*,[79] the United States District Court of Massachusetts stated:

> [W]here a physician has treated the plaintiff, disclosure of an expert report will be required where the witness' testimony was not based on his observations during the course of treating the plaintiff. . . . [A] treating physician who has formulated opinions going beyond what was necessary to provide appropriate care for the injured party steps into the shoes of a retained expert . . . . Here, it appears clear . . . that the three witnesses will be offering their testimony, at least in part, not merely based on observations made during the course of treatment, but on professional expertise going beyond treatment per se. *For example, it seems that plaintiff intends to offer opinion testimony . . . regarding causation and prognosis. Under these circumstances, a report . . . should be provided.*[80]

All other courts considering these minority-view cases as possible precedent have either declined to follow them, distinguished them, or modified them.[81]

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77. *See* Thomas v. Consolidated Rail Corp., 169 F.R.D. 1, 2 (D. Mass. 1996); Widhelm v. Wal-Mart Stores, Inc., 162 F.R.D. 591, 594 (D. Neb. 1995).

78. Thomas v. Consolidated Rail Corp., 169 F.R.D. at 2.

79. Thomas v. Consolidated Rail Corp., 169 F.R.D 1 (D. Mass. 1996).

80. *Id.* at 2 (emphasis added).

81. *See* Sprague v. Liberty Mut. Ins. Co., 177 F.R.D. 78, 80-81 (D.N.H. 1998) (declining to follow *Salas v. United States*); Sullivan v. Glock, Inc., 175 F.R.D. 497, 508 (D. Md. 1997); Shapardon v. West Beach Estates, 172 F.R.D. 415, 417 (D. Haw. 1997); Lauria v. National R.R. Passenger Corp., No. CIV A 95-1561, 1997 WL 138906, at *2 (E.D. Pa. Mar. 24, 1997), *aff'd*, 145 F.3d 593 (3d. Cir. 1998).

IV. SUMMARY OF TREATING PHYSICIANS UNDER THE DECISIONS OF SELECTED STATES

A. *Summary of New York Case Law: A Bright-Line Approach*[82]

New York traces its expert disclosure rule to the federal equivalent.[83] Its decisions on the subject of treating physicians are heavily influenced by federal decisions and the advisory committee notes of the Federal Rules of Civil Procedure.[84] In *Nesselbush v. Lockport Energy Associates*,[85] for example, the court held "treating physicians need not be disclosed as experts retained to testify at trial."[86] The court remarked: "The role of the treating physician has nothing inherently to do with the process of litigation."[87]

Unlike the federal cases construing treating physician testimony, the New York courts appear to consider the act of treating a patient as a bright-line qualification for exemption from the strictures of their expert rule.[88] The striking feature of the New York decisions is that they summarily conclude the treating physicians are exempt from the detailed disclosure requirements, without the admonishments present in many of the federal cases that treating physician

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82. New York is highlighted because of the uniformity in its lower appellate court decisions, and because those courts appear to have taken a bright-line approach to the exclusion of treating physicians from expert disclosure requirements. *See infra* notes 81-84 and accompanying text. For examples of decisions from other states finding treating physicians exempt from expert disclosure requirements, see *Miller v. Phillips*, 959 P.2d 1247, 1250 (Alaska 1998) (holding physician testimony, if pertaining to treatment, not subject to the expert disclosure rule "even when . . . involv[ing] opinions regarding their patients' injuries, treatment, and prognoses"), *Thompson* v. *KFB Ins. Co.*, 850 P.2d 773, 784 (Kan. 1993) (opining an "expert witness typically would be a consultant whose connection with the case began during trial preparation"), *Hruban v. Hickman Mills Clinic, Inc.*, 891 S.W.2d 188, 190-91 (Mo. Ct. App. 1995) (deciding treating physician conclusions and opinions are not subject to expert disclosure), *Stigliano v. Connaught Labs., Inc.*, 658 A.2d 715, 719 (N.J. 1995) (finding the treating doctors may offer opinions as to diagnoses, treatment, and cause of disorder), and *McCoy v. Black*, 949 P.2d 689, 694 (Okla. Ct. App. 1997) (defining as non-expert testimony, derived from facts "garnered in the course of . . . treatment").

83. *See* Nesselbush v. Lockport Energy Assocs., 647 N.Y.S.2d 436, 437-38 (Sup. Ct. 1996).

84. *Id.* at 437 (citing FED. R. CIV. P. 26 advisory committee's notes; Baker v. Taco Bell Corp., 163 F.R.D. 348, 349 (D. Colo. 1995)). Because of the similarities in content and purpose between the New York rules and the Federal Rules of Civil Procedure, the New York decisions are persuasive authority in Iowa courts and their treatment of the Iowa expert disclosure rule.

85. Nesselbush v. Lockport Energy Assocs., 647 N.Y.S.2d 436 (Sup. Ct. 1996).

86. *Id.* at 438.

87. *Id.* at 436.

88. *See* Casey v. Tan, 680 N.Y.S.2d 391, 392 (App. Div. 1998).

testimony must stem directly from treatment.[89] Compared to Iowa—and even the more decisive federal decisions—New York courts have been very resolute in dismissing treating physicians from detailed disclosure requirements.[90]

B. *Defining the Word "Expert" in Connecticut and Kansas: A Study in Contrast*

Although both Connecticut and Iowa use the language "in anticipation of litigation or for trial" within each state's respective expert rules,[91] Connecticut courts have ignored this language when interpreting cases dealing with treating physicians.[92] Instead, Connecticut courts have focused on the portion of the rule commanding detailed disclosure for expert witnesses generally.[93] Connecticut courts consistently hold treating physicians fall within those commands of the rule requiring disclosure of expert witnesses.[94] Thus, in an early case on the subject, the Appellate Court of Connecticut stated:

> The term expert may be extended to all persons acquainted with the science or practice in question . . . . [A] trial court may exclude expert testimony proffered by a party regardless of any agency relationship that may exist . . . . We have previously held and continue to hold that the disclosure

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89. *Compare id.* ("[T]he court's reliance on [the expert rule] was misplaced; that section applies only to experts retained to give testimony at trial and not to treating physicians . . . ."), Bonner v. Lee, 679 N.Y.S.2d 775, 776 (App. Div. 1998) ("Because the witness was one of the plaintiff's treating physicians, [the expert rule] does not apply . . . ."), *and* Brooks v. City of New York, 678 N.Y.S.2d 479, 480 (Sup. Ct. 1998) (holding the expert rule "does not apply to a treating physician"), *with* Salas v. United States, 165 F.R.D. 31, 33 (W.D.N.Y. 1995) ("[W]hen the doctor's opinion testimony extends beyond the facts disclosed during care and treatment of the patient and the doctor is specifically retained to develop opinion testimony, he or she is subject to the provisions of [the expert rule].").

90. *See, e.g.*, Beck v. Albany Med. Ctr. Hosp., 594 N.Y.S.2d 844, 846-47 (App. Div. 1993) (holding the plaintiff's treating physician was not an expert when called to testify for defendant).

91. CONN. PRAC. BOOK § 13-4(2) (1998); IOWA R. CIV. P. 125(a).

92. *See, e.g.*, Wright v. Hutt, 718 A.2d 969, 976 n.5 (Conn. App. Ct. 1998) (analyzing the commands of Connecticut Practice Book § 13-4, which requires detailed disclosure of expert witness testimony).

93. *See id.* at 976-77.

94. *See id.* (holding treating physician testimony is "based on . . . [the] skills or knowledge [of] medical doctors" and subject to exclusion by the trial court); Rosenberg v. Castaneda, 662 A.2d 1308, 1310 (Conn. App. Ct. 1995) (finding treating physicians "within the ambit of the rule"); Sung v. Butterworth, 644 A.2d 395, 398 (Conn. App. Ct. 1994) (judging treating physician's testimony on standard of care to be an expert opinion); Gemme v. Goldberg, 626 A.2d 318, 323 (Conn. App. Ct. 1993) (announcing disclosure requirements of the Connecticut Practice Book "apply with equal force to treating physicians").

> requirements . . . apply with equal force to treating physicians as well as to independent experts.[95]

In a later case, the same court refused to compromise this position by "creat[ing] a new hybrid factual expert category of witness who could give expert testimony restricted to those matters about which the witness gave factual testimony."[96]

The Kansas expert disclosure rule contains language identical to that found in Iowa's and Connecticut's respective rules.[97] Like Connecticut, Kansas has not focused on the temporal aspect of the language in deciding whether treating physicians fall within the expert disclosure requirements but instead has focused on the language pertaining to experts generally.[98] However, the Supreme Court of Kansas has reached a surprisingly different result than Connecticut in construing the purview of its statute.[99]

In *Thompson v. KFB Insurance Co.*,[100] the Supreme Court of Kansas analyzed the discovery rule pertaining to supplementation of interrogatories, but its decision appears to have hinged instead on the procedural rule differentiating between opinion testimony of experts and non-experts.[101] It examined the concept of "expert" as follows:

> A "person expected to be called as an *expert witness*" typically would be a consultant whose connection with the case began during trial preparation rather than with the events upon which a plaintiff's claim is based and would offer opinions based on information known to him or her. A treating doctor, while certainly possessing special knowledge, skill, experience, and training required of a witness testifying as an expert, typically would be called principally to recount plaintiff's injury and treatment. . . . [The rule] *allows a treating physician to inject incidental opinions into his account without transforming him from a witness who is not testifying an expert into a witness who is testifying as an expert.*[102]

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95. Gemme v. Goldberg, 626 A.2d at 323 (citations omitted) (construing former Connecticut Practice Book § 220, which was replaced by § 13-4).

96. Sung v. Butterworth, 644 A.2d at 397.

97. KAN. STAT. ANN. § 60-226(b)(4) (1994) (delineating the ways in which discoverable facts and opinions held by experts "acquired or developed in anticipation of litigation or for trial" may be obtained).

98. *See* Thompson v. KFB Ins. Co., 850 P.2d 773, 785 (Kan. 1993) (finding the factual witness provision of procedural rule § 60-456(b) permits physicians to "inject incidental opinions").

99. *See id.*

100. Thompson v. KFB Ins. Co., 850 P.2d 773 (Kan. 1993).

101. *See id.* at 784-85.

102. *Id.* (emphasis added) (quoting KAN. STAT. ANN. § 60-226(e)(1)(B) (Supp. 1992)).

It might be noted that the approach used by the court, the scope of testimony approach—as opposed to the expert versus non-expert approach—is similar to the approach employed in the Iowa.[103]

C. *The Illinois Experiment: The Future of Treating Physician Discovery?*

The Illinois decisions, like the New York decisions, have been quite decisive in finding the treating physicians are not considered experts within the meaning of Illinois's expert statute.[104] Also like New York, Illinois traces the history of its rule to the Federal Rules of Civil Procedure.[105] The advisory committee notes, as well as federal decisions, played a major role in the Illinois decisions.[106]

The Supreme Court of Illinois first examined the issue of treating physicians in *Tzystuck v. Chicago Transit Authority*.[107] While the decision related only to testimony on the extent of injury and prognosis, the court's holding encompassed physician opinions generally, including those on causation and standard of care.[108] The *Tzystuck* court stated flatly that "treating physicians are subject to the discovery provisions which apply to ordinary occurrence witnesses."[109]

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103. *Compare id.* (stating expert witnesses would testify as to opinions based on information made known to the expert while the treating doctor would recount the injury and treatment), *with* Morris-Rosdail v. Schechinger, 576 N.W.2d 609, 612 (Iowa Ct. App. 1998) (opining treating physicians may be considered experts if testimony "focus[es] less on the medical questions associated in treating the patient and more on legal questions"). *See supra* notes 15-52 and accompanying text.

104. *See, e.g.*, Tzystuck v. Chicago Transit Auth., 529 N.E.2d 525, 529 (Ill. 1988) (holding treating physicians are "not expert witnesses within the meaning of the [Illinois expert discovery rule]"). However, the Illinois Supreme Court does appear to have considered other relevant factors, such as prejudice to the other party, as well as the origin of testimony, more carefully than the New York decisions examined. *Compare id.* at 530 (considering factors such as prejudice and unfair surprise), *with* Nesselbush v. Lockport Energy Assocs., 647 N.Y.S.2d 436, 437 (Sup. Ct. 1996) (stating "a treating physician has nothing inherently to do with the process of litigation"). In fact, when the Illinois Supreme Court revisited the issue in *Wilson v. Chicago Transit Authority*, there was a strong dissent against the holding as applied to the facts. *See* Wilson v. Chicago Transit Auth., 533 N.E.2d 894, 897 (Ill. 1988) (Ryan, J., dissenting).

105. Tzystuck v. Chicago Transit Auth., 529 N.E.2d at 529.

106. *See id.* (citing FED. R. CIV. P. 26(b)(4) advisory committee's notes).

107. Tzystuck v. Chicago Transit Auth., 529 N.E.2d 525 (Ill. 1988).

108. *See id.* at 528-30. For an example of the application of the general holding to the issue of standard of care testimony, see *Dugan v. Weber*, 530 N.E.2d 1007, 1010-12 (Ill. App. Ct. 1988) (holding opinions on standard of care do not transform a treating physician into an expert under the disclosure rule).

109. Tzystuck v. Chicago Transit Auth., 529 N.E.2d at 529.

The *Tzystuck* court was unique in pointing out a very fundamental difference between treating physicians and typical retained experts, namely, the party's control over the witness.[110] The court found:

> A party generally does not have that ready access to or control over treating physicians, who, when involved in the litigation, are involved only because they did form an opinion while treating the patient . . . . To construe [the expert disclosure rule] to include treating physicians would unrealistically and unfairly oblige litigants to ensure that witnesses beyond their control comply with the extensive discovery obligations . . . .[111]

These pragmatic observations figure heavily in one of the conclusions of this Note, namely, fairness requires actual treating physicians be exempt from expert discovery requirements.[112]

In a surprising twist, however, Illinois Supreme Court Rule 220 upon which *Tzystuck* and related cases were based was later revoked.[113] Rule 220 was replaced by Rule 213, which requires detailed disclosure for *all* opinion witnesses, defined as persons who will offer "any opinion testimony."[114] The committee comments to Rule 213 indicate that "to avoid surprise, the subject matter of all opinions must be disclosed."[115] While the revocation of Rule 220 is not likely due entirely to the treating physician distinction,[116] one must wonder whether deletion of Rule 220 and its replacement with a rule requiring detailed disclosure for all opinion testimony represents the future of discovery of treating physicians.

V. CONCLUSION

It is clear from the Iowa decisions that treating physicians, while certainly experts, are not by that virtue alone subject to the detailed disclosure requirements.[117] For example, we now know from *Carson v. Webb* that opinions on causation will not *ipso facto* transform a treating physician into an expert

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110. *See id.* at 530.
111. *Id.*
112. *See infra* notes 122-28 and accompanying text.
113. ILL. S. CT. R. 220 (repealed 1996).
114. ILL. S. Ct. R. 213(g) advisory committee's notes.
115. *Id.*
116. Rule 220 was subject to many exceptions, some but not all, stemming from the *Tzystuck* decision. *See* Charles W. Chapman, *Jaws XVI: The Exceptions That Ate Rule 220*, 26 J. MARSHALL L. REV. 189, 191-94 (1993).
117. Carson v. Webb, 486 N.W.2d 278, 280-81 (Iowa 1992).

under Rule 125.[118] However, the Iowa courts need to make clear testimony on prognosis and standard of care will also receive this treatment.

The most recent Iowa decision, *Morris-Rosdail v. Schechinger*, counsels the "reason and time frame in which the underlying facts and opinions were acquired" is the criteria by which courts should judge treating physician testimony.[119] The *Morris-Rosdail* court also advised a determination that a treating physician has assumed such a role should be supported by specific findings by the trial court.[120] It follows that it would be premature for a court to entertain a motion to compel interrogatories. Only after deposition will the true nature of the physician's testimony become evident; only there can it truly be determined whether the physician has "assume[d] a role . . . analogous to the role of a retained expert."[121]

The Iowa courts should construe Rule 125 in a manner that will serve the goals of all discovery rules. Such a construction must: (1) provide certainty, (2) avoid costs, and (3) promote fairness and truth. It could be argued holding all treating physicians subject to Rule 125 would promote certainty. Perhaps this explains the approach taken by the Connecticut courts in Connecticut's similar rule.[122] Such an interpretation would be contrary to the language of Rule 125, however, which clearly distinguishes between opinions formed before, and those after, the pursuit of litigation.[123] Such an approach would render meaningless the language "acquired in anticipation of litigation or for trial."[124] On the other hand, construing Rule 125 in a manner that exempts treating physicians from the detailed disclosure requirements in all but cases where their testimony clearly exceeds the scope of their treatment of the patient would provide the needed certainty, without ignoring the plain language of Rule 125. Again, that language clearly differentiates between retained experts, on the one hand, and persons who—while technically experts—are involved in the case only through their observations of the patient outside the context of the lawsuit. Perhaps a rule

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118. *Id.* at 281 n.3.

119. Morris-Rosdail v. Schechinger, 576 N.W.2d 609, 612 (Iowa Ct. App. 1998).

120. *Id.*

121. Day v. McIlrath, 469 N.W.2d 676, 677 (Iowa 1991).

122. *See supra* note 91 and accompanying text. It also appears to be the approach taken by Illinois in creating a requirement for detailed disclosure for all opinion testimony. *See* ILL. S. CT. R. 213(g) advisory committee's notes (indicating "in order to avoid surprise, the subject matter of all opinions must be disclosed" and "there is no longer a distinction between retained and non retained experts").

123. *See* IOWA R. CIV. P. 125(a) (limiting discovery of facts known, mental impressions, and opinions of expert witnesses to those "acquired or developed in anticipation of litigation").

124. *See id.*; *see also infra* note 131.

such as the new Illinois rule, which draws the line at opinion testimony generally, provides the most certainty. Such a question is purely rhetorical for the purposes of this inquiry, however, and will remain so as long as the language of Rule 125 remains unchanged.

The second concern—costs—will be reduced when parties to suits receive the clear message that motions to exclude expert testimony are futile in all but the extreme case of a treating physician providing traditional expert testimony. As it now stands, the Supreme Court of Iowa has only held that testimony and opinions on causation will not alone trigger expert status.[125] The Iowa courts should follow the lead of the federal courts and the majority of state courts examined above and take a more firm stand against motions concerning treating physician testimony.

Arguably, if detailed disclosure was always required for treating physicians, money would be saved because the opposing party would be spared the costs of deposing the physician. Instead, the opposing party could rely on interrogatories to learn the facts, mental impressions, and opinions held by the physician. This argument ignores the fact that much of these costs will simply be transferred to the plaintiff, who will be forced to assemble answers to detailed interrogatories. The argument also assumes that an opposing party will not depose a treating physician when a plaintiff complies with the detailed disclosure requirements. This, of course, is unlikely, considering that a deposition is probably the best of the few opportunities a party has to examine a witness' prowess.[126]

Finally, fairness and truth can be best accomplished if treating physician opinions are exempted from Rule 125 requirements. After all is said and done, most treating physicians are not *retained* by parties as expert witnesses. The fact that treating physicians are technically experts, or could conceivably be retained for litigation does not change this reality. It is true that a treating physician could be referred by the plaintiff's attorney, which could allow the plaintiff to obtain a "plaintiff friendly" treating physician. Defendants can discourage this practice by carefully questioning the plaintiff and the treating physician as to how their relationship began, and whether any referral was made. If the attorney played a role in this meeting, then the treating physician should be deemed retained.

Most important, the nature of the relationship between the client and retained expert and the client and treating physician justifies different treatment because they are fundamentally different. Retained experts are tantamount to

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125. Carson v. Webb, 486 N.W.2d 278, 281 n.3 (Iowa 1992).
126. *See* THOMAS A. MAUET, PRETRIAL 237 (3d ed. 1995).

employees of the retaining party.[127] Most treating physicians, on the other hand, are related to the party only by virtue of the historical accident of having treated the party's injuries. The Illinois Supreme Court adeptly pointed out that discovery rules pertaining to experts, which require the answering and supplementation of discovery requests at the risk of disqualification of the expert, presume the retaining party has liberal access and control over the expert witnesses and their cooperation.[128] This is simply not the case with treating physicians.

Moreover, the lack of detailed expert disclosure does not result in surprise to the opposing party when the testifying witness is the party's treating physician.[129] Under the Iowa Rules of Civil Procedure, a party may not hide from the opposing party the identity of persons with knowledge of the injury or events surrounding the injury, if inquired about.[130] The opposing party, being aware of the possibility the physician may be a witness, can depose the physician either personally or in writing.[131] The argument that answers to detailed interrogatories will aid in preparation for depositions, while true, only goes so far. To an experienced litigator, the act of deposing a treating physician is relatively academic considering facts that would be known by that time. For the inexperienced litigator, an abundance of practice aids are available to help in this preparation.[132]

Fairness is jeopardized when courts unnecessarily prevent the introduction of highly probative evidence from being heard by jurors. The testimony of a treating physician is, by its nature, often more relevant, material, and probative, than that of the retained expert who is not only paid for his testimony but often gleans it from a cold record.[133] Iowa Rule of Civil Procedure 125 affirms the value of physician testimony by admonishing that an expert—even if deemed a

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127. *See* Tzystuck v. Chicago Transit Auth., 529 N.E.2d 525, 529-30 (Ill. 1988).

128. *Id.*; *see* IOWA R. CIV. P. 125(c).

129. *See* Beck v. Albany Med. Ctr. Hosp., 594 N.Y.S.2d 844, 846 (App. Div. 1993) (emphasizing the testifying doctor was one of the plaintiff's treating physicians under subpoena by the plaintiff to appear; therefore, the plaintiff was not surprised by her testimony).

130. IOWA R. CIV. P. 122(a).

131. IOWA R. CIV. P. 140(a); IOWA R. CIV. P. 150. *See generally* Shapardon v. West Beach Estates, 172 F.R.D. 415, 417 (D. Haw. 1997) (advising the treating physicians whose opinions stem from treatment can be deposed but not forced to develop written report). Surprise would especially be eliminated if the party answering the expert interrogatory indicated that it would call its treating witness as a hybrid fact witness.

132. There are many practice aids available. *See generally* Mary E. Wiss, *Litigating Medical Malpractice Claims: A Prescription for Deposing the Doctor*, SB19 A.L.I.-A.B.A. 249 (1996) (constituting one such aid).

133. Brown v. Best Foods, 169 F.R.D. 385, 388 (N.D. Ala. 1996).

retained expert—should not be precluded from testifying about facts, impressions, and opinions obtained before being retained.[134] Complete disqualification of a treating physician as a discovery sanction would be contrary to this provision of Rule 125 if the treating physician could also provide testimony based on treatment.[135]

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134. IOWA R. CIV. P. 125(a). The relevant portion of the rule states: "Nothing in this rule shall be construed to preclude a witness from testifying as to (1) knowledge of the facts obtained by the witness prior to being retained as an expert or (2) mental impressions or opinions formed by the witness which are based on such knowledge." IOWA R. CIV. P. 125(a)(1)(C).

135. *See* IOWA R. CIV. P. 125(a)(1)(C).