

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DUANE ZIEMBA

v.

JOHN ARMSTRONG, ET AL

:
:
:
:
:
:
:
:

CIV. NO. 3:98CV2344 (JCH)

RULING ON DEFENDANTS' MOTION FOR EXTENSION OF TIME

Pending is defendants' March 12, 2004 Motion for Extension of time [undocketed], seeking additional time to disclose their expert(s).

Defendants stated that they anticipate using Paul Chaplin, Chief Psychologist at NCCI, and/or Suzanne Ducate, M.D., Director of Mental Health Services for the DOC, as their expert(s). They contend that the mental examination of plaintiff conducted by Drs. Chaplin and Ducate is critical to the doctors' evaluation of plaintiff and therefore to the decision to designate them as defendants' expert(s). Defendants seek to extend the deadline for "naming their expert(s)" thirty (30) days from the date of the Court's disposition of plaintiff's Motion for Protective Order, and seek to extend the deadline for "fully disclosing their expert(s)" forty-five (45) days from the date of the Court's disposition of plaintiff's Motion for Protective Order. Assuming resolution of the motion for protective

order by April 2, this would extend the time for disclosure of defendants' expert's to June 16, 2004.¹

Plaintiff objects to any extension of time that would delay the trial of this case at the earliest possible time. He argues that "defendants have not alleged any support for the proposition that a party has a right to have a potential expert conduct an examination of the opposing party before disclosing the expert." Plaintiff noted that he disclosed his expert pursuant to the time limits set forth in the court's scheduling order.

Judge Hall's scheduling order offers no support for defendants' request for a staged disclosure of their expert(s). Fed. R. Civ. P. 26(a)(2)(B) provides that

Except as otherwise stipulated or ordered by the court, the identification of any expert who may testify must be accompanied by a written report prepared and signed by the witness. Specifically, this report is required from:

* Witnesses who are retained or specially employed to provide expert testimony in the case

¹On December 5, 2003, Judge Hall ordered defendants to

disclose its expert(s) by March 31, 2004. (Defendants' counsel will provide to plaintiff's counsel name(s) and available dates for depositions of said expert(s) by March 15, 2004, and counsel will promptly thereafter schedule a date for said deposition(s)).

[Doc. #237 at ¶3].

* Witnesses whose duties as an employee of the party regularly involve giving expert testimony.

6 James Wm. Moore, Moore's Federal Practice §26.23[2][b][I] (3d ed. 2003) (citing Fed. R. Civ. P. 26(a)(2)(B)). As explained in the Advisory Committee Notes, this language excludes treating physicians: "A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report."

Thus, to the extent that a treating physician testifies only to the care and treatment of the patient, the physician is not considered to be a "specially employed" expert and is not subject to the written report requirements of Rule 26(a)(2)(B), notwithstanding that the witness may offer opinion testimony under the Federal Rules of Evidence. However, when 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 Rule 26(a)(2)(B).

Sales v. U.S. 165 F.R.D. 31, 33 (W.D.N.Y. 1995) (quotation marks and citation omitted).

This case will be tried in accordance with the schedule already set by Judge Hall. Defendants intend to use DOC-employed doctors to conduct the mental examination of plaintiff and testify as experts at trial. The Court deems Drs. Chaplin and Ducate to have been designated in accordance with Judge Hall's scheduling order of December 5, 2003. Their reports will be disclosed or their

designation will be withdrawn within two weeks after the IME, the deadline for which the Court will establish in ruling on the motion for protective order.

Accordingly, defendant's Motion for Extension of Time dated March 12, 2004 [undocketed] is **GRANTED in part.**

SO ORDERED at Bridgeport this 19th day of March 2004.

_____/s/_____
HOLLY B. FITZSIMMONS
UNITED STATES MAGISTRATE JUDGE