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UNITED STATES DISTRICT COURT**DISTRICT OF NEVADA**CENTURY-NATIONAL INSURANCE
COMPANY, *et al.*,

Plaintiffs

v.

DOUGLAS J. GARDNER, ESQ., *et al.*,

Defendants

Case No.: 2:18-cv-02090-APG-BNW

**Order Denying ALPS' Motion to Bifurcate
Trial and Granting Plaintiffs' Motions to
Exclude**

[ECF Nos. 66, 69, 77]

Defendant Douglas Gardner represented a defendant in a personal injury lawsuit (the personal injury defendant). The plaintiffs in this case (collectively, the Insurers) provided insurance and reinsurance coverage to the personal injury defendant. The Insurers now sue Gardner and his malpractice insurer, ALPS Property & Casualty Insurance Company (collectively, the defendants). The Insurers allege that (1) Gardner's malpractice resulted in a nearly \$5 million judgment against the personal injury defendant and (2) ALPS breached a contract, breached the covenant of good faith and fair dealing, and committed fraud by offering to contribute \$1.5 million towards a settlement of the underlying litigation and then renegeing on that offer.

ALPS moves to bifurcate the claims against it and the claims against Gardner into separate trials. ECF No. 66. The Insurers move to exclude the defendants' expert witnesses Robert Underdown and David Churchill. ECF Nos. 69; 77. I deny ALPS's motion to bifurcate because bifurcation does not serve judicial economy or the parties' convenience and any undue prejudice can be cured. I grant the Insurers' motion to exclude Underdown because his testimony is either unreliable or does not assist the trier of fact. I grant the Insurers' motion to

1 exclude Churchill’s expert testimony because he is not a proper rebuttal expert, but I will allow
2 him to testify as a fact witness.

3 **I. BACKGROUND**

4 Gardner represented the personal injury defendant in a lawsuit filed in 2016. ECF No. 26
5 at ¶¶ 18, 21-22. The Insurers provided insurance and reinsurance coverage to that defendant. *Id.*
6 at ¶¶ 14-15. The Insurers allege that Gardner’s malpractice resulted in entry of a \$4,940,629.74
7 judgment in that suit. *Id.* at ¶¶ 40-41. The parties later agreed to a \$3 million settlement in
8 mediation. *Id.* at ¶¶ 43-45. The Insurers negotiated with ALPS in connection with the mediation.
9 *Id.* at ¶ 45. ALPS made a written offer to “fund \$1.5 million in settlement” and later reiterated
10 “its commitment to fund up to \$1.5 million of a total \$3 million settlement . . . and stated that its
11 contribution offer would remain open through mediation.” *Id.* But ALPS later refused to fund
12 the settlement as promised. *Id.* at ¶ 47.

13 In this case, Gardner disclosed Underdown as an expert on the conduct of a claims
14 adjuster involved in the underlying case. ECF No. 69-3. Gardner later disclosed Churchill, who
15 was the plaintiff’s counsel in the underlying litigation, as a non-retained expert to rebut the
16 Insurers’ expert’s opinion on Gardner’s malpractice. ECF No. 77-2. The Insurers now move to
17 exclude both Underdown and Churchill. ECF Nos. 69; 77.

18 **II. DISCUSSION**

19 **A. Motion to Bifurcate (ECF No. 66)**

20 ALPS argues that bifurcation of the claims against it and Gardner is necessary because:
21 (1) the claims neither arise out of the same transaction nor present common questions of law or
22 fact; (2) bifurcation would facilitate judicial economy; (3) the claims against each defendant
23 require different evidence; and (4) a consolidated trial would prejudice Gardner. ECF No. 66.

1 The plaintiffs respond that: (1) ALPS' analysis of its own exposure to the claims against Gardner
2 is relevant to the claims against it; (2) convenience and efficiency do not favor bifurcation; and
3 (3) bifurcation be more prejudicial to them than a consolidated trial would be to Gardner. ECF
4 No. 67.

5 Federal Rule Civil Procedure 42(b) authorizes courts to order a separate trial of any claim
6 when separation is in the interest of judicial economy, will further the parties' convenience, or
7 will prevent undue prejudice. Fed. R. Civ. P. 42(b). "Rule 42(b) merely allows, but does not
8 require, a trial court to bifurcate cases . . ." *Hangarter v. Provident Life & Acc. Ins. Co.*, 373
9 F.3d 998, 1021 (9th Cir. 2004). The decision to bifurcate is committed to the trial court's
10 discretion. *Id.*; *Hirst v. Gertzen*, 676 F.2d 1252, 1261 (9th Cir. 1982).

11 Much of ALPS' argument addresses documents that are the subject of a pending motion
12 to compel. *See* ECF No. 66 at 10. It would be premature to bifurcate trial on the basis of
13 evidence that may not be discoverable. On the current record, bifurcating the claims for trial
14 would require the parties to present some of the same evidence twice, have witnesses testify
15 twice, make many of the same arguments twice, pay the cost of litigation twice, require
16 empaneling two juries, and consume court resources for two trials. Any concerns about
17 prejudice or confusion on the jury's part can be properly addressed through jury instructions and
18 counsels' opening statements and closing arguments. *See Tracey v. Am. Family Mut. Ins. Co.*,
19 2010 WL 3613875, at *7 (D. Nev. Sept. 8, 2010). So I decline to bifurcate the trial at this time.

20 **B. Motion to Exclude Robert E. Underdown (ECF No. 69)**

21 Gardner and the law firms he was associated with (collectively, Gardner) designated
22 Underdown to provide expert testimony on the conduct of Ignacio Nunez, a claims adjuster
23 involved in the underlying case. ECF No. 69-3 at 2. The Insurers move to exclude Underdown's

1 report and testimony, arguing Underdown is unqualified and his testimony is unreliable and not
2 helpful to the jury. ECF No. 69. Gardner responds that Underdown is qualified to assess
3 Nunez’s conduct and his testimony is relevant to their comparative negligence defense. ECF No.
4 77.

5 Federal Rule of Evidence 702 provides that “[a] witness who is qualified as an expert . . .
6 may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or
7 other specialized knowledge will help the trier of fact to understand the evidence or to determine
8 a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the
9 product of reliable principles and methods; and (d) the expert has reliably applied the principles
10 and methods to the facts of the case.” Fed. R. Evid. 702; *see also Daubert v. Merrell Dow*
11 *Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). When determining the admissibility of such
12 evidence in advance of trial, I undertake a “gatekeeping” function to ensure that the jury’s
13 consideration of evidence is not contaminated by irrelevant or unsupported testimony. *See*
14 *United States v. Alatorre*, 222 F.3d 1098, 1100-03 (9th Cir. 2000). I have broad discretion over
15 the discharge of this gatekeeping authority, “not only . . . in determining whether an expert’s
16 testimony is reliable, but also in deciding how to determine the testimony’s reliability.” *Elsayed*
17 *Mukhtar v. Calif. State Univ., Hayward*, 299 F.3d 1053, 1064 (9th Cir. 2002), *overruled on other*
18 *grounds by Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 467 (9th Cir. 2014).
19 Although Rule 704(a) provides that an “opinion is not objectionable just because it embraces an
20 ultimate issue[.]” the Federal Rules of Evidence do not allow experts to make legal
21 conclusions. Fed. R. Evid. 704(a); *Hangerter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998,
22 1016 (9th Cir. 2004).

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1 Underdown is currently an Arizona-licensed “insurance producer.” ECF No. 69-2 at 3.
2 He has spent over 30 years in the insurance industry. *Id.* at 2. But his report includes opinions on
3 a wide variety of topics, including the standard of care for Nevada attorneys, the causation
4 standard in Nevada, and his conclusion that Nunez was at least 50.1% at fault in the underlying
5 case, “bar[ring] the Plaintiff[s]’ claim against Mr. Gardner, in whole or in part.” *Id.* at 4-5, 9.

6 I exclude Underdown’s testimony regarding an attorney’s standard of care, causation, and
7 his comparative fault because he is unqualified and his report is unreliable, unhelpful to the jury
8 and contains an impermissible legal conclusion. The remainder of his testimony is unhelpful to
9 the jury. Underdown describes the testimony of other witnesses in detail and reasons that Nunez
10 should have responded to phone calls and re-assessed settlement based on an escalation in
11 damages. The jury is capable of determining whether these failures met Nunez’s standard of
12 care. Gardner contends Underdown’s testimony is needed to explain the insurer’s litigation
13 guidelines, but the report does not address them and the jury is capable of analyzing these
14 guidelines on its own. ECF Nos. 72 at 8-9; 69-2. I therefore grant the Insurers’ motion to
15 exclude Underdown.

16 **C. Motion to Exclude David J. Churchill (ECF No. 77)**

17 Gardner disclosed Churchill on the deadline for rebuttal expert disclosures as the “lead
18 counsel” for the plaintiff in the underlying personal injury lawsuit. ECF No. 77-2 at 3. The
19 disclosure indicates that he is expected to testify “regarding Mr. Gardner’s prosecution of the
20 defense of the case, including but not limited to the utility of a defense IME expert, liability
21 assessment and lack of notice defense, impact of witness testimony at trial, including Ms. Ferris’
22 employer, and potential defense witnesses’ credibility and availability at trial, and the securing of
23 a court reporter at trial.” *Id.* The disclosure separately notes that his testimony is intended to

1 “contradict evidence on the same subject matter identified by the Insurers’ expert, Dennis L.
2 Kennedy.” *Id.*

3 Federal Rule of Evidence 26(a)(2)(D)(ii) permits rebuttal expert testimony that is
4 “intended solely to contradict or rebut evidence on the same subject matter identified” by an
5 initial expert witness. “If the purpose of expert testimony is to contradict an expected and
6 anticipated portion of the other party’s case-in-chief, then the witness is not a rebuttal witness or
7 anything analogous to one.” *R & O Const. Co. v. Rox Pro Int’l Grp., Ltd.*, No. 2:09-CV-01749-
8 LRH-LR, 2011 WL 2923703, at *2 (D. Nev. July 18, 2011) (quotations omitted). “Rather,
9 rebuttal expert testimony is limited to new unforeseen facts brought out in the other side’s case.”
10 *Id.* (quotations omitted). And “Rule 37 gives teeth to Rule 26’s disclosure requirements by
11 forbidding the use at trial of any information that is not properly disclosed[,]” unless the failure
12 is substantially justified or harmless. *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d
13 817, 827 (9th Cir. 2011) (quotation omitted).

14 The subjects identified in Churchill’s expert disclosure show that his purpose is to
15 contradict an expected part of the Insurers’ malpractice claim—the deficiency of Gardner’s
16 performance—rather than to rebut Kennedy’s report. In a malpractice case, Kennedy’s opinion
17 on Gardner’s malpractice should have been foreseen. While not required, Churchill testified that
18 he never reviewed Kennedy’s report, further suggesting that he is not a true rebuttal expert.
19 Churchill was thus an improper rebuttal witness and should have been disclosed by the deadline
20 for initial experts.¹ Gardner does not argue that his failure to timely disclose Churchill as an
21 initial expert was substantially justified or harmless. I thus grant the Insurers’ motion to exclude

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¹ It appears Churchill was not disclosed by the initial deadline because he was only named as a
non-retained expert “to assist [him] in getting paid.” ECF No. 77-3 at 6.

1 Churchill's expert testimony. However, Churchill was also disclosed as a fact witness and may
2 testify in that capacity.² ECF No. 87-1 at 6.

3 **III. CONCLUSION**

4 I THEREFORE ORDER that defendant ALPS's motion to bifurcate (**ECF No. 66**) is
5 **DENIED without prejudice.**

6 I FURTHER ORDER that the Insurers' motion to exclude Robert Underdown (**ECF No.**
7 **69**) is **GRANTED.**

8 I FURTHER ORDER that the Insurers' motion to exclude David Churchill (**ECF No. 77**)
9 is **GRANTED.** However, Churchill may testify as a fact witness.

10 DATED this 14th day of May, 2020.

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13 ANDREW P. GORDON
14 UNITED STATES DISTRICT JUDGE

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22 ² The Insurers argue in reply that Churchill should also be excluded as a fact witness. ECF No.
23 88 at 9-11. But in their opening brief, the Insurers asked for his testimony to be limited to "his
percipient knowledge and observations during the course of the litigation of the [u]nderlying
[a]ction." ECF No. 77 at 4. So I exercise my discretion not to consider their arguments for
Churchill's exclusion as a fact witness. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007)
("The district court need not consider arguments raised for the first time in a reply brief.").