# AM I REQUIRED TO DISCLOSE THIS? AN EXAMINATION OF A LITIGANT'S DUTY TO PRODUCE AN EXPERT'S PREVIOUS REPORTS AND TRANSCRIPTS IN FEDERAL LITIGATION

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## ABSTRACT

*Even the most seemingly mundane commercial litigation cases often require an expert's testimony. Thus, the question faced by litigators is usually not whether an expert is needed, but rather how many experts are needed in a given case and how early in the litigation process they should be retained. Just as important as retaining your own experts, and perhaps more so, is obtaining information from your opponent concerning the experts they have retained. This information is obtained through discovery, and in federal courts is controlled by Federal Rule of Civil Procedure 26. Presently, the federal courts do not uniformly interpret a litigant's obligations under FRCP 26. Motions to Strike/Exclude Expert Testimony, heard under the Court's responsibility as a gatekeeper of information, are common, despite the federal courts' disdain for handling discovery disputes. The courts' conflicting opinions, and lack of uniformity and guidance serves to exacerbate discovery disputes between the parties. Given the current difficulty reconciling the courts' differing opinions, estimating a party's chances of prevailing in discovery disputes is difficult at best. This article explores the differing interpretations of Rule 26 as it relates to courts' rulings on discovery disputes involving experts, particularly on disputes centered on requests for production of an expert's reports and testimony proffered in previous cases.*

## THE DISCLOSURE OBLIGATION IMPOSED BY FRCP 26(A)(2)

Rule 26(a)(2) sets forth the requirements of expert disclosures. The rule requires a party to disclose to the opposing parties the identity of any expert witness it may use at trial to present evidence. Additionally, under Rule 26(a)(2)(B), each expert must produce a report that contains:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;
(ii) the facts or data considered by the witness in forming them;
(iii) any exhibits that will be used to summarize or support them;
(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
(vi) a statement of the compensation to be paid for the study and testimony in the case.

The rule, however, does not explicitly include any requirement for a party to produce the actual reports previously written and used other cases. Nor does it require the production of the transcripts of testimony given in earlier cases in which the expert provided testimony. Rather, all that is required to be produced is a list of cases in which the expert has testified in the previous four years and a list of all publications authored in the previous ten years. (The complete text of FRCP 26 is included in Appendix A.)

## SOME COURTS CONSTRUE FRCP 26 NARROWLY AND HOLD THAT PRODUCTION OF EXPERT REPORTS AND TRANSCRIPTS FROM PRIOR CASES IS NOT REQUIRED BY THE PLAIN TEXT FEDERAL RULES

Interpreting Rule 26, some federal courts have held that expert disclosure requirements do not extend beyond what Rule 26 requires, and have accordingly rejected requests for reports or testimony given by experts in prior cases. For example, in *Roberts v. Printup*, 02-2333-CM, 2007 WL 1201461 (D. Kan. Apr. 23, 2007), the plaintiff moved to exclude defendant's expert because defendant refused to provide the expert's testimony from a prior, unrelated case. *Id*. at *1. The court denied the motion, holding that as a matter of law, "Rule 26(a)(2)(B) does not require disclosure of the testimony an expert gave in a prior case." *Id. See also, In re Air Crash Disaster,* 720 F.Supp. 1442, 1444–45 (D.Colo.1988) ("[T]he limited scope of a Rule 26(b)(4)(A) inquiry into the background and experience of an expert witness does not include the production of every deposition or trial transcript given by the expert in any litigation."); *Trunk v. Midwest Rubber & Supply Co.,* 175 F.R.D. 664, 665 (D.Colo.1997) (holding that Rule 26 does not require an expert to produce reports from unrelated litigation).

Further, in *All W. Pet Supply Co. v. Hill's Pet Prods. Div., Colgate-Palmolive Co.,* 152 F.R.D. 634, 639 (D. Kan. 1993), while deposing plaintiff's testifying expert, counsel for the defendants requested copies of the expert's reports, depositions, and trial transcripts provided during the course of his previous engagements. *Id.* The expert agreed to produce the materials, subject to approval of his attorney. *Id.* The requested materials were ultimately not produced, and the defendants then sought an order compelling their production. *Id.* In considering the situation, the court stated:

> The defendants did not submit a request for production of the documents in question to the plaintiffs as provided by Fed.R.Civ.P. 34. In fact, the defendants do not even assert that the plaintiff has possession of any of the requested materials, which were prepared by [ ] plaintiff's expert witness, for purposes of other litigation. The defendants are therefore not entitled to an order compelling the plaintiff to produce these documents.
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> Although the parties were ordered to comply with the proposed revision to Rule 26 with regard to expert disclosure, the new language of Rule 26(a)(2) requires the expert to include in the report only "a *listing* of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding four years." (Emphasis added.) …The fact that the proposed rules require the expert to provide a list of other cases in which the expert witness has testified does not mean that the expert must produce copies of his reports and transcripts of his testimony. To the

> extent that such materials are a matter of public record, the listing may be used by the adversary to obtain its own copies of these materials.

*Id.* at 639-640.

Similarly, in *Cartier, Inc. v. Four Star Jewelry Creations, Inc.*, 01 CIV.11295(CBM), 2003 WL 22227959 (S.D.N.Y. Sept. 26, 2003), the court denied the plaintiff's request for the defendant's expert's past testimony, stating that "[t]he plain language of Rule 26 directs parties to provide a *list* of cases, not the *expert reports* relied upon in those cases." *Id.* at *3 (emphasis in original). Further, the court held that so long as the expert has complied with Rule 26(a)(2)(B)(v) listing prior cases, "defendants' obligation extends no further under Rule 26." *Id.*

## SOME COURTS CONSTRUE FRCP 26 NARROWLY AND HOLD THAT PRODUCTION OF EXPERT REPORTS AND TRANSCRIPTS FROM PRIOR CASES IS NOT REQUIRED WHEN THE MATERIALS ARE NOT RELEVANT TO THE CURRENT MATTER

### Previous Version of Rule 26

Some courts routinely decline to enforce requests for expert materials from prior cases, citing the relevance standard of Rule 26. Federal Rule of Civil Procedure 26(b), in its previous version, which was effective until 2015, permitted "discovery regarding any matter not privileged, which is relevant to the subject matter in the pending action." This analytical framework holds that discoverable information is not limited to admissible evidence, but includes anything "reasonably calculated to lead to the discovery of admissible evidence." F.R.C.P. 26(b); *Dunbar v. United States,* 502 F.2d 506, 509–10 (5th Cir.1974). Traditionally, at the discovery stage, relevancy is broadly construed. *Coughlin v. Lee,* 946 F.2d 1152, 1159 (5th Cir.1991). Evidence is relevant and thereby discoverable if it "encompass[es] any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Id.* (citing *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978)). However, "practical considerations dictate that the parties should not be permitted to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so." *Munoz v. State Farm Lloyds,* No. 04-141, 2008 WL 4533932, at *2, (5th Cir. Oct. 9, 2008) (citing *Broadway & Ninety-Sixth St. Realty Co. v. Loew's Inc.,* 21 F.R.D. 347, 352 (S.D.N.Y.1958)).

These courts find requests for expert materials from prior cases to be violative of the relevance standard when such an objection is made. For example, in *Surles v. Air France*, 50 Fed. R. Serv. 3d 983 (S.D.N.Y. 2001), an employment discrimination suit, the defendant's expert voluntarily produced reports from past matters in which he opined on the standards for employment discrimination. *Id*. at *6. The court, however, rejected the plaintiff's request for past reports from the defendant's expert in cases involving unrelated subjects (such as wrongful death or breach of contract), holding that Rule 26 "does not mandate the disclosure of any additional reports that the expert may have prepared," especially "reports in prior unrelated actions." *Id.* at 7. *See also Cartier, Inc*., 2003 WL 22227959 at *3 (denying motion to compel the production of prior, unrelated expert reports in order to eliminate the threat of introducing evidence that is only "tangentially related" to the primary legal questions in the case); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo*., 720 F. Supp. 1442, 1443 (D. Colo. 1988) (denying motion to compel prior expert reports of plaintiff's expert because "[d]efendants' request for all of a

deponent's past testimony as an expert in all types of aircraft litigation is simply overbroad and beyond the scope of Rule 26," and would only serve to distract from the core issue of "weather-effected air crashes similar to the case at hand").

To the same effect, the court in *Trunk v. Midwest Rubber & Supply Co*., 175 F.R.D. 664 (D. Colo. 1997), granted the defendant's motion to quash the plaintiff's subpoena for the defendant's expert's prior reports. In analyzing the scope of Rule 26, the court held that it "does not require an expert to produce any reports from unrelated litigation." *Id.* at 664-65. The court went on to note that "conclusions and opinions offered in unrelated litigation do not fall within the scope of Rule 26 discovery and would unnecessarily burden litigation with pre-trial inquiry into facts and issues wholly irrelevant to the case at hand." (internal quotation marks omitted) *Id.* at 665.

**Current Version of Rule 26**

The 2015 amendment to the Federal Rules of Civil Procedure seemed, at cursory glance, to dramatically narrow the scope of discovery. Federal Rule of Civil Procedure 26(b) now now allows "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

Discussing the effect of the new amendments, which was predicted to represent a "seachange," Michele Hangley, who is co-chair of the Rules Amendments Roadshow and member of the ABA's Section's Federal Practice Task Force, explained:

> The biggest change will be proportionality and getting rid of the phrase 'reasonably calculated to lead to the discovery of admissible evidence' in Rule 26. Previously, the 'reasonably calculated' phrase had been moved to a less prominent place. Now it has been removed from the rule entirely. Removing the 'reasonably calculated' phrase will make a difference in how parties justify the discovery that they are seeking.

(Kennedy, 2015.)

However, in practice, not much has changed since the amendment. As noted by the advisory committee's note to the 2015 amendment, the amendment should "not change the existing responsibilities of the court and the parties to consider proportionality." And this is largely what has come to pass. Indeed, most of the courts to apply amended Rule 26(b)(1) have noted that proportionality in discovery has always been a part of the Federal Rules through the old Rule 26(b)(2)(C)(iii), which allowed courts to limit discovery when its burden outweighed its benefits, and the old Rule 26(g)(1)(B)(iii), which required lawyers to certify that discovery served was not unduly burdensome. (Miles, 2016). For this reason, courts have continued to cite and rely on pre-amendment cases. *Id.*

## SOME COURTS ALLOW FOR THE DISCOVERY OF PRIOR EXPERT REPORTS AND TRANSCRIPTS WHEN THE EXPERT HAS OPINED ON THE SAME OR EXTREMELY SIMILAR SUBJECTS OR WHEN THE NONMOVING PARTY DID NOT CONTEST RELEVANCE

In *S.E.C. v. Huff,* 08-60315-CIV, 2010 WL 228000 (S.D. Fla. Jan. 13, 2010), the court ordered the production of the defendant's damages expert's prior testimony because the movant had successfully shown that the same expert had opined on the *same evidence* in a prior case and had come to a different conclusion. *Id*. at *2 (emphasis added). The procedural posture was unusual in this case. Rather than filing a Motion to compel, the government argued during motions *in limine* that defendant's expert's testimony should be excluded because of the expert's failure to produce expert materials from other cases which he was requested to produce by a *subpoena duces tecum.* Neither the expert nor counsel for the defendant filed a timely Motion for Protective Order in response to the subpoena. Thus, the court found that any objections that might have been available had been waived by the failure to file an appropriate motion relieving the expert of his obligation to comply with the subpoena. The court went on to hold that the requested materials ("[a]ll documents reflecting sworn testimony given by [the expert] in the last four years") were reasonably calculated to lead to admissible evidence in that, at the very least, the materials constituted possible impeachment evidence. *Id*. at *5. The court, however, refused to exclude the witness' testimony, reasoning that the proper avenue of complaining about the failure to produce requested documents was a Motion to Compel, pursuant to which exclusion of evidence is not a remedy.

In *Jenks v. N.H. Motor Speedway, Inc.*, No. 09-cv-205-JD, 2011 WL 4625705 (D.N.H. Oct. 3, 2011), the plaintiff's expert opined on the sufficiency of warnings on golf carts, and upon motion by the defendant, the court ordered the production of the expert's prior reports from two matters in which he had opined on the sufficiency of warnings on ATVs (which are similar, four-wheeled, open-air vehicles). *Id*. at *1, *3. The plaintiff made the frivolous assertion that the reports served in prior litigation were privileged because the expert's previous clients had not authorized the disclosure of the reports, which the court rejected. *Id*. at 4-5.

The court reached a similar conclusion in *Brown v. Overhead Door Corp.,* 06C50107, 2008 WL 1924885 (N.D. Ill. Apr. 29, 2008). There, the court ordered the plaintiff to produce transcripts of prior testimony of its experts following motion practice in which the plaintiff did not contest the relevance of the reports. *Id.* at *1-2. Rather, the plaintiff asserted that the past testimony was protected from disclosure by the provider-patient privilege and the Health Insurance Portability and Accountability Act (HIPAA), a position the court rejected. *Id.*

Similarly, in *Duplantier v. Bisso Marine Co., Inc.,* 2011 WL 2600995, at *2–*3 (E.D. La. June 30, 2011), the defendant issued a *subpoena duces tecum* to plaintiff's expert. The subpoena requested that the expert produce: "… all of your expert reports for the last five years in which you have used a person's wage history instead of a single year's earnings to calculate wage loss, redacting from those reports each claimant's personal identifying information." *Id.* at *1. The expert did not object to the subpoena before his response was due, instead opting to file a Motion to Quash and a Motion for Protection after the deadline for his response had passed. *Id.* at *3. These motions argued that the subpoena was unduly burdensome and sought information not relevant to the matter at issue in the case. *Id.* Finding his motions untimely, the court ruled that the requested information be produced, but limited the timeframe from five years to two years. *Id.*

## SOME COURTS ALLOW FOR THE DISCOVERY OF PRIOR EXPERT REPORTS AND TRANSCRIPTS FOR IMPEACHMENT PURPOSES

Some courts have allowed the discovery of prior expert reports and transcripts where the moving party has presented evidence that the prior materials may be used for impeachment purposes, *i.e.* to demonstrate the experts' inconsistency, prejudice or bias. For example, in *S.E.C. v. Huff*, 2010 WL 228000 at *5, the court granted a motion to compel the production of an expert's past reports in part because the expert's prior report, considering the same accounting records, had reported a significantly different result. Specifically, in a prior case, the expert opined that the amount of money paid to the insurer was $6.8 million. *Id.* at *2. Less than a year later, based upon the same accounting records, the expert testified that amount in question was $8.3 million.

Other courts considering these requests have held that parties cannot request prior expert reports and transcripts for impeachment purposes as a way to circumvent the relevance requirements of Rule 26. See, e.g., *Cartier, Inc.,* 2003 WL 22227959 at *3 ("Rule 26 does not tolerate discovery requests based on pure speculation or conjecture") (internal quotation marks omitted); *In re Air Crash Disaster*, 720 F. Supp. at 1444 (holding that the "discovery of material relevant to the impeachment of an expert envisioned by courts construing Rule 26(b) is limited to materials possessed by an expert and related to the case at hand" and noting that rule 26 "was designed to prevent abusive, costly 'fishing expeditions' into the background of a testifying expert"). Similarly, the U.S. District Court in *Colorado in Carol Von Schwab v. AAA Fire & Casualty Ins. Co*., 2015 held, where Plaintiffs sought discovery of an expert witness' previous reports involving unrelated cases and parties on the basis that the reports were needed to demonstrate the expert's bias (*i.e.*, for impeachment purposes), that because Rule 26 requires production of a "list", it follows that, "by implication, [a party] is not entitled to disclosure of the reports in those [prior] cases, regardless of their subject matter." *Id.* at *2.

## SOME COURTS CONSTRUE FRCP 26 BROADLY AND REQUIRE PRODUCTION OF DEPOSITION TESTIMONY AND OPINIONS OF AN EXPERT GIVEN IN OTHER CASES

Some courts have required parties to produce deposition testimony and opinions of an expert given in other cases to assess the consistency of the expert's opinions and methodologies. *See, e.g., Duplantier v. Bisso Marine Co., Inc.,* 2011 WL 2600995, at 3 (E.D. La. June 30, 2011) (requiring production of expert reports for the previous five years in which a specific wage loss calculation was utilized).[1] Similarly, in *Expeditors Int'l of Washington, Inc. v. Vastera, Inc.,* 2004 WL 406999, at *2 (N.D.Ill. Feb. 26, 2004), the court, considering an action for trade secret misappropriation based on the damages opinion proffered by an expert, noted as an initial matter that a subpoena *duces tecum* issued pursuant to Rule 45 is an appropriate discovery mechanism against nonparties such as a party's expert witness. Fed.R.Civ.P. 34(c). *Id.* at *3. In this case, though, as in *Duplantier v. Bisso Marine Co.*, discussed *supra,* the expert failed to make timely objections to the production requests, failed to timely seek a protective order if one was needed, and ignored the response date of the subpoena. *Id.* The court ultimately held that the defendant was "entitled to explore the purported factual and legal bases of [plaintiff's] damages opinions as well as potential inconsistencies between the views he intends to express in the underlying case

[1] As discussed above, however, it appears that no proper objection was lodged to the discovery request in that case.

and the testimony and opinions he has given, and the damages theories and methodologies he had adopted" in his prior cases. *Id.* Accordingly, the expert was ordered to produce all documents responsive to the following requests:

> All transcripts of the deposition testimony, trial testimony, and/or expert reports of [the expert], in any matter involving allegations of trade secret misappropriation during the past ten years.
> All transcripts of the deposition testimony, trial testimony, and/or expert reports of [the expert], in any matter involving allegations of patent infringement during the past five years.

*Id. See also Western Res., Inc. v. Union Pac. R.R. Co.,* No. 00-2043-CM, 2002 WL 1822428, at *3 (D.Kan. July 23, 2002) (ordering testifying expert to produce prior testimony from other litigations, administrative proceedings, and arbitrations that related to the subject matter or his opinions in the underlying action, as well as documents considered in forming those prior opinions); *Ladd Furniture, Inc. v. Ernst & Young,* No. 2:95CV00403, 1998 WL 1093901, at *10-11 (M.D.N.C. Aug.27, 1998) (compelling production of prior expert reports and prior deposition and trial testimony dating back six years); *Spano v. Boeing Co.,* 2011 WL 3890268, at *1 (S.D.Ill. Sept. 2, 2011) (agreeing that by the letter of the law, discovery from third parties should occur by way of Rule 45, and accepting plaintiff's argument that "that the opinions expressed by [the expert] in the other cases relate directly to the testimony [the expert] is likely to present in the instant case"); *Brown v. Overhead Door Corporation,* 2008 WL 1924885 (N.D.Ill. Apr.29, 2008) (finding prior testimony of a party's expert relevant for evaluating consistency between an expert's opinion expressed in a case and his opinions expressed in other cases and determining that the Federal Rules of Civil Procedure contemplate such inquiries.)

At least one court has denied a protective order and allowed discovery, reasoning that the discovery is probative of the expert's qualifications. *United States Surgical Corp. v. Orris, Inc.,* 983 F.Supp. 963, 967–968 (D.Kan.1997). The court explained

> Plaintiff relies on Ms. Reichert's opinions in its motion for partial summary judgment. Thus, her experience as a consultant is directly relevant to her qualifications as an expert. By relying on her consulting experience as the basis for her expertise, plaintiff and Ms. Reichert bring her consulting experience into issue and they cannot now be heard to object to discovery of such experience on the basis of confidentiality.

## CONCLUSION

The federal courts differ greatly in their interpretations of Federal Rule of Civil Procedure 26. This difference in interpretation and application of Federal Rule of Civil Procedure 26 has led to uncertainty in litigation and a proliferation of discovery disputes. This uncertainty has also led to increased litigation expense, as savvy litigators now find themselves obligated to comb through voluminous testimony and reports provided by their experts in previous matters as part of their expert-vetting process.

When a party fails to comply with Federal Rule of Civil Procedure 26(a), a variety of potential sanctions are provided by Federal Rule of Civil Procedure 37(c)(1), the harshest of which

is possible exclusion and a ban of the expert witness' testimony. Rule 37(c)(1) states, in pertinent part:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was *substantially justified* or is *harmless* (emphasis added).

Rule 26 was designed to encourage full disclosure among litigants and to prevent trial by ambush. Compliance with the disclosure requirements eliminate the potential for unfair surprise at trial and serve to reduce costs by allowing attorneys to conduct expert depositions only after the expert's reports are produced, allowing for a more efficient discovery process. For now, it is clear that any decision on whether expert transcripts and reports from other matters must be produced in response to subpoenas is highly dependent upon the particular facts and circumstances of the case. However, given the recent amendment to Federal Rule of Civil Procedure 26, which proscribes a balancing of interests through a proportionality test, and the plain language of Rule 26(a)(2)(B)(v), which specifies the production of a "list," the best path forward would appear to be to not require production of reports and transcripts of testimony, absent exceptional circumstances.

## REFERENCES

**Federal Rules**

Federal Rule of Civil Procedure Rule 26
Federal Rule of Civil Procedure Rule 34

**Cases**

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## APPENDIX A

Rule 26(a)(2): Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—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. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).