

**EXPERT EVIDENCE IN THE
UNITED STATES DISTRICT COURT
PROCEDURAL REQUIREMENTS**

“Is it your conclusion that this man is a malingerer?”

Dr. Unsworth responded:

“I wouldn’t be testifying if I didn’t think so, unless I was on the other side, then it would be a post traumatic condition.”

***Lardner v. Higgins*, 71 So.2d 242, 244 (La. App. 1954)**

June, 2009

Gordon P. Cleary
Vetter & White
20 Washington Place
Providence, Rhode Island 02903
Tel. (401) 421-3060
Fax (401) 272-6803
gcleary@vetterandwhite.com

A district court performing the gate-keeper function required under Rule 702 of the Federal Rules of Evidence asks three preliminary questions:

First, is this junk science? The *Daubert* analysis ought resolve this question.

Second, is this a junk scientist? As a routine matter, the Court asks whether the opinion the proffered expert seeks to give in the case at bar is one that society – outside the litigation process – seeks from this individual as it goes about its daily living. If the science itself is reliable and society seeks comparable opinions from this individual, the Court asks,

Third, is this a junk opinion? In other words, as Justice Breyer expressed it in *Kuhmo Tire*, is the proffered opinion “adequate to the task at hand?”

***McGovern v. Brigham & Women’s Hospital*, 584 F.Supp.2d 418, 424 (D. Mass. 2008).**

Before the trial judge reaches this stage, however, a party must satisfy several stringent procedural requirements to be in a position to present expert opinion evidence.

In the main, the procedural requirements are found in F.R.C.P. 26.

I. SYNOPSIS OF F.R.C.P. 26 RESPECTING EXPERTS

Rule 26(a)(2)(A) – Disclose Experts

In addition to 26(a)(1) disclosures – which include identification of individuals with discoverable information – a party must disclose the identity of witnesses it may use at trial to present evidence under Federal Rules of Evidence 702 (Testimony by Experts), 703 (Bases of Opinions by Experts), or 705 (Disclosure of Facts or Data Underlying Expert Opinion)

Rule 26(a)(2)(B) – Prepare a Report

A written report, prepared and signed by the witness, must be provided to all other parties:

if the witness is one retained or specially employed to provide expert testimony in the case, or

if the witness's duties as the party's employee regularly involve giving expert testimony.

Rule 26(a)(2)(B) – Details of the Report

The report must contain:

- a complete statement of all opinions the witness will express and the basis and reasons for them;
- the data or other information considered by the witness in forming all such opinions;
- any exhibits that will be used to summarize or support all such opinions;
- the witness's qualifications, including a list of all publications authored in the previous ten years;
- a list of all other cases, during the previous four years, in which the witness testified as an expert at trial or by deposition; and

- a statement of the compensation to be paid for the study and testimony in the case.

Rule 26(a)(2)(C) – Disclose the Report

Expert disclosures, including expert reports, must be made:

- at the times and in the sequence provided in a court order;
- in the absence of a court order, at least 90 days before the trial date, or the date for the case to be ready for trial;
- within 30 days after another party's expert disclosures, if the evidence is intended solely to rebut or contradict evidence on the same subject matter identified by another party.

Rule 26(a)(2)(D) – Supplement the Report

Parties must supplement expert disclosures when required under Rule 26(e).

II. WHAT TYPES OF EXPERTS MUST BE IDENTIFIED?

Indemnity Insurance Company of North America v. American Eurocopter LLC, 227 F.R.D. 421, 422-23 (M.D.N.C. 2005)

F.R.C.P. 26(a) provides for three levels of mandatory disclosure: 26(a)(1) requires disclosure of all witnesses who likely have discoverable information which a party may use to support a claim or defense; Rule 26(a)(2)(A) requires the additional disclosure of

all individuals who will provide expert testimony; Rule 26(a)(2)(B) requires any retained expert or employee who regularly gives expert testimony provide a written report revealing all opinions to be expressed and the basis therefore.

***Gomez v. Rivera Rodriguez*, 344 F.3d 103, 112-115 (1st Cir. 2003)**

Rule 26 uses the term expert to refer to those persons who will testify under F.R.E. 702 with respect to scientific, technical and other specialized matters. That definition does not encompass a percipient witness who happens to be an expert. If an individual is not providing testimony under Rule 702, he is not an expert for the purpose of Rule 26. By and large, courts have followed the advisory committee's lead and ruled that a treating physician, testifying as to his consultation with or treatment of a patient, is not an expert witness for purposes of most of Rule 26. The triggering mechanism for application of Rule 26's expert witness requirements is not the status of the witness, but the essence of the proffered testimony.

***Rogers v. The Detroit Edison Co.*, 328 F.Supp.2d 687, 689-90 (E.D. Mich. 2004)**

While a treating physician who will be called to testify as an expert need be identified pursuant to Rule 26(a)(2)(A), a written report from a treating physician need not be provided pursuant to Rule 26(a)(2)(B), because the treating physician is not retained or specially employed to provide expert testimony in a case, and is not an employee of a party whose duties regularly involve giving expert testimony.

***United States v. Ganier*, 468 F.3d 920, 926 (1st Cir. 2006)**

The categorization of computer-related testimony as either lay or opinion testimony is a relatively new question. In most cases, courts have rejected arguments that a computer

technician's testimony is simply lay testimony based on running commercially-available software, obtaining results and reciting the results.

III. WHAT MUST THE REPORTS INCLUDE?

***Ortiz-Lopez v. Sociedad Espanola de Auxillio Mutuo Beneficiencia de P.R.*, 248 F.3d 29, 35 (1st cir. 2001)**

The purpose of a detailed and complete expert report as contemplated by Rule 26(a) is, in part, to minimize the expense of deposing experts, and to shorten direct examination and prevent ambush at trial.

***Lohnes v. Level 3 Communications, Inc.*, 272 F.3d 49, 60 (1st Cir. 2001)**

The purpose of the expert disclosure rules is to “facilitate a fair contest with the basic issues and facts disclosed to the fullest practical extent.”

***Cell Genesys, Inc. v. Applied Research Systems and Holding, N.V.*, 499 F.Supp.2d 59, 80-81 (D. Mass. 2007)**

Rule 26(a)(2)(B) expressly requires that an expert's report contain, among other things, “a complete statement of all opinions to be expressed and the basis and reasons therefore,” and “the data or other information considered by the witness in forming the opinions.” Rule 26(e)(1) requires that a party submitting an expert report supplement that report, among other things, where “the party learns that in some material respect the information disclosed is incomplete or incorrect.” Thus, where the disputed issues on which the expert proposed to opine through a supplemented report have been in the case from inception, and the party proposing the supplemental opinion fails to demonstrate substantial justification for the failure, mandatory preclusion is the required sanction.

***Thorndike v. Daimler Chrysler Corporation*, 288 F.Supp.2d 50, 55 (D. Me. 2003), quoting *McCoy v. Whirlpool Corp.*, 214 F.R.D. 646, 652 (Kan. 2003)**

The civil rule requiring an expert report does not require that “a report recite each minute fact or piece of scientific information that might be elicited on direct examination to establish the admissibility of the expert opinion under *Daubert*. Nor does it require the expert to anticipate every criticism and articulate every nano-detail that might be involved in defending the opinion on cross-examination at a *Daubert* hearing.”

IV. SUPPLEMENTAL REPORTS

***Equant Integration Services, Inc. v. United Rentals, Inc.*, 217 F.R.D. 113, 116 (D. Conn. 2003)**

The fact that an expert consulted additional evidence before issuing a report is not enough to transform the report from rebuttal to supplemental, and thus escape the 30-day deadline for rebuttal reports in Rule 26. A rebuttal report contradicts or rebuts evidence on the same subject matter identified in an opposing party’s expert report.

***Tucker v. Ohtsu Tire & Rubber Co., Ltd.*, 49 F.Supp.2d 456, 459-61 (D. Md. 1999)**

A supplemental expert report filed ten days prior to the close of discovery, and more than four months before trial, is permissible; a report supplementing an expert’s Rule 26(a)(2)(B) disclosure are governed by Rule 26(e)(1), requiring disclosure of additions or changes not later than thirty days before trial, unless ordered otherwise by the court.

***Diomed, Inc. v. Angiodynamics, Inc.*, 450 F.Supp.2d 130, 136-37 (D. Mass. 2006)**

Expert was permitted to supplement initial report on “reasonable royalty” damages with supplemental report on “lost profits” damages, because the omission of a lost profits analysis resulted from defendants’ failure to provide full disclosure of customer

information, and any prejudice suffered by defendants was not so significant as to warrant exclusion, where no trial date was set and defendant could depose the expert on lost profits and identify a rebuttal witness if defendant chose to do so.

V. WHAT ARE THE CONSEQUENCES OF INADEQUATE DISCLOSURE OR REPORTS?

***Gagnon v. Teledyne Princeton, Inc.*, 437 F.3d 188, 191 (1st Cir. 2005)**

Expert preclusion orders fall in the “heartland of case management decisions – the area where the trial judge has the remorseless responsibility, evenhandedly and efficiently, to govern, monitor and police the progress of an endless line of cases through the court.”

***Esposito v. Home Depot U.S.A., Inc.*, 2007 WL 3237269 (D.R.I. 2007)**

Where plaintiff failed to provide expert disclosures within the deadline imposed by the case management order, and failed to move for an extension of the deadline until after defendants made timely expert disclosures, the Magistrate Judge’s order excluding plaintiff’s expert was upheld.

***Vigilant Insurance v. East Greenwich Oil Co.*, 234 F.R.D. 20, 22-24 (D.R.I. 2006)**

Party sanctioned for failing to disclose employee “damage experts” as required by Rule 26(a)(2)(A), by the court’s pretrial order, and in response to expert interrogatories. All witnesses who will testify as experts must be disclosed, even if such experts are not required to prepare a report pursuant to Rule 26(a)(2)(B), and even where such witnesses are identified as persons with relevant knowledge pursuant to Rule 26(a)(1). As a result of the violations, the opposing party was given leave to depose the “damage experts,”

leave to designate an expert on liability (vacating a prior order precluding a liability expert) and costs and fees for prosecuting the motion to exclude the damages experts.

***Primus v. United States*, 389 F.3d 231, 235 (1st Cir. 2004)**

“Mandatory preclusion [is] the required sanction in the ordinary case.”

***Rivera Pomales v. Bridgestone Firestone, Inc.*, 217 F.R.D. 290, 292-93 (D.P.R. 2003)**

Expert precluded because, although expert’s report was disclosed timely, expert’s curriculum vitae was not disclosed by the time of trial, a violation of Rule 26(a)(2)(B) requiring the expert report to include the qualifications of the witness, and a violation of the court’s scheduling order requiring a “curriculum vitae and an explanation of the expert’s qualifications.”

VII. SIDEBARS

***Castro-Medina v. The Proctor & Gamble Commercial Co.*, 565 F.Supp.2d 343, 359 n. 3 (D.P.R. 2008)**

An expert report submitted without an authenticating affidavit is inadmissible for purposes of summary judgment and will not be considered.

***Young v. City of Providence*, 301 F.Supp.2d 163, 177 (D.R.I. 2004)**

Expert report, submitted in opposition to motion for summary judgment, was not affirmed by expert under oath, and so was not of sufficient evidentiary quality to sustain plaintiff’s summary judgment objection.

***Beaudette v. Louisville Ladder, Inc.*, 462 F.3d 22, 26-7 (1st Cir. 2006)**

District Court did not abuse discretion in refusing to accept late disclosure of expert on inadequacy of ladder warning labels, where disclosure came with trial scheduled for five weeks away.

***Feliciano-Hill v. Principi*, 439 F.3d 18, 24 (1st Cir. 2006)**

District Court properly refused to consider plaintiff's motion at trial to preclude expert testimony, where plaintiff received expert report five months earlier, and raised no objection before trial. Parties have an obligation to object to expert testimony in a timely fashion, so that proposed testimony can be evaluated with care. *Daubert* generally contemplates a "gate-keeping function," not a "gotcha junction," *quoting Alfred v. Caterpillar, Inc.*, 262 F.3d 1083, 1087 (10th Cir. 2003).

***Poulis-Minoff v. Smith*, 388 F.3d 354, 358-359 (1st Cir. 2004)**

On summary judgment, Magistrate Judge properly compared expert affidavits to expert reports, and struck from affidavits opinions beyond the scope of the expert report.

***Bowling v. Hasbro, Inc.*, 2008 WL 717741 (D.R.I. 2008)**

Patent damages expert's credibility undermined when Court (being unfamiliar with the topic) inquired of expert's knowledge of so-called "book of wisdom." Expert replied that the "book of wisdom" was "a book that references" damages elements, a "reference or literature that talks about these topics," and offered "to provide to the Court a copy of this book." As it turned out, the "book of wisdom" is a concept discussed in important patent cases and not an actual book.