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Federal Rule 26(a)(2) Expert Witness Disclosures: Strategies for Composing and Attacking Expert Disclosures

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FEDERAL RULE 26(A)(2) EXPERT WITNESS DISCLOSURES: STRATEGIES FOR COMPOSING AND ATTACKING EXPERT DISCLOSURES

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I. INTRODUCTION

GIVEN THE HIGHLY TECHNICAL ISSUES that typically arise in aviation-related litigation, experts often play a critical role. A plaintiff who fails to come forward with sound expert testimony in support of her theory of liability risks summary dismissal. Conversely, any defendant who lacks expert testimony to support his defenses realistically faces a poor outcome.

There are many steps that prudent aviation counsel should take to ensure that she has expert testimony at her disposal. Among these is compliance with the requirements of Federal Rule of Civil Procedure 26(a)(2). Even the most articulate expert armed with the most technically sound opinions will do a party little good if the expert is excluded due to a failure to properly disclose during discovery. Those on the receiving end of flawed disclosures should be ready to: (a) limit the prejudice caused by the defect; and (b) when possible, use the flawed disclosure to gain advantage, up to the exclusion of the expert's

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testimony. Whether a party is in the position of preparing the disclosures or analyzing them for flaws, an understanding of the Rule's requirements is crucial.

II. THE RULE

Federal Rule of Civil Procedure 26(a)(2) requires a party to disclose the identity of any witness who will provide expert testimony under Federal Rule of Evidence 702, 703, or 705.[1] Absent a court order or stipulation, a party must make the required disclosure—either a full report under Rule 26(a)(2)(B) or the more limited disclosure under Rule 26(a)(2)(C)—at least ninety days before trial.[2] Expert opinions intended only as rebuttal testimony must be exchanged within thirty days of the initial disclosure.[3] A party also has a duty to supplement any incorrect or incomplete information provided in her expert disclosures by the time the party's pretrial disclosures are due.[4] However, this rule does not provide an opportunity to disclose new opinions after the original deadline for expert disclosures has passed.[5]

A. Retained vs. Non-Retained Experts

Prior to 2010, Rule 26(a) required a full written report from an expert who was either retained to provide expert testimony or was an employee that regularly gave expert testimony (retained experts).[6] The 2010 amendment to Rule 26(a) kept in place the full written report requirement for retained experts but added a less extensive disclosure requirement for all other experts (non-retained, or percipient, experts).[7] A party who intends to elicit opinions from a non-retained expert must now only disclose the subject matter of that expert's testimony and a

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[1] Fed. R. Civ. P. 26(a).

[2] *Id.* 26(a)(2)(D)(i).

[3] *Id.* 26(a)(2)(D)(ii).

[4] *Id.* 26(a)(2)(E).

[5] Trinity Homes, LLC v. Ohio Cas. Ins. Co. Group, No. 1:04-cv-01920-SEB-DML, 2011 U.S. Dist. LEXIS 61701, at *9 (S.D. Ind. June 8, 2011) ("Although Rule 26(e) does not itself define the word 'supplement' except in terms of requiring a timely supplement to fix a discovery response that is incorrect or incomplete in a material respect, common sense suggests (and numerous decisions confirm) that an expert report that discloses new opinions is in no way a mere supplement to a prior report.").

[6] Fed. R. Civ. P. 26(a)(2)(B) (2009).

[7] *Id.* 26(a)(2)(B), (C) (2010).

summary of the facts and opinions to which that expert is expected to testify.[8]

A non-retained expert witness is one whose "opinion arises not from her 'enlistment as an expert,' but rather from her 'ground-level involvement in the events giving rise to the litigation.'"[9] It is possible for a witness to be a non-retained expert with regard to certain portions of her testimony and a retained expert as to other portions.[10] If a party seeks to elicit testimony from a non-retained expert witness "based upon facts, evidence, or expertise outside the scope" of the expert's individual observations, the expert must comply with the report requirements of Rule 26(a)(2)(B) imposed on retained experts.[11]

The party seeking to avoid submitting a Rule 26(a)(2)(B) expert report bears the burden of proving that the report is not required because the witness is a non-retained witness.[12] A party does not get to pick and choose between the requirements of Rule 26(a)(2)(B) and Rule 26(a)(2)(C) based on what is convenient for her; "[i]t is the nature of the testimony . . . that determines whether a witness is exempt from the disclosure and report requirements."[13]

B. Report Requirements for Retained Experts

Under Rule 26(a)(2)(B), a party that intends to rely upon the testimony of a retained expert witness "is required to furnish . . . a report containing, among other information, 'a complete statement of all opinions' the retained expert will provide, 'and the basis and reasons for them.'"[14] So, "[s]imply disclosing the

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[8] *Id.* 26(a)(2)(C) (2017).

[9] Speare Tools, Inc. v. Klein Tools, Inc., No. 13-C-324, 2014 U.S. Dist. LEXIS 96541, at *4 (E.D. Wis. July 15, 2014) (quoting Downey v. Bob's Discount PT Furniture Holdings, Inc., 633 F.3d 1, 6 (1st Cir. 2011)).

[10] *See, e.g.*, Meredith v. Int'l Marine Underwriters, No. JKB-10-837, 2011 U.S. Dist. LEXIS 41619, at *11 (D. Md. Apr. 18, 2011); Sullivan v. Glock, 175 F.R.D. 497, 500 (D. Md. 1997) (stating that the distinction lies in the "source of the facts on which the witness' expert opinion is based. . . . To the extent that a witness' opinion is based on facts learned or observations made 'in the normal course of duty,' the witness is a [percipient witness] and need not submit a [full] report.").

[11] *See, e.g.*, *In re* World Trade Ctr. Lower Manhattan Disaster Site Litig., No. 09-cv-00680, 2014 U.S. Dist. LEXIS 156976, at *52 (S.D.N.Y. Nov. 5, 2014).

[12] Cinergy Communs. Co. v. SBC Communs., No. 05-2401-KHV-DJW, 2006 U.S. Dist. LEXIS 80397, at *10 (D. Kan. Nov. 2, 2006).

[13] Brainstorm Interactive, Inc. v. Sch. Specialty, Inc., No. 14-cv-50-wmc, 2014 U.S. Dist. LEXIS 158891, at *5-6 (W.D. Wis. Nov. 10, 2014) (quoting 6 James Wm. Moore, Moore's Federal Practice § 26.23[2][a][i]).

[14] Ciomber v. Coop. Plus, Inc., 527 F.3d 635, 641 (7th Cir. 2008).

expert's name and contact information is not enough: A litigant has not complied with the disclosure requirement until she has disclosed the expert's written report."[15]

The report must comply with the precise standard set forth in Rule 26(a)(2)(B). The report must contain: (1) a complete statement of all opinions to be expressed and the basis and reasons therefore; (2) the facts or data considered by the witness in forming her opinion; (3) any exhibits that will be used to summarize or support her opinion; (4) the witness's qualifications, including a list of her publications for the previous ten years; (5) a list of all other cases in which she has testified in the previous four years; and (6) a statement of the compensation to be paid for her testimony.[16]

The report may not merely set forth an ultimate opinion without providing "a line of reasoning arising from a logical foundation."[17] The report "'must not be sketchy, vague, or preliminary in nature,' and it must include 'how' and 'why' the expert reached a particular result, not merely the expert's conclusory opinions."[18] Thus, "Rule 26(a) requires that the expert report contain the basis and reasons for *each* opinion."[19]

There is "a well-accepted notion that expert witnesses cannot testify about facts or data, but fail to disclose the same."[20] Where an expert "has not identified specific facts or data considered . . . [her] report is useless in preparing for cross-examination."[21] Nor does Rule 26(a)(2) allow parties "to cure deficient expert reports by supplementing them with later deposition testi-

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[15] Bell v. Ward, No. 3:12-CV-72-WGH-RLY, 2013 U.S. Dist. LEXIS 174573, at *3 (S.D. Ind. Dec. 9, 2013) ("Rule 26 requires disclosure of experts' reports—not just their identities—because information about their opinions and methods are essential to trial preparation.") (citing *Ciomber*, 527 F.3d at 642–43)).

[16] FED. R. CIV. P. 26(a)(2)(B)(i)-(vi).

[17] Brainard v. Am. Skandia Life Assur. Corp., 432 F.3d 655, 664 (6th Cir. 2005) ("[A]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.").

[18] Siburt v. U.S. Bank, No. 10-C-135, 2011 U.S. Dist. LEXIS 94531, at *8 (E.D. Wis. Aug. 23, 2011) (quoting Salgado by Salgado v. Gen. Motors Corp., 150 F.3d 735, 742 n.6 (7th Cir. 1998)).

[19] Fid. Nat. Title Ins. Co. of New York v. Intercounty Nat. Title Ins. Co., No. 00-C-5658, 2001 U.S. Dist. LEXIS 9626, at *10 (N.D. Ill. July 12, 2001) (emphasis in original).

[20] Ravo v. Covidien LP, 55 F. Supp. 3d 766, 776 (W.D. Pa. Oct. 24, 2014) (citing Siemens Med. Solutions USA, Inc. v. Saint-Gobain Ceramics & Plastics, Inc., 637 F.3d 1269, 1286 (Fed. Cir. 2011)).

[21] *Siburt*, 2011 U.S. Dist. LEXIS 94531, at *8 (citations and quotation marks omitted).

mony."[22] In *Ciomber*, the Seventh Circuit explained that deposition testimony cannot cure a deficient report:

> The purpose of Rule 26(a)(2) is to provide notice to opposing counsel—before the deposition—as to what the expert witness will testify and this purpose would be completely undermined if parties were allowed to cure deficient reports with later deposition testimony. Allowing parties to cure a deficient report with later depositions would further undermine a primary goal of Rule 26(a)(2): to shorten or decrease the need for expert depositions. After all, the parties' need for expert depositions would increase if they could use deposition testimony to provide information they should have initially included in their Rule 26(a)(2) report.[23]

C. Disclosure Requirements for Non-Retained Experts

All other expert witnesses are subject to the less extensive disclosure requirement.[24] Under Rule 26(a)(2)(C), a party intending to rely on the testimony of a non-retained, percipient expert must only disclose "the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705 . . . and a summary of the facts and opinions to which the witness is expected to testify."[25]

The quintessential example of a non-retained witness is the treating physician; however, other examples abound, including the employee-engineer or accountant.[26] As with Rule 26(a)(2)(B), a party may not satisfy Rule 26(a)(2)(C) by merely citing to a "litany of . . . records."[27] Once again, a party may not simply refer to an expert's deposition testimony to meet the re-

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[22] Ciomber v. Coop. Plus, Inc., 527 F.3d 635, 642 (7th Cir. 2008).

[23] *Id.* (citations omitted); *see also* Fed. R. Civ. P. 26(a)(2) advisory committee notes (1993) (noting that disclosures may reduce or eliminate the need for a deposition).

[24] *Id.* 26(a)(2)(C).

[25] Fed. R. Civ. P. 26(a)(2)(C)(i)–(ii).

[26] *See In re* Prograf Antitrust Litig, No. 1:11-md-02242-RWZ, 2014 U.S. Dist. LEXIS 138429, at *18 (D. Mass. June 10, 2014) (discussing treating physicians); Tajornera v. Black Elk Energy Offshore Operations, L.L.C., No. 13-0366, 2016 U.S. Dist. LEXIS 73985, at *45–49 (E.D. La. June 7, 2016) (discussing engineers); Mont. Connection, Inc. v. Moore, No. 3:12-cv-0824, 2015 U.S. Dist. LEXIS 170867, at *12–14 (M.D. Tenn. Dec. 21, 2015) (discussing accountants).

[27] Ballinger v. Casey's Gen. Store, Inc., No. 1:10-CV-1439-JMS-TAB, 2012 U.S. Dist LEXIS 45024, at *12 (S.D. Ind. Mar. 29, 2012) (holding that medical records alone do not comply with Rule 26(a)(2)(C)).

quirements of Rule 26.[28] When a party fails to make a proper disclosure, "there is no way to determine what the opinions are that the [percipient witnesses] will express or the facts upon which they rely to form these opinions," and the testimony must be stricken.[29]

D. Consequences for Failure to Timely and Adequately Disclose

Failure to timely disclose the above-described information as required by Rule 26(a) means that the party has "yet to properly disclose these witnesses as experts."[30] "Under Rule 37(c)(1), 'exclusion of non-disclosed evidence is automatic and mandatory . . . unless non-disclosure was justified or harmless.'"[31] Thus, the sanction for failure to disclose includes a shifting of the burden to prove that the violation was "justified or harmless" to the non-producing party. "In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard . . . may order payment of the reasonable expenses, including attorney's fees, caused by the failure."[32]

Courts consider the following four factors when determining whether an inadequate disclosure is harmless: "(1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date."[33] Meeting the "substantially justified" or "harmless" exception can

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[28] Lane v. Walgreen Co., No. 1:12-CV-01180-SEB, 2014 U.S. Dist. LEXIS 86259, at *14 (S.D. Ind. June 24, 2014) (stating that Rule 26 is violated where a party "simply refers to their depositions without setting forth a summary of . . . opinions or giving an indication of the purpose for which she intends to use their testimony"); *see also* Retractable Technologies, Inc. v. Becton, Dickinson & Co., 2013 U.S. Dist. LEXIS 127732, at *8 (E.D. Tex. Sept. 6, 2013) ("This is simply not a fair substitute for the summary required by Rule 26.").

[29] *See, e.g.*, Gonzalez v. City of McFarland, 2014 U.S Dist. LEXIS 156596, at *23 (E.D. Cal. Nov. 5, 2014) ("Though extensive detail was not required, *some* detail was.") (emphasis in original).

[30] Townsend v. City of Fort Wayne, No. 1:12-CV-371-JD, 2014 U.S. Dist. LEXIS 136764, at *9 (N.D. Ind. Sept. 26, 2014) (quoting Fed. R. Civ. P. 26(a)(2)(C)(ii)).

[31] Tribble v. Evangelides, 670 F.3d 753, 760 (7th Cir. 2012) (citing Musser v. Gentiva Health Servs., 356 F.3d 751, 758 (7th Cir. 2004)).

[32] Fed. R. Civ. P. 37(c)(1)(A).

[33] *E.g.*, David v. Caterpillar, Inc., 324 F.3d 851, 857 (7th Cir. 2003).

be difficult, especially considering that the burden of proving the exception is on the party facing the sanctions.[34]

"Without proper disclosures, a party may miss its opportunity to disqualify the expert, retain rebuttal experts, or hold depositions for an expert not required to provide a report."[35] As a result of these and other ways a party may be prejudiced by an improper disclosure, the sanction is severe, and there is no exception for substantial compliance.[36] Accordingly, a failure to comply with Rule 26(a)(2)'s disclosure requirements results in the offending party not being permitted "to introduce the expert witness's testimony as 'evidence on a motion, at a hearing, or at a trial.'"[37]

III. PRACTICE POINTERS

The following practice pointers are intended to serve both as strategies for appropriately composing expert disclosures as well as strategies to attack an opponent's expert disclosures, if inadequate.

A. Strategies for Preparing Expert Reports

As evidenced above, failure to timely comply with the dictates of Rule 26 could result in your expert witness being stricken entirely or being barred from providing certain opinion testimony. Given the dire consequences that may result from a failure to adhere to the rule, careful attention should be paid to proper compliance.

1. Determine the Status of the Witness

In order to ensure that the expert disclosure is compliant, the first step is to determine if the witness is a retained expert or a non-retained expert. As mentioned above, if the witness was retained to provide expert testimony or was employed by the party and her duties regularly include giving expert testimony, then a full expert report must be prepared. If not, and the witness is merely a non-retained expert witness, it is sufficient to disclose

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[34] *See* JTS, LLC v. Nokian Tyres PLC, No. 3:14-cv-00254-JWS, 2017 U.S. Dist. LEXIS 3252, at *4–5 (D. Alaska Jan. 6, 2017) ("Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to prove harmlessness.").

[35] *Tribble*, 670 F.3d at 759–60.

[36] *Id.*; Bell v. Ward, No. 3:12-CV-72-WGH-RLY, 2013 U.S. Dist. LEXIS 174573, at *4 (S.D. Ind. Dec. 9, 2013).

[37] Ciomber v. Coop. Plus, Inc., 527 F.3d 635, 641 (7th Cir. 2008) (quoting Fed. R. Civ. P. 37(c)(1); Jenkins v. Bartlett, 487 F.3d 482, 488 (7th Cir. 2007)).

only the subject matter of the testimony and a summary of the facts and opinions to which the witness is expected to testify.[38] In instances where the witness's status is not readily obvious, remember that the burden of proof is on the party seeking to provide a summary report rather than a complete expert report.[39] Thus, voluntarily adhering to the full reporting requirement may be advisable to prevent a discovery dispute surrounding the classification of the witness.

Appropriately classifying an expert witness creates a potential trap for litigants that must be avoided in order to successfully admit expert testimony. For example, consider *Tokai Corp. v. Easton Enterprises, Inc.*, in which Tokai submitted expert declarations in opposition to Easton Enterprise's motion for summary judgment.[40] The district court sustained Easton Enterprise's objections to the declarations because Tokai failed to submit the necessary written expert reports.[41] On appeal, Tokai asserted that the witness, as its employee, was entitled to offer an expert declaration without an accompanying written report under Rule 26(a)(2)(B).[42] The Federal Circuit rejected this argument and instead concluded, in relevant part, that Tokai had "failed to introduce evidence indicating that [the employee's] duties did not 'regularly involve giving expert testimony.'"[43] In other words, the court would not apply the employee exception associated with Rule 26(a)(2)(B) absent sufficient evidence demonstrating that the exception truly applied.[44]

Tokai demonstrates the care that must be taken when classifying experts. Where there is a lack of clarity as to the status of a given expert and thus a lack of clarity as to the reporting requirement, counsel may consider voluntarily adhering to the full reporting requirement. Disclosing the report will not only provide assurance that the witness or testimony will not be excluded, but also may prevent a costly discovery dispute.

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[38] *Compare* FED. R. CIV. P. 26(a)(2)(B), *with* FED. R. CIV. P. 26(a)(2)(C).

[39] *E.g.*, Cinergy Communs. Co. v. SBC Communs., No. 05-2401-KHV-DJW, 2006 U.S. Dist. LEXIS 80397, at *10 (D. Kan. Nov. 2, 2006).

[40] Tokai Corp. v. Easton Enters., Inc., 632 F.3d 1358 (Fed. Cir. 2011).

[41] *Id.* at 1364.

[42] *Id.*

[43] *Id.* at 1365.

[44] FED. R. CIV. P. 26(a)(2)(B).

2. Prepare Early

As with many errors that occur in the practice of law, waiting until the last minute to focus on an expert's report substantially increases the likelihood that the report will be flawed. Preparation for timely and compliant disclosures necessarily begins with an early determination of what experts are necessary for your particular case. Engaging the right expert at the early stages of a case is critical in determining whether the technical theories you wish to advance are supportable. A good expert is indispensable in fleshing out the challenges that may exist in proving your theories and identifying the flaws in your opponent's theories. The earlier a party can bring the right experts on board the better.

Retaining the expert is certainly just one step in avoiding last-minute disclosures. Keeping the expert updated and aware of deadlines is also critical. A surefire way to ruin an expert's day is to call or email her with an announcement that you need her report by the end of the week. Another way to cause panic is to inform the expert only days before the report is due that some vital piece of information was forgotten. Such tactics will not only make your expert look ten years older the next time you see her, they will also likely result in a poor disclosure.

One way to avoid last minute issues is to set a deadline for the expert to share a draft report well in advance of the disclosure deadline. Rule 26(b)(4) protects such "drafts."[45] Rule 26(b) also states that the work-product privilege of Rule 26(b)(3)(A) protects communications between the party's attorney and a testifying expert unless the communications

> (i) relate to compensation for the expert's study or testimony, (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed."[46]

However, note that the exact contours of confidentiality in this area are not clearly defined. For example, different courts have interpreted the meaning of a privileged "draft" report differently. In *Dongguk University v. Yale University*, the district court granted a motion to compel the production of a testifying ex-

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[45] *Id.* 26(b)(4)(B).

[46] *Id.* 26(b)(4)(c)(i)–(iii).

pert's notes.[47] The court concluded that "as a general matter, an expert's notes are not protected by 26(b)(4)(B) or (C), as they are neither drafts of an expert report nor communications between the party's attorney and expert witness."[48] In contrast, the court in *Etherton v. Owners Ins. Co.* held that a testifying expert was not required to disclose "working notes" (five pages of calculations) because the notes were protected from disclosure as a "draft" report.[49]

Accordingly, when counsel receives a draft report early, it is critical to diligently consider which documents or other materials may not be privileged. As a result of the lack of clarity in this area of the law, counsel should attempt to adhere to the formalities of the rules. For instance, be sure to ask the expert witness to memorialize her opinions in actual draft reports rather than independent notes or other documents that do not necessarily resemble draft reports. This will lessen the likelihood that a court will unexpectedly order the production of draft documents and potentially prevent a costly discovery dispute.

3. Review the Report Through an Adversary's Eyes

In order to lessen the chances of the report being excluded, it is important to review the report thoroughly for compliance. When conducting such a review, consider the level of attention that your opponent will devote to finding flaws. At a minimum, counsel should subject the report to the same level of scrutiny.

Conducting the review as the opponent would necessarily mean that you do not just take the expert's word that she has made a proper disclosure of the required information. Perhaps the most obvious place to begin when conducting the review is with a determination of whether the expert has included all of the opinions and supporting facts that are necessary to support the theory for which the party is using her. A good method to do so is to go through a mock direct and cross examination of the expert's expected trial testimony. If the expert needs to draw upon opinions and facts that are not in the report in order to testify adequately, the report is undoubtedly flawed.

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[47] Dongguk University v. Yale Univ., No. 3:08-CV-00441-TLM, 2011 U.S. Dist. LEXIS 157690 (D. Conn. May 19, 2011).

[48] *Id.* at *3.

[49] Etherton v. Owners Ins. Co., No. 10-cv-00892-MSK-KLM, 2011 U.S. Dist. LEXIS 21992, at *5 (D. Colo. Feb. 18, 2011).

The expert must also disclose all facts or data "considered by" the witness in forming her opinion. As part of this requirement, most experts will list the materials they have reviewed. It is good practice to check that list to determine whether the expert has omitted any vital information. It may be that the expert has deliberately chosen not to utilize a particular source. However, even if that is correct, it is worthwhile to at least understand why the expert chose not to consider the source.

In addition to disclosing all facts or data "considered by" the witness in forming her opinion, Rule 26(a)(2)(B)(i) requires disclosure of the "basis and reasons" for the expert's opinions.[50] All too often, experts skip directly from observations to conclusions without describing or, indeed, performing a process by which the observations have been evaluated, analyzed, or calculated to produce their conclusions. This is particularly problematic where quantitative conclusions are stated based on qualitative observations without intervening quantitative analysis. Some courts are less strict in enforcing this aspect of the rule than others, but the careful practitioner will want to both see and disclose the analytical process employed by her expert. Mathematics has been said to be the language of science, and advocates purporting to advance scientific theories should employ that language.

Moreover, although the expert may believe that she has listed her publications and cases for the relevant time periods, doing separate research into these topics prior to the report's due date can reveal new cases or publications that may not only be absent from the list, but also may not have been available when counsel first vetted the expert. Performing a LexisNexis search for cases and publications will help ensure that the expert has not omitted required information.

4. No Ghostwriting

On occasion, it may be tempting to write the expert's report and merely have the expert summarily bless and sign it. Resist this temptation. Where an expert report is required, the report must be "*prepared* and signed by the witness."[51] Courts interpret the requirement that the report be "prepared" by the expert as requiring the expert, not the attorney who retained the expert,

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[50] FED. R. CIV. P. 26(a)(2)(B)(i).

[51] *Id.* 26(a)(2)(B) (emphasis added).

to draft the report.[52] In fact, "numerous courts have admonished attorneys for ghost-writing their experts' reports, going as far as to preclude experts from testifying."[53]

This does not mean that a lawyer is precluded "from providing assistance to experts in preparing the reports."[54] The advisory committee notes to Rule 26 expressly contemplate attorney involvement in drafting the expert's report.[55] Thus, an attorney's involvement in drafting the expert report does not somehow make the report inadmissible. However, the report must be "written in a manner that reflects the testimony to be given by the witness."[56]

B. Strategies for Opposing Expert Witness Disclosures

An opponent's failure to comply with the dictates of Rule 26 can prejudice your ability to "retain rebuttal experts, or hold depositions for an expert not required to provide a report."[57] Accordingly, proper steps should be taken to limit the prejudice, including moving to strike the opponent's expert testimony.

1. Determine Whether the Report is Technically Compliant

As previously stated, the required contents of the report are extensive, and the report provided by the expert must be "detailed and complete."[58] These requirements are not mere formalities. Expert reports have been excluded for a variety of reasons including occasions where (1) the expert's opinions were largely unsupported; (2) the expert's qualifications were omitted; (3) there was no statement of the compensation received; and (4) the expert's previous testimony was not in-

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[52] United States *ex rel.* Wall v. Vista Hospice Care, No. 3:07-cv-604-M, 2016 U.S. Dist. LEXIS 99480, at *34 (N.D. Tex. Mar. 22, 2016) (discussing holdings from other courts).

[53] *Id.*

[54] Fed. R. Civ. P. 26, Advisory Committee Notes to Rule 26(a)(2)(B).

[55] *Id.* ("[I]ndeed, with experts such as automobile mechanics, this assistance may be needed.").

[56] *Id.*

[57] Tribble v. Evangelides, 670 F.3d 753, 759–60 (7th Cir. 2012); *see also* Townsend v. City of Fort Wayne, No. 1:12-CV-371-JD, 2014 U.S. Dist. LEXIS 136764, at *9 (N.D. Ind. Sept. 26, 2014) (quoting Fed. R. Civ. P. 26(a)(2)(C)(ii)).

[58] *See* Fed. R. Civ. P. 26(a)(2)(B)(i)–(vi); Fed. R. Civ. P. 26 Advisory Committee Notes.

cluded.[59] As a result, carefully determine whether the opponent's expert report satisfies each of these conditions.

To do this, make a checklist of each of the items that must be included in the report and carefully comb through the expert report to make sure each of the items is present. This will require independent research. For instance, LexisNexis searches can be performed that list the cases in which the expert has provided testimony, and searches may be performed on other platforms, such as JSTOR, to find publications authored by the expert. Some of this analysis may even necessitate the use of the party's own expert, who will be able to point out instances in which the opponent's expert failed to provide support for an opinion. As counsel performs this analysis, she should note any discrepancies between the actual disclosure and what should have been disclosed.

This method was used to exclude an expert in a recent aviation case.[60] In granting the motion, the court held that it was "particularly disturbing" that the expert did not include a "complete and useful list of trial or deposition testimony for the last four years."[61] The court stated that "Rule 26 requires more than attempted compliance; it requires mandatory disclosure of all deposition and trial testimony within the past four years, together with sufficient information about where that testimony was given to enable the opposing party to gain access to it."[62] This basis alone was sufficient to exclude the witness, thereby demonstrating the importance of notating when an expert disclosure is not complete.

2. Exposing Weaknesses in the Expert's Report

Problems with an expert's report are not always readily apparent from the face of the report and sometimes can only be determined by deposing the expert.[63] When addressing the report

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[59] *See, e.g.*, Dunkin' Donuts Inc. v. Patel, 174 F. Supp. 2d 202, 213 (D.N.J. 2001); Santiago-Diaz v. Laboratorio Clinico y de Referencia del Este, 456 F.3d 272, 276 (P.R. 2006); R.C. Olmstead, Inc. v. CU Interface, LLC, 657 F. Supp. 2d 905, 909–13 (N.D. Ohio 2008).

[60] Crouch v. John Jewell Aircraft, Inc., No. 3:07-CV-638-DJH 2016 WL 157470 (W.D. Ky. Jan. 12, 2016) (Order Granting Motion to Exclude Testimony of Harvey Rosen).

[61] *Id.* at *4.

[62] *Id.*

[63] When flaws are readily apparent on the face of the expert report, counsel may want to consider not deposing the expert. The motion to exclude should emphasize that the report was required to contain *all* opinions and bases there-

during the expert's deposition, first have the expert admit that (1) she was required to disclose any and all opinions in her report; and (2) she has no other opinions other than those contained in the report. Make clear to the expert that the deposition is not a means for her to supplement her report with additional opinions. This helps to prevent the opponent from later claiming that any failure to disclose was harmless.

Pursuant to Rule 37(c)(1), "exclusion of non-disclosed evidence is automatic and mandatory . . . unless non-disclosure was justified or harmless."[64] In determining whether the failure to disclose was harmless, courts consider, in part, the prejudice or surprise to the party and the ability to cure the prejudice. To the extent that the expert attempts to testify regarding an opinion not contained in her report, make the objection to the new opinion clear and indicate the prejudices caused. By failing to object, counsel runs the risk of the opponent later claiming that any prejudice from the failure to disclose was cured at the deposition.

With respect to the facts and data that were to be disclosed within the report, again have the expert concede that she was required to list all facts and data that she considered. Counsel should then devote a portion of the deposition to determining whether the expert relied on any facts or data missing from the report. Indeed, in preparing for the deposition, make your own assessment of whether there are documents that the expert likely needed to render her opinions but were not disclosed. If the expert agrees that she should have considered the missing information, there is a basis to claim that the report lacks a logical foundation. If, on the other hand, the expert claims that she did review the missing information but did not list it, there is a basis to claim improper disclosure.

In a recent aviation case, the court utilized the expert's deposition to solidify its opinion that the expert's report was insufficient.[65] The court determined that the expert's report did not

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fore, as well as all the other information regarding the expert's qualifications. By not taking the deposition, it lessens the chance of the opponent claiming that any prejudice was cured during the deposition. Although the rule does not contemplate allowing for this, some courts tend toward leniency in finding harmless error.

[64] Tribble v. Evangelides, 670 F.3d 753, 760 (7th Cir. 2012) (citing Musser v. Gentiva Health Servs., 356 F.3d 751, 758 (7th Cir. 2004)).

[65] *Crouch*, 2016 WL 3527, at *6 (Order Granting Motion to Exclude Harvey Rosen).

adequately disclose how the expert calculated the actual cost and present value of the amount of money that would be required to fund the life care plans created by another expert.[66] When asked in his deposition what data he relied upon to determine those values, the expert was unable to coherently explain what, if any, data he relied upon. The court cited to this particular testimony to demonstrate that the expert could not clearly articulate how he calculated the values.[67] Accordingly, taking a deposition despite knowing that an expert's report was improper provided additional fodder for excluding the expert.

3. Ways to Limit Prejudice

If an expert's disclosure is insufficient, it becomes imperative that the harmed party begins limiting the degree of prejudice borne from the inadequate disclosure. Although the best outcome will be the exclusion of the expert, there are many instances in which the court will not elect to disqualify the improperly disclosed expert.[68] As a result, consider alternatives to limit the prejudice that has occurred.

When making a motion to exclude, point out to the court every aspect of the expert disclosure that makes it inadequate and each of the prejudices that the inadequacies will cause. When done properly, courts are often amenable to, at a minimum, limiting the testimony that the expert is permitted to provide.[69] In addition to this sanction, counsel may also file a motion for the payment of the reasonable expenses, including attorney's fees, caused by the failure.[70] When facing a court that does not wish to strike the expert, counsel may also seek more creative sanctions. For example, counsel may ask to re-depose

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[66] *Id.*

[67] *Id.* at *5.

[68] *E.g.*, Roberts v. Galen of Va., Inc., 325 F.3d 776, 783 (6th Cir. 2003) (denying a motion to exclude on the grounds that a failure to disclose publications and amount of compensation was harmless).

[69] *E.g.*, Hoffman v. Caterpillar, Inc., 368 F.3d 709, 714–15 (7th Cir. 2004) (excluding portions of expert testimony where expert disclosure did not include a videotape that was the basis for the expert's opinion); Abrams v. Mendsen, 218 F.R.D. 539, 541(E.D. Mich. 2003) (refusing to allow expert testimony regarding a computer program because the expert failed to disclose the equations that were used in the computer program).

[70] FED. R. CIV. P. 37(c)(1)(A); *e.g.*, Acadia Ins. Co. v. Cunningham, 771 F. Supp. 2d 172, 177 (D. Mass. 2011) (granting attorney's fees associated with reviewing the expert's report and deposing the expert).

the expert after having an appropriate amount of time to prepare.[71]

IV. CONCLUSION

Obtaining credible expert testimony is critical to a successful outcome in most aviation cases. Rule 26(a)(2) provides the requirements for expert witness disclosures. If an expert fails to meet these requirements, the opposing party may move to exclude the expert's testimony. There are many steps that prudent aviation counsel should take to ensure that her expert is not excluded, including properly determining the status of the witness as a retained or non-retained expert, timely preparing the expert and the required disclosure, and critically reviewing the prepared disclosure for any compliance issues.

Conversely, the opposing counsel, upon receiving an inadequate disclosure, must limit the prejudice caused by it. After determining that the report is not technically compliant, opposing counsel should take additional steps to expose those weaknesses, including through the use of well-crafted deposition questions. While the ultimate goal is to have the expert's testimony excluded, counsel should also keep in mind that there are other methods to limit the prejudice caused by the noncompliant disclosures. Adherence to these strategies will limit the prejudicial effect of the improperly disclosed expert testimony.

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[71] *E.g.*, Diomed, Inc. v. AngioDynamics, Inc., 450 F. Supp. 2d 130, 137 (D. Mass. 2006) (granting, as a result of a failure to comply with discovery obligations, a short supplemental deposition solely on the issue of the expert's lost-profits theory, with costs borne by the party failing to properly disclose).