

**Do your expert witness reports and testimony comply with 2015 amendments to
C.R.C.P. 26 (a) (2) (B) (I) and C.R.C.P. 37 (a) (1)?**

***Catholic Health Initiatives Colorado v. Earl Swensson Associates, Inc.*, 2017 CO 94, ___ P.3d___ (Colo. Oct. 2, 2017)**

The employ of expert witnesses in litigation is typically undertaken to help the decider of fact (judge or jury) decipher an area of specialized knowledge which is key to the case. The expert report serves the primary purpose of “educating” deciders of fact on topics not commonly known to the general public. However, a noncomplying expert report can wreak havoc on a case, increase costs or worse, have the expert’s testimony precluded in whole or part from use at trial. This of course is contrary to the purpose of retaining an expert in the first place. Understanding the parameters of compliance (C.R.C.P. 26 (a) (2) (B) (I)) and how sanctions for non-compliance (C.R.C.P. 37 (c) (1)) may be applied is important not only for legal counsel but the expert as well under the 2015 rule updates and the recent Colorado Supreme Court case, *Catholic Health Initiatives Colorado v. Earl Swensson Associates, Inc.*

If you are a retained expert witness or an attorney using an expert what are the rules for expert witnesses? Of what need the expert reports consist? What happens when expert reports do not comply with the rules? What sanctions can enter against the non-complying party?

Retained expert reports in Colorado are governed by C.R.C.P. 26 (a) (2) (B) (I). The rule spells out the elements expert testimony need contain. It fixes the objective of expert testimony that is useful and helpful to deciders of fact in explaining and providing key understanding of critical factual elements. Another and equally important role is making available to opposing parties the conclusions and supporting documentation the expert relies upon in the report/testimony. The opposing party can use the sufficiently detailed report for cross-examination.

C.R.C.P. 26 (a) (2) (B) (I) specifically requires expert testimony to be disclosed in the form of a written report signed by the witness, complete statement of all opinions to be expressed, the basis and reasons for those opinions, disclosure of the data and/or other information considered by the witness in the written report, references to literature that may be used during witness testimony, copies of exhibits, witness qualifications (including publications authored by witness within the past 10 years), fee schedule expert services, an itemized invoice(s) and a list of testimony (deposition/trial) within the past four years.¹ The rule also expressly limits witness direct testimony to matters disclosed in detail in the report.²

The rule imposes an ongoing duty to disclose. The retaining party has a duty to supplement disclosures and statements where previously disclosed information was incomplete or incorrect or if additional or correct information was not made known to other parties during the initial disclosure or discovery process.³ Information not properly disclosed in expert reports provides a basis for the trial court to prevent expert testimony to opinions beyond those disclosures in detail in the initial report.⁴

¹ C.R.C.P. 26 (2) (B) (I), (a) through (h).

² C.R.C.P. 26 (2) (B) (I).

³ C.R.C.P. 26 (e).

⁴ C.R.C.P. 26 (e).

So, what does a C.R.C.P. 26 (a) (2) (B) (I) non-complying expert report look like? In *Catholic Health*, the Colorado Supreme Court resolved the issue of whether preclusion was mandatory under C.R.C.P. 37 (c) (1) (it is not) and what need the trial court do when faced with a non-complying scenario under the Rule Changes of 2015.⁵

The case involved a lawsuit brought by Catholic Health against Earl Swensson Associates, Inc. (ESA) for an alleged breach of contract and professional negligence by failing to design a hospital building so it could be separately licensed and certified as an Ambulatory Surgery Center.⁶ In support of its damages against EAS Catholic Health endorsed Bruce LePage and two other experts.

Catholic Health described Mr. LePage an expert with extensive experience in all aspects of cost modeling, systems studies, constructability, cost studies, subcontractor solicitation, detailed planning, client relations, and communications in hospital and other large construction projects.⁷ ESA filed a motion to strike Mr. LePage's report and testimony for multiple failures to comply with C.R.C.P. 26 (a) (2) (B) (I).

ESA's itemization of the report's alleged failures include a failure to identify the information, facts or assumptions upon which his opinions were based, or documents or the information he considered. His report was not signed, consisted of unexplained line-item costs, and the amount of loss was not supported by specific explanations. Nor was there a scope and nature of work priced, or methods and assumptions utilized to develop his estimates.⁸ There were a total of three reports (one original and two supplemental) filed by Mr. LePage. The initial report filed estimated damages of \$5,356,550 and a subsequent supplemental report estimated damages of \$10,995,000 but no "meaningful" explanation as to the change of these two figures was provided.⁹ There were multiple other informational voids raised by ESA.¹⁰ EAS finally attempted to subpoena the missing information but to no avail.¹¹

ESA's next step was to file a motion to strike Mr. LePage's testimony based on Catholic Health's failure to comply with C.R.C.P. 26 (a) (2) (B) (I).¹² EAS argued Mr. LePage's report was so void of supporting information, as required by C.R.C.P. 26 (2) (B) (I), that it was virtually impossible to "conduct a full and a

⁵ Rule Change 2015 (05), Colorado Rules of Civil Procedure, Chapter 4, Rules 26 and 37

⁶ *Catholic Health Initiatives Colorado v. Earl Swensson Associates, Inc.*, 2017 CO 94, ¶ 2.

⁷ *Catholic Health Initiatives Colorado*, 2017 CO 94, ¶ 3.

⁸ *Earl Swensson Associates, Inc., Motion to Strike Plaintiff's Expert Designation of Bruce LePage*, District Court, Broomfield County, State of Colorado, Case NO 2016CV30055, Introduction

⁹ *Earl Swensson Associates, Inc., Motion to Strike Plaintiff's Expert Designation of Bruce LePage*, District Court, Broomfield County, State of Colorado, Case NO 2016CV30055, Plaintiff's First Supplemental Expert Disclosures, paragraph 2.

¹⁰ *Earl Swensson Associates, Inc., Motion to Strike Plaintiff's Expert Designation of Bruce LePage*, District Court, Broomfield County, State of Colorado, Case NO 2016CV30055, Plaintiff's First Supplemental Expert Disclosures, paragraph 2, 3, 4,5.

¹¹ *Earl Swensson Associates, Inc., Motion to Strike Plaintiff's Expert Designation of Bruce LePage*, District Court, Broomfield County, State of Colorado, Case NO 2016CV30055, Plaintiff's First Supplemental Expert Disclosures, paragraphs 6-9.

¹² *Earl Swensson Associates, Inc., Motion to Strike Plaintiff's Expert Designation of Bruce LePage*, District Court, Broomfield County, State of Colorado, Case NO 2016CV30055, Plaintiff's First Supplemental Expert Disclosures, Argument, paragraph 15.

fair cross examination of the expert.”¹³ (Catholic Hospital’s Petition for A Rule to Show Cause sets forth a list of items arguing compliance in Mr. LePage’s reports with Rule 26.)¹⁴

EAS argued in its motion to strike Mr. LePage’s testimony hearing that a failure to disclose materials considered upon forming opinions was a basis for excluding the expert’s testimony.¹⁵ EAS’s position was C.R.C.P. 37 (c) (1) mandated the exclusion of Mr. LePage’s testimony due to his failure to comply with C.R.C.P. 26 (a) (2) (B) (I).¹⁶ The trial court interpreted the 2015 amendments to C.R.C.P. 26 and 37 to require excluding Mr. LePage’s testimony.¹⁷ (The trial court also rejected Catholic Health’s motion to continue the trial date which was scheduled 35 days from the motion to strike the hearing date.) Catholic Health sought relief from the Colorado Supreme Court on the exclusion of its expert’s testimony by the trial court.

The Supreme Court’s ruling clarified several points raised by the parties.

First, the Supreme Court ruled that exclusion of expert testimony for a failure to comply with C.R.C.P. 26 was not mandatory.¹⁸ (*Trattler v. Citron*, 182 P.3d 674, 683 (Colo. 2008) and C.R.C.P 37 (c) (1) remain the controlling authority for determining sanctions for Rule 26 violations.¹⁹

Second, the trial court need first determine whether there was justification for the non-disclosure and, second, whether there was harm to the opposing party.²⁰ If the trial court concludes there was an unjustified non-disclosure and there was harm then the court must articulate “a harm and proportionality analysis” under C.R.C.P. 37 (c) (1) when deciding suitable sanctions for non-compliance.²¹

The overall objective of C.R.C.P. 37 (c) (1) reflects that “[a] fair trial is the party’s production of all relevant evidence.”²² So what remedies exist for non-compliance of expert disclosure under C.R.C.P. 37 (c) (1)? Evidence not disclosed, absent substantial justification as called for under C.R.C.P. 26 (a) may be precluded. However, preclusion is neither mandatory or the sole available sanction but the trial court has another step to undertake before arriving at any sanction. The trial court must make additional

¹³ *Earl Swensson Associates, Inc., Motion to Strike Plaintiff’s Expert Designation of Bruce LePage*, District Court, Broomfield County, State of Colorado, Case No. 2016CV30055, Argument, paragraph 19, citing *Gall v. Jamison*, 44 P.3d 233, 240 (Colo. 2002).

¹⁴ *Catholic Health Initiatives Colorado d/b/a Centura Health-St. Anthony North Hospital v. Earl Swensson Associates, Inc.*, Petition for A Rule To Show Cause By Catholic Health Initiative Colorado, Colorado Supreme Court, Case No. 2017SA62, H. Argument, 2. Applying the proper legal standards, Mr. LePage’s testimony should not have been excluded, pages 21-29.

¹⁵ *Earl Swensson Associates, Inc., Motion to Strike Plaintiff’s Expert Designation of Bruce LePage*, District Court, Broomfield County, State of Colorado, Case No. 2016CV30055, Argument, paragraph 19, citing *Clements v. Davies*, 217 P3d 912, 916 (Colo. App. 2009).

¹⁶ *Earl Swensson Associates, Inc., Motion to Strike Plaintiff’s Expert Designation of Bruce LePage*, District Court, Broomfield County, State of Colorado, Case No. 2016CV30055, Argument, paragraphs 19 and 20, citing *Clements v. Davies*, 217 P3d 912, 916 (Colo. App. 2009)

¹⁷ *Catholic Health Initiatives Colorado d/b/a Centura Health-St. Anthony North Hospital v. Earl Swensson Associates, Inc.*, Petition For A Rule To Show Cause By Catholic Health Initiative Colorado, Colorado Supreme Court, Case No. 2017SA62, H. Argument, 2. Applying the proper legal standards, Mr. LePage’s testimony should not have been excluded, page 15.

¹⁸ *Catholic Health Initiatives Colorado*, ¶¶ 13,16.

¹⁹ *Id.* at ¶ 9.

²⁰ *Id.* at ¶ 11.

²¹ *Id.* at ¶ 9.

²² *Trattler v. Citron*, 182 P.3d 674, 680 (Colo. 2008).

inquiry as to whether there is significant harm to the other party. The trial court must consider whether remedy of preclusion of the non-disclosed information “is disproportionate to any harm caused.”²³

What if the non-disclosed evidence is unjustified but preclusion of such evidence would fail as a true remedy to the opposing party? In *Trattler* the Colorado Supreme Court concluded preclusion of an expert’s testimonial history due to the failure to disclose the same would be an insufficient remedy. The Court identified potential alternative remedies to the preclusion of evidence. Alternatives to or in addition to preclusion include payment of reasonable expenses and attorney’s fees, dismissal of the case, an order designating that certain facts have been established, an order preventing the non-disclosing party from supporting or opposing certain claims or defenses, an order striking parts or all of a pleading until the order is obeyed, prohibiting admission of any evidence, and issuing a default judgment against the non-disclosing party.²⁴ The Court also points out that non-compliance of C.R.C.P. 26 (a) (2) (B) (I) does not mandate a complete preclusion of expert testimony under C.R.C.P. 37 (c) (1) but rather only that evidence which was not disclosed as required.²⁵

The trial court has discretion to determine the appropriate sanction and must exercise its authority by first looking at the nature and severity of the violation.²⁶ One question the trial court may consider is whether the non-disclosed information is central to the case. It may be disproportionate to preclude the entire testimony of an expert for failing to disclose testimonial history on the principal that sanctions should be directly commensurate with the prejudice caused to the opposing party. The Court explained that C.R.C.P. 37 (c)(1) sanctions are “flexible” and “not absolute,” hence the trial court has discretion to fashion appropriate sanctions proportionate to the harm caused.²⁷

In short, once the trial court has determined non-disclosure was not justified and there was harm to the opposing party the court must conduct and articulate a harm and proportionality analysis under C.R.C.P. 37 (c)(1) when making its remedial order for failing to comply with C.R.C.P. 26 (a) (2) (B) (I).²⁸

Legal counsel would benefit by taking some time to educate the expert as to the requirements and to make sure that the expert’s reports comply with C.R.C.P. 26 (a) (2) (B) (I).²⁹ Reduce the number of challenges already in existence with litigation by keeping expert testimony compliant.

²³ *Catholic Health Initiatives Colorado*, ¶ 11.

²⁴ *Trattler*, 182 P.3d at 681.

²⁵ *Id.*

²⁶ *Id.* at 683.

²⁷ *Catholic Health Initiatives Colorado*, ¶ 11.

²⁸ *Id.* at ¶ 16.

²⁹ *Id.*