EXPLORING RULE 26 FROM ITS HISTORY TO ITS PRACTICAL APPLICATION

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Rule 26 of the Federal Rules of Civil Procedure was written as a means to expedite discovery and facilitate a faster trial process lessening the burden on courts in the hope claims would settle. This article covers the changes in Rule 26 over the years, focusing on notable amendments, its current iteration, and how it affects expert witnesses. Further, this article features the practical application of Rule 26 for expert witnesses detailing the best practices on how to write and properly format and expert report.

I. The History and Scope of Rule 26

Expert Witness Testimony is essential to any trial, especially when dealing with insurance and its technical terms. Insurance companies chose federal jurisdiction to avail state law favorable to insurance companies. Over the years, the Supreme Court has amended Rule 26 of the Federal Rules of Civil Procedure ("Rules"). The Court enacted the Rule's current form in 1993 and amended it in 2010. Rule 26 covers discovery disclosures, including who needs to write a report, what is protected attorney-client privilege, and what is undiscoverable by opposing counsel.

A Brief History of Rule 26

During the early years of the United States, courts had very little procedural uniformity. In the early nineteenth and twentieth centuries, the lack of procedure

came to a head as British forms of action dominated state procedure, and several jurisdictions maintained individual equity and admiralty processes. The first step in significant reform within the procedural process occurred with the Field Code of Civil Procedure of New York. This reform spurred Congress to pass the Conformity Act in 1872, which required federal courts to match their procedures to that of the state they resided in, a precursor of today's Erie Doctrine.[1] However, equity and admiralty cases were not within the scope of the Conformity Act defeating its purpose. Accordingly, Congress enacted the Rules Enabling Act in 1934 delegating to the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases" in federal courts.[2] The Court then formed the Advisory Committee on the Federal Rules of Civil Procedure ("Committee"), which endures today. The Supreme Court charged the Committee with the duty to prepare a "unified system of general rules for cases in equity and actions at law" for federal courts "to secure one form of civil action and procedure for both classes of cases."[3]

1970 Amendments

After enacting the Federal Rules of Civil Procedure in 1937, the first amendments happened in 1970. These amendments substantially and fundamentally changed the rules of discovery by rearranging and transferring the order of Rules 26 through 37, and "establish[ed] Rule 26 as a Rule governing discovery in general."[4] These amendments expanded discovery but ensured that it was limited to "interrogatories demanding identification of the subject on which the expert would testify, the substance of the facts and opinions to be stated, and a summary of the grounds for each

[1]Act of June 1, 1872, ch. 255, §§ 5 & 6, 17 Stat. 196, 197.

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[2]28 U.S. Code § 2072

[3]Advisory Comm. on Rules for Civil Procedure, Report, at iii (1937), available at http://www.uscourts.gov/rules/Reports/CV04-1937.pdf. This section discusses the current version of Rule 26 as enacted in 1993 and amended in 2010.

[4]Fed. R. Civ. P. 26 advisory committee's explanatory statement (1970).

opinion."[5] The practices related to expert witnesses developed differently throughout the US. In some states, it was common to depose trial experts, while in other's depositions were abnormal.[6] The 1970 amendments added uniformity, but the rules of discovery and Rule 26, in particular, did not take on their current significance until the 1993 amendments.

1993 Enactment

The current form and importance of Rule 26 emerged in 1993 when a series of amendments to the Rules occurred because of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). The Court ruled on *Daubert* on June 28, 1993, almost three months after arguments. Because of the decision in *Daubert*, the rules of discovery were amended on December 1, 1993.

Daubert significantly changed evidentiary standards affecting all rules governing the admissibility of expert testimony and related discovery practices at the federal level.[7] The plaintiffs claimed they were born with birth defects because their mothers took Bendectin, an anti-nausea medicine. There were no studies that found a direct link between Bendectin and deformity in humans. So, the plaintiffs used testimony from expert witnesses centered on live animal and test-tube studies, along with a reanalysis of human statistical studies that showed the necessary causal link.[8]

Dow argued that using *Frye v. United States* as the current standard, the plaintiffs could not support their burden of proving causation because the scientific methods were not "generally accepted." The Supreme Court held that "the *Frye* test was superseded by the adoption of the Federal Rules of Evidence" and specifically by Rule 702, which governed Testimony by an Expert Witness. The Supreme Court decided federal trial judges should be the "gatekeepers" of scientific evidence and set forth a two-part test: expert testimony on scientific or technical evidence must be both relevant to the facts of the case and reliable. They enumerated four guidelines to assist judges in accomplishing their "gatekeeping" role find: (1) whether the theory or technique can be and has been tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) whether there is a known or potential rate of error

[5]Fed. R. Civ. P. 26 advisory committee's note (1970) ("A limited rearrangement of the discovery rules is made, whereby certain Rule provisions are transferred, as follows: Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing Rules 26(d), (e), and (f) are transferred to Rule 32. Revisions of the transferred provisions, if any, are discussed in the notes appended to Rules 30, 31, and 32. In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a Rule governing discovery in general").

[6]Civil Rules Advisory Comm., Meeting Minutes 15 (Sept. 7-8, 2006), available at http://www.uscourts.gov/rules/Minutes/CVO9-2006-min.pdf.

[7]Paul F. Eckstein & Samuel A. Thurman, Getting Scientific Evidence Admitted: The Daubert Hearing, 24 Litig. 21 (1998); Linda Greenhouse, Trial Judges Are Backed on Rulings on Scientists, N.Y. Times, Dec. 16, 1997, at A25.

[8]*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 582 (1993).

for a particular technique, and (4) whether there is a widespread acceptance within the relevant scientific community.

The Supreme Court further explained that if there are any objections to the evidence or expert testimony, "the trial judge must determine at the outset, pursuant to Rule [of Evidence] 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of the fact to understand or determine a fact in issue." These objections are raised in a motion in limine, colloquially called *Daubert* motions. The motions and subsequent hearings highlight the importance of Rule 26 regarding expert reports.

Based on the ruling in *Daubert*, the Committee amended the Rules regarding expert witnesses to match the Federal Rules of Evidence. The amendments eliminated the use of surprise expert opinions and aimed to reduce litigation costs. The amendments also established severe consequences for violating Rule 26 by allowing courts to enact sanctions. Most notably if a party fails to disclose information, then they are not permitted to use that evidence at trial unless the failure is deemed harmless.[9]

The Committee intended Rule 26's amendments to "accelerate the exchange of basic information about the case and to eliminate the paperwork involved in requesting such information."[10] Their reporting requirement attempted to expedite depositions, and in some cases "avoid any need for deposition." The amendments helped focus discovery and assist with preparation for settlement or trial. The Committee added paragraph (b), which requires a report from anyone identified as an expert witness. Rule 26's plain meaning states that a report is not required unless a person is retained or employed explicitly as an expert or is an employee that regularly gives expert testimony. However, courts have offered differing opinions on the plain meaning of Rule 26.

2010 Amendment

The amendment in 2010 broadened the purview and eliminated the lower courts' differing opinions regarding Rule 26. Before the 2010 amendment, the lower courts were split. The Tenth Circuit and District Courts in the First, Seventh, and Ninth Circuits held that the plain meaning is what mattered, and employees of a party or a treating physician are not required to write a report, even though they are experts. While the Third, Sixth, and Eleventh Circuits, along with District Courts in the Second, Fourth, Seventh, and Ninth Circuits, held a much broader view of the rule holding that Rule 26 required expert employees and treating physicians who developed opinions in preparation for trial had to write reports.

The Committee followed the majority of courts by making any party retained or expressly employed to provide expert testimony to prepare a written report, includ-

[9]Fed. R. Civ. Pro. 37.

[10]Fed. R. Civ. P. 26 advisory committee's note (1993) https://www.law.cornell.edu/rules/frcp/rule_26.

ing physicians who develop opinions in anticipation of trial, or at the attorney's request. The 2010 Amendment increased the number of people who need to write reports but made litigation and the courts "gatekeeping" duties appreciably more manageable.[11]

Effects of 2010 Amendment

The 2010 amendment of Rule 26 changed the scope of who needs to write a report and who does not by expanding who is an expert It is the testimony that is expert or lay, not necessarily the witness. The other effect is that the drafts of an expert's opinion are no longer discoverable, and neither are the communications between the expert and the attorney.

Who Needs To Write a Report?

Since the type of witness who needs to write a report has expanded, some witnesses seem as if they are lay witness. However, they may have specialized or technical knowledge that would require them to write a report under this rule, even if their knowledge came from working on the job for many years. They are considered an expert because of their years of experience. It does not matter how they obtained this knowledge only that they acquired it.

A mechanic who did not graduate from high school but spent forty years fixing a particular style of vehicle is expert testimony because his knowledge on the vehicle is technical and specialized. However, an aeronautical engineer may be a lay witness if describing a car accident. Regarding insurance, technical or specialized knowledge of the field is expert testimony. However, merely describing the policy in general terms of what an employee believes is covered is firsthand sensory observation. The employee is only speaking as to what is on the paper in front of them, not the technical aspects of insurance claims and underwriting. Nonetheless, it is safer to have a witness write a report and not need to submit it than to need the report and not have it to submit.

What Is Protected?

The Advisory Committee expanded the scope of protected material. Now, attorneys need not hire two expert witnesses anymore, which allows attorneys and experts to send draft reports and communication without being subject to discovery. Before the 2010 Amendment, attorneys hired a consulting expert and a trial expert. Hiring two experts permitted the attorney to share all of their evidence, thoughts, and impressions with the consulting expert without fear of having to disclose such information to opposing counsel. Enabling the attorney to come up with a plan of attack and figuring out the best approach for their client.

Upon hiring the testifying expert, the attorney would give them only the necessary information to get the testimony and opinion the attorney wanted based on the

[11] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)

findings from the consulting expert. Retaining two experts increased the expense of litigation, which decreased the number of people who could seek justice to only those who could afford it. Although more people must write reports to testify, the changes in discovery lowers the cost of litigation and facilitates speedy settlements and trial preparations.

The 2010 amendment does not protect everything, including the expert's opinions, the factual foundations for their opinions, the testing method they chose and why alternatives were not chosen, any communications with people other than the attorney, nor the expert's notes in some cases. In *Republic of Ecuador v. MacKay* and *Republic of Ecuador v. Kelsh*, the plaintiff sought discovery from the two experts, MacKay and Kelsh, who helped Chevron in a dispute between it and Ecuador. The plaintiff's claimed discovery would show that the experts and Chevron colluded and manipulated the data to obtain results in Chevron's favor. Chevron produced hundreds of thousands of documents but withheld thousands more claiming privilege. The court rejected Chevron's argument and stated only draft documents, and certain expert communications with Chevron's attorneys were protected; otherwise, Chevron needed to produce everything else. On appeal, the Eleventh Circuit agreed with the lower court, citing Rule 26(b)(3)(A), which explicitly lists protection of a "consultant, surety, indemnitor, insurer, or agent," but not expert.

Regardless, the expert's notes of the attorney's opinions should be protected communications, including documents that would disclose the attorney's opinions unless used as a factual basis for the expert's opinion. However, if there is a substantial need, and the information cannot be obtained without undue hardship, discovery of otherwise protected material is allowed. Efforts by attorneys and experts to protect notes as "drafts" have been made, and sometimes they're successful. Attorneys and experts should specifically designate their notes of opinions and draft opinions as "drafts," barring any room for confusion. Even though there are protections for insurer, indemnitor, etc. a lawyer may face sanctions if they fail to disclose all policies available that may indemnify a client, including monetary sanctions.

II. How To Write a Report

An expert's report can make or break a case. Mistakes in failing to comply with the legal requirements of a report can preclude it from admission, which bars the expert from testifying. Experts and attorneys alike should know what a report requires, including local rules, and keep in mind tips and tricks to make the report more persuasive and powerful.

Legal Requirements and Formatting

Legal Requirements

The Federal Rules of Civil Procedure 26(a)(2)(B)(i)-(vi) govern the requirements

for expert reports in civil cases. Rule 26's requirements are as follows:

(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 used to summarize or support them;

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

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

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

Also, as part of the Rule 26(a)(2)(B) expert witnesses only need sign their report. However, a general or professional report is not admissible in court unless sworn. If an expert witness report does not contain the abovementioned items, the court will exclude it. In *Eldridge v. Pet Supermarket, Inc.*, Case No. 18-22531-Civ-WILLIAMS/TORRES (S.D. Fla. Jul. 25, 2019), a defendant sought to strike an insurance consumer survey report, along with the insurance expert's testimony. The defendant argued that the expert failed to comply with Rule 26(a)(2)(B) as she did not provide a complete statement of the reasons nor the data she considered in forming her opinions. The court ruled that when a party fails to provide information required by Rule 26, then that party is not allowed to use witness or information to contribute any evidence, "unless the failure was substantially justified or harmless." The court went on to state that the exclusion is "automatic and mandatory."

There is an affirmative duty to "supplement or correct" an expert report if some "material respect" is either incomplete or incorrect, including additional or corrective information that has not been made known to the parties through other discovery or in writing. The expert must write a supplemental or a rebuttal report, whichever is needed to properly amend their original report, and the attorney must file it.[12] The purpose of expert disclosures is to avoid surprises or ambushing at trial. Consequently, an expert may not continually bolster their report. A supplemental report is if new information becomes available that affects the expert witness' testimony and opinion, for good or ill. If the expert fails to amend their report, then they cannot testify to the new information or opinions, even if the opinions are elaborations or clarifications.

Lawyers and experts alike should make sure they know the Local Uniform Civil Rules for the district in which they are trying a case. The local court rules may narrow down or give specific instructions on

[12]Fed. R. Civ. Pro. 26(e)

what must be produced with the report. If the attorney does not provide the rules upon hiring, the expert should ask the hiring lawyer for the local rules for writing a report when testifying in a new court.

Formatting

Formatting a report is just as important as the contents. A report should ultimately be easy to read and look professional. Here are some tips to consider when formatting an expert report:

1. Use professional letterhead;
2. Use a 12-point font (*e.g.*, Arial, Times New Roman, etc.) and 1.5 to 2 lines when spacing;
3. Use topic headings and keep paragraphs concise;
4. Use page numbers 1 of N (so the reader knows how long the report is);
5. Use unique numbers for tables, charts, and exhibits;
6. Include a cover page and table of contents;
7. Include when the report was written and who requested the report;
8. Include the date you received documents and formed your opinion;
9. Include a summary of your conclusions and opinions;
10. Include a statement that with new information opinions may be revised or updated; and
11. Define all technical language and explain all abbreviations.

A formatted report is easier to read and more persuasive for it. Focus on the most important part, which is what the report must include. However, a persuasive and professional looking report makes for a better case.

Make Your Report Powerful and Persuasive

Before drafting a report, the attorney and expert should discuss the scope of the report in detail. Skipping this step could lead to unnecessary work and expenses. Depending on the attorney and the case, the desired report from the expert could range from a narrowly tailored three to fifteen-page report or an expansive report tallying hundreds of pages.

At the start of the drafting process, write an outline then fill in the information with initial outline doubling as a table of contents. Items to include in every outline are the executive summary, and the questions the hiring attorney asked to have answered. If your document can include line numbers, do so as it is helpful during depositions and the trial.

The audience the expert witness writes for is intelligent. However, they are a layman in comparison to the expert's profi-

ciency. So, try to avoid using jargon and abbreviations. If jargon is unavoidable, thoroughly define the terms. The report should contain the established guidelines and standards applied, details of the process or method used, and include the reliability of the test performed. Also, mention any equipment, resources, or relevant authorities, treatises, or reports used.

To enhance credibility an expert witness report should state opinions clearly and confidently, but also indicate the reasons for those opinions using facts and materials to back them up. An expert witness should counter argue their opinions by ruling out alternative explanations and giving the reasons why they were ruled out. Avoid imparting extra information or additional opinions; this could hinder a case.

It is best for an expert witness to use precise language as it clears up confusion, makes a report more concise, and helps build persuasion. Expert witnesses must be particular about facts upon which they base their conclusions. Courts have barred experts from testifying because of misstatements or flawed assumptions. In *Moore v. Int'l Paint, LLC*, 547 F. App'x 513 (2013), the estate of a deceased shipyard worker sued a paint manufacturer. An expert was hired to testify to the plaintiff's allegation that the "cumulative benzene exposure while using [International Paint]'s products" was the cause of death. The Fifth Circuit Court of Appeals held the lower court's decision to preclude the expert from testifying. The court stated, "a few scattered errors in a report are not necessarily grounds for exclusion … [h]ere however, the universe of facts assumed by the expert differs frequently and substantially from the undisputed record of evidence." Therefore, an expert witness should not assume facts not in the evidence, and always use the record. An expert should use objective statements over subjective ones. They are less persuasive and subjective characterization of an expert's methods creates a fertile ground for cross-examination.

To lower the likelihood of strong cross-examination, refrain from using absolute phrasing like "always" or "never." Do not use any incomplete terminology (e.g., "including, but not limited to," and "relevant portions of"). Avoid hedging—using phrases like "somewhat," "sort of," "apparently," and "I believe." Superlatives (e.g., very, extremely, etc.), argumentative language, or emphasis (e.g., exclamation points, bold, all capital letters, etc.) have no place in a professional report. Making comments on the credibility of the other witnesses is disfavored and only deters from the credibility of the report writer. Forego using an overly informal or over-friendly tone as it appears unprofessional. Find the balance between formal and informal, overly friendly and stern. Experts should never write about opinions outside their expertise or issues the attorney did not ask them to address. Doing so, can open the door for evidence that would otherwise be barred.

During drafting and editing of a report, the type of grammatical voice used is im-

portant. Avoid passive voice, "the mismanagement of the situation was done by the insurance company." Instead focus on using active voice, "the insurance company mismanaged the situation." Make sure the doer of the action, or the subject of the sentence, is close to the verb. Moreover, look for any "to be" verbs—is, was, were, am, are, be, being, been. If any of them are in the sentence, then check for the preposition "by." The two words in the same sentence always make it passive voice. There are acceptable instances of passive voice, like when the actor is unknown or when trying to minimize the action.

If a supplemental report is needed by one side, the opposing side should prepare to write a rebuttal report. Rebuttal testimony is allowed as long as it does not introduce new or complex methodologies that fill the gap in the expert's analysis. An expert may also write a rebuttal report if the opposing expert supplies new information or methodologies that need to be disproved.

Rebuttal reports are rarely needed. Most often it is required when new information comes to light. Use measured language that is diplomatic when writing these reports. Politely explain why the opinions, methods, and sources used by the opposing expert are outdated or not relevant.

Documenting Qualifications and Exhibits

Having the qualification and the exhibits in an organized and easy-to-read format is paramount to a persuasive report. The expert witness must include their qualifications in their report. Likewise, having organized exhibits creates a more compelling report, keeps the expert more coordinated,

Case #	Case Name	Issue	Status	Year-Type of Work	Testimony	Trial	Court	For	Firm
103	State Farm v. XYZ Corp.	Agency E&O – failure to procure	Open	2019-Report		Arbitration Nov. 4	U.S. District Court for the Middle District of Florida	Plaintiff	ABC, P.A
102	VWX Inc, v. Fidelity	Underwriting Misrepresentation	Closed	2019-Opinion	Depo Dec. 13, 2018	Oct. 2, 2019	U.S. District Court for the Southern District of New York	Defendant	LMN & RST

and allows the expert to refer to specific documents quicker and easier during deposition.

Documenting Qualifications

The easiest way to incorporate qualifications into a report is attaching a current curriculum vitae ("CV") as an expert witness must provide professional accomplishments, any certifications, and ongoing education. The CV can include a list of all publications. If it is not included in the CV, then it needs to be a separate list. The law requires a report to have a catalog of all cases testified in within the last four years. A good practice is to list all of the cases from newest to oldest in a table like so:

Documenting Exhibits

The expert's report must have a list of all the documents examined that is accurate and has as specific information as possible. Creating a table is the most organized format as seen below. Column labels can include:

1. date to establish when the document originated;
2. the page number, bates number, or other identifying number (e.g., deposition exhibit);
3. handwritten signatures;
4. any notary seals and date of notarization; and
5. the specified version (e.g., original, copy, faxed, etc.).

Moving to exhibits, the expert should incorporate them into the written report as attachments or appendices for verification and easy reference. In the body of the report, include the source and date of illustrative portions, the percentage the document or image was resized, the prepared date of the exhibit, and the specific case name.

The Importance of Deadlines

Deadlines are critical. Keep them or provide as much notice as possible when requesting an extension with the attorney. Giving an attorney notice may allow time to request an extension with the court. Missing a deadline can exclude the expert's report, evidence, and testimony destroying a case.

In *United States v. Mahaffy*, No. 05-cr-613 2007 U.S. Dist. LEXIS 30077 (E.D.N.Y. Apr. 24, 2007), the court excluded an expert from testifying about the "mechanics of trading in the New York Stock exchange" and "the meanings of rel-

Date	Doc #	Bates #	Pg #	Name	Signed Y/N	Notary Y/N	Version

evant terms, concepts, and practices within the securities industry" because the defendant submitted the report on the day of trial, and not ten days prior as the court ordered.

In *Hassebrock v. Bernhoft*, 815 F.3d 334 (7th Cir. 2016), the plaintiffs sued their former attorneys and accountants for professional malpractice. Through a series of delays and rescheduling the court imposed a discovery deadline of May 10, 2014. On April 9th, the plaintiffs requested to disclose the name of their expert without the report; the court did not rule on the motion and the deadline passed. On May 13, 2014 the plaintiffs filed a new motion identifying their expert and asking to give more time for the expert's report. At a hearing the next day the plaintiffs explained they were relying upon the 90-day prior to the month of trial set forth in Rule 26. The court denied both of their motions. On appeal, the Seventh Circuit Court of Appeals upheld the lower court's ruling stating that the disclosure deadline in Rule 26 is a default deadline a court's order on scheduling the deadline supersedes the federal rule.

Proofreading and Editing Your Report

The best practice is to have someone else proofread the report for spelling, grammar, and overall clarity. Proofreading is key to a credible witness report. Errors make a witness seem less credible and hinders persuasion. When proofreading read the report backward sentence by sentence, and go through a checklist such as:

- Subjective language (e.g., thorough, exhaustive);
- Passive voice;
- Spelling errors, especially for words that aren't necessarily spelled wrong (e.g., statue and statute, on and one, etc.); and
- Missed punctuation.

III. Conclusion

The disclosure of expert witnesses and the reports they must file has gone through several iterations. The rule in its current form means to expedite the trial process, but also focuses on moving parties towards settlement. The discovery deadlines are vital to monitor, as a report barred by the court also prohibits the expert's testimony causing a case to perish before it had a chance.

Expert reports should be persuasive, powerful, proofread, and avoid passive voice. The organization of a report is essential and can enhance the persuasiveness as well as the credibility of the expert witness. Always use precise and objective language rather than subjective language. Finally, if the case requires a rebuttal report, be respectful when discrediting the opposing expert's opinions.