

Expert Reports

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I. Introduction

If a party has retained or employed an individual who is expected to testify as an expert witness pursuant to Federal Rule of Evidence 702, Federal Rule of Civil Procedure 26 mandates that a pretrial disclosure be made in the form of a written report² signed and prepared by the witness.³ The requirements of Rule 26(a) are mandatory and self-executing.⁴ This subchapter provides an overview of Rule 26(a), explains the rule's background of this rule, summarizes the penalties for failing to disclose an expert report, discusses which witnesses are required to produce a report, details the report's content, and outlines the obligation to supplement.

II. Overview of Federal Rule of Civil Procedure 26(a)

Rule 26(a)(2)(B) requires all expert witnesses “retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony” to provide an appropriate written report.⁵ Rule 26(a)(2) requires that the report be served on “other parties” and not just the adversary. Unless the trial court orders otherwise, the expert report must be provided ninety days before trial or, for experts whose

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² State rules of civil procedure may depart from the federal rules. The practitioner should be aware that some states do not require expert reports.

³ See Fed. R. Civ. P. 26(a)(2)(B).

⁴ *Nguyen v. IBP, Inc.*, 162 F.R.D. 675, 681 (D. Kan. 1995) (“[i]f the expert is unable or unwilling to make the disclosures he should be excluded as a possibility for retention as an expert witness in the case”).

⁵ *Id.*

testimony is intended solely to contradict or rebut other experts, within thirty days after the disclosure of the material to be rebutted.⁶

Rule 26 mandates full disclosure of expert witness testimony with the aim of reducing surprise and lowering litigation costs.⁷ Furthermore, since Rule 26 reports must disclose all the topics and opinions to which an expert expects to testify,⁸ depositions—if taken—are expected to be more focused and efficient.⁹ The drafters of Rule 26(a)(2)(B) expressed the hope that fulsome reports could help further reduce the fees and costs associated with expert discovery.¹⁰

III. Background of Current Rule 26(a)

Before the 1993 amendments to the Federal Rules of Civil Procedure, parties were limited to the discovery methods listed in Rule 26(a) to obtain information about testifying experts. The pre-1993 rules generally limited an inquiring party's knowledge of an opposing expert to interrogatory answers or a discovery deposition or, most commonly, both.¹¹ The 1993 amendments introduced the concept of “required disclosures,” *i.e.*, disclosures that a party must make “without awaiting a discovery request.”¹²

Under the 1993 amendments, expert testimony became a “required disclosure” to be made in the form of a written report conforming to the specific content requirements of Rule

⁶ Fed. R. Civ. P. 26(a)(2)(C).

⁷ See Fed. R. Civ. P. 26(b)(4)(A) Advisory Committee's Note (1993); *Fielden v. CSX Transp., Inc.*, 482 F.3d 866, 871 (6th Cir. 2007).

⁸ See Fed. R. Civ. P. 26(a)(2)(B) (stating that a report must contain “a complete statement of all opinions to be expressed and the basis and reasons therefore”).

⁹ See Fed. R. Civ. P. 26(b)(4)(A) Advisory Committee's Note (1993) (“[s]ince depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition”).

¹⁰ See *Fielden*, 482 F.3d at 871.

¹¹ See Fed. R. Civ. P. 26(b)(4)(A), Fed. R. Civ. P. (1980).

¹² See Fed. R. Civ. P. 26(a)(1), Fed. R. Civ. P. (1993).

26(a)(2)(B). The purpose was to accelerate the exchange of information and eliminate unnecessary discovery requests.¹³ Requiring a written and signed report setting forth the expert's proposed opinions and the reasons supporting them was intended to "focus and expedite the deposition, and even avoid any need for a deposition in some cases."¹⁴ Accordingly, Rule 26(a) "imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed to prepare for trial or make an informed decision about settlement."¹⁵ Moreover, comprehensive expert reports ensure "that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses."¹⁶ Rule 26 therefore is intended to help "focus the discovery that is needed, and facilitate preparation for trial or settlement."¹⁷

IV. Penalties for Failing to Disclose Rule 26(a) Expert Reports

Along with the disclosure requirements of Rule 26(a)(2)(B) came the concept of mandatory sanctions under Rule 37 for failing to make the required disclosures. The Rules Advisory Committee explained that, before the 1993 amendments, information disclosed under Rule 26 about the substance of expert testimony "was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness."¹⁸ The possibility of sanctions under Rule 37 (along with Rule 702 of the Federal Rules of Evidence) now "provide[s] an incentive for full disclosure; namely,

¹³ See Fed. R. Civ. P. 26(a) Advisory Committee's Note (1993).

¹⁴ Civil Rules Advisory Comm., Meeting Minutes 15 (Sept. 7–8, 2006), *available at* <http://www.uscourts.gov/rules/Minutes/CV09-2006-min.pdf> (last visited June 15, 2009).

¹⁵ Fed. R. Civ. P. 26(a) Advisory Committee's Note (1993).

¹⁶ Fed. R. Civ. P. 26(a)(2) Advisory Committee's Note (1993).

¹⁷ Fed. R. Civ. P. 26(a)(1) Advisory Committee's Note (1993).

¹⁸ Fed. R. Civ. P. 26(a)(2)(B) Advisory Committee's Note (1993).

that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed.”¹⁹

In its current form, “Federal Rule of Civil Procedure 37(c)(1) requires absolute compliance with Rule 26(a), that is, it ‘mandates that a trial court punish a party for discovery violations in connection with Rule 26 unless the violation was harmless or is substantially justified.’”²⁰ A party failing to make the requisite disclosure bears the burden of proving the omission was either harmless or substantially justified.²¹ A violation is considered “harmless” only if there was an honest mistake by the disclosing party coupled with sufficient knowledge of the information by the opposing party to avoid unfairness.²² The determination of whether a Rule 26(a) violation is harmless is entrusted to the broad discretion of the district court.²³

The consequences of violating Rule 26 are severe: “[Any] party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.”²⁴

When fashioning a remedy, the district court will consider, *inter alia*, the reason for noncompliance, the surprise and prejudice to the opposing party, the extent to which allowing the

¹⁹ *Id.*

²⁰ *Roberts v. Galen of Virginia, Inc.*, 325 F.3d 776, 782 (6th Cir. 2003).

²¹ *Id.* See also *Mitchell v. Ford Motor Co.*, 318 Fed. Appx. 821, 824 (11th Cir. March 9, 2009); *Heidtman v. County of El Paso*, 171 F.3d 1038, 1040 (5th Cir. 1999); *Salgado v. General Motors Corp.*, 150 F.3d 735, 741-742 (7th Cir. 1998).

²² *Roberts*, 325 F.3d at 783.

²³ See *Neiberger v. FedEx Ground Package Sys.*, 2009 U.S. App. LEXIS 11161 (10th Cir. May 27, 2009).

²⁴ See *Canterna v. United States*, 2008 U.S. App. LEXIS 16653, at *10-11 (3d Cir. March 7, 2008) (*quoting* Fed. R. Civ. P. 37(c)(1)).

information or testimony would disrupt the order and efficiency of the trial, and the importance of the information or testimony.²⁵

V. Witnesses Required to Produce Rule 26(a) Expert Reports

The straightforward language of the Rule, requiring a written report from any expert witness “retained or specifically employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony,” is intended to promote consistent application.²⁶ Under the plain meaning, the rule requires reports from individuals who are retained by a party to testify in a legal proceeding; employees of a party who qualify as expert witnesses but are not regularly engaged in testifying are not required to provide a Rule 26 report.²⁷

Courts aware of the policy considerations at play in Rule 26 often look to the Advisory Committee Notes for guidance,²⁸ in effect treating the notes as a form of legislative history to

²⁵ *Wegener v. Johnson*, 527 F.3d 687, 692 (8th Cir. 2008).

²⁶ *See Duluth Lighthouse for the Blind v. C.G. Bretting Mfg. Co.*, 199 F.R.D. 320, 325 (D. Minn. 2000) (“we are not empowered to modify the plain language of the Federal Rules so as to secure a result that we think is correct”).

²⁷ *GSI Group, Inc. v. Sukup Manufacturing Co.*, 2007 U.S. Dist. LEXIS 18764 (C.D. Ill. Mar. 16, 2007) (denying motion compel the production of privileged materials relied on in writing a Rule 26 a submitted expert report because the report was not required by the expert employees). *See also Bowling v. Hasbro, Inc.*, 2006 U.S. Dist. LEXIS 58910 (D.R.I. Aug. 10, 2006) (employee experts not required to submit an expert report because “the plain language of the Rule provides otherwise. Parties should have the certainty that the Court will construe the Federal Rules as written and not have to guess as to which line of conflicting authority the Court might follow in construing an unambiguous procedural Rule”); *Adams v. Gateway, Inc.*, 2006 U.S. Dist. LEXIS 14413 (D. Utah Mar. 10, 2006) (employee of co-plaintiff and expert on technical subject matter not required to submit expert report because he was not regularly involved in litigation and unaccustomed to preparing expert reports); *Navajo Nation v. Norris*, 189 F.R.D. 610, 613 (E.D. Wash. 1999) (“[i]f the drafters had intended to impose a report obligation on all employee-experts, they could have and would have done so. . . [But] the plain language of FRCP 26(a)(2)(B) requires the report only of experts in the two explicit categories stated”).

²⁸ *United States v. Watson*, 485 F.3d 1100, 1107 (10th Cir. 2007) (“[o]n one hand, the rulemakers were clearly concerned about the fulsome and efficient disclosure of expert opinions when they adopted the report requirement for most cases and experts. On the other hand, it is apparent that

guide them in their interpretation.²⁹ “The construction given the Advisory Committee is of weight,”³⁰ and the explanatory statements of the Advisory Committee should be considered when ascertaining a Rule’s meaning.³¹

The Rule’s clear language and the Advisory Committee Notes are not enough to eliminate all disputes, however. For example, the notes identify treating physicians as an example of expert witnesses who “can be deposed or called to testify at trial without any requirement for a written report.”³² The Rule contemplates that treating physicians are not “retained or specifically employed to provide expert testimony,” presumably because their opinions are developed without regard to litigation.³³ But this is not always true. Consequently, some courts have required reports from treating physicians.³⁴

the rulemakers did not think reports should be required in all cases and seemed concerned, for example, about the resources that might be diverted from patient care if treating physicians were required to issue expert reports as a precondition to testifying”).

²⁹ *Reed v. Binder*, 165 F.R.D. 424, 427 (D.N.J. 1996) (“the Advisory Committee Notes, though not conclusive, are a very important source of information and should be given considerable weight. They provide something akin to a legislative history of the Rules”).

³⁰ *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 444 (1946).

³¹ *Id.*

³² Fed. R. Civ. P. 26(a)(2)(B) Advisory Committee’s Note (1993).

³³ *Fanning v. Target Corp.*, 2006 U.S. Dist. LEXIS 4804, at *4-5 (S.D.N.Y. Feb. 6, 2006) (treating physicians not required to provide a report in order to testify as to their examination and treatment of the plaintiff); *Sullivan v. Glock, Inc.*, 175 F.R.D. 497, 500 (D. Md. 1997) (holding that the party wishing to offer a hybrid fact/expert witness need only provide the witness’s identification to satisfy Rule 26(a)(2)); *Lauria v. AMTRAK*, 1997 U.S. Dist. LEXIS 3408, at *2 (E.D. Pa. Mar. 24, 1997) (treating physician basing opinion on facts gleaned during treatment of the plaintiff, not required to file a Rule 26(a)(2)(B) report in order to offer opinion testimony).

³⁴ *Musser v. Gentiva Health Services*, 356 F.3d 751, 757-58 (7th Cir. 2004) (barring treating physicians from testifying as experts because “failure to disclose experts prejudiced” defendants); *Rodriguez v. Town of West New York*, 191 F. App’x. 166 (3d Cir. 2006) (treating physician’s testimony excluded because he was required to submit an expert report under Rule 26(a)); *Harville v. Vanderbilt Univ.*, 2003 U.S. App. LEXIS 18053, at *15 (6th Cir. Aug. 27, 2003) (treating physicians’ testimony excluded because their testimony regarding the standard of care fell within the category of expert testimony that is required to be disclosed under Rule 26).

Similarly, some courts have required reports from party employees whose jobs do not involve testifying by reasoning that “a blanket exception for all employee expert testimony would ‘create a category of expert trial witness[es] for whom no written disclosure is required’ and should not be permitted.”³⁵ Arguments that an employee’s job does not regularly involve giving testimony have been rejected because excluding unretained employees from the requirements of the Rule could create “a distinction seemingly at odds with the evident purpose of promoting full pre-trial disclosure of expert information.”³⁶ Therefore, notwithstanding either the language of the Rule or the Advisory Committee Notes, a few courts hold that Rule 26(a)(2)(B) imposes broad disclosure requirements on all trial experts.³⁷ Even an employee who does not regularly give expert testimony may still be “fairly be viewed as having been ‘retained’ or ‘specially employed’ for that purpose.”³⁸

The divergent views on this issue prompted a proposed amendment to Rule 26(a) intended to clarify whether a report may be required from additional witnesses who will offer

³⁵ *Prieto v. Malgor* 361 F.3d 1313, 1318 (11th Cir. 2004) (employee expert who did not regularly give expert testimony, required to file an expert report prior to testifying because he only reviewed the materials in preparation for trial and had no personal knowledge of the case); *McCulloch v. Hartford Life & Accident Ins. Co.*, 223 F.R.D. 26, 27–28 (D. Conn. 2004) (requiring employee experts to file reports because “to find otherwise would risk encouraging corporate defendants to attempt to evade the report requirement by designating its own employees” as expert witnesses).

³⁶ *Day v. Consol. Rail Corp.*, 1996 U.S. Dist. LEXIS 6596, at *4 (S.D.N.Y. May 14, 1996); *Innogenetics v. Abbott Labs.*, 2007 U.S. Dist. LEXIS 193, at *26–27 (W.D. Wis. Jan. 3, 2007) (noting that the purpose of Rule 26 is to make “discovery easier, faster and more efficient, as well as to avoid surprises at trial,” and thus “it would thwart the Rule’s purposes to allow exemptions from the report requirement”).

³⁷ *Day*, 1996 U.S. Dist. LEXIS 6596, at *4–5.

³⁸ *Id.* at *7; *Funai Elec. Co. v. Daewoo Elecs. Corp.*, 2007 U.S. Dist. LEXIS 29782, at *9 (N.D. Cal. Apr. 11, 2007) (employees providing “technical evaluations of evidence reviewed solely in preparation for trial, who provide opinion testimony on the merits of the case, or who have no direct and personal knowledge of the facts to which they are testifying” required to submit Rule 26(a) expert reports).

opinion testimony. The proposed amendment recognizes that requiring an expert report from every witness who presents opinion testimony could impose substantial burdens, particularly given the concern that a treating physician may be reluctant to take part in discovery or trial, much less provide a report meeting the detailed requirements of Rule 26(a)(2)(B).³⁹ Under the proposed amendment, Rule 26(a)(2) would read:

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, the Rule 26(a)(2)(A) disclosure must state:

- (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
- (ii) a summary of the facts and opinions to which the witness is expected to testify.

The amendment is intended to “resolve a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement, reasoning that having a report before the deposition or trial testimony of all expert witnesses is desirable.”⁴⁰ It is expected that “[w]ith the addition of Rule 26(a)(2)(C) disclosure for expert witnesses exempted from the report requirement, courts should no longer be tempted to overlook Rule 26(a)(2)(B)’s limitations on the full report requirement.”⁴¹

If a witness identified under (a)(2)(A) is not required to provide an (a)(2)(B) report, the party must disclose the subject matter of the expected expert testimony and a summary of the

³⁹ May 9, 2008, as supplemented June 30, 2008, Report of the Civil Rules Committee, Committee on Rules of Practice and Procedure, at 2, available at http://www.uscourts.gov/rules/Reports/CV_Report.pdf.

⁴⁰ Fed. R. Civ. P. 26 Advisory Committee Note (2008).

⁴¹ *Id.*

facts and opinions to which the expert is expected to testify.⁴² This disclosure will support preparation for deposing the witness and may satisfy other parties that there is no need for a deposition.⁴³ According to the Advisory Committee, the disclosure should be “considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.”⁴⁴

VI. Content of Rule 26(a) Expert Reports

If an expert report is mandated, Rule 26(a)(2)(B) sets out six elements that a report must contain:

1. A complete statement of all opinions to be expressed and the basis and reasons for them;
2. The data or other information considered by the witness in forming his opinions;
3. Any exhibits that will be used to summarize or support them;
4. The witness’s qualifications, including a list of all publications authored in the previous ten years;
5. A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
6. A statement of the compensation to be paid for the study and testimony in the case.⁴⁵

The Advisory Committee Notes state that the report is expected in the first instance to “set forth the substance of the direct examination.”⁴⁶ The report should be written in a manner that reflects the testimony to be given by the witness, which explains why it must be signed by the witness himself or herself.⁴⁷ In addition, the report should include the data and other

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Fed. R. Civ. P. 26(a)(2)(B).

⁴⁶ *United States v. Kalymon*, 541 F.3d 624, 638 (2008).

⁴⁷ *Id.*

information considered by the expert as well as any exhibits or charts that summarize or support the witness's opinions.⁴⁸

The attorney's task, therefore, is to ensure that the proffered report contains opinions that are properly articulated and thoroughly supported.⁴⁹ This section details how to ensure that an expert report contains all of the requisite information.

A. A complete statement of all opinions to be expressed and the basis and reasons for them.

“The first and most important element of the Rule 26 analysis is whether the report prepared by [the expert] contains a complete statement of his opinions and the basis for his opinions.”⁵⁰ The statement must be complete and detailed—“sketchy” or “vague” statements will not suffice.⁵¹ Conclusory and unsupported statements are likewise insufficient.⁵² Courts disfavor reports providing opinions that something “could” have caused the harm at issue or that findings “suggest” a particular possibility.⁵³

“To satisfy the Rule, ‘the report must provide the substantive rationale in detail with respect to the basis and reasons for the proffered opinions. It must explain factually why and how the witness has reached them.’”⁵⁴ The report should contain not only the expert's ultimate

⁴⁸ *Id.*

⁴⁹ *Salgado*, 150 F.3d at 742 n. 6 (7th Cir. 1998).

⁵⁰ *See Campbell v. McMillin*, 83 F. Supp. 2d 761, 764 (S.D. Miss. 2000).

⁵¹ *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 571 (5th Cir. 1996).

⁵² *See Campbell*, 83 F. Supp. 2d at 765 (finding report inadequate because it merely offered conclusory allegations without providing the basis of the opinions); *Reed*, 165 F.R.D. at 430 n.11 (“[t]he insistence of Rule 26(a)(2)(B) on a ‘complete statement of all opinions to be expressed and the basis and reasons therefore’ has another salutary effect. Practitioners should no longer have to face what is referred to in the state courts as a ‘net opinion.’ This is defined as an expert's bare conclusion, unsupported by factual evidence”).

⁵³ *See Campbell*, 83 F. Supp. 2d at 764–65.

⁵⁴ *Dunkin Donuts, Inc. v. Patel*, 174 F. Supp. 2d 202, 211 (D.N.J. 2001).

conclusion, it must answer the question of how he came to such conclusions.⁵⁵ Merely stating that the expert relies on his education, experience, and training in reaching his opinions, without providing the substantive rationale for reaching the specific opinions, is insufficient.⁵⁶ A recognized exception is when a report, to effect the replacement of a previously disclosed witness, incorporates the conclusions and opinions already set forth in a previous report.⁵⁷

The Advisory Committee Notes provide that others may assist the expert in the preparation of such reports, but the Rule requires the expert to “substantially participate in the preparation of his report”⁵⁸ and mandates that “the final report must be that of the expert.”⁵⁹ The few reported cases interpreting Rule 26(a)(2)(B) indicate that the preparation and signing requirement is designed to ensure that expert reports express “what the expert has freely authorized and adopted as his own and not merely for appeasement or because of intimidation or some undue influence by the party retained by him.”⁶⁰

The disclosure of all opinions to be expressed, including the basis and reasons for those opinions, is critical in light of the United States Supreme Court decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁶¹ and *Kumho Tire Co., Ltd. v. Carmichael*.⁶² Revised to reflect

⁵⁵ See *Reed*, 165 F.R.D. at 428 n.5 (“[i]n simple terminology, this means ‘how’ and ‘why’ the expert reached the conclusions and opinions to be expressed”).

⁵⁶ See *Hilt v. SFC, Inc.*, 170 F.R.D. 182, 185 (D. Kan. 1997).

⁵⁷ See *Roberts v. Galen of Virginia, Inc.*, 325 F.3d 776, 783–84 (6th Cir. 2003).

⁵⁸ *Manning v. Crockett*, 1999 U.S. Dist. LEXIS 7966, *8 (N.D. Ill. May 18, 1999).

⁵⁹ Coquillet, Daniel R. et. al., *Moore’s Federal Practice 3d* § 26.23 [4].

⁶⁰ *Marek v. Moore*, 171 F.R.D. 298, 302 (D. Kan. 1997).

⁶¹ 509 U.S. 579 (1993).

⁶² 526 U.S. 137 (1999).

Daubert and its progeny, Fed. R. Evid. 702 governs the admissibility of expert testimony.⁶³ This standard is discussed in detail in Chapter 6.

In assessing whether a witness's proposed testimony is reliable under *Daubert*, the court undertakes an examination of the facts on which the witness relies, the method by which the witness draws conclusions from those facts, and how the witness applies the facts and methods to the case at hand.⁶⁴ *Daubert's* focus on a witness's methodology makes critical the content of expert reports because the rule requires a statement not only of an expert's opinions but also the "basis and reasons" for them.⁶⁵ Analysis of an expert's methods under *Daubert* naturally correlates with the "basis and reasons" for an expert's proposed opinions. Rule 26 reports are arguably the single most important piece of evidence in a *Daubert* hearing.⁶⁶

B. The data or other information considered by the expert in forming his opinions.

Practically speaking, this item is as important as the first. Failure to disclose all the data or other information "considered" is sufficient reason to preclude the expert's testimony.⁶⁷

Before the 1993 Amendments, Rule 26 disclosure requirements applied to data and facts a witness "relied on."⁶⁸ As the 1993 Advisory Committee Notes state, however:

⁶³ See *Smith v. Cangieter*, 462 F.3d 920, 923 (8th Cir. 2006); *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 250 (6th Cir. 2001).

⁶⁴ *Heller v. Shaw Industries*, 167 F.3d 146, 155 (3^d Cir. 1999) ("the reliability analysis applies to all aspects of an expert's testimony: the methodology, the facts underlying the expert's opinion, the link between the facts and the conclusion, et alia"); *City of Wichita, Kansas v. Trustees of APCO Oil Corp. Liquidating Trust*, 306 F.Supp.2d 1040, 1108 (D. Kan. 2003) ("[o]nce an expert meets Rule 702's qualification requirements, his or her opinions must be based on sufficient facts or data. This is the rule's requirement for foundation").

⁶⁵ *Synergetics, Inc. v. Hurst*, 477 F.3d 949, 956 (8th Cir. 2007) (so long as expert's methodology is sound, mere "disagreement with the assumptions" does not warrant exclusion)

⁶⁶ See, e.g., *Reynolds v. Freightliner, LLC*, 2006 U.S. Dist. LEXIS 97244 (E.D. Ky. June 21, 2006) (expert testimony inadmissible because expert report did not meet specificity requirement under Rule 26 and thus failed to utilize any methodology that could be tested or replicated for purposes of cross-examination or rebuttal).

⁶⁷ See e.g., *Olson v. Montana Rail Link, Inc.*, 227 F.R.D. 550, 551–53 (D. Mont. 2005).

The report is to disclose the data and other information considered by the expert and any exhibits or charts and summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

As one court observed, “[c]onsidered,’ which simply means ‘to reflect on’ or ‘to think of: come to view, judge, or classify,’ clearly invokes a broader spectrum of thought than the phrase ‘relied upon,’ which requires dependence on the information.”⁶⁹ Another court essentially defined it the same way: “‘Considered,’ which simply means ‘to take into account,’ clearly invokes a broader spectrum of thought than the phrase ‘relied upon,’ which requires dependence on the information.”⁷⁰

This expansive scope serves a key purpose in discovery. As the court said in *Trigon*, “information considered, but not relied upon, can be of great importance in understanding and testing the validity of an expert’s opinion.”⁷¹ Accordingly, when addressing motions to compel courts commonly require the disclosure of all materials reviewed by the expert in forming his opinions.⁷² Whether the witness relies on or deems the reviewed material relevant is not determinative.⁷³

⁶⁸ See *Constr. Indus. Servs. Corp. v. Hanover Ins. Co.*, 206 F.R.D. 43, 50 (E.D.N.Y. 2001) (“[d]ocuments and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party, whether or not the expert relies on the documents and information in preparing his report”).

⁶⁹ *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277, 282 (E.D. Va. 2001).

⁷⁰ *Karn v. Ingersoll Rand*, 168 F.R.D. 633, 635 (N.D. Ind. 1996).

⁷¹ 204 F.R.D. at 282.

⁷² See *id.* at 283; *Karn v. Ingersoll Rand*, 168 F.R.D. 633, 635 (N.D. Ind. 1996).

⁷³ *Fidelity Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745 (7th Cir. 2005) (upholding district court’s ruling to exclude expert witness testimony as sanction for failing to produce notes that did not support the witness’s expert opinion); *Loff v. The Landings Club, Inc.*, 2006 U.S. Dist. LEXIS 97473, at *8 (S.D. Ga. July 17, 2006) (data was undoubtedly “‘considered’ by the expert witness in forming his opinion, even if the data he gathered merely

Before 1993, there was general agreement that the Rule 26 expert witness disclosure requirements did not apply to attorney work product.⁷⁴ Post-1993, however, the rules are different. Attorneys are still expected to work with their expert witnesses: “Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed...this assistance may be needed.”⁷⁵ But most federal courts hold that an attorney’s mental impressions and other traditional work product—even trial strategy—will be subject to disclosure if provided to a testifying expert.⁷⁶

A few courts hold that the disclosure requirements of Rule 26 (a) do not trump the work product protections of Rule 26(b)(3).⁷⁷ As a practical matter, however, the observation that “Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports” is arguably illusory because there is no protection for attorney work product. Anything the witness looks at or hears, including an attorney’s input, is deemed to be

verified the data he already had in his possession”). *But see Flebotte v. Dow Jones & Co., Inc.*, 2000 U.S. Dist. LEXIS 19875 (Dec. 6, 2000) (refusing to sanction party for conducting several tests but not including them in the expert report).

⁷⁴ See, e.g., *Toledo Edison Co. v. G A Techs., Inc.*, 847 F.2d 335, 339-41 (6th Cir. 1988); *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 (3d Cir. 1984).

⁷⁵ See Advisory Committee Notes, 1993 Amendments.

⁷⁶ *Suskind v. Home Depot Corp.*, 2001 U.S. Dist. LEXIS 1349, at *11 (D. Mass. January 2, 2001) (“[i]t is worth noting that if the authors of the 1993 Amendments to Rule 26 intended the required expert disclosure pursuant to *Rule 26(a)(2)(B)* to be subject to either the attorney-client privilege and/or work product protection, they could have said so as they did with the required disclosure under *Rule 26(a)(1)(C)*”).

⁷⁷ *Magee v. The Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642 (E.D.N.Y. 1997) (core work product considered by an expert need not be disclosed under *Rule 26(a)(2)(B)*); *Ladd Furniture, Inc. v. Ernst & Young*, 1998 U.S. Dist. LEXIS 17345, at *43 (M.D.N.C., 1998) (core attorney work product materials provided to an expert are not discoverable).

“considered by the expert” and is fair game for discovery by the other side.⁷⁸ This includes any communications such as e-mail,⁷⁹ oral communications,⁸⁰ and notes of phone conversations.

The case of *Haworth, Inc. v. Herman Miller, Inc.*,⁸¹ provides a good example of one court’s attempt to balance the strong protection afforded attorney work product with the expansive discovery authorized under current Rule 26. The court drew a line between factual work product and opinion work product. On the one hand, the court held that “all factual information considered by the expert must be disclosed in the report,”⁸² even if the attorney compiled that information. On the other hand, the court held that opinion work product, even if

⁷⁸ *Manufacturing Admin and Mgmt. Sys., Inc.*, 212 F.R.D. 110, 111 (E.D.N.Y. 2002) (“[n]otwithstanding the disagreement in the courts and the literature, the text of Rule 26 mandates disclosure of [core] work product given to a testifying expert.”) *In re Pioneer Hi-bred Int’l, Inc.*, 238 F.3d 1370, 1375-1376 (Fed. Cir. 2001) (“fundamental fairness requires disclosure of all information supplied to a testifying expert in connection with his testimony,” even if such information falls under the attorney-client or core work product privilege); *Colindres v. Quietflex Mfg.*, 228 F.R.D. 567, 571 (S.D. Tex. 2005) (“information that the expert creates or reviews related to his or her role as a testifying expert must be produced,” even when materials are privileged); *Am. Fidelity Assurance Co. v. Boyer*, 225 F.R.D. 520, 521 (D.S.C. 2004) (requiring disclosure of core attorney work product materials that were used or consulted in preparation of expert report); *Cornell Research Found, Inc. v. Hewlett*, 223 F.R.D. 55, 78-79 (N.D.N.Y. 2003) (disclosure of work product materials to testifying expert overcomes privilege); *CP Kelco U.S. Inc. v. Pharmacia Corp.*, 213 F.R.D. 176, 178-179 (D. Del. 2003) (requiring production of documents, which implicate the attorney-client privilege, reviewed by testifying expert because it would be “manifestly unfair to allow a party to use the privilege to shield information which it had deliberately chosen to use offensively”); *Vitalo v. Cabot Corp.*, 212 F.R.D. 478, 479 (E.D. Pa. 2002) (“Rule 26(a)(2)(B) . . . vitiates a claim of attorney work product with respect to any information considered by a party’s expert, whether or not relied upon by that expert”).

⁷⁹ *Ass’n of Irrigated Residents v. Dairy*, 2008 U.S. Dist. LEXIS 57459 (E.D. Cal. June 18, 2008).

⁸⁰ *Synthes Spine Co., L.P. v. Walden*, 232 F.R.D. 460, 465 (E.D. Pa. 2005) (“[a] plaintiff’s expert must disclose the content of all oral communications that the expert considered in formulating his opinions as a testifying expert, regardless of whether the oral communications come from the plaintiff’s counsel or the plaintiff itself”); *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co. Of New York, Inc.*, 171 F.R.D. 57, 67 (S.D.N.Y. 1997) (“there does not seem to be a principled difference between oral and written communications between an expert and an attorney insofar as discoverability is concerned”).

⁸¹ 162 F.R.D. 289 (W.D. Mich. 1995).

⁸² *Id.* at 295

provided to the expert, was protected from discovery: “Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney.”⁸³ The court rejected the argument that the disclosure of opinion work product is necessary to shed light on an attorney’s attempt to unduly influence an expert’s opinion. The court noted that the adversarial system already provides sufficient checks to ensure a lawyer cannot unduly influence the expert’s opinion, *e.g.*, the reasonableness of the expert’s opinion is always subject to the evaluation of other experts and may be tested against basic knowledge of the expert’s field.⁸⁴

The *Haworth* court’s interpretation is in the minority, however. Other courts and commentators point out that distinctions like those drawn in *Haworth* seriously undermine the 1993 Amendments. The work product doctrine has never protected against the discovery of facts (as opposed to the documents on which an attorney has recorded those facts) and, even before the 1993 Amendments, the consensus among federal courts was already “in favor of disclosure of factual information.”⁸⁵

In sum, prudent practice dictates that any materials provided to the expert (whether he or she relies on the documents or simply reviews and rejects them) be identified and produced.⁸⁶ This includes such items as notes taken during testing, measurements and calculations,

⁸³ *Id.* (quoting *Hickman*, 329 U.S. at 510).

⁸⁴ *See Haworth*, 162 F.R.D. at 295–96.

⁸⁵ *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co. of New York, Inc.*, 171 F.R.D. 57, 66 (S.D.N.Y., 1997).

⁸⁶ *See Fidelity Nat’l*, 412 F.3d at 751 (“[a] testifying expert must disclose and therefore retain whatever materials are given him to review in preparing his testimony, even if in the end he does not rely on them in formulating his expert opinion, because such materials often contain effective ammunition for cross-examination.”). *But see id.* (“he is not required to retain every scrap of paper that he created in the course of his preparation – only documents that would be helpful to an understanding of his expert testimony or that the opposing party might use in cross-examination”).

photographs, computer calculations, and graphics.⁸⁷ Interview notes are also included.⁸⁸

Communications to and from counsel are likewise included, as are drafts of findings or conclusions. “[I]n simple language, this means disclosure applies to what the witness “saw, heard, considered, read, thought about or relied upon in reaching the conclusions and opinions to be expressed.”⁸⁹

The Advisory Committee apparently recognizes that the discovery of draft expert reports and all communications between attorney and expert allowed by most courts often fails to yield useful information because lawyers and experts employ stratagems that generally defeat discovery efforts.⁹⁰ Accordingly, proposed amendments to Rule 26(a)(2)(B)(ii) and 26(b)(4) seek to correct the unforeseen consequences that have emerged in the wake of the 1993 amendments.

Rule 26(a)(2)(B)(ii) would be amended to require disclosure of only “the facts or data considered by the witness in forming” his opinions. The Advisory Committee Notes state that the objective of striking the “data or other information” disclosure prescribed in 1993 is “to alter

⁸⁷ See *id.* at 551 (listing these as items included in the untimely supplementation of the report following counsel’s “epiphany” that such information must be provided).

⁸⁸ See *e.g.*, *Mems v. City of St. Paul, Dep’t of Fire & Safety Servs.*, 327 F.3d 771, 779–80 (8th Cir. 2003) (affirming sanction of excluding testimony for failure to provide expert’s interview notes in timely manner).

⁸⁹ *Reed*, 165 F.R.D. at 428 n.6.

⁹⁰ Fed. R. Civ. P. 26 Advisory Committee Note (2008). The Committee on Rules of Practice and Procedure identified the following issues: (i) Experts and counsel often go to great lengths to avoid creating draft reports, creating drafts only in electronic or oral form, deleting all electronic drafts, and even scrubbing hard drives to prevent subsequent discovery; (ii) Lawyers and experts often avoid written communications or creating notes by the expert, encumbering attorney-expert communications and the formulation of effective and accurate litigation opinions; (iii) Litigants often engage in expensive discovery seeking to obtain draft reports or attorney-expert communications, but gain nothing useful by it; (iv) Parties often retain two sets of experts, one for consultation and the other for testimony; (iv) Lawyers and parties are reluctant to hire potentially superb experts who have not become professional witnesses, for fear that discovery of the necessary conversations that tell them how to behave as witnesses will destroy their usefulness. May 9, 2008, as supplemented June 30, 2008, Report of the Civil Rules Committee, Committee on Rules of Practice and Procedure, at 4.

the outcome in cases that have relied on the 1993 formulation as one ground for requiring disclosure of all attorney-expert communications and draft reports.”⁹¹ The refocus on disclosure of “facts or data” is meant to limit the disclosure requirements to material of a factual nature, as opposed to theories or mental impressions of counsel.⁹² The Advisory Committee Notes are also clear that “[a]t the same time, the intention is that ‘facts or data’ be interpreted broadly to require disclosure of any material received by the expert, from whatever source, that contains factual ingredients.”⁹³ The disclosure obligation extends to any facts or data ‘considered’ by the expert in forming the opinions to be expressed, not only those relied upon by the expert.”⁹⁴

The Advisory Committee has also proposed to revise Rule 26(b)(4) by inserting subsections (B) and (C) which specifically extend work-product protections to drafts of both expert reports and expert party disclosures under Rule 26(a)(2)(C) and to attorney-expert communications.⁹⁵ Under the proposed amendment, Rule 26(b)(4) would read:

(B) Trial Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form of the draft.

(C) Trial Preparation Protection for Communications Between Party’s Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party’s attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that 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

⁹¹ Fed. R. Civ. P. 26 Advisory Committee Note (2008).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

(iii) Identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

The protection afforded by Rule 26(b)(4)(B) applies regardless of the form of the draft, whether oral, written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e).⁹⁶ Similarly, the protection under Rule 26(b)(C) applies to attorney-expert communications regardless of the form of communication whether oral, written, electronic, or otherwise.⁹⁷ While 26(b)(4)(B) applies to witnesses subject to 26(a)(2)(B) or (a)(2)(C), the Advisory Committee Notes are explicit in that the Rule 26(b)(4)(C) protections afforded for attorney-expert communications applies only to witnesses subject to 26(a)(2)(B).⁹⁸

The proposed amendment permits three exceptions to work-product protections, to permit routine discovery of attorney-expert communications relating to: (1) compensation; (2) identifying facts or data the attorney provided to the expert and that the expert considered in forming the opinions to be expressed; and, (3) identifying the assumptions that the attorney provided to the expert and that the expert relied upon in forming his or her opinions.⁹⁹

Discovery into compensation is not limited to compensation for work forming the opinions to be expressed but extends to all compensation for the study and testimony provided in relation to the action.¹⁰⁰ The Advisory Committee Notes caution that the exception is limited to those facts or data that bear on the opinions the expert will be expressing, not all facts or data that may have been discussed by the expert and counsel, and only to communications

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

“identifying” the facts or data provided to counsel.¹⁰¹ Under proposed Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinion, but the exception is limited to those assumptions that the expert actually did rely upon.¹⁰²

The proposed rule does not absolutely prohibit discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C) or draft expert reports or disclosures.¹⁰³ Discovery may be permitted regarding attorney-expert communications or draft reports in limited circumstances and by court order.¹⁰⁴ For example, a court may order discovery if a party can make the showing that it has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship.¹⁰⁵ The Advisory Committee Notes anticipate, however, that “[i]t will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert’s testimony.”¹⁰⁶

C. Any exhibits to be used as a summary of or in support of the opinions.

A report should identify all exhibits the witness expects to use. Rule 26(a)(2)(B) requires the expert report include within the report “the data or other information considered by the witness in forming the opinions [and] any exhibits to be used as a summary of or support for the opinions,” among other things. Merely including references to exhibits does not meet the

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

requirement of Rule 26(a)(2)(B).¹⁰⁷ Failure to attach exhibits may warrant exclusion of an expert, even if a party attempts to cure the absence of exhibits in a supplemental report.¹⁰⁸

D. The qualifications of the expert, including a list of all publications authored by the expert in the previous ten years.

This requirement is usually interpreted to require the witness's cv and, as part of that disclosure, a listing of recent authorships. A cv that only lists a selection of publications, and not a list of all publications authored within the last ten years, does not comply with the Rules.¹⁰⁹

The cv should be as complete as possible, establishing the expert's qualifications. First, a flimsy cv may form the basis for a *Daubert* challenge.¹¹⁰ For example, an expert might be excluded if her cv fails to incorporate any professional experience in the area about which she will testify or fails to establish that she participates in recognized organizations or institutions that establish the standards governing the area of expertise.¹¹¹ Second, a cv that evinces expertise or experience on the subject matter of the expert report may offset a sparse report.¹¹²

Inaccuracies in a cv are extremely dangerous. The practitioner should take the time to verify each item in an expert's cv. Although a minor mistake will not necessarily lead to the exclusion of an expert witness,¹¹³ skilled opposed counsel can use such a mistake to cast doubt on an expert's overall credibility.

¹⁰⁷ *Pierce v. CVS Pharm., Inc.*, 2007 U.S. Dist. LEXIS 69006 (D. Ariz. Sept. 13, 2007).

¹⁰⁸ *Minebea Co. v. Papst*, 231 F.R.D. 3 (D.D.C 2005).

¹⁰⁹ *Branche v. Zimmer, Inc.*, 2008 U.S. Dist. LEXIS 106789 (E.D. Tenn. Sept. 11, 2008).

¹¹⁰ *Redding Linden Burr, Inc. v. King*, 2009 U.S. Dist. LEXIS 8248, at *6-7 (S.D. Tex. Feb. 4, 2009) (quoting Fed. R. Evid. 702); *but see Soufflas v. Zimmer, Inc.*, 474 F. Supp. 2d 737, 745 (E.D. Pa. 2007) (rejecting argument that expert opinions must be excluded because his curriculum vitae did not reveal his experience and therefore did not provide a reasonable opportunity to prepare for effective cross examination in accordance with Rule 26(a)(2)(B)).

¹¹¹ *Rosvold v. L.S.M. Sys. Eng'g, Inc.*, 2007 U.S. Dist. LEXIS 82061 (E.D. Mich. Nov. 6, 2007).

¹¹² *Meyer v. Christie*, 2009 U.S. Dist. LEXIS 19955 (D. Kan. March 12, 2009).

¹¹³ *Jung v. Neschis*, 2007 U.S. Dist. LEXIS 97173 (S.D.N.Y.) (refusing to exclude based on inaccuracies in expert's curriculum vitae in light of his long and distinguished a career).

E. The compensation to be paid for the expert’s study and testimony.

Compensation information allows the opposing party to probe for bias or prejudice.¹¹⁴ It is not enough merely to provide the expert’s rate;¹¹⁵ however, courts may limit the extent of inquiries into this matter when appropriate (e.g., to avoid harassment brought about by sifting through an expert’s personal financial records).¹¹⁶ Nevertheless, the court may strike a report that fails to list an expert’s compensation information.¹¹⁷

F. A listing of other cases in which the expert has testified as an expert at trial or by deposition in the previous four years.

This portion of the disclosure should include, at a minimum: (1) the name(s) of the court(s) and/or administrative agencies; (2) names of the parties; (3) case number; and (4) whether the testimony was by deposition or at trial.¹¹⁸ Although the failure to disclose this

¹¹⁴ *Cary Oil Co. v. MG Ref. & Mktg.*, 257 F. Supp. 2d 751, 756 (S.D.N.Y. 2003).

¹¹⁵ *Id.* See also *See Baxter Diagnostics, Inc. v. AVL Scientific Corp.*, 1993 U.S. Dist. LEXIS 11798 (C.D. Cal. Aug. 6, 1993) (ordering production of “all invoices rendered by the trial experts in connection with this litigation”); *County of Suffolk v. Long Island Lighting Co.*, 122 F.R.D. 120, 124 (E.D.N.Y. 1988) (ordering expert to disclose “best estimate” of the total income he received from plaintiff, as well as an estimate of the percentage of his professional income attributable to his work for plaintiff).

¹¹⁶ See *Carey Oil*, 257 F. Supp. 2d at 756; *Wacker v. Gehl Co.*, 157 F.R.D. 58 (W.D. Mo. 1994) (refusing discovery into expert witness’s income tax returns for the past five (5) years reflecting the income he has received in matters in which he has been retained as an expert consultant and or witness); *Behler v. Hanlon*, 199 F.R.D. 553 (D. Md. 2001) (rejecting request to discover the total income earned by the defense expert for the last five years, the amount earned from providing independent medical examinations, copies of the expert’s tax returns, a list of all cases in which the expert provided services, and a list of all insurance companies with whom the expert was affiliated); *Rogers v. U.S. Navy*, 223 F.R.D. 533 (S.D. Cal. 2004) (holding that expert’s financial information was not discoverable since the expert was willing to provide the compensation he received in the particular case at issue, as well as estimates regarding the percentage of his work); *Sullivan v. Metro North Railroad Co.*, 2007 U.S. Dist. LEXIS 88938 (D. Conn. Dec. 3, 2007).

¹¹⁷ See *Am. Gen. Life & Accident Ins. Co. v. Ward*, 530 F. Supp. 2d 1306, 1311-12 (N.D. Ga. 2008).

¹¹⁸ *Nguyen v. IBP, Inc.*, 162 F.R.D. 675, 682 (D. Kan. 1995).

information will not necessarily be fatal,¹¹⁹ it can result in the exclusion of the witness's testimony.¹²⁰ If the expert has not testified in any other cases, there is no such information to disclose.¹²¹

VII. Rebuttal and Supplemental Reports

Rule 26(a)(2)(C) permits parties to disclose expert opinions “intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B).” A rebuttal report must provide evidence that specifically contradicts, impeaches or defuses the impact of evidence offered by the adverse party.¹²² Thus, experts may submit rebuttal reports, but the contents of a rebuttal report may contain only evidence “intended solely to contradict or rebut evidence on the same subject matter identified” in another party’s expert witness report.”¹²³ The expert is “free to support his opinions with evidence not cited in [the expert report] so long as he rebuts the ‘same subject matter’ identified in those reports.”¹²⁴ Parties may attempt to file a

¹¹⁹ See *Smith v. Baptist Healthcare Sys.*, 23 Fed. Appx. 499, 501 (6th Cir. 2001) (“[t]he Court may have been able to look past Plaintiffs’ failure to provide the expert’s publications, compensation for testifying and past testimony, but the absence of any signed report stating a specific opinion renders proceeding impossible”).

¹²⁰ See *id.*

¹²¹ *Dunkin Donuts*, 174 F. Supp. 2d at 211.

¹²² *Peals v. Terre Haute Police Dept.*, 535 F.3d 621, 630 (7th Cir. 2008).

¹²³ Fed. R. Civ. P. 26(a)(2)(C)(ii); see also *City of Gary v. Shafer*, 2009 U.S. Dist. LEXIS 41004, at *8 (N.D. Ind. May 13, 2009) (plaintiff’s expert report was proper because each opinion it contained rebutted the “same subject matter” as that contained in the report of the defendant’s expert); *Procter & Gamble v. McNeil-PPC, Inc.*, 615 F. Supp. 2d 832, 838 (W.D. Wis. 2009) (striking paragraphs of expert rebuttal report identified as “Supplementation of My Opinion on Infringement” because “rebuttal reports are limited to responding to the issues raised by the opposing parties’ experts”).

¹²⁴ *MMI Realty Svcs., Inc. v. Westchester Surplus Lines Ins., Co.*, 2009 U.S. Dist. LEXIS 18379, at *4 (D. Haw. March 10, 2009); *Sci. Components Corp. v. Sirenza Microdevices*, 2008 U.S. Dist. LEXIS 92703, at *7-8 (E.D.N.Y. Nov. 13, 2008) (“it is not only permissible but also obligatory for the rebuttal expert report to provide technical background information adequate to illustrate the point....Hence, technical information...that was not previously the subject of expert

“sur-rebuttal” report in response to a rebuttal report.¹²⁵ Courts have split on the admissibility of such reports.¹²⁶

A party may file a rebuttal report “within 30 days after the disclosure made by the other party,”¹²⁷ but courts reach differing conclusions on the timeliness of a rebuttal report where a discovery plan does not provide for rebuttal reports. Certain courts conclude that in the absence of an order setting a deadline for expert rebuttal reports, the 30 day deadline set out in Rule 26(a)(2)(C) applies.¹²⁸ Other courts, however, find that the “the thirty day requirement in Rule

testimony... without which a non-scientist would be unable to evaluate [the rebuttal report], is not out of place in a rebuttal report”).

¹²⁵ *In re Cardizem CD Antitrust Litig.*, 2000 U.S. Dist. LEXIS 18839, at *6 (E.D. Mich. Oct. 25, 2000) (granting request to submit sur-rebuttal expert report); *but see TiVo Inc. v. EchoStar Communs. Corp.*, 2006 U.S. Dist. LEXIS 97135, at *4 (E.D. Tex. April 3, 2006) (holding that even if the scheduling order did not provide for the service of sur-rebuttal reports, plaintiff should have filed one in accordance with Rule 26(a)(2)(C)).

¹²⁶ *Compare Houle v. Jubilee Fisheries, Inc.*, 2006 U.S. Dist. LEXIS 1408, at *5 n. 4 (W.D. Wash. Jan. 5, 2006) (noting that “the federal rules do not contemplate ‘sur-rebuttal’ experts”) *with In re Fleming Cos., Inc., Contract Litigation*, 2000 WL 35612913, at *1 (W.D. Mo. Nov. 30, 2000) (agreeing that Rule 26 permits sur-rebuttal reports).

¹²⁷ Practitioners should also take note to check the local rules of a district court to determine how rebuttal reports are treated. *See, e.g., Campos v. MTD Prods.*, 2009 U.S. Dist. LEXIS 63846, at *25-26 (M.D. Tenn. July 24, 2009) (noting that despite the provision of Rule 26(a)(2)(C) requiring disclosure of rebuttal reports within 30 days after the other party’s disclosure, Local Rule 39.01(c)(6)(d) states that “[t]here shall be no rebuttal expert witnesses, absent timely disclosure in accordance with these Rules and leave of Court”).

¹²⁸ *City of Gary v. Shafer*, 2009 U.S. Dist. LEXIS 41004, at *7-8 (N.D. Ind. May 13, 2009); *Dunn v. Zimmer, Inc.*, 2005 U.S. Dist. LEXIS 3505, at *3 n. 1 (D.Conn.,2005)(“[t]he court's scheduling order did not establish a time for the disclosure of rebuttal experts and therefore the Rule 26(a)(2)(C) applies as a default”); *Aircraft Gear Corp. v. Marsh*, 2004 U.S. Dist. LEXIS 15897, at *16 (N.D. Ill. Aug. 12, 2004) (finding that an expert rebuttal report was timely filed where filed within 30 days of the defendants’ expert disclosure, even though the court had not set a deadline for rebuttal reports); *Syringe Development Partners L.L.C. v. New Medical Technology, Inc.*, 2001 U.S. Dist. LEXIS 2843, at *104 n.7 (S.D.Ind.,2001)(“[t]he [scheduling order] on the issue of expert disclosures and reports is sufficiently vague about rebuttal experts to allow for resort to Rule 26(a)(2)(C)”).

26(a)(2)(C) only applies ‘in the absence of other directions from the court or stipulation by the parties.’¹²⁹

Rule 26(e)(1) may also require an expert witness to supplement an initial disclosure submitted pursuant to Rule 26(a)(2)(C). A supplemental report is required if:

the party learns that in some material respect the information disclosed is incomplete or incorrect . . . With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party’s [pretrial disclosures] are due.¹³⁰

The Rule contemplates that initial disclosures may contain partial or incomplete information.¹³¹ Rule 26(e)(1) thus permits, indeed requires, that an expert supplement his report and disclosures in certain limited circumstances when the party or expert learns the information previously disclosed is incomplete or incorrect in some material respect.¹³² Information “is incomplete or incorrect” in “some material respect” if there is an objectively reasonable

¹²⁹ *Eckelkamp v. Beste*, 315 F.3d 863, 872 (8th Cir. 2002) (affirming trial court’s decision to deny the plaintiff’s motion for leave to file a rebuttal expert report because “[t]he district court’s case order set its management requirements and did not provide for rebuttal experts, and the court was entitled to hold the parties to that order”); *Schablonentechnik v. MacDermid Graphic Arts, Inc.*, 2005 U.S. Dist. LEXIS 45982, at *7-8 (N.D. Ga. June 21, 2005) (excluding rebuttal expert reports where expert disclosure schedule did not provide for submission of rebuttal reports); *Akeva L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002) (rebuttal expert submissions impermissible where Plaintiff participated in drafting the scheduling order and the order did not include deadlines for rebuttal expert disclosures)

¹³⁰ Fed. R. Civ. P. 26(e)(1); Federal Rule of Civil Procedure 26(a),(e) Advisory Committee Notes, 1993 Amendments (“changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure . . .”).

¹³¹ *Caldwell Baker Co. v. Southern Illinois Railcar Co.*, 2001 U.S. Dist. LEXIS 9916, at *3 (D. Kan. June 5, 2001).

¹³² *Cook v. Rockwell Intern. Corp.*, 580 F. Supp. 2d 1071 (D. Colo. 2006); *Macaulay v. Anas*, 321 F.3d 45, 50 (1st Cir. 2003) (once a mandatory disclosure is provided, it must be kept current).

likelihood that the additional or corrective information could substantially affect or alter the opposing party's discovery plan or trial preparation.¹³³

A party may not, absent substantial justification, withhold information required by Rule 26(a).¹³⁴ Under such circumstances, a court may forbid¹³⁵ a party from using that information¹³⁶ as evidence at trial unless the court finds that the failure to disclose is harmless.¹³⁷ At the same time, a court may exclude a supplemental report if the report states additional opinions or rationales, or seeks to ‘strengthen’ or ‘deepen’ opinions expressed in the original expert report.¹³⁸ Permissible supplementation thus “means correcting inaccuracies, or filling the interstices of an incomplete report based on [unavailable] information at the time of the initial disclosure.”¹³⁹

A court may strike a supplemental expert report on the basis of an inadequate or incomplete initial report.¹⁴⁰ Courts recognize, however, that preclusion is a drastic remedy and

¹³³ *Sender v. Mann*, 225 F.R.D. 645, 653 (D. Colo. 2004).

¹³⁴ Fed. R. Civ. P. 37(c)(1).

¹³⁵ The factors applied by federal district court in deciding whether to exclude testimonial or equivalent evidence as a sanction for disobeying a court's order all generally consider the prejudice or surprise to the party against whom the evidence would be offered and the ability to cure the prejudice, but differ slightly in other aspects according to the factors established by the circuit in which the district court sits. *See, e.g., Paoli Railroad*, 35 F.3d at 791; *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003); *Price v. Seydel*, 961 F.2d 1470, 1474 (9th Cir. 1992); *Perry v. Winspur*, 782 F.2d 893, 894 (10th Cir. 1986).

¹³⁶ *NutraSweet Co. v. X-L Eng'g Co.*, 227 F.3d 776, 786 (7th Cir. 2000) (expert's testimony properly exclude due to failure to submit supplemental expert report); *Gallagher v. Southern Source Packaging, LLC*, 568 F. Supp. 2d 624, 630-31 (E.D.N.C. 2008) (excluding supplemental report due to surprise to plaintiff, which could not be cured without undue delay).

¹³⁷ *Mid-America Tablewares, Inc. v. Mogi Trading Co. Ltd.*, 100 F.3d 1353, 1363 (7th Cir. 1996) (no abuse of discretion in denying defendant's motion to exclude the testimony of plaintiff's expert where district judge correctly determined that defendant had sufficient time to prepare for the deposition of plaintiff's expert after receiving plaintiff's supplemented expert report).

¹³⁸ *Cook*, 580 F. Supp. 2d 1071.

¹³⁹ *Id.* (citing *Keener v. United States*, 181 F.R.D. 639, 640 (D. Mont. 1998); *Beller v. United States*, 221 F.R.D. 689, 694-95 (D. N.M. 2003)).

¹⁴⁰ *Akeva*, 212 F.R.D. at 310 (“[r]ule 26(e) envisions supplementation when a party’s discovery disclosures happen to be defective in some way so that the disclosure was incorrect or

generally order preclusion “only where the court finds that the party's failure to comply with the requirements was both unjustified and prejudicial.”¹⁴¹ Other common, but lesser, sanctions aimed at curing any prejudice include, among others, ordering depositions with the costs to be borne by the party submitting the improper report,¹⁴² limiting the expert’s testimony to the opinions expressed in the authorized reports,¹⁴³ granting the prejudiced party an opportunity to file a supplemental or rebuttal report,¹⁴⁴ forbidding the expert from expanding upon the opinions expressed in the initial disclosure,¹⁴⁵ and granting a new trial.¹⁴⁶

A party may not circumvent the requirements governing rebuttal reports by arguing that a report is a supplementation, or vice versa.¹⁴⁷ An opposing party may thus challenge and seek to strike a report on the grounds that the report does not qualify as a rebuttal or supplemental report.¹⁴⁸ In those instances, a court will conduct a “careful examination” of the disputed report to determine whether the report qualifies as a rebuttal or a supplementation.¹⁴⁹ Because the

incomplete and, therefore, misleading. It does not cover failures of omission because the expert did an inadequate or incomplete preparation”); *Sierra Club v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 571 (5th Cir. 1996) (“[t]he purpose of rebuttal and supplementary disclosures is just that—to rebut and to supplement. These disclosures are not intended to provide an extension of the deadline by which a party must deliver the lion’s share of its expert information”).

¹⁴¹ *Virgin Enters. v. American Longevity*, 2001 U.S. Dist. LEXIS 2048, at *6 (S.D.N.Y. Mar. 1, 2001).

¹⁴² *Equant Integrations Servs. v. United Rentals, Inc.*, 217 F.R.D. 113, 118 (D. Conn. 2003).

¹⁴³ *Sandata Techs., Inc. v. Infocrossing, Inc.*, 2007 U.S. Dist. LEXIS 85176, at *25 (S.D.N.Y. Nov. 16, 2007).

¹⁴⁴ *Wilderness Dev., LLC v. Hash*, 2009 U.S. Dist. LEXIS 19658, at *19 (D. Mont. March 5, 2009).

¹⁴⁵ *Id.* at *19-20.

¹⁴⁶ *Tenbarge v. Ames Taping Tool Sys., Inc.*, 190 F.3d 862, 865 (8th Cir. 1999).

¹⁴⁷ *Equant*, 217 F.R.D. at 116 (quoting 6 MOORE'S FED. PRAC. P 26.23[3] (3d ed. 2002)).

¹⁴⁸ *Estate of Gaither v. D.C.*, 2008 U.S. Dist. LEXIS 108557 (D.D.C. Oct. 23, 2008).

¹⁴⁹ *Covington v. Memphis Publ. Co.*, 2007 U.S. Dist. LEXIS 95842, at *9 (W.D. Tenn. Oct. 16, 2007).

timeliness of a report depends on whether the report is supplemental,¹⁵⁰ rebuttal,¹⁵¹ or even an entirely new opinion,¹⁵² the consequences of a court's decision to reclassify a report are significant.¹⁵³ Reclassification of a supplemental report to a rebuttal report can result in its exclusion if the report was not filed within 30 days of a report filed by the adverse party.¹⁵⁴ Conversely, a court may reclassify a rebuttal report as a supplemental report in instances where a court perceives a party submitted a report in an effort to amend an initial expert report after the deadline for pre-trial disclosures has passed.¹⁵⁵ If the deadline has passed, a court's reclassification can result in the exclusion of the report.¹⁵⁶

VIII. Conclusion

Rule 26(a) requires any witness specifically retained or specially employed to provide expert testimony to provide a written report. The expert report and any rebuttal or supplemental report are subject to explicit requirements. Despite the clear language, courts have held that the Rule imposes broad disclosure requirements on all trial experts, including treating physicians,

¹⁵⁰ Supplementations “must be disclosed by the time the party’s disclosures under Rule 26(a)(3) are due.” Fed. R. Civ. P. 26(e)(2).

¹⁵¹ Rebuttals must be filed “within 30 days after the other party's disclosure.” Fed. R. Civ. P. 26(a)(2)(C)(ii).

¹⁵² Fed. R. Civ. P. 26(a)(2)(B) requires parties to serve expert disclosures containing a complete statement of all opinions to be expressed and the basis and reason therefore.

¹⁵³ *Campos*, 2009 U.S. Dist. LEXIS 63846, at *27 (report reclassified as a rebuttal report, not a supplemental report, and thus “technically untimely”); *Sandata Techs., Inc. v. Infocrossing, Inc.*, 2007 U.S. Dist. LEXIS 85176, at *14-17 (S.D.N.Y. Nov. 16, 2007) (finding report submitted as a supplemental report was clearly a rebuttal report); *Cooper Tire & Rubber Co. v. Farese*, 2008 U.S. Dist. LEXIS 99667 (N.D. Miss. Dec. 9, 2008) (finding that an expert report was not a supplemental report but rather an entirely new opinion, which should have been included in his initial report because information relied upon in the new report was available to party at the time initial report was prepared).

¹⁵⁴ *Covington*, 2007 U.S. Dist. LEXIS 95842, at *9.

¹⁵⁵ *Cooper Tire & Rubber Co. v. Farese*, 2008 U.S. Dist. LEXIS 96729, at *7 (N.D. Miss. Nov. 26, 2008) (rejecting attempt to create a “procedural back door by labeling [the] report a rebuttal report as opposed to a supplemental report or new opinion”).

¹⁵⁶ *Id.* at *8.

who can generally be deposed or called to testify at trial without submitting a written report. To ensure that an expert report will be admissible into evidence, the factors enumerated in Fed. R. Civ. P. 26(a)(2)(B) must be satisfied. Misclassification of a witness and/or failure to comply with the requirements can have significantly negative consequences; trial courts have not been hesitant in excluding expert reports and testimony for failure to comply with Rule 26(a). Counsel should also work with the expert in crafting the expert report to ensure that any challenge under *Daubert* will be successfully repelled and that the report remains accessible to the layman. At the same time, counsel must work to protect attorney work product from becoming discoverable as a result of disclosure to an expert witness. The Civil Rules Advisory Committee has proposed amendments to Rule 26(a) meant to narrow the scope of discovery into attorney work product, but the expansive interpretation given to the Rule's disclosure requirements by the courts cautions against free disclosure of attorney work product to an expert.