National Association of Construction Auditors

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Federal Rules of Civil Procedure

Rule 26. Duty to Disclose; General Provisions of Governing Discovery [EXCERPT]

(a) REQUIRED DISCLOSURES

(1) Initial Disclosure

(2) Disclosure of Expert Testimony.

(A) **In General**. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) **Witnesses Who Must Provide a Written Report.** Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain

(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 will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

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

(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, this 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.

(D) **Time to Disclose Expert Testimony.** A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) **Supplementing the Disclosure.** The parties must supplement these disclosures when required under Rule 26(e).

(3) Pretrial Disclosures.

(4) *Form of Disclosures***.** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) **DISCOVERY SCOPE AND LIMITS.**

(1) **Scope in General**. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) Limitations on Frequency and Extent.

(3) Trial Preparation: Materials.

(A) **Documents and Tangible Things**. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) **Protection Against Disclosure.** If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) **Previous Statement**. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

(A) **Deposition of an Expert Who May Testify.** A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(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 in which the draft is recorded.

(C) **Trial-Preparation Protection for Communications Between a 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

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

(D) **Expert Employed Only for Trial Preparation.** Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) **Payment.** Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) **Information Withheld**. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) **Information Produced.** If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) PROTECTIVE ORDERS.

(d) TIMING AND SEQUENCE OF DISCOVERY.

(e) **SUPPLEMENTING DISCLOSURES AND RESPONSES**.

(1) *In General.* A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert Witness***.** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

(1) *Conference Timing*. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) *Conference Content*; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) *Discovery Plan*. A discovery plan must state the parties' views and proposals on:
(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;
(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;
(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order;
(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(g) SIGNING DISCLOSURES AND DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS.

Important Federal Rules of Evidence to Know:

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is *not* testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) Rationally based on the witness's perception;

(b) Helpful to clearly understand the witness's testimony or to determining a fact in issue; and

(c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The testimony is based on sufficient facts or data;

(c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case.

Rule 703. Bases of an Expert

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular filed would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on An Ultimate Issue

(a) **In General – Not Automatically Objectionable**. An opinion is *not* objectionable just because it embraces an ultimate issue.

(b) **Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Rule 705. Disclosing the Facts or Data Underlying an Expert

Unless the court orders otherwise, an expert may state an opinion – and give the reasons for it – without first testifying to the underlying fact or data. But the expert may be required to disclose those facts or data on cross- examination.

Rule 706. Court-Appointed Expert Witnesses

(a) **Appointment Process**. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) **Expert's Role.** The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) Must advise the parties of any findings the expert makes;
(2) May be deposed by any party;
(3) May be called to testify by the court or any party; and
(4) May be cross-examined by any party, including the party that called the expert.

(c) **Compensation.** The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and
(2) in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.

(d) **Disclosing the Appointment to the Jury.** The court may authorize disclosure to the jury that the court appointed the expert.

(e) **Parties' Choice of Their Own Experts.** This rule does not limit a party in calling its own experts.

Significant Decisions Involving Admissibility of Expert Opinion

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

  Facts: Two minors were born with birth defects. The parents of the minors (Daubert) brought suit against Merrell Dow Pharmaceuticals, alleging that the product, Bendectin, caused the defects. Daubert brought forth testimony of eight scientific experts who concluded that Bendectin was the cause of the birth defects. However, the district court granted Merrell's motion for summary judgment and the U.S. Court of Appeals for the Ninth Circuit affirmed because Daubert's experts' opinions were based on scientific techniques that were not "generally accepted" in the scientific community.

  Decision: Under the Daubert standard, expert witness's scientific knowledge does not need to be "generally accepted" in the relevant field to be admissible. The factors that may be considered in determining whether the methodology is valid are**: (1) the testability of the theory/methodology; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community.**

- *Kumho Tire Company, Ltd. V Carmichael*, 526 U.S. 137 (1999)

  Facts: Plaintiff, Carmichael, brought a products liability action against defendant, Kumho, claiming the tire the manufactured was defective. At trial, plaintiff sought to introduce the testimony of his engineering expert witness who stated that the blowout was caused by a manufacturing or design defect in the tire. Defendant sought to exclude this testimony based on the preliminary reliability test from Daubert. The district court agreed and excluded the testimony based on a preliminary determination that the expert's methodology in his determination of what caused the blowout was unreliable.

  Decision: The general principles outlined in Daubert apply to all expert testimony provided for in Rule 702. **The rule makes no distinction between "scientific" knowledge and "technical" or "other specialized" knowledge and thus its reliability standard applies to all expert knowledge.** The court reasoned that it would be impossible for courts to distinguish between evidentiary rules for scientific knowledge and technical knowledge, as the often overlap. The court concluded that this interpretation of Rule 702 would insure that an expert witness's testimony rests on a reliable foundation and is relevant to the task at hand. The court also concluded that the District Court's determination that the expert's methodology was not reliable was within the court's discretion.

Sample Federal Expert Report Format

- There is no such thing as an ideal expert witness report format. While the rules vary from State to State, at least 35 States have adopted the procedural codes based loosely on the Federal Rules. Any court may have its own additional requirements regarding report writing and these requirements would be available from the court clerk or your client.
- These reports are only mandated for expert witnesses retained to testify to eliminate the possibility of unfair surprise to the opposing party, avoid unnecessary depositions, and the reduce litigation costs.

  A simple outline can look like the following:
  - Cover Page
  - Assignment
  - Qualifications of the Expert Witness
  - Documents Review, Research & Investigation
  - Opinion(s)
  - Boilerplate Disclaimers
  - Attachments (e.g. C.V. of expert witness and supporting materials)

- For expert witnesses testifying in federal court, **Federal Rules of Civil Procedure 26(a)(2)(B)(i)-(vi)** governs the requirements for expert reports in civil cases and includes the following:

  (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;
  Tip: *For example, compose an accurate list of documents examined with specific information observed such as:*
    - *a specific date indicating when an entry/signature was written*
    - *an observed date establishing when the document was originated*
    - *page number, bates number, or other unique identifying number*
    - *handwritten signature(s) including the wording configuration*
    - *a notary seal and its date of notarization*
    - *specified version (an original, color photo-copy, faxed copy, or other)*
    - *binding (staples, spiral, hole punch, paper-clipped, or other)*
    - *size, color, and type of paper*
    - *two-sided or single-sided copy*

  (iii) Any exhibits that will be used to summarize or support them;
    - ***Tip:*** *Incorporate your exhibits in your written report as attachments or appendices. In composing your exhibits, include the source and date of illustrative portions of each document, the percentage that the image has been resized for illustrative purposes, etc. attach a copy of each source document for verification purposes.*

(iv) The witness's qualifications, including a list of all publications authored in the previous 10 years;

- ***Tip:*** *The most accurate way to satisfy this requirement is to include a current resume. You are also required to compose a list of all of your professional publications. Be sure to provide complete bibliographic information.*

(v) A list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

- ***Tip:*** *Compose and attach a list of all other cases in which, during the previous four years, you have testified as a forensic document examiner at trial or by deposition. Failure to maintain and disclose this information accurately may be the basis of having your testimony stricken. Cases in which you did not testify do not need to be included. For each case listed include the following:*
  - *Title of the case and case number*
  - *Name and location of the court*
  - *Date of testimony*
  - *Judge name*

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

- ***Tip:*** *Include a copy of your current fee schedule or engagement letter for the specific case, and a case-specific invoice for the fees, expenses, and estimates of time for future work.*

In addition to the components specified in Rule 26(a)(2)(B), compose your report to include the following:

- The specific issues your client has asked you to address
- An appendix which includes a bibliography listing the relevant authorities and research reports upon which you relied on in forming your opinion.

Composing the Report

- The report should be easy to read and look professional. It is wise to have a competent copy-editor proof your report for spelling, grammar, and overall clarity. Consult a court clerk at the courthouse where the case is to be heard and ask for any additional and specific requirements. Consider the following:

  - Using a professional letterhead
  - Using 12-point font (Arial font suggested) and a 1 ½ line spacing [Some courts may require a larger font size]
  - Creating topic headings and short, concise paragraphs
  - Providing a unique number for each page, table, chart, and exhibit
  - Including a cover page and table of contents
  - Indicating when and by whom your report was requested
  - Including a date you reviewed the documents and formed your opinion

- Identifying facts from sources as being distinct from assumptions provided by counsel
- Stating that you may have additional opinions or updated/revised opinions if new information/documents are provided
- Defining technical language and explaining any abbreviations
- Including a summary of your conclusion/opinions

Non-Compliance Issues and Cautions

- Written reports that are not in compliance may become the basis of your testimony being barred. You are cautioned against using:

    - Absolute wording and phrasing
    - Terminology such as “including, but not limited to,” and “relevant portions of”
    - Hedge words or phrases such as “sort of,” “somewhat,” or “I suppose”
    - Argumentative language
    - Comments on the credibility of other witnesses
    - An informal or too friendly tone
    - Any issues the attorney did not want addressed
    - Opinions outside your expertise or on issues(s) you were not asked to address.