I. KNOW THE REQUIREMENTS

A. FRCP 26(a)(2) Disclosure of Expert
   • 26(a)(2)(A) disclose any expert whose testimony will be used as evidence under FRE 702, 703, or 705
   • 26(a)(2)(B) submit written report of expert opinion if expert was specifically retained for litigation containing:
     1. a “complete statement” of the witness’ opinions,
     2. the “facts or data considered by the witness in forming them,”
     3. proposed exhibits summarizing or supporting the expert’s opinions, and
     4. the witness’s qualifications, including a list of all publications authored in the previous 10 years;
     5. a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or deposition;
     6. [and] a statement of the compensation to be paid for the study and testimony in the case.
   • 37(c)(1) If the party fails to disclose, it is not allowed to use that information or witness to supply evidence on:
     • A motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.
     • FRCP 37(c)(1)(C) The court may impose other sanctions, like fees

B. Changes and Committee Notes
   • Attorney-client privilege applies where employee witnesses, like accountants, are also lawyer’s client in the suit.
   • 26(a)(2)(B)(ii) After 2010 amendments: (ii) the “facts or data considered by the witness in forming them,”
   • “Routine discovery into attorney-expert communications and draft reports has had undesirable effects.”

C. Case Law

II. KNOW WHAT KIND OF EXPERT WITNESS

A. FRCP 26(a)(2)(C) Non-retained or Employee Witnesses
   • Not required to submit a written report
   • 26(a)(2)(C)(i) Must still disclose subject matter on which expert will testify under FRE 702, 703 or 705; and
   • 26(a)(2)(C)(ii) A summary of only those facts and opinions upon which the non-retained expert is to testify
   • Attorney work-product protection does not apply to non-retained or employee witnesses serving as experts
   • See Advisory Committee Note to Rule 26(a)(2)(C)
   • Also determine what opinions or facts expert may have to offer in testimony
   • Attorney-client privilege applies where employee witnesses are also lawyer’s client in the suit

B. Changes and Committee Notes
   • 26(a)(a)(2)(C) was a new section added in 2010
Rule 26(a)(2)(C) witnesses do not escape a deposition

“The absence of an expert witness report increases the need for a complete and thorough deposition.”

C. Case Law


III. KNOW THE LIMITS OF THE RULE

A. FRCP 26(b)

• 26(b)(4) Scope of Discovery and Limits for Expert Trial Preparation
• 26(b)(4)(B) Governs trial preparation protection for draft reports or disclosures.
• Rules 26(b)(3)(A) and (B)(5) protect drafts, or supplements, of any required report or disclosure, regardless of the form of the draft
• 26(b)(4)(C) Governs trial preparation protection for communications between party’s attorney and expert witnesses
• Rules 26(b)(3)(A) and (B) protect attorney-expert communications for experts required to provide a 26(a)(2)(B) report,
• This is regardless of the form of the communications, except to the extent that the communications:
  1. relate to the expert’s compensation;
  2. identify facts or data provided by the attorney and considered by the expert in forming opinions,
  3. identify assumptions that the attorney provided and the expert relied upon in forming opinions.
• 26(b)(5) Claiming privilege or protecting trial-preparation materials
• 26(b)(5)(A) Party that withholds information on the claim that such material is privileged or protected the party must:
  1. expressly make the claim;
  2. describe the nature of the documents, communications, or tangible things not produced or disclosed,
• Without revealing information, itself privileged or protected, will enable other parties to assess the claim.
• Like by a privilege log, or a categorized list of the withheld information stating the privilege or protection that applies
• 26(b)(5)(B) If some protectable material was accidentally disclosed, the party must reasonably try to return the material

B. Changes and Committee Notes

• 26(b)(4)(B) and (C) are wholly new sections
• 26(b)(4)(B) and (C) apply to “all forms of discovery” with respect to expert materials
• Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert; or
• The development, foundation, or basis of those opinions.
• Communications the expert had with anyone besides the attorney are also discoverable
• Counsel can question expert witnesses about alternative testing or approaches
• This is regardless of whether or not they were considered by the expert in forming opinions
• Be mindful of the rule in joint-defense litigation, where attorneys and other parties’ experts may confer
• “The rule does not itself protect communications between counsel and other expert witnesses. . .”

C. Case Law

IV. KNOW YOUR JURISDICTION

A. FRCP 26(b)(4)(D) Experts 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:
  1. as provided in Rule 35(b) or
  2. on showing exceptional circumstances which make it impracticable to obtain the facts or opinions by other means.
• However, in states like North Carolina, parties are entitled to obtain expert disclosure only “through interrogatories.”
• In New York depositions and interrogatories of experts are available only on a showing of special circumstances.
• Check FRCP Rule 32 for admissibility of deposition testimony at trial

B. Changes and Committee Notes
• Since 26(b)(4)(B) and (C) were wholly new sections, former (B) and (C) were renumbered (D) and (E) in 2010.

C. Case Law
• In re Application of the Republic of Ecuador, 280 F.R.D. 506 (N.D. Calif. 2012)

IV. ALWAYS BE PREPARED FOR IN CAMERA REVIEWS

• Conducted solely by Court to determine whether the information sought warrants protection under the rules.
• Opportunity to highlight why the communications sought are the kind of attorney work-product the rules protect.

C. Case Law
• United States CFTC v. Newell,301 F.R.D. 348 (N.D. Ill. 2014)