

Three Things to Know About Rule 26

In the world of expert witnesses, staying up to date on Rule 26 is vital. Not following requirements for disclosure and expert reports can break your case.

1. Not Following Directions Can Get You Banned

Earlier this year in *Walter International Products Inc. v. Salinas*, six expert witnesses were barred from testifying because they did not submit a report according to FRCP 26.

“I was very concerned and shocked when I read that the Eleventh Circuit Court of Appeals affirmed an earlier decision striking six experts from testifying at trial,” said expert witness Eugene Peterson of [Consult & Advise](#). “After all, my livelihood is based upon the fact that I write expert reports and testify in court.”

The court stated, “Each witness must provide a written report containing a complete statement of all opinions to be expressed ...Any party that without substantial justification fails to disclose this information is not permitted to use the witness as evidence at trial unless such failure is harmless.”

2. Following Directions Includes Having a Complete Expert Report

According to FRCP 26(B), “the report must have:

- A complete statement of all opinions the witness will express and the basis and reasons for them
- The facts or data considered by the witness in forming them
- Any exhibits that will be used to summarize or support them
- The witness’s qualifications, including a list of all publications authored in the previous 10 years
- A list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition
- A statement of the compensation to be paid for the study and testimony in the case.”

Cases in which an expert simply consulted do not need to be included, just as articles published more than ten years ago don’t have to be listed.

3. The Changes Made it Simpler

Since Rule 26 was revised in 2010, attorneys and experts generally agree that the revision has made the process of preparing an expert’s report easier for them.

“It’s made dealing with experts easier and less time-consuming, because I worry less about avoiding creating discoverable documents,” says Ted Frank, founder of the Center for Class Action Fairness in Washington, D.C.

David Donoghue, a partner at Holland & Knight in Chicago, agrees, “It has simplified the report process and removed some of the archaic hurdles in the process.”

Before, an attorney was required to disclose draft expert reports and all communications between an expert and attorney. Now, most communication between experts and attorneys is protected under the work product doctrine.

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