

# Working with Experts: Are We Off the Record?

By:  
David L. Bryant  
GableGotwals  
Tulsa, Oklahoma

OBA/CLE and OBA Litigation Section  
Litigation and e-Discovery  
October 3, 2013



*"Is this really necessary, Your Honor? I'm an expert."*

# Summary of Key Changes in Rule 26

1. A retained expert's report no longer must contain all "data or other information" the expert has considered, but only the "facts or data" the expert has considered in forming the opinions expressed.
2. Counsel must provide a written summary of the facts and opinions to be expressed by non-reporting experts.
3. Drafts of a retained expert's report, and drafts of the summary of a non-retained expert's opinions, have work product protection from discovery.
4. Communications between a party's counsel and the party's retained experts also have work product protection, with three express exceptions.

# FRCP 26(a)(2) - Disclosure

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

## ***(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.

# FRCP 26(a)(2) - Disclosure

**(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.

# FRCP 26(a)(2) - Disclosure

**(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.

# Rule 26(b)(4) Trial Preparation: Experts

***(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.

# Rule 26(b)(4) Trial Preparation: Experts

**(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.



# CHECKLIST OF SUGGESTED PRACTICES

1. ***Witness Identification.*** Determine, as early as feasible, experts who may be needed for the case, including:
  - a. “Reporting Experts” (federal), including specially retained experts and party employees who regularly provide expert testimony.
  - b. “Non-Reporting” experts (federal), including party employees who do not regularly provide expert testimony, treating physicians, etc.
2. ***Engagement Letters.*** Use “standardized” expert engagement letters whenever feasible.
3. ***Initial Preparation.*** At the beginning of every expert engagement, before significant substantive communications with the expert and before the expert has commenced substantial work:
  - a. ***Conflicts.*** Fully vet all potential conflicts of interest (parties, issues, etc.), and ensure that appropriate safeguards exist to prevent conflicts from arising during the engagement.

# CHECKLIST OF SUGGESTED PRACTICES

- b. **Expert Education.** Educate the expert about all applicable disclosure, discovery and privilege rules.
- c. **Expert Assignment.** Define the expert's assignment as precisely as possible.
- d. **Staffing.** Discuss and agree upon how the engagement will be staffed, how any changes will be approved, and the consequences of departures from the agreed upon staffing.
- e. **Timing and Availability.** Discuss counsel's expectations about the duration of the case, the timing of any required report, the timing of deposition and trial testimony, and the expert's availability and known scheduling conflicts.
- f. **Costs.** Discuss and agree upon the anticipated costs for the expert's work (budget).

# CHECKLIST OF SUGGESTED PRACTICES

- g. ***Billing and Payment.*** Discuss and agree upon the timing and format (e.g., level of detail) for the expert's bills, and the source and timing of payments. Depending on the needs of the particular case, determine whether it is wise to include such particulars in the engagement letter.
- h. ***Expert Materials.*** Request that the expert provide, as early as possible, a case list, all available transcripts of prior testimony, and all of the expert's potentially relevant publications; these should not be limited to information the expert will be required to disclose to the adverse party.
- i. ***Report Form.*** Provide, if necessary, a general template (outline of required elements, not substantive opinions) for the expert's use in drafting a report.

# CHECKLIST OF SUGGESTED PRACTICES

- j. **Communications.** Discuss preferences regarding the channels for, and the form, format, and substance of, communications between counsel (both outside counsel and in-house counsel, if applicable), the represented party or representatives of the party, and other experts if applicable (including other experts for the same party or experts for other aligned parties).
- k. **Expert's File.** Discuss and document how the expert (and staff) will organize and maintain the case file, including internal and external written communications, discoverable information and materials provided by counsel, expert notes (including notes of meetings and discussions with counsel), work files, report drafts, etc.
- l. **Joint Defense Agreement.** In multi-party cases, consider the desirability of a common interest / joint defense agreement to protect expert communications, collaboration, or materials sharing.

# CHECKLIST OF SUGGESTED PRACTICES

## 4. *Facts or Data Provided by Counsel.*

- a. ***Document Logs.*** Keep a log of all documents provided or made available for the expert's review, with dates and details sufficient to enable efficient review and verification that the file to be produced to the adverse party is complete.
- b. ***Lists of Facts and Assumptions.*** Consider using single, master documents which identify, for discovery purposes, the "facts or data" the expert has considered and the "assumptions" on which the expert has relied. Also consider annotating such documents with citations to non-privileged evidence supporting such facts or assumptions (with appropriate caveats, disclaimers and reservations of rights).

# CHECKLIST OF SUGGESTED PRACTICES

5. ***Foreseeable Issues.*** Anticipate troublesome or unsettled issues that may arise in discovery, and consider seeking discovery stipulations to address them in a fair and balanced way.
6. ***Verbal Communications.*** In verbal communications, never tell the expert anything, or express anything in a manner, that could be damaging or embarrassing if discovered.
7. ***Written Communications.*** Always prepare all written communications to the expert with a view toward potential discoverability, and likewise police all such communications from the expert.
8. ***Opinion Work Product.*** Never rely on the expanded work product protection as a basis for providing the expert written work product containing sensitive attorney opinions, mental impressions or the like (much less attorney-client privileged communications).

# CHECKLIST OF SUGGESTED PRACTICES

9. **Expert Opinions.** Determine whether the expert's opinions are favorable as early as possible, preferably before disclosing the expert's name, and certainly before disclosing the expert's report; do not rely on de-designation or re-designation (as a consultant) to protect the expert from discovery.
10. **Expert Report.** Never write any significant portion of the substance of the expert's report. Relatedly, when commenting on a draft report, always emphasize that the expert's report must be her own, and ensure that the expert is appropriately prepared to answer questions about the role of counsel (or others) in the expert's preparation of her report.

# CHECKLIST OF SUGGESTED PRACTICES

## 11. *Expert Deposition Preparation.*

- a. ***Witness Preparation.*** Never assume that an expert requires less testimonial preparation than a typical fact witness.
- b. ***Compensation.*** Before the expert prepares to testify or testifies, educate the expert about the applicable rules regarding adverse party payment for the expert's time in responding to discovery, and provide specific guidance about how the expert should document the time spent and expense incurred, to facilitate a request for payment.

- ## 12. **Counsel Preparation.** Think through likely expert cross-examination, prepare to assert all appropriate objections to protect work product or other privileged information, and determine how to prepare the expert to avoid inadvertent waivers, etc.



# CHECKLIST OF SUGGESTED PRACTICES

## Oklahoma State Cases:

1. ***Nothing off record.*** Always assume that all communications between counsel and the expert are “on the record” and fully discoverable, absent a discovery stipulation altering the default rules of disclosure and discovery.
2. ***Stipulations.*** Consider using a discovery stipulation to alter the Oklahoma rules to conform more closely to the current federal rules. Sample stipulations are set forth in Appendix A.
3. ***Draft Reports.*** Discuss with the expert, before the expert provides her written report, how the expert and counsel will handle any preliminary drafts of the report, and how the expert and/or counsel will respond to any requests to produce any preliminary draft.