Expert-witness disclosure in federal court

The case often comes down to a battle of experts. Be prepared for that battle

By Timothy A. Loranger

With more practitioners finding themselves removed to federal court, this article presents a quick overview of expert disclosures, the pros and cons of taking expert depositions, and some considerations when deciding to seek exclusion of defense experts, all to get you moving in the right direction. While expert disclosures and discovery do not occur at the outset of a case, having these procedures in mind as you develop your case strategy is critical. As most of you know, the case often comes down to a battle of the experts. Be prepared for that battle.

Several areas of federal practice can get an attorney into trouble if they are not paying attention. Expert witness disclosures and discovery are at the top of that list. The good news is that the federal courts are not hiding the ball as the procedures are explained in detail within the Federal Rules of Civil Procedure (FRCP), Rule 26. Don't get me wrong – there are other areas of the practice where the ball seems to be well hidden. While this is not the time to discuss the Local Rules or the very specific "local local" rules that many judges publish for their own courtrooms, never forget about those because they can sometimes modify the FRCP in fun and interesting ways.

The Federal Rules of Civil Procedure contain specific guidelines for when and how to go about designating expert witnesses in your case. Rule 26 outlines the requirements for disclosing expert witness information, including the expert's identity, qualifications, and opinions. *Warning*: Failure to comply with these requirements can result in the outright exclusion of your experts' testimony or the testimony may be substantially narrowed; this can be devastating to your client's case. Therefore, it is essential to understand the proper way to designate your expert witnesses.

Rule 26(a)(2)(A) requires parties to disclose the identity of any expert witness they intend to use at trial, along with a written report containing the expert's opinions and the bases for those opinions.

Timing of expert disclosures

The timing of the disclosures is generally set forth within Rule 26 as follows: Disclosures must be made at least 90 days before trial, or at a time ordered by the court. In all of the cases I've handled in federal court, the timing of the expert disclosures is actually determined by the judge during the trial-setting conference. There is no specific method that I can point to that would help you anticipate when the expert disclosures will be due in your case, but be certain to calendar them once you receive the Scheduling Order for your case. Also, many judges do not use the simultaneous-disclosure method you may be used to in state court. In other words, some judges will order plaintiff to disclose first and then order defendant to disclosure 30 or 60 days later. Personally, I think this is unfair and I've tried to change a judge's mind – but I've not been successful.

Contents of the expert report

The expert report is very specifically described and must include the following information set forth in Rule 26(a)(2)(B):

- 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 four years, the witness testified as an expert at trial or by deposition; and
- a statement of the compensation to be paid for the study and testimony in the case.

In addition to the written report, Rule 26(a)(2)(B) requires parties to disclose any information regarding the expert witness's expected testimony, including the subject matter, the opinions to be offered, and the basis for those opinions. This is usually accomplished in the report itself, which should contain all the expert's opinions. The key here is to give the other side as much information as possible so they can decide whether to take your expert's deposition before trial.

It is important to keep in mind that Rule 26 imposes a duty to supplement expert disclosures if new information becomes available that requires a revision to the expert's opinions or the basis for those opinions. Rule 26(e)(2) requires that such supplementation be made by the time of the party's pretrial disclosures under Rule 26(a)(3). Supplementation of an expert's report is almost a certainty if expert disclosure occurs before fact discovery ends and when the court orders

staggered expert disclosures. If new information would alter or modify an expert's opinions, then a supplemental or amended report is needed.

It is important to emphasize that the Rule 26 expert disclosure rules are *strictly* enforced, and judges tend to be unforgiving. Failure to comply often results in the exclusion or modification/narrowing of expert testimony. A party that fails to disclose its experts and their reports may be barred from using on direct examination any expert testimony not so disclosed unless the failure to disclose was "substantially justified" or "harmless." (See Rule 26(c)(1); *Heidtman v. County of El Paso* (5th Cir. 1999) 171 F3d 1038, 1040 [untimely disclosure of expert witnesses]; *ClearOne Communications, Inc. v. Biamp Systems* (10th Cir. 2011) 653 F3d 1163, 1176 [a party who fails to comply with expert-disclosure requirements may not introduce expert witness's testimony at trial].) Additionally, after a motion and an opportunity to be heard, the court may impose other sanctions such as costs and attorney fees.

In conclusion, it is essential to understand and comply with the requirements of Rule 26 when designating an expert witness. This includes providing a detailed expert report and timely supplementing that report as necessary. Failure to comply can result in the exclusion of expert testimony, which can be detrimental to a party's case.

Anecdote and lesson learned

I was trying a case arising from the crash of a small plane that had suffered an engine failure, killing the pilot and two passengers. The case was against the Federal Aviation Administration and its air-traffic controllers, who we alleged were negligent in guiding the pilot to a nearby airport. Our accident-reconstruction expert worked with an excellent animator to develop a visual aid that illustrated his testimony about the flight path leading up to the crash. We disclosed experts timely and provided the animation to defense counsel. We did not disclose the animator as an expert. Attorneys for the USA moved to exclude our animation because we didn't disclose the animator and the judge granted their motion and we were unable to use the animation. This was a bench trial, so at least the judge saw the animation. But this situation would be devastating to anyone in a jury trial. We used a large map and did our best to illustrate the flight path and the expert's testimony.

Pros and cons of taking opposing expert depositions

When I first started practicing, I was taught that one must *always* take the deposition of opposing experts. This step was a given and included a script that required asking questions at the end: (1) Are all of your opinions contained in this report; (2) Are there any other opinions that you intend to offer at trial; (3) Do you intend to do any more work between now and the deposition? It wasn't until much later that I learned that it is sometimes better not to take an expert deposition.

Having said that, expert depositions are an important tool for litigators in federal court. They allow parties to explore an expert's opinions and the bases for those opinions before trial, and they can be used to impeach an expert's testimony at trial. However, expert depositions can also be time-consuming and expensive, and they may not always provide significant benefits to a party's case. In this article, we will examine the pros and cons of taking expert depositions in federal court under FRCP Rule 26.

Pros

Discovery

Expert depositions provide an opportunity for parties to discover the expert's opinions, the basis for those opinions, and any weaknesses in the expert's testimony. This information can be used to develop trial strategy and prepare for cross-examination.

Impeachment

If an expert's testimony at trial is inconsistent with their deposition testimony, the deposition can be used to impeach the expert and undermine their credibility.

Settlement

Expert depositions can sometimes lead to settlement negotiations. If a party discovers weaknesses in the opposing party's expert testimony during a deposition, they may be able to use that information to negotiate a favorable settlement.

Cons

Expense

Expert depositions can be expensive, particularly if the expert is located out of state or requires extensive preparation. Parties must pay for the expert's time, travel expenses, and any fees charged by the court reporter.

Time-consuming

Expert depositions can be time-consuming, particularly if the expert has a lengthy report or extensive experience in their field. This can impact the party's ability to prepare for trial and may delay the trial date.

Risk

There is always a risk that the expert will provide testimony that is damaging to the party's case.

Expert depositions can be a valuable tool for litigators in federal court, but they are not without their drawbacks. Parties must weigh the potential benefits of expert depositions against the costs and risks associated with them. Ultimately, the decision to take an expert deposition should be based on the unique circumstances of each case, including the importance of the expert's testimony and the availability of other means to obtain the necessary information.

Excluding opposing experts

Excluding an expert witness from testifying can be a crucial part of a trial strategy. This is a complex area of law, so we will cover the essential considerations here. Under the Federal Rules of Civil Procedure, a party may move to exclude an expert's testimony under Rule 702,

which governs the admissibility of expert testimony. In this section, we will discuss the steps to take to exclude an expert from testifying under the FRCP.

- **Determine the basis for exclusion**: The first step in excluding an expert witness is to determine the basis for exclusion. The FRCP sets out several grounds for exclusion, including lack of qualifications, lack of reliability, and lack of relevance. The party seeking to exclude the expert must identify the specific grounds for exclusion in their motion.
- **Gather evidence**: Once the basis for exclusion has been determined, the party seeking to exclude the expert must gather evidence to support their motion. This may include deposition testimony, the expert's report, and other documents that demonstrate the expert's lack of qualifications, reliability, or relevance.
- **Draft the motion**: The party seeking to exclude the expert must draft a motion to exclude the expert's testimony. The motion should include a statement of the grounds for exclusion, a description of the evidence supporting the motion, and an argument as to why the expert's testimony should be excluded.
- **File the motion**: The motion to exclude the expert's testimony must be filed with the court and served on all parties in the case. The motion should be filed well in advance of trial to allow time for the court to consider the motion and for the parties to adjust their trial strategy if necessary.
- **Prepare for the hearing**: If the court schedules a hearing on the motion to exclude the expert's testimony, the party seeking exclusion must prepare for the hearing. This may include preparing a brief, identifying witnesses, and conducting additional research.
- **Attend the hearing**: The party seeking exclusion must attend the hearing and present their argument to the court. The opposing party will have an opportunity to respond to the motion and present their own evidence and argument.

In *Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579, the Supreme Court set out the standard for the admissibility of expert testimony under Rule 702. The court held that the trial judge must act as a "gatekeeper" to ensure that expert testimony is reliable and relevant to the case. The court identified several factors that judges should consider in evaluating the reliability of expert testimony, including whether the theory or technique has been tested, whether it has been subject to peer review and publication, and whether it has a known or potential rate of error.

In *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, the Supreme Court expanded the *Daubert* standard to cover all expert testimony, not just scientific testimony. The court held that the reliability and relevance of expert testimony must be evaluated on a case-by-case basis, considering the field of expertise and the specific facts of the case.

Excluding an expert from testifying can be a powerful tool in a litigator's arsenal, but it requires careful planning and preparation. Parties seeking exclusion must identify the basis for exclusion, gather evidence, draft a motion, file the motion, prepare for the hearing, and attend the hearing. The standard for the admissibility of expert testimony under Rule 702 is high, but with careful preparation, exclusion of an expert witness may be possible.

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