EXPERTS UNDER THE NEW RULES

Who Are "Experts"?

As was the case under old Rule 26(a)(3), all testifying experts must be disclosed, both retained experts (Rule 26(a)(4)(A)) and non-retained experts (Rule 26 (a)(4)(E)), such as treating physicians, accident investigators, etc.

The broad definition of "expert" for purposes of Rule 26 is not changed and refers to Evidence Rule 702(a)– essentially anyone using "scientific, technical, or other specialized knowledge" in their testimony. *See*, Pete v. Youngblood, 2006 UT App 303, 141 P.3d 629 (treating physicians are not *retained* experts, but they are nevertheless *experts* who must be separately identified under Rule 26.)

Disclosure of Experts

Whoever has the burden of proof on an issue goes first with designating their experts not more than **7 days** after the close of fact discovery. Rule 26(a)(4)(C)(i):

> *The party who bears the burden of proof on the issue for which expert testimony is offered shall provide the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery.*

For *retained* experts, under Rule 26(a)(4)(A) you first must provide a disclosure of basic information about the expert:

- •Name and qualifications
- •All publications within the last ten years
- •List of testimony in the last four years
- •A "brief summary" of the anticipated opinions
- •All data and other information that will be relied upon by the expert in forming opinions
- •Compensation

Note- the "brief summary" is NOT supposed to contain all the information of an expert report. You will get that information either in the "official" expert report or the deposition, depending on your election.

For *non-retained* experts, new Rule 26 (a)(4)(E) follows the recent amendments to FRCivP 26(a)(2)(C) and requires that a party provide a "written summary" of the facts and

opinions to which the expert is expected to testify.

The Committee Note to Rule 26, lines 407- 433, makes clear that this summary (like the summary in the initial disclosures for fact witnesses) is not intended to be an expert report, and recognizes that a party may be limited by the unwillingness of the non-retained expert to cooperate:

> *There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony.*
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> *Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly.*
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> *In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26(a)(3)(D) disclosure for the witness.*
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> *And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. Rule 26(a)(3)(D) and 26(a)(1)(A)(ii) are not intended to elevate form over substance – all they require is that a party fairly inform its opponent that opinion testimony may be offered from a particular witness. And because a party who expects to offer this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition.*

Election of Report or Deposition

After receiving the designation, the party opposing the expert then has the option of electing *either* a report or a deposition: if you elect a report, you don't get a deposition; if you elect a deposition, you don't get a report. This election of a report or deposition must be made within **7 days** after the opponent's expert disclosure. Rule 26(a)(4)(C)(i). In multi-party actions,

all parties opposing the expert must agree on either a report or a deposition. If they cannot agree, then Rule 26(a)(4)(D) provides that they get a deposition.

If you fail to elect either a deposition or a report within seven days after designation of the expert, you get nothing; that is, no report and no deposition. Rule 26(a)(4)(C)(ii): "If no election is made, then no further discovery of the expert shall be permitted."[1]

For opposing experts, under Rule 26(a)(4)(C)(ii) you must disclose them within 7 days after the later of your "election" of a report/deposition from the opposing expert is due or the date of receipt of the written report or taking the expert's deposition.[2]

Expert Depositions

Experts are to be deposed, or reports provided, within **28 days** after the election was made. Expert depositions are limited to four hours under Rule 26(a)(4)(B). This limit applies to parties collectively-- in other words, all defendants get four hours *total*, not four hours *each*. This time is not counted toward the hours of depositions for standard discovery under Rule 26(c)(5).

Expert Reports

Rule 26(a)(4)(A) provides that the report must be signed by the expert and must contain a *complete* statement of all opinions the expert will offer at trial, much like under Federal Rule 26(a)(2)(B)(ii), and unlike our old state Rule 26(a)(3)(b), where less detailed was required.

The Committee Note, lines 381- 387, cautions that the report is supposed to be complete, yet this requirement is not to be carried to extremes:

> *The expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement.*

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[1] Rule 26(a)(4)(D) seems to create an exception to the "nothing further" rule if the election date is missed in a multi-party case, as it provides the default is a deposition if the parties opposing the expert "do not agree."

[2] The "later than" language is necessary to deal with the situation where no election is made, or not made in time. Without it, there would be no trigger date for the designation of experts by the party who didn't make an election.

There is a substantial body of federal case law that ought to guide us in the determination of what constitutes a "complete statement."

Information Provided to Experts/Draft Reports

A major new change is the adoption of Rule 26(b)(7)(B). This shields from discovery most communications between counsel and experts, as well as draft reports:

> *(b)(7)(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:*
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> *(b)(7)(B)(i) relate to compensation for the expert's study or testimony;*
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> *(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or*
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> *(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.*

This change is based on federal Rule 26(b)(4)(C), effective December 10, 2010.

Committee Note, lines 434- 439:

> *Finally, the amendments include a new Rule 26(b)(7) that protects from discovery draft expert reports and, with limited exception, communications between an attorney and an expert. These changes are modeled after the recent changes to the Federal Rules of Civil Procedure and are intended to address the unnecessary and costly procedures that often were employed in order to protect such information from discovery, and to reduce "satellite litigation" over such issues.*

The Advisory Committee Note to the 2010 federal amendment is instructive:

> *Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); see Rule 26(a)(2)(E).*
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> *Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to*

communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

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. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and "the party's attorney" should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the "party's attorney" concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not

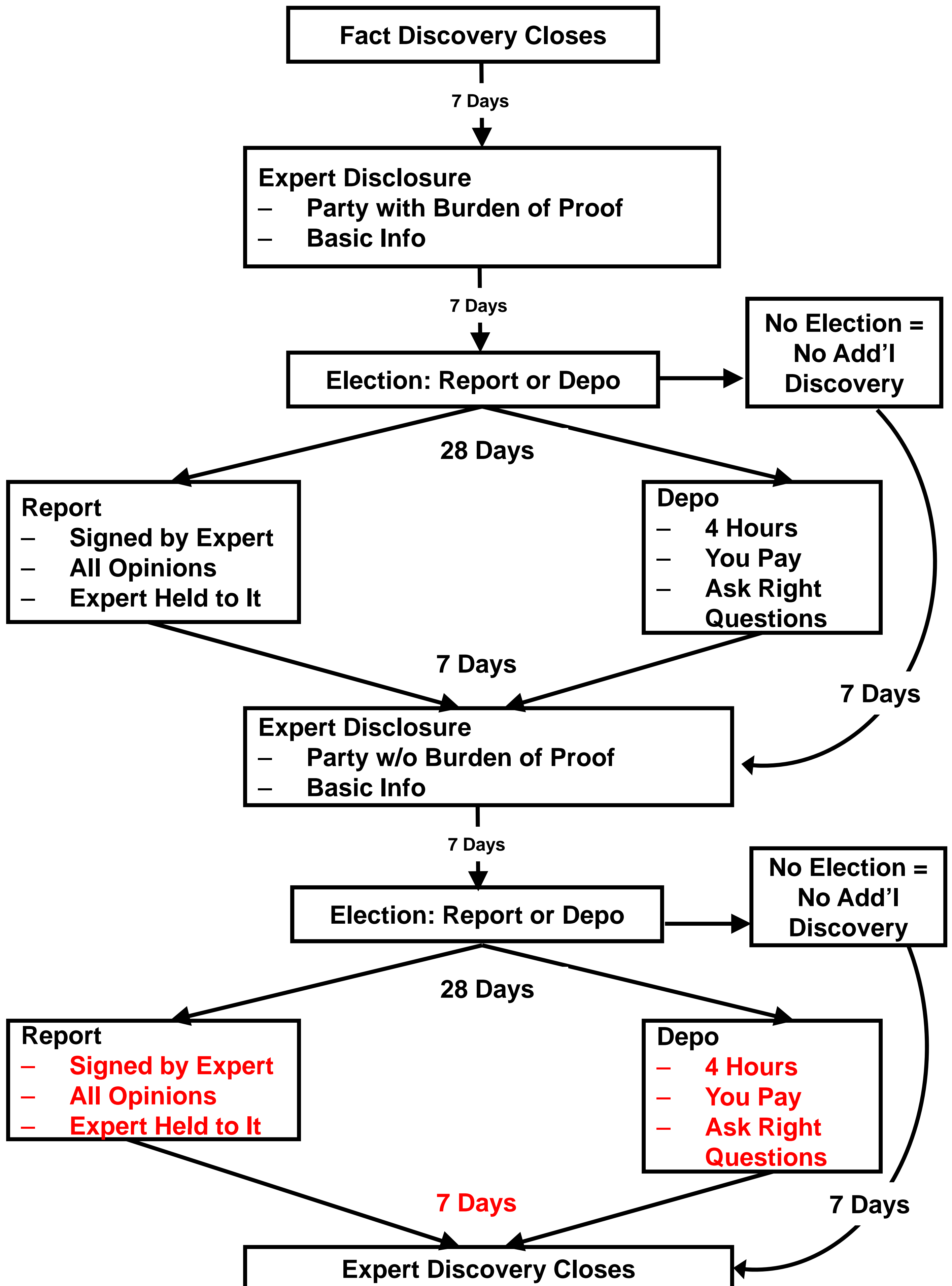
limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii)--that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.


Fact Discovery Closes
7 Days
Expert Disclosure
– Party with Burden of Proof
– Basic Info
7 Days
Election: Report or Depo
No Election = No Add'l Discovery
28 Days
Report
– Signed by Expert
– All Opinions
– Expert Held to It
Depo
– 4 Hours
– You Pay
– Ask Right Questions
7 Days
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