

# Expert Witness Rule 26 Disclosure Reports

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## Expert Witness – Rule 26 Disclosure Reports

Recent modifications in the Federal Rules of Civil Procedure impacted the procedures for discovery and disclosure of evidence used in the trial procedure. The courts have become more restrictive regarding the application of the rules and procedures which were developed to ensure full disclosure to the parties of all evidence relied upon by the parties in formulating their respective positions. These rules have direct effect upon the surveyor and the formulation of his professional opinion based upon evidence used to determine boundary locations.

Rule 26 provides the foundation governing the discovery process and outlines the duties of the parties with regard to disclosure. The rule defines the initial disclosure process, the disclosure of expert testimony, and pretrial disclosures. The rule specifically defines the trial preparation process of the experts regarding depositions, reports, opinions and evidence. Any surveyor intending to provide expert witness testimony must be familiar with and must adhere to the rules which will govern his testimony.

This course will provide a thorough review of Rule 26 regarding the preparation of the surveyor's expert report and testimonial process. The surveyor will be equipped with the knowledge of the rule, its impact upon the service provided, and the expectations of the parties for whom the report is generated. We will review the expert report specifically and discuss various formats which can be utilized to express the opinions concluded while providing full disclosure of the evidence used and the principles relied upon to reach the conclusions.

### Instructor Biography



**John B. Stahl, PLS**, is a registered professional land surveyor in the states of Utah and Montana, currently owning and operating Cornerstone Professional Land Surveys, Inc., and Cornerstone Land Consulting, Inc., in Salt Lake City. Mr. Stahl specializes in surveying land boundaries, resolving boundary conflicts, performing title research, land boundary consultation services, mediation and dispute resolution. He has been qualified as an expert witness in numerous boundary and negligence cases and has actively participated in the preparation of amicus curiae briefs to the Utah Supreme Court. He has furthered his mediation education by participating in a state qualified 40-hour training program. Mr. Stahl has been a state chair of the Utah Council of Land Surveyors and a Utah delegate to the Western Federation of Professional Surveyors. He is an adjunct professor for the Salt Lake Community College, where he has taught mathematics, ethics and liability courses for land surveying students. He has taught an extensive course in land boundary law since 1991. Mr. Stahl received his A.A.S. degree in land surveying from Flathead Valley Community College in Kalispell, Montana and has authored several articles and publications covering topics on boundary laws, research, and resolving conflicts of evidence.

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# Expert Witness Rule 26 Disclosure Reports

by John B. Stahl, PLS

## Introduction

Each jurisdiction in our legal system from the Federal Courts, the State Courts and even the Administrative Courts have adopted rules of civil procedure which govern the way in which procedures are to be conducted. These procedures are particularly familiar to the trial attorney who follows them to the letter with every case. It would be akin to the surveyor who routinely navigates the local subdivision ordinances to gain the approval of a project. While each jurisdiction is somewhat unique in their particular process, they have familiar characteristics among them.

In order to maintain a similar degree of familiarity, the court systems also have rules which govern the sequence and timing of events to maintain strict control over the procedures. The rules which outline the procedures exist for the purpose of bringing a degree of uniformity to the litigation process. Increased uniformity was recently brought to the courts through a national effort within the Federal district court system. The courts, in 1992, undertook *The Style Project*, an extensive remodeling of the existing rules which had been in place since 1938. On December 1, 2007, the revised and restyled Federal Rules of Civil Procedure (F.R.C.P.) became effective. *The Style Project* converted the then existing rules to a “plain language” format for easier understanding.

While the rewrite made significant stylistic changes in the Rules, no substantive change was made by the production of the new rules. The rules do contain important clarifications consistent with existing laws which should initiate a review by every expert witness. Recent trends by the courts to maintain and encourage early settlement by opposing parties through *Alternative Dispute Resolution* have focused even more effort toward open pre-trial disclosure of evidence. Due to the highly technical nature of expert opinions, the documentation of opinions and the evidence upon which those opinions are formulated is a critical step in the discovery process.

This course will provide a thorough review of *Rule 26* disclosure requirements regarding the preparation of the surveyor’s expert report and testimonial process. The surveyor will be equipped with the knowledge of the rule, its impact upon the service provided, and the expectations of the parties for whom the expert report is generated. We will review the expert report specifically and discuss various formats which can be utilized to express the opinions concluded while providing full disclosure of the evidence used and the principles relied upon to reach the conclusions.

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## **Rule 26 – The Duty to Disclose**

The Federal Rules of Civil procedure, Rule 26 has been formulated by the court to ensure pre-trial discovery and disclosure of the evidence to be presented at trial. The evidence which supports each party's claim must be gathered and presented to the opposing party for their review and consideration. Rule 26(a)(1)(A) requires the parties to provide:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

The witness list will provide the a means for the opposing side to consider the subject of each witnesses testimony and to determine whether there is a need for deposing any witness in more detail to ascertain the extent of their knowledge and the impact of their testimony.

The parties are also required to make initial disclosures of all documentary forms of evidence which are reasonably available. The courts will presume that the parties have made a full investigation of the evidence.

(ii) a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

The Federal Rules of Evidence (2007) outline the rules govern the introduction and use of evidence in civil and criminal proceedings. These rules have been adopted by the courts of many states with little or no revision. The surveyor should be acutely familiar with these rules as they provide the governance of the methods and techniques that the surveyor follows when researching, gathering,

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and analyzing evidence in the determination of a boundary line. If the surveyor's determination is challenged by the landowners, the role of the court and jury is to "follow after the surveyor over the same ground, and that it is exceedingly desirable that he govern his action by the same lights and the same rules that will govern theirs."<sup>1</sup>

In accordance with Rule 26(a)(2), the disclosures must also identify any witnesses which may be used at trial to present evidence under the Federal Rules of Evidence 702, 703, or 705.

**Rule 702. Testimony by Experts**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

**Rule 703. Bases of Opinion Testimony by Experts**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

**Rule 705. Disclosure of Facts or Data Underlying Expert Opinion**

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Disclosure of expert testimony is required to be made in the form of a report prepared and signed by the witness. Rule 26(2)(B) details the report requirements.

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<sup>1</sup> The Judicial Function of Surveyors; transcript of a message delivered by Justice Thomas M. Cooley of the Michigan Supreme Court at the second meeting of the Michigan Association of Surveyors and Civil Engineers at Lansing, Michigan, between January 11 - 13, 1881

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(B) *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 data or other information 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.

The rules also specify the timing and sequence of expert testimony disclosures and any supplemental disclosures which may be required. All pre-trial disclosures are required to be made at least 30 days before trial with opportunity given to the parties for expressing their objections to the witnesses within 14 days after they receive notice of the disclosures.

## **The Role of the Witness in Court**

The administrative rules of evidence adopted by the civil courts define the role of witnesses offering testimony before the court. The witnesses are generally categorized into two different types: the *lay witness* and the *expert witness*. The lay witness is described as the general or common witness who testifies before the court regarding evidence which was directly perceived by them. Their testimony addresses the affected senses of the witness by the event as it unfolded. Evidence of what the witness saw, heard, touched, tasted, or smelled can be offered before the court. The description of the witness' perception of the events is used to relay their testimony to the jury. The testimony of the lay witness cannot contain opinion testimony, as it the function of the jury is to weigh testimony and formulate their opinion. The lay witness' perception of the evidence observed by them occasionally ventures toward the expression of an opinion derived from their senses, the opinion being the means used to relate their testimony.

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Article VI of the Federal Rules of Evidence covers the topic of witnesses who may testify before the court.

**Rule 601. General Rule of Competency**

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

**Rule 602. Lack of Personal Knowledge**

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

Rule 602, in combination with Rule 701, provides a distinguishing difference between the roles of the lay witness and the expert witness. The lay witness testimony provides evidence to the court based upon *personal knowledge* and perceptions of the events as they are remembered by the witness. The lay witness can only express opinions or inferences which are based upon their *direct perceptions* as the events unfolded. These limited opinions are only presented to the court for the purpose of understanding the testimony of the witness and to develop the facts of the case. The testimony of the expert witness, as seen above in Rule 702, are based upon a formulation of scientific, specialized knowledge which will assist the court in understanding and interpreting the evidence.

**Rule 701. Opinion Testimony by Lay Witnesses**

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

A lay witness may attempt to testify that “I saw the defendant shoot and kill the victim” resulting in an immediate objection to the form of the testimony. The testimony approaches the expression of an opinion or the witness’ conclusion of the series of sensory perceptions. The opinions or conclusions are not within the prerogative of the lay witness to formulate. The testimony is better

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expressed as, “I saw the defendant from across the street.” “I saw the defendant raise his hand in front of him.” I saw a shining object which appeared to be a gun.” I saw a flash from his hand which appeared to be a muzzle blast.” “I heard what appeared to be a gunshot ring out and echo down the street.” “I saw the other man fall to the sidewalk.” It is up to the jury to decide if the witness saw the defendant shoot the victim.

Much of the surveyor’s testimony in a land boundary case is presented in the form of a lay witness. The surveyor’s testimony regarding the discovery and recovery of the evidence and the process by which it was gathered speaks directly to the actions of the surveyor. The presentation requires that the surveyor lay a foundation for the evidence utilized in the boundary determination, however, the analysis and conclusions reached based upon the evidence are the realm of the expert witness. The evidence of what the surveyor did, what he observed, distances measured, documents researched and monuments recovered could be entered into the record by the surveyor, his field crew, or anyone who was directly involved in gathering the evidence. The evaluation and analysis or interpretation of the meaning of the evidence offered and the formulation of opinions based upon the evidence is testimony which must be brought before the court by an expert witness.

The expert witness is allowed to formulate conclusions from evidence and to testify as to their opinion regarding their examination of the evidence. The expert acts, not as the jury, but in a manner which assists the jury in understanding technically specific evidence which would otherwise have no meaning to a jury of lay people. Given the following evidence from a medical examination report:

“the hair is reddish brown and abundant, the eyes are blue, the right pupil measuring 8mm. in diameter, the left 4mm. There is edema and ecchymosis of the inner canthus region of the left eyelid measuring approximately 1.5 cm. in greatest diameter. There is edema and ecchymosis diffusely over the right supra-orbital ridge with abnormal mobility of the underlying bone.” Autopsy report of President John F. Kennedy. (reproduced in ARRB MD #3 and Warren Report, p. 538.)

It would do little good to present such testimony to a jury and expect that it would have any meaning without the additional testimony from an expert in the medical examiner’s field to explain the meaning of the particular evidence, to derive a conclusion based on the evidence and to express their opinion as derived from the evidence. Without the testimony of the expert in the form of opinion, the court and jury would be lost in critical information which is entirely meaningless to them.

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## Just Who Qualifies as an Expert?

The expert witness provides a critical role in the court system. Matters of technical importance can often only be addressed by an expert trained in the particular area of question before the court. Can you imagine a judge or jury having to rule on a cause of death without someone knowledgeable in the field of forensics who can explain to them the evidence, its interpretation, and its application? Even when confronted by opposing experts, the jury can listen to the testimony and reach a decision based upon the appearance of *credibility*. One expert will appear more credible than another. One witness will offer a better explanation of the evidence and the foundation which underlies the reasoning behind their ultimate conclusion.

Just as the medical field provides experts in the forensics arena, so too the Professional Land Surveyor can serve as an expert. The surveyor's courtroom testimony is critical for the judge and jury to understand the evidence presented, to understand how the evidence is to be weighed, and to understand how the rules of law are applied to the facts determined from the evidence. The knowledge, skills and expertise of the land surveyor with regard to boundary location determination are needed to assist the judge and the jury to understand the evidence presented.

The qualification of an expert witness is the prerogative of the trial court judge. The *qualification process* undertaken by the judge typically includes a series of questions made by the attorney for whom the expert has been retained. The witness' education, experience, and professional background will be presented to the court for its consideration regarding the qualification of the witness as an expert. When challenged, the opposing attorney is given opportunity to impeach the witness' qualifications through a process of *voir dire* which is designed to determine the competency or suitability of the witness. The designation of the expert witness limits the testimony of the witness to only those opinions expressed within the specific area of competency for which the expert was qualified. Testimony which deviates from the perceived expertise may trigger an additional *voir dire* to determine the level of additional competency in the particular area.

The role of the expert, their qualification, the basis of their opinions, and the nature of their testimony in the form of affidavits and reports was scrutinized by the U.S. District Court of the Utah Central Division in *Boyett v. County of Washington*, No. 2:04cv1173 (D.Utah 11/28/2006).

It is the job of the trial judge to ensure that any scientific evidence or testimony is both relevant and reliable, before it is admitted into evidence. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). This same gate-keeping function applies to testimony and evidence based on "technical" and "other specialized" knowledge as well. *Kumho Tire Co.*,

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*Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). Based on Daubert, Rule 702 provides general standards for trial courts to use in assessing the reliability and helpfulness of expert testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. *Fed. R. Evid. 702*.

In other words, experts must identify the facts and data forming the basis for their testimony so courts can assess the sufficiency of the facts and data. And to be admissible, experts must base their opinions on scientific methods and procedures, not mere subjective belief or unsupported speculation. In particular, "[w]hen dealing with an issue of medical causation, a considered medical judgment is necessary, expressed in terms of probability rather than possibility." *Higgins v. Martin Marietta Corp.*, 752 F.3d 492, 496 (10th Cir. 1985). The court may exclude evidence where it finds "an impermissible analytical gap exists between the premises and conclusion." *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 886 (10th Cir. 2005) (citation and internal quotations omitted). And it is the burden of the proponent of the evidence to establish that the requirements for its admissibility have been met, by a preponderance of the evidence. See *Bourjaily v. United States*, 483 U.S. 171, 175 (1983).

In this case, the experts' compliance with Rule 26(a)(2)(B) (*Fed. R. Civ. P.*) is also at issue. Rule 26 requires complete disclosure, in an expert witness report provided to all parties, of all opinions an expert will give. (*Id.*) Rule 37 provides an enforcement mechanism for Rule 26. *Id.* § 37(c)(1). It provides that parties failing to disclose the information Rule 26(a)(2)(B) requires, "unless such failure is harmless[ . . . are not] permitted to use as evidence at a trial, at a hearing, or on a motion any . . . information not so disclosed." (*Id.*) The court addresses the parties' challenges to one another's experts in light of these factors.

The surveyor as an expert witness may have gained additional competency in the areas of title research, history in the local area, or a particular expertise in the application of certain legal principles. The witness may be challenged on each area of individual competency beyond the scope of what the court would consider normal or standard practice. The expert witness, when duly qualified by the court, is then given the opportunity to testify in the form of an opinion reached based upon the evidence presented at or before the trial based upon evidence reviewed by the expert to formulate his expert opinion. The opinion of the expert is given, not as instruction to the court, but as an assistance. The court will derive its own conclusions from the testimony offered in light

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of the expert opinions expressed. The court is not bound by the expert's opinions and will either accept or reject those opinions as the court deems appropriate.

### **Opinions on the Ultimate Issue**

The surveyor's testimony in a land boundary case is unique among most professions. Because the rules of law are directly applicable to the location of a boundary, the duty of the surveyor when locating a boundary line, parallel the duty of the judge in the courtroom. The *ultimate issue* before the court is the location of the boundary. This is precisely the issue which faces the surveyor on a daily basis. The surveyor's training, knowledge, skills, and expertise regarding the location of a boundary are applied by the surveyor in accordance with specific rules of law which also govern the ruling of the court itself. The rules are court-made rules; their application are made first by the surveyor on the ground, then by the judge and jury when a dispute over the surveyor's determination arises.

As an expert witness, the surveyor is not prevented from expressing an opinion on the ultimate issue before the court. The surveyor is, instead, looked upon as the expert with a responsibility to explain to the court the nature of the evidence recovered, its relative measure of importance weighed against other conflicting evidence, the determination of the facts of the case, and the appropriate application of the rules of law which determine the boundary location. The surveyor's testimony is not given as a final decision, but is merely a guide which the court may follow to make its determination of the boundary location. The surveyor, after all, is the expert who applies the rules of law on a daily basis. The judge has opportunity to apply those laws on very infrequent occasions.

#### **Rule 704. Opinion on Ultimate Issue**

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Once the court has heard the testimony of the expert, often including opposing testimony given by another expert, the final decision falls upon the judge. The testimony of the experts should provide

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the guidance necessary to understand the importance of particular evidence and its examination based upon its relative importance with other evidence. The surveyor's experience can offer invaluable clues to the judge or jury why a particular piece of evidence may be of more or less importance than another. The surveyor's expertise will also provide valuable explanation of the principles of law and their application to the facts of the case. The expert's testimony, to have any value, must be plausible, believable, and convincing.

## **The Surveyor's Role as Expert Witness**

The surveyor plays a critical role in any land boundary case. There are three steps which the court will follow when reaching its conclusion regarding a boundary location. First, they will gather the evidence. This phase will include the majority of the trial portion of the case. Second, they will analyze the evidence presented by categorizing and properly weighing the evidence in accordance with the Rules of Evidence. From this analysis process, the court will determine the facts of the case and will typically issue a "*findings of fact.*" A chronological listing of the facts as they unfolded relative to the boundary location will be reviewed. Third, the court will look to the law for the appropriate principle which applies to the given factual conditions. The application of the legal doctrines are what ultimately lead to the conclusion of the case, *i.e.* the boundary location.

The surveyor's determination of the boundary location precisely parallels the court's determination. Hopefully, the surveyor has followed the proper procedure for gathering the evidence, made a logical and defensible analysis of the evidence, considered all of the evidence while formulating the facts, and properly applied the legal principle as directed by law. Whether or not the court follows after the surveyor over the same ground will provide the ultimate test of the surveyor's actions.

## **Surveying Reference Materials**

There are a number of books in print which can assist the expert witness both in preparation for trial and during testimony. An excellent overview of the courtroom experience is given in a book entitled "*Surveying the Courtroom*" authored by John Briscoe and published by John Wiley & Sons, Inc. The book provides a summary of the rules of evidence and their applicability to expert testimony. Procedural elements from pre-trial to post-trial stages are also addressed. The book is written with land surveyors, engineers and title professionals called upon to testify in court in mind.

Another fine book dealing with the complexities of courtroom testimony by the expert witness is entitled, "*The Expert Witness Handbook: Tips and Techniques for the Litigation Consultant,*" by

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Dan Poynter and published by Para Publishing. This book contains numerous tips regarding the importance of demonstrating your testimony through the use of exhibits illustrative of the experts testimony.

A third work, to limit comment on only three of many and to focus attention on the subject material of this presentation, is a book entitled, “*Writing and Defending your Expert Report, The Step-by-Step Guide with Models*” by Steven Babitsky, Exq. and James J. Mangraviti, Jr., Esq. and published by Seak, Ink. This book provides the expert and excess of 400 pages of material containing numerous examples of actual reports with discussions of various formats and particular information to be included in an expert report as required by law.

### **Court Cases**

The majority of the surveyor’s duty and function in society is governed by common law emanating from the courts. The courts have provided sound and unwavering guidance to the land surveyor regarding the value of evidence, its collection and its analysis, the recognition of factual conditions and the importance of properly determining the facts, and explanations of the various legal principles used to determine boundary locations and their proper application. Study of case law should peak the interest of every surveyor, especially the surveyor asked to testify in an expert witness capacity. The surveyor’s opinion as expressed in the expert report will be ultimately tested against past court rulings.

The expert surveyor’s study should go beyond the subject of boundary determination and should include the study of pre-trial and post-trial, as well as courtroom procedures. The surveyor will likely be asked to join the attorneys in the preparation of complaints, interrogatories, and requests for production. The role of the surveyor in and out of the court room will likely entail a measure of consultation and assistance provided to the attorneys enabling them to understand the issues, the evidence, and the legal principles which govern their case. The surveyor, as a consultant, can provide an invaluable role during pre-trial preparation and during the trial by preparing the attorney for direct and cross-examination of the witnesses. The surveyor is an important team member.

### **Is Licensure a Requirement of the Expert Witness?**

Licensure or certification is an important factor for determining whether a particular individual is minimally qualified by the state to practice in a particular profession. Expertise in a particular subject matter, however, is not proven by the ability to obtain a license. Every expert witness proffered before the court will undergo a qualification process. The question is not whether the

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person is qualified to be a surveyor, engineer, or mechanic. The question is whether the person has the education, skills, and experience necessary to assist the court in understanding the evidence presented before it. Can the expert assist the court in understanding the meaning and importance of the evidence?

On the witness stand, the surveyor is not testifying as a licensed surveyor authorized to testify. The testimony is directed to an understanding of industry wide application of certain techniques and scientific principles applied to the evidence applicable to the case at hand. The expert must be able to derive an opinion based upon the evidence as well as the application of sound principles and to explain to the court in a convincing manner, how that opinion was reached. Licensure of an individual, while putting the court's mind at rest to some degree by the level of professional achievement, will have little value with regard to the overall level of expertise to recognize a variety of viewpoints and considerations which both favor and disfavor a particular opinion.

“On appeal, defendant urges that the trial court erred by its admission of the testimony of witness Harry N. Carlton concerning the survey he conducted of the area. Mr. Carlton, a resident of Wyoming, is a licensed engineer and land surveyor in that State. Defendant contends that Mr. Carlton was not qualified to testify as an expert witness because he was not licensed to act as a surveyor in the State of Utah in accordance with Chapter 22, Title 58, U.C.A. 1953, which regulates the practice of engineering or land surveying.

The qualification of an expert witness is to be determined by the trial Judge, and if he determines that a witness by reason of training and experience can assist the jury by giving an opinion on a matter properly before the court, we on appeal should not hold that testimony should be stricken unless such palpable ignorance of the subject matter is manifested by the witness as to indicate an abuse of discretion on the part of the trial Judge in allowing the witness to express an opinion in the first place or in refusing to grant a motion to strike after it is given.

Defendant proffers no facts concerning the witness, either as to his lack of training or experience or as to his palpable ignorance of the subject matter, to indicate that the trial Judge abused his discretion in permitting Mr. Carlton, as a qualified expert witness, to testify. His testimony was properly allowed as competent evidence.” *Cornia v. Putnam*, 26 Utah 2d 354, 489 P.2d 1001, (1971)

Expert witnesses should guard themselves against becoming an advocate of any particular position or opinion. The evidence, as it unfolds prior to trial and during trial, should be continuously evaluated and re-evaluated by the expert. As new evidence is discovered, the expert must *reevaluate* their opinion. The new evidence must be considered, weighed, and categorized. Any new facts determined by the evidence have a potential impact upon the application of the legal principles

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which govern the boundary location. Just as evidence can change the outcome of a boundary survey, the same evidence discovered before or during a trial has the same potential. The expert must remain *unbiased* and be prepared to give an alternate opinion if the evidence is found to support it.

## **The Civil Process**

The expert should acquaint themselves with the Rules of Civil Procedure. These rules will govern the process followed throughout the pre-trial, trial, and post-trial environments. The scheduling of the exchange of information is a critical step in the litigation process. The more familiar the expert is with the process, the fewer surprises will loom up in the form of immediate deadlines. The Rule 26(f) scheduling conference will provide a *framework* for the timing of initial reports, responses, and rebuttals necessary for the expert. The expert must be apprised of the schedule in order to perform their function in a timely manner. The court may not tolerate tardiness in any submissions made by the expert.

## **Initiating the Claim**

The surveyor has certain duties and responsibilities which are required for the proper performance of the survey under state and local statutes as well as making a proper determination in consideration of common law procedures. The state and local statutes will determine whether the surveyor has followed the appropriate standard of care during the performance of the survey. The statutes are relied upon as dictating the proper method and procedure utilized during the survey. The correctness of the results achieved by the surveyor are typically beyond purview of the statutory process. A surveyor can follow process and fall within the *standard of care* of a reasonable person under similar circumstances and can still derive an incorrect answer.

Upon discovery of additional evidence, the surveyor can always alter their opinion. The process for discovery of evidence changes dramatically once a claim is initiated by one of the parties. The surveyor is no longer working solely in accordance with the statutory process, the civil procedure will take precedence. The action is controlled by the judicial process which differs from the administrative and legislative functions of the law. This is an important distinction of which the surveyor must be aware. *Once the claim is filed, the rules have changed.*

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## **Initial Disclosures**

The parties should consider the necessity of employing an expert early on in the civil process. Too often, the parties have their survey in hand, equate that survey with an expert opinion worthy of all challenges, and pursue court action without any discussion with the surveyor. The surveyor is often the one who has discovered the issue leading to the dispute and should remain in contact with the parties throughout any attempts at negotiation, mediation, or litigation. The surveyor can provide the necessary *consultation* to ensure that adequate documentation of any resolution, if achieved. The surveyor also should remain apprised of any discovery of evidence which may not have been considered during the course of the survey. The disclosure of new evidence may have an impact upon the surveyor's initial decision. Finding out about that change of opinion during the last throws of desperation during trial preparation could have a disastrous outcome on both the surveyor and the parties.

The surveyor, knowing the challenges which may come against the survey, should take early opportunity to document the evidence gathered during the course of the survey and to document the key elements which led to the final decision. Continued involvement during the initial discovery process will allow the surveyor to obtain and evaluate evidence as it is discovered and to reevaluate the survey findings in light of any new evidence. It is *imperative* that the surveyor retain an open and unbiased opinion so as not to dismiss conflicting or opposing evidence. Each piece of evidence must be given due consideration.

## **Requests for Production, Interrogatories, and Admissions**

The requests provided an opportunity for the parties to gather evidence from the opposing party as well as an opportunity to "show their hand" to them. An early showing of information allows the parties to re-evaluate the strength or weakness of their positions as well as to determine what facts they may agree upon. This early showing required by the courts will often lead to settlement of misunderstandings between the parties based upon mis-communications. It is hoped that the parties haven't become too entrenched to consider settlement options available through alternative dispute resolution processes.

During this phase of early investigation, the surveyor may request that the attorneys obtain certain information which is necessary for evaluation. It is important that all requests be made through the attorneys. This is one area where the rules of the civil process differ from those normally followed by the surveyor. If the surveyor wishes to speak to the opposing party's surveyor or the neighbor (the opposing claimant), the conversations must be pre-approved by the attorneys representing their

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clients. The conversations may be freely allowed, or they may be allowed under strict rules and guidelines previously agreed upon. Such communication may be considered *ex parte*, or “out of party” meaning that it is one-sided making any evidence gleaned from the conversation inadmissible.

### **Pretrial Disclosures**

Upon exchange of initial disclosures, the parties will move to a phase of the litigation which requires a Rule 16 scheduling conference. It is important for the expert to be apprised of the schedule as it will provide the deadlines for pre-trial discovery of all evidence to be brought before the trial. There will typically be two phases for pre-trial discovery. The first phase will involve an investigation of all potential lay witnesses. Obtaining an accurate portrayal of the general nature of their testimony will provide important clues to the strategy necessary to gather the evidence for trial and for consideration by the experts. The second phase involves the *final evaluations* and reporting process for the experts. The experts cannot fully evaluate the case until all of the evidence has been provided. Any additional research necessary to evaluate, support, or to impeach the evidence presented by the lay witnesses must be made prior to this phase. The experts will be asked to formulate their opinions and to document those opinions in the form of an *affidavit* or an *expert report*.

#### Rule 16. Pretrial Conferences; Scheduling; Management

##### (a) Purposes of a Pretrial Conference.

In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

- (1) expediting disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation, and;
- (5) facilitating settlement.

### **Affidavits**

Occasionally, as issues are boiled down through the pre-trial discovery process, the central ones begin to emerge and become the focus of the dispute. Insignificant side issues are eliminated due

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to the lengthy litigation process and more important issues come to the surface. Minor hearings regarding the evidence and the issues are often held as requested by motions for Summary Judgment. The *Summary Judgment* hearings are often dependent upon evidence or testimony which has not yet been presented before the court as there has yet been no evidentiary trial. Any evidence presented during the pre-trial hearings is typically entered in the form of an affidavit. An *Affidavit* is a sworn statement of fact, signed and acknowledged by the declarant (often called the affiant or deponent).

The affidavit provides a means for taking testimony which would normally be entered during the trial process, abbreviating the testimony to a series of concise statements of fact in the perception of the affiant. Affidavits are also commonly used as a method to preserve testimony of an individual while information is more fresh in their mind at the time than later at trial. The evidence presented in the affidavit is not live testimony and cannot be cross examined by the opposing counsel. An affidavit intended for use in a pre-trial motion or hearing must be sworn to by the affiant and acknowledged under sworn oath of truth of the statements asserted.

An expert report frequently takes the form of an affidavit where the opinions expressed in the report are reiterated in a more succinct fashion. *There is a distinct difference, however, between an affidavit and an expert report.* In an affidavit, the foundation for the opinions is often abbreviated or condensed to include only the primary support as the basis of the expert opinion. Exhibits may be attached in support of the affidavit as an assertion of the facts as determined by the expert, however, the expression of the opinions often are not given as much supporting foundation as normally contained in the expert report.

The affidavit consists of *three primary sections: 1) the header or title; 2) the fact statements; and 3) the footer or signature.* The header consists of a simple title at the top of the document containing the affiant's name in a phrase such as "Affidavit of John Doe." The fact statements typically start with an identification of the affiant (name, age, occupation, address, etc.), their relationship to the facts as stated, and the facts as known or observed by the affiant. The footer of the affidavit includes a sworn statement of truth to the matters contained in the affidavit along with the notarized signature. The affidavit must be *sworn by the affiant* as to the "truth of the matters to be testified at trial."

While appearing technical in distinction, the courts have focused a high level of attention to the distinct difference between an expert who expresses and opinion in an affidavit which may be later altered during the trial and the expert's report which is required as a part of the disclosure process. Such concern was expressed by *Boyett, supra*, where they were faced with numerous expert reports and affidavits relied upon in a motion for summary judgment.

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At issue are: Dr. Eugene Strayhorn's first report, dated September 25, 2003; Dr. Strayhorn's second report, dated September 15, 2005; and Dr. Strayhorn's affidavit, which is undated. To oppose a motion for summary judgment, the non-moving party must "go beyond the pleadings and 'set forth facts' that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the non-movant." [citations omitted] *Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998).

Only sworn statements are admissible at trial. *See Fed. R. Evid. 602.*

Dr. Strayhorn submitted neither of his reports under oath, and Dr. Strayhorn was not deposed. Because neither of Dr. Strayhorn's reports are contained in sworn affidavits or accompanied by a declaration that the statements therein are offered under the penalty of perjury, they cannot affect the defendants' otherwise proper motions for summary judgment.

This is no mere technical quibble. The defendants first challenged the plaintiff with regard to this issue in February 2006. This challenge provided the plaintiff with notice its evidence failed to conform to the requirements of the Federal Rules of Civil Procedure, because the plaintiff had neglected to submit various statements in a manner "as would be admissible in evidence" at trial. *See Fed. R. Civ. P. 56(e)*. Since this time, the plaintiff has had numerous opportunities to resubmit its evidence in the proper form, including at the summary judgment hearing on September 28, 2006, but has failed to do so.

The expert's affidavit may be limited in scope from those opinions expressed in the expert's report. Because the affidavit is typically used to establish facts and opinions in pre-trial motions and hearings, the content of the affidavit is best effective when the issues germane to the specific motion. The ability to *limit the scope* of the affidavit to a few key issues can provide a powerful tool for focusing the attention of the court to a specific matter which may be lost in a 200 page expert report.

## **Depositions**

At the appropriate time agreed to by the parties during their Rule 16 scheduling conference, lists of witnesses are exchanged including a brief statement summarizing the relevance of their testimony. The witness list will include a disclosure of expert witnesses intended to be relied upon during the trial. The process of discovery will typically be scheduled such that the parties have adequate time to depose the witnesses, starting with the lay witnesses, then proceeding to the experts. The interim period between the lay and expert witness depositions, opportunity is provided for the experts to attend or review the *depositions* to ensure that they have been apprised of all evidence which will likely be presented during the trial. Once the evidence is in, the experts will formulate their final opinions as disclosed in their expert reports.

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Once the professional's opinions have been disclosed to the opposing parties, the experts will be given another period of time to review the report of the opposing party's expert and to prepare a rebuttal report in response. This *rebuttal report* is as important, if not more important, as the original expert report. The experts on both sides, once review of the expert reports and rebuttal reports have been properly completed, will then be made available for depositions.

During the deposition, the calling party will be held responsible for the expenses incurred for the expert witness being called. It is for this reason that Rule 26(2)(B)(vi) becomes apparent. The disclosure of the expert witness fees will place the calling party on notice as to the expectation of what fees will be required for *payment* of the expert's deposition. The cost of legal representation by the parties is the duty of each party to pay; the expert witness fees, however, are paid by the party calling the deposition. The expert should pay particular attention to and be familiar with the rules for payment in each jurisdiction being testified in. The Rules in California, for instance require payments to the expert up-front with specificity in the judicial procedure. The rules in other jurisdictions may not be as specific and may be, instead, a contractual issue between the expert and the deposing party. At times, the parties' counsel may jointly agree to trade expert witnesses for deposition, each party paying their own expert.

The fees for deposition testimony may also include ancillary costs such as travel time and expenses as well as time required in preparation of the deposition. *Preparation time* is often a sensitive issue for both the parties and the expert. Often many months or years transpire between the time the expert report is written and the expert's deposition. This requires the expert to review the file, visit the site, and review his expert report in order to refresh his memory in support of the opinions expressed in the report. Review time directly associated with the deposition, especially after a long period of time since the expert's report preparation are likely chargeable to the deposition. If the expert's review and preparation are made not only for the deposition, but for the trial itself (when held in close proximity to the deposition) may dissuade the time as related directly to the deposition and may be related to time spent in preparation for the trial itself which is not chargeable to the calling party.

Some guidelines for determining ancillary time charged in connection with the expert's deposition were discussed in the case of *Moore v. Smith*, 2007 UT App 101 (Utah App. 03/22/2007).

Federal courts interpreting Rule 26(b)(4) are split on whether the rule allows for parties to recoup fees from opposing parties for time spent preparing for the opposition's depositions. However, a slim majority provides for such recovery, on the condition that the recovered fees are reasonable. Compare *Boos v. Prison Health Servs.*, 212 F.R.D. 578, 578 (D. Kan. 2002) (mem.) (allowing

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recovery of expert's reasonable fees for time spent preparing for depositions), *Collins v. Village of Woodridge*, 197 F.R.D. 354, 357 (N.D. Ill. 1999) (mem.) ("The Court believes the better reading of Rule 26(b)(4)(C)(i) is that the expert's reasonable fees for preparation time are recoverable by the party who tendered the expert."), *McNerney v. Archer Daniels Midland*, 164 F.R.D. 584, 587 (W.D.N.Y. 1995) (allowing recovery of expert's reasonable fees for time spent preparing for depositions), *Hose v. Chicago & N. W. Transp. Co.*, 154 F.R.D. 222, 228 (S.D. Iowa 1994) (disagreeing with "other cases denying an expert compensation for time spent preparing for the deposition"), *Hurst v. United States*, 123 F.R.D. 319, 321 (D.S.D. 1988) (allowing recovery of expert's reasonable fees for time spent preparing for depositions), *American Steel Prods. Corp. v. Penn Cent. Corp.*, 110 F.R.D. 151, 153 (S.D.N.Y. 1986) (same), and *Carter-Wallace, Inc. v. Hartz Mountain Indus., Inc.*, 553 F. Supp. 45, 53 (S.D.N.Y. 1982) (same), with *Rhee v. Witco Chem. Corp.*, 126 F.R.D. 45, 47 (D. Ill. 1989) (allowing recovery under rule 26(b)(4) only in limited circumstances, "such as in a complex case where the expert's deposition has been repeatedly postponed over long periods of time by the seeking party causing the expert to repeatedly review voluminous documents"), *M.T. McBrian, Inc. v. Liebert Corp.*, 173 F.R.D. 491, 493 (N.D. Ill. 1997) (allowing recovery for expert deposition preparation time only if the litigation is complex and there "has been [a] considerable lapse of time between an expert's work on the case and the date of his actual deposition"), *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 154 F.R.D. 212, 214 (E.D. Wis. 1994) (same), *EEOC v. Sears, Roebuck & Co.*, 138 F.R.D. 523, 526 (N.D. Ill. 1991) (agreeing with holding in *Rhee*, 126 F.R.D. at 47), and *Benjamin v. Gloz*, 130 F.R.D. 455, 457 (D. Colo. 1990) (same).

Courts granting the sought after recovery provide the following reasoning: (1) "Time spent preparing for a deposition is, literally speaking, time spent in responding to discovery (except where the deposition preparation time actually constitutes trial preparation, which we conclude is not the case here given the lengthy lapse of time between the depositions and the trial)," *Collins*, 197 F.R.D. at 357; (2) "The goal of [r]ule 26(b)(4)(C) is to compensate experts for their time spent in participating in litigation and to prevent one party from unfairly obtaining the benefit of the opposing party's expert work free from cost," *Hurst*, 123 F.R.D. at 321; (3) "[B]ecause depositions are the only type of discovery under . . . [r]ule 26(b)(4) – it would have been relatively easy for the [r]ule's drafters to limit recovery to the time actually spent appearing for the deposition if that was what they intended to do," *Collins*, 197 F.R.D. at 357; and (4) compensating an expert for time spent preparing for a deposition may actually reduce costs by decreasing the length of time spent at a deposition. See *Hose*, 154 F.R.D. at 228.

A few courts hold that such fees are generally not recoverable unless there are exceptional circumstances or complex or unusual issues. See, e.g., *S.A. Healy Co.*, 154 F.R.D. at 214; *Sears, Roebuck & Co.*, 138 F.R.D. at 526; *Rhee*, 126 F.R.D. at 47-48. The Northern District of Illinois

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rejects these cases on grounds that they require something other than a plain language reading of rule 26:

Either the phrase "time spent responding to discovery" includes deposition preparation time, or it does not. If it does not, then there is no basis under Rule 26(b)(4)(C) or any other provision of the Federal Rules to shift such fees. In short, the Rule on its face does not permit a construction that says that such fees may not be awarded, but still somehow allows for them in unusual or exceptional cases.

The Court believes that the better reading of Rule 26(b)(4)(C)(i) is that the expert's reasonable fees for preparation time are recoverable by the party who tendered the expert. *Collins*, 197 F.R.D. at 357.

... Because this is an issue of first impression in Utah, we think it worthwhile to note that when determining reasonableness, the federal courts examine several factors, including the number of hours spent preparing for the deposition, the amount of material needing to be reviewed, the scope of the deposition, and the time between the expert's preparation of the report and the taking of the deposition. [footnote] See, e.g., *Collins v. Village of Woodridge*, 197 F.R.D. 354, 357 (N.D. Ill. 1999) (mem.); *McNerney v. Archer Daniels Midland*, 164 F.R.D. 584, 587 (W.D.N.Y. 1995). Although we do not make these factors mandatory, we consider them salutary. Of course, the trial court will also need to determine if the amount of experts' fees is reasonable.

The expert should have a clearly written contract with their client which addresses their fees including the costs associated with travel and a stated fee for trial and deposition preparation time. No matter which party is ultimately responsible, the expert's time for services rendered in preparation for trial are compensable. A clearly stated contract provision will help to ensure that the parties are apprised ahead of the deposition what the expected fees charged by the expert will be. Once the expert receives the *subpoena* notice for the deposition, a written response should be made to the calling party notifying them of the expected fees including preparation time and travel. A timely response is necessary to allow the parties to negotiate with the opposing counsel any unexpected fees they did not consider before calling the deposition.

The expert should familiarize himself with Rules 27 through 32 of the Federal Rules of Civil Procedure. These rules will cover in detail the procedures for the deposition itself and the underlying purposes for the deposition and its use throughout the trial process. Of course, the appropriate rules for the particular court jurisdiction are equally important where they may differ from the federal rules.

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## Disclosure of Expert Testimony

Expert testimony, due in large extent to its complex nature, must be made in the form of an expert report. The report should provide a summary of opinions be expressed by the expert, the facts upon which the opinions are based, and the evidence reviewed by the expert to formulate the basis for the factual determinations. In many senses, this process is similar to that typically taken by the courts when reaching a determination based upon facts determined at trial.

The disclosure of the expert in the written report should contain a summary of the evidence relied upon by the expert to formulate their opinion, including attachment of all evidence determined to play a role in the expert's analysis. Rule 26(2)(B) is quite explicit in its requirement for the expert report to contain "complete statements of all opinions" expressed including the "basis and reasons" for the opinions. The report is required to outline the evidence not only relied upon by the expert to formulate their opinion but also to include "other information considered" in forming them. The rules also require the inclusion of exhibits contemplated for use at trial.

## The Expert Report

It is said of most land boundary cases that the case is won or lost on the testimony of the expert. I would go further to state that the testimony of the expert may likely be won or lost on the basis of the expert report. A well written expert report will likely result in the early settlement of more cases than it will ever shed light upon in the court room.

The expert report provides an essential element to the disclosure of evidence as well as the expert opinions germane to the issues being litigated. The amount of evidence generated during the discovery process can be daunting. The evidence is often conflicting and confusing. The experts themselves are frequently overwhelmed with the amount of evidence and the level of conflict between the evidence. It is no wonder that the lay witness or the client are confused. The expert report can be the very tool which sorts through, itemizes, and categorizes the evidence and derives from that evidence an important set of facts which define the stage for the litigation.

The *organization* of the report content and summaries of the opinions expressed by the experts can make or break the case. The expert report will be one of the most frequently referred to documents both before and during the trial. A well written report can easily be looked upon as the *defacto* document which will guide the court in its decision. The importance of the expert and their testimony is recognized in the rules of civil procedure. The expert report is the document which

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compiles that importance into a concise format which must be easily read and understood by the judge, jury, attorneys, and clients as well as the other experts themselves. If the report is written in such a technical language as to dismiss understanding by the layman, the report may go misunderstood with little attention heeded to its contents or conclusions. *The report must be well organized and understandable to be effective.*

## **Contents - What to Include**

Many of the particular requirements for the expert report are outlined in Rule 26(2)(B) of the Civil Procedure.

(B) *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 data or other information 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.

These few short statements contain a brief synopsis of what goes on behind the scenes in a court case. The expert report will set the stage for the many facets of the case ranging from its procedural processes to its ultimate conclusion. The judge, jury and attorneys will look to the expert report to guide them in a logical pathway to a logical conclusion. A good expert will know how to communicate complex analysis in a fashion that is easily understood by the reader. Remember your audience. They have no expertise in the intricacies of your profession. They have only a basic understanding of the evidence. They need your report to point the way to a logical conclusion.

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## Opinions Expressed

The very heart of the expert report is the *opinions* expressed. The subject of the expert opinions should be defined at the outset of the report, even during the initial contract stage between the expert and the parties. When preparing a report, you should be able to write a brief synopsis of the subject of each opinion. Keeping these opinions in sight while preparing the report will help guide you to its successful completion. What is it that the client has asked of you? What is the purpose behind your engagement? What are the ultimate issues of concern which need to be determined? Is the subject of the case simply the ultimate location of the boundary? Or, does the case involve other issues such as zoning violations, access issues, technical procedural issues, or standard of care issues? Each one of these issues can be contained in a clearly defined and clearly expressed opinion.

The opinions expressed could be addressed in the introduction portion of the report following a brief overview of the property location, a discussion of its condition, or its topography. Whatever is important to paint a picture of the issues at hand. Help the reader to create a mental image of the property, its general setting, and the locations of the parties involved in the litigation. Keep the introduction simple and easy to understand. Engage the reader and leave them with the *impression* that you are about to tell them a story.

List for the reader the various opinions that you are about to discuss. You don't necessarily have to give them the ultimate result of each opinion, but might instead choose to present the opinions by subject matter. Informing the reader of the subject would lead to statements such as:

- 1) The location of the boundary line as originally run out on the ground by the surveyors, relied upon by the landowners in good faith, and perpetuated by the construction of their home, fences, barn, and flower garden in relation to the line.
  
- 2) The historical use of the driveway by the owner of the adjoining property for driving their cars, a variety of farm equipment, their guests, and the postman.

As opposed to a statement of:

- 1) In my professional opinion, the boundary line is located between a stone and a pipe as shown on my survey.
  
- 2) In my professional opinion, the driveway constitutes a prescriptive easement appurtenant to the south adjoining property.

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Save the direct affront of your opinion until the summary. Get your point across by telling the reader where they are likely to end up and how they are likely to get there, but don't tell them where to go. Allow them to go there with you. Allow them to follow your line of thinking which will ultimately arrive at the same end result.

## **Basis for Opinions**

The expert witness must be able to lay a *foundation* for the opinions expressed in the report. The foundation, like a brick wall, must be plumb, level and true when finished. Any opinion based upon a shaky foundation will be equally shaky. The expert must know the evidence, analyze the evidence, and sort through the evidence. The evidence must be arranged in some methodical process before it will be seen as anything other than a pile of bricks with no overall meaning. How you assemble the pieces will assist the reader of the report in understanding the evidence and how the evidence links together to form the foundation for the opinion.

“An expert witness can give an opinion based upon facts previously testified to by him (State v. Megorden, 49 Or. 259, 88 P. 306, 14 Ann. Cas. 130), but cannot be permitted to give an opinion or conclusion on facts known to him and not communicated to court or jury; he must, so far as possible, first detail the facts. (State v. Simonis, 39 Or. 111, 65 P. 595; State v. McLennan, 82 Or. 621, 162 P. 838; State v. Willson, 116 Or. 615, 241 P. 843; Northwest States Utilities Co. v. Brouillette, 51 Wyo. 132, 65 P.2d 223, 69 P.2d 623.)” *Irion et al. v. Hyde et al.*, 105 P.2d 666, 110 Mont. 570 (1940)

Don't overlook or leave out critical evidence. Missing bricks can leave gaping holes in the perceived logic behind the opinions expressed. If the reader cannot clearly understand the process used by the expert, they are left with a pile of bricks and no confidence in the formulation of the expert opinion. As you present the evidence, present it in a way that continues to promote development of a *graphical perception* of the events. Don't simply state the order of events in chronological fashion. By the time you get to event number 7, the reader is struggling to remember event number 1. You can forget about events 8 through 108 unless you've told a story which paints a visual representation for the reader.

Make certain, as you formulate the basis for your opinion that you don't simply discard evidence which doesn't fit in your wall of events. Each piece of evidence must be weighed not from the perspective of whether it fits with your opinion or not, but whether it tends to add or detract from a particular point of fact. It is expected that there will be *conflicts of evidence*. That is likely the nature of the dispute in the first place. Evidence must be considered whether or not you think it is

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“good” evidence or “bad” evidence, or evidence which forms an “agreeable” position or a “contrary” fact. The evidence is what it is and it is often contradictory. One of the duties of the expert is to sort through the evidence and to *make sense* out of the contradictions. An explained contradiction isn’t a contradiction. A well reasoned explanation will tend to allow the reader to answer their question of “what about this” or “why that.” A pile of discarded bricks can gather more attention than a short, non defensible wall.

## **Rebuttal Reports**

Opposing expert reports are not something which should be dismissed simply because they are in disagreement with your opinion or your ultimate conclusion. They should be considered a *fresh look* at the evidence. They offer a perspective, although you may ultimately disagree, which should give you an opportunity to reconsider your opinion. What might you have missed in your analysis? Is their review of the evidence agreeable or disagreeable? Both experts should be formulating their opinion on the same evidence. Has the analysis of the evidence led to any common factual conclusions? What facts are common; what facts appear contradictory? Changes in conclusions of fact are expected to change the outcome of the case.

The review of the rebuttal report provides the expert with a unique opportunity to view the case from an alternative viewpoint. How would you view the expert report if you were a juror or the judge? Would it build your *confidence* in the expertise of its author? Keep in mind the fact that the opposing expert is likely equally qualified, equally articulate, or equally able to persuade a belief in their opinion.

Consider that two professionals of equal character and recognition can reach equally supportable positions using the same evidence, the same facts, and the same legal principles. Appellate court justices do it all the time. That’s why they have an odd number of justices assigned to the bench. Why is it that these justices don’t always derive the same opinion when they’ve all seen the same evidence which led to the same factual conditions which were aligned with the same legal principles? There are 4-1 decisions, there are 3-2 decisions and there are 4-3 decisions. Granted, the vast

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majority of opinions expressed by the appellate courts are majority opinions. So are the vast number of decisions made by surveyors, engineers, and doctors. An increased likelihood of conflicting opinions increases the likelihood of litigation.

The schedule must be given close scrutiny when the opposing expert report is received. The response time for *rebuttal* is typically a pretty close window as the parties are typically anxious to get to trial. In the process, all the discovery deadlines have likely been bumped back like dominos leaving a short window of opportunity to respond. If the report and the opinions are sound, then let them stand. If you are in disagreement, you've likely already addressed the reasons for your disagreement. The purpose of the rebuttal report is not to restate your disagreement.

The purpose of the rebuttal report is to respond to any *new issues* raised in the other report. If they have addressed any new evidence or formulated a fact set, address the differences. Take this opportunity to respond to any new expressions of opinion which are not addressed in your report. If you've already addressed the issue, don't raise it again. Rebuttal is not the proper format to restate opinions or to make arguments.

## **Conclusion**

The expert witness provides a considerably valuable service in the court room. Without their expertise the courts would return to equity to reach their decisions rather than using well-founded scientific principles, sound logic, and well-reasoned legal principles. The outcome at trial would be no more scientific than a coin toss. The more dynamic and skilled the attorney, the more likelihood of winning the case. The more decrepit the widow, the more sympathy garnered. *Equity* in the court has its place, however, few land boundary locations are based upon equitable decisions.

Like Solomon offering to split the baby in half, when left without reasonable arguments there is little more to base decisions upon. A well reasoned expert opinion which is well documented in written form, can provide the assistance begged for in the courtroom. It will help the jury to understand the evidence, it will help the judge to understand the application of the legal principles, and it will hopefully help the opposing parties to understand that they alone have the ability to settle their differences without the aid of the court.

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# Federal Rules of Civil Procedure

## V. Depositions and Discovery

### Rule 26. Duty to Disclose; General Provisions Governing Discovery

#### (a) Required Disclosures.

##### (1) *Initial Disclosures.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

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(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures — In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures — For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its 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.

(B) *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

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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 data or other information 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.

(C) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

- (i) at least 90 days before the date set for trial or for the case to be ready for trial; or
- (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.

(D) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

### (3) *Pretrial Disclosures.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

- (i) the name and, if not previously provided, the address and telephone number of each witness — separately identifying those the party expects to present and those it may call if the need arises;
- (ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

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(iii) an identification of each document or other exhibit, including summaries of other evidence — separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made — except for one under Federal Rule of Evidence 402 or 403 — is waived unless excused by the court for good cause.

*(4) Form of Disclosures.*

Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

**(b) Discovery Scope and Limits.**

*(1) Scope in General.*

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

*(2) Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably

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accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

*(3) Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the

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request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

- (i) a written statement that the person has signed or otherwise adopted or approved; or
- (ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

*(4) Trial Preparation: Experts.*

(A) *Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Expert 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:

- (i) as provided in Rule 35(b); or
- (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

- (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and
- (ii) for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

*(5) Claiming Privilege or Protecting Trial- Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

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(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

**(c) Protective Orders.**

*(1) In General.*

A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

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(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

*(2) Ordering Discovery.*

If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

*(3) Awarding Expenses.*

Rule 37(a)(5) applies to the award of expenses.

**(d) Timing and Sequence of Discovery.**

*(1) Timing.*

A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

*(2) Sequence.*

Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

**(e) Supplementation of Disclosures and Responses.**

*(1) In General.*

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A party who has made a disclosure under Rule 26(a) — or who has responded to an interrogatory, request for production, or request for admission — must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

*(2) Expert Witness.*

For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

**(f) Conference of the Parties; Planning for Discovery**

*(1) Conference Timing.*

Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable — and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

*(2) Conference Content; Parties' Responsibilities.*

In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

*(3) Discovery Plan.*

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A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

*(4) Expedited Schedule.*

If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

**(g) Signing Disclosures and Discovery Requests, Responses, and Objections.**

*(1) Signature Required; Effect of Signature.*

Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name — or by the party personally, if unrepresented — and must state the signer's address, e-mail address, and telephone

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number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

*(2) Failure to Sign.*

Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

*(3) Sanction for Improper Certification.*

If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

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