

## Composing the Expert's Report: Factors for Compliance with Federal Rule 26(a)(2)(B)

by

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**Abstract:** The recently amended Rule 26 is the result of a proposal made by the Committee on Rules of Practice and Procedure. Approved by Congress, it became effective on December 1, 2010.

This article is a discussion of the section of Rule 26 governing written reports by experts. The FRPC requirements and elements for the expert's written report are featured. Further suggestions about formatting the report, based on the author's experience and study, are detailed. Non-compliance issues are also discussed.

For a complete discussion about the 2010 amendments, visit <http://www.apps.americanbar.org/litigation/committees/trialevidence/articles/042811-expert-witness-rule-amendments.html>

### Introduction

Rule 26 provides guidelines to the discovery process and flow of information between the expert and the client-attorney. In civil lawsuits, the United States district courts' procedures are governed by the Federal Rules of Civil Procedure (FRCP). Any court may have its own additional requirements regarding report writing and these requirements would be available from the court clerk or your client. (See sidebar: Rule 26. General Provisions Governing Discovery; Duty of Disclosure.)

While the rules vary from state to state, at least 35 states have adopted procedural codes based on the Federal Rules, sometimes with slight and time-critical variations. The FRCP applies only to matters being tried in Federal Court.

The FRCP are only mandated for expert witnesses retained to testify. However, you may be required to provide a written report in some cases. The reasons for requiring expert reports include the elimination of unfair surprise to the opposing party, the avoidance of unnecessary deposition, and the reduction of the costs of litigation.

Most fundamentally, in some situations you may be barred from testifying if your requested report does not meet the requirements of Rule 26.

*Author's Note:* The Federal Rules of Civil Procedure (FRCP) are published in the official U.S. Code in the appendix to Title 28, Judiciary and Judicial Procedure. This portion (26(a)(2)(B)) discusses the expert's report. For the complete rule, visit <http://www.law.cornell.edu/rules/frcp/>

### Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(2) Disclosure of Expert Testimony.

(A) [This section omitted for the purpose of this discussion]

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

Source: Cornell University Law School. Accessed 3/25/13 at <http://www.law.cornell.edu/rules/frcp/>

## Discussion

The following discussion covers further considerations and suggestions about writing a detailed and complete expert report. Be aware that your report becomes part of your “permanent record,” and must be prepared and signed by you.

In addition to the components specified in Rule 26(a)(2)(B), compose your report to include the following:

- The specific issues your client has asked you to address
- In cases involving signature comparisons, state the theoretical basis required for a finding of genuineness or falsity as expressed by the generally accepted authorities in the field of forensic document examination. Ordway Hilton’s book, *Scientific Examination of Questioned Documents*, revised edition, 1982, is a good source.

More specifically, in considering sections of Rule 26(a)(2)(B)(i) through (vi), the author recommends the following:

For Rule 26(a)(2)(B)(i), stating your methodological basis would include a clear delineation of the set of established guidelines and standards you used in determining the sufficiency of the evidence; the details of your step-by-step process; the reliability testing you performed; and the equipment used to examine the evidence. In cases involving signature comparisons, exemplar sufficiency is discussed in detail in “Limited Exemplars and Their Use in Forming Expert Opinions,” *NADE Journal*, Fall 1999, pp. 2-5.

Also, consider providing a bibliography listing the relevant authorities and research reports upon which you relied in forming your opinion(s) and attach it to your report as an appendix. For more information about properly formatting a bibliography, go to <http://www.chicagomanualofstyle.org> and search for “bibliographies.”

For Rule 26(a)(2)(B)(ii), include the facts or reliable data you considered in forming your opinion(s). For example, compose an accurate list of documents examined with specific information

observed such as:

- A specific date indicating when an entry/signature was written
- An observed date establishing when the document was originated
- Page number, Bates number, or other unique identifying number
- Handwritten signature(s) including the wording configuration(s)
- A notary seal and its date of notarization
- Specified version (an original, color photocopy, faxed copy, or other)
- Binding (staples, spiral, hole punch, paper-clipped, or other)
- Size, color, and type of paper
- Two-sided or single-sided copy

For Rule 26(a)(2)(B)(iii), incorporate your exhibits in your written report as attachments or appendices. They are the observational bases of your opinion and illustrate your findings. In composing your exhibits, include the source and date of illustrative portions of each document, the percentage that the image has been resized for illustrative purposes, the date your exhibits were prepared, and the name of the specific case. Attach a copy of each source document for verification purposes.

Additionally, to satisfy Rule 26(a)(2)(B)(iv),

(1) The most efficient way to present your qualifications is by including a current resume that accurately summarizes your professional accomplishments. For composing and publishing your resume, a complete quality control checklist, describing what to include and what to avoid, can be found on page 405 of *The A-Z Guide to Expert Witnessing* by Steven Babitsky, Esq., James J. Mangraviti, Jr., and Alex Babitsky, MBA. SEAK, Inc. Falmouth, MA, 2006.

(2) In addition to the above requirement, you are required to compose a list of all of your professional publications. Be sure to provide complete bibliographic information.

To satisfy Rule 26(a)(2)(B)(v), compose and attach a list of all other cases in which, during the previous four years, you have testified as a foren-

sic document examiner at trial or by deposition. Failure to maintain and disclose this information accurately may be the basis of having your testimony stricken. Cases in which you did not testify do not need to be included. For each case listed, include the following:

- Title of the case and case number
- Name and location of the court
- Date of testimony
- Name of judge

Rule 26(a)(2)(B)(vi) also requires an accurate statement of the compensation to be paid for your study and testimony in the present case, which would include:

- A copy of your current fee schedule or engagement letter for the specific case
- A case-specific invoice for the fees, expenses, and estimates of time for future work

### **Composing Your Report**

Your report should be easy to read and look professional. It is wise to have a competent copy-editor proof your report for spelling, grammar, and overall clarity. Additionally, consult the court clerk at the courthouse where the case is to be heard since they may have their own specific and additional requirements. Depending on the nature and scope of your commission, consider:

- Using your professional letterhead
- Using 12-point font (Arial font is suggested) and 1½ line spacing
- Creating topic headings and short, concise paragraphs
- Providing a unique number for each page, table, chart, and exhibit
- Including a cover page and table of contents
- Indicating when and by whom your report was requested
- Including the date you received the documents and formed your opinion
- Stating that you may have additional opinions or updated/revised opinions if new information/documents are provided
- Defining technical language and explaining

any abbreviations

- Including a summary of your conclusions/opinions

### **Non-Compliance Issues And Cautions**

Written reports that are not in compliance may become the basis for your testimony being barred. You are cautioned against using:

- Absolute wording and phrasing
- Terminology such as “including, but not limited to,” and “relevant portions of”
- Hedge words or phrases such as “sort of,” “somewhat,” or “I suppose”
- Argumentative language
- Comments on the credibility of other witnesses
- An informal or too friendly tone
- Any issues the attorney did not want addressed
- Opinions outside your expertise or on issues(s) you were not asked to address

### **Summary**

The FRCP 26(a)(2)(B) provides the basic requirements, from the Federal court’s perspective, for the expert’s written report. If an expert fails to meet these requirements, the opposing party may move to exclude the expert’s testimony and/or report. But following the FRCP requirements alone is not enough. As stated above, an expert can include other elements that will further enhance one’s professionalism and enable a comprehensive understanding of reliability. This will reduce the chance of being barred from testifying because of an insufficient report.

### **Bibliography**

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“There Is More to *Daubert* Than *Daubert*: Explanations and Critical Commentary as Illustrated Principally Through Handwriting Expertise” by Marcel B. Matley, NADE Journal, Spring 2013, pp.10-32.

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Jacqueline A. Joseph, B.A., CDE, D-BFDE, a re-certified member of NADE, was awarded accredited certification by the Board of Forensic Document Examiners. As a practicing forensic scientist since 1992, she has contributed to the field of questioned document examination in various ways. For instance, by compiling several subsequently published annotated bibliographies relating to questioned documents on topics including: genuine versus fraudulent tremor; left-hand and opposite-hand writing features; handwriting disguise; and Chinese handwriting examination. Her poster presentation, “Signature Forgery: An Uncommon Amalgamated Method Fails” was featured at the World Congress of Forensics 2011 in Chongqing, China.

Her other published papers include “Identifying the Maker of Handwritten Numerals,” “The Unidentifiable Handwriting – An Anonymous Note Case Study,” “Limited Exemplars and Their Use in Forming Expert Opinions,” and “The Layman’s Glossary of Terms Relating to the Forensic Examination of Handwriting, Signatures and Documents.” Additionally, she has produced an educational DVD presentation “Extreme Handwriting Caught-on-Tape” showing simultaneously ambidextrous handwriting, reverse mirror writing and other extremes. She has also collaborated with Marcel

B. Matley in the research, production and presentation of two DVDs: “The Two Pillars of Individuality and Identifiability in Handwriting” which was approved for academic credit at East Tennessee State University Department of Criminal Justice and Criminology, and “Book Smarts for the Document Examiner Featuring the QDE Index.”

As a member of Toastmasters International, Ms. Joseph has lectured at Portland State University and before various professional groups, and has given expert witness testimony in court depositions and arbitrations more than 55 times.

Ms. Joseph is a member of ASTM and is one of the technically qualified experts on the E-30 Forensic Science Committee. ASTM is a global leader in the development and publication of technical consensus standards that guide manufacturing, service and trade worldwide.

She has served as the chairperson of the NADE Certification Committee, co-chair of the 2010 NADE Annual Conference, and Editor-in-Chief of the 2011 NADE Journal.

Her work has been cited in *Forensic Handwriting Examination – A Definitive Guide* by Reed Hayes and in *Forensic Handwriting Examination of Motor Disorders & Forgery – Research and Applications* by Heidi H. Harralson.

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