

# Expert Witnesses in Federal Court

San Diego County Law Library

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# Introductions



*"Thank God! A panel of experts!"*

# Expert Designations

Federal Court vs. State Court

# Expert Disclosure and Testimony Rules in Federal Court

- Federal Rule of Civil Procedure 26(a)(2), 26(b)(4)
- Federal Rules of Evidence 702, 703, 704, 705
- District Judge and Magistrate Judge Chambers Rules. *See <https://www.casd.uscourts.gov/Rules/SitePages/Home.aspx>*
- Scheduling order in each case

# Example of Scheduling Order Provisions

22 1. The parties must disclose the identity of their respective experts in writing  
23 by March 11, 2020. The date for the disclosure of the identity of rebuttal experts must  
24 be on or before March 25, 2020. The written designations must include the name,  
25 address and telephone number of the expert and a reasonable summary of the testimony  
26 the expert is expected to provide. The list must also include the normal rates the expert  
27 charges for deposition and trial testimony. **The parties must identify any person who  
1 may be used at trial to present evidence pursuant to Fed. R. Evid. 702, 703 and 705,  
2 respectively. This requirement is not limited to retained experts.**

3 2. On or before April 27, 2020, each party must comply with the disclosure  
4 provisions in Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. **This disclosure  
5 requirement applies to all persons retained or specifically employed to provide  
6 expert testimony or whose duties as an employee of the part regularly involve the  
7 giving of expert testimony.**

8 3. Any party shall supplement its disclosure regarding contradictory or rebuttal  
9 evidence under Fed. R. Civ. P. 26(a)(2)(c) by May 11, 2020.

10 4. **Please be advised that failure to comply with this section or any other  
11 discovery order of the court may result in the sanctions provided for in Fed. R. Civ.  
12 P. 37 including a prohibition on the introduction of experts or other designated  
13 matters in evidence.**

14 5. All fact discovery must be completed by all parties on or before February  
15 11, 2020. All expert discovery must be completed by all parties on or before June 11,  
16 2020. "Completed" means that all discovery under Rules 30-36 of the Federal Rules of  
17 Civil Procedure, and discovery subpoenas under Rule 45, must be initiated a sufficient  
18 period of time in advance of the cut-off date, so that it may be completed by the cut-off  
19 date, taking into account the times for service, notice and response as set forth in the  
20 Federal Rules of Civil Procedure. Discovery limits in the Federal Rules of Civil  
21 Procedure and Civil Local Rules, including Federal Rule of Civil Procedure 33(a)(1) and  
22 Civil Local Rules 33.1.a and 36.1.a shall apply. Absent leave of Court to exceed these

# Example of Rule 26(a)(2)(C) Disclosure: Retained Expert

4        1.     **Robert Kenneth Eastlack, M.D.**

5        Dr. Eastlack is an orthopaedic surgeon practicing at Scripps Clinic. His  
6        business address is 10666 N. Torrey Pines Road, La Jolla, CA 92037, and his office  
7        phone number is (858) 554-7988.

8        Dr. Eastlack will offer opinions regarding the causation and damages issues  
9        in this case, including the appropriateness of past and future medical care and  
10       orthopaedic issues as they pertain to Plaintiff. Dr. Eastlack has conducted an  
11       examination of Plaintiff and will also testify as to the findings and opinions of that  
12       examination. Dr. Eastlack's opinions will include those contained in his written  
13       report, which will be produced in accordance with the Court's scheduling order.

14       At trial, Dr. Eastlack will also provide rebuttal testimony concerning any  
15       opinions expressed by Plaintiff, Plaintiff's experts, and treating medical providers  
16       on issues within his expertise. Dr. Eastlack's fee for deposition is \$750 per hour.

# Example of Rule 26(a)(2)(C) Disclosure: Non-Retained Expert

16 2. Bjorn Fredrickson, Recreation and Lands Officer, Palomar Ranger District,  
17 Cleveland National Forest. May be contacted through counsel. Mr. Fredrickson will  
18 respond to Dr. Hammersley's interpretations of the rules, guidelines, and laws governing  
19 the Forest Service's management of the Cedar Creek Falls area. Regarding FSH 1909.15,  
20 36 C.F.R. 220.6 lists factors for consideration when determining whether "extraordinary  
21 circumstances" exist. None of those factors existed with respect to the project  
22 contemplated in the June 16, 2009 "San Diego River Gorge Trailhead and Trail"  
23 Decision Memo. As set forth in 220.6(e)(1), a Decision Memo is typically appropriate for  
24 construction and reconstruction of trails. Mr. Fredrickson will also respond to Dr.  
25 Hammersley's discussion of the Forest Service National Quality Standards for Trails. The  
26 "Critical National Quality Standards" that are identified therein with an asterisk include  
27 "Hazards do not exist on or along the trail." The term "hazards," in this context, refers  
28 to a danger along a trail such as rock slides or dead trees at risk of falling, not to existing,

# Who Qualifies as an Expert?

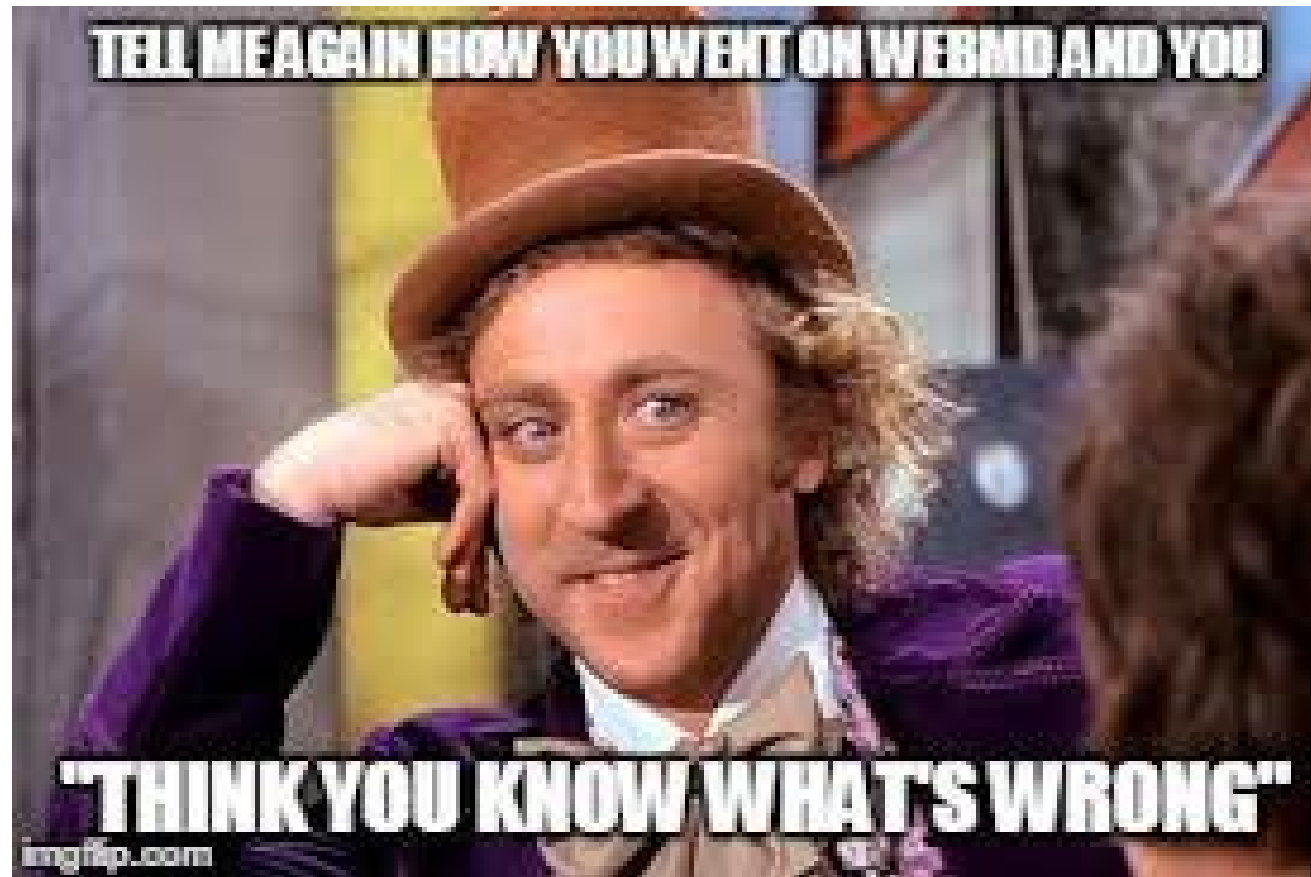




# When Can An Expert Testify? FRE 702

- A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
  - a. the expert's *scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue*;
  - b. the testimony is based on sufficient facts or data;
  - c. the testimony is the product of reliable principles and methods; and
  - d. the expert has reliably applied the principles and methods to the facts of the case.

# “Nonretained” Experts...?



# Expert Reports

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# Working With Your Experts – Work Product

- Draft expert reports are work product. FRCP 26(b)(4)(B).
- Communications between a party's attorney and the retained experts are work product, "except to the extent that the communications:
  - i. relate to compensation for the expert's study or testimony;
  - ii. identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
  - iii. identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed." FRCP 26(b)(4)(C)

# Disclosing Expert Opinions

- “Witnesses who Must Provide a Written Report”
- This rule applies to experts who are “retained or specially employed to provide expert testimony . . . or whose duties as the party’s employee regularly involve giving expert testimony.” FRCP 26(a)(2)(B)

# The Written Expert Report – 26(a)(2)(B)

- Report must contain:
  - Complete statement of all opinions and basis and reasons for them
  - Facts or data “considered” in forming the opinions
  - Exhibits that will be used to summarize or support the opinions
  - Qualifications including list of 10 years of publications
  - List of all depo/trial testimony past 4 years
  - Statement of compensation for study/testimony in the case

# Working with Your Experts – Drafting the Report



# Consequences of Nondisclosure

- A party who fails to make expert disclosures as required by Rule 26(a) is “not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1).
- The deadlines “encourage timely disclosure of expert witnesses and ... curb dilatory litigation tactics.” *Continental Lab. Prods., Inc. v. Medax Int’l, Inc.*, 195 F.R.D. 675, 676 (S.D. Cal. 2000) (striking expert opinions that were first disclosed in opposition to summary judgment).



“Your Honour, I call Nigel From The Pub ... expert witness on whatever you like.”



# Expert Depositions



# Expert Depositions – FRCP 26(b)(4)(A)

- State Court: Deposition Nearly Always Necessary
- Federal Court: Deposition Rarely Necessary
  - “The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions” – Advisory Committee Notes, 1993 Amendments