“Be an Expert on Experts!”

A Primer on Working with Experts

This short article is intended as a summary of practice tips, based on the collective experience of the Authors, who have worked with expert witnesses (and in Dr. Sabry’s case, served as an expert witness) for a combined total of more than nine decades. The outline of attached authorities provides detail regarding the ways in which federal courts have applied the rules governing experts since the 2010 amendments to Federal Rule of Civil Procedure 26, along with a few cases addressing recent experience under Daubert. Authors submitted their top “do’s and don’ts” for working with experts. These have been expanded upon and organized here, with the help of two new lawyers—who now, more than most of their peers, truly qualify as “experts on experts.”

Selecting an Expert. It is imperative to hire your experts early. This is especially important in narrow fields where good experts are few and far between. Early-retained experts can provide attorneys with input and advice to help shape case strategy and discovery plans, and may assist in resolving early issues arising during the development of the case. Engaging potential experts early also provides attorneys with a better chance of retaining an expert who is qualified on the subject matter and does not have a conflict of interest in the case at hand.

Those experts who are articulate and persuasive are prized, as it is often better to have an expert with those skills than an expert who may have better qualifications but wilts on cross-examination or comes across as lacking in confidence. Unfortunately, the latter qualities are difficult to predict in advance. So use your network to try to find out how the potential experts you are considering hiring have performed in prior cases.

When selecting an expert, consider the audience as well as the subject matter. Would an academic (professor or other scholar) fit the bill, or would the finder of fact find hands-on, nuts and bolts experience more persuasive? Sometimes the experienced auto mechanic may outshine even the best engineer.

Be sure to check out expert witness candidates online. A quick Google search or check on social media websites can sometimes reveal important information about a potential expert.

When vetting the expert witness candidate, ask whether he or she has ever been “Daubert-ed” or precluded from testifying by any court. Run a Westlaw or Lexis search using the candidate’s

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name. Ask for a list of cases in which the expert has previously testified and copies of transcripts of prior testimony given in comparable cases. Ask for examples of prior reports so you can judge writing ability. Ask for the expert’s marketing materials, if they have any. Review the list of prior engagements and make certain to investigate those similar to yours. Contact lawyers who have previously used the candidate.

The Engagement Letter. Whether the expert is a consulting expert or a testifying expert, an engagement letter should be put in place. This need not (and probably should not) be long or complex. The practitioner should bear in mind that the letter may well be discoverable under Federal Rule of Civil Procedure 26(b)(4)(C)(i) (governing “communications . . . [that] relate to compensation for the expert’s study or testimony”) (emphasis added). The letter should clearly state whether the expert is being engaged solely as a consulting expert, under Rule 26(b)(4)(D), or as a testifying expert, subject to discovery. The former are generally exempt from discovery, absent exceptional circumstances; the latter are subject to discovery, in accordance with various rules, including Rule 26(b)(4)(A)-(C). Often, experts are engaged initially as consultants, with the decision as to whether to convert the engagement to one of testifying expert deferred, pending further developments. However, once the expert is converted from consultant to testifying expert, the practitioner should expect that otherwise protected communications relating to the consultant arrangement would now be discoverable.

The engagement letter should clearly state the basis of compensation. It should go without saying that the compensation arrangement should bear no relationship to success on the merits of the claim or defense. A straight hourly rate, plus expenses, is most common.

Some practitioners are of the view that the engagement letter should describe the scope in general terms and consider the possibility that the scope of the engagement may change as issues evolve in litigation.

The engagement letter should also include a provision reminding the expert to preserve all documents relating to the engagement, including notes, electronic communications and draft reports. The expert should be reminded, whether in the engagement letter or in consultation with counsel, that anything written may be subject to discovery. It is generally preferable to preserve and litigate discoverability than to face spoliation claims relating to, for example, deleted draft reports. In that regard, while Federal Rule 26(b)(4)(B) now protects (as work product) draft reports or disclosures, these may still be discoverable under the work product exceptions (e.g., Rule 26(b)(3)(A)(ii) ("substantial need")), and the case law lacks clarity as to whether “facts,” “data” and “assumptions” transmitted by counsel in the guise of a draft report are subject to protection under Rule 26(b)(4)(B) (Protection for Draft Reports) when such would otherwise be discoverable under Rule 26(b)(4)(C)(i)-(iii). See, e.g., U.S. Commodity Futures Trading Comm’n v. Newell, 301 F.R.D. 348, 353 (N.D. Ill. 2014).

It may be preferable for the engagement letter to be between the expert and counsel, on the client’s behalf, rather than with the client directly. Under the 2010 amendments to Rule 26, there are protections for communications between attorney and expert. These protections do not apply, however, as between expert and client, expert and expert, etc. See Fed. R. Civ. P. 26(b)(4)(C). Keeping the engagement between attorney and expert may help to avoid confusion regarding the proper channel of communication—from attorney to expert and back again.
Finally, at the engagement stage, discuss with the expert his or her billing practices—many will not send bills with detailed, task by task descriptions. Bear in mind that the expert’s invoices may be discoverable under Rule 26(b)(4)(C)(i).

**Communications with Experts:** Here the rules have changed, but the practice not so much. Before the 2010 amendments to Federal Rule of Civil Procedure 26, practitioners (and experienced experts) generally understood that most federal courts enforced a “bright line” approach, rendering discoverable any communication with an expert (regardless of source), along with anything the expert generated, including notes, work papers, draft reports and communications with counsel. The bright line approach can be traced to the 1993 amendment to Federal Rule of Civil Procedure 26(a)(2), which required that an expert’s report contain “the data or other information considered by the witness” in coming to her opinion. Fed. R. Civ. P. 26(a)(2)(B)(ii) (1993 revised version) (emphasis added). The approach caused lawyers and experts to be extra diligent on written communications, notes and drafts.

The 2010 amendments to Rule 26 were intended to change all that. Rule 26(a)(2)(B)(ii) was changed to require disclosure only of “facts or data”—the phrase “or other information” was dropped. Safe harbors were established for draft reports and disclosures (see Rule 26(b)(4)(B), and for communications between a party’s attorney and the testifying expert (Rule 26(b)(4)(C)). But counsel should bear three things in mind regarding the scope of these purportedly “safe” harbors: (i) they are intended to protect only the lawyer’s work product, not the expert’s; (ii) they are intended to protect only communications between the party’s attorney and a testifying expert “required to provide a report under Rule 26(a)(2)(B),” and (iii) communications relating to compensation or that “identify facts . . . data” or “assumptions” provided by the attorney are not protected. These exceptions are broad enough to encompass a wide range of expert-related communications.

Thus, for example, client to expert communications and expert to expert communications are not protected; consulting expert to testifying expert communications are similarly not protected. In one recent case, where counsel apparently directed the client to prepare a memorandum analyzing certain financial information, and the client’s memo was provided to the expert, the memo was ordered produced. *Fialkowski v. Perry*, No. 11-5139, 2012 WL 2527020, at *1, *4 (E.D. Pa. June 29, 2012). Furthermore, communications from counsel containing facts “considered” by the expert or assumptions “relied on” by the expert, have been ordered produced, although the prevailing view is that such communications may be redacted to avoid producing attorney work product (such as an analysis of the facts presented).

Note also that none of these protections apply to counsel’s communications with experts who are not required to prepare a report under Rule 26(a)(2)(C). Experts subject to Rule 26(a)(2)(C) include experts who are not “retained or specially employed to provide expert testimony,” such as a treating physician. Under the 2010 amendments, written disclosures are now
required for these witnesses, but no protection is provided for counsel’s communications with them.3

The lesson here is simple: While there are protections for communications with specially retained, testifying experts, these are narrow and relate almost exclusively to counsel’s work product. And even those may be at risk if they include “factual ingredients” (a term actually used in the 2010 Advisory Committee Note). Thus, the better practice still appears to be the more conservative, bright line approach: Assume that what is sent to, or generated by, an expert is discoverable. One helpful organizational technique is to keep a separate file for all communications, documents, transcripts, etc., sent to or received from the expert.

**Information to Be Provided to the Expert.** Practitioners should remember that a favorite cross-examination technique is to focus on information not provided to the expert and to magnify its importance in argument. When providing information to the expert, generally more is better. Provide the complaint, the answer and any other pleadings that bear on the issues being considered by the expert. If there has been motion practice, do not overlook the affidavits, as well as the deposition transcripts in cases where the affiant was deposed. Provide a full account of the facts and all relevant documents—including those that may undermine your position, so the expert may consider and account for those in the formulation of his or her views. Keep a running list of the documents, transcripts, pleadings and other materials provided to the expert. This will be helpful when the time comes to prepare the report.

**Drafting the Expert Report.** There are relatively few reported decisions enforcing the new protections for draft expert reports or disclosures under Federal Rule 26(b)(4)(B). One court compelled production of draft reports shortly after the new rule was adopted, but the decision was based on pre-2010 case law and appears to have involved a failure to comply with the court’s earlier discovery rulings. *Gerke v. Travelers Cas. Ins. Co of Am.*, 289 F.R.D. 316, 323-24 (D. Or. 2013). A more recent decision rejected the traditional argument that drafts should be produced as bearing on the expert’s independence where they evidence attorney involvement in the drafting process. The ruling was based on the 2010 Advisory Committee Note. *Newell*, 301 F.R.D. at 353.

In general, unless one is certain that a reviewing court would not compel the production of drafts, the better practice may be to assume the draft, or some portion thereof, would be discoverable. There are open questions regarding whether courts will compel the production of portions of drafts that contain “factual ingredients” provided by counsel. Clearly separating factual elements of the draft report (which may be discoverable) from draft analyses and opinions may be of assistance in protecting the latter, since redaction of protectable elements may be more readily accomplished.

It is recommended, however, that counsel still exercise caution in working with retained experts to prepare the report. In this regard, the rule is clear that the report must be “prepared and signed by the witness.” Fed. R. Civ. P. 26(a)(2)(B) (emphasis supplied). Experienced practitioners understand that it is very important that the experts draft their own reports in their own style and

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3 The Advisory Committee Notes to the 2010 Amendments expressly state, however, that “[t]he rule does not exclude protection under other doctrines, such as privilege or independent development of the work product doctrine.”
format and to reflect their own opinions. Careful attention should be paid by counsel to the accuracy of the factual elements of the report. Opinions and the entirety of the report, however, are to be those of the expert. Opinions may be discussed with the expert prior to finalizing the report.

Parties might also consider stipulating that draft reports are entirely off limits in discovery, without regard to the exceptions provided in the Federal Rules. This was often done prior to the 2010 Amendments.

Finally, some courts have held that the Federal Rules impose no obligation to preserve drafts. See, e.g., In re Teleglobe Commc’ns Corp., 392 B.R. 561, 572 (Bankr. D. Del. 2008); Univ. of Pittsburgh v. Townsend, No. 3:04-cv-291, 2007 WL 1002317, at *3 (E.D. Tenn. Mar. 30, 2007). Courts have also gone the other way, however (see, e.g., Trigon Ins. Co. v. United States, 204 F.R.D. 277, 289 (E.D. Va. 2001); Semtech Corp. v. Royal Ins. Co. of Am., No. 03-2460-GAF PJWX, 2007 WL 5462339, at *2 (C.D. Cal. Oct. 24, 2007)), and, given the carve-outs under Fed. R. Civ. P. 26(b)(2)(C), practitioners can anticipate that there may be questions asked regarding whether facts or assumptions provided by counsel were included in drafts of the report—along with the corresponding argument that the obligation to preserve such material is implied.

**Expert Discovery.** In cases before federal courts, an expert’s report should provide comprehensive information regarding the factual basis for the expert’s opinions. But it is better practice to send written discovery requests seeking these details, along with all documents and communications provided to, considered or generated by the expert. The Federal Rules do not require production of the underlying documents considered or generated by the expert, including notes, emails, memoranda and the like.

Also, since the 2010 amendments provide work product protection for draft reports and some, but not all, attorney-expert communications, consider asking for delivery of a privilege log identifying all communications in these categories that are being withheld. Again, factual ingredients and assumptions provided by counsel and contained in these materials may be subject to production. But without a log, you will not know the materials exist. Recognize, however, that if you ask for a log, the other side will too. Limit your own communications accordingly.

Obtain transcripts of past depositions given by the opposing expert (if not prohibited by a protective order), and be sure to check the transcripts of depositions given by your expert. Effective cross-examination material is sometimes found in prior testimony.

**Deposing the Expert.** Don’t expect to hit a home run against the opposing expert. While you should not shy away from attempting the “killer” cross during depositions, your time is precious, so be sure to budget accordingly. Use your own expert’s testimony to counter the opposing expert, rather than count on your cross.

Consider using the deposition to turn an opposing expert into an expert testifying on your behalf. You can do this by getting the opposing expert to admit non-controvertible facts and principles that are in your favor. Not only does this lock-in the opposing expert when the facts and principles are presented during trial, it may also provide a nice sound bite, allowing you to
quote an opposing expert in support of your argument in a summary judgment brief or use the deposition testimony during cross-examination or in closing argument.

Before deposing the opposing expert, consult with your own expert to prepare. Attorneys should consult with their experts to explain methodologies, identify important assumptions, and locate weaknesses in the opposing expert’s report, which provides topics to explore during the deposition. Following the deposition, your expert can similarly review the transcript of the opposing expert’s testimony to identify weaknesses or contradictions between the opposing expert’s deposition and expert report.

Make certain that you fully explore the factual bases for the expert’s opinions. Identify facts and assumptions that were important to the opinion and those that were not, and have the expert explain why. In the process you may discover facts important to your side of the case that were not considered or not given weight.

A Word on Daubert Motions. Daubert motions should not be routinely filed every time an expert is involved in litigation. Not only does this strategy risk upsetting the judge, who may view baseless Daubert motions as a waste of the court’s time and resources; you also have shown your cards to opposing counsel, revealing the holes in their expert’s report and the areas on which they should spend the most time preparing their expert for trial. Unless your Daubert motion has the potential to significantly impact the outcome of the litigation, the better method to further your chances of succeeding at trial is simply to wait until cross-examination to reveal the shortcomings of an expert’s opinion and qualifications in front of the jury or judge.

Presenting the Expert at Trial. Attorneys should avoid encouraging the expert to “expertize” the fact record or make legal conclusions in his or her testimony (or expert report). Additionally, attorneys should not ask experts to draw opinions outside their areas of expertise. This makes your expert’s opinion vulnerable to being discredited during cross-examination, and may provide opportunities for opposing counsel to try to impeach your expert based on contrary testimony during his or her deposition.

When preparing the expert for deposition or trial, practitioners should specify the scope of the deposition and questions to their experts. This includes providing all the facts of the case to the expert, even facts that are detrimental to the client’s position. It is important to provide a full account of the facts to your experts so they can defend their conclusions as being supported by the factual record for the case. You don’t want to find out when you put your expert on the stand that his or her opinion would change in light of additional information you didn’t provide.

Cross Examining the Expert. “Perry Mason” moments at trial are rare, and even more so with experts. Often, however, you can succeed with a peripheral exam. For example, pin the opposing expert to his or her qualifications and the limitations thereof. The expert may have strong academic credentials but limited practical experience, or vice versa.

Plan your cross-examination strategy ahead of time with appropriate consultation with your own expert. Even the most gifted examiners need to prepare ahead in order to effectively examine an expert.
Use the opposing expert’s report against them. While it’s not admissible and you must be careful not to let the other side admit it into evidence, you can use it for cross. Keep this same point in mind when reviewing your own expert’s report and preparing your expert for cross-examination.
The Applicable Rules and Committee Notes

**Federal Rules of Civil Procedure**

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required 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) 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.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) 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) or (C), within 30 days after the other party's disclosure.

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

(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 and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(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 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) *Deposition of an 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) **Trial-Preparation Protection for Draft Reports or Disclosures.** Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) **Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.** Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, 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.

(D) **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.

(E) **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 (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

**Committee Notes on Rules—2010 Amendment**

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than “data or other information,” as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including — for many experts — an extensive report. Many courts
read the disclosure provision to authorize discovery of all communications between counsel and
expert witnesses and all draft reports. The Committee has been told repeatedly that routine
discovery into attorney-expert communications and draft reports has had undesirable effects. Costs
have risen. Attorneys may employ two sets of experts — one for purposes of consultation and
another to testify at trial — because disclosure of their collaborative interactions with expert
consultants would reveal their most sensitive and confidential case analyses. At the same time,
attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying
experts that impedes effective communication, and experts adopt strategies that protect against
discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all
“facts or data considered by the witness in forming” the opinions to be offered, rather than the
“data or other information” disclosure prescribed in 1993. This amendment is intended to alter the
outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-
expert communications and draft reports. The amendments to Rule 26(b)(4) make this change
explicit by providing work-product protection against discovery regarding draft reports and
disclosures or attorney-expert communications.

The refocus of disclosure on “facts or data” is meant to limit disclosure to material of a factual
nature by excluding theories or mental impressions of counsel. At the same time, the intention is
that “facts or data” be interpreted broadly to require disclosure of any material considered by the
expert, from whatever source, that contains factual ingredients. The disclosure obligation extends
to any facts or data “considered” by the expert in forming the opinions to be expressed, not only
those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the
opinions to be offered by expert witnesses who are not required to provide reports under Rule
26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less
extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring
undue detail, keeping in mind that these witnesses have not been specially retained and may not
be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under
Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report
is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a
fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent
examples include physicians or other health care professionals and employees of a party who do
not regularly provide expert testimony. Parties must identify such witnesses under Rule
26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure
obligation does not include facts unrelated to the expert opinions the witness will present.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify
that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to
disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule
26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule
26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all
witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); see Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel’s work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any “preliminary” expert opinions. Protected “communications” include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

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

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert’s testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party’s counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

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

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.
First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert’s study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

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

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

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

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

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

**FEDERAL RULES OF EVIDENCE**

**Rule 702. Testimony by Expert Witness**

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.

Rule 703. Bases of an Expert
An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Rule 705. Disclosing the Facts or Data Underlying an Expert
Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

   a. RULE: “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.”

   b. When is an expert report required?

      i. Witness is retained or specially employed to provide expert testimony in the case. See, e.g., In re Application of Republic of Ecuador, 280 F.R.D. 506, 511 (N.D. Cal. 2012) (holding that witnesses were specially retained to provide expert testimony and are thus obligated to produce expert reports); Welton Enters., Inc. v. Cincinnati Ins. Co., No. 13-CV-227-WMC, 2015 WL 5567983, at *4 (W.D. Wis. Sept. 22, 2015) (same).

      ii. Witness is one whose duties as the party’s employee regularly involve giving expert testimony. See, e.g., Tokai Corp. v. Easton Enters., Inc., 632 F.3d 1358, 1365 (Fed. Cir. 2011) (holding that district court did not abuse its discretion by declining to exempt an employee-expert from the written report requirement because the party failed to indicate that the expert’s duties “did not ‘regularly involve giving expert testimony.’”); see also Hellmann-Blumberg v. Univ. of the Pac., No. 2:12-CV-0286 TLN DAD, 2013 WL 4407267, at *2–3 (E.D. Cal. Aug. 15, 2013) (discussing when employee-witnesses are required to provide reports, and when they are not).

   c. When is summary disclosure required, in lieu of report (see Rule 26(a)(2)(C))?

ii. “Frequent examples include physicians or other health care professionals . . . .” Advisory Committee Note, 2010 Amendments.

iii. See Fed. R. Civ. P. 26(a)(2)(A)(“any witness [a party] may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705” [not “retained or specially employed to provide expert testimony . . .”]); see also Rule 26(a)(2)(C) (“Witnesses Who Do Not Provide a Written Report”).

d. Time to Disclose Expert Testimony. If no stipulation or court order: “(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 . . . within 30 days after the other party’s disclosure.” Fed. R. Civ. P. 26(a)(2)(D).

e. Must the Disclosure / Report Be Supplemented?


ii. But, supplements may be improper when experts were aware of the same information before producing their original reports. See, e.g., Sherwin-Williams Co. v. JB Collision Servs., Inc., No. 13-CV-1946-LAB WVG, 2015 WL 1119406, at *9 (S.D. Cal. Mar. 11, 2015) (holding that supplements intended to augment a report rather than “correct inaccuracies or fill in interstices of an incomplete report” are improper under Rule 26(e)).


a. RULE: “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. But Not For Testifying Experts

i. Rule 26(b)(3)(A) “work product” protection does not apply generally to testifying experts. See, e.g., Republic of Ecuador v. Hinchee, 741 F.3d 1185, 1192 (11th Cir. 2013) (“[N]either the text of Rule 26(b)(3)(A) nor its
structure, history, and rationale support extending the work-product doctrine to all testifying expert materials."); see also Republic of Ecuador v. Douglas, 153 F. Supp. 3d. 484, 490 (D. Mass. 2015) (holding that the Rule 26(b)(3) work product protection does not extend to the materials of testifying expert witnesses); Davita Healthcare Partners, Inc. v. United States, 128 Fed. Cl. 584, 588 (Fed. Cl. 2016) (same); Republic of Ecuador v. For Issuance of a Subpoena, 735 F.3d 1179, 1185 (10th Cir. 2013) (same); Republic of Ecuador v. Mackay, 742 F.3d 860, 871 (9th Cir. 2014) (same).

ii. Rule 26(b)(3)(A) work product applies by its terms only to “attorney, consultant, surety, indemnitor, insurer, or agent” and not to testifying experts. Hinchee, 741 F.3d at 1192.

iii. Work product protections afforded to communications with and work of testifying experts are addressed under Rules 26(b)(4)(B) (for draft reports) and (C) (for communications with attorneys). Id.; see also Republic of Ecuador v. For Issuance of a Subpoena, 735 F.3d at 1187.

c. Expert’s Personal Notes and Emails -- Protected?
   i. No:
      1. Hinchee, 741 F.3d at 1186 (holding that an expert’s personal notes and emails containing his theories and mental impressions were not entitled to work product protection).

      2. Republic of Ecuador v. Bjorkman, No. 11-CV-01470-WYD-MEH, 2012 WL 12755, at *6 (D. Colo. Jan. 4, 2012), subsequently aff’d sub nom. Republic of Ecuador v. For Issuance of a Subpoena, 735 F.3d 1179 (10th Cir. 2013) (clarifying that “it is the intention of the rules committee to protect the mental impressions and legal theories of a party’s attorney, not its expert,” and thus prohibiting expert from withholding any documents or information as “work product” unless specifically described in Rules 26(b)(4)(B) and (C)) (emphasis in original).


      4. Douglas, 153 F. Supp. 3d at 491 (“[T]he work-product doctrine only allows Dr. Douglas [testifying expert] to withhold from discovery the ‘core opinion work-product of Chevron attorneys.’” . . . . Communications between Dr. Douglas and attorneys relating to his compensation or identifying facts, data or assumptions for Dr. Douglas to use in forming his opinion are not protected and must be produced.”).

that expert’s emails do not constitute draft reports entitled to protection).

6. Advisory Committee Notes, 2010 Amendment: “[T]he expert’s testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule.”

ii. Maybe:

1. Wenk v. O’Reilly, No. 2:12-CV-474, 2014 WL 1121920, at *6 (S.D. Ohio Mar. 20, 2014) (ordering notes to be submitted for in camera review due to dispute over whether expert’s notes written on the margins of deposition transcripts are considered notes, or draft of report protected under Rule 26(b)(4)(B)).

2. Dongguk Univ. v. Yale Univ., No. 3:08-cv-441 (TLM), 2011 WL 1935865, *1–2 (D. Conn. May 19, 2011) (Court ordered production of expert’s handwritten notes only after reviewing them to determine whether they reflected communications with attorney, or counsel’s mental impressions.).

3. Etherton v. Owners Ins. Co., No. 10-cv-892-MSK, 2011 WL 684592, at *2 (D. Colo. Feb. 18, 2011) (holding that testifying expert’s “working notes” in the form of five pages of mathematical calculations drafted in connection with his expert report, were shielded from production because they qualified as a draft report. The Court noted that protection for draft expert reports applies “regardless of the form in which the draft is recorded.”).

iii. Yes:

1. Davita Healthcare Partners, Inc., 128 Fed. Cl. at 591 (Work papers of plaintiff’s testifying expert, including spreadsheets, scripts, analyses and presentations were protected work product under Rule 26(b)(4)(C). Plaintiff argued that the work papers reflected communications with counsel and preliminary opinions. The selective presentation of “facts and data” was held to be distinct from the underlying data itself, resulting in protection from discovery, under Rule 26(b)(4)(C)).

2. Int’l Aloe Science Council, Inc. v. Fruit of the Earth, Inc., No. DKC-11-2255, 2012 WL 1900536, at *2 (D. Md. May 23, 2012) (holding that an expert’s notes, created at counsel’s request to assist with the deposition of the opposing expert, were not subject to disclosure under Rule 26(b)(4)(C) because they did not contain opinions that the expert would testify to at trial).

d. Documents Prepared by a Party And Given to Expert -- Protected?

i. No:

memo prepared by plaintiff at the direction of her attorney containing her “explanation and assessment of . . . discovery documents and how they relate to the claims [she has] asserted and the various defenses raised by defendants,” which was provided to expert witness and used in preparing his report. The Court found that the document contained “factual ingredients” and that disclosure did not “implicate ‘theories or mental impressions of counsel’ because plaintiff, not plaintiff’s attorney, prepared them.”.

e. Communications between Testifying Expert and other Experts -- Protected?
   i. No:
      1. Hinchee, 741 F.3d at 1186 (finding that email communications between an expert and other experts containing their theories and mental impressions were not protected).
      3. Sierra Pac. Indus., 2011 WL 2119078 (granting motion to compel communications between two of the United States’ designated experts).
      4. In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig., No. 1:00-1898, MDL No. 1358, 2013 WL 3326799, at *6 (S.D.N.Y. June 28, 2013) (finding that factual matters exchanged by a consulting expert to a testifying expert are subject to disclosure under Rule 26(b)(4)(C)).
      5. Whole Women’s Health v. Lakey, 301 F.R.D. 266, 269 (W.D. Tex. 2014) (holding that communications between a testifying expert witness and non-testifying witness are not protected from discovery).
   
   ii. Yes:

f. Communications Between Persons Other Than Party’s Attorney and Testifying Expert -- Protected?
   i. No:
If sent to the expert by a non-attorney representative it is not protected).

2. *Powerweb Energy, Inc.*, 2014 WL 655206, at *4 (holding that there is no protection from discovery for communications between an expert witness and party representative).

3. *D.G. ex rel. G. v. Henry*, No. 08-CV-74-GKF-FHM, 2011 WL 1344200, at *2 (N.D. Okla. Apr. 8, 2011) (noting that summaries drafted by expert’s “readers” based on information contained in case files and then considered by expert when drafting report were not protected from disclosure by Rule 26(b)(4)(B)).

III. Fed. R. Civ. P. 26(b)(4)(B): Trial-Preparation Protection for Draft Reports or Disclosures

a. RULE: “Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.”

b. Protection for Draft Reports and Disclosures?

i. Yes:

1. *Republic of Ecuador v. For Issuance of Subpoena*, 735 F.3d at 1181–87 (affirming order holding that party “may properly withhold drafts of [testifying expert’s] reports and disclosures, in whatever form, under Rule 26(b)(4) . . . .”)

2. *Veolia Env’t*, 2013 WL 5779653, at *7 n.9 (finding draft reports protected under Rule 26(b)(4)(B) notwithstanding allegation that draft contained facts and data subject to disclosure under Fed. R. Civ. P. 26(b)(4)(C)(i)-(iii)).

3. *Davita Healthcare Partners, Inc.*, 128 Fed. Cl. at 584 (spreadsheets and graphs were intended to be included as part of expert’s report, so drafts of such were protected).

ii. No:


iii. Maybe:

1. *United States CFTC v. Newell*, 301 F.R.D. 348, 353 (N.D. Ill. 2014) (noting that despite protections for draft reports contained in Rule 26(b)(4)(B), facts, data, or assumptions provided by an attorney to an expert should not be excluded from production merely because such information was exchanged through the form of a revision to a draft report).

iv. Compare to Treatment of Expert Drafts Prior to 2010 Amendments
1. Prior to the 2010 amendments to Rule 26, most courts applied a “bright line” rule that all matters considered by a testifying expert in forming an opinion must be produced, even if such information is otherwise protected as work product. See, e.g., S. Yuba River Citizens League v. Nat’l Marine Fisheries Serv., 257 F.R.D. 607, 612, 615 (E.D. Cal. 2009) (compelling production of all prior drafts of testifying expert’s declaration and emails).

c. Notes, Task Lists, Outlines, Memoranda, Presentations, and Draft Letters Authored by an Expert -- Protected?
   i. No:
      1. In re Application of Republic of Ecuador, 280 F.R.D. at 513 (holding that an expert’s notes, task lists, outlines, memoranda, presentations, and draft letters cannot be protected as work product).
      2. Dongguk Univ., 2011 WL 1935865, at *1 (“As for Kim’s hand-written notes, as a general matter, an expert’s notes are not protected by 26(b)(4)(B) or (C), as they are neither drafts of an expert report nor communications between the party’s attorney and the expert witness.”).

   ii. Spreadsheets, Graphs, Charts Authored by an Expert -- Protected?
      1. Yes:
         c. In re Application of Republic of Ecuador, 280 F.R.D. at 512–13 (acknowledging that draft worksheets created by a testifying expert for use in his expert report would be protected under Rule 26(b)(4)(B), but the Rule “does not extend to the expert’s own development of the opinions to be presented outside of draft reports.”).

d. Attorney Participation in Drafting and Editing Portions of an Expert Report
   i. Discoverable:
1. *Gerke*, 289 F.R.D. 316 (relying on case law issued prior to the 2010 amendments to Rule 26, the Court held that the expert had to identify portions of the report that the attorney had drafted).


ii. Not Discoverable:

1. *Skycam, Inc. v. Bennett*, No. 09-cv-294-GKF-FHM, 2011 WL 2551188 (N.D. Okla. June 27, 2011) (holding that attorney’s notes from interviews with experts and write-ups of reports based on notes from meetings with experts were not subject to disclosure because the experts substantially participated in the preparation of the reports).

2. *Newell*, 301 F.R.D. at 352 (denying plaintiff’s motion to compel certain communications between defendants’ counsel and two of their experts despite plaintiff’s argument that work-product protection does not apply when counsel is involved in drafting expert reports).

3. *See* Fed. R. Civ. P. 26(b)(4)(B) and (C), providing work product protection under Rules 26(b)(3)(A) and (B) for draft reports, and for communications between the party’s attorney and any witness required to provide a report.

iii. Compare to Treatment of Attorney Contributions Prior to 2010 Amendments:

1. *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 283 (E.D. Va. 2001) (noting that Rule 26 requires that an attorney’s work product provided to experts who consider such work product in forming opinions which he or she will be testifying to at trial, is no longer privileged and must be disclosed).

e. Duty to Retain Drafts of Expert Reports?

i. No:

1. *In re Teleglobe Commc’ns Corp.*, 392 B.R. 561, 572 (Bankr. D. Del. 2008) (“The Court is not convinced that the plain language of Rule 26(a)(2)(B) [prior to the 2010 amendment] imposes an obligation on a party or its experts to preserve and produce drafts of an expert’s report.”). The Teleglobe Court further noted that an expert’s own revisions to prior drafts are not “considered” by the expert and therefore do not fall in the scope of discoverable evidence. *Id.* at 573. Moreover, even if there was discoverable evidence in the draft reports that was no longer available due to the destruction of the drafts, the exclusion of the experts’ testimony and/or reports was too “drastic” of a remedy. *Id.* at 578.

3. *Simmons Food, Inc. v. Indus. Risk Insurers*, No. 5:13-CV-05204, 2015 WL 5679760, at *3–4 (W.D. Ark. Sept. 25, 2015) (holding that model created by the defendant’s expert constituted the work product of an expert retained in anticipation of litigation. Consequently, the Court noted that the model was protected from discovery and the expert’s subsequent destruction of it “was, at best, a discarded draft.” Accordingly, the Court denied the plaintiff’s motion for sanctions.).

ii. Yes:

1. *Trigon Ins. Co.*, 204 F.R.D. at 289 ([pre-2010 Rules Amendments] finding that communications between litigation consultant and testifying experts and the experts’ draft reports were “intentionally” deleted even though the documents and communications were deleted by an email retention policy).

2. *Semtech Corp. v. Royal Ins. Co. of Am.*, No. CV 03-2460-GAF PJWX, 2007 WL 5462339, at *2 (C.D. Cal. Oct. 24, 2007) ([pre-2010 Rules Amendments] “Where the destroyed evidence consists of a draft report of an expert or other materials on which the expert relied, the expert may be precluded from testifying depending on the culpability of the offending party and the prejudice to the opposing party.”).

3. *But see In re Teleglobe Commc’ns Corp.*, 392 B.R. at 580 (disagreeing with *Trigon* and finding that the plaintiffs’ degree of fault was not high, because the experts “simply made corrections to their reports on their computers and failed to save prior drafts.”).

4. *Peterson v. Union Pac. R. Co.*, No. 06-3084, 2008 WL 4104169, at *4 (C.D. Ill. Aug. 28, 2008) ([pre-2010 Rules Amendments] “[Expert] also admits that he has lost or discarded discoverable draft reports, correspondence, and e-mails. There is, however, no evidence to support a finding that [Expert]’s failure to preserve this evidence was willful.”).

iii. Depends:

1. *Univ. of Pittsburgh*, 2007 WL 1002317, at *4 (“Because the draft reports were destroyed prior to the creation of any obligation on the part of the experts, the plaintiff or the plaintiff’s counsel to retain them, the Court finds that the destruction of these draft reports was not done intentionally, fraudulently, and with ‘a desire to suppress the truth,’ and therefore, is not sanctionable.”).
IV. Fed. R. Civ. P. 26(b)(4)(C): Trial-Preparation Protection for Communications Between a Party’s Attorney and Expert Witnesses

a. RULE: “Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, 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.”

b. Protection For Communications Between Attorneys and Expert Witness

i. Compensation

1. Engagement Letters -- Discoverable?

   a. Yes:

      i. In re 94th & Shea, L.L.C., No. 10-BK-37387, 2011 WL 6396522, at *2 (Bankr. D. Ariz. Dec. 15, 2011) (directing defendant to produce its experts’ engagement letters, and if these agreements were oral, defendant must provide the terms and conditions).

   b. Dispute:

      i. Davita Healthcare Partners, Inc., 128 Fed. Cl. at 592–93 (finding that the plaintiff sufficiently complied with Rule 26(b)(4)(C)(i) by providing the expert’s invoices, and that the plaintiff was not required to provide a “line-by-line” detail of services and discussions with the plaintiff).


ii. Communication of Facts or Data Between Attorney and Expert Witnesses that Were Relied Upon in Forming Opinions

   1. Expert’s Spreadsheets, Graphs, and Analyses -- Discoverable?
2. Transmittal Letters -- Discoverable?

a. Yes:
   
i. *In re Asbestos Prods. Liability Litig. (No. VI)*, 2011 WL 6181334, at *6–7 (finding that “transmittal letters” by the attorney to the expert physicians contained facts, data, and assumptions on which the experts relied and are therefore discoverable).

3. Documents Reviewed by Expert but not Relied Upon -- Discoverable?

   a. Yes:
      
i. *CTB, Inc. v. Hog Slat, Inc.*, No. 7:14-CV-157-D, 2016 WL 1244998, at *15 (E.D.N.C. Mar. 23, 2016) (finding that the expert considered facts and data given to her by the attorneys, even though the expert could not recall what was given to her).
   
      ii. *Euclid Chem. Co. v. Vector Corrosion Techs., Inc.*, No. 1:05CV80, 2007 WL 1560277, at *6 (N.D. Ohio May 29, 2007) (finding that everything that a witness “received, reviewed, read, or authored, relating to the subject matter of the facts or opinions set out in his expert’s report” must be produced) (applying pre 2010 Rules Amendment standard).
   
      iii. *Allstate Ins. Co. v. Electrolux Home Prods., Inc.*, 840 F. Supp. 2d 1072, 1080 (N.D. Ill. 2012) (discoverable “factual” information includes those materials that experts “considered” even if not specifically relied upon).
   
      iv. *In re Commercial Money Ctr., Inc., Equip. Lease Litig.*, 248 F.R.D. 532, 537 (N.D. Ohio 2008) (“[A] testifying expert has ‘considered’ data or information if the expert has read or reviewed the privileged materials before or in connection with formulating his or her opinion.”) (internal citations and quotation marks omitted).
v. *Yeda Research & Dev. Co., Ltd. v. Abbott GmbH & Co. KG*, 292 F.R.D. 97, 105 (D.D.C. 2013) (“[M]aterials reviewed or generated by an expert must be disclosed, regardless of whether the expert actually relies on the material as a basis for his or her opinions.”).

iii. Communication of Assumptions Between Attorney and Expert Witnesses that Witnesses Rely Upon in Forming Opinions

1. Attorney’s Hypotheticals -- Discoverable?
   a. No:
      i. *Mackay*, 742 F.3d at 870 (“[D]iscussions with counsel about the ‘potential relevance of facts or data’ and more general discussions ‘about hypotheticals, or exploring possibilities based on hypothetical facts’ are protected. Thus, materials containing ‘factual ingredients’ are discoverable, while opinion work product is not discoverable.”).
   b. Depends:
      i. *Green v. Nemours Found.*, No. N15C-03-208 CEB, 2016 WL 4401043, at *3 (Del. Super. Ct. Aug. 17, 2016) (finding that an attorney’s hypotheticals and proposed possibilities are protected unless the expert states that he or she relied on them) (interpreting state rule that is identical to Federal Rule 26(b)(4)(C)).
   c. Communication Between Attorneys and Experts Who are Not Required to Provide a Report
      i. Dual-Hat Experts -- Communications Protected?
         1. Yes:
            a. Rule 26(b)(4)(D) states: “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.”
            b. *Sara Lee Corp. v. Kraft Foods Inc.*, 273 F.R.D. 416, 420 (N.D. Ill. 2011) (holding that an expert’s communications were protected from discovery because they related solely to
the expert’s role as a non-testifying consultant. While the expert served as both a testifying expert for one of the advertisements at issue, and a non-testifying consultant for a second advertisement, the specific materials requested were generated “‘uniquely in the expert’s role as consultant,’” and were thus shielded from production).

2. No:

   a. *Yeda Research & Dev. Co.*, 292 F.R.D. at 115 (finding that plaintiff waived the work product protection of an expert’s work as a consultant by re-designating him as a testifying expert witness).

   b. *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 288 F.R.D. 222, 228 (D.D.C. 2012) (holding that consulting expert must produce factual information pursuant to exceptional circumstances exception in Rule 26(b)(4)(D)(ii)). The *Westrick* Court pointed out that “[e]xceptional circumstances ‘may exist when a non-testifying expert’s report is used by a testifying expert as the basis for an expert opinion, or where there is evidence of substantial collaborative work between a testifying expert and a non-testifying expert.’” *Id.* (quoting *Long-Term Capital Holdings, L.P. v. United States*, No. 01-CV-1290 (JBA), 2003 WL 21269586, at *2 (D. Conn. May 6, 2003)) (citations omitted).

   d. Communications Between a Non-Lawyer and an Expert

      i. Communication between a Non-Lawyer Employee and an Expert -- Protected?

         1. No:

            a. *In re Application of Republic of Ecuador*, 280 F.R.D. at 515 (finding that emails between an expert, his assistant, and non-attorney employees of the client were not work product, even though the attorneys were copied on the emails).

            b. *Douglas*, 153 F. Supp. 3d at 491 (“[A] testifying expert's notes and his communications with other non-attorneys must be produced in discovery.”) The *Douglas* Court specified that this extended to “communications in which attorneys are merely copied, but in which no attorney work product exists . . . .” *Id.* at 491-92.

            c. *Benson*, 2016 WL 1046126, at *6 (noting that the same communications that are shielded from discovery when between a party’s attorney and a reporting/testifying expert cannot be withheld if forwarded by a non-attorney representative of the party).
e. Communications Between an Attorney and Assistant to an Expert
   
i. Communications between an Expert’s Assistant and Attorney -- Protected?
      1. Yes:
         a. *In re Application of Republic of Ecuador*, 280 F.R.D. at 514 (finding that communications between an expert’s assistant and the attorney are protected by Rule 26(b)(4)(C)).

V. Selected *Daubert* Issues Relating To Fed. R. Civ. P. 26

a. Fed. R. Evid. 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:
   
i. (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;
   
ii. (b) the testimony is based on sufficient facts or data;
   
iii. (c) the testimony is the product of reliable principles and methods; and
   
iv. (d) the expert has reliably applied the principles and methods to the facts of the case.
   
   1. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994) (holding that plaintiff must make more than a prima facie showing that their witness is qualified to testify. Rather, a judge should only find an expert’s opinion is reliable under Rule 702 if it is based on “good grounds.”).
   
   2. *United States v. Bonds*, 12 F.3d 540, 557–58 (6th Cir. 1993) (holding than an expert’s methods are reliable even when different methods may have yielded more accurate results). The Bonds Court noted that “*Daubert* requires only scientific validity for admissibility, not scientific precision.” *Id.* at 558.
   
   3. *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F. 3d. 594, 598 (9th Cir. 1996) (upholding exclusion of testimony of expert who applied method commonly used by other scientists in his field, but obtained conclusions not shared by other scientists).

b. Fed. R. Evid. 703: “An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.”
i. *General Electric v. Joiner*, 522 U.S. 136, 146–47 (1997) (excluding expert testimony where the evidence and data relied on did not support the expert’s actual conclusion). “A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” *Id.* at 146.


c. *Daubert* Standard used to determine the admissibility of an expert’s scientific testimony:

i. whether a theory or technique can be (and has been) tested;

ii. whether the theory or technique has been subjected to peer review and publication;

iii. the known or potential rate of error, and the existence and maintenance of standards controlling the technique’s operation; and

iv. whether it has attracted widespread acceptance within a relevant scientific community.


d. Lessons on the Admissibility of Expert Witness Testimony following *Daubert*:

i. Standards articulated in Daubert are not limited to scientific experts only.

1. *Kuhmo Tire Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999) (“We conclude that *Daubert’s* general holding—setting forth the trial judge’s general “gatekeeping” obligation—applies not only to testimony based on “scientific” knowledge, but also to testimony based on “technical” and “other specialized” knowledge.”).

ii. Daubert factors are not an exhaustive list to determine the admissibility of expert testimony.

1. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316–17 (9th Cir. 1995) (“We read [the list of Daubert] factors as illustrative rather than exhaustive; similarly, we do not deem each of them to be equally applicable (or applicable at all) in every case. Rather, we read the Supreme Court as instructing us to determine whether the analysis undergirding the experts’ testimony falls within the range of accepted standards governing how scientists conduct their research and reach their conclusions.”).

iii. Expert testimony must assist the trier of fact to be admissible.

1. *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 564–65 (11th Cir. 1998) (“As expert evidence, the testimony need only
assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.”).

iv. Experts are not automatically prohibited from testifying about topics that are not published.

1. *Kannankeril v. Terminix International, Inc.*, 128 F.3d 802, 809 (3d. Cir. 1997) (permitting expert to testify on the harmful effects of organophosphates despite not having produced publications on the topic because “his opinion is supported by widely accepted scientific knowledge of the harmful nature of organophosphates.”).

v. Abuse of Discretion is the standard of review applied to an appeal of a court’s decision to admit or exclude expert testimony.

1. *Joiner*, 522 U.S. at 146 (“We hold, therefore, that abuse of discretion is the proper standard by which to review a district court's decision to admit or exclude scientific evidence.”).

e. Exclusion Under *Daubert* for Failure to Designate an Expert

i. *Peshlakai*, 2013 WL 6503629, at *18 (“Allowing a treating physician to testify in the same capacity and to the same extent as an expert, without requiring even disclosure of the physician's identity, would undermine both the *Daubert* . . . analysis and rule 702 requirements. Any plaintiff could get around the disclosure requirements of rule 26(a)(2) and *Daubert* . . . reliability standards by simply asking a physician for treatment, even once, instead of hiring a physician as an expert for the trial.”).

f. Exclusion Under *Daubert* for Failure to Provide a Summary of Facts and Opinions

i. *Motio, Inc. v. BSP Software LLC*, No. 4:12-CV-647, 2016 WL 74425, at *2 (E.D. Tex. Jan. 6, 2016) (“Even if, however, the Court found excusable Plaintiff’s mistake regarding interpretation of the Scheduling Order, the Court finds that Plaintiff failed to comply with the requirements of Rule 26(a)(2)(C). Plaintiff did not provide a meaningful ‘summary of the facts and opinions to which [Mr. Moore] is expected to testify’” as required by Rule 26(a)(2)(C)(ii). Plaintiff merely lists a set of topics that Mr. Moore may speak toward, but offers no actual facts or opinions, forcing Defendants to make assumptions based on things outside the disclosure as to what Mr. Moore will testify.”).

ii. *Morrison v. Quest Diagnostics Inc.*, 315 F.R.D. 351, 357 (D. Nev. 2016) (“Plaintiff’s expert disclosure does not comply with her Rule 26(a) expert disclosure obligations. She does not identify, let alone provide a summary of the facts and opinions on which any medical provider will provide testimony. Dr. Soloway’s affidavit contains opinions and some discussion of the bases for his opinions. It does not identify the data or other information he relied upon in forming his opinions except in the most general and unhelpful way.”).
g. Exclusion Under *Daubert* for Providing Unsupported Conclusions?


h. Exclusion Under *Daubert* for Failure to Provide Discoverable Communications?


i. Exclusion Under *Daubert* for Destruction of Expert Drafts?


j. Exclusion Under *Daubert* for Attorneys’ Drafting of Expert Opinions?