



# **Selecting, Retaining, and The Federal and Idaho Expert Disclosure Requirements**

**LITIGATION SECTION  
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# Deciding On Whether An Expert Is Necessary

- **Whether or not expert testimony is needed depends on the case and available financial resources.**
- **Expert opinions are not always necessary to explain or prove why the facts support a legal claim or to counter potential defenses.**
- **Experts can be used in complex cases requiring technical, specialized, or scientific knowledge or expertise beyond that of an average lay person.**
- **The expert should explain why expert testimony is necessary and how it would assist the factfinder in reaching a favorable result.**
- **The expert may not instruct jury on the result it should reach or usurp the role of the court to explain the law.**
- **An expert without previous litigation experience can be just as effective as a highly paid professional expert whose major source of income is from providing expert testimony.**

# Expert Selection Considerations

- **The attorney should interview the expert about the specific facts in the case and not just rely upon their credentials.**
- **The attorney should discuss the legal claims or defenses with the expert and explore why the case needs an expert opinion.**
- **The expert can be an invaluable resource in identifying potential claims and defenses, in explaining technical or scientific issues, or proving damages.**
- **The attorney should discuss how expert testimony will assist the trier of fact to understand the evidence or determine a fact in issue. Rule 702.**
- **The attorney should discuss the expert's experience as an expert:**
  - ✓ **Prior reports, depositions, and witness testimony;**
  - ✓ **Cross examination;**
  - ✓ ***Daubert* challenges/disqualifications;**
  - ✓ **References; and/or**
  - ✓ **Peered reviewed research and articles.**

# Retaining An Expert

- **When you're interviewing the potential expert:**
  - ✓ **Ensure no conflicts exist;**
  - ✓ **Assess whether the expert's thinking on relevant issues is consistent with your legal positions;**
  - ✓ **Confirm interest in serving as expert and meeting requirements of report, testimony, etc.; and,**
  - ✓ **Discuss compensation expectations.**
  
- **Review the expert's educational qualifications, employment experience, publications, and previously provided expert testimony.**
  - ✓ **Conduct legal research and a Google search to verify the expert's educational and employment experience.**
  - ✓ **Ensure that the expert has not offered contradictory opinions or unfavorable decisions on *Daubert* challenges.**
  - ✓ **No AI should be used.**

# Expert Engagement Letters

- **The attorney should prepare an expert engagement letter which includes:**
  - ✓ **A brief summary of the relevant facts;**
  - ✓ **The subject matter of the opinions to be offered;**
  - ✓ **The compensation for preparing reports and trial testimony;**
  - ✓ **The necessity of timely preparation of the expert reports;**
  - ✓ **The potential for a deposition and court testimony;**
  - ✓ **Prior reports, depositions, and witness testimony;**
  - ✓ **Cross examination;**
  - ✓ ***Daubert* challenges/disqualifications;**
  - ✓ **References; and**
  - ✓ **Peered reviewed research and articles.**

## **Fed. R. Civ. P. 26(a)(2)(B) Expert Disclosures and Reports**

- **An expert who has been “retained or specially employed” to provide expert testimony, or is a party’s employee whose regular duties include providing expert testimony, has to provide a written report. Idaho Local Rule 26.2(b).**
- **Disclosure of expert reports will be set at the scheduling conference under Idaho Local Rule 16.1 and the Court’s Scheduling Order.**
- **Simultaneous Disclosures?**
- **The reason for requiring expert reports is to eliminate unfair surprise and provide the opposing party an opportunity to evaluate the expert opinions.**
- **The report must provide the expert’s opinions and reasons for the opinions the expert will offer on a dispositive motion or at trial and not merely the expert’s conclusory opinions.**
- **Except for “good cause”, the expert’s testimony is limited to the subject areas identified in the report or through discovery such as a deposition. Idaho Local Rule 26.2(b). *See also* Fed. R. Civ. P. 37(c)(1).**
- **A party must timely supplement the disclosure of an expert witness or the Court may exclude the testimony. Fed. R. Civ. P.26 (e)(2) & IRCP 26(e)(2) & (3).**

# Retained and Specialty Employed Expert Reports

- Federal Report requirements:
  - ✓ A complete statement of all opinions the witness will express and the basis and reasons for them;
  - ✓ The facts, data, and documents considered by the witness in forming opinions;
  - ✓ Any exhibits that will be used to summarize or support the opinions;
  - ✓ The witness's qualifications, including a list of all publications authored in the previous 10 years;
  - ✓ List of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and,
  - ✓ A statement of the compensation to be paid for consultation and testimony in the case.
  - ✓ Amendment to FRE 702: expert demonstrates to the court that it is more likely than not [preponderance of the evidence] that: the opinion reflects a reliable application of the principles and methods to the facts and not just take the expert's word for it.
  
- The attorney should review the expert's report to ensure it complies with requirements for expert opinions in Rules 702 and 703 to avoid a challenge under *Daubert* and to bolster its credibility.

## **IRCP 26(b)(4)(A) Expert Disclosures and Reports**

- ❖ **A party must disclose “by answer to interrogatory, or if required by court order,” all experts who are expected to testify under IRE 702, 703, and 705.**
  
- ❖ **Idaho Report requirements for retained, specialty employed, or employees experts IRCP 26(4)(A)(i):**
  - ✓ **A complete statement of all opinions the witness will express and the basis and reasons for them;**
  - ✓ **The data or information considered by the witness in forming opinions;**
  - ✓ **Any exhibits that will be used to summarize or support the opinions;**
  - ✓ **The witness's qualifications, including a list of all publications authored in the previous 10 years;**
  - ✓ **List of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and,**
  - ✓ **A statement of the compensation to be paid for the testimony in the case.**



## **Fed. R. Civ. P. 26(b)(4): Protection of Expert Trial Preparations**

- **Draft reports and disclosures are not discoverable absent a showing under Fed. R. Civ. P. 26(b)(3)(A) of substantial need and inability to obtain information without undue hardship.**
- **Communications between attorney and experts are not discoverable except:**
  - ✓ **Rate of compensation;**
  - ✓ **The facts and data the attorney provided to expert that were considered in forming the expert's opinions; and**
  - ✓ **Assumptions provided by the attorney that the expert relied on in forming expert opinions.**
- **Depositions are permitted if the expert will testify at trial only after a required report is disclosed.**
- **Written discovery from experts retained or specialty employed who are not expected to testify at trial is not permitted absent a showing of exceptional circumstances.**

## **IRCP 26(b)(4)(C)(i)-(iii) Protection of Expert Trial Preparations**

- ❖ **Draft disclosures or draft reports “prepared in anticipation of litigation disclosed under IRCP 26(b)(4)(a)(i), are protected from disclosure.” IRCP 26(b)(4)(B).**
- ❖ **Communications between attorney and experts required to be disclosed under IRCP 26(b)(4)(a)(i), are protected from disclosure, regardless of form except: [Same as Federal Rule]**
  - ✓ **Amount of compensation;**
  - ✓ **The facts and data the attorney provided to expert that were considered in forming the expert’s opinions; and**
  - ✓ **Assumptions provided by the attorney that the expert relied on in forming expert opinions.**

## Expert Discovery Under the IRCP

- ❖ Depositions are permitted of any expert who has been disclosed. IRCP 26(b)(4)(A)(iii).
- ❖ A party may not contact a disclosed retained expert without permission of the party that retained the expert. IRCP 26(b)(4)(v).
- ❖ Further discovery of experts by other means is allowed subject to court restrictions as to the scope and the payment of expenses. IRCP 26(b)(4)(iv).
- ❖ No discovery of retained or specialty employed experts employed in anticipation of litigation or to prepare for trial who will not testify. IRCP 26(b)(4)(D)(iii) except on a showing it is impracticable to obtain facts or opinions by other means or under IRCP 35(b) for Physical and Mental Examinations.
- ❖ Unless manifest injustice would result, the party seeking discovery to pay a reasonable fee to the expert for discovery or depositions. IRCP 26(b)(4)(E)(i)-(iii).

# Disclosure of Experts Not Required to Provide Reports

- A party must disclose any non-retained or specialty employed expert it may use at trial to present expert testimony. Fed. R. Civ. P. 26(b)(2)(A).
- ❖ A party must disclose any non-retained or specialty employed expert with knowledge of relevant facts not acquired in preparation for trial to provide expert testimony. IRCP 26(b)(4)(ii).
- Federal and Idaho disclosures for non-retained or specialty employed experts are the same:
  - ✓ Disclosure must include the subject matter the witness is expected to present at trial under Fed. R. Ev. 702, 703, or 705; and
  - ✓ A summary of the facts and opinions on which the expert is expected to testify.



# QUESTIONS?

Howard Belodoff is the Associate Director of Idaho Legal Aid Services, Inc. and has a part-time private firm. In 1978, Mr. Belodoff received a Reginald Heber Smith Fellowship from Howard University after graduating from the University of Idaho College of Law. Mr. Belodoff's trial and appellate work has focused on civil rights. He has established case precedents of national significance, including fourteen successful appeals in the Ninth Circuit. He is currently the Idaho Federal District Court Ninth Circuit Lawyer's Representative. Mr. Belodoff was honored to receive the 2021 Idaho State Bar Distinguished Lawyer Award, the 2019 Reginald Heber Smith Justice Award by the National Legal Aid and Defenders Association, and the 2018 Idaho Trial Lawyers Association "Trial Lawyer of the Year" Award. He has been named a "Super Lawyer" since 2010 and is a Martindale-Hubbell Most Honored Lawyer.