

What happens when a party fails to disclose an expert witness?

Back in 2015, my former colleague Ann Anderson, wrote about legislation amending provisions in [Rule 26\(b\)\(4\)](#) dealing with expert witnesses in this post <https://civil.sog.unc.edu/north-carolinas-expert-witness-discovery-rule-changes-and-clarifications/>.

[S.L. 2015-153](#), in an effort “to provide openness and avoid unfair tactical advantage in the presentation of a case at trial,” amended [Rule 26](#) to require a party to disclose the identity of an expert witness that it may use at trial, regardless of whether the other party requested disclosure through discovery.

Since the amendment was enacted, there have been two appellate opinions interpreting the rule in the family law context. These two opinions tell us:

- [Rule 26\(b\)\(4\)\(a\)\(1\) of the Rules of Civil Procedure](#) requires that expert witnesses be disclosed before trial, even if identification of experts is not required by a discovery request, discovery plan or a court order.
- [Rule 26](#) does not specify when experts must be disclosed and does not provide a specific sanction for the failure to disclose.
- If a trial court determines a party failed to disclose an expert within a reasonable time prior to trial, the court has the inherent authority to determine an appropriate sanction.
- The trial court has discretion to exclude expert testimony as a sanction if the court in its discretion determines it is appropriate to do so because the failure to disclose gives a party an “unfair technical advantage.”

[Myers v. Myers, 269 N.C. App. 237 \(2020\)](#)

The trial court excluded the wife’s expert witness’s testimony regarding potential tax consequences of an alimony award because wife failed to disclose the expert to husband until the day before trial. The trial court determined that because of the 2015 legislative amendment to [Rule 26](#), wife was required to disclose her expert witness before trial even if not requested to do so during discovery or required to do so by a discovery plan or other court order. The trial court concluded that her failure to disclose until the day before trial required the court to exclude the expert testimony.

The court of appeals agreed with the trial court’s conclusion that [Rule 26](#) requires the disclosure of experts even if not requested in discovery, required by a discovery plan, or required by a local rule or court order. However, the court of appeals did not agree that a violation of the disclosure

provision of [Rule 26](#) requires automatic exclusion of the testimony. The court of appeals held that because [Rule 26](#) does not specify how far ahead of trial disclosure must be made and does not mandate the consequence of a party's failure to disclose, the trial court must exercise its discretion to determine first that a party did not disclose in a reasonable amount of time before trial and then to determine, if disclosure was not made in a reasonable amount of time before trial, what the appropriate sanction should be.

The court of appeals held that [Rule 37](#) provides for sanctions when a party fails to comply with a discovery request or a discovery plan or court order but does not provide sanctions for the failure to disclose when disclosure has not been ordered or agreed to. However, the appellate court held that a trial court has inherent authority to sanction a party for failure to comply with the mandatory disclosure requirement of [Rule 26](#). The specific sanction imposed is within the discretion of the trial court and the sanction can be exclusion of the testimony altogether if the trial court determines the failure to disclose in a timely manner gave the party an "unfair technical advantage."

Because the trial court in this case misinterpreted the law to require exclusion of the testimony, the court of appeals remanded the case to the trial court for further consideration and findings of fact to support the sanction the trial court determines to be appropriate.

[Aman v. Nicholson, \(N.C. App., March 7, 2023\).](#)

Mother filed for custody against father. A temporary custody order was entered granting primary physical custody to mother and visitation to father. The temporary order required that both parents obtain a psychological evaluation and provide the results of the evaluation to the other party. Both parents also were ordered to participate in individual and joint psychological counseling.

On the first day of the custody trial, father provided mother with the names and CVs of three potential expert witnesses, and reports written by two of the potential expert witnesses. One of the witnesses had conducted the evaluation of father required by the temporary custody order and his report had been provided to mother approximately one year prior to the start of the custody trial. Mother had not received notice of the other two potential experts before the first day of the trial and she had not seen the second report. She objected to father's evidence from the experts due to father's failure to disclose the experts before trial. The trial court excluded all three of father's experts and the two reports after concluding that father's failure to disclose the experts before trial gave him an unfair tactical advantage.

On appeal, father argued that the trial court erred in excluding his experts and the reports because the custody trial was scheduled with less than 120 days' notice, citing [Rule 26\(\(b\)\(4\)\(f\)\)](#), and because mother had been given one expert's report more than a year before the custody trial began. The court of appeals rejected father's argument relating to the fact that the parties had less than 120 days' notice of trial, holding that the time frames referenced by that section of [Rule 26](#) apply only when the parties have agreed to exchange written reports of experts. In this case, there

was no such agreement. In the absence of such an agreement, [Rule 26](#) provides no time frame for the disclosure; the rule only specifies that disclosure be made before trial.

The court of appeals held that the trial court did not err in excluding two of the experts and the one report mother had not seen before the trial. The appellate court held that the trial court findings that the failure to exclude the experts would result in further delay of the custody trial, that father offered no justification for the failure to disclose the experts before trial, and that the late disclosure gave father an unfair tactical advantage were sufficient to show that the trial court had not abused its discretion in excluding the evidence as a sanction for the failure to disclose in a timely manner.

The court of appeals held that the trial court should not have excluded the testimony of the expert who had provided the report to mother more than one year before the trial began. Because she had earlier access to the report, there was nothing to indicate that the use of this report or the expert's testimony would have resulted in any surprise to mother or unfair advantage to father. This error by the trial court did not result in remand of the case, however, because father failed to demonstrate he had been prejudiced by the exclusion of the testimony of this expert.