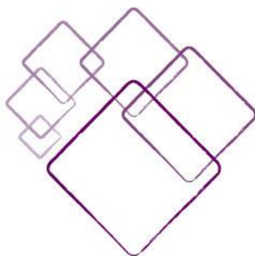

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Q&A

Duty to Supplement Discovery Responses

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September 2015

Q. Our office filed suit against the state Medicaid agency in federal district court. The agency now claims that it does not have an obligation to update information provided during discovery until the end of discovery. Is the agency correct? When does a party have a duty to supplement information provided during discovery?

A. No, the state is not correct. While older versions of Federal Rule of Civil Procedure 26(e) required supplementation in very limited circumstances, the current rule imposes a broad duty on parties to update their disclosures and discovery responses in a timely manner. *See Klonoski v. Mahlab*, 156 F.3d 255 (1st Cir. 1998), *cert denied*, 119 S. Ct. 1334 (1999). A party that fails to fulfill its duty under Rule 26(e) may face a range of possible sanctions.

Discussion

Under Rule 26(e), a party who has made a disclosure under Rule 26(a) or has responded to an interrogatory (Rule 33), a request for production (Rule 34), or a request for admission (Rule 36), has a duty to supplement its disclosure or response. The party has a duty to supplement "in a timely manner" if: (1) it learns that the disclosure or response is incomplete or incorrect in some material respect; and (2) the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. The party must also provide additional or corrective information if ordered by the court. Fed. R. Civ. P. 26(e)(1). *See also* 6 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 26.131 (3d ed. 2009).

The duty to supplement differs somewhat with respect to information from an expert whose report must be disclosed under Rule 26(a)(2)(B). It extends both to information included in the expert's report and to information given during the expert's deposition. A party must disclose the additional or corrective information by the time its pretrial disclosures are due under Rule 26(a)(3) (at least 30 days before trial unless otherwise

ordered by the court). Fed. R. Civ. P. 26(e)(2), 26(a)(3).

The duty to supplement does not apply to all disclosures and discovery responses. In particular, a party has no duty to supplement deposition testimony, with the exception of testimony provided by an expert whose report must be disclosed under Rule 26(a)(2)(B). *See* Fed. R. Civ. P. 26(e)(1)-(2). In addition, a party need not disclose additional or corrective information about documents provided through an informal agreement with the other party. *See*, *e.g.*, *Alvariza v. Home Depot*, 240 F.R.D. 586, 590 (D. Colo. 2007), *aff'd*, 241 F.R.D. 663 (D. Colo. 2007). Finally, there is no requirement to disclose information that was not fairly encompassed in the initial discovery request. *See*, *e.g.*, *In re Air Crash Disaster*, 86 F.3d 498, 539 (6th Cir. 1996) (finding no duty to disclose a videotape used by an expert when the expert was not deposed concerning matters on the videotape).

However, when the duty to supplement does apply, it attaches regardless of when the party acquires the additional or corrective information. This means that the duty attaches when a party receives new information after making the initial disclosure or response, as well as when a party realizes that it did not provide complete or correct information at the time of the initial disclosure or response, even though that information was available. 6 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 26.131 (3d ed. 2009). Moreover, the duty to supplement is ongoing, and parties should make additional or corrective responses particularly promptly as the trial date approaches. *Id.* at ¶ 26.131[3]. *See also Pasant v. Jackson Nat'l Life Ins. Co.*, 137 F.R.D. 255, 257 (N.D. Ill. 1991) (finding the plaintiff had a continuing obligation to supplement answers to interrogatories).

On occasion, parties have attempted to use Rule 26(e) to introduce new or rebuttal expert evidence after the deadline for expert disclosures has passed. A number of courts have rejected such practices. *See, e.g.*, *Keener v. United States*, 181 F.R.D. 639, 642 (D. Mont. 1998) (holding that a "supplemental" expert report submitted after the expert disclosure deadline was so different from the initial report that it could not be said to correct or supplement information under Rule 26(e), and as a result, was not admissible); *Luke v. Fam. Care & Urgent Med. Clinics*, 323 F. App'x 496, 500 (9th Cir. 2009) (rejecting expert declarations submitted under Rule 26(e) because "Rule 26(e) creates a 'duty to supplement,' not a right. Nor does Rule 26(e) create a loophole through which a party who submits partial expert witness disclosures, or who wishes to revise her disclosures in light of her opponent's challenges to the analysis and conclusions therein, can add to them to her advantage after the court's deadline for doing so has passed."); *see also SSS Enterprises v. Nova Petroleum Realty, LLC*, 533 Fed. Appx. 321, 324 (4th Cir. 2013).

When a party violates Rule 26(e), the opposing party need not seek a court order compelling disclosure before seeking sanctions. A number of appellate courts have held that district courts may impose sanctions without first issuing an admonitory order. *See, e.g., Alldread v. City of Grenada*, 988 F.2d 1425, 1436 (5th Cir. 1993) ("Rule 26 imposes no requirement, express or implied, that a motion to compel precede a court's

imposition of a sanction…"); *Thibeault v. Square D Co.*, 960 F.2d 239, 245 (1st Cir. 1992) ("While Fed. R. Civ. P. 37(b) [regarding failure to disclose or cooperate in discovery] requires that a court order must be in effect, and then violated, as a prerequisite for the imposition of sanctions thereunder, no such requirement exists under Rule 26(e). The rule itself furnishes fair warning. Thus, when Rule 26(e) is flouted, district courts possess the power to impose sanctions without first issuing a firm discovery deadline or an admonitory order.") (internal citations omitted); *see also Outley v. City of New York*, 837 F.2d 587, 589 (2d Cir. 1988); *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980); *Meyers v. Pennypack Woods Home Ownership Assoc.*, 559 F.2d 894, 904-05 (3d Cir. 1977).

District courts may order a range of sanctions such as excluding witnesses, precluding evidence, granting continuances, and imposing a monetary penalty against a party or an attorney. *See* 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 26.132[7] (3d ed. 2009). On appeal, the standard of review is abuse of discretion. *Id*. Notably, the court may impose these sanctions against a government party. *See id*. at ¶ 26.132[6]; *United States v. Shaffer Equip. Co.*, 158 F.R.D. 80, 87 (S.D. W.Va. 1994) (holding monetary sanctions were not barred by sovereign immunity because "a sufficiently explicit rule authorizing such award exists, namely Federal Rule of Civil Procedure 26(e)").

Conclusion and Recommendations

Parties have a broad duty to supplement disclosures and discovery responses under Rule 26(e). Given the amendment of Rule 26(e) to require broad disclosure, federal court practitioners should be aware of the following:

- There is a duty to supplement, even absent a request to supplement.

- Parties cannot wait until the discovery window closes or until just before trial to supplement responses; rather, supplementation must be timely made after the party becomes aware of the need to supplement.

- Even though no request to supplement is needed to trigger the duty to supplement, a party may decide to serve a notice to supplement if it is concerned that another party has additional or corrective information that it has not yet produced.

- If a party obtains information showing the need for discovery responses to be supplemented and the other party refuses to supplement, the requesting party can seek sanctions from the court even absent a court order to produce. The court can use its discretion to decide sanctions.

- If the duty to supplement does not apply to the information that the party is seeking, the party may be able to access the information another way. For example, if the party believes that information provided during a deposition has

changed, the party may be able to access the updated information by requesting responses to additional interrogatories.