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Expert Disclosures After the Exchange of Initial Reports

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Introduction

Fed R. Civ. P. 26(a) places very specific (and often very onerous) demands on a party wishing to employ the services of an expert witness at trial. With the passage of RSA §516:29-b, a similar disclosure rule is now in place in the state courts. Because of the difficulties of locating suitable witnesses and ensuring compliance with the myriad disclosure requirements of Rule 26(a)(2)(B), events arising after the initial disclosures are exchanged can easily be overlooked. The rule's less than intuitive treatment of rebuttals and supplementations does not make the process any easier. This article will discuss some of the issues raised by rebuttal and supplemental expert disclosures, and how difficulties can be avoided at the planning stages of a case.

Rebuttal and Supplemental Expert Opinions

Rebuttals **–** Rule 26(a)(2)(C) specifically permits parties, in addition to any initial disclosures, to disclose via written report expert opinions "intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B)."

Supplementations **-** Rule 26(a)(2)(C) also states that the parties "shall supplement these disclosures when required under subdivision (e)(1)." Supplementations under subsection e(1) are required when a "party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties." This duty extends, in the expert context, "both to information contained in a report and to information provided through a deposition of the expert."

Timing – When Rebuttal and Supplemental Opinions Can Be Disclosed

The text of the rule provides that rebuttal opinions can be filed "within 30 days after the disclosure made by the other party." Despite the apparent clarity of this time period, reliance on its application is ill-advised. Courts have reached differing conclusions as to what occurs when the discovery plan, like the sample plan suggested by the local rules, does not specifically provide for rebuttals. In ***Amway Corp. v. Procter & Gamble Co.***, 2001 WL 1894431, *1 (W.D.Mich., 2001), for example, the court concluded that where "[t]he case management order did not address rebuttal reports, the timetable established by the rule applies," and the plaintiff's rebuttal reports were proper under subsection (a)(2)(C).

The court in *Eckelkamp v. Beste*, 315 F.3d 863, 872 (8th Cir. 2002) came to the opposite conclusion, affirming the trial court's decision to deny the plaintiff's motion for leave to file a rebuttal expert report, holding that "the thirty day requirement in Rule 26(a)(2)(C) only applies 'in the absence of other directions from the court or stipulation by the parties.' The district court's case order set its management requirements and did not provide for rebuttal experts, and the court was entitled to hold the parties to that order."

According to the rule, supplementations "shall be disclosed by the time the party's disclosures under

Rule 26(a)(3) are due," i.e., pre-trial disclosures. Here too, parties should not rely on the plain text of the rule, as courts have departed from it where it appears that supplementation could (or should) have been made earlier. In *Tucker v. Ohtsu Tire & Rubber Co., Ltd.*, 49 F.Supp.2d 456,460 (D.Md. 1999), the court ruled that "since the rules of procedure are to be construed to reach just, speedy and inexpensive results, Fed.R.Civ.P. 1, a party who delays supplementing Rule 26(a)(2)(B) expert disclosures until the filing of its pretrial submissions, absent compelling reasons for doing so, should not expect the Court automatically to permit the expert to testify at trial about the newly disclosed information, for such action would condone 'trial by ambush.'"

Another timing issue can arise when an expert disclosed during the initial exchange files a second report. Because rebuttal reports have a tight 30-day deadline, and supplementations may be timely filed up to the deadline for pretrial disclosures,[1] a court may need to determine whether the report qualifies as a rebuttal or a supplementation. *See, e.g., RMED Int'l, Inc.*, *v. Sloan's Supermarkets, Inc.*, 2002 WL 31780188, *3 (S.D.N.Y. 2002) ("the timeliness of an expert report depends on whether the report is supplemental or solely rebuttal. Certainly, the difference can be a fine one.") If a report even arguably contains rebuttal arguments, it is advisable to comply with the thirty-day deadline to avoid any complications.

Planning considerations

Local Rule 26.1 charges the parties with negotiating a discovery plan, and there is considerable latitude to depart from the framework suggested in the sample plan. Thus, if the parties wish to adopt a more detailed or nuanced disclosure plan than the basic "plaintiff first, then defendant" scheme they can do so. In *Akeva, L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306, 308 (M.D.N.C. 2002), for example, "[t]he parties chose a bifurcated schedule wherein the party bearing the burden of proof on an issue must first disclose the expert and the expert's report on or before September 3, 2002. In the second tier, any party offering expert testimony in rebuttal had to disclose the expert and the report on or before October 3, 2002."

Adopting this type of schedule makes a great deal of sense in complex cases, or in cases where both parties bear burdens of proof, and where the parties' experts might otherwise spend a great deal of time anticipating arguments that may or may not be made by their opposite numbers. Because the parties are free to make their arrangements, courts have looked with disfavor on attempts to alter or avoid a negotiated disclosure schedule later in the case. In *Akeva*, despite the two-level disclosure plan the parties adopted, the plaintiff attempted to submit an additional round of disclosures. The court rejected these attempts, stating that "the discovery plan did not permit a third tier of expert disclosure as plaintiff contends. This was due simply to inadvertence or neglect in the formulation of the discovery plan itself. Nothing prevented plaintiff from putting in a three-tier or even four-tier expert discovery provision." *Id.* at 310. The clear lesson is that the parties need to think carefully at the planning stage about whether rebuttal opinions will be likely in their case, and make sure that the discovery plan reflects this need.

Arguably, a rebuttal report should address only information that is raised for the first time by an opponent's expert's report (as the rule itself states, a rebuttal report should "solely" address information "identified" by an opponent.) The line may be difficult to draw, but the potential for abuse makes the effort necessary.

Scope – What Supplemental and Rebuttal Reports Can Contain

Neither the rule nor the case law provides a definition of "rebuttal" tailored specifically to the process of expert disclosures.[2] In the context of testimony at trial, "[r]ebuttal is a term of art, denoting evidence introduced by a plaintiff to meet *new* facts brought out in [the] opponent's case in chief." *Lubanski v. Coleco Industries, Inc.*, 929 F.2d 42, 47 (1st Cir. 1991) (emphasis added). *See also*, *Cheshire Medical Center v. W.R. Grace & Co.*, 853 F. Supp. 564, 574 (D.N.H. 1994) ("[e]vidence may be introduced on rebuttal only to refute new facts brought out during the defendant's case-in-chief.")

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opponent's expert's report (as the rule itself states, a rebuttal report should "solely" address information "identified" by an opponent.) The line may be difficult to draw, but the potential for abuse makes the effort necessary. Case law clearly disapproves of and guards against misuse of either rebuttal or supplementation to achieve *de facto* bolstering of an original expert disclosure. In *Crowley v. Chait,* 322 F.Supp.2d 530, 551 (D.N.J. 2004), the court stated that "[r]ebuttal evidence is properly admissible when it will explain, repel, counteract or disprove the evidence of the adverse party. It is not an opportunity for the correction of any oversights in the plaintiff's case in chief.") (internal quotations and citations omitted).

The same is true of supplementations. Even though the plain language of the rule appears to permit supplementation when a report is "incomplete or incorrect," courts have placed greater emphasis on Rule 26(a)(2)(A)'s requirement that the initial report be a "complete statement" of the expert's opinions. Thus, in *Akeva L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002), the Court disallowed a supplemental expert opinion, explaining that "Rule 26(e) envisions supplementation when a party's discovery disclosures happen to be defective in some way so that the disclosure was incorrect or incomplete and, therefore, misleading. It does not cover failures of omission because the expert did an inadequate or incomplete preparation." *See also*, *Sierra Club v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 571 (5th Cir. 1996) ("The purpose of rebuttal and supplementary disclosures is just that—to rebut and to supplement. These disclosures are not intended to provide an extension of the deadline by which a party must deliver the lion's share of its expert information"); *Paris v. Amoco Oil Co.*, 2002 WL 252821, *3 (N.D. Ill. 2002).

Conclusion

In many cases, full and accurate disclosure of an expert's opinion will require disclosures beyond the initial report required by Rule 26(a)(2)(B). To the extent that a party anticipates the need for such additional disclosures, effort should be made to provide specifically for rebuttal and/or supplemental opinions in the scheduling plan. In addition, a disclosure schedule that orders expert disclosure by the allocation of the burden of proof is acceptable under the rules, and can often be useful in complex cases.

Endnotes

1 Although the courts have placed restrictions on this timeframe, as discussed above.

2 The only case located during research for this article that discussed the meaning of rebuttal in the context of Rule 26 was *Poly-America, Inc. v. Serrot Int'l, Inc.*, 2002 WL 1996561, *15 (N.D. Tex. 2002). There, the court stated:

> To determine whether a disclosure is properly included under *Rule 26(a)(2)(C)* rather than under *Rule 26(a)(2)(B)*, it will often be helpful to answer these three questions: First, what evidence does the rebuttal expert purport to contradict or rebut? Second, is the evidence disclosed as rebuttal evidence on the same subject matter as that identified by another party in its *Rule 26(a)(2)(B)* disclosure? Third, is the evidence disclosed as rebuttal evidence intended solely to contradict or rebut that evidence?

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