EXPERT WITNESSES

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ONLINE RESOURCES TO EVALUATE EXPERTS' CREDENTIALS AND PRIOR STATEMENTS

By Michael Brennan, David Dilenschneider, Myles Levin, and Jim Robinson

In a recent Vioxx lawsuit, the judge overturned a defense verdict and ordered a new trial because he found out that the defense expert had misrepresented his credentials by testifying that he was currently certified in internal medicine and cardiovascular disease when, in fact, those certifications had recently lapsed.[1] Importantly, a relatively easy search through certification information available from the American Board of Medical Specialties would have revealed the lack of current certification to defense counsel.

Evaluating an Expert's Credentials

A thorough researcher must double check an expert's credentials rather than simply relying on information related in an expert's disclosure. Studies indicate that falsifying credentials on a resume is not a rare occurrence. For instance, ResumeDoctor.com recently conducted a study of more than 1,000 resumes over a six-month period and discovered that more than 40 percent of them contained at least one significant inaccuracy relating to dates of employment, job titles, or education, and that more than 12 percent contained two or more errors.[2]

Identity and Location

In order to evaluate credentials, you must know the expert's name—and a designation prepared by opposing counsel is not necessarily reliable. Opposing counsel is not likely to intentionally misspell an expert's name, thereby making it harder to find background information, but even a typographical error could cause you to spend hours searching in vain.

Accordingly, making sure that you have the expert's name (and any variants) is a must. Public records search services can help verify an expert's name, but don't overlook other information that public records can provide, such as where the expert has lived over the years. If an expert has moved around often, it could be an indication that the expert is trying to avoid licensing problems in a particular location (or locations) and, therefore, a more expansive research effort is necessary.
(Possible Sites: www.merlindata.com; www.accurint.com)

The Expert's Website

Once the expert's name has been verified, his or her professional website should be carefully reviewed. If a search engine does not locate the expert's website, try entering the expert's name or company name as a dot com (e.g., expertname.com). Many experts post their full curriculum vitae, prior litigation experience, speaking engagements, references, memberships and professional affiliations, and authored works on their websites. Is there anything embarrassing or contradictory on the site? Does the expert pronounce that he or she is "the leader in the industry" or put forth similar bravado that could affect how the jury perceives the expert? Imagine how the jury would react if the pages of the expert's website were displayed as exhibits at trial, because they very well might be.

Expert Directories

When it comes to your initial credential gathering efforts, don't stop with just the expert's website; also determine whether or not that expert has a listing in an expert or other professional directory. Such directories provide a wealth of information about experts, and this information can be compared to the information that the expert has provided through formal discovery efforts as well as on his or her website. Has the expert included embellished information in the directory in an attempt to better market his or her services? A simple comparison of the information provided by the expert with his or her directory listing might reveal discrepancies.

Social Networking Sites

Social networking sites are among the

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HIGHLIGHTS

IS THERE A RIGHT TO SUPPLEMENT EXPERT WITNESS DISCLOSURES UNDER RULE 26(E)?

By Carl Robin Teague

Imagine a situation in which you receive from a retained expert a "supplemental" report about additional litigation testing and that the trial is about 30 days away. Is this supplemental report timely? All trial lawyers and appellate specialists know about the duties to timely disclose and to timely supplement initial disclosures and disclosures of expert testimony. But what do we know about a right to supplement?

I will use a recent case from my own practice to guide the analysis of this issue. In my case, in which I represented the defendants, I argued for the right to serve supplemental disclosures after the discovery deadline. The plaintiff argued strenuously that the supplementation was untimely.[1]

The Rules: Deadlines for Completion of Discovery and for Supplementation of Disclosures of Expert Testimony

In Rule 16[2] scheduling orders,[3] courts routinely include a limit on the time to complete discovery.[4] Although courts may be scheduling orders to "modify the timing of disclosures under Rules 26(a) and 26(e)(1),"[5] some courts do not render orders on deadlines for "disclosure of expert testimony" or for supplementation of disclosures. In the absence of such an order, Federal Rule of Civil Procedure 26(a)(2)(C)[6] establishes the "Time to Disclose Expert Testimony," and Rules 26(a)(2)(D)[7] and 26(e)[8] provide deadlines for "Supplementing the Disclosure."

The consequences for failure to comply with deadlines for disclosure and supplementation may be severe.[9] For example: "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence . . . at a trial, unless the failure was substantially justified or is harmless."[10]

The Briefing: Motions to Exclude or Strike "New" Opinions and "Untimely" Supplementation of Disclosures

In our case, the plaintiff filed a motion to "exclude late testing performed by defense expert," and, after a hearing on that motion, filed a "motion to strike." Without question, the defense served "supplemental disclosures" of expert testimony after the deposition of defense experts and after the deadline established by the court for completion of discovery. The defense did, however, serve the supplemental disclosures before the deadline established by Rules 26(a)(2)(D) and 26(e) for supplementing disclosures.

The plaintiff complained that the supplementation was "untimely." Moreover, the plaintiff argued that the so-called "supplemental disclosures" related to new and different, rather than supplemental, testing. The plaintiff contended that the supplemental disclosures would force the plaintiff to expend additional money paying its own expert to review the new disclosures.

In response, the defendants pointed out that the court did not modify the deadline for supplementing disclosures, which it could have done under Rule 26(a)(3)(B), if not also under Rule 16(b)(3)(B)(i). The defendants also called the court's attention to the fact that the plaintiff's experts had criticized earlier litigation test procedures used by defense experts. The defendants added that defense experts had merely refined the earlier test procedures in order to answer the criticism. The defendants also claimed that they had not just a duty, but a right to supplement disclosures of expert testimony, and that they had complied with the deadline established by the rules for supplementation of disclosures of expert testimony. That deadline was after the deadline for completion of discovery.

The plaintiff was undeterred, arguing that it was too late for the experts to cure their allegedly unreliable work. Thus, the plaintiff again requested that the court strike the evidence relating to litigation tests conducted after the deadline for completion of discovery and after the plaintiff had deposed the defense experts, even though the defense disclosed them before the deadline for supplementation.

The Issue: A Right to Supplement Disclosures?

Do parties have not only a duty but a right to supplement, if the supplementation is timely? And, if so, when is supplementation timely?

Two recent opinions by courts of appeals frame the issue and the competing contentions. In *Miller v. Pfizer, Inc.*,[11] the Tenth Circuit permitted a party to make supplemental disclosures until the date that pretrial disclosures were due under Rule 26(a)(3):

> We agree with the [plaintiffs] that an expert's initial Rule 26 report cannot always anticipate every possible challenge to the report. Accordingly, on occasion it may be appropriate to permit the party using the expert to submit supplements to the reports in response to assertions by opposing experts that there are gaps in the expert's chain of reasoning. A court's failure to permit such supplementation could even constitute an abuse of discretion in some circumstances.[12]

Compare that opinion with the discussion by the Fifth Circuit in *Brennan's Inc. v. Dickie Brennan and Co.*[13]

> [T]here might well be *other* grounds to exclude it [the supplemental report], such as that the disclosures were untimely or otherwise violated Rule 26(a) or the court's scheduling order. *Cf. Sierra Club v. Cedar Point Oil Co.*, 73 F. 3d 546, 571 (5th Cir. 1996) (upholding district court's exclusion of expert testimony where initial expert reports were mere outlines, though the reports were "supplemented" after the disclosure deadline).[14]

In our case, the plaintiff cited *Metro Ford Truck Sales Inc. v. Ford Motor Co.*[15] for the following proposition: "The purpose of

supplementary disclosures is just that—to supplement. Such disclosures are not intended to provide an extension of the expert designation and report production deadline." The plaintiff did not, however, disclose the reason for the Fifth Circuit's statement—that Metro Ford had failed to comply with Rule 26(a)(2) by failing to serve any disclosure of expert testimony and instead had contended that what it did serve late was "supplemental."

The plaintiff also cited *Falconcrest Aviation, LLC v. Bizjet International Sales and Support, Inc.*,[16] in which the district court criticized the party making the supplemental disclosures: "[R]epeated, unjustified amendments fly in the face of the efficiency–promoting purpose of the rule."[17] There, the district court rejected an attempt by the defendant to serve about a month before trial a supplemental report about "additional opinions,"[18] and about testing as to which the expert did not describe the conditions.[19]

The Standard of Review: Abuse of Discretion

The standard of review is well established. "As with all discovery matters, the district court maintains broad control over Rule 26(e) issues regarding the disclosures of the substance of an expert's testimony."[20] The standard of review of the exercise of that discretion is, of course, abuse of discretion.[21]

In exercising that discretion—and in determining whether discretion has been abused—courts have considered the following factors:

- the explanation by the party for failure to earlier supplement disclosures, and whether there has been bad faith or willfulness
- the importance of the proposed evidence
- potential surprise or prejudice to the opposing party resulting from admission of the exhibits or testimony
- the ability of the opposing party to cure the prejudice through, for example, a continuance. [22]

Related to the first factor, in *Phillips v. General Motors Corp.*,[23] the court considered important, in granting the plaintiff's motion to strike supplemental reports, the fact that "the tests were performed by General Motor's employees over whom it has control, and the tests were not subject to the vagaries of a third party's schedule, indicating to the court that the delay in providing the supplemental disclosures was not justified."[24]

Related to the third and fourth factors is the question of whether the supplemental disclosures of expert testimony (about new opinions) were served after the deposition of the expert, so that the opposing party was unable to depose or would have to re-depose the expert on the supplemental disclosures.[25] Moreover, in *Falconcrest Aviation, LLC v. BizJet International Sales and Support, Inc.*, the court refused to allow the supplementing party to cure the late disclosure by offering the expert witness for a second deposition:

> [D]efendant's offer both misunderstands the purpose of Rule 26 and downplays the inconvenience imposed on the parties when witnesses and counsel must reconvene to discuss issues that could have been taken up at the first meeting . . . In addition, plaintiffs are correct that the information obtained at any second deposition may well lead to requests for further discovery based upon some previously undisclosed opinion contained in . . . [the expert's] supplemental report.[26]

Other courts, however, have not been so sympathetic to the objecting party. For example, in *Newell Puerto Rico, Ltd. v. Rubbermaid Inc.*,[27] the court was unmoved by the objecting party's claims of prejudice: "[I]f counsel . . . felt ill-prepared to cross-examine [the opposing expert on the supplemental disclosures] when faced with the testimony at trial, counsel's solution was to request a continuance."[28] Note, however, that the lack of sympathy in this case might have resulted from the fact that the experts had not already been deposed and would not have had to be re-deposed, but merely deposed for the first time.

Finally, courts are sensitive to perceived bad faith in supplementing expert reports. In *Falconcrest*, although the court did not find evidence of "illicit motive," the court chastised the defendant for engaging "in what has become an all too common practice before this court, this is, the submission of 'placeholder' expert reports in compliance with the applicable scheduling order followed by the transmission of subsequent, amended versions of those reports for no reason other than that the expert has had time to consider his views more deeply and/or conduct additional testing."[29] In *Beller v. United States*,[30] the court similarly expressed concern about "sandbagging" opponents with supplemental reports.[31]

In our case, the defendants argued that they had timely filed the supplemental reports according to the deadline set by the rule, the reports did not contain additional or new opinions but additional information relative to and in support of opinions already and timely disclosed, and the supplemental reports were the result of criticisms by the plaintiff's experts of procedures used by the defense experts. Unlike the cases cited previously verging on bad faith, the defense experts in our case did not opine first and test later or change their opinion after learning about information provided by plaintiff experts.

The Court's Ruling: Denial of Motion to Exclude

After considering these factors, the court denied the plaintiff's motion to exclude. The court indicated supplementation was timely because the plaintiff would have an adequate opportunity to review and challenge the refined testing performed by the defense experts and to perform additional tests if the plaintiff desired to do so. (One reason that the plaintiff would have an adequate opportunity to review the refined testing was that defense experts recorded each test procedure by sound and visual digital recordings and provided a written test report describing the conditions and results.)

The court left the door open, however, by informing both parties that the plaintiff might renew his motion and that the court might reconsider it at the next hearing. We will never know what the court would have ruled the second time around because, as you might have guessed, our case settled.

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1. Rules applicable to disclosures and supplemental disclosures apply equally to plaintiffs and defendants. The author just happened to

represent the defendants in the case that is the background for this article. No argument is made for special treatment for defendants.

2. Fed. R. Civ. P. 16(b)(1) provides in part: "Scheduling Order. Except in categories of actions exempted by local rule, the district judge... must issue a scheduling order...."

3. Fed. R. Civ. P. 16(b)(3) provides for the contents of the order. Local court rules of the U.S. District Court for the Western District of Texas establish what might be a typical form for scheduling orders. The form is found in Local Rule CV-16(a) and Appendix "B" to the local rules.

4. Under Fed. R. Civ. P. 16(b)(3)(A), the "required contents" of the "scheduling order" must among other matters "limit the time to... complete discovery...."

5. Fed. R. Civ. P. 16(b)(3)(B)(i). Note that even though the Rule expressly applies to Rule 26(e)(1), not to Rule 26(e)(2), titled "Expert Witness," Rule 26(a)(3)(B), governing the "Time for Pretrial Disclosures," provides in effect that the "court [may] order[] otherwise" as to the deadline established by the Rule. Indeed, the Advisory Committee stated, "It may be useful for the scheduling order to specify the time or times when supplementation should be made." Fed. R. Civ. P. 26, advisory committee notes for 1993 amendments to Rule 26(e); *see also* Phillips v. General Motors Corp., 2006 WL 1285380 (E.D. La. 2000) (indicating the court set a deadline for supplemental disclosures).

6. Fed. R. Civ. P. 26(a)(2) establishes the duty to disclose expert testimony. Under Rule 26(a)(2)(C), "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), within 30 days after the other party's disclosure."

Fed. R. Civ. P. 26(a)(2)(C).

7. According to Fed. R. Civ. P. 26(a)(2)(D), titled "Supplementing the Disclosure," "[t]he parties must supplement these disclosures when required under Rule 26(e)."

8. Fed. R. Civ. P. 26(e) is titled "Supplementing Disclosures and Responses." Rule 26(e)(2) applies to supplementation of disclosures of expert testimony:

> For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any addition or changes to the information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

Note that Rule 26(e)(2) expressly refers to "the party's duty to supplement." It does not, however, expressly refer to a right to supplement. Rule 26(a)(3) provides for "Pretrial Disclosures." The "Time for Pretrial Disclosures" is set by Rule 26(a)(3)(B): "Unless the court orders otherwise, these disclosures must be made at least 30 days before trial." *See* Grassi v. Information Resources, Inc., 63 F. 3d 596, 603 (7th Cir. 1995) ("Federal Rule of Civil Procedure 26(e)(1) requires that ... supplemental information be provided 30 days prior to trial."); Patel v. Gayes, 984 F. 2d 214, 221 (7th Cir. 1993) ("Under the Federal Rules, the district court has the discretion to impose sanctions on a party if that party fails to meet the requirements of Rule 26.").

9. *See* Fed. R. Civ. P. 37(c).

10. Fed. R. Civ. P. 37(c)(1); *see* Mills v. Beech Aircraft Corp., 886 F. 2d 758, 764 (5th Cir. 1989) (holding that the district court properly exercised its discretion in excluding results from tests conducted by the expert less than a week before trial, where the report about the test was not disclosed to the objecting party until the expert testified at trial); *but cf.* United States v. $9,041,598.68, 163 F. 3d 238, 251–53 (5th Cir. 1998) (upholding the district court's decision to not exclude the testing by witnesses, the identities of which were disclosed less than five full days before trial); Nehi Bottling Co. v. All-American Bottling Corp., 8 F. 3d 157, 164 (4th Cir. 1993) (affirming the district court's decision to admit the testimony of an expert witness even though the expert's identity was not disclosed until the day before the trial, because the party offering the evidence had provided the other party advance notice of intent to call the expert to testify and the district court required the offering party to make the expert available for an interview before his testimony).

11. Miller v. Pfizer, Inc., 353 F. 3d 1326 (10th Cir. 2004).

12. *Id.* at 1332 (citation omitted); *see also* Newell Puerto Rico, Ltd. v. Rubbermaid Inc., 20 F3d 15, 22 (1st Cir. 1994) ("It is not unusual for experts to make changes in their opinions and revise their analyses and reports frequently in preparation for, and sometimes even during, a trial.").

13. Brennan's Inc. v. Dickie Brennan and Co., 376 F. 3d 356 (5th Cir. 2004).

14. *Id.* at 374–75.

15. Metro Ford Truck Sales, Inc. v. Ford Motor Co., 145 F. 3d 320, 324 (5th Cir. 1998), *cert. denied* 525 U.S. 1068 (1999).

16. Falconcrest Aviation LLC v. BizJet International Sales and Support, Inc., 2006 WL 1266447 (N.D. Ok. 2006).

17. *Id.* at *5.

18. *Id.* at *2.

19. *Id.* at *3–4.

20. Farmland Industries, Inc. v. Morrison-Quirk Grain Corp., 54 F. 3d 478, 482 (8th Cir. 1995); *accord,* Woodworker's Supply, Inc. v. Principal Mutual Life Ins. Co., 170 F. 3d 985, 993 (10th Cir. 1999) (indicating the district court has broad discretion over determination of Rule 26(a) matters); Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F. 3d 546, 569 (5th Cir. 1996) (indicating the district court has broad discretion in determining whether a party has violated a discovery rule or order, and in determining any sanction for such a violation).

21. United States v. $9,041,598.68, 163 F. 3d 238, 252 (5th Cir. 1998) (holding that "the applicable standard of review for a trial court's decision in a matter relating to discovery is abuse of discretion"); Benson v. Tocco, Inc., 113 F. 3d 1203, 1208 (11th Cir. 1997); Hardy v. Chemetron Corp., 870 F. 2d 1007, 1009 (5th Cir. 1989) (holding that abuse of discretion standard of review applies to evidentiary rulings); *but cf. Sierra Club, Lone Star Chapter,* 73 F. 3d 546, 569 n. 38 (5th Cir. 1996) (distinguishing "abuse of discretion" standard applicable to discovery rulings from "manifest error" standard applicable to evidentiary rulings).

22. *Compare* Betzel v. State Farm Lloyds, 480 F. 3d 704, 707 (5th Cir. 2007), *with* United States v. $9,041,598.68, 163 F. 3d 238, 252 (5th Cir. 1998); *Metro Ford Truck Sales, Inc.*, 145 F. 3d 320, 324, and 324 n.4 (5th Cir. 1998), *cert. denied,* 525 U.S. 1068 (1999); *Farmland Industries, Inc.*., 54 F. 3d 478, 482 (8th Cir. 1995); *Newell Puerto Rico Ltd.*, 20 F. 3d 15, 21–22 (1st Cir. 1994); Geiserman v. MacDonald, 893 F. 2d 787, 791 (5th Cir. 1990); *Falconcrest Aviation,* 2006 WL 1266447 (N.D. Ok. 2006) at *2.

23. *Phillips*, 2000 WL 1285380 (E.D. La. 2000).

24. *Id.*

25. *Falconcrest Aviation*, 2006 WL 1266447; Beller v. United States, 221 F.R.D 689 (D. N.M. 2003).

26. *Falconcrest Aviation*, 2006 WL 1266447, at *5.

27. *Newell Puerto Rico, Ltd.*, 20 F. 3d 15.

28. *Id.* at 21–22.

29. *Falconcrest Aviation*, 2006 WL 1266447 at *3–4.

30. *Beller*, 221 F.R.D 689 (D.N.M. 2003).

31. *Id.* at 690.