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January 8, 2013

COUNSEL COMMENTARY

IP: 4 ways to avoid the Rule 26 trap

IN A RECENT CASE, THE FAILURE TO DISCLOSE A WITNESS DISQUALIFIED THAT WITNESS FROM TESTIFYING

Litigating in federal courts requires adherence to the Federal Rules of Civil Procedure. One noteworthy rule is Rule 26 (a)(1), which provides for an initial disclosure of, among other things, the identity of individuals likely to have discoverable information. However, a failure to meet the obligations of that rule could have some serious ramifications, as seen in the recent case of *Gen-Probe, Inc. v. Becton Dickson & Co.*. There, the court prohibited a witness from testifying at trial because that witness was not identified in the initial disclosures.

Rule 26(a)(1)(A)(i) requires a party to disclose "the name and, if known, address and telephone number of each individual likely to have discoverable information…that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment…" The rule also requires that the subject matter of the likely discoverable information be described.

The rule is thus straightforward: Disclose the identity of each person likely to have discoverable information if that person is going to be used to support any claim or defense and then describe the information known to the person.

The rule, however, does not require disclosure of the identity of witnesses that the party does not intend to use. Also, the identity of a witness who has unfavorable information need not be provided in the Rule 26(a)(1)(A)(i) initial disclosures, although that may be required in connection with responses to discovery requests.

The Rule 26(a)(1) initial disclosures generally must be made within 14 days after the parties conduct a Rule 26(f) conference, at which they are to discuss a discovery plan and other matters. The initial disclosures are typically made within 60 to 90 days after the complaint has been filed.

In connection with the initial disclosure, it is important to bear in mind that the disclosure is made based on information that is then reasonably available to the disclosing party. However, as stated in Rule 26(a)(1)(E), a party is not excused from making the initial disclosure because it has not completed a full investigation of the case. Given the relative quickness with which the parties must prepare the initial disclosures, it is incumbent on counsel and their client to conduct a reasonable factual background investigation that addresses the known claims and defenses of that client. The investigation should be designed to identify those individuals who would likely have discoverable information relating to those claims or defenses. Counsel and the client would then consider which of the individuals might be used as witnesses to support any of the claims or defenses. Once counsel has interviewed the potential witnesses, they can prepare the initial disclosure document.

Although it may be desirable to make a complete and thorough initial disclosure at the outset of the case, the realities are that

information will surface and people will be identified as the case progresses. Fortunately, Rule 26(e)(1) provides a mechanism by which the initial disclosure may be supplemented. According to that rule, if a party learns that, in a material respect, a Rule 26(a) disclosure is incorrect or incomplete, it must supplement or correct the disclosure.

However, the supplementation/correction approach has a qualifier. If the information that would have been included in the initial disclosure has "otherwise been made known to the other parties during the discovery process or in writing," then the disclosure document does not need supplementation. For example, if an interrogatory response identifies a person and what that person knows about a claim or defense, then there appears to be no need to undertake the task of including that same information in a supplemental disclosure. Indeed, the comments to the 1993 amendments to Rule 26(e) make the point that the "otherwise been made known to" qualifier can include the identification, at a deposition, of a witness not previously identified, as well as in writing, such as an interrogatory response.

This qualifier itself may pose some problems. Because Rule 26(a)(1)(A)(i) requires that the disclosure of the identity of the person have information about a claim or defense and a description of that information, a disclosure that does not meet these requirement does not comport with the rule. Thus, if a person's identity is fronted in a deposition, that alone may be insufficient.

All of this leads to what result that may occur if a party does not meet the requirements of Rule 26(a). As stated in Rule 37(c)(1):

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 on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

As seen, Rule 37(c)(1) allows a party to show that the non-disclosure was harmless or was substantially justified under the circumstance. If that showing is not made, then a failure to supplement, or at least provide the Rule 26(a) information in another form, may bar the witness from participating in the case, either as an affiant for summary judgment or other purposes as well as a trial witness. The same holds true for the non-disclosed "information." In addition, Rule 37(c)(1) gives the court the ability to impose sanctions on the non-disclosing party. The sanctions could include informing the jury that the party failed to disclose required information, striking pleadings, entering a default judgment or dismissing claims or defenses, among other things. Obviously, these results could impact the presentation of the non-disclosing party's case, or at least the jury's perception of that party.

The application of Rule 37(c)(1) for a failure to meet the disclosure requirements of Rule 26(e) is found, albeit briefly, in the *Gen-Probe* case. There, Gen-Probe moved *in limine* to preclude Becton Dickinson from calling two witnesses. Those witnesses were not identified in Becton's Rule 26(a)(1)(A)(i) disclosures; however, they were identified as potential witnesses after the court ordered the parties to revise the pretrial order. As to the first individual, Becton withdrew him from the witness list. As to the other witness, Becton argued that the delayed disclosure was harmless because the name of that witness and his role in the company was disclosed in discovery. However, Becton did not attempt to explain or justify the delayed disclosure. On this basis, the court excluded that witness.

Practice Tips

The *Gen-Probe* case underscores the steps that should be part of any trial work-up. These are:

1. Investigate the facts and determine those individuals who may be presented to support a claim or defense. Identify those individuals and describe the information they have that relates to the claims or defenses in the initial disclosures.

2. As interrogatory responses are prepared that name other individuals, determine whether those people may be presented as a witness and, if so, include a description of the information they

possess and their contact information, consistent with Rule 26(a)(1) in the interrogatory response. Otherwise, update the Rule 26(a)(1) disclosures.

3. As depositions are taken and other individuals are identified, revisit the initial disclosures and interrogatory responses and determine whether to update one or.

4. As the discovery cut-off date approaches, do another review of the initial disclosures and interrogatory responses and supplement as needed to ensure that the Rule 26(a)(1) requirements are met.

Undertaking these simple steps of continued review and updating should go a long way to ensuring that the necessary witnesses who will support a claim or defense will not be stricken and other sanctions will not be levied.

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