# Late Expert Disclosure & Sanctions – Is 'Clarity' Needed?

by Maggie Tamburro

Talk about things that can ruin a perfectly enjoyable weekend, try this one on for size: You're wrapping up your weekend and just turning in for the evening when you hear the familiar *ping* of a new email notification, signaling the fact that a message is patiently awaiting your attention. You glance at the screen and, well, let's just say the upcoming week is officially off to a rocky start.

You discover a previously undisclosed expert witness rebuttal report has arrived in your inbox at 11:00 p.m. on a Sunday night – the night before a scheduled preliminary injunction hearing in the case.

If this scenario sounds far-fetched, it's probably more common than you think. A similar scenario allegedly occurred in a case pending in a federal district Ohio court, *Sterling Jewelers Inc. v. Zale Corp.*, which briefly captured headlines in December perhaps due to the sparkling nature of the parties' retail businesses. Involving claims under the Lanham Act alleging false and misleading advertising, the case concerns whether a certain brand of diamond, as allegedly claimed, is in fact proven to be the "most brilliant diamond in the world."

Diamonds, dazzling gems, and storytelling aside, the case highlights an interesting and recurring expert witness issue: That of late expert witness disclosure and sanctions. Chances are, if you've been involved with litigation that requires expert witness testimony, either way you 'cut it' you've had some experience with this issue.

**The Federal Rules of Civil Procedure**

A cursory reading of the applicable federal rules of civil procedure, FRCP 26 and FRCP 37, might make the issue appear crystal clear. However, as with most things legal, in application it's not quite so simple. What the rules state, and what actually occurs in court, can be two very different stories.

**FRCP 26: The Duty to Disclose**

**• Disclosure of Written Report**

As many readers are aware, FRCP 26 (a)(2) requires disclosures regarding certain expert witnesses retained to provide expert testimony (as opposed to those expert witnesses who are retained in anticipation of litigation, but not expected to testify). Although FRCP 26 now provides work product protections for draft reports and certain attorney-expert communications, a party must disclose the identity of any testifying expert it intends to use at trial accompanied by a written report which contains the following: (1) a statement of opinions the expert will express, (2) the facts or data considered by the expert in forming his opinions, (3) any exhibits the expert plans to use, (4) the expert's qualifications, including a list of all publications over the last ten years, (5) a list of cases where the expert has testified over the last four years, including both trial and deposition, and (6) the amount of compensation to be paid to the expert in the case.

**• Time Frame for Disclosures**

Subparagraph (D) of FCRP (a)(2) addresses timing. In practice, the time frames for expert witness disclosures are usually dictated via scheduling orders that are part of case management. However, absent stipulation by the parties or court order, according to the federal rule the disclosure must be made at least 90 days prior to the trial date. If the expert evidence is used in rebuttal, the disclosure must be made within 30 days after the opposing party's expert disclosure.

**FRCP 37: Failure to Make Disclosures and Sanctions**

When a party fails to make a disclosure required by FRCP 26(a)(2), including that of making a late disclosure, FRCP 37(c)(1) provides for a variety of sanctions, the harshest of which is possible exclusion and a ban of the expert witness' testimony.

Rule 37(c)(1) states, in pertinent part:

> "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* (emphasis added)."

The Notes of Advisory Committee on Rules concerning the 1993 Amendment to FRCP 37 state that FRCP provides a "self-executing sanction." This essentially means the court is authorized to automatically award sanctions for failure to make a disclosure required by FCRP 26(a) on its own volition, without the need for a party's motion for sanctions.

In practice, despite the harsh language of the Rule 37(c)(1) and the "self-executing" authority given to a court, many circuits seem hesitant to impose sanctions which exclude the expert's testimony as a sanction for belated disclosure. Generally, courts impose a balancing of various factors in determining whether a late expert witness disclosure is "substantially justified" or "harmless," thereby justifying exclusion.

Circuits seem to differ, but according to an article published through the ABA, the factors considered generally include "prejudice or surprise to the party against whom the evidence is offered, the ability of the party to cure the prejudice, the likelihood of disruption to the trial, and bad faith or willfulness involved in not disclosing evidence at an earlier date (citations omitted)."

Despite differing treatment among circuits, one thing remains clear – although courts may employ differing factors, they generally seem reluctant to impose harsh sanctions for belated disclosure, such as the imposition of automatic exclusion of the expert testimony. Indeed, according to the Practising Law Institute's Expert Witness Answer Book 2012, (which incidentally includes a thorough, annotated chapter on designation and disclosure of expert witnesses), the authors noted that courts, in determining whether a failure to disclose was "substantially justified" and thus should be excluded, have given much attention to the *reason* for the belated disclosure.

Although any decision is highly dependent upon the particular facts and circumstances of the case, the authors point out that a finding that the party against whom the evidence was offered was "prejudiced" is often necessary before the expert testimony will be excluded. In addition, mitigation of the harm provided by the party offering the belated evidence can be helpful in making an argument that the expert testimony should be allowed, according the authors.

**FRCP 37: A Rule with No Bite?**

Which brings us to an interesting expert witness question – is FRCP 37(c)(1) merely words over substance – with no real bite or practical courtroom effect? Does a history of arguably lenient interpretation by some courts pave the way for parties to engage in dilatory expert witness disclosure tactics or sandbagging – for example serving a last minute disclosure upon a party at a critical juncture in the case, in hopes that a court will have no choice but to find it allowable? Should arguments that expert testimony is being offered as rebuttal, or for supplementing earlier disclosures, for example, be available to bolster an argument that a disclosure isn't actually late, but offered for some other reason? Should courts crack down on imposition of automatic sanctions in an effort to make the pretrial process more efficient, discourage courtroom game-playing, and avoid last minute disputes which can prolong case schedules and involve judges in discovery disputes that counsel should be capable of working out?

Or, conversely, given the critical make-or-break nature of expert testimony in today's high stakes litigation, and increasingly complex cases that require the use of experts, should judges give every benefit of the doubt to a seemingly belated disclosure, particularly when the effect of outright exclusion of the expert testimony might mean dismissal of the case, for example, pursuant to motion for summary judgment? Should courts impose harsh sanctions that result in exclusion or limiting the expert's testimony only under the most egregious or prejudicial of circumstances?

Lastly, should judges be required to police discovery tactics and take court time and client expense to rule on never-ending motions that the parties, very frankly, should have the professional skills and civility to work out themselves?

Perhaps amendment to the federal rules should be considered which codify certain factors which should be balanced in each case, so that courts and counsel alike have specific guidelines under which the issue may be treated similarly and consistently. Or maybe, like one expert witness issue argued in the U.S. Supreme Court last year, the issue is one that might (in some form) eventually make it to the high court of the land. After all, it may be only an evidentiary issue, but it's one that certainly has potential to tremendously affect a party's rights and survival.

**Back to *Sterling Jewelers Inc. v. Zale Corp.***

Regardless, it's prudent to heed the requirements of FRCP 26 and be ever-mindful of possible harsh sanctions under FRCP 37 for failure to comply and for late expert witness disclosure, even if some courts seem hesitant to invoke the full power and authority of the rule (perhaps in fear of being overturned at the appellate level) and instead err on the side of caution, crafting their own practical applications on a case by case basis.

What will ultimately happen in the *Sterling Jewelers Inc.* case is anyone's guess. But knowing the rules of the game involving late expert witness disclosure – the applicable federal rules and case application in your own circuit – is worth its weight in gold, (or rather, carats).

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