

THE DAUBERT SERIES: Part III

Supplementing the Expert Report

The expert report and its content were discussed in the first installment of this Series. However, the initial disclosure of the report does not end the expert's or the attorney's obligations with respect to the report, particularly when a Daubert challenge is anticipated.

Fed. R. Civ. P. 26 (e) requires, on penalty of sanction, parties to supplement all expert reports on their own initiative if they learn that “in some material respect the information [previously] disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.” State rules of procedure generally impose upon the parties a similar continuing duty to disclose.

To Supplement or Not To Supplement?

New opinions or bases for those opinions may spring from a *Daubert* challenge to the admissibility of the expert's testimony. In many cases, the groundwork for a *Daubert* challenge is established through the course of an expert's deposition testimony. In other cases, the basis for the challenge does not become clear until the *Daubert* motion is filed. In either case, a supplemental expert report can correct and clarify the expert's opinion, potentially thwarting a successful challenge.

Even in the absence of a *Daubert* challenge, however, an expert report may require modification to address later-acquired information such as that developed through the disclosure and depositions of other experts in the case, from additional research or reflection, or from other late discovery.

Supplementation may signal a “weakness” in an expert opinion and will likely raise issues as to why the expert failed to address a particular matter in his/her initial report. Thus, it should be done sparingly and with deliberation.

When Must The Expert's Report Be Supplemented?

Rule 26 (e)(1) requires a party to supplement “at appropriate intervals . . . if the party learns that in some material respect the information disclosed is incomplete or incorrect... .” The Rule makes clear that the duty applies to information contained in an expert report and to information provided through an expert deposition. *Id.* The deadline for supplementation is set forth by Rule 26 (e)(1) as the time the party's disclosures under Rule 26(a)(3) are due. *Id.*

The Potential for Sanctions.

Failure to supplement an expert report without “substantial justification” can lead to dire consequences. Fed. R. Civ. P. 37 (c)(1). Particularly, the proffered opinion may be precluded if the adversary has suffered prejudice as a result. *Id.*

In sum, supplement an expert's report only as necessary and in accordance with the applicable rules of procedure. Be mindful, however, that supplementation may be a useful tool to undermine an impending *Daubert* challenge.