

LITIGATION MINUTE: OBTAINING INFORMATION AFTER THE CLOSE OF DISCOVERY

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U.S. Complex Commercial Litigation and Disputes Alert

By: Jeffrey T. Kucera, Carly S. Everhardt, Claudia Marina Velasquez

WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

Imagine this scenario: you just learned that the opposing party is using the same witness or expert from your case in some related litigation. You have good reason to suspect that the testimony in that other case directly relates to the very facts in your case. Because of the prior commercial relationships between the parties, the witness or expert likely made some admissions that would be very helpful to your case. But the discovery cutoff in your case has long past, and you are preparing for trial. What do you do?

Discovery may close, but litigation goes on. Sometimes you become aware of information that is relevant to your case after the close of discovery. This could be information that did not previously exist or information that you only learned about after the discovery deadline had passed. In a minute or less, here are some considerations you should keep in mind for obtaining information after the close of discovery.

Check your local rules

First and foremost, always consult your local rules, as jurisdictions may vary in their standards for late discovery and whether a local duty to supplement is imposed. For example, the Northern District of Illinois temporarily implemented a Mandatory Initial Discovery Pilot Program, which required parties to respond to a series of standard discovery requests before partaking in any other discovery. Witness statements are one of the specific categories of documents that parties must disclose. Thus, some jurisdictions may provide additional mechanisms and authority to rely upon in order to obtain the sought transcripts.

Duty to supplement

If the information you are seeking is responsive to timely-served requests, seek opposing counsel's compliance under the duty to supplement imposed by Rule 26 of the Federal Rules of Civil Procedure.

Under Rule 26(e), parties that have made prior disclosures or responded to a discovery request with a disclosure or response are generally under a duty to supplement or correct the provided information. The duty to supplement extends to expert witnesses whose report must be disclosed pursuant to Rule 26(a)(2)(B). An expert's duty to supplement includes information within the report, as well as information provided during the expert's deposition.

The duty to supplement survives past the discovery cutoff. It is important to know that the duty to supplement may extend far past the deadline to complete discovery. Even if the discovery deadline has come and gone, parties must nonetheless supplement and/or correct prior disclosures or responses in a timely manner upon learning that the prior disclosure was incomplete or incorrect in some material respect and the additional and/or corrective

information has not been made known to the other party. Note some courts and/or scheduling orders set a separate supplemental discovery deadline.

Meet and confer

Once you have identified previous discovery requests that would cover this material, you can approach opposing counsel. An effort to obtain the information without the court's action is a prerequisite to a Motion to Compel under the Federal Rules of Civil Procedure and most local rules. Under Rule 37(a)(1), parties cannot move for an order compelling discovery until the movant has in good faith conferred, or attempted to confer, with the party resisting discovery and included a certification of those efforts. Additionally, you can move for appropriate sanctions if the resisting party fails to make a disclosure required by Rule 26(a).

Good cause requirement for extending discovery

If the information you seek is not responsive to timely-served requests, you may want to move to extend the discovery deadline to serve additional requests. To do so, you must demonstrate "good cause" warranting the extension. Courts generally focus their inquiry on the movant's diligence and/or excusable neglect. Some courts find excusable neglect by balancing the danger of prejudice to the opposing party, the potential impact of the delay on the proceedings, the movant's reason for the delay, and whether the movant acted in good faith. So, it will be important to show that the information is critical to your case and explain why it was not requested earlier.

Can you serve requests for admission?

In some jurisdictions, requests for admission are not considered discovery devices that are subject to the fact discovery cutoff. If you are in one of these jurisdictions, consider whether the information you seek can be established by use of this mechanism.

The key takeaways here are: (1) draft your initial discovery requests in a way that is broad enough to capture later developments, like testimony; (2) know your local rules; and (3) act quickly and decisively to make sure your client is not prejudiced.

KEY CONTACTS



JEFFREY T. KUCERA
PARTNER

MIAMI
+1.305.539.3322
JEFFREY.KUCERA@KLGATES.COM



CARLY S. EVERHARDT
ASSOCIATE

MIAMI
+1.305.539.3341
CARLY.EVERHARDT@KLGATES.COM



CLAUDIA MARINA VELASQUEZ
ASSOCIATE

MIAMI, MIAMI
+1.305.539.3362
CLAUDIA.VELASQUEZ@KLGATES.COM

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