Supplementation of Discovery Responses in Federal Civil Procedure

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I. Introduction

Mutual knowledge of all relevant facts known to the litigants is the essential\(^1\) prerequisite to mitigating the sporting theory\(^2\) of adversarial litigation. This laudable goal has not been implemented judicially by the available discovery sanctions. These sanctions have been characterized as either too lenient\(^3\) or insufficient,\(^4\) partially because of the lack of explicit power to impose sanctions for all forms of discovery abuse.\(^5\)

A classic instance of the sporting theory of litigation, which has

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\(^1\) See Hickman v. Taylor, 329 U.S. 495, 507 (1947). Two weeks after the effective date of the Federal Rules of Civil Procedure, a federal decision recognized that their primary purpose was to "secure the just, speedy, and inexpensive determination of every action, and [assure] that cases might be settled on their merits." Nichols v. Sanborn Co., 24 F. Supp. 908, 910 (D. Mass. 1938).


\(^3\) Professor Rosenberg has characterized Federal Rule of Civil Procedure 37, the rule dealing with failure to make discovery, as a "paper tiger." Rosenberg, New Philosophy of Sanctions, in New Federal Civil Discovery Rules Sourcebook 140, 141 (W. Treadwell ed. 1972). The United States Supreme Court, in its leading discovery sanctions opinion, reinstated a trial court's dismissal under Rule 37 for failure to comply with discovery obligations with this admonition:

[T]he lenity evidenced by the Court of Appeals... cannot be allowed to wholly supplant other and equally necessary considerations embodied in that Rule.

... If the decision of the Court of Appeals remained undisturbed in this case... other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642-43 (1976). Some lenience may be justified when sufficient opportunity to obtain discovery as to undisclosed witnesses or documents exists but is not utilized. Ed Houser Enterprises, Inc. v. General Motors Corp., 595 F.2d 366, 372 (7th Cir. 1979) (no abuse of discretion in admitting witness and documentary evidence not disclosed in pretrial memorandum when opportunity for discovery not utilized).

\(^4\) The American Bar Association's Section on Litigation recently advised: "The [Discovery Abuse] Committee is strongly of the view that existing Rule 37 is insufficient to bring about the effective imposition of discovery sanctions." ABA Section on Litigation, Report of the Special Committee for the Study of Discovery Abuse 24 (1977) [hereinafter cited as Report of the ABA Committee].

ironically received only tangential treatment by legal writers,\(^6\) involves whether\(^7\) and to what extent litigants must supplement previous discovery responses. The adoption of Rule 26(e) of the Federal Rules of Civil Procedure\(^8\) provided a model for the emerging trend toward codifying the various federal and state approaches to this perplexing problem. However, existing sanctions

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7. Interpretational problems spawned by Federal Rule of Civil Procedure 26(e) are analyzed in Section III infra. The existence of a duty to supplement discovery responses is uncertain in state courts such as California. Compare Singer v. Superior Court, 54 Cal. 2d 318, 353 P.2d 305, 5 Cal. Rptr. 697 (1960) (no duty to supplement discovery responses) with Rangel v. Graybar Electric Co., 70 Cal. App. 3d 943, 950 n.6, 139 Cal. Rptr. 191, 195 n.6 (1977) (now open to question whether continuing interrogatories are permitted in California).

8. The Federal Rules provide that:

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

FED. R. CIV. P. 26(e). A detailed but classic violation of this duty is illustrated in Weiss v. Chrysler Motors Corp., 515 F.2d 449, 454 n.5 (2d Cir. 1975) (nonsupplemented interrogatory answers failed to identify undisclosed trial defense theory).
in the Federal Rules are inapplicable to violations of Rule 26(e). This rule resolved a decisional conflict as to the duty to supplement prior discovery answers. Only the broad issue of whether some form of supplementation was applicable in federal courts was resolved. A myriad of narrower issues, generating conflict among the federal circuits, remains subject to judicial resolution.

This article will examine how the federal courts have balanced the burdens of supplementation with its benefits. It primarily analyzes statutory construction of the continuing discovery duty. Existing limitations on the federal requirement to amend certain discovery responses can be transcended by more aggressive use of existing mechanisms for enforcement.

II. BALANCING BENEFITS AND BURDENS

Since Rule 26(e) was adopted in 1970, federal district court judges have experienced a numerical caseload increase of fifty per cent, accompanied by a dramatic increase in complex litigation. Both developments have spawned greater use of discovery and sanctions for its abuse. The escalating annual cost of operating the federal court system is now in the half-billion-dollar range. Expediting pretrial exchange of unadulterated discovery information is inevitable if future litigants desire to avoid excessive costs, delay, and ineffective judicial disposition of actions.

Abuse of discovery to achieve the tactical advantage of surprise retains rudiments of the allegedly extinguished age of trial by combat. Modern obstruction of the right to gather critical facts in advance of trial generated problems that concerned the great judicial publicists just prior to adoption of liberal discovery rules. Speaking for the United States Supreme Court, Justice Cardozo determined that, "[a]t times, cases will not be proved or will be proved clumsily or wastefully, if the litigant is not permitted to gather his evidence in advance." Such clumsiness and waste continued to thrive upon nondisclosure of witnesses or claims, even after the equitable bill of discovery was supplanted by the Federal Rules of Civil Procedure. Lack of familiarity and candor has infected the rather limited docket of civil cases, advises that the problem focuses upon discovery where "[t]he litigation too often resembles the duels of the young gentlemen of San Francisco in the last century, who matched each other tossing gold coins into the bay until one cried 'Enough!'" A Quicker Route to Court, Bus. Week, Dec. 5, 1977, at 84.

One of California's central district court judges advises that "many—maybe most—cases do not justify the costs of litigation," possibly resulting in placement of an abusive attorney on a judicial blacklist. Los Angeles Daily Journal, Sept. 1, 1978, at 1, cols. 4-5.

At least one federal district court in New York sought a one-year suspension of the Speedy Trial Act's required trial within one hundred days of indictment. Los Angeles Daily Journal, June 15, 1979, at 1, col. 1. Criminal cases, under the Speedy Trial Act, take precedence over civil cases. Disposition of civil cases must be streamlined to avoid continuances and other problems associated with the highly developed litigation art of discovery exploited to the disadvantage of an opponent, particularly where failure to amend obsolete discovery results in surprise and delays.

15. For treatises, articles, comments, and annotations dealing with the historical development of trial, see J. Koffler & A. Repp, Handbook of Common Law Pleading 536 n.1 (1969).


18. See generally Kaufman, Some Observations on Pre-Trial Examinations in Federal and State Courts, 12 F.R.D. 363 (1952) (comparison of federal rules, emphasizing discovery, and state rules, emphasizing production of proof or evidence admissible at trial); Pollack, Discovery—Its Abuse and Correction, 80 F.R.D. 219 (1978) (discovery procedures have acquired justified reputation of being hopelessly secretive, unnecessarily complex, and prohibitively expensive).
duty to supplement responses applicable to depositions,\textsuperscript{19} interrogatories,\textsuperscript{20} production of documents,\textsuperscript{21} physical and mental examinations,\textsuperscript{22} and requests for admissions.\textsuperscript{23}

A. General Duty Expressly Negated

There is no general duty to supplement discovery responses in federal litigation. Rule 26(e) expressly negates such a duty because "[a] party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired . . . ."\textsuperscript{24} except in a limited number of situations.\textsuperscript{25}

The Advisory Committee Note to the 1967 Preliminary Draft\textsuperscript{26} and to the 1970 Revised Draft\textsuperscript{27} of the new supplementation requirement crystallized two closely related problems. Dual concern was expressed over how to balance the advantages and disadvantages of continuing discovery and whether to manifest the result of this balancing process with a broad or limited rule. The Committee favored imposing a duty to update previous re-

\textsuperscript{19} Voegeli v. Lewis, 568 F.2d 89, 96 (8th Cir. 1977) (unremedied failure to advise appellant of change in deposition testimony prior to trial required new trial).


\textsuperscript{21} Rozier v. Ford Motor Co., 573 F.2d 1332, 1341-42 (5th Cir. 1978) (interrogatory response suggested nonexistence of document although house counsel subsequently discovered it but failed to amend party's inaccurate response, resulting in a finding of discovery misrepresentation); United States v. IBM, 83 F.R.D. 92, 96 (S.D.N.Y. 1979) (responsive documents created after return of subpoena subject to production). See also Pare v. Rodique, 256 Md. 204, 260 A.2d 313 (1969) (preamble triggers continuing burden to provide documents sought by interrogatory based upon moral duty drawn from federal cases).

\textsuperscript{22} Nutt v. Black Hills Stage Lines, Inc., 452 F.2d 480, 482 (8th Cir. 1971) (failure to seasonably notify adversary regarding new claim stemming from undisclosed physical examination resulted in new trial); Szilvassy v. United States, 71 F.R.D. 589 (S.D.N.Y. 1976) (failure to supplement interrogatory responses regarding previous physical examination noted during defendant's physical examination of plaintiff).


\textsuperscript{24} Fed. R. Civ. P. 26(e) (emphasis added).

\textsuperscript{25} See note 8 supra.

\textsuperscript{26} ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 43 F.R.D. 211, 237 (1967) [hereinafter cited as 1967 PRELIMINARY DRAFT].

\textsuperscript{27} REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE RELATING TO DISCOVERY, 48 F.R.D. 487, 507 app. 2 (1970) [hereinafter cited as 1970 AMENDMENTS].
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sponses in order to mitigate the need for or the tactic of refiling similar interrogatories, a natural byproduct of the 1948 amendment which permitted more than one set of interrogatories without leave of court.

Local rules in the federal district courts that previously imposed a duty to supplement responses and the leading case of Taggart v. Vermont Transportation Co. influenced the Advisory Committee's consideration of the supplementation issue. A Pennsylvania federal district court local rule provided that: "Upon discovery by any party of information which renders that party's prior answers to interrogatories substantially inaccurate, incomplete or untrue, such party shall file appropriate supplemental answers with reasonable promptness." This explicit rule, coupled with the judge's inherent power under Rule 41(b), was utilized in Taggart to exclude the testimony of a surprise eyewitness not listed in response to an eyewitness interrogatory. Reliance upon Rule 41(b) was apparently misplaced. However, reliance upon the local rule of court signaled emerging recognition of the inherent judicial power to compel supplementation of obsolete responses. This power was confirmed by the Ju-

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29. See ADVISORY COMMITTEE ON THE RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, 5 F.R.D. 433, 461 (1946) [hereinafter cited as 1948 AMENDMENTS] (last sentence of previous Rule 33, permitting one set of interrogatories without leave of court, stricken because of need for inexpensive means of updating discovery information).
32. See 1967 PRELIMINARY DRAFT, supra note 26, at 237; 1970 AMENDMENTS, supra note 27, at 507.
34. This rule provides that "[f]or failure of the plaintiff to prosecute or to comply with these rules . . . a defendant may move for dismissal of an action or of any claim against him." FED. R. CIV. P. 41(b).
36. The United States Supreme Court had previously determined that "harsh" discovery sanctions were solely controlled by FED. R. CIV. P. 37. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958), noted in 107 U. PA. L. REV. 103 (1958).
37. Compare Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958) (improper dismissal entered against party for failure to comply with discovery order where good faith compliance subjected party to criminal penalties), with National Hockey League v. Metropolitan
The most serious objection to an unlimited continuing duty was that it would result in complex and protracted litigation. The attorney, not the party, bears the responsibility for periodic rechecking and recanvassing of new information to be transmitted to the adversary by way of updated responses. The Advisory Committee, cognizant of the possibility of an undue burden, noted:

In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information. But a full set of new answers may no longer be needed by the interrogating party. Some issues will have been dropped from the case, some questions are now seen as unimportant, and other questions must in any event be reformulated.

The decision in the critical case of Novick v. Pennsylvania Railroad effectively struck the balance for the rulemakers who, in light of the wording of the adopted supplementation rule, condoned neither the absence of any continuing burden nor the adoption of an unlimited rule mandating supplementation of all responses regardless of materiality. Novick was the tenth reported federal decision to deal with discovery abuse spawned by

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38. The revision of the Advisory Note to Proposed Rule 26(e) added a paragraph which patently recognized that "the duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate." 1970 AMENDMENTS, supra note 27, at 508. But cf. 1979 REVISED PRELIMINARY DRAFT, supra note 5, at 344-48 (unexplained deletion of prior draft opinion expressing need for a rule providing explicit authority to impose sanctions for all forms of discovery abuse, regardless of whether court order violated). A leading scholar has implicitly criticized this lack of explicit authority. See Rosenberg, Appellate Review of Trial Court Discretion, 79 F.R.D. 173 (1979) (too much discretion in too many areas now accorded to trial judges by appellate courts).


40. 1970 AMENDMENTS, supra note 27, at 507.

41. 18 F.R.D. 296 (W.D. Pa. 1955) ("continuing" interrogatory not broadly permitted but limited to circumstances where very nature of interrogatory should require continuing answers or where information obtainable at pretrial conference would not afford sufficient basis to prepare case).

42. For the text of Fed. R. Civ. P. 26(e), see note 8 supra. The wording of the rule is nearly identical to that in Diversified Prod. Corp. v. Sports Center Co., 42 F.R.D. 3, 5 (D. Md. 1967), cited in 1970 AMENDMENTS, supra note 27, at 508. The Committee's supporting rationale for avoiding the onerous burden of an unlimited duty was based upon the Novick opinion. Id. at 507.

43. See RCA Mfg. Co. v. Decca Records, Inc., 1 F.R.D. 433 (S.D.N.Y. 1940) (defendant should furnish information acquired between answer and trial, but not...
the absence of a continuing duty to supplement, although supplementation was available through the medium of multiple sets of interrogatories.45

Prior to Novick, four opinions by the District Court for the Eastern District of Pennsylvania had exclusively crystallized the controversy over the effect of a preambular statement requiring supplementation, absent any authority in the Federal Rules of Civil Procedure.46 The first of these pre-Novick opinions, Wolf v.
Dickinson overruled the objection that imposing a continuing duty to supplement was intolerably burdensome. The unilaterally imposed preamble triggered an otherwise nonexistent duty to supplement, so as to implement a primary goal of the federal discovery rules; namely, full disclosure. The other pre-Novick decisions dealing with preambles nurtured embryonic development of continuing discovery in federal courts. These decisions fashioned a duty to supplement, supported by the distinct grounds of stare decisis, the Federal Supplemental Rules for Certain Admiralty and Maritime Claims, and unadorned reliance upon the "good faith and the spirit of the [rules]." From the vantage point of these analyses, Novick v. Pennsylvania Railroad forecast the Federal Rules' approach to this discovery problem. Novick was an action brought under the Federal Employer's Liability Act involving proper interrogatory procedure under Rule 33 of the Federal Rules of Civil Procedure.

47. 16 F.R.D. 250 (E.D. Pa. 1953) (interrogating party's preambular statement rendered interrogatories continuing so as to require supplementation if further information obtained by interrogated party between time of original responses and trial).

48. Id. at 252.

49. The interrogatories filed by plaintiff included a preamble affecting each interrogatory by specifically stating: "These interrogatories shall be deemed continuing, so as to require supplemental answers if defendant obtains further information between the time answers are served and the time of trial." Id. The court specified:

Thus, we hold that the interrogatories continue to speak and the defendant is obliged to furnish supplemental answers if he obtains additional information between the time answers are served and the time of trial. . . . The holding, we feel, gives effect to one of the primary purposes of the rules, that of full disclosure before trial of all the facts which are relevant to the subject matter or issues of the case and which are not privileged.

50. Smith v. Acadia Overseas Freighters, Ltd., 120 F. Supp. 192 (E.D. Pa. 1953). The court, dealing with whether a continuing duty to supplement existed, stated:

We feel however that the matter is governed by an order of this Court . . . in Wolf v. Dickinson. . . . [I]n the present case it was not specified that the interrogatories . . . were to be deemed continuing. Nevertheless, we hold that they are, on the strength of the views expressed by us in Wolf v. Dickinson . . . .

Id. at 192-93.


52. McNally v. Yellow Cab Co., 16 F.R.D. 460 (E.D. Pa. 1954). The court chose not to pass upon an objection to a preamble imposing a duty to supplement interrogatory responses, but expressed in dicta:

[I]t may not be out of place for the Court to say at this time what should be obvious, namely, that the defendant is bound to give truthful answers to the interrogatories and that both good faith and the spirit of the Rule require it to see to it that its answers are truthful as of the time of the trial as well as of the time when the interrogatories are answered.

Id. at 460 (emphasis added).

The plaintiffs had prefaced their questions with the statement that "[t]hese interrogatories shall be deemed continuing, so as to require supplemental answers if defendant obtains further information between the time answers are served and the time of trial." The defendant's unsuccessful contention was that the Federal Rules neither expressly nor impliedly permitted the interrogating party to characterize responses as "continuing to speak." Novick overtly crystallized the concern that burdens might outweigh benefits if supplementation was applicable to all interrogatories or discovery responses.

The alternative of no duty to supplement would require responses to multiple sets of same-subject interrogatories. An unlimited duty would reduce or eliminate paperwork associated with the discovery amendment allowing multiple sets of interrogatories addressed to the same facts or issues. It would also entail the detailed rechecking of all previous discovery responses, a costly and time consuming task in the case of depositions, without regard to the impact of the newly acquired information. However, overzealous supplementation of nonessential matters could degenerate into an "ideal" form of confusing discovery abuse. The alternative of an unlimited duty to supplement would require frequent rechecking of all responses to all previous discovery without regard to case complexity or subsequent immateriality. The party burdened with such a duty could burden his opponent.

55. Prior to 1970 and at the time of the Novick decision, there was no express federal provision requiring parties to update responses no longer accurate. Incorrect answers could be the basis for appropriate sanctions. See authorities cited in note 6 supra.
56. Plaintiff could resubmit identical interrogatories to ascertain the existence of new information, thereby supporting the legislative intent not to limit the exchange of information without imposing a continuous burden to periodically update answers to interrogatories. See generally Novick v. Pennsylvania R.R., 18 F.R.D. 296, 297 (W.D. Pa. 1955).
57. See notes 49, 50, 52 supra, indicating that supplementation is required in all instances. Contemporary concern with this problem was demonstrated by a recent California decision. Rangel v. Graybar Elec. Co., 70 Cal. App. 3d 943, 950 n.6, 139 Cal. Rptr. 191, 195 n.6 (1977) (it is now open to question whether continuing interrogatories are permitted in California).
58. As pointed out by the Novick court, "under the language of [amended] Rule 33, it is provided, inter alia: 'The number of interrogatories ... to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression.'" Novick v. Pennsylvania R.R., 18 F.R.D. 296, 297 (W.D. Pa. 1955). See also Fed. R. Civ. P. 33; 5 F.R.D. 433, 461 (1946) (Advisory Committee Report setting forth previous limited interrogatory rule).
with a plethora of amended responses.\textsuperscript{59}

To derive the benefit of continuing discovery with its related burden of amending prior responses, while avoiding the burden of a universal application of the duty to supplement responses, Novick struck a balance between the competing alternatives. The court limited the duty to supplement by its analysis that:

It is only in those circumstances where the very nature of the interrogatory should require continuing answers, or where the information obtainable at pretrial would not afford the party sufficient time and opportunity to prepare his case, that the court should treat an interrogatory as “continuing.” Otherwise, parties may be burdened with the requirement of providing a myriad of scraps of information which could prove of little aid to either party.\textsuperscript{60}

Prior to Novick, state courts had adopted a trial sanction approach to surprise generated by lack of candor in discovery responses.\textsuperscript{61} Shortly after Novick, the state cases began to incorporate the federal approach to this complex problem.\textsuperscript{62} Some jurisdictions reoriented their approach toward inaugurating an open season on facts, thereby discarding the “cards-up-the-sleeve” psychology of civil litigation. This was accomplished by requiring supplementation in the absence of a codified rule.\textsuperscript{63}

However, latent reactionism to the propriety of continuing answers was most evident in the leading case of Smith v. Superior Court.\textsuperscript{64} The court in Smith balanced the burdens of continuing answers against the benefits of the Novick limited burden approach. The Smith court rejected the possibility of any continuing answers, as permitted in Novick, in the absence of court order. The California rule\textsuperscript{65} differed from the federal rule in that

\textsuperscript{59} The interrogating party, entitled to unlimited amendment from the interrogated party, could be similarly burdened by receipt of amended responses which are no longer needed or important. Overcompliance with the duty to amend could result in abuse or counterabuse.


\textsuperscript{61} Evtush v. Hudson Bus Transp. Co., 7 N.J. 167, 81 A.2d 6 (1951) (new trial because of error in permitting testimony of undisclosed witness at trial); Abbatemarco v. Colton, 31 N.J. Super. 181, 106 A.2d 12 (App. Div. 1954) (reversing denial of mistrial for exclusion of deposition testimony of unavailable and unlisted sole eyewitness, although express state rule required timely amendment of answers to interrogatories); Sather v. Lindahl, 43 Wash. 2d 463, 261 P.2d 682 (1953) (granting of new trial reversed although party’s deposition testimony, four days prior to trial, attested to an awareness of the personal injury witnesses he produced at trial).


\textsuperscript{64} 189 Cal. App. 2d 6, 11 Cal. Rptr. 165 (1961).

\textsuperscript{65} The state rule then provided: “No party may serve more than one set of interrogatories to be answered by the same adverse party, except with leave of
a California litigant could not ask for continuing interrogatories without leave of the court. The Smith court recognized that neither a second set of interrogatories nor continuing interrogatories were generally available to update witness information as in Novick. However, the Smith court did not venture any commentary regarding whether only court approved supplementation was a justifiable substitute for continuing discovery.

The contemporary decision in Gebhard v. Niedzwiecki also noted the respective burdens imposed by multiple sets of interrogatories and a continuing duty to supplement responses as analyzed in Smith. The Gebhard trial court had suppressed the testimony of surprise witnesses disclosed at trial. The duty to amend obsolete witness responses was extended to all phases of the action although the witnesses were not discovered until after trial had begun. The appellate court reasoned that responses must always be accurate and complete in order to avoid the suppression sanction pursuant to Minnesota's rule patterned upon the federal model. Contemporary state courts had held to the contrary, avoided the issue, or given up trying to articulate a


For the text of the then existing Federal Rule 33, see note 58 supra.

Multiple sets of interrogatories and imposition of a continuing burden to supplement responses were then available only with leave of court. CAL. CIV. PROC. CODE § 2030(a), quoted in Smith v. Superior Court, 189 Cal. App. 2d 6, 11, 11 Cal. Rptr. 165, 169 (1961).

For the text of the statute, see note 65 supra. California has since provided for a statutory continuing duty as to trial experts. CAL. CIV. PROC. CODE §§ 2037, 2037.6 (West Cum. Supp. 1980). As stated in a recent California decision: It is apparently an open question whether continuing interrogatories may be used in this state. (Smith v. Superior Court... holding that they may not was decided on the basis of old Code Civ. Proc., § 2030, subd. (a), which required leave of court for one party to file more than one set of interrogatories on the same adverse party.)


69. 265 Minn. 471, 477 n.8, 122 N.W.2d 110, 114 n.8 (1963) (citing Smith).

70. Id. at 475, 122 N.W.2d at 113.

71. Id. at 479, 122 N.W.2d at 116.

72. Id. at 476, 122 N.W.2d at 115; see text accompanying note 79 infra; cf. federal authorities cited notes 128-30 infra (excluding unseasonable supplementation).


74. See, e.g., Capone v. Norton, 8 N.J. 54, 83 A.2d 710 (1951) (interrogated party need not gratuitously provide new witness information if original response truthful and complete when made).

75. Where the trial court exclusion of eyewitness testimony was reversed for new trial, the court stated that:
specific approach to the obsolete discovery answer since "it [was] impossible to lay down any rule as to the proper course to be followed in such circumstances."\textsuperscript{76} 

In \textit{Gebhard}, the Minnesota Supreme Court considered the alternatives of a preamble triggering the duty to supplement or the repeated submission of same-subject interrogatories until trial.\textsuperscript{77} The court rejected both alternatives, specifically drawing from the rationale of federal decisions that had also characterized varying preambles and successive interrogation as unnecessarily burdensome.\textsuperscript{78} Drawing upon \textit{Novick}, the court held that the Minnesota rule permitted continuing interrogatories although:

\begin{quote}
[t]he application of this rule should not require the disclosure of every bit of information discovered after the answers are served, but should require that any information which is of a substantial nature and which will render the answers theretofore served untruthful, unreliable, or incomplete must be disclosed. Certainly, in a case such as this, the discovery of witnesses that a party intends to call comes within the area of information which must be disclosed.\textsuperscript{79}
\end{quote}

This approach injected the ingredient of timely discovery supplementation as required by later federal cases\textsuperscript{80} and the Federal Rule requirement of seasonable supplementation.\textsuperscript{81}

\textbf{B. Limited Duty Unfurled}

Continued resistance to the required exchange of essential discovery information\textsuperscript{82} impeded development of an explicit continuing duty to amend obsolete discovery responses.\textsuperscript{83} Judicial reaction to the advantages of such supplementation was nonexist-

\begin{footnotes}
\textsuperscript{76} For the purpose of this appeal it is not necessary for this court to decide whether plaintiff was required by Missouri discovery rules to amend his original answers and advise defendant of information learned since filing them. The essential question for our decision is not whether plaintiff technically conformed to the prescribed procedures of civil practice. Our concern is whether the trial court acted within the bounds of its own authority.

\textsuperscript{77} Aulgur v. Zylich, 390 S.W.2d 553, 555 (Mo. App. 1965).

\textsuperscript{78} Id. at 556 (quoting 2A W. BARBON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 776, at 44 (Supp. 1963-64)).

\textsuperscript{79} Gebhard v. Niedzwiecki, 265 Minn. 471, 477, 122 N.W.2d 110, 114 (1963).

\textsuperscript{80} Id.

\textsuperscript{81} Id. at 478, 122 N.W.2d at 115 (1963).

\textsuperscript{82} See authorities cited notes 84-86 infra.

\textsuperscript{83} See text accompanying notes 118-40 infra.

\textsuperscript{84} See text supra.
\end{footnotes}
tent, faintly implicit, or limited to the Third Circuit. These methods of resolution divided the federal circuits during the interim period bridging the Novick v. Pennsylvania Railroad analysis and the rulemakers’ 1967 proposal. A uniform federal approach had not materialized completely. The maze of opinions, therefore, necessitated resolution of this problem, which was clearly identified only two years after adoption of the Federal

84. Wray M. Scott Co. v. Daigle, 309 F.2d 105 (8th Cir. 1962) (failure to list lay witness placed burden of demonstrating prejudice on adversary); Bell v. Swift & Co., 263 F.2d 407 (5th Cir. 1960) (permitting defendant’s undisclosed witness to testify deemed erroneous; however, plaintiff’s burden of proving substantial error not met); Wrobleski v. Exchange Ins. Ass’n, 273 F.2d 138 (7th Cir. 1959) (no abuse of discretion in permitting testimony although court-ordered answer did not identify prospective witness); Texas & Pac. Ry. v. Buckles, 232 F.2d 257 (5th Cir.), cert. denied, 351 U.S. 984 (1956) (expert testimony permitted notwithstanding violation of pretrial conference order); Goria v. Commercial Transp. Corp., 38 F.R.D. 188 (E.D. La. 1965) (multiple sets of interrogatories under Rule 33 characterized as superior to implying a continuing burden of supplementation); Wedding v. Tallant Transfer Co., 37 F.R.D. 8 (N.D. Ohio 1963) (complete and timely response to interrogatories is largely dependent upon integrity of counsel in case where interrogatories lack “common request” that they be continuing).

85. Halverson v. Campbell Soup Co., 374 F.2d 810 (7th Cir. 1967) (exclusion of lay testimony deemed abuse of discretion notwithstanding reliance upon interrogatory which appellee failed to supplement); Clark v. Pennsylvania R.R., 328 F.2d 591 (2d Cir.), cert. denied, 377 U.S. 1006 (1964) (affirming receipt of lay testimony notwithstanding omission from pretrial statement where no motion for mistrial or continuance); Globe Cereal Mills v. Scrivener, 240 F.2d 330 (10th Cir. 1956) (no abuse of discretion in excluding exhibits and lay testimony not identified in pretrial order pursuant to Rule 16); Wembley, Inc. v. Diplomat Tie Co., 216 F. Supp. 565 (D. Md. 1963) (failure to supplement interrogatory answer regarding lay witnesses constitutes grounds for sanctions; however, doubts resolved against imposition of sanctions).


Only one decision beyond those of the Third Circuit courts fully adopted a duty to supplement lay and expert witness information prior to the 1967 official proposal by the Advisory Committee of a continuing duty. The same court had previously resolved doubts against sanctions under similar circumstances. Compare Diversified Prod. Corp. v. Sports Center Corp., 42 F.R.D. 3 (D. Md. 1967), with Wembley, Inc. v. Diplomat Tie Co., 216 F. Supp. 565 (D. Md. 1963). This result may be explained by the Diversified Products opinion’s proximity to promulgation of the Advisory Committee’s proposal seven months later.


88. See 1967 Preliminary Draft, supra note 26, at 228 (rule), 257-38 (note). The proposed rule, as amended, was adopted in 1970. See 1970 Amendments, supra note 27, at 459. For the text of the adopted rule, see note 8 supra.

89. See notes 84-86 supra.
Rules of Civil Procedure. The Advisory Committee, apparently concerned with all discovery devices rather than simply interrogatories, posited its concern that, "the issue is acute when new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made. It is essential that the rules provide an answer to this question. The parties can adjust to a rule either way, once they know what it is." The Advisory Committee did not advocate, and probably could not have justified, a blanket rule of unlimited continuing discovery. The primary advantage of such a rule would have been the reduction of paperwork associated with an amendment to the interrogatory rule that permitted multiple sets of interrogatories without leave of court. This means of supplementation did not depend upon the interrogated party to amend prior responses, although it was susceptible to excessive use by the interrogating party. Other advantages were the elimination of surprise and promotion of economical litigation. But the primary disadvantage associated with a continuing duty to supplement all responses was deemed to be that of visiting an intolerable burden upon a party's lawyer. This forced the Advisory Committee to rely on cases such as Novick and Diversified Products Corp. v. Sports Center Co., which limited the burden to the most essential information. Rule 26(e) was apparently derived from language in the district court's foundation in Diversified Products.95

90. As stated by a relevant decision: "If in the interim, between the time of the answers to these interrogatories and the trial, defendants obtain further information, they will not be prevented from offering such further information on the trial and should under this interrogatory furnish it to plaintiff when it is obtained." RCA Mfg. Co. v. Decca Records, Inc., 1 F.R.D. 433, 435 (S.D.N.Y. 1940) (emphasis added).

91. 1967 PRELIMINARY DRAFT, supra note 26, at 237; see 1970 AMENDMENTS, supra note 27, at 507. The Committee focused upon "interrogatories (and questions at deposition as well as requests for inspection and admissions)." 1967 PRELIMINARY DRAFT, supra note 26, at 237.

92. See 1948 AMENDMENTS, note 29 supra.

93. 1967 PRELIMINARY DRAFT, supra note 26, at 238; 1970 AMENDMENTS, supra note 29, at 507.

94. 42 F.R.D. 3 (D. Md. 1967) (construction of duty nearly identical to subsequently proposed rule).

95. As stated by the court:

Unless otherwise ordered by the Court or by agreement of parties, a party who has responded to a request for discovery with an answer that was complete when made is under no duty to supplement his answer to include information thereafter acquired, except that he is under a duty sea-
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Current concern with the prohibitive cost of discovery in both complex\textsuperscript{96} and uncomplicated\textsuperscript{97} litigation sustains the Advisory Committee's concern with expanding discovery requirements. Discovery abuses based upon surprise should not be replaced by discovery amendments generating more problems than they solve. The required recanvassing of new information to comply with even the limited burdens of supplementation has its most profound effects in the largest and smallest cases. Federal litigants in complex cases must seasonably evaluate numerous scraps of information to determine their bearing upon prior discovery responses and to avoid exclusion of newly acquired evidence. This generates more costs and fees than supplementation by responding to additional interrogatories. If the complex case experience with federal supplementation confirms this possibility, related litigation costs will confirm public\textsuperscript{98} and international\textsuperscript{99} distrust of United States discovery procedures. In small cases, reasonably to supplement his answer with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters and the identity and stated subject matter of each person who will be called as an expert witness at trial. Supplemental interrogatories may be filed in order to bring up to date the answers to particular interrogatories, and the Court may make appropriate provisions with respect thereto in a pre-trial order.

\textit{Id.} at 5. \textit{See also} FED. R. CIV. P. 26(e), note \textit{supra}.

\textit{96. See generally} authorities cited notes 11-14 \textit{supra}.

\textit{97. Selected California courts are engaged in a pilot project that prohibits discovery and substantially limits pretrial motions in specified cases when the amount in controversy is less than $25,000. CAL. CIV. PROC. CODE §§ 1823-1833.2 (West Supp. 1979). A primary goal of the project is to eliminate the cost of discovery in the so-called small cases. Ultimate use or expansion of this project would extinguish the burdens associated with continuing discovery in those cases in which discovery is prohibited or limited because of cost and fee considerations. See Goebel, Policy for the Conduct of Proceedings Relating to Cases Filed and Heard in Economical Litigation Project, Los Angeles Daily Journal, May 4, 1979, at 4 (Report Supp. 79-9); Economical Litigation Committee of the Los Angeles Municipal Court, The ABCs of ELP, Los Angeles Daily Journal, May 4, 1979, at 10 (Report Supp. 79-9).}

\textit{98. The President of the American Bar Association recently stated that the average person cannot afford the cost of litigation and is being deprived of access to the legal system. The legal profession must therefore curb rising costs and increasing delays—for example, new trial for failure to supplement—to eliminate public mistrust. Janofsky Says Litigation Cost, Delay Causes Public Mistrust, Los Angeles Daily Journal, May 9, 1979, at 1, cols. 5-6.}

the burdens of continuing discovery may be counterproductive to desired reduction of discovery costs and attorneys' fees.  

The continuing discovery proposal had little effect upon the existing federal split of authority regarding the scope of supplementation. Federal opinions vacillated among the alternatives of a continuing duty as to all interrogatories, effective or explicit inapplicability of a continuing duty in federal civil procedure, or a limited continuing duty predicated upon particular

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100. See note 97 supra.
101. See notes 84-86 supra.
102. Montecatini Edison v. Rexall Drug and Chem. Co., 288 F. Supp. 486 (D. Del. 1968). As stated by the court: "[I]f future discovery or study were to alter the plaintiff's position the Court would expect the plaintiff, in accordance with his continuing obligation to keep the answers to all interrogatories as up to date as possible, to amend his answer to Interrogatory 42." Id. at 491 (emphasis added). This broad position was a surprise, in view of authority in the leading case from within the Third Circuit which recognized a continuing duty only as to certain categories of information. See Novick v. Pennsylvania R.R., 18 F.R.D. 296 (W.D. Pa. 1955), wherein the court stated: It is only in those circumstances where the very nature of the interrogatory should require continuing answers, or where the information obtainable at pre-trial would not afford the party sufficient time and opportunity to prepare his case, that the court should treat an interrogatory as "continuing." Otherwise, parties may be burdened with the requirement of providing a myriad of scraps of information which could prove of little aid to either party. Id. at 298. The same Delaware Federal District Court, in partial reliance upon Novick, had previously characterized only one of a number of interrogatories as continuing in nature. Lunn v. United Aircraft Corp., 25 F.R.D. 186, 190 (D. Del. 1960).
103. See Washington Hosp. Center v. Cheeks, 394 F.2d 964 (D.C. Cir. 1968). The trial court permitted appellee to call an expert witness during trial although he had not been identified previously as required by court order. The appellate court, reasoning that this witness was actually deposed during trial, nevertheless affirmed the effective lack of a continuing duty imposed by court order in its determination: "The District Judge must, of course, have broad discretion [to permit the witness to testify] since he is in a far better position to evaluate the situation than are we." Id. at 965. The Court cited a Fifth Circuit case which also affirmed admissibility of expert testimony notwithstanding violation of a pretrial conference order. Id. at 966 (citing Texas & Pac. Ry. v. Buckles, 232 F.2d 257 (5th Cir.), cert. denied, 351 U.S. 984 (1956)).
104. St. Paul Fire & Marine Ins. Co. v. King, 45 F.R.D. 521 (W.D. Okla. 1969). As stated by the court: "It is the Court's opinion that to allow continuing interrogatories will impose an intolerable burden on the Court's administration of judicial business... The Court, therefore, takes the view that continuing interrogatories will not be permitted." Id. at 522. The court dealt with what it deemed to be a case of first impression, based upon no consideration of the continuing interrogatory question in regard to surprise witnesses. Id. However, in an analogous situation, exhibits and witnesses were not permitted because of failure to identify them in response to a pretrial order, which was affirmed because "the order was not complied with by giving notice of a desire to use additional exhibits and witness[es]." Globe Cereal Mills v. Scrivener, 240 F.2d 330, 335 (10th Cir. 1956).
circumstances. The interim decisions citing proposed Rule 26(e) prior to its effective date specifically noted the inherent lack of unanimity in federal law spawned by the always competing benefits and burdens of supplementation.

The federal supplementation rule was designed to encourage litigants to adjust to a narrow rule. The original proposal was substantively expanded to more thoroughly limit the overall scope of the continuing discovery concept. The early commentators gave speculative approval to this discovery amendment. It was designed to resolve more ambiguities than it created. However, the adversarial nature of litigation has fostered problems of

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105. As stated in an Eighth Circuit opinion:

We think, within the context of this case, the plaintiff could be held to be under a continuing obligation to provide the defendant with all of her hospital records subsequent to her injury, which were relevant to the issues of the case up to the date of trial. However, we hesitate at this time to formulate any general rule covering this problem. . . . Greyhound Lines, Inc. v. Miller, 402 F.2d 134, 143 (8th Cir. 1968). The court was obviously hesitant to formulate a general rule, although it quoted the 1967 Advisory Committee's continuing duty proposal. Id. at 145.


107. See, e.g., Greyhound Lines, Inc. v. Miller, 402 F.2d 134, 142-43 (8th Cir. 1968) (citing conflicting federal decisions as to existence or scope of a continuing duty); Fernandes v. United Fruit Co., 50 F.R.D. 82, 83 (D. Md. 1970) (citing conflict between federal and state decisions in Maryland, as well as expansion of district court's scope of continuing duty from earlier decision because of anticipated adoption of uniform federal rule).

108. Rule 26(e), as originally proposed, read as follows:

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial and the subject matter on which he is expected to testify.

(2) A party who knows or later learns that his response is incorrect is under a duty seasonably to correct the response.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through requests for supplementation of prior responses.

1967 PRELIMINARY DRAFT, supra note 26, at 228.

109. Paragraph two imposes no continuing duty as to responses correct when tendered but later alleged to be incorrect because of failure to supplement, where knowing concealment cannot be proven.

construction which were inconceivable when Rule 26(e) was promulgated in 1970.

III. CURRENT CONSTRUCTION PROBLEMS

Rule 26(e) was intentionally and explicitly cast in the negative:111 "A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired. ..."112 The Advisory Committee Note is not very explicit regarding its reasons for drafting the rule in this manner.113 It is implicit that caution, manifested by a limited duty under certain exceptions, would be superior to the reckless abandon evidenced by an unlimited duty.114

This no-duty rule, not subject to expansion by preamble or local rule,115 is qualified by the following seven exceptions:

(a) Persons having knowledge of discoverable matter;
(b) Expert witnesses;
(c) Responses known to be incorrect when made;
(d) Responses correct when made but subsequently known to be incorrect;
(e) Duty to supplement imposed by court order;
(f) Duty to supplement agreed to by parties;
(g) New discovery requests for supplementation of prior responses.116

111. The Advisory Committee cited law review commentary lamenting the prejudice inherent in failing to advise an adversary prior to trial (1) when known witnesses were intentionally undisclosed and (2) when a new witness was discovered but undisclosed. The cases had found no duty in the latter situation in the absence of an express duty. The commentators disagreed. See 1970 AMENDMENTS, supra note 27, at 508 (citing Note, Discovery Practice in States Adopting the Federal Rules of Civil Procedure, 68 HARV. L. REV. 673, 677 (1955).

112. FED. R. CIV. P. 26(e) (emphasis added).

113. See 1970 AMENDMENTS, supra note 27, at 507-08.

114. See text accompanying notes 92-100 supra.


116. FED. R. CIV. P. 26(e).
These exceptions are herein analyzed under the broad categories of witnesses, incorrect responses, and elastic supplementation.

A. Witnesses

A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, and the subject matter on which he is expected to testify, and the substance of his testimony.\textsuperscript{117}

1. Seasonable Supplementation

Rule 26(e) requires timely amendment in order to promote efficiency and prevent the abuse which existed prior to its adoption. The rule does not expressly require "seasonable" supplementation as to a duty imposed by court or party agreement,\textsuperscript{118} although this is expressly required as to witnesses and incorrect responses.\textsuperscript{119} Seasonable supplementation should be implied throughout Rule 26(e) as its legislative intent is premised upon providing adequate reaction time to the interrogating party.\textsuperscript{120} The trial court's inherent power to control discovery abuse may now fill this gap.\textsuperscript{121} However, a contrary argument can be drawn from the legislative comment that there are no duties except as expressly provided.\textsuperscript{122} This ambiguity could be resolved by recognition of the need for an express sanction applicable to Rule

\textsuperscript{117} \textit{Fed. R. Civ. P.} 26(e)(1). Although there are distinctions between "persons having knowledge of discoverable matters," "lay" witnesses, and "perceipient" witnesses, these terms are herein utilized interchangeably unless otherwise indicated.

\textsuperscript{118} \textit{Fed. R. Civ. P.} 26(e) (court order, party agreement, and new requests for supplementation).

\textsuperscript{119} \textit{Fed. R. Civ. P.} 26(e)(1) (witnesses), (2) (incorrect responses).

\textsuperscript{120} The Advisory Committee guidelines were expanded by one paragraph: "The duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate." 1970 Amendments, \textit{supra} note 27, at 508, Advisory Committee Note. \textit{But cf.} 1987 Preliminary Draft, \textit{supra} note 26, at 236 (quoted paragraph not included in original Advisory Committee Note).

\textsuperscript{121} \textit{Id}. \textit{See also} National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976) (per curiam) (Supreme Court reiteration that appropriate review standard for trial court choice of discovery sanctions is whether discretion was abused); S. Kann's Sons Corp. v. Hayes, 320 A.2d 593, 596 (D.C. Ct. App. 1974) (wide discretion to impose sanctions for failure to completely and accurately answer pretrial interrogatories as to photographs, relying upon federal procedure).

\textsuperscript{122} For Advisory Committee comment, see note 115 \textit{supra}.
The seasonable amendment requirement is not limited to party responses. A party may produce an independent witness whose deposition testimony does not disclose matter to be relied upon at trial. The party controlling such a deponent should seasonably disclose any additional bases for the deposition testimony, assuming that all bases are sought by the interrogating party at the deposition. Seasonable amendment is required if the circumstances are such that surprise would result from concealment by the controlling party. No such concealment would be found if the deposing party does not properly discover the case because of failure to inquire regarding all bases for claims or defenses while taking a deposition. The limited federal supplementation duty does not make a volunteer of the responding party. There is no duty to read into discovery questions anything that is not asked.

Judicial opinion of what constitutes seasonable supplementation recently shifted from an emphasis upon specific events to an earliest opportunity approach. Untimely disclosure of new issues has resulted in the uniform exclusion of matter sought to be in-

123. An amendment expanding Rule 37 to govern all discovery violations was proposed but rejected without comment. Compare 1978 Preliminary Draft, supra note 5, at 652-53, with 1979 Revised Preliminary Draft, supra note 5, at 344-48. Otherwise, the word "seasonably" could be inserted in paragraph three of Rule 26(e) to ensure uniformity in interpretation of each of the rule's subdivisions. Reported decisions involving Rule 26(e)(3) have implied this requirement. See, e.g., Tabatchnick v. G.D. Searle & Co., 67 F.R.D. 49 (D.N.J. 1975). "Whatever else that term [as soon as feasible] means, it implies a time long enough before trial to permit a fair opportunity to prepare for trial." Id. at 55 (court-ordered requirement of informative disclosure as soon as feasible).

124. See, e.g., Barnes v. St. Francis Hosp. & School of Nursing, Inc., 211 Kan. 315, 321, 507 P.2d 288, 294 (1973) (affirmed trial court exercise of discretion excluding a basis for nonparty testimony at trial not timely disclosed after deposition, relying upon federal procedure). Seasonable amendment should be inserted in paragraph three of Rule 26(e) to ensure uniformity in interpretation of each of the rule's subdivisions. Reported decisions involving Rule 26(e)(3) have implied this requirement. See, e.g., Tabatchnick v. G.D. Searle & Co., 67 F.R.D. 49 (D.N.J. 1975). "Whatever else that term [as soon as feasible] means, it implies a time long enough before trial to permit a fair opportunity to prepare for trial." Id. at 55 (court-ordered requirement of informative disclosure as soon as feasible).


126. As stated in an illustrative state decision construing Kansas' Rule 226(e): "We believe that Dr. Reals [defendant hospital's staff physician] should seasonably have amended his deposition by disclosing that he had examined the pathological slides in forming his opinion, in addition to the documents mentioned in his deposition." Barnes v. St. Francis Hosp. & School of Nursing, Inc., 211 Kan. 315, 321, 507 P.2d 288, 294 (1973) (relying upon federal authority in support of quoted statement). A prima facie case of control of a nonparty is all that need be established to justify a party to undertake appropriate discovery measures. See Norman v. Young, 422 F.2d 470 (10th Cir. 1970); Hart v. Wolff, 489 P.2d 114 (Alaska 1971).

127. See Dudley v. South Jersey Metal, Inc., 555 F.2d 96, 99-100 (3d Cir. 1977) (ambiguous deposition question generating response that manufacturer did not make injury-producing bracket although it finalized product after receipt and incorporation of third party's bracket not answered in violation of Rule 26(e)).
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introduced after the close of discovery, just prior to trial, and subsequent to impaneling of the jury. Supplementation at these stages was not deemed seasonable since the continuing discovery concept was necessitated by such surprise tactics. As was stated succinctly in an opinion dealing with the critical impact of surprise expert testimony:

The subjective explanation for the default is irrelevant. It makes no difference whether it was due to failure to prepare for trial or due to an intentional purpose to gain the benefit of surprise. The [continuing burden] rule bars the result without regard to cause, except for those beyond control.


The early decisions focused upon specific events which triggered exclusion of unseasonable supplementation. Current opinions evidence a more demanding approach, whereby

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128. As stated in a relevant decision: “The defendant had two and one-half months from the time it got the new information from Polite until the final closing of discovery, and waited another five or six weeks after that before filing the supplemental answers. This was clearly not acting seasonably.” Havenfield Corp. v. H. & R. Block, Inc., 509 F.2d 1263, 1272 (8th Cir.), cert. denied, 421 U.S. 999 (1975) (exclusion of medical records within trial court discretion).

129. As stated in a relevant decision: “[T]here was virtually no way for Marathon to prepare adequately to respond to the testimony of the surprise witnesses. Unfair surprise of this sort is contrary to the policy of the federal rules, which sanction extensive discovery.” Davis v. Marathon Oil Co., 528 F.2d 395, 404 (6th Cir. 1975) (no credible support for contention party discovered witnesses three days prior to trial as reasonable diligence would have resulted in earlier disclosure).


131. Id. at 55.


134. As provided in the Act: “Unless otherwise authorized by the court, no party shall call a witness, who has not been appointed by the court, to give expert testimony unless that party has given the court and the adverse party to the proceeding reasonable notice of the expert to be called.” MODEL EXPERT TESTIMONY ACT § 3 (1937) (withdrawn).

135. See text accompanying notes 128-30 supra (involving the “early” decisions of 1975).

136. More rigid adherence to the philosophy of mutual exchange of all relevant information is a likely result of the U.S. Supreme Court’s recently expressed disapproval of traditional judicial leniency regarding discovery abuses. Compare
supplementation would be characterized as unseasonable if not tendered at the earliest opportunity. In a recent water pollution case brought by the federal government, interrogatories filed in 1972 requested that the defendant list all studies it had undertaken dealing with alternative methods of pollution control and discharge. Additional studies were identified in the defendant's supplemental responses, but only after the plaintiff's discovery of their existence from other sources. This apparent compliance was not deemed to be meaningful compliance with Rule 26(e) because of the requirement of *timely* supplementation.

In a 1978 contract case, the first federal decision to impose a dismissal sanction on the basis of Rule 26(e), the defendant failed to comply with a court order requiring submission of an expert witness list. Its counterclaim was dismissed because this category of discovery information was so "vital that proper responses to interrogatories asking for information concerning experts [must] be afforded at the earliest opportunity." Otherwise, an unacceptable lengthening of trial would be necessary because of surprise that would necessitate depositions and related discovery during trial. A rather strict standard is therefore emerging regarding "seasonable" supplementation of responses as to witnesses, incorrect responses, and court-ordered continuing discovery.

2. Questions Directly Addressed to Witness Information

A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) . . . persons having knowledge of discoverable matters and (B) . . . an expert witness at trial.

The duty to supplement is further limited by the "direct question" requirement. The propounding party must directly address his discovery to percipient and expert witness information if he intends to trigger the responding party's duty to supplement.

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One commentator's test is that supplementation must be made in sufficient time to allow the opponent to take whatever responsive action is necessary to properly prepare for trial. Clough, *Rx for Defense—Aggressive Use of the Amended Federal Rules of Civil Procedure*, 38 INS. COUNSEL J. 354, 355 (1971).

138. Id.
140. Id. at 504.
141. FED. R. CIV. P. 26(e)(1) (emphasis added).
Litigants cannot depend upon the rule's surprise-avoidance function if their discovery has not been addressed directly to the witness information governed by it. Where a party initially obtains the names of opposition experts and opinions pursuant to Rule 26(b) (4),\textsuperscript{142} the opponent's failure to fully supplement under Rule 26(e) will ordinarily result in unfair prejudice because of the reliance interest generated by the latter rule.\textsuperscript{143} Experts cannot be permitted to testify when the opposing party, unable to establish their potential relationship with the jury, has not been provided a seasonable opportunity to assess their impact upon the lawsuit.\textsuperscript{144} There is no general duty to read into discovery questions anything that is not asked.\textsuperscript{145} Litigants may not otherwise avoid the duty to update obsolete responses directed to persons having knowledge of discoverable matter under Rule 26(b)(1)\textsuperscript{146} and experts under Rule 26(b)(4).\textsuperscript{147}

\textsuperscript{142} The general scope of expert witness discovery is:
A party may through interrogatories require the other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. . . . [T]he court may order further discovery by other means, subject to such restrictions as to scope and such provisions . . . concerning fees and expenses as the court may deem appropriate.
\textbf{FED. R. CIV. P. 26(b)(4)(A)(i), (ii).}

\textsuperscript{143} Full supplementation would not be appropriate if witnesses identified after original discovery responses are not useful to any party. This would occur when, for example, the new witness could testify only upon matters no longer in issue.


\textsuperscript{145} \textit{See} Dudley v. South Jersey Metal, Inc., 555 F.2d 96, 99-100 (3d Cir. 1977) (abuse of discretion in refusal to permit evidence that party did not set out to mislead adversary by failing to amend response to interrogatory).

\textsuperscript{146} The general scope of nonexpert witness discovery is:
Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.
\textbf{FED. R. CIV. P. 26(b)(1).}

\textsuperscript{147} \textit{See} note 142 \textit{supra}. 

\begin{small}
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\textbf{FED. R. CIV. P. 26(b)(1).}

\textsuperscript{147} \textit{See} note 142 \textit{supra}.

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3. Persons Having Knowledge of Discoverable Matters

A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters . . . .148

The dearth of cases involving this portion of Rule 26(e) suggests that problems construing it result from unseasonable compliance rather than from any drafting defect. But judicial application has not been uniform.149 For example, the Court of Appeals for the Seventh Circuit affirmed trial court discretion permitting testimony of witnesses provided during trial.150 The Sixth Circuit affirmed trial court discretion excluding testimony of witnesses provided three days prior to trial.151 In both cases, unexpected lay witnesses were identified at the eleventh hour, Rule 26(e) was applicable, and trial court discretion was not disturbed.152 In Eisbach v. Jo-Carroll Electric Cooperative, the Seventh Circuit acquiesced in the receipt of such testimony, notwithstanding the recently adopted continuing discovery rule that was applicable.153 Ironically, it relied on its own precedent

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149. EEOC v. Carter Carburetor, 577 F.2d 43 (8th Cir. 1978), cert. denied, 99 S. Ct. 865 (1979) (mandamus withdrawing establishment-preclusion order regarding certain unidentified trial witnesses); Sadowski v. Bombardier Ltd., 539 F.2d 615 (7th Cir. 1976) (discretion determinative of whether listed lay witnesses are also expert witnesses); Davis v. Marathon Oil Co., 528 F.2d 395 (6th Cir. 1975) (exclusion of witnesses identified three days prior to trial); Eisbach v. Jo-Carroll Elec. Coop., 440 F.2d 1171 (7th Cir. 1971) (trial witness list provided to adversary on first day of trial approved).

State decisions dealing with the surprise witness problem, subsequent to adoption of Rule 26(e), are reported in Hollins v. Sneed, 300 A.2d 447 (D.C. Ct. App. 1978) (discretion not abused in permitting witness testimony where potential witness unknown until just prior to trial); In re Estate of Weber, 97 Idaho 703, 551 P.2d 1339 (1976) (1975 amendment adding Rule 26(e) not retroactively applicable to action commenced in 1974); Everett v. Morrison, 478 S.W.2d 312 (Mo. 1972) (unsuccessful argument that continuing discovery ceases moment trial commences); Laney v. Hefley, 262 S.C. 54, 202 S.E.2d 12 (1974) (unidentified witness permitted to testify, notwithstanding continuing burden under local rule, as prejudice not strong).

Approval of permitting testimony of undisclosed witnesses has been based largely upon the opposing party's independent knowledge of their existence. See, e.g., Sadowski v. Bombardier Ltd., 539 F.2d 615, 617 n.1 (7th Cir. 1976); Buckler v. Sinclair Refining Co., 68 Ill. App. 2d 232, 216 N.E.2d 14 (1965); Wolfe v. Northern Pac. Ry., 147 Mont. 23, 409 F.2d 528 (1969).


151. Davis v. Marathon Oil Co., 528 F.2d 395, 397 (6th Cir. 1975).


153. It appears that this case was filed prior to July 1, 1970, the effective date of Rule 26(e).
excluding such testimony. The court concluded without supportive commentary: "Nevertheless, since the [witness] list was eventually furnished to plaintiffs on the first trial day, the district judge was entitled to permit defendants' witnesses to testify." The decisional authority cited for this statement predated the existence of Rule 26(e) by five years and is factually distinguishable because the identity of the alleged surprise witness was known to the opponent "long before the date of [the] trial."

A recent case warned that a moving party, who is in pari delicto in creating the discovery problem, should not expect the benefits of Rule 26(e). In Equal Employment Opportunity Commission v. Carter Carburetor, the plaintiff Commission supplemented its answers to the defendant employer's interrogatories seeking the identity of discriminatees. However, the EEOC did so using the all too familiar statement that it was unable to identify other individuals until it had completed its discovery, but that it would, in accordance with Rule 26(e), supplement responses to the defendant's second set of interrogatories. The trial court, relying upon the Supreme Court's disdain for leniency in imposing sanctions for discovery abuse expressed in National Hockey League v. Metropolitan Hockey Club, had characterized the EEOC's repeated refusal to answer critical witness interrogatories as "indefensible." After reviewing the conduct of the interrogating party defendant that had successfully moved for sanctions, the Eighth Circuit reversed the decision in this "classic case of [dual] abuse of the discovery process." Carter Carburetor admonishes future litigants that sanctions involving Rule 26(e) violations may

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154. Eisbach v. Jo-Carroll Elec. Coop., 440 F.2d 1171, 1173 (7th Cir. 1971) (relying upon Fisher v. Underwriters at Lloyd's, 115 F.2d 641 (7th Cir. 1940)). Fisher involved a plaintiff who declined to answer interrogatories and was precluded from offering proof thereon at trial.
156. Stewart v. Meyers, 353 F.2d 691 (7th Cir. 1965).
157. Id. at 696.
159. Id. at 49.
162. EEOC v. Carter Carburetor, 577 F.2d at 49 (mandamus ordering withdrawal of sanctions which had been levied against plaintiff EEOC, the interrogated party under a duty to supplement its witness list), cert. denied, 99 S. Ct. 865 (1979).
be withheld when the "aggrieved" party contributes to the alleged discovery abuse.

A final problem involving supplementation of lay witnesses interlocks with supplementation of expert witnesses. The case of *Sadowski v. Bombardier Ltd.*\(^{163}\) involved the familiar scenario where both parties were at fault regarding discovery obligations, resulting in denial of the relief requested. The defendant objected to the plaintiff's listing of some percipient witnesses who then testified as alleged experts at trial.\(^{164}\) At issue in the case was whether the plaintiff's snowmobile accident had resulted from the plaintiff's loss of control, as the defense contended, or from a broken defective part. The two witnesses, snowmobile dealers, were directly examined on the issue of typical reasons for loss of control. Although they testified on highly technical matters, they were not deemed experts in view of the nonexpert nature of their testimony.\(^{165}\) The objecting defendant was also at fault for tardily furnishing its witness list.

The trial court in *Sadowski* permitted the plaintiff's witnesses to testify in the interest of justice, rationalizing that:

> [P]laintiff's counsel were skating very close to the line dividing expert from lay testimony, and we think that total candor might have required them to indicate that [these witnesses] did have some expert ability. However, the two witnesses were listed in the pretrial report. Nor does the record support a conclusion that there was a knowing concealment such as is prohibited by Fed. R. Civ. P. 26(e).\(^{166}\)

If the referenced witnesses had been characterized as undisclosed experts, the result would not have differed necessarily as trial courts now enjoy great latitude in the conduct of pretrial matters.\(^{167}\) However, a pervasive approach can be deduced from this supplementation problem. Rule 26 requires supplementation of responses regarding the identity of trial experts, the subject matter on which they will testify, and the substance of their testimony.\(^{168}\) It aids in carrying out the pretrial exchange of critical expert testimony under Rule 26(b) and will not be readily avoided by the less-than-candid compliance permitted in *Sadowski*. As a result of the Supreme Court's decision in *National Hockey League v. Metropolitan Hockey Club*\(^{169}\) five weeks after

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163. 539 F.2d 615 (7th Cir. 1976).
164. Id. at 617-18.
165. Id. at 620.
166. Id.
Supplementation of Discovery

Sadowski, future trial use of witnesses not clearly identified as experts is not likely to be tolerated.

4. Experts: The Critical Category

A party is under a duty seasonably to supplement his response with respect to any question directly addressed to . . . the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony. 170

A federal court litigant cannot force disclosure of lay witnesses that his adversary intends to call as trial witnesses, 171 except as permitted by pretrial procedure. 172 Expert witnesses are treated far differently. The pivotal nature of expert testimony 173 renders its subject matter and substance both discoverable and subject to continuing supplementation in the event of any change in listed experts. It is submitted that deletion of a listed expert is also subject to supplementation requirements. This is premised upon the opponent's justified reliance upon anticipated retention and utilization of all listed experts at trial. This results in unnecessary pretrial preparation for cross-examination and rebuttal testimony. Sanctions controlling this abuse would serve to further implement the stated goal of avoiding unfair surprise.

Litigation involving supplementation of federal discovery responses often focuses upon the expert trial witness whose testimony tends to have the greatest effect upon the trier of fact. 174


171. Witnesses intended to be called for nonexpert trial testimony were not discoverable either prior to, or subsequent to, the 1970 adoption of continuing discovery. See, e.g., Brennan v. Engineered Prod., Inc., 506 F.2d 299, 303 n.2 (8th Cir. 1974); Wirtz v. Continental Fin. & Loan Co., 326 F.2d 561, 564 (5th Cir. 1964).

172. See Padovani v. Bruchhausen, 293 F.2d 546, 550 (2d Cir. 1961) (order precluding witness testimony, removing all basis for proof of claim, improperly at odds with intent and purpose of federal rules).

173. Persons utilized for consultation purposes because of their particular field of expertise, but not intended to be called at trial to testify as experts, are discoverable only upon a showing of good cause under exceptional circumstances. Fed. R. Civ. P. 26(b)(4)(B). Federal decisions are split regarding discoverability of the consultant's identity. See Sea Colony, Inc. v. Continental Ins. Co., 63 F.R.D. 113 (D. Del. 1974) (opponent not required to demonstrate exceptional circumstances to discover identity of expert-consultant not intended to testify). Contra, Perry v. W.S. Darley & Co., 54 F.R.D. 278 (E.D. Wis. 1971) (motion for order compelling disclosure of "experts" denied where no showing of adversary's intent to call expert-consultant as trial witness).

174. An analysis of the critical nature of this type of testimony is contained in Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L. Rev. 455 (1962).
The major problems involve where to place the burden of proving prejudice and whether Rule 26(e) is subject to strict or liberal construction.

_Nutt v. Black Hills Stage Lines, Inc._175 was the first case decided under Rule 26(e) that dealt with expert witness supplementation.176 The _Nutt_ decision evidenced latent resistance to the logic of supplementation. This reaction was confirmed by the trial court’s opinion and the dissent at the appellate level. The plaintiff in the case failed to notify the defendant of the identity of a neuropsychiatrist who had examined the plaintiff on the day prior to the trial, for the purpose of testifying at trial. The defendant’s motion for a continuance, predicated upon surprise and lack of opportunity to conduct discovery, was denied. The court opted for placing a burden upon the unsuspecting defendant who was expected to locate an expert rebuttal psychiatrist to examine the plaintiff on the very evening that the plaintiff’s surprise expert was identified during voir dire.177

On appeal, the _Nutt_ decision was reversed. The majority could not acquiesce in leaving the burden of proving prejudice with the innocent party. The surprise-avoidance objective of the Federal Rules of Civil Procedure and the state court rules prohibiting one from profiting from one’s own wrong would be otherwise offended.178 The _Nutt_ court implemented these objectives by placing the burden of proving lack of prejudice squarely upon the

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175. 452 F.2d 480 (8th Cir. 1971).
176. The record refers to “[a]ppellee’s medical witness, who examined appellee for the sole purpose of qualifying himself to testify as an expert at trial.” _Id._ at 481. However, the record could be construed as involving a treating physician to be utilized as a percipient witness or in the dual capacity of treating physician and expert medical witness. _See id._ at 481-83.
177. _Id._ at 482. More recent federal decisions recognize the possibility of such a rapid reaction balanced with the objective of surprise avoidance.
Of course, it may well be possible in many cases for able counsel on an overnight basis to prepare and defend against last-minute claims by his adversary. Certainly, that sort of emergency litigation which could degenerate into “quick-draw hip-shooting” is precisely what the discovery rules were designed to prevent. Under a holding approving the initial presentation of a principal claim and theory of recovery at the eleventh hour, as we find in this case, the discovery rules would serve no inducement to a candid and orderly revelation of the claims, defenses, and facts upon which the issues would ultimately be presented. To be sure, the defendant was well aware of the fact that the plaintiff had suffered a heart attack, but there was no forewarning that the heart attack would serve as the foundation for one of the key issues at trial. The question the defendant had properly propounded by interrogatory to the plaintiff was designed to determine whether or not the plaintiff was proceeding in court under a claim that the heart attack was caused by the broken step incident.
_Shelak v. White Motor Co.,_ 581 F.2d 1155, 1159 (5th Cir. 1978) (interests of justice and judicial economy best served by reversal and remand solely on issue of damages).
party who failed to supplement. Because expert testimony is of a more critical nature than other information subject to continuing discovery, the interrogated party should always bear this burden in order to eliminate surprise.

Of all the federal decisions dealing with surprise generated by inadequate supplementation of experts, Tabatchnick v. G.D. Searle & Co., most clearly signals patent adherence to the logic of supplementation. During trial, the plaintiff unsuccessfully attempted to call an undisclosed expert without good cause. The expert's testimony was the necessary foundation for further testimony by a disclosed expert. The apparent necessity for such foundational testimony three years prior to trial resulted in the exclusion of this foundational testimony. The court harshly admonished any litigator who planned to violate Rule 26(e): "The bar allowed to practice before the federal court here is put on notice by this ruling [excluding undisclosed expert's testimony] that cases must be prepared for trial, and that the consequences

179. The *Nutt* majority describes this situation as occurring without the fault of either party. *Id.* at 483. It seems, however, that if both parties were "innocent," then the defendant was far more innocent than the plaintiff who should have borne the consequences in such a situation. The dissent resumed:

I do not believe it is entirely accurate to say that "Dr. Natarajan's testimony added a significant new dimension to appellee's case." Plaintiff's answers to defendants' interrogatories and reports of her Scottish physicians were available to defendants' attorneys long before the trial. Although these documents did not assert a claim of traumatic neuroses in those precise words, they plainly described her condition in terms which defendants' experienced and competent attorneys should have recognized as symptomatic of that affliction.

*Id.* at 484 (Matthes, J., dissenting) (footnote omitted). This was premised upon the usual wide latitude of discretion accorded to trial court control of the judicial process.

180. As stated by the Advisory Committee Note to Rule 26(e), specifically incorporating Rule 26(b)(4) as to experts: "A party is not under a continuing burden except as expressly provided. . . . An exception is also made as to expert trial witnesses in order to carry out the provisions of Rule 26(b)(4)." 1970 AMENDMENTS, *supra* note 27, at 508 (emphasis added). *But see* Dychalo v. Copperloy Corp., 78 F.R.D. 146, 148 (E.D. Pa.) (pretrial memorandum identifying possible expert's identity only sufficient to place opponent on notice of intended use of referenced person as expert), *aff'd sub nom.* Copperloy Corp. v. Congoleum Indus., Inc., 588 F.2d 819 (3d Cir. 1978).


182. *Id.* at 50-51.

183. The need for introducing one undisclosed expert's testimony in order to introduce a disclosed expert's testimony should not result in putting an opponent on constructive notice that an additional expert may testify. *See* text accompanying notes 178-80 *supra*. 

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of failure to do so will fall on their own clients.” Federal counsel should anticipate that, with the limited exception of uncontrollable cause such as death of an expert during trial, subjective explanations for noncompliance will be deemed irrelevant.

The Tabatchnick court’s rather strict interpretation of continuing discovery has not been followed uniformly even within its own circuit which pioneered development of pre-Rule 26(e) continuing discovery. The comparatively liberal doctrine of “constructive compliance” recently surfaced in Dychalo v. Copperloy Corp. In Dychalo various post-verdict motions seeking to rectify nondisclosure of an expert witness, a Mr. Sargeant, were denied. This expert’s testimony was characterized as nonprejudicial because it did not propound a novel theory. The court assumed that lack of a novel theory is equivalent to adequate knowledge of the subject matter and substance of the disclosed expert’s undisclosed testimony. The rationale was that Mr. Sargeant’s testimony was cumulative rather than decisive. Admittedly, commentators are not in a sound position to assess the impact of such testimony upon the trial. Yet this rationale assumes that failure to furnish the substance of Mr. Sargeant’s testimony did not result in unfair surprise at trial. The court concluded that the burdened party had constructively complied with the supplementation requirements of Rule 26(e)(1)(B).

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Since it is not clear to what extent, if any, plaintiff was at fault, and since it is abundantly clear to what extent plaintiff’s counsel is at fault (as described above), the Court declines to dismiss the action, but will require plaintiff’s counsel (and not plaintiff) to pay the reasonable expenses of this motion, including attorney’s fees.

185. See text accompanying notes 46-52 supra.


187. Trial court motions for new trial and vacation of judgment are the likely procedural devices for reviewing supplementation problems, rather than interlocutory appeal which requires the presence of a “controlling question of law,” mandamus which requires “extraordinary circumstances,” or appeal pursuant to the collateral order doctrine which requires the presence of a “serious and unsettled question.” The impotence of the referenced appellate devices is evident from an examination of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 547 (1949) (collateral order doctrine); Ex parte Fahey, 332 U.S. 258, 280 (1947) (mandamus requirements); 28 U.S.C. § 1292(b) (1958) (interlocutory appeal).


189. Id. at 149.

190. But the rule requires the interrogated party to tender the general subject matter and specific substance of the expert’s testimony in addition to identifying the expert. See Fed. R. Civ. P. 26(e)(1)(B). See also Fed. R. Civ. P. 26(b)(4).
The court pointed to the pretrial memorandum identifying Sargeant as a possible expert witness as evidence of sufficient compliance to avoid substantial prejudice. Further evidence of compliance was drawn from Sargeant’s execution of the affidavit to interrogatory answers. An abusive adversary could generate excessive discovery costs merely by listing every possible conceivable expert trial witness, without providing the substance of each witness’ intended testimony. An active opponent would want to depose all such experts, thereby bearing the costs of mutual discovery.

Avoidance of surprise should not necessitate a per se rule imposing sanctions for every breach of Rule 26(e). But the fully supported record of discovery abuse should necessitate utmost judicial scrutiny when a constructive compliance argument is tendered by the party burdened with a duty to supplement. Compliance with Rule 26(e) is not complete and arguably not “substantial” according to the Dychalo court because of its potential for abuse, particularly when mere identification of a listed expert is tendered without further providing the subject matter on which he is expected to testify and the substance of his testimony. An interrogated party should not be permitted to comply partially by the mere listing of names without demonstrating why his possible experts are the intended trial experts. Future cases may require many assumptions, sometimes without regard for the record, to avoid the delay and cost of new trials. Stretching this constructive compliance doctrine to judicially mitigate failure to comply with continuing discovery requirements will result in the very surprise which is to be avoided by proper Rule 26(e) practice.

192. Id. at 148-49.
194. See, e.g., Shelak v. White Motor Co., 581 F.2d 1155, 1164 (5th Cir. 1978) (Rubin, J., dissenting from appellate direction of new trial after trial court denial of continuance, on rationale of majority’s improper assumptions drawn from the record). See also Weiss v. Chrysler Motors Corp., 515 F.2d 449, 463 (2d Cir. 1975) (Lumbard, J., dissenting from appellate majority’s finding of surprise in the record).
195. This rule has been in effect for nearly ten years and has not been the subject of any proposal, as with many of the other discovery rules. This evidences
Only the expert witness segment of continuing discovery has generated decisions about who should bear the burden of proving prejudice when an undisclosed witness testifies at trial and whether strict or liberal construction may be anticipated. Consequences of noncompliance are more evident with the expert witness because of opposing counsel's limited ability to engage in “quick-draw-hip-shooting.” Yet the approach in such cases constitutes viable precedent for all witness problems arising under Rule 26(e)(1). This subsection establishes a continuing burden as to both “persons having knowledge of discoverable matters” and the “expert witness at trial.” The propounding party may inquire directly regarding the adversary's expert and nonexpert witnesses. When this is done, the responding party must fully and seasonably supplement responses regarding such witnesses. It is not suggested that supplementation problems regarding experts and those involving nonexperts are of equal magnitude. However, the federal objective of avoiding surprise is less likely to be achieved with the development of a dual line of cases establishing more liberal construction in the case of nonexpert witnesses. The language of Rule 26(e) does not support such a distinction.

Two residual problems with expert trial witness supplementation coincide with pervasive themes affecting the entire continuing duty sphere. First, the question of when the supplementation duty starts and ends frequently surfaces in the expert witness cases. The continuing burden to supplement expert discovery responses commences at the earliest opportunity as in the case of the other discovery responses. This duty does not end with commencement of trial since nothing in Rule 26(e), its legislative history, or trial court discretion suggests any time limitation.


197. Laclede Gas Co. v. G.W. Warnecke Corp., 78 F.R.D. 502, 504 (E.D. Mo. 1978) (dismissal of counterclaim for, inter alia, failure to supplement experts at earliest opportunity), aff'd, 604 F.2d 561 (8th Cir. 1979).


199. Although there is no general duty to update responses, the express exceptions contained in Rule 26(e) would be readily circumvented if the limited duty to supplement was subject to any time limitation.

200. The Advisory Committee commented: “The issue is acute when new information renders substantially incomplete or inaccurate an answer which was com-
Secondly, because amending deposition responses is significantly more time-consuming and costly than amending interrogatory responses, there is a subtle pressure to disregard required amendment of stale or incomplete deposition responses. This has generated more problems with the expert deposition than with the percipient witness deposition. When an expert's deposition is given, counsel who retained the expert should re-canvas its premises for supporting facts and opinions. This will reveal whether any different information has developed that might be used by that expert at trial. If such information has developed, the retaining party will have to supplement responses given in the deposition usually by filing supplemental responses to pre-deposition interrogatories that addressed the substance of the expert's anticipated trial testimony. Failure to do so has resulted in exclusion of expert testimony in both state and federal courts, particularly where an expert's deposition is given in lieu of answers to interrogatories.

B. Incorrect Responses

A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment. This acuteness is not relieved or mitigated when such information comes to the attention of the burdened party during trial unless it is revealed immediately to the opponent who is justifiably conducting trial in reliance upon obsolete responses.

Weiss v. Chrysler Motors Corp., 515 F.2d 449, 457 (2d Cir. 1975) (supplementation of discovery responses to be tendered at the earliest opportunity).

A party must also supplement his deposition answers when governed by Rule 26(e)(2) provisions regarding prior incorrect responses. See text accompanying notes 205-51 infra.


Fed. R. Civ. P. 26(e)(2). Failure to amend responses regarding either "persons having knowledge of discoverable matters" pursuant to Rule 26(e)(1)(A) or the "expert witness at trial" pursuant to Rule 26(e)(1)(B) would conceptually fit within the parameters of Rule 26(e)(2)(A) governing responses that are "incorrect when made" or Rule 26(e)(2)(B) governing responses that are "no longer true." However, the express language of Rule 26(e) as to witness supplementation obvi-
There are two major segments to the continuing discovery rule. One governs witnesses and the other governs incorrect responses. Circumstances involving their interplay suggest an unusual anomaly. Witnesses have always been critical to the course of most lawsuits. Adoption of the duty to supplement witness responses merely codified existing judicial power to control concealment. This duty has not been analyzed critically. Yet the incorrect responses segment of the supplementation rule, equally subject to abuse and an ameliorating duty, may ultimately prove to be more critical because of the greater possibility of surprise.

The “notice” pleading approach of the federal courts significantly contributes to the need for a continuing duty to supplement discovery responses. Prior to the use of notice pleading, federal litigants were required to emphasize issue formulation at the pleading stage rather than during the discovery stage of a lawsuit. The need for discovery response amendment is less evident any dual analysis under both Rule 26(e)(1) and 26(e)(2). Rule 26(e)(2) was designed to avoid discovery abuse in very limited circumstances beyond the scope of Rule 26(e)(1) governing witness supplementation. See generally 1970 Amendments, supra note 27, at 508, Advisory Committee Note. 206. A federal duty was judicially suggested as early as 1940, only two years after promulgation of the Federal Rules of Civil Procedure. RCA Mfg. Co. v. Decca Records, Inc., 1 F.R.D. 433, 435 (S.D.N.Y. 1940) (defendant should furnish information acquired between answer and trial but not prohibited from offering new evidence as interrogatory function not to limit evidence). Implementation of a very limited duty was formally suggested in 1957, possibly as an outgrowth of the efforts of U.S. District Court Judge Holtzoff of the District of Columbia. Compare Note, The “Continuing” Nature of Discovery Techniques, 42 Iowa L. Rev. 579 (1957), with Holtzoff, The Elimination of Surprise in Federal Practice, 7 Vand. L. Rev. 576, 578-80 (1954). Rule 26(e) was ultimately adopted after three years of hearings and commentary in 1970. See 1970 Amendments, supra note 27, at 459. 207. See 1948 Amendments, note 29 supra. 208. See note 195 supra. See generally Report of the ABA Committee, note 4 supra; 1979 Revised Preliminary Draft, note 5 supra. Neither of these suggest any change to Rule 26(e). 209. This term was never utilized by the federal rulemakers and apparently was rejected because of adverse connotations. See Clark, Two Decades of the Federal Civil Rules, 58 Colum. L. Rev. 435, 450-51 (1958). But see the U.S. Supreme Court's wording that the federal rules “restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in preparation for trial.” Hickman v. Taylor, 329 U.S. 495, 501 (1947). See also Holtzoff, Origin and Sources of the Federal Rules of Civil Procedure, 30 N.Y.U. L. Rev. 1057, 1065-66 (1955) (term “notice” pleading used by courts and commentators albeit some question regarding technical accuracy). See generally Conley v. Gibson, 355 U.S. 41, 48 (1957) (specific reference to and approval of simplified “notice” pleading); Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (reversing dismissal for failure to state facts sufficient to state cause of action where pro se complaint inartistically disclosed rudimentary nature of claim with some possibility of relief); C. Wright, Handbook of the Law of Federal Courts § 68, at 319-25 (3d ed. 1976). 210. For a concise discussion of the role of discovery in issue formulation, see F. James & G. Hazard, Civil Procedure §§ 6.1, 6.2 (2d ed. 1977).
dent in the state jurisdictions which use "fact" pleading to identify triable theories and damages.\footnote{211. There is some intrajurisdictional use of both fact pleading and notice pleading. Compare Cal. Civ. Proc. Code \$ 425.10(a) (West 1973) (statement of facts constituting cause of action) with id. \$ 424.1(b) (West Supp. 1980) (short and plain statement of occurrence or transaction upon which pleader entitled to relief, as in Fed. R. Civ. P. 8(a)(2)). For an analysis of the continuing duty of supplementation in "fact" pleading jurisdictions, see notes 61-76 and accompanying text supra. Illustrative law review articles and cases analyzing fact pleading are collected in M. Green, Basic Civil Procedure 115 nn. 30 & 31 (2d ed. 1979).}

As with witnesses, seasonable amendment of incorrect responses at the earliest opportunity\footnote{212. For a general overview of contemporary problems associated with expeditious commencement and termination of discovery, see Cohn, Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules, 63 Minn. L. Rev. 253, 264-71 (1979).} should be the practice with those responses governed by Rule 26(e)(2). This practice should apply to responses that were incorrect \textit{when made} and to responses that are \textit{no longer true} when the failure to amend either type of response would be fraudulent.\footnote{213. FED. R. Civ. P. 26(e)(2) (A), (B). Express use of the word "fraud," as synonymous with "knowing concealment" in Rule 26(e)(2)(B), is contained in P.A.B. Produits et Appareils de Beaute v. Satinine Societa, 570 F.2d 328, 334 (C.C.P.A. 1978). See also Rozier v. Ford Motor Co., 573 F.2d 1332, 1337-38, 1342 n.10 (3d Cir. 1978) (Rule 60(b) fraud basis for relief from judgment involving Rule 26(e)(2) violation).} The literal distinction between the two duties involving incorrect responses is deceptively simple because the practical distinction is illusive.

The original draft of this requirement of federal supplementation proposed: "A party who knows or later learns that his response is incorrect is under a duty seasonably to correct the response."\footnote{214. See 1967 Preliminary Draft, supra note 26, at 228.} This language suggested a broad continuing duty. It would have resulted in an unlimited duty to supplement since preliminary interrogatories are intended to elicit every conceivable scrap of discoverable information. It was deleted without comment. The word "knows" and the phrase "later learns" apparently evolved\footnote{215. The original and the revised Advisory Committee Notes to Rule 26(e)(2) are identical. Compare 1967 Preliminary Draft, supra note 26, at 238, with 1970 Amendments, supra note 27, at 508.} into the adopted rule which significantly limited the scope of the continuing duty to supplement.

The adopted rule greatly restricts the impact of required amendment of discovery responses. The infirmity of this segment of the rule is evident. If the interrogated party does not realize...
that he provided an incorrect response, Rule 26(e) (2) (A) has not been violated, notwithstanding his lack of diligence and the interrogating party's justifiable reliance upon the incorrect response. In the absence of any federal decision on point, it is probable that this problem is minimized by proper pursuit of discovery by the interrogating party or by the pretrial conference device. Furthermore, Rule 26(e) (2) (B) does not require amendment of all such responses but only those that involve a knowing or actual concealment of important incorrect responses. Federal counsel practicing in states that have not adopted this knowing concealment rule are more prone to unintentional violations.

In the absence of an explanatory advisory note discussing the rulemakers' intended distinctions between originally incorrect responses and subsequently incorrect responses, the judiciary has undertaken the necessary construction. Inability to distinguish these independent segments of Rule 26(e)(2) has resulted in decisions citing both duties without identifying which one was breached. A crucial difference is that knowing concealment, an element of the continuing duty when discovery responses are no longer true, is not an element of the continuing duty when discovery responses are incorrect when made.

1. Incorrect When Made

This aspect of federal continuing discovery has rarely been addressed in reported decisions. When it has been addressed, however, severe sanctions and ethical admonitions have accompanied the breach. An unusual illustration is *Travis Mills Corp. v. Square*

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216. The Advisory Committee Note cryptically states: "This exception does *not* impose a duty to check the accuracy of prior responses, but it *prevents* knowing concealment by a party or attorney." 1970 AMENDMENTS, supra note 27, at 508 (emphasis added).

217. Professors Wright and Miller, who comment upon the limited scope of the rule as adopted, state: "If a response was correct when made, and the party subsequently has *actual* knowledge that the response is no longer correct, he must amend his response only if failure to do so would be 'in substance a knowing concealment.'" 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2049, at 324 (1970) (emphasis added). If constructive knowledge does not suffice to evidence a violation, then "knowing concealment" will remain quite difficult to prove.

218. See Phil Crowley Steel Corp. v. Macomber, Inc., 601 F.2d 342, 344 n.1 (8th Cir. 1979) (accountant's trial testimony on damages differing from deposition testimony); Rozier v. Ford Motor Co., 573 F.2d 1332, 1342 n.10 (5th Cir. 1978) (new trial because of fraud involving "cost benefit analysis" not identified in response to "trend cost estimate" interrogatory, an arguably correct response until judicially deemed otherwise); Holiday Inns, Inc. v. Robertshaw Controls Co., 560 F.2d 656, 657 n.2 (7th Cir. 1977) (exclusion of alternative theory of recovery, undisclosed in preliminary contention interrogatory answer, correct when answered yet characterized as intended to surprise adversary). These cases cite both segments of Rule 26(e)(2) without venturing an opinion regarding which of the two duties was breached.

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D. Co. A Pennsylvania corporation brought a diversity action against a Pennsylvania defendant. The plaintiff, in response to the defendant's interrogatory, stated that it was a New York corporation. Following entry of judgment for the plaintiff, the action was dismissed because of lack of diversity. This dismissal was premised upon plaintiff's failure to amend its incorrect response that it was a New York corporation. Dismissal of its claim, notwithstanding a lengthy trial, was justified "by pointing out that the situation was brought about by the plaintiff's incorrect answer to the [state of incorporation] interrogatory." The court squarely placed the blame upon the responding party's failure to amend a prior incorrect response even though there was no evidence of deception by either party.

The typical illustration of Rule 26(e)(2)(A) application to originally incorrect responses involves interrogatories answered at an early stage of the litigation. A party may not be able to answer accurately but must respond to the best of his knowledge in order to comply with his discovery obligations. For example, original answers to interrogatories might admit the presence of a rug at the time and place of plaintiff's slip and fall. Seasonable amendment denying the presence of the rug would then permit the interrogated party to rely upon the amended answers at trial. However, amendment of the original answers will not preclude introduction of the original answers by the interrogating party to effectuate the purposes of Rule 26(e)(2)(A).

The pervasive problem with this duty is determining whether

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220. Id. at 24, 27. The federal rules provide: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3). See also 28 U.S.C. § 1359 (1976) (party improperly made or joined to invoke jurisdiction of a federal court).
222. Id.
223. See text accompanying note 205 supra.
224. The Federal Rules provide that "an evasive or incomplete answer is to be treated as a failure to answer." Fed. R. Civ. P. 37(a)(3).
ambiguous, incomplete, inadequate, or grossly negligent responses are "incorrect when made," as not every such answer constitutes a breach of duty. A motion to exclude evidence under Rule 26(e)(2)(A) is the appropriate procedural device to raise the issue. This motion is particularly appropriate after the close of discovery when undisclosed evidence is offered in the absence of an appropriately amended discovery response.

2. No Longer True: Concealment

The most limited aspect of the continuing duty to supplement discovery responses is codified in Rule 26(e)(2)(B). Amendment of a prior response, correct when made but no longer true, is not necessary if an issue has been settled, rendered subsequently unimportant, or reformulated. As the court reasoned in the leading case relied upon by the rulemakers, if amendments were required in such cases, "parties [would] be burdened with the requirement of providing a myriad of information which could prove of little aid to either party." Amendment is necessary only in those cases where failure to amend is judicially characterized as "knowing concealment."

228. Voegeli v. Lewis, 568 F.2d 89, 95-97 (8th Cir. 1977) (reversal and remand for new trial because of inadequate answers identifying expert); DiGregorio v. First Rediscoun Corp., 506 F.2d 781, 786 (3d Cir. 1974) (dismissal without finding of wilfulness where answers to interrogatories inadequate or unresponsive).
230. In reversing the trial court’s exclusion of defendant’s previously undisclosed evidence, an appellate opinion succinctly stated: Whatever the division of responsibility for the misunderstanding, defendant must bear some of the blame. The question is what sanctions would have been appropriate. Although we recognize that under our legal system counsel owe a legal duty to each other and to the court to be candid in their pleadings and in discovery and not to lay a trap for the unwary by artful pleading or half-truths, not every ambiguous answer warrants a sanction as extreme as that imposed in the instant case. Dudley v. South Jersey Metal, Inc., 555 F.2d 96, 99 (3d Cir. 1977).
231. See, e.g., id. at 99-99.
233. The Advisory Committee Note provides no guidance as to what constitutes “knowing concealment.” See 1970 AMENDMENTS, supra note 27, at 507-08.
The federal decisions since the 1970 adoption of Rule 26(e) are repeatedly concerned with this scenario: through lack of diligence an attorney fails to recanvass the impact of new information, eventually fails to seasonably amend obsolete discovery responses, and ultimately is found to have knowingly or fraudulently concealed the information. A lawyer's voluminous practice may induce an honest failure to recognize that the nature of newly acquired information is inconsistent with prior discovery responses. For example, an attorney may respond to a preliminary set of interrogatories that he has identified witnesses A, B, and C. During discovery he locates witness D but is uncertain whether D will be a good trial witness. When the case nears trial, the attorney finally decides to use witness D but has not disclosed this to his adversary. However, Rule 26(e) imposes the burden of amendment upon the responding party only to prevent knowing concealment. Compliance with this aspect of Rule 26(e) is required even in the absence of legislative guidelines, as supplementation has been judicially characterized as increasingly necessary.

Probably because of the restrictive influence of the rulemakers, few federal courts have found requisite circumstances that characterize the forbidden zone of knowing concealment. When knowing concealment is found, it nearly always generates judicial disagreement, as evidenced by a reversal of the finding on appeal or a dissenting opinion when the finding is affirmed.

234. But see id. at 508. The Advisory Committee Note cryptically states: "This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney." Id. (emphasis added).

235. The first federal decision after the effective date of Rule 26(e), noting that supplementation would still be required in the absence of the rule, stated: "Supplementation of responses in discovery proceedings is increasingly important. . . . [setting forth Rule 26(e)] This language appears to be clear and explicit and will greatly clarify procedure. . . ." Rogers v. Tri-State Materials Corp., 51 F.R.D. 234, 244-45 (N.D. W.Va. 1970) (emphasis added) (plaintiff must provide factual support for negligence complaint by answering interrogatory which is subject to continuing duty to supplement response).

236. See text accompanying notes 215-17 supra.

237. The author's research revealed only one Rule 26(e)(2)(B) "knowing concealment" decision that did not result in reversal or an appellate split decision. See United States v. Reserve Mining Co., 412 F. Supp. 705, 710 (D. Minn.), aff'd, 543 F.2d 1210 (8th Cir. 1976) (violation of Rule 26(e) because of unquestionable knowing concealment of documents).

Decisional formulation of what constitutes "knowing concealment" may coincide with the chief disciplinary rule of the A.B.A. Code of Professional Responsibility.
In *Rozier v. Ford Motor Co.*,\(^{238}\) a wrongful death case alleging negligent fuel tank design, the plaintiff sought production of a document. The defendant responded that it could find no such document, a statement arguably true when made.\(^{239}\) One month after this response, a defense attorney found the requested document but did not disclose or amend the defendant's previous negative response that was no longer true. The trial court did not construe these facts as knowing concealment. The appellate court unanimously reversed on the grounds of a Rule 26(e) violation.\(^{240}\)

In *Shelak v. White Motor Co.*,\(^{241}\) a strict liability action involving an allegedly related heart attack, the majority's decision to reverse the trial judge was harshly criticized by the dissenting judge who claimed that the majority had made "many assumptions...some in disregard of the record, to find him in error."\(^{242}\) The defendant's pretrial interrogatory had requested disclosure of all parts of the plaintiff's body injured as a result of the accident.\(^{243}\) The plaintiff's responses did not assert that the heart attack was causally connected to the prior personal injury. Furthermore, the assertion was not made in the complaint, but was first tendered at the time of trial in an express violation of Rule 26(e)(1)(B). The defendant moved unsuccessfully for exclusion of expert testimony related to this new claim or, alterna-
tively, a continuance. The majority criticized the trial judge’s seizure of this opportunity to clear his calendar, possibly to aid the plight of the litigants in a nonpriority civil case.244 The dissent responded that such “[a]ssumptions, though they [were] obviously made out of generous and understanding hearts,”245 did not properly support the finding of prejudice resulting from failure to supplement.246 The dissent found no surprise in the heart attack claim because there was no concealment of the heart attack in other answers to defendant’s interrogatories, medical reports, and defendant’s previous motion for a trial continuance to undertake some additional discovery.247

There are very limited circumstances that provide justification for not finding knowing concealment, within the meaning of Rule 26(e), although a significant discovery response is no longer true. For example, the allegedly aggrieved party may be partially responsible for his adversary’s breach;248 new evidence should be received to prevent manifest injustice;249 or “harsh application of . . . rule [26(e)(2)(B)] would translate into a forfeiture . . .,”250 notwithstanding continued reliance upon an incorrect response by the interrogating party.251

244. Id. The Speedy Trial Act gives preference to criminal matters, thereby delaying disposition of civil cases. 18 U.S.C. §§ 3161-3174 (1976). This may influence judges to avoid rulings that will further delay final disposition of civil matters, especially when they have finally reached the trial stage. At least one eastern federal district court sought a one-year suspension of the July 1, 1979, effective date of the provision in the Speedy Trial Act, which now requires that defendants be brought to trial within 100 days of indictment, because of fear that its burgeoning caseload would prevent compliance. Los Angeles Daily Journal, June 15, 1979, at 1, col. 1. But cf. Los Angeles Daily Journal, July 4, 1979, at 1, col. 1 (reference to Washington Post editorial criticizing the courts and prosecutors for their possibly intentional delays in meeting deadlines in order to force either a change in the Act or an extension of the effective date of the Act).


246. See generally id. at 1164 nn.6-8 (Rubin, J., dissenting).

247. Id. at 1163.


249. See Price v. Lake Sales Supply R.M., Inc., 510 F.2d 388, 395 (10th Cir. 1974) (no knowing concealment if propounding party in better position to answer than answering party who failed to update interrogatory answer).


251. Id. at 335-36 (Baldwin, J., dissenting). For due process analysis permitting dismissal for failure to answer interrogatories based upon information contained
Continuing discovery is expressly limited by rule. However, supplementation beyond the relatively inflexible scope of the witness and incorrect response segments of Rule 26(e) is possible.

C. Elastic Supplementation

A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.\textsuperscript{252}

The two Rule 26(e) exceptions governing witnesses and incorrect responses were drafted to confine the burdens associated with continuing discovery. Required recanvassing of new information can be justified either when new witnesses are acquired or when an opponent's reliance on incorrect responses would result in unfair surprise.

Fortunately, an elastic segment of the limited federal approach was provided. Judicial flexibility to adjust to the circumstances of each case, a pervasive feature of the Anglo-American legal system,\textsuperscript{253} was preserved. The Advisory Committee apparently felt that no guidelines were necessary to aid judicial implementation of Rule 26(e) (3).\textsuperscript{254} It permits continuing discovery beyond what is expressly limited by other subdivisions of the rule. This is usually accomplished by court orders dealing with the particular case, as Rule 26(e) cannot be expanded by local rules of court.\textsuperscript{255} The parties can achieve broader supplementation than expressly permitted\textsuperscript{256} through mutual agreement or the unilateral filing of another set of interrogatories by either party.\textsuperscript{257} The latter method of supplementation is available "[a]t any time prior to trial,"\textsuperscript{258} unless a local rule\textsuperscript{259} or court order\textsuperscript{260} terminates discov-
ery at an earlier date. The elastic nature of Rule 26(e)(3) therefore permits both broader and more limited supplementation than exists by virtue of other subdivisions of the rule. Federal procedure carefully delineates the duty to amend responses in the critical witness and incorrect response zones, "yet leav[es] latitude, under Rule 26(e)(3), in the District Courts to require supplementation of responses."261

1. Court Order

Pretrial supplementation orders, which become the law of the case, bind the parties to mutually exchange discoverable information.262 Such orders may prohibit supplementation263 otherwise required by the rule.264

There is a significant distinction between nonsupplementation in violation of Rule 26(e) and nonsupplementation in violation of a court order. The latter situation triggers applicable discovery sanctions including dismissal,265 as well as the inherent power to

the close of discovery upon a showing of good cause. Greyhound Lines, Inc. v. Miller, 402 F.2d 134, 145 (8th Cir. 1968) (responding party permitted to utilize new medical records because new facts were not discovered until after close of discovery).


262. Tabatchnick v. G.D. Searle & Co., 67 F.R.D. 49, 54 (D.N.J. 1975) (purpose of order withdrawing nonspecified possible experts, which is to narrow factual issues, would be thwarted by calling of new undisclosed expert after jury drawn, which is contrary to purposes of supplementation rule). For a further analysis of Tabatchnick, see text accompanying notes 182-84 supra.


264. Compare Weiss v. Chrysler Motors Corp., 515 F.2d 449, 457 (2d Cir. 1975) (court ordered supplementation duty does not end with commencement of trial), with Havenfield v. H. & R. Block, Inc., 509 F.2d 1263, 1271-72 (8th Cir.), cert. denied, 421 U.S. 999 (1975) (rule's required supplementation does not supercede local rule or prohibit court order closing discovery at specific pretrial date).

265. See note 9 supra. The Federal Rules provide: "If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just. . . ." F.R. Civ. P. 37(b)(2). Dismissal for failure to supplement pursuant to Rule 26(e)(3) was entered in Laclede Gas Co. v. G.W. Warnecke Corp., 78 F.R.D. 502, 503-04 (E.D. Mo. 1978), aff'd, 604 F.2d 561 (8th Cir. 1979). Dismissal, recognized as an appropriate sanction on the facts, was nearly entered for failure to supplement in Szilvassy v. United States, 71 F.R.D. 589, 594 (S.D.N.Y. 1976); United States v. Reserve Mining Co., 412 F. Supp. 705, 710-13 (D. Minn.), aff'd, 543 F.2d 1210 (8th Cir. 1976).
exclude evidence because of failure to amend. 266 Recent decisions dealing generally with discovery 267 and specifically with Rule 26(e)(3) 268 have emphasized the need for liberal interpretation of discovery procedures to effectuate discovery through the use of sanctions.

District court supplementation orders have not created any continuing duty broader than the witness and incorrect response requirements of the existing rule. Court ordered supplementation has uniformly dealt with new experts 269 and documents 270 and has mirrored the existing duty applicable to the various discovery phases. 271 Courts have used supplementation orders as a reminder that litigants must comply with expressly stated rule requirements. They have not used such orders to expand the scope of Rule 26(e) in the only manner possible. 272 This reflects favorable judicial reaction to the limited scope of continuing discovery in the federal courts as envisioned by the rulemakers.

2. Party Agreement

Rule 26(e) and its Advisory Committee Note severely limit the scope of the continuing duty to amend prior discovery responses. The provision in Rule 26(e)(3) that permits supplementation by agreement of the parties is an intentional loophole. The parties

266. See note 120 supra.
267. See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam), wherein Court of Appeals improperly reversed dismissal for violation of court order. If appellate reversal of dismissals was left undisturbed, the U.S. Supreme Court felt that "parties to other lawsuits would feel freer . . . to flout the discovery orders of other district courts." Id. The Supreme Court subsequently indicated continuing concern with discovery abuse in its statement: "As the years have passed, discovery techniques and tactics have become a highly developed litigation art—one not infrequently exploited to the disadvantage of justice. As the Court now recognizes, the situation has reached the point where there is serious 'concern about undue and uncontrolled discovery.'" Herbert v. Lando, 441 U.S. 153, 179 (1979) (Powell, J., concurring).
268. United States v. IBM Corp., 83 F.R.D. 92, 96 (S.D.N.Y. 1979) (responsive documents created after return date of subpoena subject to production); Carlson Companies, Inc. v. Sperry & Hutchinson Co., 374 F. Supp. 1080, 1101, 1103 (D. Minn. 1974) (post-complaint discovery of documents permitted without necessity of filing supplemental complaint, particularly if complaint alleges continuing breaches and supplemental discovery can be obtained through the filing of additional interrogatories).
271. For the discovery tools and relevant Rule 26(e) cases, see notes 19-23 supra.
272. See note 255 supra.
apparently may contract for continuing discovery which is broader than otherwise required. More limited supplementation is unlikely because of the importance of witness information and reliance upon the continued correctness of tendered discovery responses. Presently, the possibility of such an agreement is remote because of existing nonuse and abuse of discovery which inherently retards the mutual exchange of pretrial information.

The American Bar Association’s Section on Litigation, recognizing that adversaries often disagree regarding pretrial discovery matters, now recommends early judicial control as an alternative. When this recommendation is implemented, earlier judicial handling of discovery problems may create an atmosphere wherein adversaries are more likely to agree upon such matters. If litigants could readily agree to the mutual and seasonable exchange of supplemented discovery information, they could avoid the risks of possible sanctions and the costs of multiple requests for supplementation.

3. Multiple Requests

The remaining exception to the general rule of nonsupplementation of discovery responses involves new requests for information by the interrogating party. This may be done either informally or through repeated use of discovery tools such as multiple sets of interrogatories or multiple requests for the production of documents. The use of these means of obtaining information regarding new witnesses or obsolete responses is not

273. Discovery abuse is often, if not primarily, generated by nonuse. See P. Connolly, E. Holleman & M. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery 28 (Federal Judicial Center District Court Study Series 1978).

274. Report of the ABA Committee, supra note 4, at 5-7. The only reported case ostensibly dealing with the possibility of such an agreement involved an unsuccessful court suggestion that the parties so agree. See Carlson Companies, Inc. v. Sperry & Hutchinson Co., 374 F. Supp. 1080, 1104 (D. Minn. 1974).

275. Report of the ABA Committee, supra note 4, at 5.


277. The consequences of informal requests for supplementation, even if original responses have been obtained, may be delay and sanctions. See generally Szilvassy v. United States, 71 F.R.D. 589, 590-93 (S.D.N.Y. 1976).


limited except unless the interrogated party obtains a protective order.

The practical need for this exception to the continuing duty rule has been mitigated by the existing duty to amend witness responses and incorrect responses imposed by Rule 26(e)(1) and (2). Ironically, the interrogated party who receives a set of supplementary interrogatories or a supplemental document request may justifiably protest that much of the requested discovery is duplicative. Continuing discovery should reduce the volume and frequency of discovery requests. Rule-oriented decisions continue to note that the aggrieved party could have requested supplementation of prior responses pursuant to Rule 26(e)(3).

This is an unusual admonition as the burdened party is already subject to the supplementation requirements of Rule 26(e). This should result in the desired supplementation without resort to filing new requests for supplementation under Rule 26(e)(3).

The authentic need for additional requests for supplemental information exists when amended pleadings, party agreement, or other major developments have altered the course of the initial litigation and preliminary discovery information. These are the circumstances which properly result in altering the impact of earlier responses, necessitating substantial reformation of prior discovery inquiries.

IV. PROPOSAL FOR MORE EFFECTIVE IMPLEMENTATION

A. Seasonable Court Ordered Supplementation

There is no express sanction for violating Rule 26(e). No reference to enforcement was made when the rule was originally proposed. The final Advisory Committee Note provides limited guidance, stating only: "The duty will normally be enforced, in those limited circumstances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate." This basis for imposing sanctions is theoretically ob-

284. See 1967 PRELIMINARY DRAFT, supra note 26, at 237-38.
The express federal sanctions for failure to make discovery usually do not apply. Rule 37 remedies may be invoked only for violation of a court order or for failure to respond to discovery requests. Furthermore, the harsh Rule 37 sanctions of establishment-preclusion orders, striking pleadings, and contempt are available only in the rare situations involving noncompliance with court-ordered updating of discovery responses. They have been imposed only in cases of gross violations of Rule 26(e).

Failure to supplement prior discovery responses usually surfaces during trial without violating a relevant court order. The court may then draw upon its inherent power to fashion appropriate sanctions in the absence of a court order. This amorphous...
situation could be ameliorated by trial court emphasis on seasonable court-ordered supplementation under Rule 26(e). It would be overly optimistic to assume that the required mutual exchange of discovery information has resulted from the existing duty "imposed" by Rule 26(e). When a violation is exposed at trial, the judge may exercise the inherent power to take "action, as the court may deem appropriate," but cannot resort to Rule 37 sanctions because of the absence of a preexisting court order to supplement discovery responses. Judicial attention to this discrepancy at an earlier stage of the litigation would give Rule 26(e) the importance it merits.

Attention to the continuing duty requirements should be manifested at the initial pretrial conference. A federal court has the express authority to summon counsel to a pretrial conference after which it may issue an order controlling the subsequent course of the entire lawsuit. The Advisory Committee Note to Rule 26(e) already provides for court-ordered supplementation in any "particular case, (including an order resulting from a pretrial conference)." It is arguable that the drafters intended narrow judicial construction on a case-by-case basis. However, the broad purpose in establishing continuing discovery in the 1970 Amendments to the Federal Rules of Civil Procedure was to avoid unfair surprise. Since the Federal Rules are to be liberally construed to effectuate this purpose, there is a growing need to order sup-

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295. An undisclosed percipient witness or expert witness may be called upon by the defaulting party to testify at trial, or the interrogating party may demonstrate justified reliance upon the interrogated party's discovery responses which are incorrect. These circumstances continue to generate the unfair surprise sought to be eliminated by the adoption of Rule 26(e) in 1970. See cases cited notes 117-251 supra.

296. 1970 AMENDMENTS, supra note 27, at 508, Advisory Committee Note.

297. The Federal Rules provide:

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

4. The limitation of the number of expert witnesses.

6. Such other matters as may aid in the disposition of the action.

FED. R. CIV. P. 16.


299. See, e.g., the court's statement that "the 1946 amendments to Rule 26 and recent commentary and court interpretations indicate the need for a more liberal interpretation of discovery procedures." Carlson Companies, Inc. v. Sperry &
plementation as long as Rule 37 sanctions remain otherwise inaccessible.\textsuperscript{300}

Many federal courts consider discovery matters in preliminary pretrial conferences conducted at the close of the pleading stage of a lawsuit.\textsuperscript{301} They should augment the function of the conference by ordering compliance with the continuing duty requirements of Rule 26(e). This would trigger the applicability of Rule 37 sanctions\textsuperscript{302} and avoid the Supreme Court's disdain for traditional leniency in failing to devise and impose sanctions to deter violations of court orders.\textsuperscript{303}

B. Counsel's Liability for Excessive Costs

In the absence of a court order, the condition precedent for Rule 37 sanctions for violating Rule 26(e), courts are expected to rely upon their inherent powers to fashion an appropriate remedy.\textsuperscript{304} The recently proposed amendment to Rule 37 would have extended its reach to additional\textsuperscript{305} discovery violations.\textsuperscript{306} It

\textsuperscript{300} Professors Wright and Miller state:

Failure to supplement a response—or making an incorrect response in the first instance—is not one of the kinds of flagrant misconduct listed in Rule 37(d) for which the sanctions of that section are available. The sanctions of Rule 37(b) may be imposed only for a violation of a court order under Rule 35 or 37(a) requiring a party to provide or permit discovery.\textsuperscript{8} C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2050, at 325 (1970) (emphasis added). Rule 37 states that if “a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just . . . .” FED. R. CIV. P. 37(b)(2) (emphasis added). The courts could readily interpret this rule as not limiting its applicability to Rules 35 and 37(a). This would permit the court to characterize violations of Rule 26(e), on a case-by-case basis, as authorizing the imposition of the harsh sanctions contained in Rule 37(b) if the court had previously ordered supplementation under Rule 26(e) (3) at a pretrial conference or any hearing on any motion.

\textsuperscript{301} See 1979 REVISED PRELIMINARY DRAFT, supra note 5, at 332.

\textsuperscript{302} See note 300 supra.

\textsuperscript{303} See note 300 supra.

\textsuperscript{304} See note 120 supra.

\textsuperscript{305} But cf. note 294 supra.

\textsuperscript{306} See 1978 PRELIMINARY DRAFT, supra note 5, at 652.
would have expressly empowered the federal courts to impose sanctions for any form of abuse; however, it was rejected.\textsuperscript{307}

The usual "inherent power" sanctions for violating Rule 26(e) are exclusion of evidence, continuance, and new trial.\textsuperscript{308} Reluctance to use them\textsuperscript{309} suggests the interim need for a sanction somewhere between the "inherent power" sanctions and the "harsh" sanctions arguably applicable for a violation of court-ordered supplementation.\textsuperscript{310}

The United States Judicial Code provides: "Any attorney . . . who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."\textsuperscript{311} This remedy is suggested for those situations in which attorney's fees are unavailable because of the absence of a court order. This remedy for violating Rule 26(e) would be analogous to those decisions under Rule 37(b)(2) that personally assess attorney's fees against deserving counsel.\textsuperscript{312} Application of this express sanction, although generally limited to statutorily taxable costs, could be extended to Rule 26(e) cases.\textsuperscript{313}

\textsuperscript{307} The initial Advisory Committee Note stated: "The new subdivision [proposed Rule 37(e)] is offered to make explicit the power of the court to impose sanctions for all forms of discovery abuse." \textit{Id.} at 653. The referenced proposal was deleted from the 1979 revision of the preliminary draft. \textit{Compare 1976 Preliminary Draft, supra} note 5, at 652-53, \textit{with 1979 Revised Preliminary Draft, supra} note 5, at 346-48. For a conceivable reason, see note 294 \textit{supra}.\textsuperscript{308} 1970 \textit{Amendments, supra} note 27, at 508, Advisory Committee Note. \textit{See, e.g., Shelak v. White Motor Co., 581 F.2d 1155, 1160 (5th Cir. 1978) (new trial directed by appellate reversal, because of failure to grant continuance to meet new evidence not disclosed pursuant to Rule 26(e)); Dychalo v. Copperloy Corp., 78 F.R.D. 146, 148 (E.D. Pa.) (motions for vacation of judgment and new trial denied as Rule 26(e) substantially complied with), aff'd sub nom. Copperloy Corp. v. Congoleum Indus., Inc., 588 F.2d 819 (3d Cir. 1978).}\textsuperscript{309} \textit{See generally Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Columbia L. Rev. 480 (1958); Comment, The Decline and Fall of Sanctions in California Discovery: Time to Modernize California Code of Civil Procedure Section 2034, 9 U.S.F. L. Rev. 360 (1974); see also Note, The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions, 91 Harv. L. Rev. 1033 (1978).}\textsuperscript{310} \textit{See note 300 supra.}\textsuperscript{311} 28 U.S.C. § 1927 (1976) (emphasis added).\textsuperscript{312} \textit{See, e.g., Szilvassy v. United States, 71 F.R.D. 589, 594 (S.D.N.Y. 1976), where the court determined that: since it is not clear to what extent, if any, plaintiff was at fault, and since it is abundantly clear to what extent plaintiff's counsel is at fault (as described above), the Court declines to dismiss the action, but will require plaintiff's counsel (and not plaintiff) to pay the reasonable expenses of this motion, including attorney's fees. Id. (footnote omitted).}\textsuperscript{313} Statutory fees include fees of the clerk, marshall, court reporter, printing, and witnesses. 28 U.S.C. § 1920 (1976). \textit{See generally Adler v. Gotthardt, 257 F. 2d 199, 200 (D.C. Cir. 1958) (cost assessment partly governed by statute and partly governed by usage); W.F. & John Barnes Co. v. International Harvester Co., 145
Courts are understandably reluctant to exclude evidence because this may deprive a party of its only claim or defense.\footnote{314} Continuances burden the federal courts, which are understandably anxious to dispose of civil cases. New trials generate costly delay. Where such remedies are deemed appropriate, the excess costs should be borne by the attorney who knowingly fails to update stale responses upon receipt of new information regarding witnesses or incorrect responses. In cases involving flagrant violations of Rule 26(e), costs associated with continuance, new trial, or reversal for excluding or permitting undisclosed evidence should be personally taxed to the defaulting attorney\footnote{315} on the authority of section 1927 of the Judicial Code.

Courts preferring to limit this proposal to statutory grounds could assess double or multiple costs.\footnote{317} More daring implementation may be appropriate in the aftermath of \textit{National Hockey League v. Metropolitan Hockey Club} criticism of traditional reluc-
tance to impose sanctions.\textsuperscript{318} Courts may venture an extension of section 1927 to recoup the innocent party's attorney's fees, in advance of trial,\textsuperscript{319} although nonstatutory costs have been taxed sparingly.\textsuperscript{320} Otherwise, the rulemakers' invitation to the judiciary to enforce the duty to supplement prior responses will be a futile gesture.\textsuperscript{321}


\textsuperscript{321} The Advisory Committee Note to Rule 26(e), apparently providing enforcement machinery to the judiciary, establishes the following guideline: "The duty will normally be enforced, in those limited circumstances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate." \textit{1970 Amendments, supra} note 27, at 508 (emphasis added).