

A man brought a diversity action against a retail store in federal district court for injuries he sustained from a fall in the store. The man alleged that the store allowed its entryway to become slippery from a pipe that leaked water.

Sixty days before trial, the store sent the man its pretrial disclosures, which included a spreadsheet containing the names, addresses, and telephone numbers of the witnesses whom the store expected to testify at trial. Due to a formatting problem, one of the testifying witnesses was omitted from the spreadsheet. The store discovered the omission the following day. Twenty-one days before trial, the store sent the man's attorney an amended spreadsheet containing the testifying witness's information. This was the first time the man's attorney had heard of the testifying witness.

The man's attorney argues that the witness should be excluded from testifying at trial.

Which of the following arguments is most likely to achieve the man's goal of preventing the witness from testifying at trial?

- A. The parties did not stipulate that pretrial disclosures could be amended before trial.
- B. The store failed to timely correct its pretrial disclosures.
- C. The store never obtained the court's leave before correcting its pretrial disclosures.
- D. The store's initial pretrial disclosures were untimely filed.

Explanation:

Required discovery disclosures

(FRCP 26(a))

Initial disclosures*	<ul style="list-style-type: none">• Persons with relevant information• Items in party's possession that support claim/defense• Computation of damages & supporting material• Relevant insurance policies
Expert testimony	<ul style="list-style-type: none">• Identity of expert witnesses• Expert's written report• If no report, subject matter & summary of testimony
Pretrial disclosures*	<ul style="list-style-type: none">• Testifying witnesses• Deposition testimony to be used at trial• Documents/exhibits to be used at trial

FRCP = Federal Rule of Civil Procedure.

*Does not apply to evidence used solely for impeachment.

During discovery, certain information must be **automatically disclosed** through required disclosures. This includes **pretrial disclosures**, the purpose of which is to avoid surprise at trial regarding substantive evidence. Therefore, pretrial disclosures must, at a minimum, identify the witnesses expected to testify and the evidence expected to be offered at trial.

If a party learns that its disclosures were **materially incomplete or incorrect**, it must **supplement or correct** them in a **timely manner** unless the other parties were made aware of that information during discovery or in writing.* Timeliness is generally evaluated based on how soon the supplemental/corrected information was disclosed after it became available to the disclosing party. Failure to timely supplement generally results in exclusion of the omitted witness or evidence at trial.

Here, the store learned that its pretrial disclosures were materially incomplete because they omitted a testifying witness. The store was required to and did correct those disclosures because the man's attorney had no knowledge of the omission. But waiting nearly 40 days after discovering the mistake before doing so was likely untimely. Therefore, arguing that the correction was untimely will most likely prevent the witness from testifying.

*A party also must supplement or correct any incomplete or incorrect initial disclosures, disclosures of expert testimony, and responses to [interrogatories](#), requests for production, and requests for admission.

(Choices A & C) Neither the court's leave (ie, permission) nor the parties' stipulation is required for a party to supplement or correct its pretrial disclosures.

(Choice D) Pretrial disclosures must be made at least **30 days** before trial. Therefore, the store's disclosures were timely submitted 60 days before trial.

Educational objective:

A party must timely supplement or correct pretrial disclosures when (1) the party learns that its disclosures were materially incomplete or incorrect and (2) the other parties have not been made aware of the supplemental or corrected information during discovery or in writing.

References

- Fed. R. Civ. P. 26(e) (supplementing disclosures and responses).
- 8A Charles Alan Wright et al., Federal Practice and Procedure § 2049.1 (3d ed. 2020) (explaining a party's duty to supplement or correct initial disclosures, expert testimony, pretrial disclosures, and certain discovery responses).