

Auto-Exclusion: Undermining Your Own Case with Failed Disclosures

By Joshua Gilliland, Esq., D4 LLC

Discovery Rules with Teeth



Here is a great rule with teeth: If you do not disclose ESI or documents under Federal Rule of Civil Procedure Rule 26(a), they are automatically excluded under Federal Rule of Civil Procedure Rule 37(c)(1).

In *Melczer v. Unum Life Ins. Co. of Am.*, 2009 U.S. Dist. LEXIS 82549 (D. Ariz. July 16, 2009), the Plaintiff successfully excluded 526 documents that were untimely disclosed under Federal Rule of Civil Procedure 37(c)(1). *Melczer*, 1-3.

Federal Rule of Civil Procedure Rule Rule 26(a)(1)(A)(ii)

The Defendants received the documents in May 2008. *Melczer*, 3. These documents were not disclosed to the Plaintiff, as required by Federal Rule of Civil Procedure Rule 26(a)(1)(A)(ii). The Rules states, in relevant part:

“a copy—or a description of category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.”

Put it in Writing: Federal Rules of Civil Procedure Rules 26(a)(4) and 26(g)(1)



Disclosures must be “in writing, signed, and served.” *Melczer*, 2, citing Federal Rule of Civil Procedure Rule 26(a)(4). The disclosure must be signed by an attorney. Federal Rule of Civil Procedure Rule 26(g)(1).

To make life exciting, the Defendants orally told the Plaintiffs about the documents in October 2008....before the close of discovery that month. *Melczer*, 2.

Oral disclosure doesn't count under the Federal Rules of Civil Procedure, because the Rules require disclosure to be in writing and signed.

Melczer, 3. As such, the disclosure was untimely.

Auto-Exclusion of Untimely Disclosures

Pursuant to Federal Rule of Civil Procedure Rule 37(c)(1), untimely disclosures must be excluded, unless there is untimely disclosure was “substantially justified or harmless.” *Melczer*, 2, citing Federal Rule of Civil Procedure Rule 37(c)(1).

The Defendants claimed there was substantial delay because the Plaintiffs refused to sign a stipulated protective order after the close of discovery. *Melczer*, 5-6. This was a self-defeating argument, since the stipulation was sought after the close of discovery. *Melczer*, 6.

The Court found the untimely production to not be harmless. *Melczer*, 8. The Plaintiffs would have sought additional discovery on the documents, which would have required discovery to be reopened. *Melczer*, 8-9.

The Court found the late production to be an untimely disclosure, which was neither justified nor harmless. *Melczer*, 10. Moreover, the remedy for an untimely disclosure is not reopening discovery, but an “automatic” exclusion under Federal Rule of Civil Procedure Rule 37(c)(1). *Melczer*, 10.

Bow Tie Lessons

The Courts are throwing down the gauntlet on Federal Rule of Civil Procedure Rule 26(a) violations. After preserving electronically stored information, a party must disclose ESI and documents that support their claims or defense. This could get ugly where there are thumb drives, mp3 players or any removal media.