

# If It is Lost, It's Not in Your Possession, Custody or Control under Rule 26(a)

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In a prison medical treatment case, the Plaintiff brought a motion to exclude medical records pursuant to Federal Rule of Civil Procedure Rule 37(c) after the files were not identified in the Defendants' initial disclosures or produced in discovery. *Nance v. Wayne County*, 2009 U.S. Dist. LEXIS 96279 (M.D. Tenn. Sept. 15, 2009).



The only catch: the non-identified files were lost.

The Plaintiff claimed the Defendants failed to disclose the Plaintiff's medical record pursuant to Federal Rule of Civil Procedure Rule 26(a) (or supplement their discovery responses) and erroneously denied a request for admission. *Nance*, at \* 5-6. The fact the medical records at one time existed was not discovered until the deposition of a treating nurse. *Nance*, at \*6-7.

The Plaintiff wanted 1) the Defendants not be allowed to use the medical records; 2) the facts in the medical records be taken as true according to the Plaintiff's claims 3) jury instructions on the non-disclosure of the medical records and 4) fees and costs for the deposition. *Nance*, at \*11-12.

The Plaintiff lost....because the medical file was lost.

The Court found the Defendants did not violate Federal Rule of Civil Procedure Rule 26(a). A party's initial disclosures only need to include documents within its "possession, custody or control." *Nance*, at \*13-14. Since the medical file was lost, the file was not within the Defendants "possession, custody or control." *Nance*, at \*16. Additionally, the Defendant was not going to use the medical file to support claims or defenses. *Nance*, at \*16-17.

## Bow Tie Lesson

The lesson of this discovery dispute is that you cannot use what is lost, nor can you disclose what does not exist.