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The Duty to Disclose: Rule 37(c) and Self-Executing Sanctions

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The adoption of Federal Rule of Civil Procedure 37(c)(1) in 1993 "gave teeth to a significantly broadened duty" to comply with discovery obligations. Chief among the sanctions provided by Rule 37(c) for failure to timely disclose materials in discovery is the exclusion of the undisclosed information. The rule is said to be automatic, or self-executing, because a court may exclude undisclosed evidence even if no motion to compel has been brought. There is no meet-and-confer requirement prior to bringing a motion to exclude evidence under Rule 37(c). ***See, e.g., Fulmore v. Home Depot, U.S.A., Inc.*, 423 F. Supp. 2d 861, 871–72 (S.D. Ind. 2006)** ("The Advisory Committee Notes to both the 1993 and 2000 Amendments to Rule 37 make clear that Rule 37(c) operates independent of any motion required by Rule 37(a). Rule 37(c) simply does not require conferral."). The rule applies not only at trial but also to any motion, such as a motion for summary judgment, or a hearing. It applies both to information not disclosed and to witnesses.

Moreover, courts have enforced the rule strictly, granting motions to exclude evidence even where the failure to disclose was inadvertent and not in bad faith and even where the sanction results in preclusion of an entire cause of action. Accordingly, litigants would be well advised to disclose all potential evidence and to supplement all required disclosures and discovery responses to avoid the possibility of having their evidence excluded. On the other hand, for litigants who have been prejudiced by their opponents' failure to disclose, Rule 37(c) offers a remedy to offset the disadvantage of unfair surprise.

Rule 26 Required Disclosures

Rule 37(c) sanctions apply to failures to disclose information required by Rule 26(a), as well as to failures to supplement discovery responses in accordance with Rule 26(e). The automatic exclusion sanction of material not disclosed pursuant to Rule 26(a) was added by the 1993 amendments to the rule. In 2000, a subsequent amendment made the same remedy available for material that should have been disclosed in discovery responses. Rule 26(a) lists mandatory disclosures that must be made even in the absence of a request from the opposing party. These disclosures include the identification of witnesses and documents that may be used to support the disclosing parties' claims or defenses, computations of damages, and insurance agreements. Fed.

R. Civ. P. 26(a)(1)(A). In addition, Rule 26(e) imposes a duty to supplement a Rule 26(a) initial disclosure or a response to an interrogatory "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect." Fed. R. Civ. P. 26(e); ***Colon-Millin v. Sears Roebuck De Puerto Rico, Inc.*, 455 F.3d 30, 37 (1st Cir. 2006)** ("[A] party must supplement its answers to interrogatories if the party learns that the response is in some material respect incomplete or incorrect and the other party is unaware of the new or corrective information."). Where a party is not required to make a disclosure, there is no duty to supplement.

The duty to supplement discovery responses is ongoing, and failure to supplement responses adequately can result in the exclusion of the untimely disclosed information. The required Rule 26(e) supplementation "should be made at appropriate intervals during the discovery period." Fed. R. Civ. P. 26(e) advisory committee's note to 1993 amendments. It is the responsibility of the party in possession of the information to supplement its responses, whether or not the opposing party seeks additional disclosure. A "party may not free itself of the burden to fully comply" with the obligation to supplement by placing "a heretofore unrecognized duty of repeated requests for information on its adversary." ***Arthur v. Atkinson Freight Lines Corp.*, 164 F.R.D. 19, 20 (S.D.N.Y. 1995)** (discussing duty to supplement under Rule 26(e)). The duty to supplement applies whether the corrective information is learned by the client or the attorney and extends not only to newly discovered evidence but also to information that was not originally provided even though it was available at the time of the initial disclosure or response. ***Am. Friends of Yeshivat Ohr Yerushalayim, Inc. v. United States*, 2009 WL 1617773, at *5 (E.D.N.Y. June 9, 2009).** In addition, the duty to supplement continues even after the discovery period has closed. *See, e.g.*, ***McKinney v. Connecticut*, 2011 WL 166199, at *2 (D. Conn. Jan. 19, 2011)** (noting that the "fact that discovery has closed has no bearing on [the d]efendant's duty to supplement under Rule 26(e)"). Thus, as discussed below, if newly discovered evidence is offered at trial or at summary judgment, a party may seek to exclude the evidence on the grounds that the proponent had a duty to supplement its discovery responses and that its failure to do so resulted in prejudice. *See, e.g.*, ***Net 2 Press, Inc. v. 58 Dix Ave. Corp.*, 266 F. Supp. 2d 146, 161 (D. Me. 2003)** ("While supplementation of interrogatory answers may be allowed under some circumstances, it should not be allowed after the filing of dispositive motions and on the eve of trial." "It makes no sense . . . to allow the plaintiff to avoid summary judgment by placing the necessary information in an affidavit submitted in opposition to the defendants' motion for summary judgment.").

Rule 37(c) Exclusionary Sanction

Rule 37(c) enforces the disclosure requirements imparted by Rule 26. Rule 37(c) states, in relevant part:

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."

Fed. R. Civ. P 37(c)(1); *see also* ***Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008)** (affirming district court's order excluding undisclosed damages evidence); ***Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001); *Ortiz-Lopez v. Sociedad Española de Auxilio Mutuo*, 248 F.3d 29, 33 (1st Cir. 2001); *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10, 21 (1st Cir.2001)** ("[T]he party facing sanctions for belated disclosure" has the obligation "to show that its failure to comply with the Rule was either justified or harmless and therefore deserving of some lesser sanction.").

Thus, the rule contemplates the exclusion of later-discovered evidence not disclosed in the supplemental discovery responses required by Rule 26(e), as well as the initial disclosures contemplated by Rule 26(a)(1). ***See Klonoski v. Mahlab*, 156 F.3d 255, 269 (1st Cir. 1998)** (noting that prior to 1993 "adoption of Rule 37(c)(1), no rule specifically provided sanctions for the failure to supplement discovery"). The exclusionary sanction also applies to the disclosure of expert witnesses and pretrial disclosures. On its application to expert witnesses, see Rule 26(a)(2); ***Daniel v. Coleman Co.*, 599 F.3d 1045, 1049 (9th Cir. 2010)** (excluding expert report as untimely where delay was "neither justified nor harmless"); ***Poulis-Minott v. Smith*, 388 F.3d 354, 358 (1st Cir. 2004)** ("Rules 26(a) and 37(c)(1) seek to prevent the unfair tactical advantage that can be gained by failing to unveil an expert in a timely fashion, and thereby potentially deprive a plaintiff of the opportunity to depose the proposed expert, challenge his credentials, solicit expert opinions of his own, or conduct expert-related discovery.") (internal quotations and citation omitted). On the application of the exclusionary sanction to pretrial disclosures, see Rule 26(a)(3); ***Grajales-Romero v. Am. Airlines, Inc.*, 194 F.3d 288, 297 (1st Cir. 1999)**. A court may also order sanctions under Federal Rule of Civil Procedure 16(f) for failure to obey a pretrial order. Rule 16(f) is permissive and allows sanctions for, among other things, failure to abide by a court's discovery orders directing disclosure or supplementation under Rule 26(e).

The sanction is intended to provide "a strong inducement for disclosure" of material that the disclosing party would expect to use as evidence, whether at trial, at a hearing, or on a motion. Fed. R. Civ. P. 37(c)(1) advisory committee's notes to 1993 amendment; *see also* ***Star Direct Telecom, Inc. v. Global Crossing Bandwidth, Inc.*, 272 F.R.D. 350, 359 (W.D.N.Y. 2011)** ("If the Federal Rules of Civil Procedure are to be effective and meaningful, parties should not be permitted to conceal potential sources of responsive information in the hope that the opposing party does not discover their deliberate omission until the discovery deadline has expired."). As discussed below, in addition to the exclusion of evidence, Rule 37(c)(1) allows a court to impose

the full range of sanctions enumerated under Rule 37(b)(2) short of contempt and specifically authorizes the court to impose other penalties, including payment of reasonable expenses and attorney fees caused by the failure to disclose.

The Supreme Court has noted that Rule 37 sanctions must be applied diligently both to penalize those whose conduct may be deemed to warrant such a sanction and to deter those who might be tempted to engage in such conduct in the absence of a deterrent. ***Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980)**. Following the addition of the exclusionary remedy in Rule 37(c) in the 1993 amendments, courts have given broad effect to the rule. *See, e.g.*, ***Poulis-Minott*, 388 F.3d at 358 (1st Cir. 2004)** (noting that the rule clearly contemplates stricter adherence to discovery requirements and harsher sanctions for failure to comply). Many courts, including the First and Seventh Circuits, have held that the sanction of exclusion is mandatory, unless the nondisclosing party can demonstrate substantial justification for the failure to disclose or can demonstrate that the failure was harmless. *See, e.g.*, *id.* (holding that the exclusion of undisclosed evidence is a mandatory sanction); ***Happel v. Walmart Stores, Inc.*, 602 F.3d 820 (7th Cir. 2010)** (holding that the sanction for failure to comply with expert disclosures is automatic and mandatory exclusion unless the failure was substantially justified or harmless); ***David v. Caterpillar, Inc.*, 324 F.3d 851 (7th Cir. 2003)** (same). Other courts, including the Second Circuit, have reasoned that, while exclusion may be the primary sanction contemplated by the rule, a district court has discretion to impose other sanctions in lieu of exclusion. ***Design Strategy, Inc. v. Davis*, 469 F.3d 284, 298 (2d Cir. 2006)** (reasoning that mandatory exclusion was inconsistent with the wording of the rule, which provides that "[i]n addition to *or in lieu of* this [preclusion] sanction, the court . . . may impose other appropriate sanctions") (quoting Rule 37(c)(1)) (emphasis added).

Ninth Circuit Analysis of Rule 37(c) Sanctions

The Ninth Circuit has thus far not followed the First and Seventh Circuits in explicitly holding that exclusion of undisclosed evidence is mandatory. However, the Ninth Circuit has consistently upheld district court decisions to exclude untimely disclosed evidence where the failure to disclose resulted in prejudice; the Ninth Circuit gives "particularly wide latitude to the district court's discretion to issue sanctions under Rule 37(c)(1)." ***Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)**. Further, the Ninth Circuit has held that the burden is on the party who failed to comply with its discovery obligations to demonstrate that it meets one of the two exceptions to mandatory sanctions. *Id.* at 1107 ("Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to prove harmlessness."). That is, the burden is on the proponent of the evidence to demonstrate that the failure to disclose was either substantially justified or harmless. Moreover, the Ninth Circuit has held that a district court is not required to make a finding of willfulness or bad faith to exclude the undisclosed evidence**. *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008)** (noting that Rule 37 has been described as "a self-executing, automatic sanction to provide a strong inducement for disclosure of material") (quoting ***Yeti by Molly*, 259 F.3d at 1106**). Finally, the Ninth Circuit has held that the sanction may be imposed "even when a litigant's entire cause of action . . . [will be]

precluded." *Id.* (citation omitted); *see also* ***Yeti by Molly*, 259 F.3d at 1106** (noting that the 1993 revisions to Rule 37 clearly contemplated "stricter adherence to discovery requirements, and harsher sanctions for breaches of this rule. . . ."); ***Ortiz-Lopez v. Sociedad Española de Auxilio Mutuo*, 248 F.3d 29, 35 (1st Cir. 2001)** (holding that although the exclusion of an expert would prevent the plaintiff from making out a case and was "a harsh sanction to be sure," it was "nevertheless within the wide latitude of" Rule 37(c)(1)).

Substantially Justified or Harmless Nondisclosure

The factors a court may consider in determining whether the nondisclosure is justified or harmless include prejudice or surprise to the party against whom the evidence is offered, the ability of the party to cure the prejudice, the likelihood of disruption to the trial, and bad faith or willfulness involved in not disclosing evidence at an earlier date. ***Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co., 170 F.3d 985, 993 (10th Cir. 1999);*** *see also* ***David v. Caterpillar, Inc.*, 324 F.3d 851 (7th Cir. 2003)** (same); ***MicroStrategy, Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344 (Fed. Cir. 2005)** (applying five-factor test); ***Macaulay v. Anas*, 321 F.3d 45, 51 (1st Cir. 2003)** (factors to consider include "the history of the litigation, the proponent's need for the challenged evidence, the justification (if any) for the late disclosure, and the opponent's ability to overcome its adverse effects."). *See also* ***Gagnon v. Teledyne Princeton, Inc.*, 437 F.3d 188, 197 (1st Cir. 2006)** (noting that the advisory committee notes to the 1993 amendments to Rule 37(c) "suggest a fairly limited concept of 'harmless'").

As noted above, a showing of bad faith is not required for preclusionary sanctions. However, courts have authorized terminating sanctions for failure to make required disclosures. Courts have relied on Rule 37(c)'s inclusion of allowable sanctions under Rule 37(b). Generally speaking, a court must make a finding of bad faith or willfulness prior to dismissing a case under Rule 37(b). *See, e.g.*, ***In re Connolly N. Am., LLC*, 376 B.R. 161, 182–94 (E.D. Mich. 2007)** (dismissing with prejudice a case where a bankruptcy trustee failed to turn over 36 bankers' boxes of documents and failed to update discovery responses; finding the trustee was grossly negligent in his discovery duties). *See also* ***Bass v. Jostens, Inc.*, 71 F.3d 237, 241 (6th Cir. 1995)** (noting that the sanction of dismissal is available in appropriate cases because it "accomplishes the dual purpose of punishing the offending party and deterring similar litigants from such misconduct in the future") (citing ***Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 646 (1976)).**

Prejudice or Surprise

Concealing theories of liability of damages so that the opposing party has no opportunity to obtain discovery regarding the concealed theories is generally sufficient to demonstrate prejudice. For example, in ***Oracle USA, Inc. v. SAP AG*, 264 F.R.D. 541 (N.D. Cal. 2009)**, the district court for the Northern District of California excluded all evidence of damages stemming from theories not asserted in discovery. The court noted that the plaintiffs had chosen to frame

their case around a particular theory of damages and had not identified their newly articulated theories in connection with the required disclosures under Rule 26(a)(1)(A)(iii), nor did they supplement those disclosures for almost two years. The court also discussed the burden and expense associated with discovery in complex cases, noting that the defendants' expert would not have time to complete the required analysis within existing time constraints and that the costs of such analysis would be exorbitant:

Here, Plaintiffs seek to rely on the vague, very general damages allegations in their initial complaint to preserve their new, more extensive damages theories, even though they failed to disclose those theories in discovery for over two years, despite Defendants' efforts from the outset to flesh out Plaintiffs' sketchy damages allegations through appropriate discovery tools. To allow the belated disclosure of the new theories to trigger large new waves of expensive discovery and expert analysis at this late date based on vague allegations that Plaintiffs previously refused to elaborate on despite their ability to do so, would be simultaneously unfair to Defendants, very expensive and hugely time consuming, slowing down what is already very lengthy litigation. Such a result would run directly contrary to the mandate of Rule 1, achieving a dubious trifecta of unfair, glacially slow and exorbitantly expensive litigation.

Id. at 549; *see also* ***Reyes Canada v. Rey Hernandez*, 233 F.R.D. 238, 242 (D.P.R. 2005)** (excluding evidence where nondisclosure of evidence may not have been an intentional act because "the element of undue and unfair surprise remains"); ***Pérez-Pérez v. Popular Leasing Rental, Inc.*, 993 F.2d 281, 286–88 (1st Cir. 1993)** (holding that testimony of undisclosed medical expert that changed theory of the case constituted unfair surprise).

Ability to Cure Prejudice

Although the ability to cure prejudice caused by untimely disclosure is one of the factors a court may consider in determining whether the nondisclosure was harmless, courts have excluded evidence even where it would be possible to reopen discovery so that, for example, depositions could be obtained from undisclosed witnesses or from previously disclosed witnesses regarding undisclosed documents. Courts have made this finding even where the trial date has not yet been set. *See, e.g.*, ***AVX Corp. v. Cabot Corp.*, 252 F.R.D. 70, 81 (D. Mass. 2008)**. In finding that

reopening discovery would not eliminate the prejudice, courts frequently reason that the party to whom material was not disclosed has expended time and resources preparing its case, and should not be required to expend additional resources responding to late-disclosed materials. *See id.*; *see also* ***Primus v. United States*, 389 F.3d 231, 236 (1st Cir. 2004).** ("[W]e cannot fault the court for considering the time and expense involved in the government's having prepared a dispositive motion"); ***Santiago-Diaz v. Laboratorio Clinico y de Referencia del Este*, 456 F.3d 272, 277 (1st Cir. 2006)** (noting that "the plaintiff's foot-dragging in announcing her expert . . . deprived the defendants of the opportunity to depose him, . . . pursue countering evidence, or generally prepare their defenses").

Effect on Trial Schedule

In ***Hoffman v. Construction Protective Services, Inc.*, 541 F.3d 1175 (9th Cir. 2008),** the Ninth Circuit affirmed the district court's exclusion of damages calculations, noting that untimely disclosure would require modification of the briefing schedule and possibly require reopening of discovery. "Such modifications to the court's and the parties' schedules supports a finding that the failure to disclose was not harmless." *Id.* at 1180 (citing ***Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1062 (9th Cir. 2005)**); *see also* ***Gagnon*, 437 F.3d at 197–98** (noting that the "multiplicity of pertinent factors" includes an "assessment of what the late disclosure portends for the court's docket"). District courts have weighed this factor in favor of excluding evidence, even where no trial date has been set. *See, e.g.*, ***Melczer v. Unum Life Ins. Co. of Am.*, 259 F.R.D. 433, 437 (D. Ariz. July 16, 2009)** (noting that reopening discovery would result in increased expense and delay and that party "was entitled to assume that Rule 37(c)(1) means what it says and that the untimely disclosed documents would be excluded from evidence at trial").

Bad Faith

As noted previously, the Ninth Circuit has held that a district court need not make a finding of bad faith and may exclude evidence even when to do so would eliminate a litigant's cause of action. However, it is likely within the district court's discretion to consider both the degree of culpability of the nondisclosing party and the effect of the preclusion. For example, in ***Network Appliance v. Bluearc Corp.*, 2005 WL 1513099, at *3 (N.D. Cal. June 27, 2005)**, the district court for the Northern District of California declined to exclude undisclosed evidence, stating that "under certain circumstances, the imposition of preclusive sanctions may be tantamount to dismissal of a plaintiff's claims or entry of default judgment against a defendant," and that "[u]nder those circumstances, mere negligent conduct is insufficient to impose the severe penalty of exclusionary sanctions, and a showing of bad faith is required."

Other Remedies

Rule 37(c) provides for alternative sanctions in addition to or in lieu of the sanction of exclusion. One reason for alternative remedies is that preclusion of evidence is not an effective incentive to

compel disclosure of information that would benefit the party to whom it was not disclosed. For example, a plaintiff might discover evidence that would tend to support the defendant's position; excluding such evidence would not punish the nondisclosing party or afford a remedy to the opposing party. Thus, in addition to or in lieu of the automatic preclusion of evidence, the district court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.

In addition to requiring payment of reasonable expenses, including attorney fees, caused by the failure to disclose, these sanctions may include an order that facts be taken to be established under Rule 37(b)(2)(A); an order striking pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party under Rule 37(b)(2)(C); or informing the jury of the failure to make the disclosure under Rule 37(c)(1). Dismissal is a severe sanction, and a court will impose it only in extreme circumstances. Dismissal may be "imposed only if the court concludes that a party's failure to cooperate in discovery is due to willfulness, bad faith, or fault***." Reg'l Refuse Sys., Inc. v. Inland Reclamation Co.*, 842 F.2d 150, 153–54 (6th Cir. 1988).**

Conclusion

Rule 37(c) was adopted with the intent that compliance with discovery rules be strictly enforced. The sanctions contemplated by the rule are intended not only to encourage compliance but also to penalize noncompliance and deter litigants who might be tempted to shirk their obligations in the future. Because there is no requirement that the parties meet and confer or that the disadvantaged party bring a motion to compel, a nondisclosing party may not have much notice of the other party's intent to exclude evidence. And, because undisclosed evidence may be excluded even where the failure to disclose was not willful or in bad faith, litigants must take seriously their duty to disclose all required information and to supplement their discovery responses, even in the absence of a renewed request from opposing counsel. Rule 37(c) ensures that failure to comply with discovery obligations can have profound, even game-changing consequences.

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