

Disclosures — Exclusion as sanction for failure to disclose

Questions:

Under the 2011 Amendments, if a party moves to exclude evidence or testimony that was either not disclosed in the other party's Rule 26(a) disclosures, or was not disclosed timely, is the party requesting exclusion still required to make a showing of wilfulness, bad faith, fault or persistent dilatory tactics?

Under the 2011 Amendments, if a party moves to exclude an expert witness, or the opinions of an expert witness, that were not timely disclosed, is the party requesting exclusion still required to show wilfulness, bad faith, fault or persistent dilatory tactics?

Answer:

No. The trial court continues to have broad discretion in these matters, but a party seeking exclusion of evidence or testimony under Rule 26(d)(4) is not required to show, and the trial court does not need to find, wilfulness, bad faith, fault or persistent dilatory tactics on the part of the non-complying party.

Rule 26(d)(4) states: "If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document, or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure." Likewise, Rule 37(h) states: "If a party fails to disclose a witness, document or other material as required by Rule 26(a) ... that party shall not be permitted to use the witness, document, or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose."

Expert witnesses must be disclosed pursuant to Rule 26(a)(4)(A) and if they are not, the standard in Rules 26(d) and 37(h) applies. If the expert is required to prepare a written report, Rule 26(a)(4)(B) states: "A report ... shall contain a complete statement of all opinions the expert will offer and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report."

Prior to the 2011 Amendments, and under Rule 37, the Supreme Court and the Utah Court of Appeals both ruled that the trial court should not exclude witnesses, evidence or testimony unless the court first finds "on the part of the non-complying party wilfulness, bad faith, ... fault, or persistent dilatory tactics frustrating the judicial process." *Welsh v. Hospital Corp. of Utah*, 2010 UT App. 171, ¶9; see also *Arnold v. Curtis*, 846 P.2d 1307, 1309-10 (Utah 1993) (trial court properly excluded expert witness); *Dahl v. Harrison*, 2011 UT App. 389, ¶18 (trial court properly excluded testimony from expert where non-complying party wilfully delayed moving the case forward).

The 2011 Amendments supplant this standard. Today, the consequence for failure to disclose or untimely disclosure is stated in Rule 26(d)(4) and Rule 37(h). Exclusion is

not necessarily automatic, and the non-complying party may avoid it, but the burden of proof is on the non-complying party who must show that the non-disclosure or untimely disclosure was (1) harmless, or (2) justified by good cause. *Id.* The committee note explains the reasons why this departure from the prior standard is important:

If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that nondisclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being able to use evidence that a party fails properly to disclose provides a powerful incentive to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, ***the usual and expected result should be exclusion of the evidence.***

URCP 26, Advisory Committee Note, Consequences of Failure to Disclose. [Emphasis added].

There is at least one important caveat. If a party elects to take the deposition of an expert, rather than require an expert report, the Rules do not explicitly limit the opinions that the expert can offer at trial. As explained in the committee note:

If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. ***If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to "lock in" the expert's testimony.*** But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

URCP 26, Advisory Committee Note, Consequences of Failure to Disclose. [Emphasis added].

Finally, Rule 37(h) also states that "in addition to or in lieu of [exclusion], the court on motion may take any action authorized by paragraph (e)(2)." Rule 37(e) identifies sanctions that a court may impose when a party fails to comply with a court order. Because it is outside the scope of this discussion forum, the committee takes no position on whether a party seeking relief under Rule 37(e) must show wilfulness, bad faith, fault or persistent dilatory tactics. Likewise, if the case involves a failure to disclose or untimely disclosure, and the party seeks one of the remedies available under Rule 37(e) in addition to or in lieu of exclusion of the evidence, that remedy likely would be

subject to the same standard as a claim brought under Rule 37(e) directly. For that reason, the committee takes no position on whether the moving party must show wilfulness, bad faith, fault or persistent dilatory tactics in that context.