Disturbo se if I Don't Produce Discovery?

Joshua Gilliland, Esq., Professional Development Manager, D4 LLC

In *Gotlin v. Lederman,* 2009 U.S. Dist. LEXIS 78818 (E.D.N.Y. Sept. 1, 2009), the Plaintiff was precluded from using Italian medical records because of a failure to include the records in their initial disclosures.

In the words of the Court, the Plaintiff's attorney "provided virtually no discovery during the nearly eleven-month period allotted by the Court for fact discovery" and failed to attend a settlement conference. *Gotlin,* 3.

It is no stretch of imagination to see how these actions resulted in the preclusion of evidence.

***Che Macello* Discovery**

The Plaintiff's attorney belatedly produced 571 pages of "previously undisclosed, untranslated Italian medical records" on a CD-ROM after the close of expert discovery. *Gotlin,* 7. The only prior related discovery had been a 9 page report that was a summary of "the as-then-unproduced underlying Italian medical records." *Gotlin,* 6.

The Plaintiff produced the Italian medical records on August 3, 2009. *Gotlin,* 7. The Plaintiff's attorney had received the medical records in May 2008 and had neither reviewed or translated the records. *Gotlin,* 7-8. The Plaintiff's attorney did tell his expert about the medical records, who declined to review them. *Gotlin,* 8. The records laid in wait in the attorney's file cabinet for over a year. *Gotlin,* 8.

Initial & Supplemental Disclosures under Federal Rules of Civil Procedure Rule 26(a) & Rule 26(e)

Federal Rule of Civil Procedure Rule 26(a) requires that "a party must, without awaiting a discovery request, provide to the other parties . . . a copy — or a description by 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." *Gotlin,* 9-10, citing Fed. R. Civ. P. 26(a)(1)(A)(ii).

Federal Rule of Civil Procedure Rule 26(e) requires that a party supplement their initial disclosures or discovery responses, when they learn "that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not

otherwise been made known to the other parties during the discovery process." *Gotlin,* 10, Fed. R. Civ. P. 26(e)(1)(A).

The duty to supplement a discovery response is triggered when a lawyer "obtains actual knowledge that a prior response is incorrect." *Gotlin,* 10, citing *Zubulake v. UBS Warburg LLC,* 229 F.R.D. 422, 433 (S.D.N.Y. 2004).

The Preclusion of the Italian Medical Records

The Plaintiff had no justification in not producing the Italian medical records. These records should have been included in the Plaintiff's initial disclosures and should have been produced pursuant to the Defendant's discovery requests. *Gotlin,* 13. The Plaintiff's attorney only excuse was his difficulty in "juggling 20 clients." *Gotlin,* 14.

As the Court stated:

In this connection, [Plaintiff's attorney] essentially admits that his failure to disclose was due to his own neglect…which, unfortunately, represents yet another example of [Plaintiff's attorney] having failed to competently manage his discovery obligations in this case. Simply put, in circumstances such as these, attorney neglect or oversight is not an acceptable explanation for failure to disclose. *Gotlin,* 14.

The Court evaluated three factors in deciding whether to preclude the use of the Italian medical records. These interests were 1) The Explanation for the Failure to Disclose 2) Importance of the Evidence, and 3) Prejudice Against the Defendants for the Failure to Disclose. *Gotlin,* 14-17.

The Court found the attorney's answer "unsatisfactory" for not producing the Italian medical records. *Gotlin,* 14. Having an active caseload is not an excuse for failing to meet your discovery obligations.

The Court found the evidence could have some importance on the Plaintiff's quality of life, despite the fact the records sat untranslated in a file cabinet for a year. *Gotlin,* 15-16.

As for the prejudice, there would be costs for translation, delays and even a possible trial continuance. *Gotlin,* 16-17. Expert discovery would also likely need to be reopened to evaluate the medical reports.

The Court found the factors weighed in favor of precluding the evidence, given the amount of time that had past and the prejudice upon the Defendants, pursuant to Federal Rule of Civil Procedure Rule 37(c). *Gotlin,* 17-18.

Bow Tie Lessons

Discovery cannot sit on the shelf and collect dust if a party intends to use it in their case. The challenge with hard drives full of electronically stored information can compound this issue if attorneys do not access and analyze their cases with their clients once litigation is reasonably foreseeable.