The Perils of Expert Disclosures in an Electronic World

Geoffrey M. Howard and Thomas S. Hixson

Antitrust litigators spend a lot of time with experts—consulting, discussing, and contributing to the formation of opinions that may tip the balance on a dispositive motion or at trial. Often, a case will require multiple experts on a variety of issues, each supported by one or more "consultants" who help develop raw data, empirical studies, or other analyses. This is familiar terrain. Increasingly familiar as well are the pleasures and perils of electronic discovery, with a particular focus on email and the difficulty of retaining and producing it. But what happens when these two worlds intersect?

Several recent cases illustrate the dangers to litigators of not having produced—or, worse, no longer possessing—documents required to be disclosed under the expert disclosure provisions of Federal Rule of Civil Procedure 26. In these circumstances, lawyers may lose their experts, get sanctioned, and suffer adverse inference instructions at trial. And, under these same recent cases, it is no longer safe for counsel to rely on arguments that they acted in good faith and without violating a prior court order.

Trigon Insurance Co. v. United States, 204 F.R.D. 277 (E.D.Va. 2001), provides a starting point for this analysis. *Trigon* was a taxpayer suit against the United States, in which the government made the decision to retain Analysis Group/Economics (AGE) as a litigation consultant and then use two employees affiliated with AGE—one of its managers and one of its principals—as testifying experts. The AGE firm acted as a litigation consultant, it paid the fees of the testifying experts (and was in turn reimbursed by the government), it communicated with the testifying experts, and it participated heavily in drafting the testifying experts' Rule 26 reports. However, AGE and the testifying experts did not retain many of the communications between AGE and the testifying experts, nor did they retain many of the experts' draft reports. AGE and the testifying experts stated that this was pursuant to their normal document retention practice; and indeed, normally the internal communications within a firm acting as a litigation consulting expert would not fall within the expert disclosure requirements of Rule 26(a)(2)(B).

The problem for AGE was that two employees affiliated with the firm were also acting as testifying experts, and that dual role rendered the communications with those experts, and the draft reports sent to or from those experts, subject to mandatory disclosure. The plaintiff, Trigon, moved to compel production of those communications and drafts. When it became clear to the court "that a substantial amount of potential evidence had been destroyed," *id.* at 281, the court ordered the government to hire an independent computer forensics expert to retrieve as much as possible from AGE's and the experts' computers. Deloitte & Touche was able to recover hundreds of communications and many draft reports (embarrassingly for AGE, which had represented that recovery was impossible), but not enough. The court found that the document destruction was sufficiently serious that it undermined

■
Geoffrey M. Howard *is a partner with the law firm of Bingham McCutchen LLP, in the firm's San Francisco office.* ***Thomas S. Hixson*** *is an associate in the firm's San Francisco office. Both are members of Bingham McCutchen's Antitrust and Trade Regulation practice group.*

Trigon's ability to cross-examine the government's experts, and it ordered sanctions in the form of an adverse inference instruction at trial.

The reasoning of the *Trigon* court, and other recent cases involving similar issues, have several important implications for expert disclosures, as discussed below.

What to Give the Expert

The first rule of thumb in dealing with a testifying expert is that every document the expert "considers" will have to be disclosed under Rule 26(a)(2)(B) and is of course fair game for a document request. "Considers" does not mean "relies upon." The drafters of the 1993 amendment to Rule 26 had originally proposed that the expert disclosure obligations extend only to "the data or other information relied upon in forming such opinions,"[1] but the Rule as adopted replaced "relied upon" with "considered." As the *Trigon* court explained, "as a consequence of the 1993 amendments, disclosure simply includes all documents that were provided to and reviewed by the expert." 204 F.R.D. at 283; *see also In re Pioneer Hi-Bred International, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001) (also holding that Rule 26 requires disclosure "whether or not the expert relies on the documents and information in preparing his report").

Courts have held that the term "considers" in Rule 26 should be construed broadly, and that there is "no distinction between *reviewing* a document and *considering* a document" because such a distinction "could become too easy a dodge." *Simon Property Group L.P. v. mySimon, Inc.*, 194 F.R.D. 644, 649–50 (S.D. Ind. 2000) (emphasis supplied). *See also In re Tri-State Outdoor Media Group, Inc.*, 283 B.R. 358, 364–65 (Bankr. M.D. Ga. 2002) ("[W]hen an expert has read or reviewed privileged materials before or in connection with formulating their opinion, the expert witness is deemed to have 'considered' the materials to satisfy Rule 26(a)(2)(B).").

Further, some courts find that the act of supplying a document to the testifying expert creates a rebuttable presumption that the expert "considered" it, shifting the burden to the party who retained the expert to prove that the document was not considered and therefore does not fall within the mandatory disclosure provisions in Rule 26(a)(2)(B). *See Musselman v. Phillips*, 176 F.R.D. 194, 202 (D. Md. 1997); *cf. Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 306 (W.D. Va. 1998) ("There is no evidence that the experts received, but did not read, reflect on, or think about the memoranda.").

The *Trigon* court's willingness to apply this bright-line rule to the situation before it illustrates a problem with using a consulting firm as a source of both consulting and testifying experts. Normally, the internal communications within a consulting firm (or consultants' communications with counsel) would fall outside of the mandatory disclosures in Rule 26(a)(2)(B). But once one of the recipients or senders of an email or a draft document is someone who ends up becoming a testifying expert, that communication or document must be disclosed. Thus, the convenience of using well-educated consulting experts at trial carries the potential downside of rendering discoverable essentially all of the important communications and work product that the consultants have developed.

That exact situation existed in *United States Fidelity & Guaranty Co. v. Braspetro Oil Services. Co.*, 2002 WL 15652 (S.D.N.Y. Jan. 7, 2002), where the defendants furnished their consulting

---

[1] *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 89 (1991).

experts with more than a million documents, including privileged materials. Because the same firm doubled as both consulting and testifying experts, and because there was "no evidence supporting Defendants' bare assertion that certain documents were reviewed by the experts solely in a consultative capacity," and no evidence that the defendants tried to limit access to the documents at issue only to consultative purposes, the dual consulting-testifying expert roles rendered all of the documents discoverable. *Id.* at *6.

Nor does the attorney-client privilege or work product doctrine necessarily help: the disclosure obligation in Rule 26(a)(2)(B) may trump those protections. *See United States Fidelity & Guaranty Co.*, 2002 WL 15652 at *5. *Trigon* is in line with other cases in finding a per se waiver for any document or communication that the testifying expert considers. *See, e.g., In re Pioneer Hi-Bred International, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001) ("[W]e are quite unable to perceive what interests would be served by permitting counsel to provide core work product to a testifying expert and then to deny discovery of such material to the opposing party."); *Herman v. Marine Midland Bank*, 207 F.R.D. 26, 29 (W.D.N.Y. 2002) (noting that "the overwhelming majority of district courts" have held that the expert disclosure requirement in Rule 26(a)(2)(B) "trumps the substantial protection otherwise accorded opinion work product").

Litigators who designate a client as a testifying expert should explore how to plausibly narrow the categories of information that could be deemed "in connection with" the client's expert testimony.

In fact, the per se waiver rule was apparently intended by the drafters of the current Rule 26. The Advisory Committee Note to the 1993 Amendments to Rule 26 states that under the current Rule 26(a)(2)(B), "litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed."

This waiver rule is also something to consider before designating a client as a testifying expert. *Kooima v. Zacklift Int'l, Inc.*, 209 F.R.D. 444 (D.S.D. 2002), held the per se waiver rule applicable even when the litigant was himself the expert, resulting in a presumably sweeping waiver of the privilege: "Because Plaintiff has designated himself as an expert . . . all documents and information disclosed to him (including correspondence from his attorneys) in connection with his anticipated expert testimony are discoverable." *Id.* at 447. Litigators who designate a client as a testifying expert should explore how to plausibly narrow the categories of information that could be deemed "in connection with" the client's expert testimony.[2] Opposing counsel will likely see a potentially valuable way to stick their nose under the tent and learn as much as possible about a lawyer's case strategy and legal theories. To prevent a wholesale waiver of the privilege, a smart lawyer will separate emails dealing with the client's planned testimony from other communications. In the context of a motion to compel, there may be other options available, such as *in camera* review, that can let the court determine for itself which documents must be disclosed under Rule 26.

What Must Be Retained

The second rule of thumb in dealing with a testifying expert is to make sure the expert retains every "considered" document. This requires giving thought at the outset of the case as to whether the expert may ultimately testify and, if so, to create or appropriately modify document retention

[2] *See Simon Property Group*, 194 F.R.D. at 650 (furnishing privileged documents to the testifying expert did not mandate finding waiver of privilege where documents "simply had nothing to do" with the expert's testimony); *cf.* B.C.F. Oil Refining, Inc. v. Consolidated Edison Co. of N.Y., Inc., 171 F.R.D. 57, 60 (S.D.N.Y. 1997) (Rule 26(a)(2)(B) does not mandate disclosure of documents supplied to testifying expert that "have nothing to do with the preparation of his expert report or his expert testimony").

policies. Non-testifying experts who communicate with the testifying expert may need to take similar steps to retain their related documents. In *Trigon*, for example, the court held that the defendant had an obligation to ensure that communications between the consulting experts (AGE) and the testifying experts were retained, and it rejected the defendant's attempt to "scapegoat AGE's document retention policy." 204 F.R.D. at 289. The court noted that "AGE holds itself out to have expertise in litigation consulting," and it charged AGE with knowing its obligation to preserve communications and documents that the testifying experts reviewed. *Id.* Considering that AGE was not, in fact, the testifying expert (although it was affiliated with some of them), that obligation might not have been obvious. The problem was that AGE communicated with (and was affiliated with) the testifying experts, and that changed what might otherwise have been a legal document retention policy into one whose "rather obvious effect, and perhaps even the purpose . . . was to eliminate this source of undeniably meaningful cross-examination resource about the substance of the expert opinions and about the ghost writing of the opinions." *Id.* at 290.

. . . litigators should assume that any loss of documents will be presented in the worst possible light.

A concomitant lesson of *Trigon* is the scope of what litigators and experts must retain for discovery. The rule is simple: "The document retention policies of [the expert] do not trump the Federal Rules of Civil Procedure." *Trigon*, 204 F.R.D. at 289. The testifying expert must retain the documents and communications he considers in the course of forming his opinion. Implementing this rule with electronic documents is not always simple, however. Consider the common practice of testifying experts, sometimes encouraged by counsel, of saving new versions of a report over old versions, so that in the end only one electronic version of the expert's report exists. This practice appears to violate Rule 26(a)(2)(B), at least as to draft reports that reflect input from counsel or anyone other than the expert himself[3]: every time the author saves over the old version, he is destroying a draft expert report, which necessarily discusses "data or other information considered by the witness" in forming his ultimate opinion and, therefore, must be disclosed under Rule 26. Since in most cases it would be easy to alter this document retention policy in order to retain drafts of the expert report, it's unlikely that this practice would withstand scrutiny under Rule 26.

If documents that fall within Rule 26(a)(2)(B) have not been retained, litigators then must demonstrate that the documents would not have benefited the opposing party anyway—an uphill argument that courts view with suspicion. As discussed in the next section, courts are quick to infer that missing documents would have provided fuel for cross-examining the expert. So, if for some reason documents are not retained, counsel should give the best possible explanation and be prepared for opposing counsel's fireworks. Consider *Texas Instruments, Inc. v. Hyundai Electronics Indus. Co.,* 190 F.R.D. 413 (E.D. Tex. 1999), in which TI's expert scribbled notes while inspecting computer equipment in a "clean room," in which "human visitors" were required "to protect the sensitive equipment" by wearing "bulky suits, gloves, and helmets." *Id.* at 419 n.12. The expert threw away his notes, explaining that it was hard to write legibly in that environment, and the court declined to impose sanctions after finding that the expert's notes were duplicative of other, legible notes that were produced in the case. TI won that discovery battle, but the fact that Hyundai was willing to fight so hard to obtain sanctions for the loss of illegible scribbles illustrates that litigators should assume that any loss of documents will be presented in the worst possible light.

[3] *Trigon* left open the question of whether the disclosure obligations in Rule 26(a)(2)(B) apply to "drafts prepared solely by that expert while formulating the proper language in which to articulate that expert's own, ultimate opinion arrived at by the expert's own work or those working at the expert's direction." 204 F.R.D. at 283 n.8.

Sanctions

In the event that the court finds that a party's expert disclosures were not sufficient, the issue becomes what remedies, if any, the court will impose. As with other discovery sanctions, the appropriate remedy for a violation of expert disclosure obligations is within the discretion of the district court. Courts commonly balance competing goals in deciding the appropriate sanction. In addition to the normal factors of intent, bad faith, and prejudice, courts evaluate other case-specific issues, such as whether the nature of the lawsuit requires some kind of expert testimony in order for the trial to be meaningful, or the relative importance of the electronic evidence when viewed in the case as a whole. *See, e.g., Trigon*, 204 F.R.D. at 289–91; *Texas Instruments*, 190 F.R.D. at 419–20; *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 107–10 (2d Cir. 2002). Generalizations about the appropriate remedy for a particular type of discovery violation are complicated because the timing of the violation can be significant: "[A]s a discovery deadline or trial date draws near, discovery conduct that might have been considered 'merely' discourteous at an earlier point in the litigation may well breach a party's duties to its opponent and to the court." *Residential Funding Corp.*, 306 F.3d at 112.

In the realm of expert disclosures, courts may impose sanctions without any showing of bad faith or violation of a prior discovery order.

In the realm of expert disclosures, courts may impose sanctions without any showing of bad faith or violation of a prior discovery order. *Trigon* is in line with the Second Circuit and the Ninth Circuit in finding that sanctions can be appropriate for a discovery violation even when a litigant did not violate a prior discovery order and did not act in bad faith. *Trigon* relied on a long line of Supreme Court cases to hold that a court's power to remedy spoliation of evidence (there, the failure to retain communications with the expert and draft expert reports) is "inherent" and exists "even absent an antecedent order." 204 F.R.D. at 285. *Trigon* acknowledged that a finding of spoliation requires a showing that the litigant intentionally destroyed evidence, but the court refused to equate "intentional" with "bad faith." The court explained, "Reference to the intentional destruction of documents does not imply that bad faith is necessary for the imposition of sanctions for spoliation." *Id.* at 287.

The Ninth Circuit has also rejected the argument that either bad faith (or willfulness or fault), or violation of a prior discovery order, is necessary in order to justify a sanction for failing to comply with expert disclosure obligations. In *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101 (9th Cir. 2001), the court held that a finding of bad faith is unnecessary for a sanction "less than a dismissal." *Id.* at 1106.[4] *Yeti* involved a rebuttal expert report that was submitted two years after the close of discovery, a year after the report it was supposedly rebutting, and a mere twenty-eight days before trial. The court noted that Rule 37(c)(1) provides that a litigant that does not comply with the expert disclosure requirements in Rule 26(a) is not permitted to use the evidence at trial unless its failure to disclose was substantially justified or harmless. The court's opinion is significant in that it characterizes exclusion under Rule 37(c)(1) as an "automatic" and "self-executing" sanction, and the opinion bears out that characterization: After holding that there is no bad faith requirement for an exclusion sanction, the court simply dropped the issue of culpability and moved on to whether the litigant could demonstrate substantial justification or harmlessness (it couldn't).

[4] In general, some showing of culpability, such as bad faith or gross negligence is necessary for a terminating discovery sanction. *See, e.g.,* Hairston v. Alert Safety Light Prods., Inc., 307 F.3d 717 (8th Cir. 2002); Fair Housing of Marin v. Combs, 285 F.3d 899, 905 (9th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3169 (Aug. 30, 2002) (No. 02-332).

Yeti's statement that exclusion of expert testimony is an "automatic" sanction for an untimely expert report is in tension with Rule 37(c)(1)'s statement that a court may impose other sanctions "in lieu of" exclusion. Other courts have indicated that the exclusion of expert testimony based on a defective report is not automatic, but is an act of discretion, requiring the district court to weigh the importance of the testimony, the likely effect that exclusion would have on the trial, and the litigants' good or bad faith. *See Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 952–54 (10th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3247 (Sept. 23, 2002) (No. 02-482); *Konstantopoulous v. Westvaco Corp.*, 112 F.3d 710, 719 (3d Cir. 1997). *Yeti* did not rule out the existence of such discretion, but it suggests that if the district court opts for the default sanction of exclusion, the Ninth Circuit, at least, might not fault the district court for failing to consider other possible remedies. Still, given the plain language of Rule 37, a district court might make an initial determination that the exclusion of expert testimony is an unduly drastic remedy. *See, e.g., Burton v. R.J. Reynolds Tobacco Co.*, 203 F.R.D. 636 (D. Kan. 2001) (plaintiff filed untimely supplemental expert reports, had no justification, and could not prove harmlessness; nonetheless, only monetary sanctions appropriate because striking expert disclosures would be too drastic); *but see Yeti*, 259 F.3d at 1106 (automatic sanction of exclusion appropriate even though "the district court made it much more difficult, perhaps almost impossible," for defendant to rebut plaintiff's damages calculations).[5]

The Second Circuit took a similar view to *Trigon* and *Yeti* in *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), although the case did not involve expert disclosures. In that case, the plaintiff, RFC, dragged its feet in producing emails to the defendant, DeGeorge. For about four-and-a-half months, RFC made representations that it was working diligently to obtain email from its back-up tapes and that it had retained an outside vendor to search through the tapes. On the eve of trial, RFC still had not produced any emails from the time frame relevant to the case, and it asserted that it was not possible to obtain them from its tapes. RFC turned over the tapes to DeGeorge three days before trial, and DeGeorge's outside vendor was able to retrieve 950,000 emails from the relevant time frame in the span of only four days. The sheer quantity of late-produced information rendered all of it unusable at trial. After RFC prevailed on a $96.4 million verdict, DeGeorge asked for sanctions in light of RFC's foot-dragging. The district court declined to impose sanctions because although it found that RFC had been "purposefully sluggish" in producing emails, there was no evidence of bad faith.

The court of appeals disagreed, holding that "discovery sanctions, including an adverse inference instruction, may be imposed where a party has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence." *Id.* at 101. In the Second Circuit's view, "purposeful sluggishness" was enough, and it was no defense that RFC had not violated any specific discovery order. The court of appeals sent the case back to the district court to determine what sanctions were appropriate given the evidence now available to the parties. *Residential Funding Corp.* thus represents a potential nightmare for the successful litigant at trial who has not fully complied with its obligation to produce documents in pretrial discovery—potentially putting at risk a large jury verdict because of discovery abuse.

---

[5] Note that if an expert is excluded from testifying based on a failure to comply with Rule 26(a)(2)(B), a court may also prevent other, proper experts from testifying about draft reports they received from the excluded expert. *See* Starling v. Union Pacific R.R., 203 F.R.D. 468, 480 (D. Kan. 2001).

Residential Finding Corp. also shows that courts are becoming increasingly comfortable with electronic discovery and intolerant of litigants unwilling to make use of available technology to expedite document production. The court viewed the existence of outside vendors with expertise in electronic document retrieval not as a convenience for the litigants, but as an obligatory tool in the discovery process. Indeed, the failure to use it with sufficient speed was a sanctionable offense.

These cases do not mean, however, that intent or bad faith have no role in the assessment of sanctions for failure to make proper expert disclosures. First, *Trigon*'s view, and that of the Second and Ninth Circuits, that discovery sanctions may be imposed absent bad faith or violation of a prior discovery order is not shared by every court. The Sixth Circuit, for example, requires bad faith as a precondition for issuing sanctions under its inherent powers, although the district court need not make a specific finding of bad faith, if the facts demonstrate its existence. *See First Bank of Marietta v. Hartford Underwriters Insurance Co.*, 307 F.3d 501 (6th Cir. 2002). The Seventh and Eighth Circuits require both bad faith and a violation of a prior discovery order. *See Crabtree v. National Steel Corp.*, 261 F.3d 715, 720 (7th Cir. 2001) (citing *Phillips Medical System International, B.V. v. Bruetman*, 982 F.2d 211, 214 (7th Cir. 1992)); *Chrysler Corp. v. Carey*, 186 F.3d 1016, 1019 (8th Cir. 1999), and the Fifth Circuit requires a finding of bad faith. *See Advanced Display System, Inc. v. Kent State University*, 212 F.3d 1272, 1288 (Fed. Cir. 2000) (applying Fifth Circuit law and citing *Chavez v. M/W Medina Star*, 47 F.3d 153, 156 (5th Cir. 1995)), *cert. denied*, 532 U.S. 904 (2001). *But see United States v. Russell*, 109 F.3d 1503, 1511 (10th Cir. 1997) (bad faith not necessary for a discovery sanction).

The court viewed the existence of outside vendors with expertise in electronic document retrieval not as a convenience for the litigants, but as an obligatory tool in the discovery process. Indeed, the failure to use it with sufficient speed was a sanctionable offense.

Second, and perhaps more importantly, scienter can be an important question in determining the appropriate remedy to impose. The Tenth Circuit has held that in the absence of bad faith, the district court should impose the least severe sanction that will result in compliance with discovery obligations. *See United States v. Golyansky*, 291 F.3d 1245, 1249 (10th Cir. 2002).[6]

As to the specific sanction of an adverse inference instruction at trial, *Trigon* followed Fourth Circuit case law in holding that negligent loss or destruction of documents is not enough to support an adverse inference instruction as a sanction. *See Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) ("An adverse inference about a party's consciousness of the weakness of his case . . . cannot be drawn merely from his negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction."). So while bad faith might not be necessary for a discovery sanction, "some quantum of blameworthiness is required before sanctions for spoliation may obtain." *Trigon*, 204 F.R.D. at 287. The Seventh Circuit has likewise held that an adverse inference instruction requires a showing that the document destruction or nonproduction was conducted in bad faith. *See Park v. City of Chicago*, 297 F.3d 606, 615 (7th Cir. 2002).

Residential Funding Corp. similarly embraced the view that an adverse inference instruction requires at least some level of scienter, although it ratcheted down the necessary level of culpability. The court held that "bad faith alone is sufficient circumstantial evidence . . . that the missing evidence was unfavorable to that party," 306 F.3d at 109, but the court added that gross negligence in the untimely production of evidence will "in some circumstances suffice, standing

[6] Note that under the Tenth Circuit's view, good faith, standing alone, "would not be enough" to avoid discovery sanctions altogether for failing to submit proper expert disclosures. *See Jacobsen*, 287 F.3d at 954.

alone, to support a finding that the evidence was unfavorable to the grossly negligent party." *Id.* That's a significant holding when read in context: *Residential Funding Corp.* was not a spoliation case; the sanctionable misconduct consisted of the sluggish production of emails. And while the focus of the court's opinion was on the fact that the delay in production rendered the evidence unavailable for trial, the "sluggish" time frame involved was not particularly unusual—less than five months to produce nearly a million emails.

Conclusion

Electronic communication and information storage present obvious opportunities for litigants in developing and challenging sophisticated expert testimony for trial. But they also present serious risks for counsel and experts not conversant in the requirements on Rule 26(a)(2)(B). Because antitrust cases typically require multiple experts, and a support system of consultants contributing to the development of those experts' opinions, *Trigon* and related cases pose particular obstacles. In dealing with a testifying expert, counsel should be careful what documents they provide to the expert, since they will likely become discoverable, notwithstanding their former status as privileged or work product. Counsel should also ensure that the experts understand their obligation to retain every document they considered in the course of preparing their testimony, a burden that can be greatly expanded when the testifying expert is also, or is affiliated with, the consulting expert. And, finally, in the event that the litigator does not comply with Rule 26(a)(2)(B), the parties should be aware of the broad discretion a district court has to impose sanctions, sometimes even without a specific finding of bad faith or violation of a prior discovery order. ●