

4. An opinion from the U.S. District Court for the Northern District of Texas denying a motion to compel documents listed in the Defendants' Rule 26 initial disclosures, finding that Rule 26 did not require production, only description, of the documents.

In *Olmos v. David B. Giles P.C.*, Civil Action No. 3:22-CV-0077-D, 2022 WL 2104506 (N.D. Tex. June 9, 2022), Senior Judge Sidney A. Fitzwater denied a motion to compel documents listed in the Defendants' Rule 26 initial disclosures, finding that Rule 26 did not require production, only description, of the documents.

In this action involving claims for legal malpractice, breach of fiduciary duty, and fraudulent misrepresentation, Plaintiff alleged that Defendants wrongfully took funds belonging to Plaintiff that she had deposited into Defendants' Interest on Lawyer's Trust Account (IOLTA).

In April 2022, Defendants served Plaintiff with their Rule 26(a) initial disclosures, in which Defendants stated that they had in their possession, custody, or control “[d]ocuments concerning Defendants’ attorney-client relationship with Mr. Robert Shambora,” another party involved in Plaintiff’s investment. Plaintiff moved under Fed. R. Civ. P. 37(a) to compel Defendants to produce the documents described in their Rule 26(a) initial disclosures related to the existence of Defendants’ attorney-client relationship with Shambora and sought attorney’s fees and costs incurred in bringing the motion to compel. Plaintiff contended that Defendants wrongfully withheld these documents as privileged.

Judge Fitzwater explained that under Rule 26(a)(1)(A)(ii), a party must provide to 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, unless the use would be solely for impeachment.” *Id.* at *2. He further explained that under Rule 37(a)(3)(A), “if a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.”

Judge Fitzwater noted that Plaintiff did not challenge the sufficiency of Defendants’ description of documents in their Rule 26(a) disclosures; rather, she maintained that Defendants were required to produce the documents they described in their initial disclosures, and she moved to compel their production on that basis.

But Judge Fitzwater found that Plaintiff’s position rested on a misreading of Rule 26(a)(1)(A)(ii). He explained that Rule 26(a)(1)(A)(ii) “does not require production of documents but merely allows for production in lieu of a description.” Because Rule 26(a)(1)(A)(ii) does not require a party to produce documents — it allows a party the

option either to produce documents or to provide a description of the documents by category and location — Plaintiff cannot compel Defendants to produce the documents in question. Judge Fitzwater therefore denied Plaintiff's motion to compel.