

The Sedona Conference Sufficiency of Rule 26(a)(1) Initial Disclosures Brainstorming Group Draft Outline

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I. SUMMARY AND DESCRIPTION

- A. The WG1 Sufficiency of Rule 26(a)(1) Initial Disclosures Brainstorming Group (“BG”) was constituted to explore concepts for a new Sedona work product regarding whether 1) parties are currently living up to the original intent of the Rule and meeting their obligations to make a reasonable inquiry into the facts in preparing the disclosures; 2) as part of a party’s initial disclosures, they should be identifying custodians and custodial and noncustodial data sources containing potentially relevant ESI; and 3) the timing for initial disclosures under Rule 26(a)(1)(C) is workable for the parties to provide sufficient disclosures and, potentially, the extent counsel are responsible to update the disclosures.
- B. As outlined further below based on weekly discussions with the BG and a collective drafting effort, the BG recommends that WG1 proceed with work product on this topic as there is a current need for guidance on and clarification about the Rule’s intent and implementation. The outline sets for the BG’s recommendations for what work product in this area would look like, both in terms of the scope of the structure of the work product, as well as its intended audience, and how the work product would meet the intended audience’s needs.
- C. While Rule 26(a)(1) initial disclosures can be extremely useful early in discovery, the work product will create guidance for practitioners, regulators, and judges regarding complying with the Rule while also satisfying the Rule’s intent, practical tips for maximizing the Rule’s efficiency and effectiveness, and proportionality considerations.

II. GOALS AND SCOPE OF THE WORK PRODUCT

- 1. Governing Principles/Considerations
 - 1. Rule 26(a)(1) and its history and Committee Notes
 - 2. The Initial Disclosures Pilot Programs in Arizona and the Northern District of Illinois for perspective on their structure, goals, successes and failures.
 - 3. FJC Report
 - 4. E.D. Texas
 - 5. N.D. California Checklist
 - 6. Federal case law that may be applicable and provide guidance on the Rules intent, implementation, and compliance.

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B. Goals

1. Identify existing efficiencies in and effectiveness of compliance with Rule 26(a)(1) as well as hurdles to and deficiencies in effective compliance.
2. Provide guidance for best practices and practical advice in executing Rule 26(a)(1) Initial Disclosures sufficient to satisfy the intent of the Rule.
3. Outline potential suggested modifications to the Rule and/or Committee Notes to ensure effective disclosures that align more closely with the Rule's intent

III. RECOMMENDED FORM FOR WORK PRODUCT

A. Guidelines and Checklists

IV. INTENDED AUDIENCE: WHO NEEDS THIS WORK PRODUCT, AND WHY DO THEY NEED IT

A. Who Needs It

- i. Civil litigation attorneys in all U.S. jurisdictions whose practice includes compliance with Rule 26(a)(1) obligations including both external and internal counsel.
- ii. Legislators and the Federal Rules of Civil Procedure Rules and Advisory Committees that may be faced with creating or modifying the existing rule to ensure clarity, efficiency, and effectiveness as originally intended by the Rule.
- iii. Judges, with the goal of providing a framework for evaluating the timeliness, completeness, and effectiveness of parties' compliance with Rule 26(a)(1).

B. Why Do They Need It

- i. There is currently little precedent, case law, guidance or direction regarding best practices and practical tips for complying with Rule 26(a)(1).
- ii. Failure to sufficiently comply with Rule 26(a)(1) can result in a lack of critical information exchanged early in the case.
- iii. To avoid wasting time and resources disputing the sufficiency of a party's disclosures.
- iv. Judges rendering decisions and facilitating litigation and Rules

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Committees making relevant law may benefit from guidance on how parties can comply with Rule 26(a)(1) in order to meet the efficiencies and effectiveness intended by the Rule.

- v. Practitioners and judges may benefit from checklists and other practical tips for complying with Rule 26(a)(1).
- vi. Rules Committees/Legislators may benefit from a framework for evaluating whether Rule 26(a)(1) is meeting its stated purpose and, if not, how to modify it accordingly.

V. EXISTING PUBLICATIONS (anything existing for consideration)

VI. PROPOSED DRAFTING TEAM

A. Drafters:

- 1. Plaintiff and defense outside litigation counsel from various areas of practice
- 2. In-house litigation counsel
- 3. Law professor
- 4. Retired judge

B. Review of proposed final work product by Working Group 1 Steering Committee and public comment.

VII. OUTLINE OF PROPOSED WORK PRODUCT

A. Why and how this issue is of interest to the intended audience

- 1. Discuss/Highlight some of the tension points
 - (a) Some parties are not taking their obligations seriously or seriously misunderstand the nature of their obligations resulting in a waste of time and resources
 - (b) What are realistic expectations for initial disclosures

B. General governing principles

- 1. Rule 26(a)(1)
 - (a) History of the Rule and analysis of commentary/intent
 - (b) Overview of how Rule 26(a)(1) changed litigation
 - (c) Examples and discussion of successful Rule 26(a)(1) compliance

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(efficiency and exchange of key documents early in case)

- C. Potential obstacles to making meaningful initial disclosures (with suggestions to review other Sedona publications throughout on how to improve the specific issue)
 - 1. Vague, on the one hand, or lengthy and detailed complaints (which may be necessary to satisfy pleading requirements), on the other hand, can make it hard to know where to focus initial investigation and disclosure
 - 2. Early timing and relatively short deadline after the Rule 26(f) conference
 - 3. Necessity to agree upon a Protective Order prior to giving detailed disclosures (including with respect to damages)
 - 4. Information systems may not be set up to facilitate quick identification and retrieval
 - 5. Perceived strategic advantage in providing less detailed initial disclosures early in the case, including the cost/benefit analysis if one or both parties intend to explore early settlement
 - 6. Relative lack of case law on initial disclosure requirements
 - 7. Perceived ability to get the same information, without motion practice, from early discovery requests
 - 8. Scope of the rule as written (having information “the disclosing party may use to support its claims or defenses...” versus information “relevant” to the claim or defenses in the case), including consideration of the reasons the committee chose to limit the scope of the rules in this way
 - 9. Misunderstanding the scope and timing of the duty to supplement and ambiguity about the extent to which disclosure in other discovery responses absolves the party of the need to supplement initial disclosures with the same information
- D. Guidelines, recommendations, and best practices for sufficient compliance with Rule 26(a)(1) in absence of case law
 - 1. Guidance on benefits of efficiency and proportionality and why compliance with Rule 26(a)(1) is beneficial
 - 2. Examples and discussion of unsuccessful Rule 26(a)(1) compliance (additional work, over-production, unnecessary disputes)
 - 3. Analysis of continuing obligations for Rule 26(a)(1) compliance throughout

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litigation

- (a) How much diligence should go into supplementation?
 - (b) Rule 26(e): supplementation required “if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing”
 - (c) A specific or no specific deadline for rolling supplementation – would this be helpful in the rule or on a case by case basis?
 - (d) Consequences - in the rule and from case law
 4. Consideration of Rule 26(a)(1) disclosures including a certification that identifies the legal holds that have been implemented
 5. Enforcement by courts (and consistency in enforcement)
 - (a) Model Standing Orders
 6. Impact of growing data volumes on sufficiency of Rule 26(a)(1)
 7. Checklists and examples of sufficient required disclosures
 - (a) Examples of core types of documents and data sources that should be included in initial disclosures and discovery (including for particular case types like employment, patent etc.) and affirmative representation that data has been placed on hold or otherwise adequately preserved
 - (b) Disclosure of custodians and custodial/non-custodial ESI sources that may contain relevant data or such sources that may have data that is within the current requirements of the rules (i.e., having information “the disclosing party may use to support its claims or defenses...”
 - (c) Broad list that parties can negotiate from to reach agreement on what will be included on a case-by-case basis.
 8. Suggestions for interpretations of the rule
- E. Intersection between Initial Disclosures and Rule 26(f) conferences
1. Can a meaningful 26(f) conference help the parties know where to focus their initial investigation and disclosure?
 2. If parties comply with their obligations under Rule 26(f), does that alleviate many of the concerns about perceived lack of compliance with Rule

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26(a)(1)?

3. Should parties consider agreeing on due dates for initial disclosures that are different from the default set in Rule 26(a)(1)(C) of 14 days after the Rule 26(f) conference?
 4. Produce guidance for discussion during Rule 26(f) conference perhaps with checklist. Can parties use the 26(f) conference to agree to specific core documents or information to be produced?
 5. Discussion of counsel's duty to work with the client to be able to provide meaningful and reasonably detailed disclosures
- F. Recommendations and considerations for suggested modifications to Rule 26(a)(1) to better meet the stated goals of efficiency and the exchange of important data early in a case.