

# Draft Outline: Commentary on the Sufficiency of Rule 26(a)(1) Initial Disclosures

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## **The Sedona Conference WG1 Drafting Team Outline for Commentary on the Sufficiency of Rule 26(a)(1) Initial Disclosures**

### **I. INTRODUCTION & CHARTER**

- A. After months of discussion and evaluation, a Sedona Conference Working Group 1 Brainstorming Group recommended a Commentary on the Sufficiency of Rule 26(a)(1) Disclosures. The original intent of the Initial Disclosures required by Rule 26(a)(1) is for parties to make a reasonable inquiry into—and disclose—key, relevant facts at the outset of a matter without the need for discovery requests. In many cases, however, parties are not currently living up to that intent. Instructive case law on complying with Rule 26(a)(1) is focused on what not to do and provides limited examples of effective compliance, and practitioners struggle matching the original intent of the rule as currently written with the demands of modern discovery. The Brainstorming Group under Sedona Conference Working Group 1 explored this topic and found that in general, requesting parties in asymmetrical cases often find initial disclosures lacking, while responding parties find the obligations too onerous. This sentiment was echoed by the membership at large.
- B. CHARTER: The Commentary will be both legal and practical in orientation and provide guidance to parties, counsel, and the courts on the history of the rule and the case law that exists regarding its interpretation, while also suggesting best practices for parties to live up to the spirit of the rule while simultaneously representing their clients' best interests. Specifically, the Commentary on Initial Disclosures will, among other things: (1) Discuss the governing principles of the Rule, including its history and the committee notes; (2) Explore how pilot programs and reports regarding the same have highlighted strengths and weaknesses of the rule; (3) Survey the current state of case law regarding Initial Disclosures; (4) Identify existing efficiencies in, and effectiveness of, compliance with Rule 26(a)(1), as well as hurdles to and deficiencies in effective compliance; (5) Provide guidance for best practices and practical advice in executing Rule 26(a)(1) Initial Disclosure obligations sufficient to satisfy the intent of the Rule; and (6) Discuss common questions regarding Initial Disclosures, including disclosure of data sources, balancing the timing of disclosures against the effort required to provide sufficient disclosures, and responsibility for updating disclosures where appropriate.

### **II. INTENDED AUDIENCE: WHO NEEDS THIS WORK PRODUCT AND WHY DO THEY NEED IT**

- A. Intended Audience
1. Personnel with litigation responsibilities including outside counsel, in-

house counsel, eDiscovery specialists and technical experts, corporate/government officers and regulators.

(a) Outside counsel who may need guidance in complying with the intentions of Rule 26(a)(1).

(i) Understanding what information is required can help them draft the questions for their client.

(b) Inside counsel

(i) Understanding the information required to be provided as part of Initial Disclosure can allow inside counsel to track certain information prior to litigations being filed, making it easier to respond when a litigation is filed.

(c) Government agencies/employees

2. Judges, with the goal of providing a practical framework for evaluating and enforcing sufficient and productive compliance with Rule 26(a)(1).
3. Legislators and Rules Committees that may be faced with making law with the goal of providing practical considerations for evaluating the sufficiency of Rule 26(a)(1) compliance and potential supplements, commentary or revisions thereto.

#### B. Why Do They Need It?

1. Providing information required under Rule 26(a)(1) may not reduce the costs, volume, or duration of discovery over the course of a case, as intended.
2. The information provided in initial disclosures may not be useful to pursuing discovery later in the case.
3. The Rule 26(a)(1) obligations may be too onerous for one or more parties given the early stage of the case. Claims may not yet be well-defined, and a complaint may not set out sufficient facts to allow defendants to identify relevant information at this stage of litigation.
4. Some parties may misunderstand the nature of their obligations resulting in a waste of time and resources for all parties.

### III. COMMENTARY OUTLINE

#### A. General Governing Principles – Rule 26(a)(1)

## 1. Relevant History of the Rule

- (a) Initial disclosures are intended to allow efficient and proportional access to relevant information early in the life of a case so that parties can focus additional discovery and streamline the pretrial process.
- (b) 1991: The proposed Rule required disclosure of information relevant to matters alleged with particularity, even if unfavorable to the disclosing party.
- (c) 1993: As enacted, Rule 26(a) required initial disclosure of information regarding potential witnesses, documentary evidence, damages, insurance, expert information, and pretrial disclosure of evidence that may be offered at trial—this included disclosure of information that was unfavorable to the disclosing party. Districts were permitted to opt out. The stated purpose of the revision was to “accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information[.]”
- (d) 2000: In recognition of “widespread support for national uniformity,” the Rule was amended to make 26(a)(1)(B) mandatory and to limit disclosures to information the disclosing party “may use to support” its claims or defenses. A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use. The disclosure obligation applies to “claims and defenses” and therefore requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party.

## 2. 2016 Mandatory Initial Disclosures Pilot Project (“MIDP”). The Judicial Conference Advisory Committee on Civil Rules initiated the MIDP to investigate the potential effect of more demanding disclosure requirements. The Federal Judicial Center issued a final report on the project in 2022. In Oct. 2023, the Discovery Subcommittee recommended that the topic be dropped from the Advisory Committee’s agenda. The Final Report found the following:

- (a) The disclosure requirement is not toothless because it is tied directly to the exclusion provisions of Rule 37(c)(1). Parties must give careful thought to what they will use in the litigation from the

outset.<sup>1</sup>

- (b) Rule 26(a)(1) disclosures are intended to “eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement.”<sup>2</sup>
- (c) Rule 26(a)(1)(A)(i), which requires parties to briefly indicate the general topics on which such persons have information, “should not be burdensome” and is intended to “assist other parties in deciding which depositions will actually be needed.”<sup>3</sup>
- (d) Rule 26(a)(1)(A)(ii) requires parties to disclose categories of documents relevant to their claims and defenses. These disclosures can allow parties “(1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests.”<sup>4</sup>
- (e) Rule 26(a)(1)(A)(iii) directs any party claiming damages or other monetary relief to provide a computation of those damages or other relief and make available all unprivileged documents on which such computation is based. This requires computation supported by documents.<sup>5</sup> This requirement can be considered the functional equivalent of a request for production or standing interrogatory.
- (f) Rule 26(a)(1)(A)(iv) requires production of any insurance policy that might cover all or a part of a judgment entered in the case. This requirement can be considered the functional equivalent of a standing request for production.
- (g) Vague, conclusory allegations should not give requesting parties unfettered access to information, nor should they impose on responding parties an obligation to engage in a broad investigation on plaintiffs’ behalf. “Broad, vague, and conclusory allegations sometimes tolerated in notice pleading—for example, the assertion that a product with many component parts is defective in some unspecified manner—should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design,

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<sup>1</sup> See § 2053 Initial Disclosure, 8A Fed. Prac. & Proc. Civ. § 2053 (3d ed.)

<sup>2</sup> See FED. R. CIV. P. 26(a)(1) Advisory Committee’s notes.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006).

manufacture, and assembly of the product.”<sup>6</sup>

### 3. Impact of Rule 26(a)(1) on litigation

- (a) 1997 Federal Judicial Center study: Initial disclosure is being widely used and is apparently working as intended, increasing fairness and reducing costs and delays far more often than decreasing fairness or increasing costs and delays. Attorneys reported that initial disclosure reduced litigation cost and time. Multivariate analyses confirmed these impressions for disposition time but not for litigation cost.<sup>7</sup>
- (b) 1998 Survey in District of Minnesota: Oliphant, Robert E. (1998) "Four Years of Experience with Rule 26(A)(1): The Rule is Alive and Well," William Mitchell Law Review: Vol. 24: Iss. 2, Article 6.<sup>8</sup>
- (c) 2009 ACTL/IAALS Survey: 34 percent of the respondents said that the current initial disclosure rules reduce discovery, and 28 percent said they save the clients money.<sup>9</sup>

### 4. Examples and discussion of successful Rule 26(a)(1) compliance (efficiency and exchange of key documents early in case)

### 5. Case Law

- (a) Cases providing background information about or general interpretation of Rule 26(a)(1) obligations.
- (b) Cases providing guidance to parties on compliance with Rule 26(a)(1) obligations including considerations of noncompliance.

### B. Intended Purpose of Rule 26 Initial Disclosures

- 1. To improve the efficiency and reduce cost overall of fact discovery by providing parties with essential information about the case early on.

### C. Requirements for Compliance with Rule 26 Initial Disclosures

- 1. Rule 26(g) imposes an obligation to make a reasonable inquiry to ensure that the party's disclosures are complete and accurate.

<sup>6</sup> See FED. R. CIV. P. 26(a)(1) Advisory Committee's notes.

<sup>7</sup> <https://www.fjc.gov/sites/default/files/2012/discovery.pdf>

<sup>8</sup> <https://open.mitchellhamline.edu/wmlr/vol24/iss2/6>.

<sup>9</sup> [https://iaals.du.edu/sites/default/files/documents/publications/actl-iaals\\_final\\_report\\_rev\\_8-4-10.pdf](https://iaals.du.edu/sites/default/files/documents/publications/actl-iaals_final_report_rev_8-4-10.pdf).

2. Parties need not conduct “an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings.”<sup>10</sup>
3. To satisfy Rule 26, parties must make an unequivocal statement that they may rely upon an individual on a motion or at trial. Merely mentioning an individual during discovery is not enough to meet the Rule 26 standard.<sup>11</sup>
4. Description and categorization of the disclosures must be sufficient to enable opposing parties “(1) to make an informed decision concerning which documents might need to be examined ... and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests.”<sup>12</sup>
5. Where “a party is unwilling to conduct a reasonable inquiry in advance of making Rule 26(a)(1) disclosures, that party cannot defeat the purposes of Rule 26(a)(1) simply by providing a laundry list of undifferentiated witnesses.”<sup>13</sup>
  - (a) With the exception of Rules 26(a)(1)(A)(iii) and (iv), Rule 26(a)(1) should not function like a de facto discovery request for all information relevant to the action. Instead, it should provide up-front, reasonably accessible information based on the parties’ assessment of the claims, which can lay the groundwork for future discovery.
  - (b) Disclosure requirements should be imposed equally. Just as defendants must provide information to allow plaintiffs to prosecute their cases, defendants should have access to the documents plaintiffs may rely on to support their allegations.

#### D. Potential Obstacles to Meaningful Initial Disclosures

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<sup>10</sup> *Sender v. Mann*, 225 F.R.D. 645 (D. Colo. 2004).

<sup>11</sup> *Goosen v. Minn. Dep’t of Transp.*, 105 F.4th 1034 (8th Cir. 2024) (upholding trial court’s refusal to consider affidavits submitted by the plaintiff in opposition to the defendant’s motion for summary judgment when the plaintiff had not identified the affiants in Rule 26 initial disclosures or in interrogatory answers); *Sanders-Peay v. New York City Dep’t of Educ.*, No. 20-CV-1115 (PKC) (VMS), 2024 WL 3937597, at \*8 (E.D.N.Y. Aug. 26, 2024). See also *Lujan v. Cabana Mgmt., Inc.*, 284 F.R.D. 50, 73 (E.D.N.Y. 2012) (citing *Kullman v. New York*, No. 07-CV-716 (GLS) (DRH), 2009 WL 1562840, at \*6–8 (N.D.N.Y. May 20, 2009)) (collecting cases).

<sup>12</sup> 1993 Advisory Committee Note.

<sup>13</sup> *Sender v. Mann*, 225 F.R.D. 645 (D. Colo. 2004) (bankruptcy litigation trust failed to satisfy the rule by listing 196 investors and 126 brokers without identifying those who had knowledge, instead giving the same general disclosure for each person); *Tamas v. Fam. Video Movie Club, Inc.*, 304 F.R.D. 543, 544 (N.D. Ill. 2015) (defendant disclosed 3,300 current and former employees).



1. Vague, conclusory pleadings that fail to allege sufficient facts to allow responding parties to meaningfully provide relevant information up front.
2. Lengthy and detailed pleadings that can make it hard to know where to focus initial investigation and disclosure.<sup>14</sup>
3. The deadline for making initial disclosures is early in the case with a relatively short deadline after the Rule 26(f) conference, which may occur before a party has a good handle on relevant facts, custodians, and documents.
4. Protective Order and ESI Protocol negotiations prior to giving detailed disclosures (including with respect to damages) may delay meaningful disclosures or production of documents.
5. Information systems may not be set up to facilitate quick identification and retrieval.
6. Until custodian interviews take place, it may not be clear what systems are being used or where relevant files are stored.
7. Legal strategy may include providing less detailed initial disclosures early in the case for reasons that could include if one or both parties intend to explore early settlement.
8. Relative lack of case law on initial disclosure requirements.
9. Scope of the rule as written requires disclosure of information that “the disclosing party may use to support its claims or defenses,” which is more narrow and may require more time and investigation to determine, instead of requiring disclosure of information “relevant” to the claim or defenses in the case, which is broader and likely easier to isolate.
10. Misunderstanding the scope and timing of the duty to supplement initial disclosures.<sup>15</sup>
11. Growing data volumes may impact the sufficiency or usefulness of data produced pursuant to Rule 26(a)(1), as there may be significant volumes left

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<sup>14</sup> United States ex rel. Hunt v. Merck-Medco Managed Care, LLC, 223 F.R.D. 330 (E.D. Pa. 2004) (U.S. listing of approximately 3,900 individuals did not violate its disclosure duties because the allegations were very broad, and a large number of persons would have knowledge of facts relating to them).

<sup>15</sup> 2000 Committee Note: “A party must supplement its disclosures when it determines that it may use a witness or document that it did not previously intend to use.”



unproduced at that stage of litigation.

E. Guidelines, Recommendations, and Best Practices for Sufficient Compliance with Rule 26(a)(1)

1. Guidance on efficient and beneficial Rule 26(a)(1) compliance

- (a) Parties should keep the intended purpose of the rule in mind when completing the initial disclosures (expedite discovery, focus on data that would inevitably need to be disclosed).
- (b) Parties should focus on identifying their essential fact witnesses, relevant documents, theories of their case (both affirmative and defensively), and damage calculations.
- (c) Depending on the nature of the case, precise calculation of damages might not be possible at the outset of the case, and/or may depend on obtaining relevant information from the other side. In such events, even if a plaintiff is not able to calculate its damages at the outset, the plaintiff should be able to articulate the method by which it intends to prove damages (e.g., calculating a reasonable royalty in IP infringement cases, calculating defendant's revenues or profits in cases involving disgorgement damages, use of constructive trust, damages based on loss of goodwill or reputation, etc.) Where a plaintiff intends to seek lost profit damages, it should be able to articulate the basis and at least preliminary calculations of the lost profits it claims.
- (d) If the disclosing party intends to produce relevant documents as part of its disclosure (*see, e.g.*, practice in districts such as the Eastern District of Texas), the disclosing party should set out the sources from which such documents will be collected for production and set out a schedule for making such production.
- (e) Before tendering Rule 26(a)(1) disclosures, the parties should consider engaging in a discussion to identify facts that will allow the disclosing party to identify appropriate persons and/or documents, and parties should consider including in their Initial Disclosures the facts or assumptions used to determine the identity of persons and/or documents being disclosed.
- (f) The parties may want to discuss how proportionality impacts the scope of initial disclosures based on the amount in controversy and other factors provided for in Rule 26.

- (g) Indicating briefly the general topics on which potential custodians likely have information could assist the other party(ies) in deciding which depositions are necessary.<sup>16</sup>
- (h) Providing the names of service or other providers as potential custodians or deponents if their costs and/or fees are part of the damages calculation.<sup>17</sup>
- (i) In particularly large or complex cases, parties may find it more efficient to engage in early discussions about waiving initial disclosures (or at least modifying the timing of such disclosures) and instead crafting a comprehensive discovery plan that will result in providing the information otherwise covered by initial disclosures. This can help alleviate the problems of overdesignating potential persons with knowledge or dumping documents of little or no relevance.
- (j) Although not required by the Rule, parties may consider ranking or prioritizing the persons identified as custodians so the receiving party understands the likely relative importance of such witnesses.
- (k) Although not required by the Rule, parties may consider disclosing the data sources from which relevant documents may be collected.

## 2. Examples of inefficient and ineffective attempts to comply with Rule 26(a)(1)

- (a) Providing opposing counsel with a large quantity of custodians not only opens up the disclosing party to more depositions than necessary but can be grounds for a motion to compel (and potentially sanctions) if the disclosures aren't specific in a way that is helpful.<sup>18</sup>
- (b) Providing categories of potentially relevant information without providing names of custodians attached to such information is ineffective and considered deficient.<sup>19</sup>

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<sup>16</sup> *Poitra v. Sch. Dist. No. 1 in the Cnty. of Denver*, 311 F.R.D. 659, 664 (D. Colo. 2015)

<sup>17</sup> *See, e.g., Watson v. Argee Transp. Co.*, No. 4:23-CV-00722-NCC, 2024 U.S. Dist. LEXIS 63451 (E.D. Mo. Apr. 5, 2024)

<sup>18</sup> *Sender v. Mann*, 225 F.R.D. 645, 649 (D. Colo. 2004).

<sup>19</sup> *Forrest v. Facebook, Inc.*, No. 22-cv-03699-EJD (VKD), 2023 U.S. Dist. LEXIS 1189, at \*7 (N.D. Cal. Jan. 2, 2023)

### 3. Analysis of continuing obligations for Rule 26(a)(1) compliance throughout litigation

- (a) How much diligence should go into supplementation?
  - (i) What depth and breadth of review is required of a party to determine whether additional information has surfaced that triggers the duty to supplement?
  - (ii) Best practices for counsel and client in periodically assessing the need for supplementation, including, e.g., internally calendaring dates for review (e.g., “every 60 days”), and/or identifying litigation inflection points that will trigger review (e.g., upon the conclusion of internal custodian interviews, before finalizing interrogatory responses, upon the conclusion of document discovery, 60 days before the close of fact discovery, upon the conclusion of depositions, etc.).
- (b) Rule 26(e): supplementation is required “if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing”
  - (i) Guiding principles, with hypotheticals:
    - (1) A party (or a court) could reasonably conclude the information has been “made known” and therefore need not have been the subject of supplementation (e.g., name and subject matter of knowledge was identified in an interrogatory response).
    - (2) A party (or a court) could not reasonably conclude the information was “made known” and therefore should have been the subject of supplementation (e.g., the name appeared among multiple cc’s on a few emails dealing with the subject matter within a large document production); while noting that...
  - (ii) The best practice is always to supplement and not have to rely on the “made known” exception.
- (c) Consideration for the parties to agree upon deadlines for supplementation.
  - (i) Should the rule be amended to prescribe such deadlines?

- (ii) If not, should scheduling orders regularly include such deadlines?
  - (iii) Reasons in favor of or against case-by-case and/or party-agreed deadlines.
  - (iv) Reasons for or against court-prescribed deadlines vs. functional considerations for the timing of supplementation: a deadline eliminates any question about when it must happen, but is that potentially too soon to be meaningful or too late to be helpful?
- (d) Consequences for failure to supplement
  - (i) Rule 37(c) and related committee notes
  - (ii) Case law
- 4. Enforcement by courts (and consistency in enforcement)
  - (a) Model Standing Orders
- 5. 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/noncustodial 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 ...”
    - (i) Parties should disclose the following information for each custodian:
      - (1) Title
      - (2) Employment Dates
      - (3) Description of Involvement
      - (4) Contact Information
  - (c) Broad list of categories that parties can negotiate from to reach agreement on what will be included on a case-by-case basis.

F. Intersection between Initial Disclosures and Rule 26(f) conferences

1. Considerations for using 26(f) conferences to help parties focus their initial disclosures and make compliance with Rule 26(a)(1) more efficient and effective.
  - (a) Additional disclosures regarding claims and factual support for same
  - (b) Factors impacting proposed damages
2. Negotiation between the parties with consent from the court to agree 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 in order to facilitate more robust and useful disclosures.
3. Utilize the 26(f) conference to agree to specific core documents or information that the parties will produce.
4. Court or jurisdiction-provided checklists of information types expected to be provided in initial disclosures.<sup>20</sup>
5. Discussion of counsel's duty to work with the client to be able to provide meaningful and reasonably detailed disclosures.

G. 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.

1. Move back the deadline for initial disclosures.
2. Encourage more robust Rule 26(f) conferences, with a longer timeline for preparing disclosures.
3. Different stages of disclosure, with certain information to be disclosed at an early stage, with more robust disclosures later in discovery (to the extent still necessary).
4. Consideration of Rule 26(a)(1) disclosures including a certification that identifies the legal holds that have been implemented
  - (a) What might this entail – simply to certify that holds have been implemented, or to actually identify those holds, and if the latter, to what degree – names of custodians? Issues addressed? Specific language?

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<sup>20</sup> See, e.g., Eastern District of Pennsylvania.

This working draft document was created for discussion purposes only for the 2024 Annual Meeting of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). It is not intended for distribution beyond members of the Sedona Working Group Series. Comments are welcome and may be sent by email to [comments@sedonaconference.org](mailto:comments@sedonaconference.org)

- (b) To what extent are privilege or attorney work-product concerns implicated?
- (c) If parties are required to certify, does this give too much power to the court to sanction parties even when they were taking reasonable steps to preserve.

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