From: Jared Bennett
To: RulesCommittee Secretary
Subject: Revised Proposed Change to Rule 26(a)(1)(A)(i)
Date: Wednesday, October 13, 2021 2:32:49 PM

21-CV-X

Dear Rules Committee:

I propose a change to Fed. R. Civ. P. 26(a)(1)(A)(i) in an effort to make initial disclosures more useful for targeted discovery and early settlement discussions. When I was practicing and now that I am deciding discovery disputes, I have noticed that initial disclosures about fact witnesses are not helpful in their present, traditional form. In my experience, it seems quite common for a disclosing party to produce a lengthy list of witnesses accompanied by a generic description of what the witnesses will say. Usually, this same generic description is used for multiple witnesses. This becomes especially problematic in cases where there are numerous witnesses that have this same generic designation, and opposing counsel is left with the choice to depose all of them or to guess as to which of the witnesses has unique information that is worth deposing. Although the 1993 and 2000 Advisory Committee Notes provide some guidance as to how these disclosures should be made in a common sense fashion, there is considerable variation in the requirements that different courts place on disclosing parties in terms of the specificity of information about each disclosed witness.

This variation has led to at least two ill effects. First, disclosing counsel have an incentive to disclose as many witnesses a possible with as little meaningful information so that opposing counsel has to guess about who is deposition-worthy and who is not. To determine who is "deposition-worthy," opposing counsel must use up some of its interrogatories, which is inefficient. This makes discovery unnecessarily costly and ineffective. Second, because little meaningful information is required in an initial fact-witness disclosure, disclosing counsel has very little incentive to actually speak to a disclosed witness to know whether that witness has anything useful to say at all. In my experience as a lawyer and judge, the initial disclosure of fact witnesses amount to a "knee-jerk, disclose-them-all-even-though-we-haven't-talked-to-them-yet list" that results in inefficient fact discovery and stifles early settlement discussions.

Given this state of affairs, I propose that Rule 26(a)(1)(A)(i) require a more clear statement about the information that disclosing attorneys must provide for each witness to help the bench and the bar obtain maximum benefit from initial disclosures, which will fulfill the worthy purposes of Fed. R. Civ. P. 1. To accomplish this, my suggestion is to borrow from the disclosure rule pertaining to non-report-producing experts (i.e., Rule 26(a)(2)(C)). Rule 26(a)(1)(A)(i) could require the disclosing attorney to initially disclose: (1) the subject matter of the witness's testimony; and (2) a summary of the facts and lay opinions that the witness will provide. This specific requirement will send a clear message to both the bench and the bar as to the type of specificity required for initial disclosures; whereas now, it is certainly ambiguous as to the detail required. Adding this level of detail will reduce the need for follow-up interrogatories about which generically-described witness knows what, may reduce Rule 45 subpoena practice, will make deposition selection more efficient, will

improve the prospect of early settlement discussion, and will make these pre-trial disclosures easier to evaluate in the event of a Rule 37(c) challenge for summary judgment or before trial.

I recognize that counsel may object that this will be a burden. However, Rule 26(g) already provides that any disclosure that a party makes is certified to be "complete and correct as of the time it is made" after the party has engaged in a "reasonable inquiry." By disclosing a witness under current Rule 26(g), counsel should already know the subject of the witness's testimony and the facts/lay opinions that the disclosed witness will offer. This is especially true where, as here, the only witnesses a party must disclose are those that the party plans on calling in support of its claims or defenses. Indeed, if a party puts a witness on a list of supporters for that party's claims or defenses, the party should already be aware of the basic information that the proposed rule change would require. Thus, providing a more robust disclosure should not be an additional burden under the current rules. In fact, I think that this will encourage counsel to engage with witnesses sooner, which will transform initial disclosures from a knee-jerk, disclose-them-all-even-though-we-haven't-talked-to-them-yet list into something useful for guiding discovery and, hopefully, generating settlements. Of course, as more information about what a witness knows comes to light during the iterative discovery process, Rule 26(e) will provide for supplementation that will further guide discovery. Therefore, I respectfully request amending Rule 26(a)(1)(A)(i) to incorporate the disclosure obligations in Rule 26(a)(2)(C).

Respectfully,

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United States Magistrate Judge

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