June 16, 2026

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

Re: Suggested Amendment to Federal Rule of Civil Procedure 26(a)(2)(B)(v) - Standardizing the Required Prior-Testimony List for Retained Experts

Dear Secretary Dubay:

I respectfully suggest that the Advisory Committee on Civil Rules consider a narrow amendment to Federal Rule of Civil Procedure 26(a)(2)(B)(v). The current rule requires a retained expert to provide a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition. The rule does not, however, specify what identifying information that list must contain. As a result, the lists served in practice are often incomplete, inconsistent, or practically unusable, and they generate avoidable discovery disputes. The amendment proposed below would require a short, standardized set of identifying fields for each listed case. It would improve the quality of a disclosure the rule already mandates. It would not require any party to file a deposition transcript, expert report, or other discovery material; it would not disturb Rule 5(d)(1)'s limits on filing discovery; and it would not create any new public database or impose any new technology burden on the courts.

1. The problem the amendment addresses

Rule 26(a)(2)(B)(v) was designed to let an opposing party locate an expert's prior testimony so that it can be evaluated and, where appropriate, used for impeachment. That purpose fails when the list omits the information needed to find the testimony. In practice, the lists vary widely. Common defects include:

- a case identified only by a short or informal name (for example, “Smith v. Jones”) with no court and no docket number;
- a list of case names with no dates of testimony, so the reader cannot tell when the expert testified or which testimony is recent;
- case names that cannot be reliably matched to any record because the caption is abbreviated, misspelled, or inconsistent with how the case is indexed;
- the same expert describing the same prior case differently across disclosures in different matters; and

- a case identified without any indication of the subject on which the expert testified, so the reader cannot tell whether the prior testimony is relevant.

Each defect forces the requesting party to spend time and money reconstructing information the disclosing party already possessed. The expert knows the cases in which the expert testified; the marginal burden of identifying each case completely is slight. The burden of running down an incomplete list falls on the opposing party and, when the parties cannot resolve the dispute, on the court.

2. Why text, rather than case-by-case enforcement, is the right fix

A reasonable question is whether existing tools already address the problem. A court can compel a more complete list under Rule 37, and a diligent party can raise the deficiency at a meet-and-confer. Those tools exist, but they operate only after a dispute has formed, one matter at a time, and only when a party has the resources to pursue the issue. They do not prevent the recurring, low-grade friction that the rule's silence creates in the first place.

The defects described above recur precisely because the rule states a duty ("a list of all other cases") without stating the content of the list. Where a rule names a required disclosure but not its required contents, drafters of the disclosure fill the gap inconsistently, and the resulting disputes are about what the rule requires rather than about the facts of the case. The Committee has repeatedly cured that kind of recurring ambiguity by specifying contents in a short vertical list rather than leaving the contents to case-by-case litigation. The proposed amendment does only that. It does not expand the universe of experts covered, change who must disclose, or add a new category of disclosure; it states the contents of a list the rule already requires.

An initial review of expert-designation materials located in the proponent's case files showed that prior-testimony information is not presented in a standardized format. Several designations referenced attached testimony lists, deposition logs, or curriculum vitae materials, but the searchable designation text did not itself provide a usable, fielded list. In the entries reviewed, prior-testimony information sometimes included case caption, date, court, and case number, but did not consistently identify whether the testimony occurred at trial or deposition, the party for whom the expert testified, or the testimony's general subject matter.

3. Proposed amendment to Rule 26(a)(2)(B)(v)

The amendment replaces the single sentence now in subparagraph (v) with a sentence that foreshadows a vertical list of required fields. Proposed new language is shown in the rule text below; the surrounding subparagraphs of Rule 26(a)(2)(B) are unchanged.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

* * *

(v) for each case in which the witness testified as an expert at trial or by deposition during the previous 4 years:

(A) the case caption;
(B) the court and docket number;
(C) the date of the testimony and whether it was given at trial or by deposition;
(D) the party for whom the witness testified; and
(E) the general subject matter of the testimony.

If the witness cannot provide an item of information for a case because the information is protected by statute, by a court order, or by a sealing order, the witness must so state and must identify the protected item rather than omit the case.

Drafting choices reflected above: The list uses "must" to state the duty, a colon to foreshadow the vertical list, items placed at the end of the sentence, and the serial "and" after the penultimate item — consistent with the style of the restyled Civil Rules. The fields are deliberately stated without a "to the extent known" or "if known after reasonable inquiry" qualifier: such a qualifier would reintroduce the very vagueness the amendment is meant to cure, because a disclosing party could treat every field as optional. A witness who genuinely lacks an item for a protected reason is covered by the final sentence, which keeps a sealed or protected case visible on the list (as an acknowledged omission) instead of silently dropping it.

4. Proposed Committee Note

Rule 26(a)(2)(B)(v) is amended to standardize the information that the existing prior-testimony list must contain. The former rule required "a list of all other cases" in which the witness testified as an expert during the previous four years but did not specify the contents of the list. The amendment identifies the items the list must include so that an opposing party can locate and evaluate the prior testimony.

The amendment does not require a party to file an expert report, a deposition transcript or recording, or any other discovery material, and it does not change Rule 5(d)(1)'s limits on filing discovery materials. It does not require disclosure of information protected by statute, by a court order, or by a sealing order; when such information cannot be provided for a case, the witness states that the information is protected rather than omitting the case, so that the existence of the prior testimony remains disclosed.

The amendment does not expand the category of witnesses subject to Rule 26(a)(2)(B). It does not apply to witnesses who do not provide a written report under Rule 26(a)(2)(C).

5. Anticipated objections and responses

Objection. Rule 5(d)(1) bars filing discovery materials.

Response. The amendment requires no filing of any kind. It standardizes the contents of a disclosure that Rule 26 already requires the expert to provide to the other party. Nothing is filed with the court, and Rule 5(d)(1) is untouched.

Objection. The proposal invades expert or third-party privacy.

Response. The required fields are case-identifying information already within the scope of the existing prior-testimony disclosure — caption, court and docket number, date, retaining party, and subject. The amendment requires no home address, contact information, or personal data, and its final sentence expressly preserves statutory protections, court orders, and sealing orders.

Objection. Private testimony databases already solve this.

Response. Commercial databases assist the lawyers who can afford and access them; they vary by side and practice area and do not reach every expert or every case. Rule 26 should still require the testifying expert to provide a usable disclosure to the opposing party regardless of whether that party subscribes to a private service.

Objection. This burdens experts.

Response. The amendment standardizes a list retained experts must already prepare. The expert is the person best positioned to identify the cases in which the expert testified, and the marginal effort of stating the caption, court, docket number, date, party, and subject for each case is small relative to the cost the opposing party now bears in reconstructing an incomplete list.

Objection. This is a meet-and-confer problem, not a rulemaking problem.

Response. Case-by-case enforcement addresses individual disputes after they arise but does not prevent the recurring ambiguity that the rule's silence creates. Specifying the contents of a required list is a classic drafting fix and is the kind of clarification the Committee has often made by adding a short list of required items.

6. A separate, longer-term question for study

A standardized list improves the disclosure that already exists between the parties. It does not, by itself, make prior expert testimony searchable across cases. Whether a national expert-testimony locator could improve enforcement of Rule 26(a)(2)(B)(v) — and whether such a

locator could operate without requiring the filing of discovery materials, exposing sealed matters, or imposing unfunded technology costs — is a separate and harder question that this suggestion does not ask the Committee to resolve.

I raise it only to be candid about the larger problem and to keep the present suggestion narrow. If the Committee were ever to take up that question, the appropriate course would be an empirical study by the Federal Judicial Center addressing cost, privacy, sealing, protective orders, transcript ownership, expert availability, public access, and the feasibility of a limited district-level test. I am prepared to develop that question separately, through the appropriate channels, and I am not asking that it be coupled to the modest amendment proposed here.

7. Enclosures

This suggestion is accompanied by:

- Attachment 1 — Proposed rule text (Section 3 above, in clean form).
- Attachment 2 — Proposed Committee Note (Section 4 above).

Thank you for considering this suggestion. I would be glad to provide additional examples or to respond to any questions from the Advisory Committee on Civil Rules.

Respectfully submitted,

SHOOK & STONE, CHTD.

John B. Shook

Attachment 1
Proposed Rule Text

Federal Rule of Civil Procedure 26(a)(2)(B) would read as follows. New language appears in italics; all other text is the current rule, shown for context. Subparagraphs (i)–(iv) and (vi) are unchanged and are omitted here for brevity, as indicated by the ellipsis.

(a) Required Disclosures.

* * *

(2) Disclosure of Expert Testimony.

* * *

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

* * *

(v) *for each case in which the witness testified as an expert at trial or by deposition during the previous 4 years:*

(A) the case caption;
(B) the court and docket number;
(C) the date of the testimony and whether it was given at trial or by deposition;
(D) the party for whom the witness testified; and
(E) the general subject matter of the testimony.

If the witness cannot provide an item of information for a case because the information is protected by statute, by a court order, or by a sealing order, the witness must so state and must identify the protected item rather than omit the case.

* * *

Note on numbering: The amendment adds subitems (A)–(E) within Rule 26(a)(2)(B)(v). The pre-existing item formerly designated (v) is preserved as the introductory clause; no later subparagraph is renumbered. If the Committee prefers, the same content could instead be set out in a new subparagraph (vi) to avoid nested lettering within (v); the substance is identical.

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Attachment 2
Proposed Committee Note

Rule 26(a)(2)(B)(v) is amended to standardize the information that the existing prior-testimony list must contain. The former rule required "a list of all other cases" in which the witness testified as an expert during the previous four years but did not specify the contents of the list. The amendment identifies the items the list must include — the case caption; the court and docket number; the date and type of testimony; the party for whom the witness testified; and the general subject matter — so that an opposing party can locate and evaluate the prior testimony.

The amendment responds to a recurring problem: because the former rule named the disclosure without specifying its contents, the lists served in practice were often incomplete or inconsistent. A case might be identified by an informal name with no court or docket number, without a date, or without the subject of the testimony, leaving the opposing party unable to find the prior testimony the disclosure was meant to reveal. Standardizing the required fields reduces these disputes without altering the scope of the disclosure obligation.

The required items are stated without a qualifier such as "to the extent known." A retained expert is ordinarily able to identify the cases in which the expert testified and the basic information about each. A qualifier permitting the omission of any field at the discloser's discretion would reintroduce the inconsistency the amendment is designed to cure.

The amendment does not require a party to file an expert report, a deposition transcript or recording, or any other discovery material, and it does not change Rule 5(d)(1)'s limits on filing discovery materials. It does not require disclosure of information protected by statute, by a court order, or by a sealing order. When such information cannot be provided for a particular case, the final sentence directs the witness to state that the information is protected and to identify the protected item rather than omit the case, so that the existence of the prior testimony remains disclosed even when a specific field cannot be completed.

The amendment does not expand the category of witnesses subject to Rule 26(a)(2)(B). It does not apply to witnesses who do not provide a written report under Rule 26(a)(2)(C).