

A fisherman from State A repeatedly trespassed across a homeowner's property in State B to fish in a publicly owned lake. After one of the fisherman's trips across the homeowner's property, the homeowner discovered that her \$80,000 marble statue had been destroyed. The homeowner filed a lawsuit in a federal court in State B to enjoin the fisherman from trespassing and to recover for the damage to her statue.

During discovery, the homeowner interviewed a former friend of the fisherman. The friend said that the fisherman had bragged about trespassing across the homeowner's property and accidentally knocking over a marble statue on one occasion. The homeowner expects the fisherman to testify at trial that he did not know he was trespassing and never saw the statue. To impeach the fisherman's anticipated testimony, the homeowner intends to call the friend to testify. The homeowner does not want to disclose the friend's identity to the fisherman.

What is the homeowner's strongest argument to accomplish her goal?

- A. The fisherman could have discovered this evidence on his own.
- B. The fisherman will have a full and fair opportunity to cross-examine the friend.
- C. The friend's testimony will be used solely to impeach the fisherman's testimony.
- D. The homeowner's failure to disclose the friend as a witness is harmless.

Explanation:

Required discovery disclosures

(FRCP 26(a))

Type	Required disclosures	Time to disclose
Initial disclosures*	<ul style="list-style-type: none">• Persons with relevant information• Items in party's possession that support claim/defense• Computation of damages & supporting material• Relevant insurance policies	<ul style="list-style-type: none">• ≤ 14 days after initial planning conference• ≤ 30 days after post-conference service or joinder• As court orders or parties stipulate
Expert testimony	<ul style="list-style-type: none">• Identity of expert witnesses• Expert's written report• If no report, subject matter & summary of testimony	<ul style="list-style-type: none">• ≥ 90 days before trial• ≤ 30 days after disclosure to rebut evidence• As court orders or parties stipulate
Pretrial disclosures*	<ul style="list-style-type: none">• Testifying witnesses• Deposition testimony to be used at trial• Documents/exhibits to be used at trial	<ul style="list-style-type: none">• ≥ 30 days before trial• As court orders

FRCP = Federal Rule of Civil Procedure.

*Does not apply to evidence used solely for impeachment.

Federal Rule of Civil Procedure 26(a) requires parties to automatically make initial disclosures, disclosures of expert testimony, and pretrial disclosures. **Pretrial disclosures** *must* include:

- the **name, address, and phone number of each witness**—separately identifying witnesses expected to testify and those who may be called if the need arises
- the **deposition testimony** that will be used at trial *and*
- all **documents and exhibits**—separately identifying items expected to be offered as evidence and those that may be offered if the need arises.

The purpose of pretrial disclosures is to avoid surprises at trial regarding *substantive* evidence—ie, evidence offered to help prove a material fact or issue. As a result, these requirements **do not apply to impeachment evidence**—ie, evidence used solely to discredit a witness and not to prove a material fact or issue. Therefore, the homeowner's strongest argument to avoid disclosing the friend's identity is that his testimony will be used solely to impeach the fisherman's testimony.

(Choices A & B) The fact that the fisherman could have discovered this evidence on his own and will have a full and fair opportunity to cross-examine the friend does not provide grounds for nondisclosure. Instead, the homeowner can withhold the friend's identity only if his testimony will be used solely for impeachment.

(Choice D) Failure to identify a witness in pretrial disclosures bars the nondisclosing party from using that witness's testimony in a motion, hearing, or trial—unless the failure to disclose was substantially justified or is harmless. But if the witness's testimony will be used only for impeachment purposes, the rules for pretrial disclosures do not apply and there is no need to show that the nondisclosure is harmless.

Educational objective:

A party's pretrial disclosures must include (1) the name, address, and phone number of each witness, (2) deposition testimony that will be used at trial, and (3) all documents and exhibits. But these requirements do not apply to witnesses and evidence that will be used solely for impeachment.

References

- Fed. R. Civ. P. 26(a)(3) (required pretrial disclosures).