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ADVANCE SHEET HEADNOTE
November 23, 2026

2026 CO 70

No. 26SA179, *De Leon Cabral v. Chan Law Firm PC*—C.R.C.P. 37(c)(1)—Harm and Proportionality Analysis—Discovery Violation Sanction.

In this C.A.R. 21 proceeding, the supreme court considers whether the district court abused its discretion by precluding late-disclosed expert testimony and damages evidence. The district court determined that preclusion was an appropriate sanction for the late disclosure because the untimely disclosure was "highly prejudicial" and not substantially justified.

The supreme court now concludes that the district court properly applied the law and did not abuse its discretion in precluding the late-disclosed experts and damages evidence. Accordingly, we discharge our order to show cause, and we remand this case to the district court for further proceedings consistent with this opinion

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2026 CO 70

Supreme Court Case No. 26SA179
Original Proceeding Pursuant to C.A.R. 21
District Court, City and County of Denver, Case No. 25CV31590
Honorable Ericka F. H. Englert, Judge

In Re
Plaintiff:

Javier De Leon Cabral,

v.

Defendants:

Chan Law Firm PC, Catherine Chan, and Joshua H. Russcol.

Order Discharged
en banc
November 23, 2026

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JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ**, **JUSTICE BOATRIGHT**, **JUSTICE BERKENKOTTER**, and **JUSTICE BLANCO** joined.
JUSTICE HOOD, joined by **JUSTICE SAMOUR**, dissented.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 In this C.A.R. 21 proceeding, plaintiff Javier De Leon Cabral asserts that the district court abused its discretion by precluding late-disclosed expert testimony and damages evidence. The district court determined that preclusion was an appropriate sanction for the late disclosure because the untimely disclosure was "highly prejudicial" to defendants and not substantially justified.

¶2 We now conclude that the district court properly applied the law and did not abuse its discretion in precluding the late-disclosed experts and damages evidence. Accordingly, we discharge our order to show cause, and we remand this case to the district court for further proceedings consistent with this opinion.

I. Facts and Procedural History

¶3 Defendants Chan Law Firm, PC, Catherine Chan, and Joshua H. Russcol represented De Leon Cabral in an immigration matter and missed a critical deadline, causing him damages. De Leon Cabral then retained new counsel and filed the instant legal malpractice lawsuit against defendants.

¶4 In this lawsuit, De Leon Cabral seeks monetary damages for, among other things, (1) lost wages and (2) the attorney fees that he incurred to correct defendants' alleged negligent representation. In his initial disclosures, De Leon Cabral itemized his damages as $28,842 in lost wages between 2022 and 2023, a to-be-determined amount of future lost wages from 2023 on, and $4,042.50

in attorney fees incurred to remedy defendants' alleged negligent representation. Thereafter, in the case management order, De Leon Cabral did not identify damages experts who would testify either to his alleged lost wages or to the reasonableness of the attorney fees that he was seeking to recover. The parties, however, agreed that the expert disclosure deadline would be February 9, 2026 and that the trial would begin on June 15, 2026.

¶5 As pertinent here, throughout this case, De Leon Cabral's counsel made conflicting representations as to whether he planned to retain experts to testify to lost wages and the reasonableness of the legal fees that De Leon Cabral was seeking. Early in the case, counsel represented that no attorney of record would serve as an expert witness regarding defendants' alleged malpractice and, separately, that the case was a "classic negligence case" by which the jury could find defendants' negligence without the assistance of expert testimony. At a later hearing concerning an unrelated discovery dispute, however, De Leon Cabral's counsel identified "Jeffrey and Ted Opp" as expert witnesses who would testify to De Leon Cabral's alleged lost wages.

¶6 Thereafter, De Leon Cabral responded to written discovery requests that sought, among other things, details on the lost wages and attorney fee damages alleged in his initial disclosures. With respect to his alleged lost wages, De Leon Cabral stated that he would provide an expert to testify to the amount of

his alleged lost wages, and although he conceded that his responses to date were incomplete, he stated that he would supplement those responses in his expert disclosures. As to his claim for attorney fees, he did not indicate whether an expert would testify to the reasonableness of the alleged attorney fee damages.

¶7 The expert disclosure deadline, February 9, 2026, subsequently passed, and De Leon Cabral did not disclose any experts to testify either to his alleged lost wages or to the reasonableness of the attorney fees that he was seeking. As a result, approximately one month later, defendants filed a motion to strike any evidence of De Leon Cabral's alleged lost wages and attorney fee damages. In support of this motion, defendants asserted that De Leon Cabral had not produced supporting evidence regarding those alleged damages, endorsed necessary experts, or identified the amount of his alleged future lost wages.

¶8 Subsequently, five weeks after the expert disclosure deadline and nearly three months before the trial in this case was set to begin, De Leon Cabral belatedly served his expert disclosures. He did not request leave from the district court to do so. Nor did he seek to amend the case management order to allow for a later expert disclosure deadline.

¶9 As pertinent here, De Leon Cabral disclosed Jeffrey and Theodore Opp as expert witnesses to testify to lost wages damages, and their expert report opined that De Leon Cabral's past and future lost wages totaled $597,033, a more than

fifteenfold increase in De Leon Cabral's previously disclosed damages calculation. De Leon Cabral further disclosed Catharine Davies, one of his attorneys of record in the instant case and his current immigration attorney, as a non-retained expert. The bulk of Davies's report discussed defendants' alleged malpractice in the underlying immigration case. The report, however, also contained a section entitled "Damages," which said, "It is my profession [sic] opinion that malpractice errors of Chan Law resulted in damage to De Leon Cabral as follows: . . . Legal fees associated with the cost and legal representation associated with reopening the order of removal."

¶10 Defendants then filed a second motion to strike, this one directed to De Leon Cabral's untimely expert designations. In this motion, defendants argued that they would be prejudiced by De Leon Cabral's untimely disclosures.

¶11 De Leon Cabral responded that preclusion of the evidence at issue would be a disproportionate sanction, particularly given that his counsel had missed the expert disclosure deadline due to a "good-faith calendaring error." De Leon Cabral further contended that defendants were not surprised by the late disclosure because, among other things, his counsel had stated the names of his proposed experts in open court (and at one point incorrectly stated the expert disclosure deadline without correction by defendants' counsel). De Leon Cabral

also noted that he had referenced in his discovery responses his intent to obtain an expert.

¶12 At no time in De Leon Cabral's responses to defendants' motions did he request a continuance of the trial date. To the contrary, he proposed extending defendants' rebuttal expert disclosure deadline by a reasonable period and granting "such limited discovery relief as may be necessary to cure any prejudice, *without moving the June 15, 2026 trial* unless the Court determines that to be necessary." (Emphasis added.) Similarly, in a pleading requesting a hearing on the expert disclosure dispute, he noted in passing that continuing the trial was a possible remedy, but he did not request a continuance.

¶13 The district court subsequently conducted a hearing on defendants' motions to strike and, in a detailed oral ruling, methodically considered each of the six factors set forth in *Todd v. Bear Valley Village Apartments*, 980 P.2d 973, 978 (Colo. 1999), for assessing whether De Leon Cabral's late disclosures were substantially justified or harmless.

¶14 As to the first *Todd* factor (importance of the witness's testimony), *id.*, the court concluded that the witnesses were "very important" to both De Leon Cabral and defendants.

¶15 Regarding the second factor (the party's explanation for its failure to comply with the required disclosures), *id.*, the court acknowledged De Leon Cabral's

explanation for his failure to comply with the required disclosure (i.e., that the missed deadline was due to a calendaring error and was a "good faith mistake") but noted that miscalendaring a deadline does not constitute "excusable neglect" under *Farmers Insurance Group v. District Court*, 507 P.2d 865, 867 (Colo. 1973).

¶16 With respect to the third *Todd* factor (potential prejudice to the other party), *Todd*, 980 P.2d at 978, the district court determined that allowing the evidence to be considered at trial would be "highly prejudicial" to defendants because (1) the late-disclosed lost wages damages were "substantially enlarged"; and (2) De Leon Cabral had not explicitly identified, by the time of the hearing, an expert who would opine as to the reasonableness of the claimed attorney fees. Allowing Davies to do so, the court observed, would further prejudice defendants because Davies had not addressed the reasonableness of De Leon Cabral's attorney fees in her expert report.

¶17 As to the fourth *Todd* factor (the availability of a continuance to cure any prejudice), *id.*, the court observed that although a continuance might have been possible, "both sides are telling me that they don't want a continuance. Both the Defense and Plaintiff agree that a continuance is not what they're seeking."

¶18 Regarding the fifth factor (the extent to which admitting the late-disclosed evidence would disrupt the trial), *id.*, the court did not believe that factor to be "quite as applicable."

¶19 Finally, as to the sixth *Todd* factor (the non-disclosing party's bad faith or willfulness), *id.*, the court did not find that De Leon Cabral's counsel had acted willfully or in bad faith but recognized that he showed "lack of diligence and lack of care in calendaring deadlines and confirming the correctness of their calendaring of deadlines." Further, the court noted that once De Leon Cabral's counsel had realized his calendaring error, he did not act expeditiously to correct it and did not seek leave of the court to file untimely disclosures or beg forgiveness until he filed his response to the motion to strike.

¶20 Having thus considered each of the *Todd* factors and found De Leon Cabral's untimely disclosures to be highly prejudicial to defendants, the court explained that it had limited options in terms of remedies, given that the close of discovery was less than two weeks away, the trial date was then less than two months away, and neither side was seeking a continuance of the trial. At this point in the court's oral ruling, after it was clear that De Leon Cabral was going to lose the motion, his counsel interrupted the court to say, "I just wanted to make sure Plaintiff's position is clear. We're not asking for a continuance, but if the Court finds that that is necessary to cure the prejudice, we would not object to a continuance."

¶21 The court then proceeded to conclude that the *Todd* factors favored preclusion because (1) the late disclosure caused defendants significant harm and

was not substantially justified; and (2) given the procedural posture of the case, there was no other option but preclusion "that would lead to a fair result." The court thus granted defendants' motion to strike evidence of De Leon Cabral's alleged lost wages and attorney fee damages and granted in part defendant's motion to strike De Leon Cabral's untimely expert designations, precluding Jeffrey and Theodore Opp's proposed expert testimony regarding De Leon Cabral's alleged lost wages and the portion of Davies's report relating to attorney fees.

¶22 De Leon Cabral then, for the first time, stated that he would like a continuance, noting that the court had "indicated that the Court has time on its calendar." The court responded that De Leon Cabral needed to confer with opposing counsel and could file a motion requesting a continuance. The court clarified, however, that it remained to be determined whether the court could provide a new trial date within a reasonable time without the trial's being the fifth setting on the court's calendar. The court emphasized, "[W]hen I say there's time on the Court's calendar, I don't mean that I've got weeks that are blank."

¶23 A few days later, De Leon Cabral filed a motion to continue the trial, but the court denied that motion, stating, "Plaintiff's Motion is styled as a motion to continue trial but is, in essence, a motion to reconsider the Court's oral ruling . . . and reach a different result." Because De Leon Cabral had provided no new

information and had not demonstrated that the court had made a manifest error of fact or law, the court denied De Leon Cabral's motion to continue.

¶24 De Leon Cabral then petitioned this court pursuant to C.A.R. 21 for immediate relief from the district court's discovery order, and we issued an order to show cause.

II. Analysis

¶25 We begin by discussing our jurisdiction under C.A.R. 21 and setting forth the applicable standard of review. Next, we address C.R.C.P. 37(c)(1) and De Leon Cabral's claims thereunder. We then turn to the question of whether the district court abused its discretion by precluding the late-disclosed evidence at issue and conclude that it did not.

A. Original Jurisdiction

¶26 Our decision to exercise our original jurisdiction under C.A.R. 21 is a matter within our sole discretion. *People v. Lawrence*, 2026 CO 39, ¶ 12, 590 P.3d 278, 281. An original proceeding under C.A.R. 21 is an extraordinary remedy that is limited in both its purpose and availability. *Id.* We have thus exercised our discretion under C.A.R. 21 to review whether a district court has abused its discretion or ruled in excess of its jurisdiction when no other adequate appellate remedy would exist. *Id.* And although discovery orders are typically interlocutory in nature and not reviewable under C.A.R. 21, we have exercised our original jurisdiction under

that rule when a district court's discovery order would significantly hinder a party's ability to litigate the merits of the controversy at issue. *Warden v. Exempla, Inc.*, 2012 CO 74, ¶ 16, 291 P.3d 30, 34.

¶27 Here, the district court's order precluding De Leon Cabral's late-disclosed damages and expert testimony regarding his purported lost wages and attorney fees is a discovery order that may well have a significant effect on De Leon Cabral's ability to litigate the merits of this case and, therefore, could not readily be remedied through the ordinary appellate process. Accordingly, we believe that the exercise of our original jurisdiction under C.A.R. 21 is warranted and appropriate here.

B. Standard of Review

¶28 We review a district court's discovery orders for an abuse of discretion. *Fox v. Alfini*, 2018 CO 94, ¶ 17, 432 P.3d 596, 600. A district court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or is based on a misapprehension of the law. *Cath. Health Initiatives Colo. v. Earl Swensson Assocs., Inc.*, 2017 CO 94, ¶ 8, 403 P.3d 185, 187.

C. C.R.C.P. 37(c)(1)

¶29 C.R.C.P. 37(c)(1) states that if a party, without substantial justification, fails to disclose information required by C.R.C.P. 26(a) (setting forth the parties' mandatory disclosures, including disclosures of expert testimony), then that party

is not permitted to present the undisclosed evidence at trial unless (1) the nondisclosure "has not caused and will not cause significant harm" to the opposing party or (2) "such preclusion is disproportionate" to the harm caused. *See also Cath. Health Initiatives Colo.*, ¶ 15, 403 P.3d at 188 (reiterating that to determine the appropriate sanction for a discovery violation, the district court must perform the harm and proportionality analysis mandated by C.R.C.P. 37(c)(1)).

¶30 In *Todd*, 980 P.2d at 978, we provided a non-exhaustive list of factors for a district court to consider in conducting this harm and proportionality analysis. These factors include (1) the importance of the evidence at issue, (2) the party's explanation for its failure to comply with the required disclosure, (3) the potential prejudice or surprise to the opposing party that would arise from allowing the evidence, (4) the availability of a continuance to cure any such prejudice, (5) the extent to which admission of the evidence would disrupt the trial, and (6) the non-disclosing party's bad faith or willfulness. *Id.*

¶31 After performing the foregoing harm and proportionality analysis, a district court may, in its discretion, fashion a sanction proportionate to the harm caused. *Cath. Health Initiatives Colo.*, ¶ 11, 403 P.3d at 188. If the court determines that preclusion of the undisclosed evidence is not an appropriate or adequate sanction, then it should "look to the nature and severity of the violation and then to the

alternative sanctions specified in the rule" and impose a sanction that is "directly commensurate with the prejudice caused to the opposing party." *Trattler v. Citron*, 182 P.3d 674, 682 (Colo. 2008) (interpreting the pre-2015 version of C.R.C.P. 37(c)(1)); *see also Cath. Health Initiatives Colo.*, ¶¶ 11–15, 403 P.3d at 188 (explaining the 2015 amendments to C.R.C.P. 37(c)(1)).

D. Application of the *Todd* Factors

¶32 De Leon Cabral principally argues that the district court did not properly address the *Todd* factors and therefore abused its discretion in ordering a preclusion sanction. We are not persuaded.

¶33 Here, as noted above, the district court addressed, in detail, each of the above-listed *Todd* factors. Specifically, the court assessed (1) the importance of the evidence at issue, (2) De Leon Cabral's explanation for failing to comply with the disclosure rules, (3) the prejudice to defendants, (4) whether a continuance would be appropriate, (5) the potential disruption to the trial, and (6) any bad faith or willfulness on De Leon Cabral's part. Then, in light of its assessment of each of these factors, the court determined that the appropriate sanction was preclusion of (1) De Leon Cabral's lost wages and attorney fee damages, (2) Jeffrey and Theodore Opp's proposed expert testimony regarding De Leon Cabral's alleged lost wages, and (3) Davies's proffered expert testimony relating to De Leon Cabral's attorney fees.

¶34 We perceive no abuse of discretion in this conclusion. Specifically, we perceive no misapprehension of the governing law, and although reasonable minds could perhaps have differed as to the appropriate sanction, we see nothing in the district court's analysis that could be deemed manifestly arbitrary, unreasonable, or unfair. *Cath. Health Initiatives Colo.*, ¶ 8, 403 P.3d at 187.

¶35 Notwithstanding the foregoing, De Leon Cabral contends that the district court erred by (1) referencing excusable neglect in its harm and proportionality analysis; (2) concluding that defendants were prejudiced or unfairly surprised, even though they were on notice of De Leon Cabral's intent to retain an expert; (3) failing to consider whether a continuance would have cured any prejudice to defendants while focusing, instead, on whether either party had requested a continuance; and (4) not considering and explaining why alternative, lesser sanctions were insufficient to address prejudice to defendants. We address and reject each of these arguments in turn.

¶36 De Leon Cabral first asserts that because *Farmers Insurance Group*, 507 P.2d at 866–67, arose in the context of a case involving C.R.C.P. 6(b)(2), as opposed to a case involving C.R.C.P. 37(c)(1), C.R.C.P. 6(b)(2)'s "excusable neglect" standard cannot displace the requisite harm and proportionality analysis in determining the proper sanction for an untimely expert disclosure. In referring to excusable neglect, however, the district court did not displace the requisite harm and

proportionality analysis. Rather, as discussed above, the district court conducted the requisite analysis, and its reference to the lack of excusable neglect was merely one factor that the court considered in that analysis. De Leon Cabral cites no authority suggesting that the existence or absence of excusable neglect is irrelevant to the second *Todd* factor (regarding a party's explanation for its failure to comply with the required disclosures), and we have seen none.

¶37 Next, De Leon Cabral contends that defendants were not prejudiced or unfairly surprised by the late disclosure because they were on notice that De Leon Cabral had planned to retain an expert. To support this contention, De Leon Cabral points to his brief identification, at an unrelated discovery hearing, of Jeffrey and Theodore Opp as his expert witnesses, his discovery responses indicating his intent to retain a lost wages expert, and defendants' failure to correct him after he stated in open court the incorrect expert disclosure deadline. The purpose of expert disclosures, however, is not merely to provide notice of a party's intent to call an expert, but to advise the opposing party of the substance of the expert's opinions and the supporting material from which those opinions arise. *See* C.R.C.P. 26(a)(2)(B)(I) (requiring experts to provide, among other things, a written report including all opinions that the expert intends to express at trial and the reasons therefor, and all data or other information considered by the expert in forming the opinions). As the district court reasonably

concluded, the vague and sometimes conflicting statements regarding experts that De Leon Cabral's counsel had made prior to the expiration of the expert disclosure deadline fell short of these requirements.

¶38 De Leon Cabral further contends that the district court did not properly assess whether a preclusion sanction was proportional to the harm. Specifically, in De Leon Cabral's view, the court focused on whether either party had requested a continuance, rather than on whether a continuance could cure any prejudice to defendants. This, however, misstates what the court actually did. The court did not rely solely on the fact that neither party had requested a continuance. To the contrary, as noted above, the court considered (1) the importance of the evidence at issue, (2) De Leon Cabral's explanation for failing to comply with the disclosure rules, (3) the prejudice to defendants, (4) whether a continuance would be appropriate, (5) the potential disruption to the trial, and (6) any bad faith or willfulness on De Leon Cabral's part. This is precisely the harm and proportionality analysis that *Todd*, 980 P.2d at 977–78, and *Catholic Health Initiatives Colorado*, ¶ 15, 403 P.3d at 188, required the court to conduct.

¶39 To the extent that De Leon Cabral now contends that the trial court erred in failing to order a continuance—regardless of the other *Todd* factors and despite both parties' repeated insistence that they did not want a continuance—we disagree. Notwithstanding De Leon Cabral's suggestion to the contrary, the

possible availability of a continuance was not the sole factor guiding the district court's discretion. Nor can we say that the district court abused its discretion in declining to grant a continuance that neither party sought or desired.

¶40 We likewise are unpersuaded by the suggestion that the district court's order made it impossible for De Leon Cabral to proceed in this case. The court's order principally left De Leon Cabral with the damages that he had claimed throughout most of this case, precluding him from increasing his claimed damages more than fifteenfold shortly before trial. In this way, this case is easily distinguishable from *Pinkstaff v. Black & Decker (U.S.) Inc.*, 211 P.3d 698, 704–05 (Colo. 2009). There, the district court struck the defendant's answer and affirmative defenses as a discovery sanction. *Id.* at 701. Such an order amounted to a default judgment, which literally precluded the defendant from proceeding in the case. *Id.* at 703–04. The present discovery order bears no resemblance to the order at issue in *Pinkstaff*.

¶41 Finally, De Leon Cabral asserts that the district court could not impose a preclusion sanction without expressly addressing why less severe sanctions would have been insufficient to cure any prejudice. Although, as noted above, a district court "may use its discretion to impose an appropriate sanction in cases where preclusion is an inappropriate or inadequate sanction," *Trattler*, 182 P.3d at 682, we have seen no authority, and De Leon Cabral cites none, supporting his

contention that when a court decides to preclude late-disclosed evidence as a sanction, the court is required to explain on the record why it rejected all other possible sanctions.

III. Conclusion

¶42 For these reasons, we conclude that the district court correctly applied the law and did not abuse its discretion in precluding De Leon Cabral's late-disclosed damages and expert testimony regarding his purported lost wages and attorney fees.

¶43 Accordingly, we discharge our order to show cause, and we remand this case to the district court for further proceedings consistent with this opinion.

JUSTICE HOOD, joined by **JUSTICE SAMOUR**, dissented.

JUSTICE HOOD, joined by JUSTICE SAMOUR, dissenting.

¶44 Because I believe that the district court abused its discretion by concluding that it had no choice but to preclude Javier De Leon Cabral's lost-wages and attorney-fees damages experts without independently considering whether a continuance of the trial would have eliminated any potential prejudice to defendants, I respectfully dissent. In doing so, I accept the majority's recitation of the relevant facts, but I reiterate and supplement those facts as necessary to share my analysis.

¶45 Although I reach a different conclusion, I have no quarrel with most of the majority's analysis. It has a "check-the-boxes" quality to it that is mostly reasonable even if the outcome it affirms strikes me as decidedly unfair. Sure, De Leon Cabral's counsel's calendaring error was careless and potentially set this case back by a few months, but precluding any expert testimony about De Leon Cabral's lost wages—unquestionably the centerpiece of his case—because of what all agree was a good-faith mistake is disproportionate, especially when that mistake could have been so easily remedied by a continuance.

¶46 Of course, trial courts enjoy tremendous discretion in this highly fact-driven setting. *See Pinkstaff v. Black & Decker (U.S.) Inc.*, 211 P.3d 698, 702–03 (Colo. 2009). I might disagree with where the district court landed, but it's not my place to substitute my judgment for that of the judicial officer who is so much closer to the

facts (and trying to manage a busy docket). What's more, the district court here exercised its considerable discretion thoughtfully by identifying the generally applicable law and making many relevant findings that are well supported by the record.

¶47 Despite all of this, what prompts me to write separately is the district court's conclusion that, in the end, it really had *no choice* but to "gut the [p]laintiff's case" (its words earlier in the hearing). More precisely, the court said that "given these circumstances, the [c]ourt . . . has very limited options in terms of remedies . . . . I have two options. *I can strike these expert disclosures or not*." (Emphasis added.) That conclusion was error. Regardless of whether De Leon Cabral affirmatively requested a continuance, the simple fact remains that a brief continuance could have cured any potential prejudice to defendants caused by the late disclosures. And while not immediately at issue, there were other ways to sanction De Leon Cabral's counsel for causing an unnecessary delay.

¶48 The majority camouflages this critical error by pointing to *other* findings by the district court. Maj. op. ¶¶ 38–39. But the majority neglects the district court's failure to consider whether a continuance could've alleviated the potential harm from the late disclosure of the experts, as mandated by C.R.C.P. 37, even if De Leon Cabral's counsel was reluctant to embrace that remedy. As for counsel's questionable choice not to formally request a continuance before the district court

ruled (rather than simply making no objection to one in the midst of the court's ruling), it's worth remembering that we're not here to hand out grades for legal strategy; we're implementing a body of law that strives for procedural fairness. And what happened here isn't that.

¶49 So, let's return to that body of law. The late disclosures at issue here fall at the intersection of C.R.C.P. 26 and 37. Rule 26(a)(2) provides the disclosure requirements for expert testimony, and Rule 37(c)(1) authorizes a court to impose sanctions if a party fails to meet those requirements. *Cath. Health Initiatives Colo. v. Earl Swensson Assocs., Inc.*, 2017 CO 94, ¶¶ 9–11, 403 P.3d 185, 187.

¶50 More specifically, Rule 26(a)(2)(A) requires parties to disclose, without waiting for a request, the identity and field of expertise of any person who may present expert testimony at trial. Rule 26(a)(2)(B) provides that generally, such disclosures "shall be made by a written report," and then specifies what the report must include. The rule provides that the witness's direct testimony "shall be limited to matters disclosed in detail in the report." *Id.*

¶51 Rule 37(c)(1), in turn, provides: "A party that without substantial justification fails to disclose information required by C.R.C.P. 26(a) . . . shall not be permitted to present any evidence not so disclosed at trial . . . *unless such failure has not caused and will not cause significant harm, or such preclusion is disproportionate to that harm*." (Emphasis added.) The rule further provides that "[t]he court, after

holding a hearing if requested, may impose *any other sanction proportionate to the harm*." *Id.* (emphasis added).

¶52 These two rules work together "'to provide a "just, speedy, and inexpensive determination" of civil cases.'" *Trattler v. Citron*, 182 P.3d 674, 683 (Colo. 2008) (quoting *Todd v. Bear Valley Vill. Apartments*, 980 P.2d 973, 979 (Colo. 1999)). To achieve this goal, Rule 37's framework is flexible. *Cath. Health Initiatives Colo.*, ¶ 11, 403 P.3d at 188. In fashioning an appropriate sanction, courts are required "to assess the harm and determine the appropriate proportional sanction." *Id.* at ¶ 13, 403 P.3d at 188. Courts should generally "impose the least severe sanction that will ensure there is full compliance with a court's discovery orders and is commensurate with the prejudice caused to the opposing party." *Pinkstaff*, 211 P.3d at 702; *see Trattler*, 182 P.3d at 682.

¶53 The most recent amendments to Rule 37 were intended "to reduce the likelihood of preclusion of previously undisclosed evidence." C.R.C.P. 37 cmt. 4 to 2015 amend. Under the previous version of the rule, courts were required to preclude late-disclosed evidence unless the failure was harmless. Under that standard, a party could show merely *some* harm "and thereby cause preclusion of otherwise important evidence," *id.*, which isn't what the drafters intended. *See Cath. Health Initiatives Colo.*, ¶ 14, 403 P.3d at 188; *see also Pinkstaff*, 211 P.3d at 703 ("[U]nless enforcement of procedural requirements is essential to shield

substantive rights, litigation should be determined on the merits and not on formulistic application of the rules.").

¶54 In *Todd*, we explained that it is the non-disclosing party's burden "to establish that its failure to disclose was either substantially justified or harmless," so they must be given an opportunity to do so. 980 P.2d at 978. "[T]he question is whether the failure to disclose the evidence in a timely fashion will prejudice the opposing party by denying that party an adequate opportunity to defend against the evidence" rather than "whether the new evidence is potentially harmful to the opposing side's case." *Id.* at 979.

¶55 We identified several factors that may aid a court in this determination:

> (1) the importance of the witness's testimony;
>
> (2) the explanation of the party for its failure to comply with the required disclosure;
>
> (3) the potential prejudice or surprise to the party against whom the testimony is offered that would arise from allowing the testimony;
>
> (4) *the availability of a continuance to cure such prejudice*;
>
> (5) the extent to which introducing such testimony would disrupt the trial; and
>
> (6) the non-disclosing party's bad faith or willfulness.

Id. at 978 (emphasis added).

¶56 As relevant to the fourth factor, the district court observed that it had availability on its calendar to accommodate a continuance and thus "a continuance

would be possible." But the court then stated that "both sides are telling me that they don't want a continuance."

¶57 Although De Leon Cabral had expressed his willingness to "do anything to help [the] [d]efense in responding to these late disclosures, including allowance of additional time for discovery on—on especially damages, rebuttal experts, et cetera," the court questioned whether, even with extensions, there would be enough time to complete discovery and obtain rebuttal experts by the existing trial date. It was then—before the court ruled—that De Leon Cabral's counsel interjected to say that his client wasn't asking for a continuance, but he wouldn't object to one if the court found that a continuance was necessary to cure the prejudice. Even so, the court concluded that it really had no choice but to "gut" De Leon Cabral's case.

¶58 Trial courts shouldn't "deny a party an opportunity to present relevant evidence based on a draconian application of pretrial rules." *Trattler*, 182 P.3d at 682 (quoting *J.P. v. Dist. Ct.*, 873 P.2d 745, 750 (Colo. 1994)). This court has previously determined, in a case in which there was willful discovery misconduct, that a sanction effectively ending the litigation was improper because it was disproportionate to the prejudice caused. *Pinkstaff*, 211 P.3d at 704–05. Such a sanction was especially troubling because it punished the party, denying them

their day in court, because their attorneys missed deadlines and failed to appropriately respond to pleadings. *Id.* at 705.

¶59 Here, because the district court failed to understand its ability to choose a less severe sanction than preclusion and failed to properly exercise its discretion in imposing a proportionate sanction, I believe it abused its discretion by precluding De Leon Cabral's expert witnesses regarding lost-wages and attorney-fee damages.

¶60 For these reasons, I respectfully dissent.