

## **Rule 26. General Provisions Governing Discovery; Disclosure of Information**

(a) Disclosure of information; Methods to discover additional matter.

(1) Pretrial disclosures. At the status conference, the judicial officer shall determine whether to order the parties to exchange information and documents, and, if so, set the dates and sequence. If so ordered, each party shall provide to the other parties the following information regarding the evidence that the party may present at trial other than solely for impeachment purposes:

(A) The name, address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises.

(B) A copy of each exhibit, with a list of all exhibits which separately identifies those which the party expects to offer and those which the party may offer if the need arises.

(C) The identity of any expert witness, and copies of any exhibits to be used in connection with the expert's testimony.

(D) Financial information in accordance with a form(s) provided by the Court.

An order for pretrial disclosures shall not preclude a subsequent motion for a protective order, where appropriate.

(2) Discovery methods. In addition to any disclosures made pursuant to subparagraph (a)(1), parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; requests for production or for permission to enter property for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery scope and limits. Unless limited by order of the judicial officer in accordance with these Rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to an issue involved in the pending action, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the judicial officer if the judicial officer determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues in the litigation, and the importance of the proposed discovery in resolving the issue. The judicial officer may act upon his or her own initiative or pursuant to a motion under paragraph (c).

(3) Discovery of trial preparation materials. A party may obtain discovery of documents and tangible things that are relevant, and not privileged, and were prepared in anticipation of litigation or for trial only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery

of such materials when the required showing has been made, the judicial officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of SCR-Dom Rel 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Discovery of trial preparation of experts. Discovery of facts known and opinions held by an expert, otherwise relevant and not privileged, and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) A party may by deposition require a person whom any other party expects to call as an expert witness at trial to state the substance of the facts and opinions to which the expert is expected to testify and the grounds for each opinion. (iii) Upon motion, the judicial officer may order discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subparagraph (b)(4)(C) of this Rule, concerning fees and expenses as the judicial officer may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in SCR-Dom Rel 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, upon motion the judicial officer shall require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under this rule;

(ii) pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from an expert who has been retained or specially employed by the other party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial. The judicial officer may also order the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from an expert who is expected to be called as a witness at trial.

(5) Claims of privilege or protection of trial preparation materials. When a party withholds information otherwise discoverable under these Rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the

claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has made a good faith effort to resolve the dispute without court action, and for good cause shown, the judicial officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. In matters relating to a deposition, the court in the district where the deposition is to be taken may make such an order. The protective order may include one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the Court; (6) that a deposition after being sealed be opened only by order of the Court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Court.

Upon the filing of the motion for a protective order, further action with respect to the matter in dispute shall be stayed until the Court's determination of the motion. The provisions of SCR-Dom Rel 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery. Methods of discovery may be used in any sequence unless otherwise ordered by the judicial officer, and the fact that a party is conducting discovery shall not operate to delay any other party's discovery. Time limitations for completion of discovery will be set by order of the judicial officer.

(e) Motion to enlarge time for discovery. A motion for an enlargement of time for discovery shall require a showing of good cause and shall specify the discovery to be sought and the time within which the discovery is expected to be completed.

(f) Supplementation of disclosures and responses. A party who has made a disclosure or responded to a request for discovery is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the judicial officer or in the following circumstances:

(1) Where there was a question directly addressed to (A) the identity and location of persons having knowledge of specific discoverable matter, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) Where the party obtains information upon the basis of which (A) the party knows that the disclosure or response was incorrect when made, or (B) the party knows that the disclosure or response though correct when made is no longer true and the circumstances are such that a failure to amend it is in substance a knowing concealment.

## COMMENT

Subparagraph (a)(1) of this Rule allows the Court, in appropriate cases, to require the parties to disclose certain information and documents whether or not requested in discovery. It is intended to provide automatically for basic information likely to be needed to fairly determine the issues. The parties may employ traditional discovery methods to obtain the same or additional information to prepare for trial or make an informed decision about settlement.