

## **Rule 26. Duty to Disclose; General Provisions Governing Discovery**

### **(a) REQUIRED DISCLOSURES.**

(1) [Omitted].

(2) *Disclosure of Expert Testimony.*

(A) *In General.* A party must disclose to the other parties the identity of any witness it may use at trial to present 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 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:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition;

(vi) a statement of the compensation to be paid for the study and testimony in the case; and

(vii) the following certification, signed by the witness: "I hereby certify that this report is a complete and accurate statement of all of my opinions, and the basis and reasons for them, to which I will testify under oath."

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence set forth in the scheduling order issued pursuant to Rule 16(b)(5)(C) and (D).

(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(3) [Omitted].

(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

### **(b) DISCOVERY SCOPE AND LIMITS.**

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or length of depositions under Rule 30. By order, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2) requires a report from an expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

- (i) as provided in Rule 35(b); or
- (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

- (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and
- (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(C) *Orders and Agreements Controlling the Effects of Disclosure.*

(i) The court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other proceeding in any jurisdiction.

(ii) An agreement on the effect of disclosure in a proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(6) *Insurance Agreements.* A party may obtain for inspection and copying any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(c) PROTECTIVE ORDERS.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in this court—or as an alternative on matters relating to a deposition, in the court for the jurisdiction where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only by court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

(d) TIMING AND SEQUENCE OF DISCOVERY.

(1) *Timing.* Time limitations for completion of discovery will be set by court order. The court may order an enlargement of the time limitations for the completion of discovery, pursuant to Rule 16(b)(5)(E) and (F).

(2) *Sequence.* Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) SUPPLEMENTING DISCLOSURES AND RESPONSES.

(1) *In General.* A party who has made an expert disclosure under Rule 26(a) —or who has responded to an interrogatory, request for production, or request for admission— must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert Witness*. For an expert whose report must be disclosed under Rule 26(a)(2), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 16(c) are due.

(f) [Omitted].

(g) **SIGNING DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS.**

(1) *Signature Required, Effect of Signature*. Every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry, the discovery request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(B) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(C) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign*. Other parties have no duty to act on an unsigned request, response, or objection, until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification*. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

(h) **MEETING TO RESOLVE DISCOVERY DISPUTES.**

(1) *In General*. Before filing any motion relating to discovery except a motion pursuant to Rule 37(b) for sanctions for failure to comply with a court order, the affected parties or counsel must meet for a reasonable period of time in an effort to resolve the disputed matter. Any motion relating to discovery, except a motion pursuant to Rule 37(b), must contain, immediately below the signature of the attorney or party signing the motion, a certification that despite a good faith effort to secure it, the relief sought in the motion has not been provided. The certification must set forth specific facts describing the good faith efforts, including a statement of the date, time, and place of the meeting required by this rule.

(2) *Waiver*. The requirement of a meeting is waived if:

(A) the motion concerns a failure to serve any response whatever to a Rule 33, 34, or 36 discovery request or a failure to appear for a deposition or a Rule 35 examination and the motion is accompanied by a copy of a letter, sent at least 10 days before the motion was filed, asking that the opposing counsel or party respond to the discovery request or that the deponent or examinee appear for a rescheduled deposition or examination; or

(B) the movant certifies that, despite having sent to the opposing counsel or party, at least 10 days before the motion was filed, a letter (a copy of which must be attached to the motion) proposing a time and place for such a meeting, and despite having made 2 telephone calls to the office of the opposing counsel or party (the date and time of which calls must be specified in the motion), the movant has been unable to convene a meeting to resolve the disputed discovery matter.

## COMMENT TO 2017 AMENDMENTS

This rule incorporates the 2010 and 2015 amendments to *Federal Rule of Civil Procedure 26* with the following exceptions: 1) subsection (a)(2)(C)(i) does not include references to *Federal Rules of Evidence 702, 703, or 705*; 2) the timing of expert disclosures in subsection (a)(2)(D) differs; 3) the subsection entitled “Early Rule 34 Requests” is omitted because there is no discovery moratorium in the Superior Court; and 4) amendments to section (f) are not incorporated because this section was previously omitted. New subsection (b)(5)(C) was created to address an issue raised by a 2015 amendment to *Federal Rule of Civil Procedure 16*. Instead of referencing *Federal Rule of Evidence 502* in Rule 16(b)(4)(C), Rule 26(b)(5)(C) includes the text of *Federal Rule of Evidence 502(d) and (e)*. These new provisions govern the manner and means by which litigants and the court can control the effects of disclosure of privileged or protected information. Agreements reached under Rule 26(b)(5)(C) can be included in a scheduling order issued under Rule 16(b)(4).

## COMMENT

Subsection (a)(1). *Federal Rule of Civil Procedure 26(a)(1)* is inconsistent with Superior Court practice, and would ultimately slow down the process of discovery. The Superior Court rules allow parties to begin discovery at the filing of the complaint; this process gives parties greater options for early discovery than those available under the Federal Rules.

Subsection (a)(2) is new. It requires a written report from an expert; however, it clarifies the federal rule in accordance with the Federal Advisory Committee Notes and case decisions, which explain that legal counsel are not prohibited from being substantively involved with the preparation of the expert’s written report so long as the substance and conclusions are the expert’s own.

Subsection (a)(3). As it relates to pretrial disclosures, *Federal Rule of Civil Procedure 26(a)(3)* is incorporated in the pretrial statement required under Rule 16.

Subsection (b). The Advisory Committee Notes to the *Federal Rules of Civil Procedure* contain a lengthy discussion of the 2006 amendments to the federal rule addressing the discovery of electronically-stored information. Because these 2015

amendments to the Superior Court Rules closely follow the 2006 *Federal Rules of Civil Procedure* amendments, parties and counsel should refer to the *Federal Rules of Civil Procedure* Advisory Committee Notes for guidance. In particular, the *Federal Rules of Civil Procedure* Advisory Committee Notes to Rule 26(b) address the potential for cost-shifting in the context of discovery and state as follows:

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.