

Rule 26. General Provisions Governing Discovery

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods except as otherwise provided in Rule 30(a) and Rule 30A(a), (b): depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise, or unless otherwise provided in these rules, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court 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 the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, 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 any 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) *Insurance Agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he 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 court 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 Rule 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) *Trial Preparation: Experts.* ~~Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule 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)~~ Deposition of an Expert Who May Testify. Upon motion, the court may order ~~further discovery by other means~~ the deposition of an expert who may testify at trial, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(~~C~~E) of this rule, concerning fees and expenses as the court may deem appropriate. If Rule 26(b)(5)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial Preparation Protection for Draft Reports or Disclosures. Rule 26(b)(3) protects drafts of any report or disclosure required under Rule 26(b)(5), regardless of the form in which the draft is recorded.

(C) Trial Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rule 26(b)(3) protects communications between the party's attorney and any witness required to provide a report under Rule 26(b)(5)(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 upon in forming the opinions to be expressed.

~~(B)~~(A)(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 ~~preparation to prepare~~ preparation 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 ~~upon a~~

(ii) _____ on 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)~~(E) *Payment.* Unless manifest injustice would result, ~~(i)~~ the court shall require that the party seeking discovery :

(i) _____ pay the expert a reasonable fee for time spent in responding to discovery under ~~subdivisions Rule 26(b)(4)(A)(ii) and (b)(4)(B) of this rule or (D);~~ and

(ii) ~~with respect to for~~ discovery ~~obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to~~ under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred ~~by the latter party~~ in obtaining the expert's facts and opinions ~~from the expert.~~

(5) *Disclosure of Expert Testimony*

(A) In General. A party shall disclose to the other parties the identity of any witness it may use at trial to present expert testimony.

(B) Witnesses Who Shall Provide a Written Report. Unless otherwise stipulated or ordered by the court, upon motion or *sua sponte*, this disclosure shall 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 shall 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 ten 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; and

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

(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 shall state:

(i) the subject matter on which the witness is expected to present expert testimony; 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 shall make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures shall be made:

(i) by the party with the burden of proof on the claim or affirmative defense in support of which the expert testimony will be offered, at least 90 days before the close of discovery or, in cases without a discovery deadline, 90 days before trial; and

(ii) by the party not having the burden of proof on the claim or affirmative defense in regard to which the expert testimony will be offered, at least 60 days before the close of discovery or, in cases without a discovery deadline, 60 days before trial.

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

(6) Claims of Privilege or Protection of Trial Preparation Materials: Privilege Log. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as material prepared in anticipation of litigation or for trial, the party shall make the claim expressly and, without revealing

information that is privileged or protected, shall prepare a privilege log containing the following information: the respective author(s) and sender(s) if different; the recipient(s); the date and type of document, written communication or thing not produced; and in general terms, the subject matter of the withheld information. By written agreement of the party seeking the withheld information and the party holding the information or by court order, a privilege log need not be prepared or may be limited to certain documents, written communications, or things.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county or judicial district, as the case may be, where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the 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 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 disclosed or be disclosed 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.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to: (A) any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony as to experts, any additions or changes to information provided in the disclosures provided under Rule 26(b)(5)(B) and (C) and to information

given during the expert's deposition.

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

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

Rule 37. Failure to Make Discovery: Sanctions

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(c) ~~Expenses on~~ Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(b)(5) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)-(C).

(2) Failure to Admit. If a party fails to admit the genuineness of any documents or the truth of any matters as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable grounds to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

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