

Rule 26. DISCOVERY CONTROL

(a) Pre-Discovery Disclosures of Core Information/Other Cooperative Discovery Devices

(1) Initial Disclosure

(A) Within the time designated in the court's initial order setting the FED.R.CIV.P. 16 conference, the parties must make the disclosure required by FED.R.CIV.P. 26(a)(1). Disclosures must be made no later than seven days before the Case Management Conference unless a different time is set by court order or unless a party objects during the attorney conference and states the objection in the proposed case management order. At the time of the submission of the proposed case management order, the parties must certify that the conference required by FED.R.CIV.P. 26(f) has taken place and that the initial disclosures have been made.

(B) If the documents, electronically stored information, data compilations, and tangible things [collectively "items"] required for production are voluminous, or if other circumstances make their production unduly burdensome or expensive, the party may describe by category and location all such items in its possession,

custody or control and must provide the opposing party a reasonable opportunity to review all the items at the site they are located or maintained.

- (C) A party withholding information claimed privileged or otherwise protected must submit a privilege log that contains at least the following information: name of the document, electronically stored information, or tangible thing; description of the document, electronically stored information, or tangible thing, which description must include each requisite element of the privilege or protection asserted; date; author(s); recipient(s); and nature of the privilege. To withhold materials without such notices subjects the withholding party to sanctions under FED.R.CIV.P. 37 and may be viewed as a waiver of the privilege or protection.
- (2) **Expert Witnesses.** A party must make full and complete disclosure as required by FED.R.CIV.P. 26(a)(2) and L.U.CIV.R. 26(a)(2)(D) no later than the time specified in the case management order. Absent a finding of just cause, failure to make full expert disclosures by the expert designation deadline is grounds for prohibiting introduction of that evidence at trial.
- (A) For purposes of this section, a written report is “prepared and signed” by the expert witness when the witness executes the report after review.
 - (B) An attempt to designate an expert without providing full disclosure information as required by this rule will not be considered a timely expert designation and may be stricken upon proper motion or sua sponte by the court.
 - (C) Discovery regarding experts must be completed within the discovery period. The court will allow the subsequent designation or discovery of expert witnesses only upon a showing of good cause.
 - (D) A party must designate physicians and other witnesses who are not retained or specially employed to provide expert testimony but are expected to be called to offer expert opinions at trial. No written report is required from such witnesses, but the party must disclose the subject matter on which the witness is expected to present evidence under FED.R.EVID. 702, 703 or 705, and a summary of the facts and opinions to which the witness is expected to testify. The party must also supplement initial disclosures.

- (E) FED.R.CIV.P. 26(b)(3) protects drafts of any report or disclosure required by FED.R.CIV.P. 26(a) and communications between the party's attorneys and the witness, regardless of the form of the communication, except to the extent the communication relates to: (i) compensation for the expert's study or testimony; (ii) identity of facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identity of assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.
 - (F) The party seeking the deposition of an expert witness must pay the expert a reasonable fee for the time spent in preparing for and responding to the deposition and reasonable travel, room, and board expenses for the expert witness to attend the deposition.
- (3) **Failure to Disclose.** If a party fails to make a disclosure required by this section, any other party must move to compel disclosure and for appropriate sanctions under FED.R.CIV.P. 37(a). The failure to take immediate action and seek court intervention when a known fact disclosure violation other than as to expert witnesses occurs will be considered by the court in determining the appropriate sanctions to be imposed regarding a subsequent motion filed under FED.R.CIV.P.37(c). Challenges as to inadequate disclosure of expert witness(es) must be made no later than thirty days before the discovery deadline or will be deemed waived. Daubert motions challenging a designated expert must be filed no later than the deadline for dispositive motions or other deadline for such motions established by the case management order or other order, whichever is later.
- (4) **Discovery Before the Case Management Conference.** Discovery before the case management conference is governed by FED.R.CIV.P. 26(d).
- (5) **Supplementation of Discovery.** A party is under a duty to supplement disclosures at appropriate intervals under FED.R.CIV.P. 26(e) and in no event later than the discovery deadline established by the case management order.
- (b) **Setting Discovery Deadlines.** The Case Management Order will establish a firm discovery deadline consistent with the track assignment of the case.

- (1) The discovery deadline is that date by which all responses to written discovery, including supplementation of responses, required by the Federal Rules of Civil Procedure must be made and by which all depositions must be concluded. Supplementation of disclosures must be concluded by the discovery deadline.
 - (2) Counsel must initiate discovery requests and notice or subpoena depositions sufficiently in advance of the discovery deadline date to comply with this rule, and discovery requests that seek responses or schedule depositions that would otherwise be answerable after the discovery deadline date are not enforceable except by order of the court for good cause shown.
 - (3) The parties may not extend the discovery deadline by stipulation or without the consent of the court .
- (c) **Attorney/Party Signatures for Requests to Extend Discovery Deadlines.** The court in its discretion may require the requesting attorney and party to sign requests to extend discovery deadlines.
- (d) **Limitations on Use of Discovery.** The court should limit the number of depositions, interrogatories, requests for production and requests for admission to the needs of each particular case consistent with the track assignment. A specific interrogatory/request and its reasonably related subpart will be counted as one interrogatory/request.
- (1) **Expedited.** Interrogatories, requests for production of documents, and requests for admission should be limited to fifteen succinct questions or requests. Depositions should be limited to the parties and no more than three fact witness depositions per party without prior approval of the court.
 - (2) **Standard.** Interrogatories, requests for production of documents, and requests for admission should be limited to twenty-five succinct questions or requests. Depositions should be limited to the parties and no more than five fact witness depositions per party without prior approval of the court.
 - (3) **Complex.** The case management order should provide for discovery consistent with the needs of the case.
 - (4) **Administrative.** No discovery should be the norm.
 - (5) **Mass Torts.** The case management order should provide for discovery consistent with the needs of the case.

(e) **FED. R. CIV. P. 26(f) Conference of the Parties.** Early Meeting of Counsel/Attorney Conference. Except in categories of proceedings exempted from initial disclosures by Fed.R.Civ.P. 26(a)(1)(E), the attorneys and any unrepresented parties must confer by telephone or in person as soon as is practicable and no later than the deadline established by the court and discuss, at a minimum, the following:

(1) **Principal Issues.**

- (A) Identify the principal factual and legal issues in dispute;
- (B) Discuss the principal evidentiary basis for claims and defenses;
- (C) Determine the DCM case track as provided by LU.CIV.R. 1(c) and (d), days required for trial, and whether the case should be considered for ADR procedures.

(2) **Disclosure**

- (A) Discuss the arrangements for exchanging the disclosures required by FED.R.CIV.P. 26(a)(1) and whether any changes should be made in the timing, form, or requirement for such disclosures.
- (B) Confer on the following topics relating to electronically stored information [ESI]:
 - (i) The native format, media, and repositories of discoverable ESI;
 - (ii) Steps the parties will take to identify and preserve discoverable ESI to avoid a claim of spoliation;
 - (iii) The scope of e-mail discovery and any e-mail protocol;
 - (iv) Whether discoverable deleted ESI still exists, the extent to which restoration of deleted ESI is necessary, and who will bear the burden and cost of restoration;
 - (v) With respect to discoverable ESI, whether embedded data and metadata exist, whether they will be requested or should be produced, and how to address determinations regarding privilege and FED. R. CIV. P. 26(b)(3)-protected ESI;

- (vi) Whether responsive back-up and archival ESI exists, the extent to which back-up and archival ESI is needed and who will bear the burden and costs of obtaining such ESI;
 - (vii) The format and media to be used in the production of ESI;
 - (viii) The identity of sources and types of potentially discoverable ESI that a party does not intend to subject to discovery;
 - (ix) Whether any discoverable ESI is not reasonably accessible and the basis for that contention;
 - (x) If a party intends to seek discovery of ESI from sources or of types identified as not reasonably accessible, the parties should discuss: (i) the burden and cost of accessing and retrieving such ESI; (ii) any putative good cause for requiring production of all or part of such ESI; and (iii) any mitigating conditions such as scope, time, and cost shifting that might reduce the burden or cost of producing ESI that is not reasonably accessible;
 - (xi) How to handle inadvertent disclosure of privileged or FED. R. Civ. P. 26(b)(3)-protected ESI considering FED.R.EVID. 502.
- (3) **Motions.** Identify any motions whose early resolution would have a significant impact on the scope of discovery or other aspects of litigation.
- (4) **Discovery.** Consistent with case management track recommendations, determine what discovery is required, when discovery should be completed, whether discovery should be conducted in phases or be limited to or focused upon particular issues, and what limitations should be placed on discovery.
- (5) **Jurisdiction by a Magistrate Judge.** Discuss whether all parties consent to jurisdiction by a magistrate judge under 28 U.S.C. § 636.
- (6) **Settlement.** Discuss the possibilities for prompt settlement or resolution of the action and whether it would be helpful to schedule an early settlement conference.

- (7) **Preparation of a proposed case management plan and scheduling order.** The proposed order must set forth track and ADR recommendations, whether all parties consent to trial by a magistrate judge, the date and manner in which disclosures required under FED.R.CIV.P. 26(a) have been made, whether any party objects to the disclosures made and, if so, on what grounds, discovery limitations, deadlines for amendments to pleadings and joinder of additional parties, completion of discovery, designation of experts; filing of motions, including motions for summary judgment, *Daubert* motions, and other motions in limine. The attorneys of record and all unrepresented parties who have appeared in the action are jointly responsible for arranging the conference and attempting in good faith to agree on the proposed case management plan and scheduling order.
- (8) Whether any other orders should be entered by the court under FED.R.CIV.P. 16(b) or (c).