

DISCLOSURE REQUIREMENTS UNDER RULE 26 OF THE
FEDERAL RULES OF CIVIL PROCEDURE

JAMES TARMAN, ESQUIRE
COZEN AND O'CONNOR
2300 Bank One Center
1717 Main Street
Dallas, Texas 75201
(214) 462-3000
jtarman@cozen.com

Atlanta, GA
Charlotte, NC
Cherry Hill, NJ
Chicago, IL
Columbia, SC
Dallas, TX
Los Angeles, CA
New York, NY
Newark, NJ
Philadelphia, PA
San Diego, CA
Seattle, WA
W. Conshohocken, PA
Westmont, NJ

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I. **Rule 26(f) - Mandatory Discovery Conference**

- A. No discovery whatsoever allowed pursuant to Rule 26(d) in any case until the parties meet at a discovery conference, except:
 - 1. When local rules permit and/or the parties agree;
 - 2. Deposition of witnesses about to leave the country (see Rule 30(a)(2)(C)).
- B. Conference should be held “as soon as reasonably practicable”, but no later than 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b).
 - 1. The scheduling order deadline is now 90 days after appearance of defendant and within 120 after the complaint has been served on a defendant.
 - a. Old Rule deadline was 120 days after filing of the complaint.
 - b. Note that it is service on a defendant, not all defendants.
- C. Must submit a report to the court, substantially similar to new Form 35.
- D. Any party who refuses to participate is subject to sanctions.
- E. Purpose is to narrow the issues and plan how to develop the case for settlement and trial.

II. **Rule 26(a)(1)**

- A. Designed to accelerate the exchange information while eliminating the paperwork required to request same.
- B. After the Rule 26(f) conference, within 10 days the parties must meet the requirements of Rule 26(a)(1) that requires each party to disclose to the other parties without a discovery request the following:
 - 1. The name, and if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information (Rule 26(a)(1)(A));
 - a. Requires disclosure of persons who will be called as witnesses or who might be called as a witness by the other party or parties if their potential testimony was known.
 - b. Attorney should indicate briefly the general topics about which people will have information.
 - 2. A copy of or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings (Rule 26(a)(1)(B));
 - a. Does not require actual production of the documents: The party has the option of either producing the documents or identifying categories of relevant documents, i.e. fire marshall’s report, adjuster’s reports, witness statements, etc.

- b. A question arises concerning documents that a party discovers during an investigation and knows of their existence but does not actually take custody or control of, do these need to be disclosed?
 - c. Numbers 1 and 2 above are limited to “disputed facts” alleged with particularity in the pleadings; there is no disclosure regarding undisputed facts.
 - 3. A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered (Rule 26(a)(1)(C)); and
 - a. Disclosure not expected as to any portion of damages that must be calculated from information possessed by another party or person.
 - 4. For inspection and copying as under Rule 34 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 (Rule 26(a)(1)(D)).
- C. The parties are expected to narrow the disputed facts in the discovery conference.
- D. An obligation is placed on the parties to make a reasonable inquiry into the facts in preparing the disclosures (Rule 26(g)(1)).
- E. Cannot refuse to make disclosure or postpone it on grounds that the party has not fully investigated the case or based on the adversaries failure to comply with discovery requests.
- F. The disclosures must be in writing, signed, served and filed with the court unless local rules state otherwise. (Rule 26(g)(1)) Note that the majority of the local rules state that disclosures may not be filed with the court.
- G. On-going duty to supplement responses.
 - 1. Timing for supplementing is governed by
 - a. Stipulation of Parties;
 - b. Specific Court Order;
 - c. Local Rules;
 - d. Rule 26(e) which requires supplementing disclosures at “appropriate intervals.”
 - 2. Parties should consider stipulating to the timing of supplementing disclosures and discovery in their initial meeting.
 - 3. The duty to supplement or correct an initial disclosure arises if the information disclosed is:
 - a. Incomplete or incorrect;
 - b. Additional or corrected information has not otherwise been made known to other parties during the discovery process or in writing.

- H. All disclosure obligations can be suspended by stipulation, court order or local rule.
- III. Privilege Log - 26(b)(5).
- A. A brand new rule which states that if a party withholds information otherwise discoverable due to a claim of privilege or protection as trial preparation material, that party must:
 - 1. Make that claim expressly;
 - 2. Describe the nature of the documents, communications, or things not produced or disclosed in the manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.
 - B. Caution that withholding information without complying with this request may be viewed as a waiver of the privilege or protection as trial preparation material.
 - C. Note also that a protective order may be sought if compliance with this requirement would impose an unreasonable burden.
- IV. **Protective Order - 26(c)(A).**
- A. A new rule - requires that when filing a motion for a protective order, the moving party must file a certification with the court that the movant has, in good faith, conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action.
- V. **Selected District Courts' Implementation of the Rule 26 Amendments.**
- A. New Jersey
 - 1. Adopted all amendments for cases filed after 12/1/93 and for all cases pending on 12/1/93 that have not had their initial scheduling conference prior to 1/20/94, except civil cases where scheduling conferences are not normally held unless directed otherwise.
 - 2. One exception is that transcripts of depositions, interrogatories and answers thereto, Request for Production of Documents and responses thereto, and Requests for Admissions and answers thereto shall not be filed except when needed in a particular pretrial proceeding or upon order of the court.
 - B. Pennsylvania
 - 1. Middle District
 - a. All amendments adopted.
 - 2. Western District
 - a. The requirement of Rule 26(a)(1) for initial disclosures is not in effect in the Western District, nor is the Rule 26(a)(4) requirement that disclosures be filed.
 - b. The requirements of Rule 26(f) for a meeting of the parties, development of proposed discovery plan and a written report to the court are not in effect, nor is the prohibition in Rule 26(d) against seeking discovery before the occurrence of a Rule 26(f) meeting.

3. Eastern District (Standing Order of Chief Judge Cahn attached as Appendix "A")
 - a. Various provisions not in effect in that they are inconsistent with the court's already existing Civil Justice Expense and Delay Reduction Plan ("The Plan") (Appendix B).
 - b. The requirements in Rule 26(a)(1) for initial disclosures and the requirement in Rule 26(a)(4) that disclosures be filed are not in effect.
 - c. The provisions for self-executing disclosures in section 4.01 of The Plan will continue to be in effect.
 - d. Note that The Plan disclosure requirements are almost identical to those in 26(a)(1), and, in fact, the scope of the disclosure obligation is even more broad.
 - e. Note that each Justice has the option to adopt provisions of the Rule which they feel are in the interest of a just and speedy disposition of a case.
 - (1) Appendix C - Standing Orders of Judges Gawthrop and Padova.

C. New York

1. Varies from district to district.
 - a. S.D.N.Y. - has not adopted FRCP 26 Disclosures
 - b. E.D.N.Y. - has adopted
 - c. W.D.N.Y. - has adopted portions of FRCP

VI.

Rule 37 - Failure to Make Disclosure or Cooperate in Discovery; Sanctions.

- A. Rule 37 is amended to include sanctions for failure to make disclosures as required by Rules 26(a) and (e).
- B. Rule 37(c)(1): a party may not offer as evidence the testimony of a witness or information that, without substantial justification, was not included in an initial disclosure or by supplemental disclosure.
 1. This witness or information may not be used as evidence at trial, at hearing, or on a motion unless the failure is "harmless".
 2. The court may require the payment of reasonable expenses caused by the failure, including attorney's fees, and may inform the jury of the party's failure to make the disclosure.
 3. An evasive or incomplete disclosure, answer or response is treated as a failure to disclose, answer or respond and is subject to the aforementioned sanctions.
- C. If a party fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may require the party to pay the reasonable expenses caused by the failure, including attorney's fees.
- D. If a party discloses information after a motion to compel has been filed, the court will still require the offending party to pay the reasonable expenses incurred in making the motion unless the movant failed to make

a good faith effort to obtain such disclosure without court action or the failure to disclose was substantially justified.

- E. Subparagraphs (A), (B) and (C) of subdivision (b)(2) of Rule 37 set forth sanctions with respect to unfavorable information that was not disclosed for the purpose of keeping it out of evidence.

VII. **PRETRIAL DISCLOSURE OF EXPERT WITNESSES**

A. **INTRODUCTION**

It has long been the law that attorneys during the pretrial stages “owe a duty to the court an opposing counsel to make a full and fair disclosure of their views as to what the real issues of the trial will be ... it is through such disclosure at pretrial that trial prejudice can be avoided”. Payne v. S.S. Nabob, 302 F.2d 803, 807 (3d Cir. 1962), cert denied 371 U.S. 870 (1962). The “duty to disclose” has found favor with various commentators, the judiciary and legislature. D.R.C.P. 26 and Notes of Advisory Committee (1993 Amendments); Brazil, The Adversary Character of Civil Discovery: A Critique of Proposals for Change, 31 Vand.L.Rev. 1348 (1978); Schwarzer, The Federal Rules, 50 U.P.H.L.Rev. 703 (1989). Effective use of pretrial disclosure techniques can discharge an attorney’s ethical duty to disclose to the court and adversaries, to avoid prejudice, will serve to preserve the record in the event an appeal is necessitated, and will result in a savings of costs, expenses and attorneys fees. Moreover, recent changes in rules of procedure and case law suggest that expert testimony must be fully disclosed well before a case is scheduled for trial.

B. **TECHNIQUES TO DISCHARGE DUTY TO MAKE FULL AND FAIR DISCLOSURE OF EXPERT TESTIMONY**

1. **FEDERAL RULE 26(A)(2) DISCLOSURE OF EXPERT TESTIMONY**

Rule 26(a)(2) outlines requirements that a party must follow in order to introduce expert testimony at trial. The disclosure requirements have greatly expanded that which had been required under previous discovery rules. And, Rule 26 places an affirmative duty upon a party to identify certain expert information in order to allow an expert witness to testify at trial.

i) Reports Required

Rule 26(a)(2)(B) requires a written report prepared and signed by the witness.

The written report must contain a complete statement of all opinions to be expressed. The report must contain the basis and reasons for the opinion. The report must also identify all data or other information considered by the witness in forming the opinion.

The report requirement applies to (2)(B) experts only, i.e. experts retained or specially employed. A treating physician for example can be deposed to testify at trial without any requirement for a written report.

ii) Who Are Experts?

Paragraph 26(a)(2)(B) requires that the persons retained or specially employed to provide expert testimony must be identified. The rule also broadens the requirement to include those persons whose duties as an employee of the party regularly involved the giving of expert testimony to provide a written report. It should be noted that the Advisory Notes do not preclude counsel from providing assistance to experts in preparing reports.

iii) Disclosure of Data and Other Information
Considered by the Experts _____

This additional disclosure obligation precludes litigants from arguing that materials furnished to their experts - whether or not ultimately relied upon by the expert - are privileged or otherwise protected from disclosure when such persons are testifying or being deposed. See Notes of Advisory Committee on Rule, 1993 Amendments. It is crucial, therefore, that counsel identify work product materials and privileged documents before supplying experts these materials. Query whether expert used to assist counsel in developing trial strategies are subject to these broad disclosure requirements.

iv) Disclosure of Expert Qualifications

The qualifications of the expert witness include:

- a. A listing of all publications authored by the witness within the preceding ten (10) years.
- b. A listing of any cases in which the witness has testified as an expert at trial within the preceding four (4) years.
- c. A listing of all cases in which the witness has testified as an expert by deposition within the preceding four (4) years.

v) Compensation Disclosure

An expert must now disclose the compensation to be paid for the study and testimony in the case.

2. RULE 26(a)(2)(C) DISCLOSURE TIMING

i) Disclosures shall be made at the times and in the sequence directed by the Court. Typically, in Special Management under the Civil and Delay Reduction Plan, dates will be assigned.

ii) In the absence of court direction or party stipulation, disclosure timing is set by the rule. Typically, these disclosure timings will be required in Standard Track Cases. These disclosure requirements are:

(a) At least ninety days before the trial date or the date the case is to be ready for trial.

It appears that this ninety day requirement was designed to require the party with the burden of proof on an issue to disclose testimony sufficiently in advance of trial CO that opposing parties have a reasonable opportunity to prepare defective cross-examination and arrange for expert testimony from other witnesses.

(b) If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party, disclosure must be made within thirty days after the disclosure made by the other party.

3. RULE 26(b)(4)(A) - EXPERT DEPOSITIONS

This revised section of the rules authorizes the deposition of expert witnesses. It should be noted that if the report is required under subdivision (a)(2)(B), the deposition cannot be conducted until after the report is provided. Subsection (4)(C) requires that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery if the witness is called as an expert; and also to pay a “fair portion of fees and expenses” of the expert if discovery is conducted under subsection (4)(B) [discovery of facts or opinions of an expert who is not expected to be called at trial after the demonstration of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means].

4. F.R.C.P. 26(e)(1) - SUPPLEMENTATION REPORT

Parties making disclosures now have a duty to supplement or correct a disclosure or respond if the party learns that in some material respects disclosure was incomplete or incorrect. With respect to testimony of an expert from whom a report is required, the duty extends to both information contained in the report and to information provided through a deposition of the expert. All Supplemental disclosures must be made within the time set under Rule 26(a)(3).

The Advisory Notes state that there is no duty to make supplemental disclosures if that information was made known to the parties in writing or during discovery, such as when an expert during a deposition corrects information contained in an earlier report.

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