

V DISCOVERY

Rule 26.1 DISCOVERY

(a) **Applicability.** This Rule is applicable to all cases filed in this District except where modified by Court order.

(b) **Stay of Discovery.** Formal discovery, including oral depositions, service of interrogatories, requests for production of documents and things, and requests for admissions, shall not commence until the parties have complied with Fed.R.Civ.P. 26(a)(1).

(c) **Initial Disclosure (Self-Executing Routine Discovery Exchange).** It is the policy of this District that discovery shall be open, full and complete within the parameters of the Federal Rules of Civil Procedure.

(1) **Initial Disclosures.** [Excerpted from Fed.R.Civ.P. 26(a)(1)(A)-(O)] Except in categories of proceedings specified in Fed.R.Civ.P. 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment. In cases where it is impractical due to the volume or nature of the documents to provide such copies, parties shall provide a complete description by category and location in lieu thereof;

(C) 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; and

(D) 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.

(d) **Rule 26(f) Meeting of Counsel; Initial Disclosure Exchange.** The Court will set an initial pretrial conference no sooner than thirty-five (35) days after the last

pleading pursuant to Fed.R.Civ.P. 7 or a dispositive motion is filed with the Court.

(1) Counsel must meet and confer in person or by telephone in accordance with Fed.R.Civ.P.26(f) no later than twenty (20) days after the last pleading pursuant to Fed.R.Civ.P. 7 or a dispositive motion is filed with the Court. (See Appendix D)

(2) Counsel on behalf of the parties must exchange the initial disclosures (self-executing routine discovery) pursuant to Local Rule 26.1(c)(1) above, no later than thirty (30) days after the last pleading filed pursuant to Fed.R.Civ.P. 7 or a dispositive motion is filed with the Court.

(3) Counsel may either submit a written report or report orally on their discovery plan at the initial pretrial conference.

(e) Computer-Based Discovery. Prior to a Fed.R.Civ.P. 26(f) conference, counsel should carefully investigate their client's information management system so that they are knowledgeable as to its operation, including how information is stored and how it can be retrieved. Likewise, counsel shall reasonably review the client's computer files to ascertain the contents thereof, including archival and legacy data (outdated formats or media), and disclose in initial discovery (self-executing routine discovery) the computer based evidence which may be used to support claims or defenses.

(1) **Duty to Notify.** A party seeking discovery of computer-based information shall notify the opposing party immediately, but no later than the Fed.R.Civ.P. 26(f) conference of that fact and identify as clearly as possible the categories of information which may be sought.

(2) **Duty to Meet and Confer.** The parties shall meet and confer regarding the following matters during the Fed.R.Civ.P. 26(f) conference:

(A) **Computer-based information (in general).** Counsel shall attempt to agree on steps the parties will take to segregate and preserve computer-based information in order to avoid accusations of spoliation;

(B) **E-mail information.** Counsel shall attempt to agree as to the scope of e-mail discovery and attempt to agree upon an e-mail search protocol. This should include an agreement regarding inadvertent production of privileged e-mail messages.

(C) **Deleted information.** Counsel shall confer and attempt to agree whether or not restoration of deleted information may be necessary, the extent to which restoration of deleted information is needed, and who will bear the costs of restoration; and

(D) **Back-up data.** Counsel shall attempt to agree whether or not

back-up data may be necessary, the extent to which back-up data is needed and who will bear the cost of obtaining back-up data.

(f) Filing of Discovery Pleadings. Initial disclosures (self-executing routine discovery exchange pursuant to Local Rule 26.1 c), interrogatories under Fed. R. Civ. P. 33, and answers thereto, requests for production or inspection under Fed. R. Civ. P. 34, requests for admissions under Fed. R. Civ. P. 36, and responses thereto shall be served upon other counsel or parties, but shall not be filed with the Court. Certificates or notices of compliance are not required and shall not be filed with the Court. If relief is sought under Fed. R. Civ. P. 26(c) or 37 concerning any interrogatories, requests for production or inspection, requests for admissions, answers to interrogatories or responses to requests for admissions, copies of the portions of the interrogatories, requests, answers or responses in dispute shall be filed with the Court contemporaneously with any motion filed under Fed. R. Civ. P. 26(c) or 37. If interrogatories, requests, answers or responses are to be used at trial, the portions to be used shall be filed with the Clerk of Court at the outset of the trial, insofar as their use reasonably can be anticipated.

(g) Discovery of Expert Testimony.

(1) The parties are limited to the designation of one expert witness to testify for each particular field of expertise.

(2) A party may depose any person who has been identified and designated as an expert whose opinions may be presented at trial. An expert witness is one who may be used at trial to present evidence under Fed. R. Evid. 702, 703 or 705 including, but not limited to, expert witnesses who have knowledge of facts and hold opinions which were acquired or developed in anticipation of litigation or for trial.

(3) At the time of the initial pretrial conference, the presiding judicial officer shall, unless good cause appears to the contrary:

(A) establish deadlines by which any party shall designate all of their expert witnesses and provide opposing counsel with a complete written designation of the testimony of each witness;

(B) require the party designating the expert witnesses to indicate in reasonable detail the areas and fields of expertise and the qualifications of the witness as an expert in said areas and fields;

(4) The written designation of expert witness opinions shall include a comprehensive statement of each of the opinions of such witness and the factual basis for each opinion and shall be filed with the Court. See *Smith v. Ford Motor Company*, 626 F.2d. 784 (10th Cir. 1980). The written designation shall include the following:

(A) A written report prepared and signed by the expert witness as

set forth in Fed. R. Civ. P. 26(a)(2)(B); or a written report prepared and signed by counsel for the party.

(B) The party designating the expert shall provide a current resume or curriculum vitae including a list of all publications authored by the witness within the preceding ten years and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years; [Fed. R. Civ. P. 26(a)(2)(B)].

(C) require the party designating the expert witness to set forth all special conditions or requirements which the designating party or the expert witnesses will insist upon with respect to the taking of their depositions, including the amount of compensation the expert witness will require and the rate per unit of time at which said compensation will be payable. In the event counsel is unable to obtain such information to include in the designation, the efforts to obtain the same and the inability to obtain such information shall be set forth in the designation;

(5) In the event a designation of an expert witness fails to set forth the compensation to be paid by a party for the deposition of the expert, or fails to set forth the efforts to obtain such information for designation, any adverse party shall be entitled to depose such witness at the fee provided by the Federal Rules of Civil Procedure.

(6) In the event the amount and rate of the compensation is designated for the expert witness, and the deposition of that expert witness is taken without further action, discussion or agreement between counsel, then the amount described in the designation shall be paid by the party or parties taking the deposition.

(7) Nothing herein contained shall prevent the parties involved from agreeing to other terms and conditions and amount of compensation following the designation.

(8) In all cases where there is a dispute as to the proper compensation or other conditions relative to the taking of an expert discovery deposition, or an inability to obtain information concerning compensation, a party may file a motion with the Court pursuant to Fed. R. Civ. P. 26(b)(4) and (c) or Fed. R. Civ. P. 45(c), as the case may be. The Court will, thereafter, issue its order setting forth the terms, conditions, protections, limitations and amounts of compensation to be paid by the party taking the deposition.

(h) Discovery Time Limit. Whenever possible, discovery proceedings in all civil actions filed in this Court shall be completed within ninety (90) days after joinder of issue or after such issues may have been determined at the initial pretrial conference. Exceptions hereto may be granted, upon good cause shown and upon timely application, and the time for completion of such discovery proceedings therein extended by order of this Court.

(i) Stay of Self-Executing Routine Discovery Exchange. The filing of pretrial dispositive and non-dispositive motions, including motions for protective order, shall not stay the requirement that the parties exchange routine discovery as prescribed by U.S.D.C.L.R. 26.1(c), absent an order of the Court granting a stay of self-executing routine discovery.