I. PLANNING CONFERENCE WITH OTHER PARTIES

§3:01 Purpose

Under FRCP 26(f), counsel for all parties that have appeared in the case (or the parties themselves, if not represented) must confer, by telephone or in person, to consider case management issues and to prepare a joint discovery plan. Check your local rules to determine if your district (or judge) allows a phone conference (common), or requires the parties to attend in person (rare). The parties are not normally permitted to initiate traditional discovery until after the planning conference. *United States v. Little*, 176 F.R.D. 420 (D.Mass. 1997). The main purpose of this meeting is to consider the issues in the case, including the claims and defenses, and develop an appropriate joint discovery plan. *See* FRCP 26(f), advisory committee's note (1993). The parties should also discuss settlement possibilities, discuss the scope and schedule of the initial disclosures, and arrange for FRCP 26(a)(1) initial disclosures. In most cases, the court will send an order to the parties in advance of the conference with an outline describing the topics the court wants the parties to discuss. The parties are responsible for arranging and participating in the meeting and attempting to agree upon a joint discovery plan. In fact, the parties must arrange for and have this meeting even if a motion to dismiss is pending. *See* FRCP 26(f), advisory committee's notes; 146 F.R.D. 401 (1993).

At the conclusion of the meeting, the parties should cooperate to draft the joint discovery plan (which the court uses to prepare the FRCP 16 scheduling order). The plan must include proposals for the following:

- Subjects on which discovery may be needed.
- Discovery cutoff.
- Maximum allowable number of interrogatories, depositions and requests for admission.
- Extending the maximum number of depositions.
- Extensions needed for the 7 hour limit in oral depositions.
- Deadlines for expert reports.
- Special deadlines for supplementing discovery.
- Changes to the requirements, the timing, or the scope of initial disclosures under Rule 26(a). The plan should explain that disclosures have been made and if not, the deadline for initial disclosures.
- The parties should state their positions or proposals concerning protective orders or case management orders that may be necessary in the case.

The court may impose sanctions against any party who fails to participate in good faith in drafting the discovery plan. FRCP 37(f). Pursuant to local rules, most districts also require "joint status reports" or "case management statements" in addition to the FRCP requirements.

The parties must make initial disclosures pursuant to FRCP 26(a)(1) within 14 days after the FRCP 26(f) discovery meeting. As described in more detail below in Section C, initial disclosures serve the same purpose as court-ordered interrogatories and require early disclosure of information regarding witnesses, documents, tangible things, damages, and insurance relevant to claims and defenses.

§3:02 Timing of the Conference

The requirement to meet and develop a joint discovery plan is triggered after the first defendant appears in the case. Specifically, the parties should meet as soon as practicable after the case is filed, but they must meet no later than 21 days before the initial FRCP 16 status conference date set by the court. FRCP 26(f). If the court has not set a status conference, the parties must meet within 120 days after the plaintiff serves any defendant and within 90 days after a defendant appears. FRCP 26(f), 16(b)(2). Of course, the timing of the discovery plan meeting may be controlled by local rules or court order. The court may exempt the parties from specific duties, require a conference further than 21 days before the scheduling conference, excuse the parties from preparing a report, or specify additional tasks in connection with the discovery meeting requirement. FRCP 26(f).

Strategy also plays a role in scheduling. For example, in a complex or multi-party case, schedule the meeting as late as possible so the parties have more time to understand the case and are better able to formulate an appropriate plan. Try to determine when all key defendants will be served so as to include them in the meeting. If the goal is to settle early or expedite the trial, hold the meeting as early as possible so the parties can begin discovery quickly, because formal discovery is stayed until the discovery plan meeting. FRCP 26(d)(1).

After the meeting, the parties must file a discovery plan (and usually a more comprehensive joint status report that includes a discovery plan). File the joint discovery plan no later than 14 days after the initial discovery meeting FRCP 26(f) unless otherwise ordered. Then, periodically review the discovery plan and the court's resulting scheduling order to make sure discovery complies with the order, and to determine whether you will need to seek an amendment of the order.

§3:03 Procedure for Conference and Report

Begin by reviewing the applicable rules, including FRCP 26(f) and 16, and any applicable local rules. Then, contact counsel for the other parties and attempt to agree on a date for the conference. If the parties cannot agree on a date for the conference (which would be very unusual), file a motion asking the court for an order requiring a meeting on a particular date that is in the best interest of your client. Before asking the court to intervene, however, make sure you have been sufficiently flexible to defend your role in any failure to reach agreement. Although a motion is an option, it represents a real failing of counsel to be cooperative and reasonable, and should never be required.

Determine the scope of discovery to include in the joint discovery plan. *See* Form 3-01. If there is an official discovery plan report form used in your district, obtain it from the court clerk. When preparing the report, consider including the following in the "subjects for discovery" section:

- The factual elements of each claim and defense.
- The factual elements of each damages claim, including punitive damages.
- Any significant facts or events bearing on the parties' and witnesses' credibility, e.g., whether a witness was ever convicted of a felony.
- Any other matters you must inquire into under the circumstances of the case.

Next, determine your position on topics such as the maximum allowable number of depositions, extension of time for each deposition, and the number of interrogatories. Consider extending the length of depositions to ensure a fair and thorough deposition. The answers to these issues may depend upon your discovery needs and the parties' relative resources. For example, if you have most of the facts necessary to prove your case and are on a tight budget, and your adversary is wealthy with much to lose, it is probably to your advantage to press for strict limits (although be more careful about limits when most of the information you need is under your opponent's control). Also, be aware that your opponent may supplement responses after you use up your discovery allotment, leaving you with no opportunity to conduct follow-up discovery. Therefore, consider exempting from the limitations discovery intended only to follow up on supplemental responses.

Then, determine an appropriate discovery cutoff. To do this, consider the following factors (keeping in mind that once the schedule is set, the parties may be stuck with it):

- How long it will take you to complete needed discovery, including the time it will take to negotiate discovery disputes, move to compel, wait for supplemental responses, and conduct follow-up discovery.
- Leave sufficient time to take discovery about any unexpected developments.
- If a single factual issue (e.g., the measure of damages) is the only obstacle to settlement, and you wish to settle early in such a case, consider setting an early cutoff.

Consider your needs and preferences regarding expert discovery and provide proposals. Discuss stipulated deadlines for serving expert reports, usually after allowing sufficient time to complete most of your discovery, decide which experts you need, and retain them. Agree on a deadline for designating rebuttal experts, leaving time to review your opponent's expert report and locate and disclose rebuttal experts before the expert discovery cutoff.

Also, discuss stipulations for supplementing disclosures and discovery responses, particularly if most of the information you need is within your opponent's control. An early deadline will force the parties to supplement before the discovery cutoff.

Conclude the meeting by agreeing on the timetable and logistics for finalizing the plan. If your client has the money for you to be in charge, offer to prepare the discovery plan and circulate it for the parties' comment and signature. By undertaking this task, you ensure that your client's interests and views are adequately considered and protected. When drafting the plan for which the parties could not agree on all issues, be sure to include each party's position in the plan. For example, "Parties W, X, and Y propose a March 10 discovery

cutoff. Party Z proposes a May 13 discovery cutoff." Adding a sentence of two of explanation is permitted and helpful. The court will then have to decide. File the plan with the court by the deadline.

Finally, if it becomes necessary to change the court-approved discovery plan (or perhaps if you represent a defendant brought into the litigation after the meeting), make a motion setting forth why you need a different discovery schedule. *See* advisory committee's notes, 146 F.R.D. 401, 643 (1993). If the opposing party's tactics or other unforeseen events bring about the need for relief from the plan and the opposing party refuses to stipulate, the court can grant a FRCP 26(c) protective order. In your motion, emphasize that:

- You will suffer undue prejudice if the schedule is not changed.
- New information has come to light since the plan was formulated.
- Other parties will not be prejudiced.
- The new discovery will not cause undue delay.

§3:04 Practice Tips

- When developing your discovery positions, consider your long-term goals, rather than attempting to limit your opponent's discovery. Remember that you will have to live with the joint discovery plan and that, unless the case is very simple, you cannot be certain what discovery may become necessary.
- Be creative in modifying the usual discovery methods, particularly if it will save your client money. For example, limit certain types of discovery to particular issues or defer discovery on damages until liability is established.
- At the initial meeting, try to detect discovery disputes so you can alert the court to them early. Do your best to persuade the other parties to resolve each issue. However, do not spend too much time and effort trying to orchestrate agreement on points about which the parties clearly disagree. At this early juncture, inexperienced counsel may (unfortunately) be reluctant to commit to positions that their opponents suggest. Obtain agreement on as many issues as possible so that fewer issues are left to the court for decision.
- If the case is complex or involves multiple parties, review the Federal Judicial Center's MANUAL FOR COMPLEX LITIGATION for additional issues to consider at the meeting. For example, the parties may need different "phases" of discovery based on each of the major issues in the case or on the geographical location of the evidence.
- During the moratorium on discovery prior to the initial meeting, conduct informal discovery to prepare for the initial meeting. If necessary, seek court permission under FRCP 30(a)(2)(C) to take depositions or other discovery to prevent evidence from being lost.

II. SCHEDULING CONFERENCE WITH COURT

§3:05 Generally

After the parties complete their planning conference and submit their discovery plan to the court, the court may hold a scheduling conference. Sometimes these are in person. Sometimes the court bypasses the scheduling conference and simply issues an order following receipt of the discovery plan. Which a court chooses is generally a matter of local rule, judicial custom and preference, the apparent level of disagreement in the plan between the parties, and perhaps any difference between the plan of the parties and the preference of the court. Generally, the parties have an opportunity to request a scheduling conference even for judges that do not routinely hold them in person.

Under FRCP 16(c)(2), the scheduling status conference will address the following subjects:

- Simplifying issues and eliminating frivolous claims and defenses.
- Amending pleadings.
- Admitting facts and entering stipulations regarding documents and other evidentiary issues.
- Avoiding unnecessary evidence.
- Limiting expert testimony.
- Determining the appropriateness and timing of summary judgment motions.
- Scheduling discovery and disclosures (including electronic discovery).
- Identifying witnesses and documents.

- Scheduling pretrial brief exchanges and further conferences.
- Referring matters to a magistrate judge or special master.
- Setting settlement procedures.
- Preparing pretrial orders.
- Disposing of pending motions.
- Adopting procedures for managing complex issues.
- Severing claims and issues.
- Scheduling evidence presentation to facilitate judgment as a matter of law.
- Limiting time for presenting evidence at trial.
- Determining the number of depositions, length of depositions, and proportionality of discovery.
- Other matters that facilitate just, speedy and inexpensive case disposition.

When the court holds an in-person status conference, each party must attend the conference or be represented by an attorney authorized to stipulate and make admissions. FRCP 16(c)(1). In some cases, courts may require parties to be available by telephone during the conference to discuss settlement. FRCP 16(c). In fact, some courts have held that parties may be required to attend the scheduling conference even though they are represented by an attorney. *In the matter of Sargeant Farms, Inc.*, 224 B.R. 842, 845 (Bankr. M.D. Fla. 1998). Courts can order a corporate officer with settlement authority to attend. *Heilemen Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989). Courts may or may not have the authority to order nonparty insurers with settlement authority to attend. *See, e.g., In re Novak*, 932 F.2d 1397 (11th Cir. 1991) (holding courts lack authority to order non-party insurers to attend a settlement conference). In reality, of course, federal district court judges generally feel comfortable issuing an order requiring settlement decision-makers to attend, which in some cases includes insurers.

Regardless of whether the court holds an in-person status conference, it must nevertheless issue a scheduling order for the case under FRCP 16(b). The scheduling order must limit the time to:

- Join other parties.
- Amend the pleadings.
- File motions.
- Complete discovery.

The scheduling order may also modify the deadlines for initial and expert disclosures, specify pretrial conference and trial dates, and address any other appropriate matters. The court may not, however, order parties to accept material stipulations of fact as part of the pretrial scheduling process. *Briggs v. Dalkon Shield Claimants Trust*, 174 F.R.D. 369 (D. Md. 1997).

Once the order is in place, it may be difficult to change the deadlines. Specifically, for a party to amend the scheduling order because of an inability to meet the court's deadlines, it must show "good cause," which will often be measured in part by the party's diligence. *Bradford v. Dana Corp.*, 249 F.3d 807, 809 (8th Cir. 2001) (search for new attorney while seeking postponement of a trial date).

§3:06 Timing

The court will schedule the initial status conference to occur 90-120 days after the plaintiff files the complaint. It is, of course, important to prepare for the scheduling conference. Under FRCP 26, the following sequence is normally employed for early deadlines:

1. The court schedules the initial scheduling conference;
2. The parties conduct the discovery meeting at least 21 days before the court's initial scheduling conference;
3. The parties make their voluntary disclosures;
4. The parties submit a written report of discovery plan 14 days after the discovery meeting;
5. The parties meet with the judge for the scheduling conference; and
6. The court issues an order containing the discovery deadlines and the remainder of the scheduling deadlines. The court issues the scheduling order within 90 days after a defendant appears in the case and within 120 days after the complaint is served on a defendant. FRCP 16(b).

§3:07 Procedure

To prepare for the conference, review Federal Rule 16, local rules, and any existing orders for topics the court may raise, and to determine any deadline for filing a Proposed Status Conference Order or Joint Status Report before the conference. Also, review the FRCP 26(f) joint discovery plan (*see* §3:03) before the status conference. Review your proof outline and discovery plan, your opponent's FRCP 26 initial disclosures, and the joint discovery plan to determine your position on each topic the court may raise. Early

preparation is important to effectively advocate positions, such as a discovery cutoff and trial date, that are in your client's best interests. At the conference, support your position on each issue by:

- Having case or rule citations ready with a short cover memo (attach copies of the cases or rules).
- Explaining how your position or request will save time and/or expense.
- Explaining the downside of rejecting your position or request.

Consider taking the lead in drafting the Order or Report containing the FRCP 26 discovery plan, scheduling order, or proposed modifications to the scheduling order, as well as any previous discussion among the parties about the subjects listed in FRCP 16(c). Your client then will have the most visible representation before the court and you will be in a position to organize the case for your client's benefit.

Determine whether to request any case management orders, such as assignment to a magistrate judge or a protective order. Draft any proposed orders you would like the court to enter and bring them to the conference. *See generally* Form 7-07. Normally, the court will draft a minute order or scheduling order memorializing the conference. However, some districts delegate the task to the parties. In districts that do, offer to draft the order to ensure a clear record of the court's rulings.

§3:08 Practice Tips

- Judicial consideration: The status conference may be your first opportunity to meet the assigned judge and make an impression. Your preparation, organization, and willingness to cooperate will go far in establishing your credibility with the judge. Explain your client's positions in a persuasive fact-oriented style without blatant advocacy.
- Keep in mind that the court's interest is to provide a just, speedy, and inexpensive adjudication of the hundreds of cases on his or her docket. Pitch your positions accordingly. The judge likely will welcome anything that shortens or simplifies the case. Focus on the most important issues, particularly those that may affect future discovery. Usually, it is more productive to simplify the case and discuss only the core issues with the court.
- Repeated violations of the court's orders to participate in status conferences can result in sanctions including dismissal for lack of prosecution under FRCP 16(f), 41(b).
- Because the Scheduling Conference Order will control the subsequent course of the case, the parties should carefully anticipate the time necessary to conduct discovery in order to have sufficient time to determine the proper parties and to ascertain all necessary causes of action and defenses. *Sosa v. Airprint*, 133 F.3d 1417 (11th Cir. 1998). *See generally* Form 3-06, Defendants' Response to Plaintiff's Third Motion to Amend Case Management Order.
- The provisions in the FRCP regarding discovery of electronically stored information impact the parties' preparation for and participation in the Rule 16 Conference. *See* Chapter 5.

[§3:09 Reserved]

III. INITIAL DISCLOSURES

§3:10 Generally

Although a limited list of cases is excluded from the initial disclosure requirement (*see* FRCP 26(a)(1)(B)), at the outset of most cases the parties are required to disclose information they will rely on to support claims and defenses. FRCP 26(a)(1). In particular, the parties must disclose "reasonably available" information about:

- **Witnesses.** The parties must disclose the name, known address, and telephone number of each individual likely to have discoverable information that the party may use to support its claims or defenses. When deciding whether to disclose names of witnesses, unless used solely for impeachment, care should be taken to read all of the court's rules with regard to disclosure of witnesses who could provide substantive testimony in order to avoid sanctions, including the exclusion of witness testimony. *Wilson v. AM General Corp.*, 167 F.3d 1114 (7th Cir. 1999).
- **Documents.** The parties must provide a copy or "a description by category and

location" of all documents, data compilations, and tangible things that are used by the party to support its causes of action and affirmative defenses. "Data compilations" includes electronically stored information. *See* Chapter 5. A party must disclose all those relevant documents within the possession, control, or custody of the parties or their attorneys.

- **Damages.** Each party must provide a computation of any category of damages claimed by that party and produce non-privileged documents supporting the computation. *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221 (10th Cir. 1999).
- **Insurance policies.** Each party must provide all insurance policies that may provide coverage for a part or all of any judgment that might be entered in the action. *Wegner v. Cliff Viessman, Inc.*, 153 F.R.D. 154 (N.D. Iowa 1994). *See generally* Form 3-02.

Also, the local rules and/or the court may order the disclosure of additional information.

§3:11 Timing of Disclosures

File and serve initial disclosures no later than 14 days after the FRCP 26(f) initial conference, unless the parties stipulate or the court orders otherwise. FRCP 26(a)(1). Notably, however, there is nothing to prevent a party from serving its initial disclosures immediately upon service of the complaint or answer (or anytime earlier than the deadline). FRCP 26 establishes the following sequence for early disclosures and discovery planning: (1) the court schedules an initial scheduling conference pursuant to FRCP 16; (2) the parties conduct a discovery meeting, by telephone if desired, at least 21 days before the scheduled conference date; (3) the parties make voluntary disclosures within 14 days after the discovery meeting pertaining to the claims and defenses; (4) the parties submit a written report outlining a discovery plan, within 14 days after their discovery meeting; (5) the parties meet with the judge for the scheduling conference pursuant to FRCP 16. At the scheduling conference the court will establish a timetable for discovery; and (6) those parties joined or served after the parties Rule 26(f) conference must make the initial disclosures within 30 days after being joined or served, unless a different time is set by stipulation or court order.

§3:12 Procedure for Disclosures

Initial disclosures are mandatory. Although at one time districts courts could "opt out" of the FRCP 26(a)(1) initial disclosure requirement, that option is no longer available. FRCP(26)(a)(1), as amended Dec. 1, 2000. Thus, review the opposing party's initial disclosures and determine if they are proper and complete. Use Form 3-02 as a guide. Make sure they include:

- **Witnesses.** The parties must list witnesses' names, addresses and telephone numbers, and the subject of their relevant information. FRCP 26(a)(1)(A)(i). *See Jones v. Kemper Ins. Co.*, 153 F.R.D. 100 (N.D. Miss. 1994) A disclosing party is required to provide addresses and phone numbers. *Scaife v. Boenna*, 191 F.R.D. 590 (N.D. Ind. 2000).
- **Documents.** The parties must describe and categorize the nature and location of the documents with enough specificity to enable other parties to identify them in document requests. FRCP 26(a)(1)(A)(ii). Parties need not produce the documents, just the list describing them by category and location.
- **Damages.** The parties must provide calculations of all damages they seek to recover. FRCP 26(a)(1)(A)(iii). They need not provide calculations that depend on information in another party's possession, such as an infringer's gains in a copyright infringement action. FRCP 26(a), advisory committee's notes (1993). The parties must produce all evidence supporting their damages claims, such as repair bills and records showing lost profits.
- **Insurance policies.** The parties must produce copies of all insurance policies that may satisfy a judgment for the alleged liability. FRCP 26(a)(1)(A)(iv). They need not produce private indemnity or guaranty agreements, only insurance agreements issued by persons "an insurance business." FRCP 26(a)(1)(A)(iv).

If you believe the opposing party did not disclose all the information it should, consider moving to compel disclosures. In fact, the cases that have interpreted the initial disclosure requirement generally emphasize that if a party fails to make initial disclosures, the other party must move to compel or take other action

to compel disclosures. This procedure should be followed if the aggrieved party wishes to eventually preclude the admission of the undisclosed evidence should the opponent attempt to introduce it before or at trial. *Fitz, Inc. Handmade Furniture v. Ralph Wilson Plastics Co.*, 174 F.R.D. 587 (D.N.J. 1997). You may also seek sanctions under FRCP 37(c)(1). For example, if you learn the opposing party conducted new tests or a comprehensive document search, ask for the information and make a motion to compel if necessary.

The fact that investigation is ongoing or that another party has not made its disclosures does not excuse noncompliance. FRCP 26(a)(1). Violating the disclosure requirements may lead to a variety of sanctions, including:

- Evidence preclusion denying the use of the nondisclosed information at trial (if nondisclosure was not substantially justified and was not harmless).
- Monetary sanctions.
- Informing the jury about the nondisclosure.

However, sanctions are not necessarily easy to obtain. For example, where a defendant filed a motion for partial summary judgment, relying on materials it failed to turn over to the plaintiff with its initial disclosures, the court denied a motion to strike, because the error was harmless and the plaintiff knew of the existence of the documents. *Cash v. State Farm Fire Insurance & Casualty Co.*, 125 F.Supp.2d 474, 477 (M.D.Ala. 2000).

Review your client's initial disclosures for accuracy and supplement them if necessary to preclude opposing counsel from seeking sanctions or obtaining any advantage from the omission.

§3:13 Practice Tips

- The FRCP 26(a) "information … to support claims or defenses" disclosure standard is not as broad as the FRCP 26(b)(1) "relevant to a claim or defense of any party" discovery test. Thus, initial disclosures need not cover matters that are admitted or are not in dispute, or matters such as defendant collectability or venue. Most importantly, the party need not disclose unfavorable evidence that the party has no intention of using to support their case. Although these matters are fair game for civil discovery under FRCP 26(b)(1), FRCP 26(a) is designed to accelerate discovery of information a party intends to use to support claims and defenses to prevent surprise. *See* FRCP 26(a).
- Upon motion the court can expand discovery to the "subject matter" standard previously used for all FRCP 26 discovery.
- Throughout the case, as you receive your opponent's discovery responses and review evidence your opponent uses to support motions, consider whether your opponent had the information within 14 days of the initial meeting and should have disclosed it in his or her initial disclosures.
- It is not clear if a party can limit burdensome disclosure if the party is the custodian of rooms full of documents that may contain information concerning the disputed facts in a detailed complaint with many causes of action. The court may grant a protective order in such circumstances, but also may not.
- As noted above, parties are not required to disclose in initial disclosures information that may be adverse to their interests or relevant to the broad, vague, or conclusory allegations routinely used in "notice" pleading. Thus, a defect allegation in a product liability case should not require the defendant to search for and identify every person and document related to the product's manufacture, assembly, testing, and warnings unless such documents support a defense.
- It benefits the plaintiff who wants comprehensive initial discloses from the defendant to include all potential claims in the complaint rather than waiting to amend. If the plaintiff drafts a complaint using traditional notice pleading, the defendant's disclosure requirements will arguably be limited to the claims stated unless the answer contains detailed affirmative defenses. One can plead with specificity to obviate arguments that the opponent did not recognize the information it would "use" to support its case or raise affirmative defenses.
- The FRCP regarding discovery of electronically stored information impact the parties' initial disclosures. *See* Chapter 5.

3-08 CONFERENCE AND SCHEDULING DEADLINES CHART