# I.R.C.P. 26. General Provisions Governing Discovery

**Idaho Rules of Civil Procedure Rule 26. General Provisions Governing Discovery.**

**(a) Discovery Methods.** Discovery may be made by:

(1) deposition upon oral examination or written questions;

(2) written interrogatories;

(3) production of documents, electronically stored information or tangible things;

(4) entry upon land or other property for inspection or other purposes;

(5) physical and mental examinations; and

(6) requests for admission.

**(b) Discovery Scope and Limits.**

(1) *In General*.

(A) General Scope of Discovery. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense, including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

(B) Limits on Electronically Stored Information. A party need not provide discovery of electronically stored information

from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(1)(C). The court may specify conditions for the discovery.

(C) Limits on Frequency and Extent of Discovery. Unless limited by these rules or the court orders otherwise, the frequency of use of discovery is not limited. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii)the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(2) *Insurance Agreements*. A party may obtain discovery of the existence and contents of any insurance agreement under which any insurer 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. An application for insurance is not subject to disclosure as part of an insurance agreement as provided by this rule.

(3) *Trial Preparation: Materials*.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording, or a transcription of it, that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts*.

(A) Discovery of an Expert Expected to Testify. A party must disclose to the other parties by answer to interrogatory, or if required by court order, the identity of any witness it expects to ask to present evidence under Rule 702, 703 and 705, Idaho Rules of Evidence.

(i) What Must be Disclosed: Retained Experts. For individuals retained or specially employed to provide expert testimony in the case or who are employees of the party:

- a complete statement of all opinions to be expressed and the basis and reasons for the opinion must be disclosed;
- the data or other information considered by the witness in forming the opinions;
- any exhibits to be used as a summary of or support for the opinions;
- any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;

- the compensation to be paid for the testimony; 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.

(ii) What Must be Disclosed: Non-Retained Experts. For individuals with knowledge of relevant facts not acquired in preparation for trial and who have not been retained or specially employed to provide expert testimony in the case:

- a statement of the subject matter on which the witness is expected to present evidence under Rule 702, 703 or 705, Idaho Rules of Evidence, and

- a summary of the facts and opinions to which the witness is expected to testify.

(iii)Deposition of Expert Allowed. A party may depose any person who has been disclosed as an expert witness.

(iv) Further Discovery. The court may order further discovery of experts by other means, subject to restrictions set bet the court as to the scope of discovery and the payment of expenses to the expert as provided by Rule 26(b)(4)(E).

(v) Limitation on Contact With Expert. A party must not contact a retained expert disclosed by another party pursuant to this Rule without first obtaining the permission of the party who retained the expert or by the court.

(B) Trial-Preparation Protection for Draft Reports or Disclosures. A draft disclosure or draft report prepared in anticipation of litigation by any witness disclosed under 26(b)(4)(A)(i) is protected from disclosure.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and an Expert Witness. Communications between the party’s attorney and any witness required to be disclosed under 26(b)(4)(A)(i), regardless of the form of the communications, is protected from disclosure, except to the extent that the communications:

(i) state the amount of compensation for the expert’s services;

(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 on in forming the opinions to be expressed.

(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 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

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A)(ii) or 26(b)(4)(D);

(ii) or if by deposition of an expert pursuant to Rule 26(b)(4)(A)(i), pay the expert a reasonable fee for time spent testifying at the deposition; and

(iii)for discovery under Rule 26(b)(4)(D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions, and for discovery under Rule 26(b)(4)(A)(ii) may require such payment.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials*.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it, and must preserve the information until the claim is resolved. After being notified, a party:

(i) must promptly return, sequester, or destroy the specified information and any copies it has;

(ii) must not use or disclose the information until the claim is resolved;

(iii)must take reasonable steps to retrieve the information if the party disclosed it before being notified; and

(iv) may promptly present the information to the court under seal for a determination of the claim.

**(c) Protective Orders.**

(1) *In General*. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending, or as an alternative on matters relating to a deposition, in the court where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery*. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit the discovery.

(3) *Awarding Expenses*. Rule 37(a)(5) applies to the award of expenses.

**(d) Sequence of Discovery.** Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(1) methods of discovery may be used in any sequence; and

(2) discovery by one party does not require any other party to delay its discovery.

**(e) Supplementing Responses.**

(1) *In General*. A party who has responded to an interrogatory, request for production, or request for admission, which response was complete when made, is under no duty to supplement the response to include information subsequently acquired, except:

(A) in a timely manner if the party learns that in some material respect the disclosure or response was incorrect when made or, if correct when made, is no longer true and a failure to amend the response is in substance a knowing concealment;

(B) a party is under a duty to supplement in a timely manner the identity and location of persons having knowledge of discoverable matters; and

(C) by agreement of the parties; upon timely submission of discovery requests for supplementation; or by order of the court.

(2) *Expert Witnesses*. A party must supplement in a timely manner the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(3) *Sanction for Failure to Supplement*. The court may exclude the testimony of any witness or the admission of evidence not disclosed by a supplementation required by this rule.

**(f) Signing Discovery Requests, Responses and Objections.**

(1) *Signature Required; Effect of Signature*. Every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name, or by the party personally, if unrepresented, and must state the signer's address and e-mail address. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a statement of fact, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii)neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign*. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification*. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

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