

Expert discovery — Effect of premature disclosure of expert witnesses.

Question: What is the consequence if the plaintiff serves its expert witness disclosures before the end of fact discovery? Must the defendant elect a deposition or report within seven days or face losing the opportunity to conduct expert discovery at the appropriate time?

Answer: The plaintiff's expert disclosures are premature and do not trigger the defendant's obligation to elect an expert deposition or report, nor do they otherwise affect the timing of expert disclosures and discovery. The rules do not permit any party to "jump-start" the expert disclosure and discovery process by serving expert disclosures prematurely. Rule 26(a)(4)(C)(i) states "[t]he party who bears the burden of proof on the issue for which expert testimony is offered shall provide the information required by paragraph (a)(4)(A) [i.e., the initial expert disclosure] within seven days after the close of fact discovery." This specifies a window within which the parties must provide their initial expert disclosures; it is not merely a deadline for such disclosures. There is nothing wrong with submitting an expert declaration in support of a summary judgment motion at any time, but a formal "disclosure of expert testimony" under Rule 26(a)(4)(A) is premature and ineffective if made before the close of fact discovery.