

## **Expert discovery — Timing of disclosures, elections and extensions.**

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**Question:** When must a party disclose its experts? 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:** [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. The rules do not permit any party to "jump-start" the expert disclosure and discovery process by serving expert disclosures prematurely. 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.

A plaintiff's disclosure of its expert witness information before the close of fact discovery disclosures does 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.

**Question:** Under [Rule 26\(a\)\(4\)\(C\)\(i\)](#), the election of a report or deposition must be made within seven days after the opponent's designation of expert witnesses. Does this mean after service of the expert designation? Is the time for the election calculated under [Rule 6](#)?

**Answer:** Yes. The committee intended that the election of a report or deposition must be made within seven days after an opposing party serves its designation of experts. An amendment effective April 1, 2013 will expressly state that. See [Rule 26\(a\)\(4\)\(C\)\(iii\)](#).

The time for electing a report or deposition is calculated using [Rule 6](#). That is, the party who does not bear the burden of proof, must serve its election on the other party within seven days after the other party serves its designation of experts. Under [Rule 6](#) intermediate weekends and holidays are excluded from the seven-day period, and, if the other party's designation of experts was served by mail, three extra days are added for serving the election.

**Question:** If parties want to stipulate (or move) to extend the 28 days for expert discovery, does the stipulation (or motion) have to be filed "before the close of standard discovery and after reaching the limits of standard discovery," as provided in [Rule 26\(c\)\(6\)](#) and [Rule 29](#)?

**Answer:** No. There are limits on the discovery of expert witnesses, but stipulations and motions to extend those limits are not bound by the same time frame for extraordinary discovery. See [Rule 26\(c\)\(5\)](#), which expressly excludes expert disclosure and discovery. The required timing for stipulations and motions for extraordinary fact discovery, found

in [Rule 26\(c\)\(6\)](#) and in [Rule 29](#), does not apply. Stipulations and motions to modify the limits of expert discovery can be filed after the close of fact discovery.