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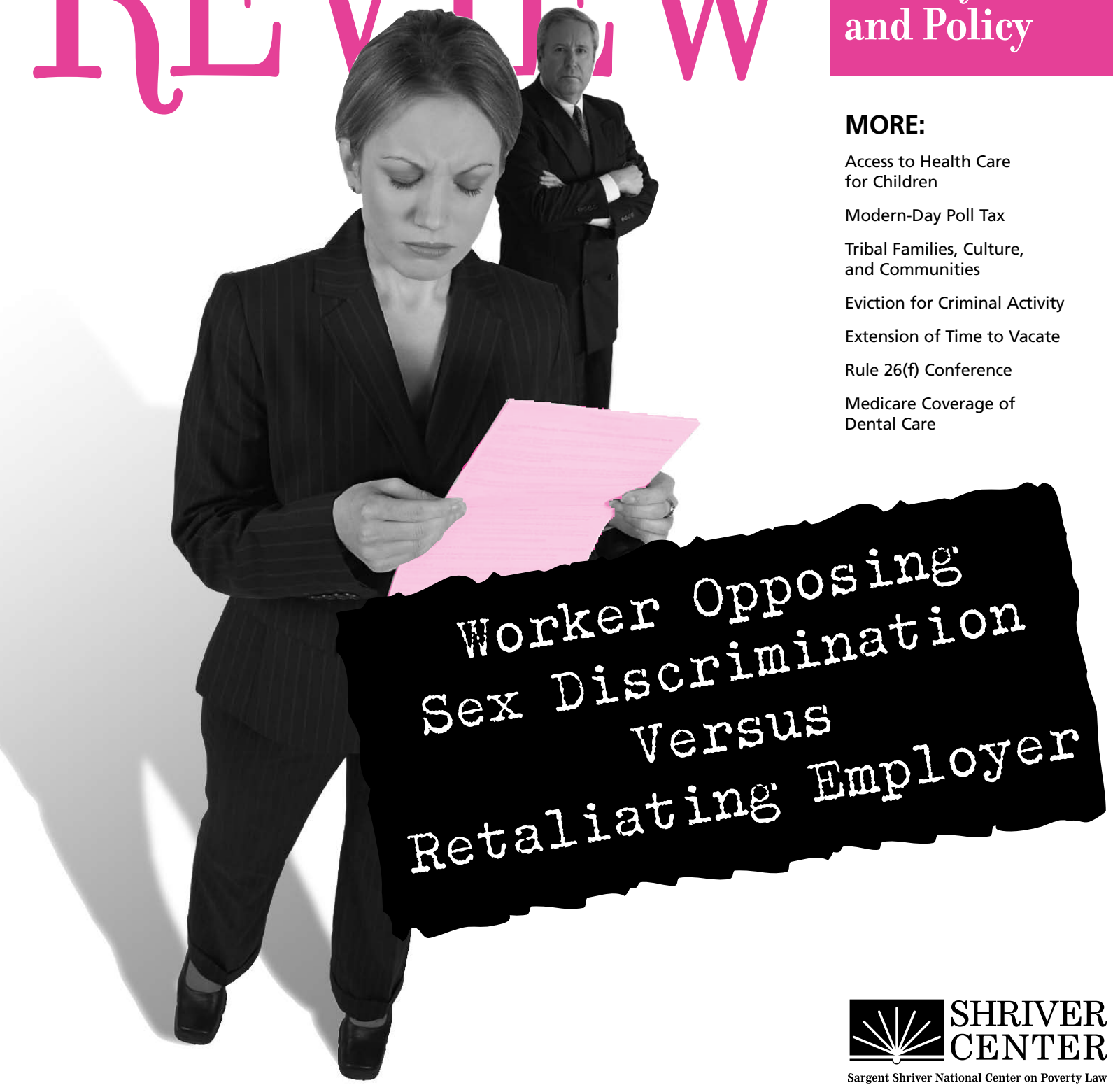

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How the Federal Rules of Civil Procedure Require Early Case Planning: The Rule 26(f) Conference

By Greg Bass

[**Editor's Note:** This periodic column aims to give practical help on litigation issues that advocates encounter in federal or state court. It outlines the problems, offers some basic legal research results and analyses, and suggests possible approaches to resolving the issues. The columnist Greg Bass, litigation director, Greater Hartford Legal Aid, welcomes reader feedback. Send your comments, questions, and suggestions for topics to gbass@ghla.org.]

The Question

Shortly after you file a federal court action challenging your local housing authority's violation of various Section 8 mandates, opposing counsel leaves you a voicemail message insisting that your case is meritless and further demanding when the "26(f) conference" will be held. You have done significant prefiling fact investigation and legal research, but somehow this reference is not familiar. This case is part of your program's new focus on affirmative litigation, so you want to cover all the bases. What is this "26(f) conference" all about?

The Answer

Federal Rule of Civil Procedure 26(f) requires counsel and unrepresented parties to "confer" at the outset of most actions regarding a wide range of case planning and discovery issues. Under the rule the conference involves, among other matters, consideration of the parties' claims and defenses, discussion of early settlement possibilities, making or arranging for initial disclosures of information required by Rule 26(a)(1), and the development of a detailed, proposed discovery plan. Within fourteen days of the conference, the parties must jointly submit to the court a written report that contains this discovery plan and specifies all issues agreed to and those still in dispute.[1] The parties generally may not commence formal discovery, apart from initial disclosures of information, until after the Rule 26(f) conference is held.[2] After receiving the parties' report, the court must promptly enter a corresponding "scheduling order" that specifies, at a minimum, limitations and deadlines regarding discovery, motions, joinder of parties, and amendment of pleadings.[3]

The effect of Federal Rule of Civil Procedure 26(f) is to engage the attorneys, early in the lawsuit, in a mutual case management that is coordinated with the active involvement of the court. Effective use of this process should be an incentive for early, comprehensive case planning that enables you to organize your litigation productively and to avoid being constrained by ill-advised choices that find their way into a scheduling order of the court.

While I focus on Federal Rule of Civil Procedure 26(f), a number of comparable case planning procedures guide affirmative litigation practice in state courts. Seventeen states and the District of Columbia "have adopted a variety of rules that either require, or utilize incentives to encourage, counsel to confer on crafting discovery plans tailored to the needs of the individual case .... [S]ome of these jurisdictions require judicial follow-up through the entry of scheduling orders, while others contemplate judicial intervention only where the parties cannot agree."[4]

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[1] Fed. R. Civ. P. 26(f). Note that local rules may modify the time periods for holding the conference and for reporting to the court and may allow the substitute of an oral report for the written submission. *Id*.

[2] *Id*. 26(d).

[3] *Id.* 16(b).

[4] Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process,* 58 Vanderbilt Law Review 1167, 1236–37 (2005) (footnotes omitted).

Federal Rule of Civil Procedure 26(f)

Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues relating to claims of privilege or of protection as trial-preparation material, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order;

(5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(6) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

Purpose and Benefit of Federal Rule of Civil Procedure 26(f)

As characterized by one federal district court, "Rule 26(f) was created to counter discovery abuses and to allow for speedier processing of civil suits. It seeks to provide assistance for parties that are unable to get cooperation from opposing counsel in the formation of discovery terms."[5] Unless authorized by agreement, court order, or the Federal Rules of Civil Procedure, parties "may not seek discovery from any source" until they have conducted the required Rule 26(f) conference.[6] Commentators explain that "[t]he seriousness of this [Rule 26(f)] meeting is reflected in the fact that … Rule 26(d) imposes a moratorium on formal discovery (except for the deposition of a witness about to leave the country) until the meeting has been held …. [O]rdinarily the meeting is to be an important event in most civil cases."[7]

[5] *Kampfer v. Pitcher,* No. 95-CV-214 (FJS/DNH), 1996 WL 492702, at *1 (N.D.N.Y. Aug. 27, 1996) (citing 1980 Amendments to Fed. R. Civ. P. 26(f), advisory committee notes); see 2000 Amendments to Fed. R. Civ. P. 26(f), advisory committee notes (Rule 26(f) conference requirement applied nationwide as it was "one of the most successful changes made in the 1993 amendments").

[6] Fed. R. Civ. P. 26(d); see *id.* 33(a) (interrogatories); *id.* 34(b) (requests for production); *id.* 36(a) (requests for admission); see also *Riley v. Walgreen Company,* 233 F.R.D. 496, 499 (S.D. Tex. 2005) ("Rule 26(d)'s proscription sweeps broadly: not only may a party not 'serve' discovery, it may not even 'seek' discovery from any source until after the Rule 26(f) conference …. The discovery bar facilitates the goal of orderly, efficient, and economical discovery by creating an incentive to meet and devise a joint discovery plan at an early stage of the litigation."). But see *OMG Fidelity Incorporated v. Sirius Technologies, Incorporated* No. 6:06-CV-1184 (DNH/DEP), 2006 WL 3359313 (N.D.N.Y. Nov. 16, 2006) (allowing plaintiff's expedited discovery request prior to 26(f) conference).

[7] 8 Charles Alan Wright et al., Federal Practice And Procedure § 2051.1 (2d ed. 1994) (footnote omitted); see Fed. R. Civ. P. 33(a)(2)(C) (obtaining leave of court to waive Rule 26(d) moratorium for deposition of witness leaving the United States).

The Basics

In anticipating a Rule 26(f) conference, keep the following points in mind.

Cases Subject to the Rule. Unless expressly exempted by Federal Rule of Civil Procedure 26(f) or by a case-specific court order, all federal civil actions are generally subject to the requirement that the parties hold a case planning conference at an early stage in the litigation.[8]

The Process. Under the terms of Rule 26(f), all attorneys of record and unrepresented parties share joint responsibility for three basic steps of the conference process:

(1) *"Arranging" for the conference to be held*—a face-to-face meeting is encouraged but not required.[9]

(2) *"Attempting in good faith to agree" on the contents of a "proposed discovery plan"*—the process is meant to incorporate informal discussion of case-related issues and facilitate efficient, economical discovery. Rule 26(f)'s specific directive to "confer" is mandatory, and noncompliance may subject a party to sanctions.[10] The requirement of good faith requires only an attempt at agreement, however; unanimous consent on all issues is not mandated.[11] The duty to participate applies to all parties appearing in the case, including defendants who have not yet filed answers due to pending Federal Rule of Civil Procedure 12 motions to dismiss.[12]

(3) *Submitting to the court a "written report outlining" the proposed discovery plan*—counsel are generally expected to agree on who will prepare and submit the report to the court. The report should refer to discovery plan agreements and disputes and "should not be difficult to prepare."[13]

Subjects Covered. Discovery planning, which I discuss separately, is a focal point of Rule 26(f). The litigation topics to be addressed in the parties' conference and report to the court break down, however, into five areas that do not constitute an exclusive list.[14] The broader case planning scope of the process is highlighted by the subjects referred to in Rule 26(f), together with their implementation through local rule variations, court preferences, and actual practice.[15]

Rule 26(f) directs coverage of the following areas in the conference:

(1) *Consideration of the "nature and basis of their claims and defenses"*—the parties are counseled to explore informally the issues involved in the litigation.[16]

(2) *Consideration of the "possibilities for a prompt settlement or resolution of the case"*—this requirement appears to contemplate a discussion that goes be-

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[8]Unless specifically ordered by the court, the cases that Rule 26(f) exempts track the categories of proceedings that are also excluded from the Federal Rule of Civil Procedure 26(a)(1)(E) discovery mandate to provide initial disclosures. These include, e.g., actions for review on an administrative record, habeas corpus petitions, actions to enforce or quash administrative summons or subpoenas, and actions to enforce arbitration awards. See FED. R. CIV. P. 26(f) & 26(a)(1)(E); 2000 Amendments to FED. R. CIV. P. 26(f), advisory committee notes; see also FED. R. CIV. P. 16(b) (court must issue scheduling order unless exempted by local rule as "inappropriate"). Absent an order of the court, the Rule 26(f) conference requirement applies to all other cases. See FED. R. CIV. P. 26(f).

[9]See 2000 Amendments to FED. R. CIV. P. 26(f), advisory committee notes.

[10]See 1993 Amendments to FED. R. CIV. P. 26(f), advisory committee notes; FED. R. CIV. P. 37(g) (sanctions applied for failure to "participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f)").

[11]See 1993 Amendments to FED. R. CIV. P. 26(f), advisory committee notes; see also *Fieldturf USA Incorporated v. Speciality Surfaces International Incorporated,* No. 06-CV-02515, 2006 WL 3500902, at *3 (E.D. Va. Dec. 5, 2006) ("That rule [26(f)] … does not require parties to agree to a written plan …. Development is not the same as agreement …. Because the parties discussed their cases and made proposals for discovery during a lengthy conference call … the Rule 26(f) requirement was met.").

[12]1993 Amendments to FED. R. CIV. P. 26(f), advisory committee notes. Note that another conference "may be desirable" if additional parties are joined or appear after the initial meeting. *Id.*

[13]*Id.*; see FED. R. CIV. P. 26(f).

[14]*Id.*; 1993 Amendments to FED. R. CIV. P. 26(f), advisory committee notes ("This listing does not exclude consideration of other subjects, such as the time when any dispositive motions should be filed and when the case should be ready for trial.").

[15]See WRIGHT ET AL., *supra* note 7, § 2051.1 ("Although keyed to discovery and included in the basic discovery rule, Rule 26(f) goes well beyond planning discovery …. [T]he 'discovery plan' and report to emerge from the meeting may often go well beyond the mechanics and timing of discovery events.").

[16]See 1993 Amendments to FED. R. CIV. P. 26(f), advisory committee notes. There is no requirement to provide substitute or more specific pleadings. See WRIGHT ET AL., *supra* note 7, § 2051.1.

yond whether proposed restrictions on discovery facilitate agreement.[17]

(3) *Making or arranging for the initial disclosures of information under Federal Rule of Civil Procedure 26(a)(1)*—at the outset of the litigation, unless otherwise directed by stipulation, court order, or Federal Rule of Civil Procedure 26, each party must make specific "initial disclosures" in writing, without waiting for formal discovery requests from the other party. This mandate includes the identification of witnesses, "documents, electronically stored information, and tangible things" that "the disclosing party may use to support its claims or defenses"; a computation of damages; and the disclosure of information regarding insurance agreements. The disclosures must generally be made at or within fourteen days following the Rule 26(f) conference.[18]

The attorneys are encouraged to consider informally providing both the automatic Rule 26(a)(1) initial disclosures and other information not subject to those requirements.[19] The conference is also designed to give the opportunity to clarify the meaning and intent of the parties' respective disclosures. It "is evident that the parties are to exchange views on how refined and particularized the pleadings are, and the drafters specifically contemplated that the discussion at the meeting would control the scope of the disclosure obligation."[20]

(4) *Discussion of "issues relating to preserving discoverable information"*—this applies to all sorts of information but is especially critical in cases of electronically stored data.[21]

(5) *Development of a "proposed discovery plan"*—the parties must include their "views and proposals" on six subjects in the plan submitted to the court:

- Proposed modifications of the "timing, form, or requirement" for Rule 26(a)(1) initial disclosures.[22]
- Basic discovery management issues, including necessary subjects of inquiry, completion dates, and whether discovery should be conducted in phases or otherwise limited.[23]
- Disclosure and production of electronic discovery and related issues.[24]
- Claims of privilege or protection of attorney work product.[25]
- Proposed alterations to discovery restrictions imposed by local rule or by the Federal Rules of Civil Procedure, including, for example, the limitations of ten depositions per case, one day of seven hours' duration per deposition, and twenty-five interrogatories per case.[26]

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[17]See WRIGHT ET AL., *supra* note 7, § 2051.1.

[18]FED R. CIV. P. 26(a)(1); see *id.* 26(f).

[19]See 1993 Amendments to FED. R. CIV. P. 26(f), advisory committee notes ("The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.").

[20] WRIGHT ET AL., *supra* note 7, § 2051.1 (footnote omitted); see 1993 Amendments to FED. R. CIV. P. 26(f), advisory committee notes.

[21]See 2006 Amendments to FED. R. CIV. P. 26(f), advisory committee notes. In the context of the Federal Rules of Civil Procedure amendments that became effective December 1, 2006, and deal extensively with electronic discovery, the amendments to Rule 26(f) specifically call for the parties to consider issues of electronically stored information, including the form of production and preservation of discoverable information, and ways to handle problems of privilege waiver. See 2006 Amendments to FED. R. CIV. P. 26(f), 33, 34, 37, Form 35, advisory committee notes, available at www.uscourts.gov/rules/EDiscovery_w_Notes.pdf (electronic discovery amendments to Federal Rules of Civil Procedure and committee notes). These amendments raise many complicated and evolving issues that are beyond the scope of this column but that commentators continue to address extensively. See generally Louis R. Pepe & Jared Cohane, *Document Retention, Electronic Discovery, E-Discovery Cost Allocation, and Spoliation of Evidence: The Four Horsemen of the Apocalypse in Litigation Today,* 80 CONNECTICUT BAR JOURNAL 331 (2006); David K. Isom, *Electronic Discovery Primer for Judges*, 2005 FEDERAL COURTS LAW REVIEW 1 (2005).

[22] FED R. CIV. P. 26(f)(1).

[23]*Id.* 26(f)(2); see *Williams v. Scottrade Incorporated,* No. 06-10677, 2006 WL 1722224 (E.D. Mich. June 19, 2006) (staying discovery pending resolution of motion to dismiss). Cf. *Gettings v. Building Laborers Local 310 Fringe Benefits Fund*, 349 F.3d 300, 304 (6th Cir. 2003) ("Trial courts have broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined. Limitations on pretrial discovery are appropriate where claims may be dismissed based on legal determinations that could not have been altered by any further discovery." (citations omitted)).

[24]FED. R. CIV. P. 26(f)(3); see *supra* note 23. Cf. *id.* 29 (parties may stipulate to certain discovery procedural modifications).

[25]*Id.* 26(f)(4); see *supra* note 21.

[26]*Id.* 26(f)(5); see *id.* 30(a)(2)(A) (ten deposition limit); 30(d)(2) (one seven-hour day per deposition limit); 33(a) (25 interrogatory limit).

- A catchall category that includes "any other orders that should be entered by the court under Rule 26(c) [discovery protection orders] or under Rule 16(b) and (c) [scheduling and pretrial orders]."[27]

Official Form 35, the "Report of Parties' Planning Meeting," of the Federal Rules of Civil Procedure confirms that Rule 26(f) contemplates a broad case planning report that can serve as a potential agenda for the conference itself.[28] References in the form include proposed deadlines for pretrial conferences, joinder of parties, amendment of pleadings, filing of dispositive motions, witness and exhibit lists, and trial readiness.

Resulting Scheduling Order. After receiving the Rule 26(f) report and conferring with the parties at a scheduling conference or through other means, the district court judge or magistrate judge issues a scheduling order under Federal Rule of Civil Procedure 16(b). The court's order incorporates the parties' agreed-upon case planning proposals and rules on issues still in dispute.[29] The Rule 26(f) report should help the court tailor proposed discovery limitations, scope, and timing to the circumstances of the case.[30] The parties' "proposals, particularly regarding matters on which they agree, should be of substantial value to the court in setting the timing and limitations on discovery and should reduce the court's time in conducting a meaningful conference under Rule 16(b)."[31]

The Rule 16(b) scheduling order sets a blueprint for the litigation. Its terms can be modified only by leave of court, based upon a showing of good cause.[32]

Timing. The Rule 26(f) process is designed to operate fairly quickly. While the rule does not state precisely when the conference must occur, it does direct that it take place "as soon as practicable" and "at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)[.]"[33] The parties must submit the report within fourteen days of the conference.[34] Once the court receives the Rule 26(f) report, or after a conference or other consultation with counsel and unrepresented parties, Federal Rule of Civil Procedure 16(b) provides that the scheduling order "shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant."[35]

Practice Pointers

1. Anticipating and discussing appropriate limitations and deadlines for depositions, interrogatories, dispositive motions, and other case planning topics can be daunting at the outset of a lawsuit—especially because, once the court incorporates these proposals into a Rule 16(b) scheduling order, you must show good cause to modify them. Rule 26(f) reinforces the importance of effective case management in general, and discovery planning in particular, well before you file your action. Your case will benefit from early analysis of your causes of action and corresponding issues of proof; whether you anticipate proof of these claims through documents or witness testimony; how and in what form you will procure necessary evidence; and which discovery tools best suit your plan.
2. Take the initiative in contacting opposing counsel to schedule the Rule 26(f) conference. Remind your adversary, if necessary, of the need to discuss initial disclosures, discovery planning, and other case management issues, and suggest the timing and format—face-to-face or over the telephone. Be prepared to reduce your efforts (and your opponent's) to writing in or-

[27] *Id*. 26(f)(6).

[28] 1993 Amendments to Fed. R. Civ. P. 26(f), advisory committee notes; see Fed. R. Civ. P., app. Form 35; 1993 Amendments to Fed. R. Civ. P., app. Form 35, advisory committee notes; Wright et al., *supra* note 7, § 2051.1 (footnote omitted) ("invitation" to consider "a broad range of topics is confirmed by Official Form 35").

[29] Fed. R. Civ. P. 16(b); see *id*. 26(f) (local rule may provide for oral report of discovery plan at Rule 16(b) conference).

[30] 1993 Amendments to Fed. R. Civ. P. 26(f), advisory committee notes.

[31] 1993 Amendments to Fed. R. Civ. P. 16(b), advisory committee notes.

[32] Fed. R. Civ. P. 16(b); see *id.* 16(f) (sanctions for noncompliance with scheduling order).

[33] *Id*. 26(f).

[34] *Id*. The court may prescribe expedited timelines by local rule for conducting the Rule 26(f) conference and submitting the report. *Id.*

[35] *Id*. 16(b).

der to document compliance, if necessary, with Rule 26(f).

3. Assess the relative merits of an in-person meeting and a telephone conference call. Are you familiar with the opposing counsel's tactics and litigation style? Will this be your introduction to this attorney? Will the discovery plan involve complex issues concerning restrictions, potential stays, and related motion practice that can more easily be addressed in person? Is your case likely to involve straightforward discovery requests that can be discussed efficiently by phone? Consider such factors in determining the best format for the conference.[36]

4. Before the conference, prepare a draft of the Rule 26(f) report that conveys your case planning proposals. Consider forwarding it to opposing counsel ahead of time to facilitate a more efficient meeting and set an early framework for your positions.

5. Use the conference to get an initial impression of your adversary's litigation style (especially if you have never encountered the attorney before) and to gain insight into the adversary's apparent theories of the case and litigation strategies. The claims or defenses that your opponent wants to include in the report can shed light on these matters. For example, you may first learn in the conference that your opponent plans to assert an Eleventh Amendment immunity defense. Keep in mind that this is a two-way street—opposing counsel is likely to be sizing you up as well.

6. Do not allow the "informal" nature of the process to let you become complacent. This involves a balancing act. On the one hand, failure to agree on a discovery plan means that the court will resolve the dispute, perhaps not to your advantage. On the other hand, unwarranted agreement to opposing counsel's suggested "refinements" and "clarifications" of your discovery requests may result in unwarranted concessions that will unduly hamper your case.

7. While disclosure of information without formal discovery requests may be advantageous, consider whether insisting on discovery provided through sworn, written responses might help with potential disputes over admissible evidence.

8. After the conference, take responsibility for both drafting a final version of the Rule 26(f) report that accurately incorporates the parties' proposals and for ensuring its timely submission to the court.

9. Know your local rules variations on Rule 26(f) and the individual case management preferences of the district court judge or magistrate judge presiding over your case. These local rules can mandate modified deadlines and procedures, as well as dictate initial discussion and reporting of a wide range of case status and discovery planning issues that pose an early challenge to your management of the litigation.[37]

10. Use Rule 26(f) as an opportunity to craft a litigation plan that will allow you to acquire all needed discovery, start becoming familiar with the case theory and strategies of opposing counsel, and anticipate and overcome roadblocks to a successful outcome.

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[36]These factors should lead you to resist the temptation to conduct the Rule 26(f) process by e-mail.

[37]See, e.g., Rules of the U.S. District Court for the District of Connecticut, Rule 26(f) (amended 2007), available at www.ctd.uscourts.gov/noticereediscovery.pdf (requiring, inter alia, initiation of conference by plaintiff, modified conference deadline for cases with government defendants, ten-day deadline for submitting report to court, and specifying categories of exempted cases); see *id.* Form 26(f) (amended 2007) (requiring counsel, inter alia, to certify their "good faith attempt to determine whether there are any material facts that are not in dispute," specify those undisputed facts, specify jurisdictional bases, and outline discovery of expert witnesses); see also *Stephens v. Bell Helicopter Textron Incorporated,* No. 4:03-CV-1248-Y, 2003 WL 22961254 (N.D. Tex. Oct. 27, 2003) (mandating parties' participation in Rule 26(f) conference and submission of detailed joint status report and proposed discovery plan, including discussion of, inter alia, jurisdiction, consent to magistrate judge referral, and settlement and mediation prospects); *Estate of Logan v. Brown and Williamson Tobacco Company*, No. C03-1046Z, 2003 WL 22341281 (W.D. Wash. May 28, 2003) (requiring plaintiff's counsel to start the conference process, directing parties to confer "by direct and personal communication" and to submit joint status report and discovery plan detailing, inter alia, "the nature and complexity of the case," "how discovery will be managed so as to minimize expense," whether the case should be bifurcated, the date of trial readiness and number of trial days required, and "any other suggestions for shortening or simplifying the case."

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