

SUGGESTED AMENDMENT
SUPERIOR COURT CIVIL RULES (CR)
CR 26 – GENERAL PROVISIONS GOVERNING DISCOVERY

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2 **(a) Discovery Methods and Cooperation.** Parties may obtain discovery by one or more of the
3 following methods: depositions upon oral examination or written questions; written
4 interrogatories; production of documents or things or permission to enter upon land or other
5 property, for inspection and other purposes; physical and mental examinations; and requests for
6 admission. Consistent with the general obligation to cooperate set forth in CR 1, the court
7 expects the parties and their counsel to reasonably cooperate with each other in using discovery
8 methods; exchanging discoverable information; scheduling depositions, inspections, and
9 examinations; and reducing the costs of discovery.
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11 **(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance
12 with these rules, the scope of discovery is as follows:

13 (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is
14 relevant to the subject matter involved in the pending action, whether it relates to the claim or
15 defense of the party seeking discovery or to the claim or defense of any other party, including the
16 existence, description, nature, custody, condition and location of any books, documents, or other
17 tangible things and the identity and location of persons having knowledge of any discoverable
18 matter. It is not ground for objection that the information sought will be inadmissible at the trial
19 if the information sought appears reasonably calculated to lead to the discovery of admissible
20 evidence.
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22 The frequency or extent of use of the discovery methods set forth in section (a) shall be limited
23 by the court if it determines that: (A) the discovery sought is unreasonably cumulative or
24 duplicative, or is obtainable from some other source that is more convenient, less burdensome, or
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1 less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the
2 action to obtain the information sought; or (C) the discovery is unduly burdensome or expensive,
3 taking into account the needs of the case, the amount in controversy, limitations on the parties'
4 resources, and the importance of the issues at stake in the litigation. The court may act upon its
5 own initiative after reasonable notice or pursuant to a motion under section (c).

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7 (2) *Insurance Agreements.* A party may obtain discovery and production of: (i) the existence and
8 contents of any insurance agreement under which any person carrying on an insurance business
9 may be liable to satisfy part or all of a judgment which may be entered in the action or to
10 indemnify or reimburse for payments made to satisfy the judgment; and (ii) any documents
11 affecting coverage (such as denying coverage, extending coverage, or reserving rights) from or
12 on behalf of such person to the covered person or the covered person's representative.
13 Information concerning the insurance agreement is not by reason of disclosure admissible in
14 evidence at trial. For purposes of this section, an application for insurance shall not be treated as
15 part of an insurance agreement.
16

17 (3) *Structured Settlements and Awards.* In a case where a settlement or final award provides for
18 all or part of the recovery to be paid in the future, a party entitled to such payments may obtain
19 disclosure of the actual cost to the defendant of making such payments. This disclosure may be
20 obtained during settlement negotiations upon written demand by a party entitled to such
21 payments. If disclosure of cost is demanded, the defendant may withdraw the offer of a
22 structured settlement at any time before the offer is accepted.
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24 (4) *Trial Preparation: Materials.* Subject to the provisions of subsection (b)(5) of this rule, a
25 party may obtain discovery of documents and tangible things otherwise discoverable under
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1 subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for
2 another party or by or for that other party's representative (including a party's attorney,
3 consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking
4 discovery has substantial need of the materials in the preparation of such party's case and that the
5 party is unable without undue hardship to obtain the substantial equivalent of the materials by
6 other means. In ordering discovery of such materials when the required showing has been made,
7 the court shall protect against disclosure of the mental impressions, conclusions, opinions, or
8 legal theories of an attorney or other representative of a party concerning the litigation.

9
10 A party may obtain without the required showing a statement concerning the action or its subject
11 matter previously made by that party. Upon request, a person not a party may obtain without the
12 required showing a statement concerning the action or its subject matter previously made by that
13 person. If the request is refused, the person may move for a court order. The provisions of rule
14 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this
15 section, a statement previously made is:
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- 17 (A) a written statement signed or otherwise adopted or approved by the person making it; or
18 (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is
19 substantially verbatim recital of an oral statement by the person making it and
20 contemporaneously recorded.

21 (5) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts,
22 otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or
23 developed in anticipation of litigation or for trial, may be obtained only as follows:
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1 (A)(i) A party may through interrogatories require any other party to identify each person whom
2 the other party expects to call as an expert witness at trial, to state the subject matter on which
3 the expert is expected to testify, to state the substance of the facts and opinions to which the
4 expert is expected to testify and a summary of the grounds for each opinion, and to state such
5 other information about the expert as may be discoverable under these rules. (ii) A party may,
6 subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other
7 party expects to call as an expert witness at trial.
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9 (B) A party may discover facts known or opinions held by an expert who is not expected to be
10 called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional
11 circumstances under which it is impracticable for the party seeking discovery to obtain facts or
12 opinions on the same subject by other means.

13 (C) Unless manifest injustice would result, (i) the court shall require that the party seeking
14 discovery pay the expert a reasonable fee for time spent in responding to discovery under
15 subsections (b)(5)(A)(ii) and (b)(5)(B) of this rule; and (ii) with respect to discovery obtained
16 under subsection (b)(5)(A)(ii) of this rule the court may require, and with respect to discovery
17 obtained under subsection (b)(5)(B) of this rule the court shall require the party seeking
18 discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by
19 the latter party in obtaining facts and opinions from the expert.
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21 (6) *Claims of Privilege or Protection as Trial-Preparation Materials for Information*
22 *Produced.* If information produced in discovery is subject to a claim of privilege or of protection
23 as trial-preparation material, the party making the claim may notify any party that received the
24 information of the claim and the basis for it. After being notified, a party must promptly return,
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1 sequester, or destroy the specified information and any copies it has; must not use or disclose the
2 information until the claim is resolved; and must take reasonable steps to retrieve the information
3 if the party disclosed it before being notified. Either party may promptly present the information
4 in camera to the court for a determination of the claim. The producing party must preserve the
5 information until the claim is resolved.

6
7 *(7) Discovery From Treating Health Care Providers.* The party seeking discovery from a
8 treating health care provider shall pay a reasonable fee for the reasonable time spent in
9 responding to the discovery. If no agreement for the amount of the fee is reached in advance,
10 absent an order to the contrary under section (c), the discovery shall occur and the health care
11 provider or any party may later seek an order setting the amount of the fee to be paid by the party
12 who sought the discovery. This subsection shall not apply to the provision of records under RCW
13 70.02 or any similar statute, nor to discovery authorized under any rules for criminal matters.

14
15 *(8) Treaties or Conventions.* If the methods of discovery provided by applicable treaty or
16 convention are inadequate or inequitable and additional discovery is not prohibited by the treaty
17 or convention, a party may employ the discovery methods described in these rules to supplement
18 the discovery method provided by such treaty or convention.

19 **(c) Protective Orders.** Upon motion by a party or by the person from whom discovery is sought,
20 and for good cause shown, the court in which the action is pending or alternatively, on matters
21 relating to a deposition, the court in the county where the deposition is to be taken may make any
22 order which justice requires to protect a party or person from annoyance, embarrassment,
23 oppression, or undue burden or expense, including one or more of the following: (1) that the
24 discovery not be had; (2) that the discovery may be had only on specified terms and conditions,
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1 including a designation of the time or place; (3) that the discovery may be had only by a method
2 of discovery other than that selected by the party seeking discovery; (4) that certain matters not
3 be inquired into, or that the scope of the discovery be limited to certain matters; (5) that
4 discovery be conducted with no one present except persons designated by the court; (6) that the
5 contents of a deposition not be disclosed or be disclosed only in a designated way; (7) that a
6 trade secret or other confidential research, development, or commercial information not be
7 disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file
8 specified documents or information enclosed in sealed envelopes to be opened as directed by the
9 court.
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11 If the motion for a protective order is denied in whole or in part, the court may, on such terms
12 and conditions as are just, order that any party or person provide or permit discovery. The
13 provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.
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15 **(d) Sequence and Timing of Discovery.** Unless the court upon motion, for the convenience of
16 parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may
17 be used in any sequence and the fact that a party is conducting discovery, whether by deposition
18 or otherwise, shall not operate to delay any other party's discovery.

19 **(e) Supplementation of Responses.** A party who has responded to a request for discovery with a
20 response that was complete when made is under no duty to supplement the response to include
21 information thereafter acquired, except as follows:

22 (1) A party is under a duty seasonably to supplement his response with respect to any question
23 directly addressed to:
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25 (A) the identity and location of persons having knowledge of discoverable matters, and
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1 (B) the identity of each person expected to be called as an expert witness at trial, the subject
2 matter on which the expert witness is expected to testify, and the substance of the expert
3 witness's testimony.

4 (2) A party is under a duty seasonably to amend a prior response if the party obtains information
5 upon the basis of which:

6 (A) the party knows that the response was incorrect when made, or

7 (B) the party knows that the response though correct when made is no longer true and the
8 circumstances are such that a failure to amend the response is in substance a knowing
9 concealment.

10 (3) A duty to supplement responses may be imposed by order of the court, agreement of the
11 parties, or at any time prior to trial through new requests for supplementation of prior responses.

12 (4) Failure to seasonably supplement in accordance with this rule will subject the party to such
13 terms and conditions as the trial court may deem appropriate.

14
15 **(f) Discovery Conference.** At any time after commencement of an action the court may direct
16 the attorneys for the parties to appear before it for a conference on the subject of discovery. The
17 court shall do so upon motion by the attorney for any party if the motion includes:

18 (1) A statement of the issues as they then appear;

19 (2) A proposed plan and schedule of discovery;

20 (3) Any limitations proposed to be placed on discovery;

21 (4) Any other proposed orders with respect to discovery; and

22 (5) A statement showing that the attorney making the motion has made a reasonable effort to
23 reach agreement with opposing attorneys on the matters set forth in the motion.
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1 Each party and each party's attorney are under a duty to participate in good faith in the framing
2 of a discovery plan if a plan is proposed by the attorney for any party.

3 Notice of the motion shall be served on all parties. Objections or additions to matters set forth in
4 the motion shall be served not later than 10 days after service of the motion.

5 Following the discovery conference, the court shall enter an order tentatively identifying the
6 issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations
7 on discovery, if any, and determining such other matters, including the allocation of expenses, as
8 are necessary for the proper management of discovery in the action. An order may be altered or
9 amended whenever justice so requires.
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11 Subject to the right of a party who properly moves for a discovery conference to prompt
12 convening of the conference, the court may combine the discovery conference with a pretrial
13 conference authorized by rule 16.
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15 **(g) Signing of Discovery Requests, Responses, and Objections.** Every request for discovery or
16 response or objection thereto made by a party represented by an attorney shall be signed by at
17 least one attorney of record in the attorney's individual name, whose address shall be stated. A
18 party who is not represented by an attorney shall sign the request, response, or objection and
19 state the party's address. The signature of the attorney or party constitutes a certification that the
20 attorney or the party has read the request, response, or objection, and that to the best of their
21 knowledge, information, and belief formed after a reasonable inquiry it is:

22 (1) consistent with these rules and warranted by existing law or a good faith argument for the
23 extension, modification, or reversal of existing law;
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1 (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or
2 needless increase in the cost of litigation; and

3 (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the
4 discovery already had in the case, the amount in controversy, and the importance of the issues at
5 stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless
6 it is signed promptly after the omission is called to the attention of the party making the request,
7 response, or objection and a party shall not be obligated to take any action with respect to it until
8 it is signed.
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10 If a certification is made in violation of the rule, the court, upon motion or upon its own
11 initiative, shall impose upon the person who made the certification, the party on whose behalf the
12 request, response, or objection is made, or both, an appropriate sanction, which may include an
13 order to pay the amount of the reasonable expenses incurred because of the violation, including a
14 reasonable attorney fee.
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16 **(h) Use of Discovery Materials.** A party filing discovery materials on order of the court or for
17 use in a proceeding or trial shall file only those portions upon which the party relies and may file
18 a copy in lieu of the original.

19 **(i) Motions; Conference of Counsel Required.** The court will not entertain any motion or
20 objection with respect to rules 26 through 37 unless counsel have conferred with respect to the
21 motion or objection. Counsel for the moving or objecting party shall arrange for a mutually
22 convenient conference in person or by telephone. If the court finds that counsel for any party,
23 upon whom a motion or objection in respect to matters covered by such rules has been served,
24 has willfully refused or failed to confer in good faith, the court may apply the sanctions provided
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1 under rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall
2 include counsel's certification that the conference requirements of this rule have been met.

3 **(j) Access to Discovery Materials Under RCW 4.24.**

4 (1) *In General.* For purposes of this rule, “discovery materials” means depositions, answers to
5 interrogatories, documents or electronic data produced and physically exchanged in response to
6 requests for production, and admissions pursuant to rules 26-37.
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8 (2) *Motion.* The motion for access to discovery materials under the provisions of RCW 4.24 shall
9 be filed in the court that heard the action in which the discovery took place. The person seeking
10 access shall serve a copy of the motion on every party to the action, and on nonparties if ordered
11 by the court.

12 (3) *Decision.* The provisions of RCW 4.24 shall determine whether the motion for access to
13 discovery materials should be granted.
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