MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. John D. Bates, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 12, 2016

Introduction

The Civil Rules Advisory Committee met in Palm Beach, Florida, on April 14, 2016. Draft Minutes of this meeting are attached.

Part I of this Report presents recommendations to approve publication this summer of proposed amendments to Civil Rules 5 (e-filing and e-service); 23 (class actions); and 62 (stays of execution of judgment).

Part II presents a recommendation to approve submission to the Judicial Conference of the United States two proposed pilot projects. One project would test a system of mandatory initial discovery requests to be adopted in each participating court. The second would test the effectiveness of court-wide adoption of practices that, under the current rules, have proved effective in reducing cost and delay. The Committee on Court Administration and Court Management has participated in the work that shaped these projects. It is understood on all sides that the projects will evolve as they move along the path to implementation, both in the interlude before presentation to the Judicial Conference and, if approved, in the actual implementation period thereafter.

Part III describes other work. The first segment describes proposals under active consideration for eventual publication and adoption. These proposals include a new subdivision in Rule 5.2 that would establish a procedure for redacting information that was improperly included in a court filing; a renewal of the extensive work that was done ten years ago to evaluate concerns about the operation of Rule 30(b)(6)(deposition of an entity); and consideration of the Rule 81(c) provisions for demanding a jury trial after a case is removed from state court. The second segment briefly notes action on a number of suggestions that were submitted to the Committee through the public submission process.

I. RECOMMENDATIONS FOR PUBLICATION

A. RULE 23

The Civil Rules Advisory Committee recommends publication of the following preliminary draft of amendments to Rule 23.

Rule 23. Class Actions

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(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

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(2) ***Notice.***

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(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by United States mail, electronic means, or other appropriate means.
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(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to the Class.***

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) ***Approval of the Proposal.*** If the proposal would bind class members under Rule 23(c)(3), the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:~~.~~

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) class members are treated equitably relative to each other.

(3) ***Identification of Side Agreements.*** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) ***New Opportunity to Be Excluded.*** If the class was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) ***Class-Member Objections.***

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required For Payment to an Objector or Objector's Counsel.* Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure For Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

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(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). ~~if a petition for to appeal is filed~~ A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Committee Note

Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003.

Subdivision (c)(2). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision is sometimes inaccurately called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions, and it is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this notice practice. Requiring repeat notices to the class can be wasteful and confusing to class members, and costly as well.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts read the rule to require notice by first class mail in every case. But technological change since 1974 has meant that other forms of communication are more reliable and important to many. Courts and counsel have begun to employ new technology to make notice more effective, and sometimes less costly. Because there is no reason to expect that technological change will halt soon, courts giving notice under this rule should consider existing technology, including class members' likely access to such technology, when selecting a method of giving notice.

Rule 23(c)(2)(B) is amended to take account of these changes, and to call attention to them. The rule continues to call for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may often be true that electronic methods of notice, for example by email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet. Instead of preferring any one means of notice, therefore, courts and counsel should focus on the means most likely to be effective in the case before the court. The amended rule emphasizes

that the court must exercise its discretion to select appropriate means of giving notice. Courts should take account not only of anticipated actual delivery rates, but also of the extent to which members of a particular class are likely to pay attention to messages delivered by different means. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it may often be important to include a report about the proposed method of giving notice to the class.

In determining whether the proposed means of giving notice is appropriate, the court should give careful attention to the content and format of the notice and, if this notice is given under Rule 23(e)(1) as well as Rule 23(c)(2)(B), any claim form class members must submit to obtain relief. Particularly if the notice is by electronic means, care is necessary regarding access to online resources, the manner of presentation, and any response expected of class members. As the rule directs, the means should be the "best * * * that is practicable" in the given case. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class made up in significant part of members likely to be less sophisticated. As with the method of notice, the form of notice should be tailored to the class members' anticipated understanding and capabilities. The court and counsel may wish to consider the use of class notice experts or professional claims administrators.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices. The process of opting out should not be unduly difficult or cumbersome. As with other aspects of the notice process, there is no single method that is suitable for all cases.

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about the opt-out rate could then be available to the court at the time that it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The amended rule makes clear that the parties must provide the court with information sufficient to enable it to decide whether notice should be sent. At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit in support of approval under Rule 23(e)(2). That would give the court a full picture and make this information available to the members of the class. The amended rule also specifies the standard the court should use in deciding whether to send notice—that notice is justified by the parties' showing regarding the likely approval of the proposal. The prospect of final approval should be measured under amended Rule 23(e)(2), which provides criteria for the final settlement review.

If the court has not previously certified a class, this showing should also provide a basis for the court to conclude that it likely will be able to certify a class for purposes of settlement. Although the order to send notice is often inaccurately called "preliminary approval" of class certification, it is not appealable under Rule 23(f). It is, however, sufficient to require notice under Rule 23(c)(2)(B) calling for class members in Rule 23(b)(3) classes to decide whether to opt out.

There are many types of class actions and class-action settlements. As a consequence, no single list of topics to be addressed in the submission to the court would apply to each case. Instead, the subjects to be addressed depend on the specifics of the particular class action and proposed settlement. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary in regard to a proposed settlement is whether the proposal calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved and certification for purposes of litigation is later sought, the parties' earlier submissions in regard to the proposed certification for settlement should not be considered in deciding on certification.

Regarding the proposed settlement, a great variety of types of information might appropriately be included in the submission to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the claims process that is contemplated and the anticipated rate of claims by class members. If the notice to the class calls for submission of claims before the court decides whether to approve the proposal under Rule 23(e)(2), it may be important to provide that the parties will report back to the court on the actual claims experience. And because some funds are frequently left unclaimed, it is often important for the settlement agreement to address the use of those funds. Many courts have found guidance on this subject in § 3.07 of the American Law Institute, Principles of Aggregate Litigation (2010).

It is important for the parties to supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. In that connection, information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(A), information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal—including the breadth of any such release—may be important.

The proposed handling of an award of attorney's fees under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class, and to take account of the likely claims rate. One method of addressing this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results. Another topic that normally should be considered is any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. It must not direct notice to the class until the parties' submissions show it is likely that the court will have a basis to approve the proposal after notice to the class and a final approval hearing.

Subdivision (e)(2). The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. This standard emerged from case law implementing Rule 23(e)'s requirement of court approval for class-action settlements. It was formally recognized in the rule through the 2003 amendments. By then, courts had generated lists of factors to shed light on this central concern. Overall, these factors focused on comparable considerations, but each circuit developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any of these factors, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

One reason for this amendment is that a lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of those factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every single factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

Approval under Rule 23(e)(2) is required only when class members would be bound under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment based on the proposal.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. Attention to these matters is an important foundation for scrutinizing the specifics of the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may be important as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests.

In undertaking this analysis, the court may also refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual conduct of counsel has been consistent with what Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. The relief that the settlement is expected to provide

to class members is a central concern. Measuring the proposed relief may require evaluation of the proposed claims process and a prediction of how many claims will be made; if the notice to the class calls for pre-approval submission of claims, actual claims experience may be important. The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast what the likely range of possible classwide recoveries might be and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved.

Examination of the attorney-fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be an important factor in determining the appropriate fee award. Provisions for reporting back to the court about actual claims experience, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims. Particularly if some or all of any funds remaining at the end of the claims process must be returned to the defendant, the court must be alert to whether the claims process is unduly demanding.

Paragraph (D) calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that affect the apportionment of relief.

Subdivision (e)(3). A heading is added to subdivision (e)(3) in accord with style conventions. This addition is intended to be stylistic only.

Subdivision (e)(4). A heading is added to subdivision (e)(4) in accord with style conventions. This addition is intended to be stylistic only.

Subdivision (e)(5). Objecting class members can play a critical role in the settlement-approval process under Rule 23(e). Class members have the right under Rule 23(e)(5) to submit objections to the proposal. The submissions required by Rule 23(e)(1) may provide information important to decisions whether to object or opt out. Objections can provide the court with important information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

Subdivision (e)(5)(A). The rule is amended to remove the requirement of court approval for every withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection.

The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them. One feature required of objections is specification whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. Beyond that, the rule directs that the objection state its grounds "with specificity." Failure to provide needed specificity may be a basis for rejecting an objection. Courts should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may not present objections that adhere to technical legal standards.

Subdivision (e)(5)(B). Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h). As recognized in the 2003 Committee Note to Rule 23(h): "In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as * * * attorneys who represented objectors to a proposed settlement under Rule 23(e)."

But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors—or their counsel—have sought to extract tribute to withdraw their objections or dismiss appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors.

The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern. Because the concern only applies when consideration is given in connection with withdrawal of an objection, however, the amendment requires approval under Rule 23(e)(5)(i) only when consideration is involved. The term "consideration" should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel. If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees; the court may approve the fee if the objection assisted the court in understanding and evaluating the settlement even though the settlement was approved as proposed.

Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court.

Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals over the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal. A party dissatisfied with the district court's order under Rule 23(e)(5)(B) may appeal the order.

Subdivision (e)(5)(C). Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies. That procedure does not apply after the court of appeals' mandate returns the case to the district court.

Subdivision (f). As amended, Rule 23(e)(1) provides that the court should direct notice to the class regarding a proposed class-action settlement in cases in which class certification has not yet been granted only after determining that the prospect of eventual class certification justifies giving notice. This decision is sometimes inaccurately characterized as "preliminary approval" of the proposed class certification. But it does not grant or deny class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.

The rule is also amended to extend the time to file a petition for review of a class-action certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. In such a case, the extension applies to a petition for permission to appeal by any party. The extension of time recognizes—as under Rules 4(i) and 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for additional time in regard to these matters. The extension applies whether the officer or employee is sued in an official capacity or an individual capacity; the defense is usually conducted by the United States even though the action asserts claims against the officer or employee in an individual capacity. An action against a former officer or employee of the United States is covered by this provision in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time.

Report on Topics Still Under Study

After the Rule 23 Subcommittee gave careful attention to a range of topics not specifically included in the above preliminary draft of proposed amendments to Rule 23, it decided not to proceed with several of them. It also recommended that two additional topics remain under study, and the Advisory Committee approved that decision. Below is a brief summary of those two topics.

Pick-off issues: In recent years, there have been a number of instances in which defendants in putative class actions have sought to "pick off" the named class representative by offering all the individual relief he or she could obtain and moving to dismiss on grounds of mootness. In *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663 (2016), the Supreme Court held that such an offer does not moot a case because "an unaccepted settlement offer has no force." The decision left open the possibility, however, that the outcome could be different if the defendant deposited the money in court and consented to entry of judgment against it in favor of the putative class representative. The Rule 23 Subcommittee has been monitoring activity in the lower courts since the Supreme Court's decision. If pick-off issues continue to be important, it may return to considering these issues.

This recent discussion has also caused the Subcommittee to focus on the possibility of specifying in Rule 23 that the court must or may afford counsel time to find a replacement class representative if the initial proposed representative proves unable to continue in that role.

Ascertainability: The lower courts have, in recent years, fairly frequently addressed arguments about whether the membership in a proposed class was sufficiently ascertainable to support certification. The extent to which the lower courts' views differ on this subject remains uncertain. In two cases (from the Sixth and Seventh Circuits), the Supreme Court has denied certiorari this year. Given the evolving state of this doctrine in the lower courts, and the initial difficulties the Rule 23 Subcommittee encountered in drafting possible amendments to address this

issue, no proposal for amendment was brought forward. Nonetheless, the issue seemed to have sufficient currency and importance to be retained on the Subcommittee's agenda.

B. RULE 62

The Rule 62 provisions for staying execution were brought to the Committee and to the Appellate Rules Committee by independent and distinct questions. This Committee was asked about an apparent "gap" between the 14-day automatic stay provided by Rule 62(a) and the authority to issue a stay "pending disposition of" a post-judgment motion that might not be made until a time after expiration of the automatic stay. The Appellate Rules Committee was asked about authority to post security in a form other than a bond, and about authority to post a single security in a form that lasts through post-judgment proceedings in the district court and the conclusion of all proceedings on appeal. The Committee recommends approval of the following amendments for publication. They address all three of the questions that prompted the inquiry.

The groundwork has been laid by a subcommittee that includes representatives of the Appellate and Civil Rules Committees. Judge Scott Matheson chaired the subcommittee. The subcommittee began work on the three topics that launched the project, but also developed complicated drafts that sought to address several questions not treated in Rule 62. Many of the complications proved too difficult to address with any confidence. The drafts were then simplified. These simpler drafts were discussed both in the advisory committees and in the Standing Committee. These discussions continued to prune away provisions that directly recognized open-ended district-court authority to grant, amend, or deny stays, with or without security. In the end, the proposal is limited to address only the three questions that started the work. It eliminates the "gap" at the end of the automatic stay by extending the stay from 14 days to 30 days, and qualifies the automatic stay by allowing the court to order otherwise. Security can be posted by bond or in other forms; as in the present rule, the court must approve either the bond or a different form of security. And the security can be posted on terms that continue from the time it is approved to the time specified in the bond or security.

Subdivisions (a) through (d) of present Rule 62 are rearranged to bring related provisions closer together, easing the reader's path through the rule. The remaining subdivisions, (e) through (h), are left unchanged. They were thoroughly explored in a memorandum prepared by Professor Struve as Reporter for the Appellate Rules Committee, and were considered by the subcommittee. In the end, it seemed better to leave them as they are.

The rearrangement of subdivisions (a) through (d) is so thorough that presentation in the traditional over- and underline form can be hard to follow. That version is left to the end. First comes the clean text of the rule as proposed for publication, including the Committee Note. The Committee Note provides a deliberately spare explanation of the underlying purposes. A somewhat more elaborate explanation follows, and it is then followed by the over- and underline version that illustrates the changes and rearrangement of the rule text.

Rule 62 Proposed for Publication

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) Automatic Stay. Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.

(b) Stay by Bond or Other Security. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.

(c) No Automatic Stay of an Injunction, Receivership, or Patent-Accounting Order. Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or a receivership; or
(2) a judgment or order that directs an accounting in an action for patent infringement.

(d) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or
(2) by the assent of all its judges, as evidenced by their signatures.

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Committee Note

Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for staying a judgment are revised.

The provisions for staying an injunction, receivership, or order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivisions (c) and (d) apply both to interlocutory injunction orders and to final judgments that grant, refuse, or otherwise deal with an injunction.

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay "pending disposition of" motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was later extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. A thirty-day automatic stay also suffices in cases governed by a 60-day appeal period.

Amended Rule 62(a) expressly recognizes the court's authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk that the judgment debtor's assets will be dissipated. Similarly, it may be important to allow immediate execution of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay that lasts longer or requires security.

Subdivision 62(b) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic

stay has been lifted by the court. The new rule's text makes explicit the opportunity to post security in a form other than a bond. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security—a party may find it convenient to arrange a single bond or other security that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari. Finally, subdivision (b) changes the provision in former subdivision (d) that "an appellant" may obtain a stay. Under new subdivision (b), "a party" may obtain a stay. For example, a party may wish to secure a stay pending disposition of post-judgment proceedings after expiration of the automatic stay, not yet knowing whether it will want to appeal.

Further Discussion

The Appellate Rules Committee took up Rule 62 at the suggestion of a member who was interested in making it clear that a judgment debtor can secure a stay by posting continuing security, whether as a bond or by other means, that will last from termination of the automatic stay through completion of all acts by the court of appeals. This beginning led to a comprehensive report by Professor Struve, Reporter for the Committee, examining many different aspects of Rule 62 stays.

The Civil Rules Committee first looked at Rule 62 in response to a question raised by a district judge. The question grew from a complication in the relationship between automatic stays and the authority to order a stay pending disposition of a post-judgment motion. The complication arose from the Time Computation Project that led each of the several advisory committees to reset many of the time periods set in the various sets of rules. Before the Time Project changes, Civil Rules 50, 52, and 59 set the time for motions at 10 days after entry of judgment. Rule 62(a) extinguished the automatic stay 10 days after entry of judgment. Rule 62(b) recognized authority to issue a stay pending disposition of a motion under Rules 50, 52, 59, or 60. The Time Project reset the time for motions under Rules 50, 52, or 59 at 28 days. It also reset expiration of the automatic stay at 14 days after entry of judgment. The result was that the automatic stay expired half-way through the time allowed to make a post-judgment motion. Rule 62(b), however, continued to authorize a stay "pending disposition of any of" these motions. The judge submitted a suggestion that Rule 62 should be amended to make it clear that a stay could be issued before a post-judgment motion is made. The Committee decided against any immediate action. It believed that there is inherent authority to issue a stay as part of the court's necessary control over its own judgment. It concluded that the usual conservative approach made it sensible to wait to see whether actual problems might emerge in practice.

Consultation through the joint subcommittee led to consideration of many other questions.

The "gap" between expiration of the automatic stay and the later time allowed to make a post-trial motion was addressed from the beginning. The simplest adjustment would be to rewrite the rule to allow the court to enter a stay at any time. Several successive drafts included such a provision. It was abandoned, however, as unnecessarily broad. Instead, reliance was placed on a parallel amendment of Rule 62(a) that has carried through from the beginning of the subcommittee's work. The amendment extends the time of the automatic stay to 30 days. That time allows two days beyond the time for making a post-trial motion, an advantage that could become important in cases in which decisions whether to appeal may be affected by the absence of any post-trial motion. It also provides a brief window to arrange security for a court-ordered stay.

The possible disadvantage of extending the automatic stay is the risk that it will become easier to take steps to defeat any execution. That risk is addressed at the end of proposed Rule 62(a): the automatic stay takes hold "unless the court orders otherwise." The court may dissolve the stay, perhaps on condition that the judgment creditor post security for injuries caused by execution of a judgment that is later modified, set aside, or reversed. Or the court may supersede the automatic stay by ordering a stay on different terms, most likely by including some form of security to protect the judgment creditor.

The single-security question turned attention to present Rule 62(d)'s provisions for a stay by supersedeas bond. An attempt to post a single bond to cover a stay both during post-judgment proceedings and during an appeal might run afoul of the present rule language that recognizes this procedure "If an appeal is taken," and directs that "[t]he bond may be given upon or after filing the notice of appeal." Proposed Rule 62(b) allows a single bond or other security by enabling a party to obtain a stay by providing a bond "[a]t any time after judgment is entered." Proposed Rule 62(b) also explicitly recognizes "a bond or other security."

Consideration of the stay by supersedeas bond raised the question whether there is an absolute right to a stay. Practitioners report a belief that this provision establishes a right to stay execution on posting a satisfactory bond. This belief may be supported by the rule text: "the appellant may obtain a stay by supersedeas bond * * *." There may be some offsetting implication in the further provision that the stay takes effect when the court approves the bond, although approval may be limited to considering the amount of the security, the form of the bond, and the assurance that the bond can be made good. This question was discussed at length. Successive proposed drafts recognized authority to refuse a stay for good cause even if adequate security is tendered. But in the end, ongoing practice and understanding prevailed. Proposed Rule 62(b) carries forward the critical language of present Rule 62(d): "The stay takes effect when the court approves the bond" or other security. This course means that present practice carries forward, including whatever measure of discretion the cases recognize to allow a stay on less than full security in exceptional circumstances.

The final major decision was to reorganize and carry forward the provisions in present Rule 62(a) and (c) for stays of judgments in an action for an injunction or a receivership, or judgments directing an accounting in an action for patent infringement. They are joined in proposed subdivision (d). One change is proposed. Present Rule 62(c) incorporates some, but not all, of the words used in the interlocutory injunction appeal statute, 28 U.S.C. § 1292(a)(1). The Rule refers to "an interlocutory order or final judgment that grants, dissolves, or denies an injunction." The formula in § 1292(a)(1) is more elaborate. Although the Committee is not aware of any difficulties arising from the differences, it has seemed wise to forestall any arguments about appeals from orders that "continue" or "modify" an injunction.

Over- and Underline Rule 62(a) through (d)

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay.~~; Exceptions for Injunctions, Receiverships, and Patent Accountings.~~ Except as provided in Rule 62(c) and (d), ~~stated in this rule, no~~ execution ~~may issue~~ on a judgment~~, nor may~~ and proceedings ~~be taken~~ to enforce it~~,~~ are stayed for 30 days ~~until 14 days have passed~~ after its entry, unless the court orders otherwise. ~~But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:~~

~~**(1)** an interlocutory or final judgment in an action for an injunction or a receivership; or~~

~~**(2)** a judgment or order that directs an accounting in an action for patent infringement.~~

~~**(b)Stay Pending the Disposition of a Motion.** On appropriate terms for the opposing party's security, the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the following motions:~~

~~**(1)** under Rule 50, for judgment as a matter of law;~~
~~**(2)** under Rule 52(b), to amend the findings or for additional findings;~~
~~**(3)** under Rule 59, for a new trial or to alter or amend a judgment; or~~
~~**(4)** under Rule 60, for relief from a judgment or order.~~

(b) Stay by Bond or Other Security. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.

(c) No Automatic Stay of an Injunction, Receivership, or Patent-Accounting Order. Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or receivership; or
(2) a judgment or order that directs an accounting in an action for patent infringement.

(d~~e~~) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or ~~denies~~ refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or
(2) by the assent of all its judges, as evidenced by their signatures.

~~**(d) Stay with Bond on Appeal**. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.~~

C. RULE 5: E-SERVICE AND E-FILING

The Standing Committee Subcommittee on matters electronic has suspended operations. The several advisory committees, however, have cooperated in carrying forward consideration of the ways in which the several sets of rules should be revised to reflect the increasing dominance of electronic means of preserving and communicating information. For the Civil Rules, the Advisory Committee initially worked through to recommendations to publish three rules amendments for comment in August 2015: Rule 5(d)(3) on electronic filing; Rule 5(b)(2)(E) on electronic service, with the corresponding abrogation of Rule 5(b)(3) on using the court's transmission facilities ((b)(2)(E) would supersede it); and Rule 5(d)(1) on using the Notice of Electronic Filing as a certificate of service. But continuing exchanges with the other advisory committees showed that further work was needed to achieve as much uniformity as possible in language, and at times in meaning. Much of the work has involved the Criminal Rules Committee. Criminal Rule 49 now invokes the Civil Rules on filing and service. The Criminal Rules Committee has worked long and hard to create a new and self-contained Rule 49 that will be independent of the Civil Rules. They have welcomed close collaboration with the Civil Rules e-representatives in their Subcommittee deliberations. The result has been great progress that has improved the earlier Civil Rules drafts.

There are powerful reasons to make Civil Rule 5 and Criminal Rule 49 as nearly identical as possible, recognizing that the different circumstances of criminal prosecutions may at times warrant differences in substance and that the different structural and linguistic context of the full sets of rules may at times warrant differences in expression. The value of uniform expression extends beyond the Civil and Criminal Rules to include the Appellate and Bankruptcy Rules as well. But it has not seemed useful to attempt to restructure the Appellate, Bankruptcy, and Civil Rules to emulate the structure of the all-new Criminal Rule 49. All four advisory committees have cooperated in achieving what all believe to be the fullest desirable level of uniformity.

Before turning to the present proposals, it may be useful to provide a brief reminder of broader possibilities that have been put aside.

Earlier work considered an open-ended rule that would equate electrons with paper in two ways. The first provision would state that a reference to information in written form includes electronically stored information. The second provision would state that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each provision would be qualified by an "unless otherwise provided" clause. Reviewing these proposals against the full set of Civil Rules showed that it is still too early to attempt to adopt them as a general approach, even with exceptions—determining what exceptions to make would be difficult, and there were likely to be many of them.

A subset of these questions was considered again in preparing the present proposal. The Rules were scanned for words that direct one party to communicate with another party by means that might, or might not, embrace e-communication. There are several of these words, and they appear in many places. The most obvious example is "mail." Other familiar words include deliver (delivery); send; and notify (notice). Somewhat less familiar words include "provide"; "return[, sequester, or destroy]"; "supplement or correct"; and "furnish." Other words seem to imply tangible embodiment in paper, most commonly "written" and "writing." Taking on all of these provisions now would needlessly delay completion of the present e-filing and e-service proposals. Practice is adjusting comfortably to the electronic era. There will be time enough for a separate project to consider which circumstances justify, or perhaps even require, communicating or acting by electronic means.

A related general question involves electronic signatures. Many local rules address this question now, often drawing from a Model Rule. A proposal to amend the Bankruptcy Rules to address electronic signatures was published and then withdrawn. There did not seem to be much difficulty with treating an electronic filing by an authorized user of the court's e-filing system as the filer's signature. But difficulty was encountered in dealing with papers signed by someone other than the authorized filer. Affidavits and declarations are common examples, as are many forms of discovery responses. The several advisory committees share the view that it is too early to take on e-signatures in a general way. Draft Rule 5(d)(3) does provide that the user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

Rule 5(d)(3): Electronic Filing

The Rule 5(d)(3) amendment would establish a uniform national rule that makes e-filing mandatory except for filings made by a person not represented by an attorney, and with a further exception that paper filing must be allowed for good cause and may be required or allowed for other reasons by local rule. A person not represented by an attorney may file electronically only if allowed by court order or local rule, and can be required to do so only by court order or by a local rule that includes reasonable exceptions. And the user name and password of an attorney of record, along with the attorney's name on a signature block, serves as the attorney's signature.

This proposal rests on the advantages that e-filing brings to the court and the parties. Local rules in most districts already require attorneys to file electronically. The risks of mistakes have been reduced by growing familiarity with, and competence in, electronic communication. At the same time, deliberation in consultation with other advisory committees showed that the general mandate should not extend to pro se parties. Although pro se parties are thus generally exempted from the requirement, the proposal allows them access to e-filing by local rule or court order. This treatment recognizes that some pro se parties have already experienced success with e-filing, and reflects an expectation that the required skills and access to electronic systems will expand. The court and other parties will share the benefits when pro se litigants can manage e-filing. Finally, the proposal allows a court to require e-filing by an unrepresented party. This provision is designed to support existing programs that direct e-filing in collateral proceedings brought by prison inmates. But e-filing can be required only by court order or by a local rule that includes reasonable exceptions. The language that a local rule must include reasonable exceptions is taken almost verbatim from present Rule 5(d)(3). It will protect against local-rule requirements that might impede access to courts, a concern that had troubled the Criminal Rules Committee with respect to habeas corpus and § 2255 proceedings.

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing * * *

(2) ***Nonelectronic Filing*** ~~***How Filing is Made—In General***~~***.*** A paper <u>not filed electronically</u> is filed by delivering it:

(A) to the clerk; or
(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) ***Electronic Filing and Signing*** ~~***; or Verification***~~***.***

(A) *By a Represented Person—Generally Required; Exceptions.* ~~A court may, by local rule, allow papers to be filed, signed, or verified~~ A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. ~~by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States~~.

(B) *By an Unrepresented Person—When Allowed or Required.* A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

(D) *Same as a Written Paper.* A paper filed electronically ~~in compliance with a local rule~~ is a written paper for purposes of these rules.

Committee Note

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it generally mandatory in all districts for a person represented by an attorney. But exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a local rule may allow or require nonelectronic filing for other reasons.

Filings by a person not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by pro se prisoners.

The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(d) FILING. * * *

(2) ***Nonelectronic Filing.*** A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) ***Electronic Filing and Signing.***

(A) *By a Represented Person—Generally Required; Exceptions.* A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *By an Unrepresented Person—When Allowed or Required.* A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

(D) *Same as a Written Paper.* A paper filed electronically is a written paper for purposes of these rules.

Rule 5(b)(2)(E): e-Service

Present Rule 5(b)(2)(E) allows service by electronic means only if the person to be served consented in writing. It is complemented by Rule 5(b)(3), which provides that a party may use the court's transmission facilities to make electronic service "[i]f a local rule so authorizes." The proposal deletes the requirement of consent when service is made through the court's transmission facilities on a registered user. It also abrogates Rule 5(b)(3) as no longer necessary.

Consent continues to be required for electronic service in other circumstances, whether the person served is a registered user or not. A registered user might consent to service by other electronic means for papers that are not filed with the court. In civil litigation, a common example is provided by discovery materials that must not be filed until they are used in the action or until the court orders filing. A pro se litigant who is not a registered user—and very few now are—is protected by the consent requirement. In either setting, consent may be important to ensure effective service. The terms of consent can specify an appropriate address and format, and perhaps other matters as well.

Rule 5. Serving and Filing Pleadings and Other Papers

(b) Service: How Made. * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means ~~if~~ that the person consented to in writing—in either of which events service is complete upon ~~transmission~~ filing or sending, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

Committee Note

Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service on a registered user by filing with the court's electronic-filing system. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service by filing with the court's system unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not use the court's system. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

Because Rule 5(b)(2)(E) now authorizes service by filing with the court's electronic-filing system as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(b) Service: How Made. * * *

(2) ***Service in General***. A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

Permission to Use Court's Facilities: Abrogating Rule 5(b)(3)

This package includes a proposal to abrogate Rule 5(b)(3) to reflect the amendment of Rule 5(b)(2)(E) that allows service on a registered user by filing with the court's electronic-filing system without requiring consent. Rule 5(b)(3) reads:

> **(3)** ***Using Court Facilities.*** If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

The basic reason to abrogate (b)(3) is to avoid the seeming inconsistency of authorizing service by filing with the court's system in (b)(2)(E) and then requiring authorization by a local rule as well. Probably there is no danger that a local rule might opt out of the national rule, but eliminating (b)(3) would ensure that none will. It remains important to ensure that a court can refuse to allow a particular person to become a registered user. It may be safe to rely on the Committee Note to (b)(2)(E), with added support in a Committee Note explaining the abrogation of (b)(3).

The published proposal would look like this:

> ~~(3) *Using Court Facilities*. If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).~~

Committee Note

Rule 5(b)(3) is abrogated. As amended, Rule 5(b)(2)(E) directly authorizes service on a registered user by filing with the court's electronic-filing system. Local rule authority is no longer necessary. The court retains inherent authority to deny registration or to qualify a registered user's participation in service through the court's facilities.

Notice of Electronic Filing as Proof of Service

Rule 5(d)(1) was amended in 1991 to require a certificate of service. It did not specify any particular form. Many lawyers include a certificate of service at the end of any paper filed in the court's electronic filing system and served through the court's transmission facilities. This practice can be made automatic by amending Rule 5(d)(1) to provide that a Notice of Electronic Filing constitutes a certificate of service on any party served by the court's electronic-filing system. The draft amendment does that, retaining the requirement for a certificate of service following service by other means.

Treating the Notice of Electronic Filing as the certificate of service will not save many electrons. The certificates generally included in documents electronically filed and served through the court's facilities are brief. It may be that cautious lawyers will continue to include them. But there is an opportunity for some saving, and protection for those who would forget to add the certificate to the original document, whether the protection is against the burden of generating and filing a separate document or against forgetting to file a certificate at all. Other parties will be spared the need to check court files to determine who was served, particularly in cases in which all parties participate in electronic filing and service.

The Notice of Electronic Filing automatically identifies the means, time, and e-address where service was made and also identifies the parties who were not authorized users of the court's electronic-filing system, thus flagging the need for service by other means. There might be some value in amending Rule 5(d)(1) further to require that the certificate for service by other means

specify the date and manner of service; the names of the persons served; and the address where service was made. Still more detail might be required. The Committee considered this possibility but decided that there is no need to add this much detail to rule text. Lawyers seem to be managing nicely without it.

The draft considered by the Committee included, as a subject for discussion, a further provision that the Notice of Electronic Filing is not a certificate of service if "the serving party learns that it did not reach the person to be served." That formula appears in Rule 5(b)(2)(E), both now and in the proposed revision. The Committee concluded that this caution need not be duplicated in Rule 5(d)(1). Learning that the attempted e-service did not work means there is no service. No service, no certificate of service.

Rule 5. Serving and Filing Pleadings and Other Papers

(d) FILING.

(1) ***Required Filings: Certificate of Service.***

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served ~~— together with a certificate of service —~~ must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served by the court's electronic-filing system.

Committee Note

The amendment provides that a notice of electronic filing generated by the court's CM/ECF system is a certificate of service on any person served by the court's electronic-filing system. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

When service is not made by filing with the court's electronic filing system, a certificate of service must be filed and should specify the date as well as the manner of service.

Clean Rule Text

(d) FILING.

(1) ***Required Filings: Certificate of Service.***

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served by the court's electronic-filing system.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

* * *

(b) Service: How Made. * * *

(2) ***Service in General.*** A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

(d) Filing * * *

(1) ***Required Filings: Certificate of Service.***

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served by the court's electronic filing system.

(2) ***Nonelectronic Filing.*** A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) ***Electronic Filing and Signing.***

(A) *By a Represented Person—Generally Required; Exceptions.* A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *By an Unrepresented Person—When Allowed or Required.* A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule, and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

(D) *Same as Written Paper.* A paper filed electronically is a written paper for purposes of these rules.

II. RECOMMENDATION FOR APPROVAL: PILOT PROJECTS

One of the conclusions reached in the process of developing the rule amendments that became effective on December 1, 2015, was that additional innovations in civil litigation may be more likely if they are tested first in a series of pilot projects. To pursue the possible development of such pilot projects, a subcommittee was formed consisting of Jeff Sutton, John Bates, Paul Grimm, Neil Gorsuch, Amy St. Eve, John Barkett, Parker Folse, Virginia Seitz, Ed Cooper, and Dave Campbell. Judge Phil Martinez from the Judicial Conference Committee on Court Administration and Case Management (CACM) was added as a liaison to the subcommittee. The subcommittee's charge is to investigate pilot projects already completed in other locations and recommend possible pilot projects for federal courts.

The subcommittee reported on its work at the January 2016 Standing Committee meeting. At that time, the subcommittee had made contact with the National Center for State Courts, the Institute for Advancement of the American Legal System (IAALS), the Conference of State Court Chief Justices, and various innovative federal courts, and had conducted reviews of pilot projects in ten states. Summaries of the subcommittee's findings were included in the January materials.

Since the January meeting, the subcommittee has held focus-group discussions with lawyers and judges from courts in Colorado, Arizona, and Canada, which all use enhanced initial disclosures. Summaries of the Colorado and Arizona discussions are included as Exhibits 1 and 2 to this report. The subcommittee has also collected and reviewed much additional information, including a recently-proposed revision to Arizona's longstanding enhanced disclosure rule, a recently-revised portion of a joint project by IAALS and the American College of Trial Lawyers recommending more robust initial disclosures, reactions to and comments on a 1993 proposed amendment to the Federal Rules of Civil Procedure to require enhanced initial disclosures, articles from a 1997 symposium concerning the initial disclosure efforts of the early 1990s, the robust initial disclosure rules used in various states (Ex. 3), and a recent FJC report titled "A Study of Civil Case Disposition Time in U.S. District Courts" (Ex. 4).

The subcommittee has concluded that two specific pilot projects should be implemented in federal district courts, one focused on enhanced initial disclosures and the other on expedited case management. Descriptions of these proposed pilot programs are provided below. The Civil Rules committee concurred in the pursuit of these pilot projects at its April 2016 meeting.

The subcommittee believes that more robust initial disclosure requirements could help reduce the cost and delay of civil litigation. This belief is based on several sources: (a) the employment protocol pilot project currently underway, which requires more substantial initial disclosures in employment cases and, according to a study completed by the FJC and described at the January meeting, appears to be reducing discovery disputes; (b) the Colorado Civil Access Pilot Project, which included more robust initial disclosures and was found, in a study by IAALS, to have reduced time to disposition of civil cases (the Colorado courts have now adopted the initial disclosures as part

of their civil rules); (c) the Arizona enhanced disclosure rule, which has been in place for more than twenty years and generally is preferred by Arizona lawyers over the federal rules; and (d) the rather obvious conclusion that civil litigation will be resolved more quickly and less expensively if relevant information is disclosed earlier and with less discovery practice.

The subcommittee also believes that expedited case management practices could help reduce the cost and delay of civil litigation. Many studies have found that cases are resolved more quickly and with less cost when judges intervene early, actively manage cases, set reasonable but efficient discovery schedules, set firm trial dates, and resolve disputes quickly. The purpose of the second pilot is to implement these practices in the pilot districts, with specific time goals and focused training for judges, measuring case disposition times and other relevant milestones as the pilot progresses. The pilot would test how effectively these proven case management practices can be implemented in various districts through specific time goals and focused training.

Authority to engage in these pilot projects is found in several places. Civil Rule 16(b)(3) authorizes a district court to enter a scheduling order that addresses several relevant subjects: deadlines for the litigation, the timing of disclosures and the extent of discovery, the disclosure of ESI, procedures for prompt resolution of discovery disputes, and "other appropriate matters." Rule 26(b)(2)(C) authorizes the court, on its own, to limit the frequency or extent of discovery, considering whether information can be obtained from other sources that are more convenient, less burdensome, or less expensive. And 28 U.S.C. § 331 authorizes the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure" used in the federal courts, and to recommend "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay[.]"

A. MANDATORY INITIAL DISCOVERY PILOT PROJECT

1. Standing Order. This pilot project would be implemented through a standing order issued in each of the pilot districts. Our current draft of the order, which includes comments received during the Civil Rules committee meeting in April, is as follows:

> "The Court is participating in a pilot project that requires mandatory initial discovery in all civil cases other than cases exempted by Rule 26(a)(1)(B), patent cases governed by a local rule, and cases transferred for consolidated administration in the District by the Judicial Panel on Multidistrict Litigation. The discovery obligations addressed in this Standing Order encompass the disclosures required by Rule 26(a)(1) – separate disclosures under Rule 26(a)(1) therefore are not required – and are framed as court-ordered mandatory initial discovery pursuant to the Court's inherent authority to manage cases and Rule 16(b)(3)(B)(ii), (iii), and (vi). Unlike initial disclosures required by current Rule 26(a)(1)(A) & (C), this Standing Order does not allow the parties to opt out.

A. Instructions to Parties.

1. The parties are ordered to respond to the following mandatory initial discovery requests before initiating any further discovery in this case. Further discovery will be as ordered by the Court. Each party's response must be based on the information then reasonably available to it. A party is not excused from providing its response because it has not fully investigated the case or because it challenges the sufficiency of another party's response or because another party has not provided a response. Responses must be signed under oath by the party certifying that it is complete and correct as of the time it was made, based on the party's knowledge, information, and belief formed after a reasonable inquiry, and signed under Rule 26(g) by the attorney.

2. The parties must provide the requested information as to facts that are relevant to the parties' claims and defenses, whether favorable or unfavorable, and regardless of whether they intend to use the information in presenting their claims or defenses. If a party limits the scope of its response on the basis of any claim of privilege or work product, the party must produce a privilege log as required by Rule 26(b)(5) unless the parties agree or the court orders otherwise. If a party limits its response on the basis of any other objection, it must explain with particularity the nature of the objection and its legal basis, and provide a fair description of the information being withheld.

3. All parties must file answers, counterclaims, crossclaims, and replies within the time set forth in Rule 12(a)(1)(A), (B), and (C) even if they have filed or intend to file a motion to dismiss or other preliminary motion. Fed. R. Civ. P. 12(a)(4). But the court may [for good cause] defer the time to answer, counterclaim, crossclaim, or reply while it considers a motion to dismiss [for lack of subject-matter jurisdiction, personal jurisdiction, sovereign immunity, or absolute immunity of a public official]. The time can be set by the court at any time no later than the time set by paragraph 4, measured from entry of the order that decides the motion. [If the court does not set a time, it is set by paragraph 4 as measured from entry of the order that decides the motion].

4. A party seeking affirmative relief must serve its responses to the mandatory initial discovery no later than 30 days after the filing of the first pleading made in response to its complaint, counterclaim, crossclaim, or third-party complaint. A party filing a responsive pleading, whether or not it also seeks affirmative relief, must serve its initial discovery responses no later than 30 days after it files its responsive pleading. However, (a) no initial discovery responses need be served if the Court approves a written stipulation by the

parties that no discovery will be conducted in the case; and (b) initial discovery responses may be deferred, one time, for 30 days if the parties jointly certify to the Court that they are seeking to settle their dispute and have a good faith belief that the dispute will be resolved within 30 days of the due date for their responses.

5. Initial responses to these mandatory discovery requests shall be filed with the Court on the date when they are served; provided, that voluminous attachments need not be filed, nor are parties required to file documents that are produced in lieu of identification pursuant to paragraphs (B)(3), (5), or (6) below. Supplemental responses shall be filed with the Court if they are served prior to the scheduling conference held under Rule 16(b), but any later supplemental responses need not be filed, although the party serving the supplemental response shall file a notice with the Court that a supplemental response has been served.

6. The duty of mandatory initial discovery set forth in this Order is a continuing duty, and each party must serve supplemental responses when new or additional information is discovered or revealed. A party must serve such supplemental responses in a timely manner, but in any event no later than 30 days after the information is discovered by or revealed to the party. If new information is revealed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental response.

7. The Court normally will set a deadline in its Rule 16(b) case management order for final supplementation of responses, and full and complete supplementation must occur by the deadline. In the absence of such a deadline, full and complete supplementation must occur no later than 90 days before the final pre-trial conference.

8. During their Rule 26(f) conference, the parties must discuss the mandatory initial discovery responses and seek to resolve any limitations they have made or intend to make in their responses. The parties should include in the Rule 26(f) report to the Court a description of their discussions. The report should describe the resolution of any limitations invoked by either party in its response, as well as any unresolved limitations or other discovery issues.

9. Production of information under this Standing Order does not constitute an admission that information is relevant, authentic, or admissible.

10. Rule 37(c)(1) shall apply to mandatory discovery responses required by this Order.

B. Mandatory Initial Discovery Requests.

1. State the names and, if known, the addresses and telephone numbers of all persons whom you believe are likely to have discoverable information relevant to any party's claims or defenses, and provide a fair description of the nature of the information each such person is believed to possess.

2. State the names and, if known, the addresses and telephone numbers of all persons whom you believe have given written or recorded statements relevant to any party's claims or defenses. Unless you assert a privilege or work product protection against disclosure under applicable law, attach a copy of each such statement if it is in your possession, custody, or control. If not in your possession, custody, or control, state the name and, if known, the address and telephone number of each person whom you believe has custody of a copy.

3. List the documents, electronically stored information ("ESI"), tangible things, land, or other property known by you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party's claims or defenses. To the extent the volume of any such materials makes listing them individually impracticable, you may group similar documents or ESI into categories and describe the specific categories with particularity. Include in your response the names and, if known, the addresses and telephone numbers of the custodians of the documents, ESI, or tangible things, land, or other property that are not in your possession, custody, or control. For documents and tangible things in your possession, custody, or control, you may produce them with your response, or make them available for inspection on the date of the response, instead of listing them. Production of ESI will occur in accordance with paragraph (C)(2) below.

4. For each of your claims or defenses, state the facts relevant to it and the legal theories upon which it is based.

5. Provide a computation of each category of damages claimed by you, and a description of the documents or other evidentiary material on which it is based, including materials bearing on the nature and extent of the injuries suffered. You may produce the documents or other evidentiary materials with your response instead of describing them.

6. Specifically identify and describe any insurance or other agreement under which an insurance business or other person or entity may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse a party for payments made by the party to satisfy the judgment. You may produce a copy of the agreement with your response instead of describing it.

7. A party receiving the list described in Paragraph 3, the description of materials identified in Paragraph 5, or a description of agreements referred to in Paragraph 6 may request more detailed or thorough responses to these mandatory discovery requests if it believes the responses are deficient. When the court has authorized further discovery, a party may also serve requests pursuant to Rule 34 to inspect, copy, test, or sample any or all of the listed or described items to the extent not already produced in response to these mandatory discovery requests, or to enter onto designated land or other property identified or described.

C. Disclosure of Hard-Copy Documents and ESI.

1. Hard-Copy Documents. Hard-copy documents must be produced as they are kept in the usual course of business.

2. ESI.

a. Duty to Confer. When the existence of ESI is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, including:

i. requirements and limits on the preservation, disclosure and production of ESI;

ii. appropriate ESI searches, including custodians and search terms, or other use of technology-assisted review;

iii. the form in which the ESI will be produced.

b. Resolution of Disputes. If the parties are unable to resolve any dispute regarding ESI and seek resolution from the Court, they must present the dispute in a single joint motion or, if the Court directs, in a conference call with the Court. Any joint motion must include the parties' positions and the separate certification of counsel required under Rule 26(g).

> c. Production of ESI. Unless the parties agree or the Court orders otherwise, a party must produce the ESI identified under paragraph (B)(3) within 40 days after serving its initial discovery response. Absent good cause, no party need produce ESI in more than one form.
>
> d. Presumptive Form of Production. Unless the parties agree or the Court orders otherwise, a party must produce ESI in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the ESI in any reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the ESI as the producing party."

2. User's Manual. The pilot project will require something of a "user's manual" for the pilot judges, The precise form of that manual has not been developed, but it would include the following kinds of instructions:

Pilot judges should hold initial case management conferences under Rule 16(b) within the time specified in Rule 16(b)(2). Judges should discuss with the parties their compliance with the mandatory discovery obligations set forth in the Standing Order, resolve any disputes, and set a date for full and complete supplementation of responses.

Judges may alter the time for mandatory initial discovery responses upon a showing of good cause, but this should not be a frequent event. Early discovery responses are critical to the purposes of this pilot program.

Judges should make themselves available for prompt resolution of discovery disputes. It is recommended that judges require parties to contact the Court for a pre-motion conference, as identified in Rule 16(b)(3)(B)(v), before filing discovery motions. If discovery motions are necessary, they should be resolved promptly.

Courts should vigorously enforce mandatory discovery obligations. Experience in states with robust initial disclosure requirements has shown that diligent enforcement by judges is the key to an effective disclosure regime. Rule 37 governs sanctions.

3. Timing, Participation, and Other Issues.

We propose that the initial disclosure pilot project be approved by the Standing Committee at its June meeting. Additional details will need to be worked out, but our hope is that this pilot can be launched in 2017. We will seek the agreement of CACM and the FJC, and approval by the Judicial Conference in September.

We think that at least three to five districts should participate. One small district has already volunteered.

To participate in this pilot, district courts must be willing to make the pilot's requirements mandatory. We have debated whether to require that all judges in the pilot districts be willing to participate. On one hand, complete participation would avoid skewing the results of the pilot through self-selection by judges, and would present a better prospect of culture change – one of the goals of the pilot. On the other hand, requiring participation by all judges might mean that larger districts do not participate. We would appreciate your thoughts on this issue.

One other issue was discussed at the civil rules committee meeting. The subcommittee's original draft required that answers be filed and mandatory disclosures be made in every case, even when motions to dismiss have been filed. Some expressed the view that exceptions should be allowed for motions raising jurisdictional or immunity issues, and language has been added to paragraph 1(A)(3) of the standing order to reflect this possibility. The counter-argument is that permitting any exceptions for motions to dismiss will only encourage such motions and delay the disclosures required by the pilot, defeating in part the purpose of prompt and complete disclosures early in every case. We would appreciate your thoughts on this issue as well.

B. EXPEDITED PROCEDURES PILOT

1. Description of Pilot Project

The goal of the Civil Rules is to further the "just, speedy, and inexpensive determination of every action." Case resolution that is not speedy and inexpensive often will not be just. This pilot will involve all civil cases where discovery and trial are possible (it will not include cases decided on an administrative record with no trial). The pilot will include three parts:

(1) Each participating court will adopt the following practices: (a) prompt case management conferences in every case (within the time allowed by amended Rule 16(b)(2)); (b) firm caps on the amount of time allocated for discovery, to be set by the judge after conferring with the parties at the case management conference, and to be extended no more than once and only for good cause based on a showing of diligence by the parties; (c) prompt resolution of discovery disputes by telephone conferences; (d) decisions on all dispositive motions within 60 days of the reply brief being filed; and (e) setting and holding firm trial dates.

(2) Metrics will be as follows: (a) if we could measure it, the level of the pilot judges' compliance with the goals in (1) above; (b) trial dates in 90% of civil cases set within 14 months of case filing, trial dates in the remaining 10% set within 18 months, and all trial dates held firm; (c) 25% reduction in the number of categories of cases in the district "dashboard" that are decided

slower than the national average (or some comparable measure that could use the new CACM dashboard tool).

(3) Training and collaboration: (a) the FJC will do an initial one-day training session for pilot judges and staff, followed by additional FJC training every six months or year; (b) judges in the district will meet quarterly to discuss best practices and what is working and not working, and to refine their case management methods to meet the pilot goals; (c) one or two judges from outside the district will be available as resources during these quarterly conferences, with the same resource judges serving throughout the duration of the pilot; (d) the judges in the pilot district would have at least one bench-bar meeting per year to talk with lawyers in the district about how the pilot is working and to make appropriate adjustments; (e) the pilot would last three years.

Building on the work of several federal and state courts, this project seizes on the increased reasonableness associated with discovery that must be finished within a discrete time period. A similar dynamic is at play when trial judges allocate a set amount of time for each party to make its case at trial; redundancy is lessened and efficiency increases.

There are several premises of the pilot: (1) the longer a case takes to resolve, the more expensive it is for the parties; (2) the combination of tight timetables for discovery, prompt resolution of discovery and dispositive motions, and firm trial dates is more likely to prompt lawyers to be reasonable in their discovery requests and litigation behavior than any rule; (3) lawyer cooperation should increase when both parties must conduct discovery within a set period of time; and (4) prompt feedback about the impact of these practices will demonstrate their utility to the judges who use them.

2. Participants

A. Civil Rules and Standing Committees
B. CACM
C. FJC

3. Timetable

A. April 2016—approval by Civil Rules Committee
B. June 2016—approval by Standing Committee, CACM, and FJC
C. September 2016—approval by the Judicial Conference
D. Early 2017—initial implementation
E. End of 2020—completion

4. Criteria for district courts to participate

A. Court must be willing to make the pilot's requirements mandatory.

B. All judges on the district court must be willing to participate.
C. At least three to five district courts need to participate.

This pilot project is less refined that the mandatory disclosures pilot and will require significant work over the next several months. Because of the schedule we hope to follow, we need your input now. We would appreciate your careful review and your comments and suggestions.

III. REPORT ON PROJECTS

A. ONGOING PROJECTS

1. RULE 5:2: MOTION TO REDACT

The Bankruptcy Rules Committee is considering the addition of a new subdivision (h) to Bankruptcy Rule 9037, the Bankruptcy Rules equivalent of Civil Rule 5.2. The draft would create an explicit procedure for deleting information protected by Rule 9037(a) but mistakenly included in a filed document. The Bankruptcy Rules Committee took up this subject in response to concerns raised by the Committee on Court Administration and Case Management.

Although Rule 9037(h) has been developed to a point that would support a recommendation for publication, the Bankruptcy Rules Committee has decided that it is better to defer publication while the Appellate, Civil, and Criminal Rules Committees explore parallel amendments to the rules that parallel Rule 9037. There has been some hope that the courts' electronic filing system might be developed to effect automatic redaction of personal identifying information improperly included in court filings. Nonetheless, it is useful to move ahead with work that can be put aside if a reliable technological solution can be found.

This report of progress on a possible Civil Rule 5.2(i) is offered for two purposes. The first is the intrinsic purpose of exploring the need for a new rule and the best shape it might take.

The second purpose is to reflect on the unavoidable growing pains that commonly attend efforts to achieve the maximum level of appropriate uniformity when several different committees approach the same topic. The Standing Committee is responsible for all rules that it recommends to the Judicial Conference and, through the Conference, to the Supreme Court and Congress. When two or more rules are intended to mean the same thing, they should say it in the same way. But there are many possible ways of saying something, and minds both disciplined and creative may disagree on the most accurate way of saying it. Intellectual commitments can be hard to reconcile, even if professional detachment succeeds in putting aside any element of pride of authorship. The early draft Civil Rule 5.2(i) is presented below with footnotes that identify several styling choices. There are many reasons to avoid discussion of them by the Standing Committee itself. The advisory committees are responsible for reaching consensus on their own. But it may be useful to have this simple illustration of the process in the mid-stream evolution of a very modest rule.

Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 were adopted in a coordinated process that sought to achieve as much uniformity as possible. Appellate Rule 25(a)(5) adopts the other rules for appeals in cases that they governed in the district court, invokes Criminal Rule 49.1 when an extraordinary writ is sought in a criminal case, and adopts Civil Rule 5.2 for all other proceedings. Criminal Rule 49.1 largely parallels Civil Rule 5.2, but also limits home addresses to identifying the city and state and expands the list of exemptions to include several matters peculiar to criminal proceedings. Bankruptcy Rule 9037 hews close to Civil Rule 5.2, with an additional exception and without Rule 5.2(c) (limitations on remote access).

This common origin adds extra weight to the growing tradition that parallel rules addressing the same problems should be as nearly identical as possible. Differences can be warranted by the different circumstances that confront different sets of rules. But care should be taken in assessing the need for differences.

There is good reason to take seriously the prospect that Civil Rule 5.2 should be amended by adding a new subdivision (i) that essentially tracks Bankruptcy Rule 9037(h) if the Bankruptcy Rules Committee goes forward with the proposed amendment.

It is possible that the circumstances of civil practice differ from those that confront bankruptcy practice. The Committee on Court Administration and Case Management referred the question to the Bankruptcy Rules Committee, reacting to reports that bankruptcy courts are receiving creditors' requests to redact previously filed documents, sometimes involving thousands of documents in numerous courts. Bankruptcy courts are, of necessity, dealing with these requests now. CACM believes it is important to establish a uniform procedure. And it may be concerned that the pressures of bankruptcy practice make it more difficult to rely on parties and courts to act to accomplish required redactions in ways that restore protection as promptly as possible.

The problem may arise more frequently in bankruptcy practice, but surely it arises in civil and criminal practice as well. The need for uniform practice across different courts also may be more pressing in bankruptcy if an improper filing can involve thousands of documents in numerous courts. That circumstance is less likely to arise in civil and criminal practice. And it is nice to believe that courts and parties should be able to manage to act effectively without need for explicit prompting in Rule 5.2.

The prospect that there is little need to add a new Rule 5.2(i), on the other hand, is offset by the prospect that little harm will be done, apart from adding to the Civil Rules word-count. The Bankruptcy Rules Committee has led the way with a carefully considered draft. And although there may be little risk that adoption of a new Bankruptcy Rule 9037(h) would mislead courts if Rule 5.2(i) is not added in parallel, uniformity is reassuring. That is particularly so if the Criminal Rules Committee believes it useful to add a parallel provision to Criminal Rule 49.1.

A draft Rule 5.2(i) is set out below. Some style differences from the Bankruptcy Rule are unavoidable. Others are a matter to be worked out when all committees have reached their own conclusions. This question has come up late enough in the winter cycle that it has not been feasible to ask all four of the advisory committees responsible for these rules to decide on recommendations in time to publish Bankruptcy Rule 9037(h) this summer. But the work will continue, subject only to the bare possibility that a technological solution may be found that will accomplish everything that might be accomplished by new rules.

Rule 5.2. Privacy Protection for Filings Made with the Court

* * * * *

(i) Motion to Redact a Previously Filed Document.

(1) ***Content of the Motion***. Unless the court orders otherwise, a person[1] that seeks to redact from a previously filed document information that is protected under

[1] Draft Bankruptcy Rule 9037(h) uses "entity" because the Bankruptcy Code definition of "person" does not include a governmental unit. "Entity" does. But "entity" is a poor fit for a natural person. "Person" as used in the Civil Rules regularly includes all sorts of entities.

Rule 5.2(a)[2] must file a motion under seal. The motion must:

(A) include[3] an identical[4] copy of the original document showing the proposed redactions;
(B) include the docket number of the original document; and
(C) be served on all parties[5] and any person whose identifying information[6] is to be redacted.

(2) ***Restricting Public Access to an Unredacted Document.*** The court must:
(A) [promptly][7] restrict [deny][8] public access to the motion and the

[2] The Bankruptcy draft is: "information that is subject to privacy protection under," which seems longer than necessary.

[3] The Bankruptcy Draft reads: "attach a copy." That works in their draft. This version consolidates the various requirements for the motion in a series of subparagraphs. It is clearer that way: "The motion must * * *." "Include" works with that formula. It may be argued that "attach" treats the copy of the paper as an exhibit, while "include" makes it part of the motion. It is a copy either way. Although it applies only to pleadings, Civil Rule 10(c) suggests the mood: "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

[4] "[I]dentical" is carried forward for uniformity with draft Rule 9037(h). But the 9037(h) Committee Note introduces an ambiguity. It explicitly states that the "identical" copy is identical to the unredacted document "except for the redaction." The intended meaning is "identical to the unredacted document except for the redactions." It seems better to delete "identical," relying on the sense of "copy" to prevent surreptitious deletion of information beyond that protected—or at least arguably protected—by Rule 5.2(a).

[5] The Bankruptcy Rule includes a long list of bankruptcy characters that do not fit the Civil Rules context.

[6] The Bankruptcy Rule is: "any individual whose personal identifying information is to be redacted." For the Civil Rule, "person" seems to fit better with a financial-account number that should have been redacted, at least assuming that an entity other than an individual can have a protected financial-account number.

[7] The Bankruptcy Rule begins: "Upon receipt of the motion, the court shall promptly restrict public access." The direction to act promptly reflects a concern that the motion itself may point out the existence and public availability of the unredacted document in the court file.

Rendered in Civil Rules language, this approach would substitute "must" for "shall," and "receiving" for "receipt of." But "filed" may be better than "receiving": "When the motion is filed, the court must promptly restrict public access * * *."

But during the Style Project the Civil Rules Committee was continually reminded that directions that a court must act promptly, or immediately, or whatever, begin to seem like the often conflicting docket priority directions of earlier and unlamented days. Perhaps it is enough to rely on the movant to request prompt action to deny access, omitting the bracketed "[promptly]."

[8] "Deny" likely is better than restrict. No public access.

unredacted document:
(i) pending its ruling on the motion, and
(ii) if the motion is granted, until the court amends or vacates the order; and

(B) restore public access if the motion is denied.[9]

Committee Note

Subdivision (i) is new. It is adopted to reflect the parallel adoption of new Bankruptcy Rule 9037(h). Subdivision (i) differs from Rule 9037(h) in some details that reflect differences from the circumstances that may arise in bankruptcy filings.

Any person may file a motion to redact a filed document to delete information protected by Rule 5.2(a).

The motion must include a copy that is identical to the filed document except for the redactions. It must identify the location of the unredacted document in the docket.

A single motion may relate to one or more unredacted documents. But if the proposed redactions involve different documents it may be better to file separate motions, particularly if different types of protected information are involved.

The motion should request immediate action to deny public access to [the motion and][10] the unredacted document pending the court's ruling on the motion. Because the motion itself may call attention to the unredacted document, the court should act as promptly as possible to deny public access pending its ruling. The movant may assist the court by invoking whatever means are compatible with the court's electronic and paper filing procedures.

If the motion is granted, the redacted document should be placed on the docket, and public access to [the motion and] the unredacted document should remain restricted. If the court denies the

[9] The Bankruptcy Rule includes a final sentence: "If the motion is denied, the restrictions shall be lifted, unless the court orders otherwise." It may not be necessary to add the provision for denial of the motion. Under (A), the document is protected pending the ruling, and that's all. The restriction dissolves unless the ruling grants the motion. But there may be some risk that the restriction will carry forward by sheer inertia—that seems to be the fate of a fair share of sealed documents.

This draft shows one way to include a direction to lift the restrictions if the motion is denied. Better drafting can be crafted if the provision seems useful—if the Bankruptcy Rules Committee wishes to retain it, the gain in uniformity is worthwhile.

Uniformity also may require that "unless the court orders otherwise" be added to the rule text. But it is difficult to believe that a court will deny the motion without further opportunity to seek redaction if the unredacted document in fact includes protected information.

[10] Once the unredacted document in the file is protected, is there any need to deny access to the motion? On the other hand, will there be any circumstances in which there is a public interest in access to the motion, so long as all parties have access to the motion?

motion, generally the restriction on public access to [the motion and] the document should be lifted.

This procedure does not affect any remedies that a person whose personal identifiers are exposed may have against the person that filed the unredacted document.

2. RULE 30(b)(6): DEPOSING AN ENTITY

Rule 30(b)(6), which allows a party to name an entity as a deponent, was added in 1970. In rough terms, the purpose was to enable a party to discover "information known or reasonably available to the organization" more effectively than had proved possible through written interrogatories or an endless trek through named individual deponents who claim not to be the ones who know what the organization knows.

Implementation of Rule 30(b)(6) has encountered problems. In 2006, the Committee undertook an extensive study at the prompting of a submission by a committee of the New York State Bar Association. Genuine problems were identified, but it was not thought likely that effective solutions could be found in revised rule text. The question came back in 2013 in a set of proposals made by the New York City Bar. Consulting the efforts made seven years earlier, the Committee again decided to put the question aside.

Now those questions and others have been renewed in a proposal submitted by "members of the Council and Federal Task Force of the ABA Section of Litigation, in our individual capacities." The submission repeats many of the challenges made by earlier submissions. It offers views on some of them, but not all. The broad request is that the Committee "undertake a review of the Rule and the case law developed under it with the goal of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice under the Rule, particularly in light of the purposes and text of the 2015 amendments to the Federal Rules."

The Committee concluded that these questions should be taken up again. The reasons are expressed in a statement by one member quoted in the Draft Minutes: These problems arise "constantly, all over the country, and even in sister cases. The Rule is constantly a source of controversy. Proper preparation issues will never go away." It will be difficult to find rule text that will encourage reasonable practice. But the Committee should at least try.

A Rule 30(b)(6) Subcommittee has been appointed. Its work is just beginning. It does not seem likely that any proposed rule amendments can be developed in time for a recommendation to publish as early as August 2017.

3. RULE 81(c)(3)(A): JURY DEMAND ON REMOVAL

This submission to the Civil Rules Committee addresses a single word in Rule 81(c)(3)(A), altered in the Style Project. The specific problem is narrow; it will be identified after setting out the full text of Rule 81(c)(3). Examination of the specific problem in the setting of the full rule suggests more serious questions, however.

This topic is presented now to seek advice on two questions. The first is whether the Style Project erred in changing "does" to "did," as explained below, and whether the change should be undone if indeed it was unfortunate. The second is whether Rule 81(c)(3) strikes the right balance in protecting against forfeiture of the right to jury trial by assigning to the court and the party who removes a case from state court responsibility to initiate the Rule 38 demand process.

RULE 81. APPLICABILITY OF THE RULES IN GENERAL; REMOVED ACTIONS

(c) Removed Actions.

(1) ***Applicability.*** These rules apply to a civil action after it is removed from a state court.

* * *

(3) ***Demand for a Jury Trial.***

(A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law ~~does~~ did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(B) *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:
(i) it files a notice of removal; or
(ii) it is served with a notice of removal filed by another party.

[The Style Project rewording challenged by 15-CV-A is shown by overlining the pre-2007 word, "does," and underlining the substitute, "did."]

The specific suggestion focuses narrowly on the change from "does" to "did." The suggestion is that the change has created a trap for the unwary. So long as the rule said "does," it was clear that an express demand for jury trial must be made unless state law allows a jury trial without making an express request at any time. Saying "did" may lead some to believe that they need not make an express demand for jury trial after removal if state law, although requiring a demand at some point, allowed the demand to be made later than the time the case was removed to federal court. Cases are cited to show that federal courts continue to interpret the rule as if it says "does"; an appendix includes a decision granting a motion to strike a jury demand made by the lawyer who made the submission. The opinion relies on the 2007 Committee Note stating that the changes were intended to be stylistic only.

Initial research into the change from "does" to "did" has explored Civil Rules Committee agenda books, Committee Minutes, and a substantial number of memoranda prepared for the Style Subcommittees. They show that "did" appeared in the style draft at least as early as September 30, 2004, but do not show any discussion of this specific change. They also show an intriguing hint in a note recognizing that "Joe Spaniol is right" that there is a gap in the rule, but suggesting that it cannot be fixed—if fixing is needed—in the Style Project. One question is whether there is a gap that is worth filling. A broader question is whether the whole rule is unnecessarily complicated. The complication can be illustrated by looking for the gap.

At least these situations can be imagined:

(1) A jury trial was "expressly demanded * * * in accordance with state law" before removal. It makes sense to carry the demand forward after removal. Rule 81(c)(3)(A) does that.

(2) Rule 81(c)(3)(B): All necessary pleadings have been served at the time of removal, but no express demand for jury trial was made. The rule applies the same principle as Rule 38(b)(1), adjusting the time for the circumstance of removal—a demand must be served, not "14 days after the last pleading directed to the issue is served," (the Rule 38(b)(1) timing,) but 14 days after removing or being served with the notice of removal. This provides the advantages sought by Rule 38(b): the parties and the court know whether this is to be a jury case early in the proceedings.

(3) All necessary pleadings have not been served at the time of removal. Here the principle of Rule 81(c)(1) seems to do the job—Rule 38 applies of its own force after removal. The most sensible reading of the rule text is that an exception is made for cases where state law does not require a demand for jury trial.

(4) State law does not require a demand for jury trial at any point. The Rule was amended in 1963 to say that a demand need not be made after removal. The Committee Note said this is "to avoid unintended waivers of jury trial." But the amendment went on to provide, as the rule still does, that the court may order that a demand be made; failure to comply waives the right to jury trial. The Committee Note added the suggestion that "a district court may find it convenient to establish a routine practice of giving these directions to the parties in appropriate cases." Professor Kaplan, Reporter for the Committee, elaborated on the Note in a law review article quoted in 9 Federal Practice & Procedure: Civil 3d, § 2319, p, 230, n. 12. He suggested that it might be useful to adopt a local rule "under which the direction is to be given routinely." But he further suggested that it is important to give the parties notice in each case, since relying on a local rule alone "would recreate the difficulty which the amendment seeks to meet." These observations may address the question why it would not be better to complement subparagraph (B) by providing that if all necessary pleadings have not been served at the time of removal, Rule 38(b) applies. That would require a written demand no later than 14 days after the last pleading addressed to the issue is served. The apparent concern is that people will not pay attention to the Federal Rules after removal when they are habituated to a state procedure that provides jury trial without requiring an express demand at any point. That explanation seems to fit with the observation in § 2319 that "a number of courts have held that this provision is applicable only if the case automatically would have been set for jury trial in the state court * * * without the necessity of any action on the part of the party desiring jury trial."

(5) State law does require an express demand for jury trial, but the time for the demand is set at a point after the time when the case is removed. The Nevada rule involved in the docket suggestion, for example, allows a demand to be made not later than entry of the order first setting the case for trial. This is the circumstance in which the change from "does" to "did" may create

some uncertainty. One possible reading is that the change reflects concern that state law may have changed after removal: at the time of removal, it did not require an express demand at any point in the progress of the case to trial, but after removal it was changed to require an express demand. That is a fine-grained explanation. Another possible reading is that no demand need be made after removal so long as the state-court deadline had not been reached before removal. That reading can be resisted on at least two grounds. One is that the change was made in the Style Project, and thus must be read to carry forward the meaning of the rule as it was. A second is that the result is unfortunate: although both state and federal systems require an express demand, none need be made because of the differences in the deadlines. There is little reason to suppose that a party who wishes a jury trial should believe that removal provides relief from the demand requirement. Anyone who actually reads the rules should at least recognize the uncertainty and make a demand. It makes little sense to read the rule in a way that is most likely to make a difference only when a party belatedly decides to opt for a jury trial.

The immediate question is whether the style choice should be reversed to promote clarity. "Does" took on an apparently established and quite limited meaning. It is possible to read "did" in the Style Rule to have a different meaning. But the Committee has been reluctant to revisit choices made in the Style Project, particularly when the courts—no matter what may be the experience of particular lawyers—seem to be getting it right. If that were all that might be considered, the case for amending the rule may not be strong.

But it is worth asking whether it makes sense to perpetuate the exception for cases removed from courts in however many states there be that do not require a demand for jury trial at all. One example would be a state that does not provide for jury trial in a particular case—but that does not offer much reason to excuse a demand requirement after removal. Perhaps the rule has been too eager to protect those who refuse to read Rule 81(c) to find out that federal procedure governs after removal. There is a strong federal interest in the early demand requirement of Rule 38(b). All parties and the court know from the outset whether they are moving toward a jury trial, however likely it is that the case will ever get there. The risk that a party may decide to opt for a jury trial late in the case only because the judge does not seem sufficiently sympathetic is reduced. And if there is some reason for excusing failure to make a timely demand, Rule 39(b) protects the opportunity to reclaim a jury trial.

Rule 81(c) would be much simpler, a not inconsiderable virtue in this setting, if it were recast to read something like this:

> **(3)** ***Demand for a Jury Trial.*** Rule 38(b) governs a demand for jury trial unless, before removal, a party expressly demanded a jury trial in accordance with state law. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one[11] if the party serves a demand within 14 days after:
>
> (A) it files a notice of removal, or
> (B) it is served with a notice of removal filed by another party.

With all of this, the two most likely choices are these: Do nothing or undertake a thorough

[11] This version simply tracks the current rule. It might be shortened: "If all necessary pleadings have been served at the time of removal, a demand must be served within 14 days after * * *."

reexamination of Rule 81(c). Matters can be resolved reasonably without changing "did" back to "does." But the complex and incomplete structure of Rule 81(c), built on sympathy for those who refuse to consult the rules, might benefit from significant simplification. The Committee will consider this choice at its November 2016 meeting.

B. ISSUES RESOLVED

A number of suggestions for rules amendments have been removed from the agenda. Only brief identifications are provided here. Further discussion is provided in the Draft Minutes.

A judge suggested adoption of a rule that would enhance initial disclosure, reduce discovery, and limit motions for summary judgment. The suggestion advances specific approaches to questions that have been constantly on the agenda. It was put aside now because it overlaps in many ways with the proposed pilot projects on initial mandatory disclosure and expedited procedures.

Another judge noted frustration with the "separate document" requirement of Rule 58. The problem arises when a judge offers a brief explanation of reasons in a document that is intended to be the final judgment in the case. The precise line may waver a bit in application, but it is clear that anything more than a completely minimal explanation disqualifies the document as "separate." The result under Rule 58(c)(2) is a 150-day delay before time limits start to run for post-judgment motions and appeal. These questions were explored extensively in the process of amending Rule 58 in 2002. The Appellate Rules Committee explored them again in 2008. Each time the conclusion was that the separate document requirement should be retained. It serves a valuable function in setting a clear line that begins the time for post-judgment motions and appeal. Compliance is easy. Only absent-mindedness gets in the way. The Committee concluded that renewed education, with particular attention to deputy courtroom clerks, is better than a rule amendment.

One submission offered four suggestions. The first relates to e-filing by pro se litigants; that subject is addressed in the proposed Rule 5 amendments discussed above. The other three were:

(1) To amend Rule 5.2 to forbid filing even the last four digits of a social security number. The Committee understands that the last four digits are important in bankruptcy practice and preferred to maintain uniformity with the Bankruptcy rule.

(2) To require sealing of affidavits stating the assets of a party seeking to proceed *in forma pauperis*. The Committee concluded that protection of financial privacy in this setting is outweighed by the value of public access to information about decisions to allow free filing and by the administrative burdens of sealing.

(3) To require counsel to provide a pro se party with copies of cases or other authorities cited by court or counsel "that are unpublished or reported exclusively on computerized data bases." Some courts require this by local rule now. Although it may be a desirable practice, it seems better left to local practice than enshrined in a national rule.

Another submission suggested that the pleading standard articulated in Rule 8(a)(2) has, by virtue of Supreme Court reinterpretations, become "so misleading as to be plain error." In recent years the Committee has deliberately deferred any project that would attempt to rearticulate, and perhaps to redefine, the pleading standards that have emerged in the wake of the *Twombly* and *Iqbal* decisions. The time has not yet come for such a project.

Still other suggestions deal with a wide range of issues:

(1) A potential confusion about adding additional time to respond when a time period starts from the day when a disclosure is "made," rather than "served." The Committee concluded the rules are clear on careful reading.

(2) The need for continued monitoring of the time when it may be desirable to consider mandatory disclosure of third-party litigation financing arrangements. The Committee retains this question in its agenda, but believes that present action would be premature because these arrangements are evolving rapidly.

(3) Finding means to facilitate personal service on United States employees as defendants. The Committee concluded a court rule probably cannot direct government agencies to reveal employee home addresses, and that service by leaving the summons and complaint at the employee's office would not be desirable.

(4) Addressing "time stamps" and facilitating access to court resources by the visually impaired—a topic not appropriate for solution by a national rule of procedure, but deserving of attention by court administrators.

TAB 4B

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EX. 1

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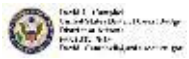
RE: Discussion with Colorado Lawyers

Parker Folse to: David_Campbell@azd.uscourts.gov, Judge_Grimm@mdd.uscourts.gov
02/24/2016 11:31 AM

Cc: Edward Cooper, "coquille@law.harvard.edu" , "JBARKETT@shb.com", "Judge_Neil_Gorsuch@ca10.uscourts.gov" , "Jeffrey_Sutton@ca6.uscourts.gov"

From: Parker Folse <pfolse@SusmanGodfrey.com>
To: "David_Campbell@azd.uscourts.gov" <David_Campbell@azd.uscourts.gov>, "Judge_Grimm@mdd.uscourts.gov" <Judge_Grimm@mdd.uscourts.gov>
Cc: Edward Cooper <coopere@umich.edu>, "coquille@law.harvard.edu" <coquille@law.harvard.edu>, "JBARKETT@shb.com" <JBARKETT@shb.com>, "Judge_Neil_Gorsuch@ca10.uscourts.gov" <Judge_Neil_Gorsuch@ca10.uscourts.gov>,
History: This message has been forwarded.

1 attachment

ATT00001.gif

Thanks for this excellent summary. I'll add a few items.

Under the Colorado pilot project, defendants were required to file answers even if they also moved to dismiss, which seemed to be a practice that received support in the survey that Dave mentioned (perhaps in part because it helps identifies the issues in dispute and facilitates initial disclosures and early case management while the motion is pending), yet in adopting the new rules, the Colorado Supreme Court did not adopt this rule for reasons that were not explained.

I got the sense that there may not have been a lot of experience with large document cases involving significant ESI during the Colorado pilot project, but the comments indicated that in such cases the early disclosure requirements focused the parties' attention on ESI issues earlier than otherwise would have been the case and usually resulted in agreements for staged disclosures to allow time for handling ESI issues.

There seemed to be agreement among the Colorado lawyers and judges that early trial settings are meaningless (and can be inefficient) unless they really are firm. Yet it's impractical not to multi-track trial settings given the high rate of settlements. One judge said he had been lucky to have colleagues who were willing to pick up each other's trial settings to avoid continuances, but guessed that this could be a bigger problem in the federal system.

There certainly seemed to be uniform enthusiasm among the Colorado lawyers and judges for robust early disclosure and for requiring disclosure of all relevant information (harmful as well as helpful) as a means of reducing sideshow fights over what must be produced in discovery and focusing attention on the merits -- though as Dave reported, there seemed to be equally uniform agreement on the importance of early and active case management by judges to make such a system work.

Parker

Parker

From: David_Campbell@azd.uscourts.gov [David_Campbell@azd.uscourts.gov]
Sent: Wednesday, February 24, 2016 9:34 AM
To: Judge_Grimm@mdd.uscourts.gov
Cc: Edward Cooper; coquille@law.harvard.edu; JBARKETT@shb.com; Parker Folse; Judge_Neil_Gorsuch@ca10.uscourts.gov; Jeffrey_Sutton@ca6.uscourts.gov
Subject: Discussion with Colorado Lawyers

Everyone:

We had a discussion this morning with Colorado lawyers and judges who have worked under their new rules, which include expedited litigation and case management procedures as well as mandatory initial disclosures. This email will recount some of what was said. Parker, Ed, Dan, and Neil (who kindly arranged the call) can fill in any gaps.

One of the judges began by noting that he conducted a survey of lawyers after every case management conference during the early phases of the pilot program. In total, he received comments from 97 lawyers. He asked them to grade the new system on a scale of 1 to 10, with 1 being the most unfavorable and 10 the most favorable. The average grade was 3.9. He observed that this may have reflected the fact that lawyers do not like change. Becky Kourlis, who was on the call, noted that data from various states shows that it generally takes 2 to 3 years for initial resistance to subside. Colorado's pilot project has now become a formal set of rules. All of the lawyers and judges on the call seemed to like the new system.

It was observed that collection lawyers generally did not like the requirement of robust initial disclosures. Originally, those disclosures were required just 21 days into the case. Many collection cases default, and yet these lawyers found they were required to spend time and money collecting documents before they knew if the case would default. Interestingly, the initial disclosure requirements appear to have reduced the number of defaults that occur in cases. Becky said the same phenomenon has been observed in other states. To avoid this problem, the current rule does not require disclosures until after an answer has been filed.

Those on the phone observes that lawyers in complex cases tend to like the new rules the most.

We asked how e-discovery was handled in initial disclosures. One lawyer commented that the pilot program asked the parties whether there were e-discovery issues in the case, a question which prompted lawyers to engage in a discussion about e-discovery. The parties generally worked out an agreement on the issue.

One lawyer observed that the requirement to disclose good and bad information has not really increase the amount of work done at the beginning of a case because lawyers would review the bad information while searching for the good information in any event. Thus, the amount of review is essentially the same.

Folks explained that the new rules were intended to produce a culture change, from hide-the-ball to getting all information on the table. They seemed to believe that the culture change is taking hold. They noted that initial disclosure issues are often raised at the first case management conference, but that the parties virtually always work them out. One judge said that he sets the hearing one week later to address the unresolved disclosure issues and that he has never had to actually hold such a hearing because the parties always reach agreement. Another judge said that he is simply requires the parties to discuss a solution, and they have always found a solution to the disclosure issues.

The Colorado system apparently includes a form that requires the parties to indicate whether they believe the initial disclosures have been adequate. The form is provided to the court before the initial case management conference.

Folks on the call emphasized that an in-person case management conference with the judge is key to making the initial disclosures work. We should consider making this point in our pilot project proposal.

The pilot project included mandatory sanctions for disclosure violations. There was widespread unhappiness with this portion of the rule, and judges usually found ways not to apply it. It was not included in the final rule. Becky noted that the study of the Arizona disclosure rule revealed that its success turned heavily on the willingness of judges to enforce it.

The judges commented that the new rules have been successful, in part, because appellate courts have been willing to back-up trial judge decisions. Becky noted that the designers of the pilot project actually went to the Colorado appellate courts to educate them regarding the pilot and to encourage them to support it in there appellate decisions. We should consider doing the same thing with our pilot. If a district agrees to participate, but the circuit is antagonistic to the pilot, the effort may fail. We should consider an appellate education component to our pilots. (The chiefs of the circuits will hear about it ay the judicial conference, but other appellate judges will not.)

One medical malpractice lawyer expressed concern about procedures now being used by medical records and vendors. He said the vendors are deciding what is and is not a legal document, and lawyers representing defendants are able to get access only to legal documents within the system. The vendors won't disclose how they distinguish between nonlegal and legal documents, and this is causing great complexity in many states.

We talked about early trial dates. All of the lawyer say they favor them, but only when they are firm. It does no good to set an early trial date only to have it continued multiple times.

Dave

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EX. 2

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John Barkett's Notes on Call with Arizona Judges and Lawyers on Rule 26.1 (March 1, 2016)

Arizona Rule 26.1	Comments During the Focus Group
The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.	It is helpful as to affirmative defenses in particular. Duty to supplement is helpful here as facts are developed, new disclosures are made. If complaint is highly detailed, there is nothing more in the disclosure statement than in the complaint. But with bare bones complaints, there will be more factual detail provided. And in supplementation, if new facts are discovered, they are disclosed in a supplement.
The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.	Duty to supplement is also helpful because parties generally develop new claims in litigation.
The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.	If a good disclosure statement, it will help decide who to depose. The disclosures are typically in summary form identifying the subject matter of the testimony. Sometimes there is more and the disclosure might be 2-3 paragraphs. A detailed script of what the witness knows or will say is not given. A proportionality determination has to be made. Could be lots of names on documents that will not be material to the case but may have some knowledge. And if dollar value is not large, that has to be taken into account in how much to say. Judge: problem is objection at trial comes very fast with jury sitting there. Was it "fairly described"? Will someone be prejudiced? These are inherent problems in a rule like this. "I don't think it can be better drafted." Unwritten rule: if you ask about a topic in a deposition, it is incorporated in the

Arizona Rule 26.1	Comments During the Focus Group
	disclosure statement. Or some add, "Mr. Smith will also testify on topics covered in his deposition." Some now are engaging in tactic of not deposing and then arguing not disclosed. Or last minute submissions of depositions to supplement disclosures.
The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.	The disclosures are typically in summary form identifying the subject matter of the testimony. Sometimes there is more and the disclosure might be 2-3 paragraphs. A detailed script of what the witness knows or will say is not given. Judge: The question she asks is whether the opposing side had fair notice of a general category of information possessed by a witness.
The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.	
The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.	No one does this. It is okay to say this disclosure will be supplemented. By the time of final disclosure, you had better answer this but not needed initially.
A computation and the measure of damage alleged by the disclosing party and the documents or testimony on	This does not happen up front. It is okay to say this disclosure will be supplemented. By the time of final

Arizona Rule 26.1	Comments During the Focus Group
which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.	disclosure, you had better answer this but not needed initially. Judge: you want to be sure issues are raised fairly by the disclosure. One lawyer gave an example: witness who is asked about lost profits but the disclosure does not say lost profits would be covered by this witness.
The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.	A proposed rule would require disclosure of indemnities and surety agreements. And if it is wasting insurance policy, one has to disclose in a supplement how much of the coverage is left. If indemnity is confidential? That topic was not discussed on AZ task force that proposed the change. But judges commonly enter protective orders where warranted.
A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents	Could be debate over relevance. I am sure some people don't comply, but the culture in Arizona is to turn over. However, it does not work for ESI since disclosures are due 40 days after an answer is filed. It does not happen. And it should not happen. Too costly. A proposed revised rule is currently pending before the Arizona Supreme Court. If adopted, there would be staggered disclosure. ESI is carved out. Parties required to confer and talk about formatting, searches, custodians, cost. Then go before the Judge to work out any differences. In commercial court, there is an ESI checklist and the Judge goes through the checklist at the case management conference to resolve any issues. Moving to more active case management. She supports Rule 26.1. She is very aggressive in enforcing the Rule. She tells parties that she enforces the disclosure rule strictly and will keep out evidence not disclosed. She sees fewer discovery disputes. She does not allow motions to compel. She gets parties on phone after receiving 1-page summary of dispute. Objections should not be made to discovery if the production is required by 26.1. One change proposed in Arizona is to eliminate "reasonably calculated" standard

Arizona Rule 26.1	Comments During the Focus Group
and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.	and leave it just as "relevance." The disclosure rule eliminates hiding the ball and if you do so, you are in serious trouble. The Federal Rules allow you to hide the ball if no one asks for it. In this individual's cases in state court, he almost never issues interrogatories. One downside: initial disclosures accelerate the cost of prosecuting or defending the case. But parties can agree to postpone the 40-day disclosure deadline if they are going to talk settlement. Another judge spoke up. Rule is designed to make litigation civil again and eliminate gamesmanship. But there is still gamesmanship. Does not eliminate need for depositions. Does eliminate need of interrogatories. Does eliminate arguments over notice pleadings when you have disclosure rules. "Yeah, they have not given you a lot of facts, but they will in 40 days, so dismissal motion is denied." We get motions to exclude evidence based on non-disclosure. They become "gotchas" for some lawyers, who should have just picked up the phone and called to ask for a supplement. One lawyer was trained under federal rules and then moved to Arizona and encountered Rule 26.1. This lawyer also practices against highly sophisticated lawyers. This lawyer said 26.1 has been positive. Saves money. Moves matters more quickly. Parties tend to adjust timing based on Rule 26.1 This lawyer has never seen a party prejudiced by following the disclosure rule but has seen lawyers who failed to comply face evidence exclusion by virtue of the failure. One plaintiff's lawyer believes that the disclosure rule has affected plaintiff's lawyers more than defense lawyers: it is more costly; this lawyer has to constantly review the 26.1 disclosure to be sure it is supplemented as facts develop so he does not face an exclusion request at trial. A plaintiff's personal injury lawyer felt that Rule 26.1 adds a layer of discovery.

Arizona Rule 26.1	Comments During the Focus Group
	Statements are filed but then this lawyer still gets interrogatories and requests for production on a number of issues. This lawyer felt it would be great if all judges did what judge above does: no discovery motions—call the court instead. This lawyer suggested a discovery master could play a role in ferreting out those that comply and those that don't intentionally versus accidentally. Judge disagrees with use of discovery master. Had bad experience with it. Cost the parties too much and took too long. Court involvement can move a matter along more quickly. She would add to the Rule that a party must issue a litigation hold when a case is filed. As to ESI, she thinks the Maricopa County Superior Court model should be the one followed in the Rule. Judges need to get involved in ESI discovery immediately. This judge says rule has helped, but it has not eliminated sharp practices that judges have to police. When supplemental disclosures are produced, new information is typically bolded or in italics. Deadline for final disclosure? It is typically in the scheduling order under AZ Rule 16. Rule says 60 days before trial, but the Court can trump this deadline and make it earlier than that. Most judges do. 60 days before trial is too late. One lawyer said he could never remember seeing anything "startling" in a disclosure statement. This lawyer has gotten favorable documents from the other side, however. In a $25,000 or $50,000 case, it adds expense. Lawyers do press client for every potential relevant document to be sure you are complying with the disclosure statement. Clients do balk. The Rule then is invoked by the lawyers to support them with respect to documents when clients balk at production. Conceptually, though, it is harder to explain to some clients that AZ's rule

Arizona Rule 26.1	Comments During the Focus Group
	requires full disclosure. One has to think differently than when responding to a request for production. In that respect, it is more expensive. But on balance, this lawyer believes the disclosure rule saves money. Another lawyer: must think through your entire case, including its problems, because of what has to be disclosed. If there is a large amount of ESI, what is done? Disclosure would likely say: "we are negotiating an ESI protocol," or "we have agreed on an ESI protocol and this is what will happen…" If no discussion occurs, it might say: "We will make disclosure in due course after review." When data rich parties are against each other, they work things out. In asymmetrical cases, it is more difficult to work out. If data poor party tries to use ESI burden as leverage, then can be difficult. Judge: try to discuss with counsel and with the judge. One lawyer told story of NY lawyers dribbling out ESI and he is back to issuing requests for production. It will cost him quite a bit of money to engage in this iterative process. Should disclose sources of ESI at a minimum. If a "data dump," hard to argue something was not disclosed. Rule 26.1 is really drafted for small cases; sometimes with no lawyers involved. For larger cases, the proposed amendment on ESI will be make it self-executing versus now where lawyers have to avoid the rule in order to comply. Lawyers generally said they prefer the Arizona disclosures to federal court discovery practices.

Arizona Rule 26.1	Comments During the Focus Group
	A plaintiffs' lawyer said he finds the disclosures of facts, legal theories, and documents to be helpful. He finds that judges generally enforce the disclosure rules. A judge said she thinks the disclosure rule, when enforced, makes cases move more quickly and reduces the amount of written discovery. A defense lawyer said the rule eliminates hiding the ball and makes litigation more cost-effective. He rarely serves interrogatories because they are not necessary in light of disclosures. If he thinks information is missing, he sends a letter to the opposing side requesting it. If it is not produced, the letter provides a basis for excluding it at trial. It does front-load costs, and can interfere with settlement of smaller cases. A judge agreed that the disclosure rule generally makes interrogatories unnecessary. On balance, he thinks the disclosure approach is better than the federal rules approach. A defense lawyer who learned to practice in Chicago before moving to Arizona said that she thinks the disclosure rules are extremely positive. They reduce costs and move cases more quickly. She has never seen a party unfairly prejudiced by the disclosure rule, but has seen partiers fairly prejudice when they failed to comply. A plaintiffs' lawyer said he thinks the document disclosure requirement is helpful, but the other disclosure obligations just increase cost. Some lawyers turn them into a "gotcha" tactic by arguing something obvious was not disclosed. A plaintiffs' lawyer said he thinks the disclosure rule would be more effective if other forms of discovery were limited. He still has to respond to much discovery, which means the disclosure obligation only adds another layer of cost.

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EX. 3

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To: Judge Campbell

Cc: Rebecca Womeldorf

From: Amelia Yowell, Supreme Court Fellow

Date: December 13, 2015

RE: State Initial Disclosure Models

The Pilot Projects Subcommittee asked me to compile information about states with robust initial disclosure rules. I found seven states with initial disclosure rules that I thought would be helpful to the Subcommittee as it drafts a possible pilot program (Alaska, Arizona, Colorado, Nevada, New Hampshire, Texas, and Utah). I have provided a summary of these states' initial disclosure rules in the attached table, which I hope will provide a quick and easy way to compare the rules. Because I have simplified the rules for space and ease of comparison, I have linked each section of the table to the text of the relevant state rule.[1] If the Subcommittee thinks it would be helpful, I am happy to do additional research or analysis.

[1] You can access the text of the rule by clicking anywhere on a state's section in the table. The links are invisible. To get back to the main table, go to the bookmark bar on the left side of the PDF and click on "AGY Table."

TABLE COMPARING SELECTED STATE INITIAL DISCLOSURE RULES

	Scope of Disclosure	List or Summary re Individuals	Produce or Identify Docs, ESI, data compilations, tangible things	Damages	Insurance Agreements
Federal **Fed. R. Civ. P. 26(a)(1)**	Helpful information (but not impeachment information)	Name, address, and telephone number and subject	A copy or description by category and location, limited to possession, custody, or control	A computation of each category and documents/material must be available for inspection or copying	Inspection and copying
New Hampshire **N.H. Superior Court Civ. R. 22(a)**	Helpful information (but not impeachment information)	Name, address, and telephone number and summary (unless the information is in a produced document)	A copy, limited to possession, custody, or control	A computation of each category and a copy of documents/materials	Inspection and copying
Nevada **Nev. R. Civ. P. 16.1(a)(1), 26(b)(1)**	Helpful and hurtful information, including impeachment *"Relevant to the subject matter"*	Name, address, and telephone number and subject	A copy or description by category and location, limited to possession, custody or control	A computation of any category and documents/materials must be available for inspection and copying	Inspection and copying
Alaska **Alaska R. Civ. P. 26(a)(1)**	The factual basis for each claim or defense Helpful and hurtful information	Name, address, and telephone number and subject	For relevant documents, a copy or a description by category and a copy of any un-privileged	List categories of damages and a computation of each category of special damages and	Produce a copy

	"Relevant to disputed facts alleged with particularity in the pleadings"		statements or the name, address, and telephone number of the custodian of the statement and photos, diagrams, and videotapes	documents/materials must be available for inspection or copying	
Colorado **Colo. R. Civ. P. 26(a)(1)**	Helpful and hurtful information *Relevant to the claims and defenses of any party"*	Name, address, and telephone number and "brief description"	A listing and a copy or description by category and location, limited to possession, custody, or control and make available for inspection and copying	A description of the categories and a computation of economic damages and relevant documents/materials must be available for inspection or copying	Inspection and copying
Utah **Utah R. Civ. P. 26(a)(1)**	For individuals: helpful information (but not impeachment information) and each fact witness the party may call in its case-in-chief For documents: any referred to in the pleadings and any the party may offer in its case-in-chief (but not charts, summaries,	Name, address, and telephone number and subject and, if an expected fact witness, a summary	A copy, limited to possession or control of the party	A computation of any damages claimed and a copy of documents/materials	Produce a copy

	and demonstrative exhibits)				
Arizona **Ariz. R. Civ. P. 26.1(a)**	The factual basis and legal theory for each claim or defense For individuals: helpful and hurtful information (*knowledge or information relevant to the events, transactions, or occurrences*) and witnesses the party intends to call at trial and all persons who have given statements (written, recorded, signed, or unsigned) and anticipated expert witnesses For documents, etc.: any the party plans to use at trial and helpful and hurtful documents (*relevant to the subject matter*), and those reasonably calculated to lead to the discovery of admissible evidence	Names, address, and telephone number and nature and, for witnesses expected at trial, a fair description of the substance of the testimony and, for witnesses who have given a statement, the identity of the custodian of the copies and, for expert witnesses, the subject matter, the facts and opinions, a summary of the grounds for the opinions, the expert's qualification, and the name and address of the custodian of the expert's reports	For documents expected to be used at trial, "the existence, location, custodian, and general description," and for relevant documents, a list or, in the case of voluminous information, a list of the categories known to exist (no possession, custody, or control limitation) and unless good cause, a copy	A computation of damages and a copy of the documents/materials and the names, addresses, and telephone numbers of all damage witnesses	List existence, location, custodian, and general description

Texas **Tex. R. Civ. P. 194.2** **(NOT MANDATORY)**	Factual basis and legal theories for claims or defenses (but not all evidence that may be offered at trial) Helpful and hurtful information "*Relevant facts*"	Name, address, and telephone number and a brief statement of connection and for expert witnesses, the subject matter, general substance of impressions and opinions, brief summary of the basis, or documents reflecting the information (if not subject to the control of the party)	A copy of any witness statements and for experts controlled by the party, a copy of everything provided to, reviewed by, or prepared by or for the expert and the expert's current resume and bibliography	The amount and method of calculating economic damages and, if physical or mental injury, all medical records and bills reasonably related or authorization permitting disclosure	A copy

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 26

Rule 26. Duty to Disclose; General Provisions Governing Discovery

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 26 are displayed in two separate documents. Notes of Decisions for subdivisions I to III are contained in this document. For Notes of Decisions for subdivisions IV to end, see second document for 28 USCA Federal Rules of Civil Procedure Rule 26.>

(a) Required Disclosures.

(1) ***Initial Disclosure.***

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures--In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures--For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) ***Disclosure of Expert Testimony*.**

(A) *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially

employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e).

(3) ***Pretrial Disclosures.***

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under Federal Rule of Evidence 402 or 403--is waived unless excused by the court for good cause.

(4) ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** 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 and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) ***Limitations on Frequency and Extent.***

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations 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)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule 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 proposed discovery is outside the scope permitted by Rule 26(b)(1).

(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) *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(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) or (D); and

(ii) for discovery under (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.

(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. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(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 for the district 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 or the allocation of expenses, 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 discovery.

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

(d) Timing and Sequence of Discovery.

(1) ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) ***Early Rule 34 Requests.***

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) ***When Considered Served***. The request is considered to have been served at the first Rule 26(f) conference.

(3) ***Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

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

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

(e) Supplementing Disclosures and Responses.

(1) ***In General.*** A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) ***Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. 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. The court may order the parties or attorneys to attend the conference in person.

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

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

(B) 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 on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) 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

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, 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.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and 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, e-mail address, and telephone number. 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 disclosure, 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.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective

December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 28, 2010, effective December 1, 2010; April 29, 2015, effective December 1, 2015.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence. Many states have adopted this practice on account of its simplicity and effectiveness, safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the trial or hearing as are deemed advisable. See Ark.Civ.Code (Crawford, 1934) §§ 606 to 607; Calif.Code Civ.Proc. (Deering, 1937) § 2021; 1 Colo.Stat.Ann. (1935) Code Civ.Proc. § 376; Idaho Code Ann. (1932) § 16-906; Ill.Rules of Pract.Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) §§ 2-1501, 2-1506; Ky.Codes (Carroll, 1932) Civ.Pract. § 557; 1 Mo.Rev.Stat. (1929) § 1753; 4 Mont.Rev.Codes Ann. (1935) § 10645; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 4 Nev.Comp.Laws (Hillyer, 1929) § 9001; 2 N.H.Pub.Laws (1926) ch. 337, § 1; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) §§ 7889 to 7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 Ore.Code Ann. (1930) Tit. 9, § 1503; 1 S.D.Comp.Laws (1929) §§ 2713-16; Vernon's Ann.Civ.Stats.Tex. arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) § 104-51-7; Wash.Rules of Practice adopted by the Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1. Compare [former] Equity Rules 47 (Depositions--To be Taken in Exceptional Instances); 54 (Depositions Under Revised Statutes, §§ 863, 865, 866, 867--Cross Examination); 58 (Discovery--Interrogatories--Inspection and Production of Documents--Admission of Execution or Genuineness).

This and subsequent rules incorporate, modify, and broaden the provisions for depositions under U.S.C., Title 28, [former] §§ 639 (Depositions *de bene esse;* when and where taken; notice), 640 (Same; mode of taking), 641 (Same; transmission to court), 644 (Depositions under *dedimus potestatem* and *in perpetuam*), 646 (Deposition under *dedimus potestatem*; how taken). These statutes are superseded in so far as they differ from this and subsequent rules. U.S.C. Title 28, [former] § 643 (Depositions; taken in mode prescribed by State laws) is superseded by the third sentence of Subdivision (a).

While a number of states permit discovery only from parties or their agents, others either make no distinction between parties or agents of parties and ordinary witnesses, or authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts. See Ark.Civ.Code (Crawford, 1934) §§ 606 to 607; 1 Idaho Code Ann. (1932) § 16-906; Ill.Rules of Pract., Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) § 2-1501; Ky.Codes (Carroll, 1932) Civ.Pract. §§ 554 to 558; 2 Md.Ann.Code (Bagby, 1924) Art. 35, § 21; 2 Minn.Stat. (Mason, 1927) § 9820; Mo.St.Ann. §§ 1753, 1759, pp. 4023, 4026; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 2 N.H.Pub.Laws (1926) ch. 337, § 1; 2 N.D.Comp.Laws Ann. (1913) § 7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 S.D.Comp.Laws (1929) §§ 2713-16; Vernon's Ann.Civil Stats.Tex. arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) § 104-51-7; Wash.Rules of Practice adopted by Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1.

The more common practice in the United States is to take depositions on notice by the party desiring them, without any order from the court, and this has been followed in these rules. See Calif.Code Civ.Proc. (Deering, 1937) § 2031; 2 Fla.Comp.Gen.Laws Ann. (1927) §§ 4405-7; 1 Idaho Code Ann. (1932) § 16-902; Ill.Rules of Pract., Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) § 2-1502; Kan.Gen.Stat.Ann. (1935) § 60-2827; Ky.Codes (Carroll, 1932) Civ.Pract. § 565; 2 Minn.Stat. (Mason, 1927) § 9820; Mo.St.Ann. § 1761, p. 4029; 4 Mont.Rev.Codes Ann. (1935) § 10651; Nev.Comp.Laws (Hillyer, 1929) § 9002; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) § 7895; Utah Rev.Stat.Ann. (1933) § 104-51-8.

Note to Subdivision (b). While the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation. See Ala.Code Ann. (Michie, 1928) §§ 7764 to 7773; 2

Ind.Stat.Ann. (Burns, 1933) §§ 2-1028, 2-1506, 2-1728-2-1732; Iowa Code (1935) § 11185; Ky.Codes (Carroll, 1932) Civ.Pract. §§ 557, 606(8); La.Code Pract. (Dart, 1932) arts. 347-356; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, §§ 61 to 67; Mo.St.Ann. §§ 1753, 1759, pp. 4023, 4026; Neb.Comp.Stat. (1929) §§ 20-1246, 20-1247; 2 N.H.Pub.Laws (1926) ch. 337, § 1; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11497, 11526; Vernon's Ann.Civ.Stats.Tex. arts. 3738, 3753, 3769; Wis.Stat. (1935) § 326.12; Ontario Consol.Rules of Pract. (1928) Rules 237-347; Quebec Code of Civ.Proc. (Curran, 1922) §§ 286 to 290.

Note to Subdivisions (d), (e), and (f). The restrictions here placed upon the use of depositions at the trial or hearing are substantially the same as those provided in U.S.C., Title 28, [former] § 641, for depositions taken, *de bene esse*, with the additional provision that any deposition may be used when the court finds the existence of exceptional circumstances. Compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 37, r. 18 (with additional provision permitting use of deposition by consent of the parties). See also [former] Equity Rule 64 (Former Depositions, Etc. May be Used Before Master); and 2 Minn.Stat. (Mason, 1927) § 9835 (Use in a subsequent action of a deposition filed in a previously dismissed action between the same parties and involving the same subject matter).

1946 Amendment

Note. Subdivision (a). The amendment eliminates the requirement of leave of court for the taking of a deposition except where a plaintiff seeks to take a deposition within 20 days after the commencement of the action. The retention of the requirement where a deposition is sought by a plaintiff within 20 days of the commencement of the action protects a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit; the plaintiff, of course, needs no such protection. The present rule forbids the plaintiff to take a deposition, without leave of court, before the answer is served. Sometimes the defendant delays the serving of an answer for more than 20 days, but as 20 days are sufficient time for him to obtain a lawyer, there is no reason to forbid the plaintiff to take a deposition without leave merely because the answer has not been served. In all cases, Rule 30(a) empowers the court, for cause shown, to alter the time of the taking of a deposition, and Rule 30(b) contains provisions giving ample protection to persons who are unreasonably pressed. The modified practice here adopted is along the line of that followed in various states. See e.g., 8 Mo.Rev.Stat.Ann.1939, § 1917; 2 Burns' Ind.Stat.Ann.1933, § 2-1506.

Subdivision (b). The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. *Engl v. Aetna Life Ins. Co.*, C.C.A.2, 1943, 139 F.2d 469; *Mahler v. Pennsylvania R. Co.*, E.D.N.Y.1945, 8 Fed.Rules Serv. 33.351, Case 1. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. *Lewis v. United Air Lines Transportation Corp.*, D.Conn.1939, 27 F.Supp. 946; *Engl v. Aetna Life Ins. Co.*, supra; *Mahler v. Pennsylvania R. Co.*, supra; *Bloomer v. Sirian Lamp Co.*, D.Del.1944, 8 Fed.Rules Serv. 26b.31, Case 3; *Rosseau v. Langley*, N.Y.1945, 9 Fed.Rules Serv. 34.41, Case 1 (Rule 26 contemplates "examinations not merely for the narrow purpose of adducing testimony which may be offered in evidence but also for the broad discovery of information which may be useful in preparation for trial."); *Olson Transportation Co. v. Socony-Vacuum Co.*, E.D.Wis.1944, 8 Fed.Rules Serv. 34.41, Case 2 (". . . the Rules . . . permit 'fishing' for evidence as they should."); Note, 1945, 45 Col.L.Rev. 482. Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved. Under Rule 26(b) several cases, however, have erroneously limited discovery on the basis of admissibility, holding that the word "relevant" in effect meant "material and competent under the rules of evidence". *Poppino v. Jones Store Co.*, W.D.Mo.1940, 1 F.R.D. 215, 3 Fed.Rules Serv. 26b.5, Case 1; *Benevento v. A. & P. Food Stores, Inc.*, E.D.N.Y.1939, 26 F.Supp. 424. Thus it has been said that inquiry might not be made into statements or other matters which, when disclosed, amounted only to hearsay. *See Maryland for use of Montvila v. Pan-American Bus Lines, Inc.*, D.Md.1940, 1 F.R.D. 213, 3 Fed.Rules Serv. 26b.211, Case 3; *Gitto v. "Italia," Societa Anonima Di Navigazione*, E.D.N.Y.1940, 31 F.Supp. 567; *Rose Silk Mills, Inc. v. Insurance Co. of North America*, S.D.N.Y.1939, 29 F.Supp. 504; *Colpak*

v. Hetterick, E.D.N.Y.1941, 40 F.Supp. 350; *Matthies v. Peter F. Connolly Co.,* E.D.N.Y.1941, 6 Fed.Rules Serv. 30a.22, Case 1, 2 F.R.D. 277; *Matter of Examination of Citizens Casualty Co. of New York,* S.D.N.Y.1942, 3 F.R.D. 171, 7 Fed.Rules Serv. 26b.211, Case 1; *United States v. Silliman,* D.C.N.J.1944, 8 Fed.Rules Serv. 26b.52, Case 1. The contrary and better view, however, has often been stated. See, e.g., *Engl v. Aetna Life Ins. Co.,* supra; *Stevenson v. Melady,* S.D.N.Y.1940, 3 Fed.Rules Serv. 26b.31, Case 1, 1 F.R.D. 329; *Lewis v. United Air Lines Transport Corp.,* supra; *Application of Zenith Radio Corp.,* E.D.Pa.1941, 4 Fed.Rules Serv. 30b.21, Case 1, 1 F.R.D. 627; *Steingut v. Guaranty Trust Co. of New York,* S.D.N.Y.1941, 1 F.R.D. 723, 4 Fed.Rules Serv. 26b.5, Case 2; *DeSeversky v. Republic Aviation Corp.,* E.D.N.Y.1941, 2 F.R.D. 183, 5 Fed.Rules Serv. 26b.31, Case 5; *Moore v. George A. Hormel & Co.,* S.D.N.Y.1942, 6 Fed.Rules Serv. 30b.41, Case 1, 2 F.R.D. 340; *Hercules Powder Co. v. Rohm & Haas Co.,* D.Del.1943, 7 Fed.Rules Serv. 45b.311, Case 2, 3 F.R.D. 302; *Bloomer v. Sirian Lamp Co.,* supra; *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.,* D.Mass.1944, 8 Fed.Rules Serv. 26b.31, Case 1; *Patterson Oil Terminals, Inc. v. Charles Kurz & Co., Inc.,* E.D.Pa.1945, 9 Fed.Rules Serv. 33.321, Case 2; *Pueblo Trading Co. v. Reclamation Dist. No. 1500,* N.D.Cal.1945, 9 Fed.Rules Serv. 33.321, Case 4, 4 F.R.D. 471. See also discussion as to the broad scope of discovery in *Hoffman v. Palmer,* C.C.A.2, 1942, 129 F.2d 976, 995-997, affirmed 63 S.Ct. 477, 318 U.S. 109, 87 L.Ed. 645; Note, 1945, 45 Col.L.Rev. 482.

1963 Amendment

This amendment conforms to the amendment of Rule 28(b). See the next-to-last paragraph of the Advisory Committee's Note to that amendment.

1966 Amendment

The requirement that the plaintiff obtain leave of court in order to serve notice of taking of a deposition within 20 days after commencement of the action gives rise to difficulties when the prospective deponent is about to become unavailable for examination. The problem is not confined to admiralty, but has been of special concern in that context because of the mobility of vessels and their personnel. When Rule 26 was adopted as Admiralty Rule 30A in 1961, the problem was alleviated by permitting depositions *de bene esse*, for which leave of court is not required. See Advisory Committee's Note to Admiralty Rule 30A (1961).

A continuing study is being made in the effort to devise a modification of the 20-day rule appropriate to both the civil and admiralty practice to the end that Rule 26(a) shall state a uniform rule applicable alike to what are now civil actions and suits in admiralty. Meanwhile, the exigencies of maritime litigation require preservation, for the time being at least, of the traditional *de bene esse* procedure for the post-unification counterpart of the present suit in admiralty. Accordingly, the amendment provides for continued availability of that procedure in admiralty and maritime claims within the meaning of Rule 9(h).

1970 Amendment

A limited rearrangement of the discovery rules is made, whereby certain rule provisions are transferred, as follows: Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing Rules 26(d), (e), and (f) are transferred to Rule 32. Revisions of the transferred provisions, if any, are discussed in the notes appended to Rules 30, 31, and 32. In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a rule governing discovery in general. (The reasons are set out in the Advisory Committee's explanatory statement.)

Subdivision (a)--Discovery Devices. This is a new subdivision listing all of the discovery devices provided in the discovery rules and establishing the relationship between the general provisions of Rule 26 and the specific rules for particular discovery devices. The provision that the frequency of use of these methods is not limited confirms existing law. It incorporates in general form a provision now found in Rule 33.

Subdivision (b)--Scope of Discovery. This subdivision is recast to cover the scope of discovery generally. It regulates the discovery obtainable through any of the discovery devices listed in Rule 26(a).

All provisions as to scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules. Rule 26(c) (transferred from 30(b)) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b), and these powers have always been freely exercised. For example, a party's income tax return is generally held not privileged, 2A Barron & Holtzoff, *Federal Practice and Procedure*, § 651.2 (Wright ed. 1961), and yet courts have recognized that interests in privacy may call for a measure of extra protection. E.g., *Wiesenberger v. W. E. Hutton & Co.*, 35 F.R.D. 556 (S.D.N.Y.1964). Similarly, the courts have in appropriate circumstances protected materials that are primarily of an impeaching character. These two types of materials merely illustrate the many situations, not capable of governance by precise rule, in which courts must exercise judgment. The new subsections in Rule 26(b) do not change existing law with respect to such situations.

Subdivision (b)(1)--In General. The language is changed to provide for the scope of discovery in general terms. The existing subdivision, although in terms applicable only to depositions, is incorporated by reference in existing Rules 33 and 34. Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary or under court order, is not a concession or determination of relevance for purposes of trial. *Cf.* 4 *Moore's Federal Practice* ¶26-16[1] (2d ed. 1966).

Subdivision (b)(2)--Insurance Policies. Both the cases and commentators are sharply in conflict on the question whether defendant's liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue in the case. Examples of Federal cases requiring disclosure and supporting comments: *Cook v. Welty*, 253 F.Supp. 875 (D.D.C.1966) (cases cited); *Johanek v. Aberle*, 27 F.R.D. 272 (D.Mont.1961); Williams, *Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases*, 10 Ala.L.Rev. 355 (1958); Thode, *Some Reflections on the 1957 Amendments to the Texas Rules*, 37 Tex.L.Rev. 33, 40-42 (1958). Examples of Federal cases refusing disclosure and supporting comments: *Bisserier v. Manning*, 207 F.Supp. 476 (D.N.J.1962); *Cooper v. Stender*, 30 F.R.D. 389 (E.D.Tenn.1962); Frank, *Discovery and Insurance, Coverage*, 1959 Ins.L.J. 281; Fournier, *Pre-trial Discovery of Insurance Coverage and Limits*, 28 Ford.L.Rev. 215 (1959).

The division in reported cases is close. State decisions based on provisions similar to the federal rules are similarly divided. See cases collected in 2A Barron & Holtzoff, *Federal Practice and Procedure* § 647.1, nn. 45.5, 45.6 (Wright ed. 1961). It appears to be difficult if not impossible to obtain appellate review of the issue. Resolution by rule amendment is indicated. The question is essentially procedural in that it bears upon preparation for trial and settlement before trial, and courts confronting the question, however they have decided it, have generally treated it as procedural and governed by the rules.

The amendment resolves this issue in favor of disclosure. Most of the decisions denying discovery, some explicitly, reason from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence; they avoid considerations of policy, regarding them as foreclosed. See *Bisserier v. Manning*, *supra*. Some note also that facts about a defendant's financial status are not discoverable as such, prior to judgment with execution unsatisfied, and fear that, if courts hold insurance coverage discoverable, they must extend the principle to other aspects of the defendant's financial status. The cases favoring disclosure rely heavily on the practical significance of insurance in the decisions lawyers make about settlement and trial preparation. In *Clauss v. Danker*, 264 F.Supp. 246 (S.D.N.Y.1967), the court held that the rules forbid disclosure but called for an amendment to permit it.

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information

about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.

Disclosure is required when the insurer "may be liable" on part or all of the judgment. Thus, an insurance company must disclose even when it contests liability under the policy, and such disclosure does not constitute a waiver of its claim. It is immaterial whether the liability is to satisfy the judgment directly or merely to indemnify or reimburse another after he pays the judgment.

The provision applies only to persons "carrying on an insurance business" and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. *Cf.* N.Y.Ins.Law § 41. Thus, the provision makes no change in existing law on discovery of indemnity agreements other than insurance agreements by persons carrying on an insurance business. Similarly, the provision does not cover the business concern that creates a reserve fund for purposes of self-insurance.

For some purposes other than discovery, an application for insurance is treated as a part of the insurance agreement. The provision makes clear that, for discovery purposes, the application is not to be so treated. The insurance application may contain personal and financial information concerning the insured, discovery of which is beyond the purpose of this provision.

In no instance does disclosure make the facts concerning insurance coverage admissible in evidence.

Subdivision (b)(3)--Trial Preparation: Materials. Some of the most controversial and vexing problems to emerge from the discovery rules have arisen out of requests for the production of documents or things prepared in anticipation of litigation or for trial. The existing rules make no explicit provision for such materials. Yet, two verbally distinct doctrines have developed, each conferring a qualified immunity on these materials--the "good cause" requirement in Rule 34 (now generally held applicable to discovery of documents via deposition under Rule 45 and interrogatories under Rule 33) and the work-product doctrine of *Hickman v. Taylor,* 329 U.S. 495 (1947). Both demand a showing of justification before production can be had, the one of "good cause" and the other variously described in the *Hickman* case: "necessity or justification," "denial * * * would unduly prejudice the preparation of petitioner's case," or "cause hardship or injustice" 329 U.S. at 509-510.

In deciding the *Hickman* case, the Supreme Court appears to have expressed a preference in 1947 for an approach to the problem of trial preparation materials by judicial decision rather than by rule. Sufficient experience has accumulated, however, with lower court applications of the *Hickman* decision to warrant a reappraisal.

The major difficulties visible in the existing case law are (1) confusion and disagreement as to whether "good cause" is made out by a showing of relevance and lack of privilege, or requires an additional showing of necessity, (2) confusion and disagreement as to the scope of the *Hickman* work-product doctrine, particularly whether it extends beyond work actually performed by lawyers, and (3) the resulting difficulty of relating the "good cause" required by Rule 34 and the "necessity or justification" of the work-product doctrine, so that their respective roles and the distinctions between them are understood.

Basic Standard.--Since Rule 34 in terms requires a showing of "good cause" for the production of all documents and things, whether or not trial preparation is involved, courts have felt that a single formula is called for and have differed over whether a showing of relevance and lack of privilege is enough or whether more must be shown. When the facts of the cases are studied, however, a distinction emerges based upon the type of materials. With respect to documents not obtained or prepared with an eye to litigation, the decisions, while not uniform, reflect a strong and increasing tendency to relate "good cause" to a showing that the documents are relevant to the subject matter of the action. *E.g.*, *Connecticut Mutual Life Ins. Co. v. Shields,* 17 F.R.D. 273 (S.D.N.Y.1959), with cases cited; *Houdry Process Corp. v. Commonwealth Oil Refining Co.,* 24 F.R.D. 58 (S.D.N.Y.1955); see *Bell v. Commercial Ins. Co.,* 280 F.2d 514, 517 (3d Cir. 1960). When the party whose documents are sought shows that the request for production is unduly burdensome or oppressive, courts have denied discovery for lack of "good cause", although they might just as easily have based their decision on the protective provisions of existing Rule 30(b) (new Rule 26(c)). *E.g.*, *Lauer v. Tankrederi,* 39 F.R.D. 334 (E.D.Pa.1966).

As to trial-preparation materials, however, the courts are increasingly interpreting "good cause" as requiring more than relevance. When lawyers have prepared or obtained the materials for trial, all courts require more than relevance; so much is clearly commanded by *Hickman*. But even as to the preparatory work of nonlawyers, while some courts ignore work-product and equate "good cause" with relevance, *e.g.*, *Brown v. New York, N.H. & H.R.R.*, 17 F.R.D. 324 (S.D.N.Y.1955), the more recent trend is to read "good cause" as requiring inquiry into the importance of and need for the materials as well as into alternative sources for securing the same information. In *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962), statements of witnesses obtained by claim agents were held not discoverable because both parties had had equal access to the witnesses at about the same time, shortly after the collision in question. The decision was based solely on Rule 34 and "good cause"; the court declined to rule on whether the statements were work-products. The court's treatment of "good cause" is quoted at length and with approval in *Schlagenhauf v. Holder*, 379 U.S. 104, 117-118 (1964). See also *Mitchell v. Bass*, 252 F.2d 513 (8th Cir. 1958); *Hauger v. Chicago, R.I. & Pac. R.R.*, 216 F.2d 501 (7th Cir. 1954); *Burke v. United States*, 32 F.R.D. 213 (E.D.N.Y.1963). While the opinions dealing with "good cause" do not often draw an explicit distinction between trial preparation materials and other materials, in fact an overwhelming proportion of the cases in which a special showing is required are cases involving trial preparation materials.

The rules are amended by eliminating the general requirement of "good cause" from Rule 34 but retaining a requirement of a special showing for trial preparation materials in this subdivision. The required showing is expressed, not in terms of "good cause" whose generality has tended to encourage confusion and controversy, but in terms of the elements of the special showing to be made: substantial need of the materials in the preparation of the case and inability without undue hardship to obtain the substantial equivalent of the materials by other means.

These changes conform to the holdings of the cases, when viewed in light of their facts. Apart from trial preparation, the fact that the materials sought are documentary does not in and of itself require a special showing beyond relevance and absence of privilege. The protective provisions are of course available, and if the party from whom production is sought raises a special issue of privacy (as with respect to income tax returns or grand jury minutes) or points to evidence primarily impeaching, or can show serious burden or expense, the court will exercise its traditional power to decide whether to issue a protective order. On the other hand, the requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side. See Field and McKusick, *Maine Civil Practice* 264 (1959).

Elimination of a "good cause" requirement from Rule 34 and the establishment of a requirement of a special showing in this subdivision will eliminate the confusion caused by having two verbally distinct requirements of justification that the courts have been unable to distinguish clearly. Moreover, the language of the subdivision suggests the factors which the courts should consider in determining whether the requisite showing has been made. The importance of the materials sought to the party seeking them in preparation of his case and the difficulty he will have obtaining them by other means are factors noted in the *Hickman* case. The courts should also consider the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents the production of which he seeks.

Consideration of these factors may well lead the court to distinguish between witness statements taken by an investigator, on the one hand, and other parts of the investigative file, on the other. The court in *Southern Ry. v. Lanham*, 403 F.2d 119 (5th Cir. 1968), while it naturally addressed itself to the "good cause" requirements of Rule 34, set forth as controlling considerations the factors contained in the language of this subdivision. The analysis of the court suggests circumstances under which witness statements will be discoverable. The witness may have given a fresh and contemporaneous account in a written statement while he is available to the party seeking discovery only a substantial time thereafter. *Lanham*, *supra* at 127-128; *Guilford*, *supra* at 926. Or he may be reluctant or hostile. *Lanham*, *supra* at 128-129; *Brookshire v. Pennsylvania RR*, 14 F.R.D. 154 (N.D.Ohio 1953); *Diamond v. Mohawk Rubber Co.*, 33 F.R.D. 264 (D.Colo.1963). Or he may have a lapse of memory. *Tannenbaum v. Walker*, 16 F.R.D. 570 (E.D.Pa.1954). Or he may probably be deviating from his prior statement. *Cf. Hauger v. Chicago, R.I.*

& Pac. RR, 216 F.2d 501 (7th Cir. 1954). On the other hand, a much stronger showing is needed to obtain evaluative materials in an investigator's reports. *Lanham, supra* at 131-133; *Pickett v. L. R. Ryan, Inc.,* 237 F.Supp. 198 (E.D.S.C.1965).

Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision. *Goosman v. A. Duie Pyle, Inc.,* 320 F.2d 45 (4th Cir. 1963); cf. *United States v. New York Foreign Trade Zone Operators, Inc.,* 304 F.2d 792 (2d Cir. 1962). No change is made in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.

Treatment of Lawyers; Special Protection of Mental Impressions, Conclusions, Opinions, and Legal Theories Concerning the Litigation.--The courts are divided as to whether the work-product doctrine extends to the preparatory work only of lawyers. The *Hickman* case left this issue open since the statements in that case were taken by a lawyer. As to courts of appeals compare *Alltmont v. United States,* 177 F.2d 971, 976 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950) (*Hickman* applied to statements obtained by FBI agents on theory it should apply to "all statements of prospective witnesses which a party has obtained for his trial counsel's use"), with *Southern Ry. v. Campbell,* 309 F.2d 569 (5th Cir. 1962) (Statements taken by claim agents not work-product), and *Guilford Nat'l Bank v. Southern Ry.,* 297 F.2d 921 (4th Cir. 1962) (avoiding issue of work-product as to claim agents, deciding case instead under Rule 34 "good cause"). Similarly, the district courts are divided on statements obtained by claim agents, compare, e.g., *Brown v. New York, N.H. & H.R.R.,* 17 F.R.D. 324 (S.D.N.Y.1955) with *Hanke v. Milwaukee Electric Ry. & Transp. Co.,* 7 F.R.D. 540 (E.D.Wis.1947); investigators, compare *Burke v. United States,* 32 F.R.D. 213 (E.D.N.Y.1963) with *Snyder v. United States,* 20 F.R.D. 7 (E.D.N.Y.1956); and insurers, compare *Gottlieb v. Bresler,* 24 F.R.D. 371 (D.D.C.1959) with *Burns v. Mulder,* 20 F.R.D. 605 (E.D.Pa.1957). See 4 Moore's *Federal Practice* ¶26.23[8.1] (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 652.2 (Wright ed. 1961).

A complication is introduced by the use made by courts of the "good cause" requirement of Rule 34, as described above. A court may conclude that trial preparation materials are not work-product because not the result of lawyer's work and yet hold that they are not producible because "good cause" has not been shown. *Cf. Guilford Nat'l Bank v. Southern Ry.,* 297 F.2d 921 (4th Cir. 1962), cited and described above. When the decisions on "good cause" are taken into account, the weight of authority affords protection of the preparatory work of both lawyers and nonlawyers (though not necessarily to the same extent) by requiring more than a showing of relevance to secure production.

Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf. The subdivision then goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents. In enforcing this provision of the subdivision, the courts will sometimes find it necessary to order disclosure of a document but with portions deleted.

Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to fact but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep confidential documents containing such matters prepared for internal use.

Party's Right to Own Statement--An exception to the requirement of this subdivision enables a party to secure production of his own statement without any special showing. The cases are divided. Compare, *e.g., Safeway Stores, Inc. v. Reynolds,* 176

F.2d 476 (D.C. Cir.1949); *Shupe v. Pennsylvania R.R.,* 19 F.R.D. 144 (W.D.Pa.1956); with *e.g., New York Central R.R. v. Carr,* 251 F.2d 433 (4th Cir. 1957); *Belback v. Wilson Freight Forwarding Co.,* 40 F.R.D. 16 (W.D.Pa.1966).

Courts which treat a party's statement as though it were that of any witness overlook the fact that the party's statement is, without more, admissible in evidence. Ordinarily, a party gives a statement without insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage. Discrepancies between his trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced. *E.g., Smith v. Central Linen Service Co.,* 39 F.R.D. 15 (D.Md.1966); *McCoy v. General Motors Corp.,* 33 F.R.D. 354 (W.D.Pa.1963).

Commentators strongly support the view that a party be able to secure his statement without a showing. 4 *Moore's Federal Practice* ¶26.23[8.4] (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 652.3 (Wright ed. 1961); see also Note, *Developments in the Law--Discovery,* 74 Harv.L.Rev. 940, 1039 (1961). The following states have by statute or rule taken the same position: *Statutes:* Fla.Stat.Ann. § 92.33; Ga.Code Ann. § 38-2109(b); La.Stat.Ann.R.S. 13:3732; Mass.Gen.Laws Ann. c. 271, § 44; Minn.Stat.Ann. § 602.01; N.Y.C.P.L.R. § 3101(e); *Rules:* Mo.R.C.P. 56.01(a); N.Dak.R.C.P. 34(b); Wyo.R.C.P. 34(b); *cf.* Mich.G.C.R. 306.2.

In order to clarify and tighten the provision on statements by a party, the term “statement” is defined. The definition is adapted from 18 U.S.C. § 3500(e) (Jencks Act). The statement of a party may of course be that of plaintiff or defendant, and it may be that of an individual or of a corporation or other organization.

Witness' Right to Own Statement.--A second exception to the requirement of this subdivision permits a non-party witness to obtain a copy of his own statement without any special showing. Many, though not all, of the considerations supporting a party's right to obtain his statement apply also to the non-party witness. Insurance companies are increasingly recognizing that a witness is entitled to a copy of his statement and are modifying their regular practice accordingly.

Subdivision (b)(4)--Trial Preparation: Experts. This is a new provision dealing with discovery of information (including facts and opinions) obtained by a party from an expert retained by that party in relation to litigation or obtained by the expert and not yet transmitted to the party. The subdivision deals separately with those experts whom the party expects to call as trial witnesses and with those experts who have been retained or specially employed by the party but who are not expected to be witnesses. It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Subsection (b)(4)(A) deals with discovery of information obtained by or through experts who will be called as witnesses at trial. The provision is responsive to problems suggested by a relatively recent line of authorities. Many of these cases present intricate and difficult issues as to which expert testimony is likely to be determinative. Prominent among them are food and drug, patent, and condemnation cases. See, *e.g., United States v. Nysco Laboratories, Inc.,* 26 F.R.D. 159, 162 (E.D.N.Y.1960) (food and drug); *E. I. du Pont de Nemours & Co. v. Phillips Petroleum Co.,* 24 F.R.D. 416, 421 (D.Del.1959) (patent); *Cold Metal Process Co. v. Aluminum Co. of America,* 7 F.R.D. 425 (N.D.Ohio 1947), aff'd, *Sachs v. Aluminum Co. of America,* 167 F.2d 570 (6th Cir. 1948) (same); *United States v. 50.34 Acres of Land,* 13 F.R.D. 19 (E.D.N.Y.1952) (condemnation).

In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. McGlothlin, *Some Practical Problems in Proof of Economic, Scientific, and Technical Facts,* 23 F.R.D. 467, 478 (1958). A California study of discovery and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is “lengthy--and often fruitless--cross-examination

during trial," and recommends pretrial exchange of such material. Calif.Law Rev.Comm'n, Discovery in Eminent Domain Proceedings 707-710 (Jan. 1963). Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

These considerations appear to account for the broadening of discovery against experts in the cases cited where expert testimony was central to the case. In some instances, the opinions are explicit in relating expanded discovery to improved cross-examination and rebuttal at trial. *Franks v. National Dairy Products Corp.*, 41 F.R.D. 234 (W.D.Tex.1966); *United States v. 23.76 Acres*, 32 F.R.D. 593 (D.Md.1963); see also an unpublished opinion of Judge Hincks, quoted in *United States v. 48 Jars, etc.*, 23 F.R.D. 192, 198 (D.D.C.1958). On the other hand, the need for a new provision is shown by the many cases in which discovery of expert trial witnesses is needed for effective cross-examination and rebuttal, and yet courts apply the traditional doctrine and refuse disclosure. *E.g.*, *United States v. Certain Parcels of Land*, 25 F.R.D. 192 (N.D.Cal.1959); *United States v. Certain Acres*, 18 F.R.D. 98 (M.D.Ga.1955).

Although the trial problems flowing from lack of discovery of expert witnesses are most acute and noteworthy when the case turns largely on experts, the same problems are encountered when a single expert testifies. Thus, subdivision (b)(4)(A) draws no line between complex and simple cases, or between cases with many experts and those with but one. It establishes by rule substantially the procedure adopted by decision of the court in *Knighton v. Villian & Fassio*, 39 F.R.D. 11 (D.Md.1965). For a full analysis of the problem and strong recommendations to the same effect, see Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 Stan.L.Rev. 455, 485-488 (1962); Long, *Discovery and Experts under the Federal Rules of Civil Procedure*, 38 F.R.D. 111 (1965).

Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subsection (b)(4)(A) holds the risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.

Subdivision (b)(4)(A) provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope and to prevent abuse. Ordinarily, the order for further discovery shall compensate the expert for his time, and may compensate the party who intends to use the expert for past expenses reasonably incurred in obtaining facts or opinions from the expert. Those provisions are likely to discourage abusive practices.

Subdivision (b)(4)(B) deals with an expert who has been retained or specially employed by the party in anticipation of litigation or preparation for trial (thus excluding an expert who is simply a general employee of the party not specially employed on the case), but who is not expected to be called as a witness. Under its provisions, a party may discover facts known or opinions held by such an expert only on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Subdivision (b)(4)(B) is concerned only with experts retained or specially consulted in relation to trial preparation. Thus the subdivision precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed. As an ancillary procedure, a party may on a proper showing require the other party to name experts retained or specially employed, but not those informally consulted.

These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert, *e.g.*, *American Oil Co. v. Pennsylvania Petroleum Products Co.*, 23 F.R.D. 680, 685-686 (D.R.I.1959). See *Louisell, Modern California Discovery* 315-316 (1963). They also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine. See *United States v. McKay*, 372 F.2d 174, 176-177

(5th Cir. 1967). The provisions adopt a form of the more recently developed doctrine of "unfairness". See *e.g.*, *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 597 (D.Md.1963); Louisell, *supra*, at 317-318; 4 *Moore's Federal Practice* 26.24 (2d ed. 1966).

Under subdivision (b)(4)(C), the court is directed or authorized to issue protective orders, including an order that the expert be paid a reasonable fee for time spent in responding to discovery, and that the party whose expert is made subject to discovery be paid a fair portion of the fees and expenses that the party incurred in obtaining information from the expert. The court may issue the latter order as a condition of discovery, or it may delay the order until after discovery is completed. These provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum. E.g., *Lewis v. United Air Lines Transp. Corp.*, 32 F.Supp. 21 (W.D.Pa.1940); *Walsh v. Reynolds Metal Co.*, 15 F.R.D. 376 (D.N.J.1954). On the other hand, a party may not obtain discovery simply by offering to pay fees and expenses. Cf. *Boynton v. R. J. Reynolds Tobacco Co.*, 36 F.Supp. 593 (D.Mass.1941).

In instances of discovery under subdivision (b)(4)(B), the court is directed to award fees and expenses to the other party, since the information is of direct value to the discovering party's preparation of his case. In ordering discovery under (b)(4)(A)(ii), the court has discretion whether to award fees and expenses to the other party; its decision should depend upon whether the discovering party is simply learning about the other party's case or is going beyond this to develop his own case. Even in cases where the court is directed to issue a protective order, it may decline to do so if it finds that manifest injustice would result. Thus, the court can protect, when necessary and appropriate, the interests of an indigent party.

Subdivision (c)--Protective Orders. The provisions of existing Rule 30(b) are transferred to this subdivision (c), as part of the rearrangement of Rule 26. The language has been changed to give it application to discovery generally. The subdivision recognizes the power of the court in the district where a deposition is being taken to make protective orders. Such power is needed when the deposition is being taken far from the court where the action is pending. The court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending.

In addition, drafting changes are made to carry out and clarify the sense of the rule. Insertions are made to avoid any possible implication that a protective order does not extend to "time" as well as to "place" or may not safeguard against "undue burden or expense."

The new reference to trade secrets and other confidential commercial information reflects existing law. The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection. See, *e.g.*, *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965); *Julius M. Ames Co. v. Bostitch, Inc.*, 235 F.Supp. 856 (S.D.N.Y.1964).

The subdivision contains new matter relating to sanctions. When a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery. This will bring the sanctions of Rule 37(b) directly into play. Since the court has heard the contentions of all interested persons, an affirmative order is justified. See *Rosenberg, Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480, 492-493 (1958). In addition, the court may require the payment of expenses incurred in relation to the motion.

Subdivision (d)--Sequence and Priority. This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case.

A priority rule developed by some courts, which confers priority on the party who first serves notice of taking a deposition, is unsatisfactory in several important respects:

First, this priority rule permits a party to establish a priority running to all depositions as to which he has given earlier notice. Since he can on a given day serve notice of taking many depositions he is in a position to delay his adversary's taking of depositions for an inordinate time. Some courts have ruled that deposition priority also permits a party to delay his answers to interrogatories and production of documents. *E.g.*, *E. I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 23 F.R.D. 237 (D.Del.1959); *but cf. Sturdevant v. Sears, Roebuck & Co.*, 32 F.R.D. 426 (W.D.Mo.1963).

Second, since notice is the key to priority, if both parties wish to take depositions first a race results. See *Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co.*, 11 F.R.D. 156 (S.D.N.Y.1951) (description of tactics used by parties). But the existing rules on notice of deposition create a race with runners starting from different positions. The plaintiff may not give notice without leave of court until 20 days after commencement of the action, whereas the defendant may serve notice at any time after commencement. Thus, a careful and prompt defendant can almost always secure priority. This advantage of defendants is fortuitous, because the purpose of requiring plaintiff to wait 20 days is to afford defendant an opportunity to obtain counsel, not to confer priority.

Third, although courts have ordered a change in the normal sequence of discovery on a number of occasions, *e.g.*, *Kaeppler v. James H. Matthews & Co.*, 200 F.Supp. 229 (E.D.Pa.1961); *Park & Tilford Distillers Corp. v. Distillers Co.*, 19 F.R.D. 169 (S.D.N.Y.1956), and have at all times avowed discretion to vary the usual priority, most commentators are agreed that courts in fact grant relief only for "the most obviously compelling reasons." 2A Barron & Holtzoff, *Federal Practice and Procedure* 44-47 (Wright ed. 1961); see also Younger, *Priority of Pretrial Examination in the Federal Courts--A Comment*, 34 N.Y.U.L.Rev. 1271 (1959); Freund, *The Pleading and Pretrial of an Antitrust Claim*, 46 Corn.L.Q. 555, 564 (1964). Discontent with the fairness of actual practice has been evinced by other observers. Comments, 59 Yale L.J. 117, 134-136 (1949); Yudkin, *Some Refinements in Federal Discovery Procedure*, 11 Fed.B.J. 289, 296-297 (1951); *Developments in the Law-Discovery*, 74 Harv.L.Rev. 940, 954-958 (1961).

Despite these difficulties, some courts have adhered to the priority rule, presumably because it provides a test which is easily understood and applied by the parties without much court intervention. It thus permits deposition discovery to function extrajudicially, which the rules provide for and the courts desire. For these same reasons, courts are reluctant to make numerous exceptions to the rule.

The Columbia Survey makes clear that the problem of priority does not affect litigants generally. It found that most litigants do not move quickly to obtain discovery. In over half of the cases, both parties waited at least 50 days. During the first 20 days after commencement of the action--the period when defendant might assure his priority by noticing depositions--16 percent of the defendants acted to obtain discovery. A race could not have occurred in more than 16 percent of the cases and it undoubtedly occurred in fewer. On the other hand, five times as many defendants as plaintiffs served notice of deposition during the first 19 days. To the same effect, see Comment, *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 Yale L.J. 117, 134 (1949).

These findings do not mean, however, that the priority rule is satisfactory or that a problem of priority does not exist. The court decisions show that parties do battle on this issue and carry their disputes to court. The statistics show that these court cases are not typical. By the same token, they reveal that more extensive exercise of judicial discretion to vary the priority will not bring a flood of litigation, and that a change in the priority rule will in fact affect only a small fraction of the cases.

It is contended by some that there is no need to alter the existing priority practice. In support, it is urged that there is no evidence that injustices in fact result from present practice and that, in any event, the courts can and do promulgate local rules, as in New York, to deal with local situations and issue orders to avoid possible injustice in particular cases.

Subdivision (d) is based on the contrary view that the rule of priority based on notice is unsatisfactory and unfair in its operation. Subdivision (d) follows an approach adapted from Civil Rule 4 of the District Court for the Southern District of New York. That rule provides that starting 40 days after commencement of the action, unless otherwise ordered by the court, the fact that one party is taking a deposition shall not prevent another party from doing so "concurrently." In practice, the depositions are

not usually taken simultaneously; rather, the parties work out arrangements for alternation in the taking of depositions. One party may take a complete deposition and then the other, or, if the depositions are extensive, one party deposes for a set time, and then the other. See *Caldwell-Clements, Inc. v. McCraw-Hill Pub. Co.,* 11 F.R.D. 156 (S.D.N.Y.1951).

In principle, one party's initiation of discovery should not wait upon the other's completion, unless delay is dictated by special considerations. Clearly the principle is feasible with respect to all methods of discovery other than depositions. And the experience of the Southern District of New York shows that the principle can be applied to depositions as well. The courts have not had an increase in motion business on this matter. Once it is clear to lawyers that they bargain on an equal footing, they are usually able to arrange for an orderly succession of depositions without judicial intervention. Professor Moore has called attention to Civil Rule 4 and suggested that it may usefully be extended to other areas. 4 *Moore's Federal Practice* 1154 (2d ed. 1966).

The court may upon motion and by order grant priority in a particular case. But a local court rule purporting to confer priority in certain classes of cases would be inconsistent with this subdivision and thus void.

Subdivision (e)--Supplementation of Responses. The rules do not now state whether interrogatories (and questions at deposition as well as requests for inspection and admissions) impose a “continuing burden” on the responding party to supplement his answers if he obtains new information. The issue is acute when new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made. It is essential that the rules provide an answer to this question. The parties can adjust to a rule either way, once they know what it is. See 4 *Moore's Federal Practice* ¶33.25[4] (2d ed. 1966).

Arguments can be made both ways. Imposition of a continuing burden reduces the proliferation of additional sets of interrogatories. Some courts have adopted local rules establishing such a burden. *E.g.,* E.D.Pa.R. 20(f), quoted in *Taggart v. Vermont Transp. Co.,* 32 F.R.D. 587 (E.D.Pa.1963); D.Me.R. 15(c). Others have imposed the burden by decision. *E.g.*, *Chenault v. Nebraska Farm Products, Inc.*, 9 F.R.D. 529, 533 (D.Nebr.1949). On the other hand, there are serious objections to the burden, especially in protracted cases. Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information. But a full set of new answers may no longer be needed by the interrogating party. Some issues will have been dropped from the case, some questions are now seen as unimportant, and other questions must in any event be reformulated. See *Novick v. Pennsylvania R.R.,* 18 F.R.D. 296, 298 (W.D.Pa.1955).

Subdivision (e) provides that a party is not under a continuing burden except as expressly provided. Cf. Note, 68 Harv.L.Rev. 673, 677 (1955). An exception is made as to the identity of persons having knowledge of discoverable matters, because of the obvious importance to each side of knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention. Many of the decisions on the issue of a continuing burden have in fact concerned the identity of witnesses. An exception is also made as to expert trial witnesses in order to carry out the provisions of Rule 26(b)(4). See *Diversified Products Corp. v. Sports Center Co.,* 42 F.R.D. 3 (D.Md.1967).

Another exception is made for the situation in which a party, or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney. Finally, a duty to supplement may be imposed by order of the court in a particular case (including an order resulting from a pretrial conference) or by agreement of the parties. A party may of course make a new discovery request which requires supplementation of prior responses.

The duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate.

1980 Amendment

Subdivision (f). This subdivision is new. There has been widespread criticism of abuse of discovery. The Committee has considered a number of proposals to eliminate abuse, including a change in Rule 26(b)(1) with respect to the scope of discovery and a change in Rule 33(a) to limit the number of questions that can be asked by interrogatories to parties.

The Committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases. A very recent study of discovery in selected metropolitan districts tends to support its belief. P. Connolly, E. Holleman, & M. Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* (Federal Judicial Center, 1978). In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.

To this end this subdivision provides that counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery is entitled to the assistance of the court.

It is not contemplated that requests for discovery conferences will be made routinely. A relatively narrow discovery dispute should be resolved by resort to Rules 26(c) or 37(a), and if it appears that a request for a conference is in fact grounded in such a dispute, the court may refer counsel to those rules. If the court is persuaded that a request is frivolous or vexatious, it can strike it. See Rules 11 and 7(b)(2).

A number of courts routinely consider discovery matters in preliminary pretrial conferences held shortly after the pleadings are closed. This subdivision does not interfere with such a practice. It authorizes the court to combine a discovery conference with a pretrial conference under Rule 16 if a pretrial conference is held sufficiently early to prevent or curb abuse.

1983 Amendment

Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems. Recent studies have made some attempt to determine the sources and extent of the difficulties. See Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses,* American Bar Foundation (1980); Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery,* Federal Judicial Center (1978); Ellington, *A Study of Sanctions for Discovery Abuse,* Department of Justice (1979); Schroeder & Frank, *The Proposed Changes in the Discovery Rules,* 1978 Ariz.St.L.J. 475.

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. “Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.” *Hickman v. Taylor,* 329 U.S. 495, 507 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.

Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay. See Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change,* 31 Vand.L.Rev. 1259 (1978). As a result, it has been said that the rules have “not infrequently [been] exploited to the disadvantage of justice.” *Herbert v. Lando,* 441 U.S. 153, 179 (1979) (Powell, J., concurring). These practices impose costs on an already overburdened system and impede the fundamental goal of the “just, speedy, and inexpensive determination of every action.” Fed.R.Civ.P. 1.

Subdivision (a); Discovery Methods. The deletion of the last sentence of Rule 26(a)(1), which provided that unless the court ordered otherwise under Rule 26(c) “the frequency of use” of the various discovery methods was not to be limited, is an attempt

to address the problem of duplicative, redundant, and excessive discovery and to reduce it. The amendment, in conjunction with the changes in Rule 26(b)(1), is designed to encourage district judges to identify instances of needless discovery and to limit the use of the various discovery devices accordingly. The question may be raised by one of the parties, typically on a motion for a protective order, or by the court on its own initiative. It is entirely appropriate to consider a limitation on the frequency of use of discovery at a discovery conference under Rule 26(f) or at any other pretrial conference authorized by these rules. In considering the discovery needs of a particular case, the court should consider the factors described in Rule 26(b)(1).

Subdivision (b); Discovery Scope and Limits. Rule 26(b)(1) has been amended to add a sentence to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). See, e.g., *Carlson Cos. v. Sperry & Hutchinson Co.*, 374 F.Supp. 1080 (D.Minn.1974); *Dolgow v. Anderson*, 53 F.R.D. 661 (E.D.N.Y.1971); *Mitchell v. American Tobacco Co.*, 33 F.R.D. 262 (M.D.Pa.1963); *Welty v. Clute*, 1 F.R.D. 446 (W.D.N.Y.1941). On the whole, however, district judges have been reluctant to limit the use of the discovery devices. See, *e.g.*, *Apco Oil Co. v. Certified Transp., Inc.*, 46 F.R.D. 428 (W.D.Mo.1969). See generally 8 Wright & Miller, *Federal Practice and Procedure: Civil* §§ 2036, 2037, 2039, 2040 (1970).

The first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information. Subdivision (b)(1)(ii) also seeks to reduce repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition, document request, or set of interrogatories. The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.

The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis. See Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* 77, Federal Judicial Center (1978). In an appropriate case the court could restrict the number of depositions, interrogatories, or the scope of a production request. But the court must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.

The court may act on motion, or its own initiative. It is entirely appropriate to resort to the amended rule in conjunction with a discovery conference under Rule 26(f) or one of the other pretrial conferences authorized by the rules.

Subdivision (g); Signing of Discovery Requests, Responses, and Objections. Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term “response” includes answers to interrogatories and to requests to admit as well as responses to production requests.

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection. Motions relating to discovery are governed by Rule 11. However,

since a discovery request, response, or objection usually deals with more specific subject matter than motions or papers, the elements that must be certified in connection with the former are spelled out more completely. The signature is a certification of the elements set forth in Rule 26(g).

Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

The duty to make a "reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. See the Advisory Committee Note to Rule 11. See also *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n,* 365 F.Supp. 975 (E.D.Pa.1973). In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances.

Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand. Thus, the lawyer's certification under Rule 26(g) should be distinguished from other signature requirements in the rules, such as those in Rules 30(e) and 33.

Nor does the rule require a party or an attorney to disclose privileged communications or work product in order to show that a discovery request, response, or objection is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection.

The signing requirement means that every discovery request, response, or objection should be grounded on a theory that is reasonable under the precedents or a good faith belief as to what should be the law. This standard is heavily dependent on the circumstances of each case. The certification speaks as of the time it is made. The duty to supplement discovery responses continues to be governed by Rule 26(e).

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. *ACF Industries, Inc. v. EEOC,* 439 U.S. 1081 (1979) (certiorari denied) (Powell, J., dissenting). Sanctions to deter discovery abuse would be more effective if they were diligently applied "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 643 (1976). See also Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions,* 91 Harv.L.Rev. 1033 (1978). Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor.

Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, see Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses,* American Bar Foundation (1980); Ellington, *A Study of Sanctions for Discovery Abuse,* Department of Justice (1979), Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court's inherent power. See *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980); *Martin v. Bell Helicopter Co.,* 85 F.R.D. 654, 661-62 (D.Col.1980); Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process,* 44 U.Chi.L.Rev. 619 (1977). The new rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances. The court may take into account any failure by the party seeking sanctions to invoke protection under Rule 26(c) at an early stage in the litigation.

The sanctioning process must comport with due process requirements. The kind of notice and hearing required will depend on the facts of the case and the severity of the sanction being considered. To prevent the proliferation of the sanction procedure and to avoid multiple hearings, discovery in any sanction proceeding normally should be permitted only when it is clearly required by the interests of justice. In most cases the court will be aware of the circumstances and only a brief hearing should be necessary.

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendment

Subdivision (a). Through the addition of paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3) as the trial date approaches to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).

A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 *Vand.L.Rev.* 1348 (1978), and Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 *U.Pitt.L.Rev. 703, 721-23 (1989)*.

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.

Paragraph (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement *[sic]* or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.

Authorization of these local variations is, in large measure, included in order to accommodate the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and

expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1), these changes probably could not become effective before December 1998 at the earliest. In the meantime, the present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed to reject all such requirements for the present, are designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement.

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are likely to have discoverable information relevant to the factual disputes between the parties. All persons with such information should be disclosed, whether or not their testimony will be supportive of the position of the disclosing party. As officers of the court, counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.

Subparagraph (B) is included as a substitute for the inquiries routinely made about the existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party. Although, unlike subdivision (a)(3)(C), an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests. As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items then known to the party, whether or not supportive of its contentions in the case.

Unlike subparagraphs (C) and (D), subparagraph (B) does not require production of any documents. Of course, in cases involving few documents a disclosing party may prefer to provide copies of the documents rather than describe them, and the rule is written to afford this option to the disclosing party. If, as will be more typical, only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence “relevant to disputed facts alleged with particularity in the pleadings.” There is no need for a party to identify potential evidence with respect to allegations that are admitted. Broad, vague, and conclusory allegations sometimes tolerated in notice pleading--for example, the assertion that a product with many component parts is defective in some unspecified manner--should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1)(B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product. Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.

Subparagraph (D) replaces subdivision (b)(2) of Rule 26, and provides that liability insurance policies be made available for inspection and copying. The last two sentences of that subdivision have been omitted as unnecessary, not to signify any change of law. The disclosure of insurance information does not thereby render such information admissible in evidence. See Rule 411, Federal Rules of Evidence. Nor does subparagraph (D) require disclosure of applications for insurance, though in particular cases such information may be discoverable in accordance with revised subdivision (a)(5).

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation the timing or scope of these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must ordinarily be held within 75 days after a defendant has first appeared in the case and hence that the initial disclosures would be due no later than 85 days after the first appearance of a defendant.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. The type of investigation that can be expected at this point will vary based upon such factors as the number and complexity of the issues; the location, nature, number, and availability of potentially relevant witnesses and documents; the extent of past working relationships between the attorney and the client, particularly in handling related or similar litigation; and of course how long the party has to conduct an investigation, either before or after filing of the case. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

It will often be desirable, particularly if the claims made in the complaint are broadly stated, for the parties to have their Rule 26(f) meeting early in the case, perhaps before a defendant has answered the complaint or had time to conduct other than a cursory investigation. In such circumstances, in order to facilitate more meaningful and useful initial disclosures, they can and should stipulate to a period of more than 10 days after the meeting in which to make these disclosures, at least for defendants who had no advance notice of the potential litigation. A stipulation at an early meeting affording such a defendant at least 60 days after receiving the complaint in which to make its disclosures under subdivision (a)(1)--a period that is two weeks longer than the time formerly specified for responding to interrogatories served with a complaint--should be adequate and appropriate in most cases.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case

is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U.Ill.L.Rev. 90.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 37(c)(1) provides an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Revised subdivision (b)(4)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence--as well as other items relating to conduct of trial--may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was "without substantial justification" and hence would not bar

an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated--*e.g.*, a change of testimony.

Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting and ending dates. As with witnesses, the exhibits that will probably be offered are to be listed separately from those which are unlikely to be offered but which are listed in order to preserve the right to do so if needed because of developments during trial. Under revised Rule 37(c)(1) the court can permit use of unlisted documents the need for which could not reasonably have been anticipated in advance of trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under Rules 402 and 403 of the Federal Rules of Evidence). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide “foundation” testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion “in limine” and rule upon the objections in advance of trial to the extent appropriate.

The time specified in the rule for the final pretrial disclosures is relatively close to the trial date. The objective is to eliminate the time and expense in making these disclosures of evidence and objections in those cases that settle shortly before trial, while affording a reasonable time for final preparation for trial in those cases that do not settle. In many cases, it will be desirable for the court in a scheduling or pretrial order to set an earlier time for disclosures of evidence and provide more time for disclosing potential objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A signed written statement is required, reminding the parties and counsel of the solemnity of the obligations imposed; and the signature on the initial or pretrial disclosure is a certification under subdivision (g)(1) that it is complete and correct as of the time when made. Consistent with Rule 5(d), these disclosures are to be filed with the court unless otherwise directed. It is anticipated that many courts will direct that expert reports required under paragraph (2)(B) not be filed until needed in connection with a motion or for trial.

Paragraph (5). This paragraph is revised to take note of the availability of revised Rule 45 for inspection from non-parties of documents and premises without the need for a deposition.

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly

increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

Second, former paragraph (2), relating to insurance, has been relocated as part of the required initial disclosures under subdivision (a)(1)(D), and revised to provide for disclosure of the policy itself.

Third, paragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions. Accordingly, the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.

Paragraph (4)(C), bearing on compensation of experts, is revised to take account of the changes in paragraph (4)(A).

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.

The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents.

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.

The obligation to provide pertinent information concerning withheld privileged materials applies only to items “otherwise discoverable.” If a broad discovery request is made--for example, for all documents of a particular type during a twenty year period--and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).

Subdivision (c). The revision requires that before filing a motion for a protective order the movant must confer--either in person or by telephone--with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indicated in the certificate.

Subdivision (d). This subdivision is revised to provide that formal discovery--as distinguished from interviews of potential witnesses and other informal discovery--not commence until the parties have met and conferred as required by subdivision (f). Discovery can begin earlier if authorized under Rule 30(a)(2)(C) (deposition of person about to leave the country) or by local rule, order, or stipulation. This will be appropriate in some cases, such as those involving requests for a preliminary injunction or motions challenging personal jurisdiction. If a local rule exempts any types of cases in which discovery may be needed from the requirement of a meeting under Rule 26(f), it should specify when discovery may commence in those cases.

The meeting of counsel is to take place as soon as practicable and in any event at least 14 days before the date of the scheduling conference under Rule 16(b) or the date a scheduling order is due under Rule 16(b). The court can assure that discovery is not unduly delayed either by entering a special order or by setting the case for a scheduling conference.

Subdivision (e). This subdivision is revised to provide that the requirement for supplementation applies to all disclosures required by subdivisions (a)(1)-(3). Like the former rule, the duty, while imposed on a “party,” applies whether the corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful for the scheduling order to specify the time or times when supplementations should be made.

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1).

The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

Subdivision (f). This subdivision was added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rules 26(c) and 37(a). The amendment envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a “discovery conference” and then enter an order establishing a schedule and limitations for the conduct of discovery. It was contemplated that the procedure, an elective one triggered on request of a party, would be used in special cases rather than as a routine matter. As expected, the device has been used only sparingly in most courts, and judicial controls over the discovery process have ordinarily been imposed through scheduling orders under Rule 16(b) or through rulings on discovery motions.

The provisions relating to a conference with the court are removed from subdivision (f). This change does not signal any lessening of the importance of judicial supervision. Indeed, there is a greater need for early judicial involvement to consider the scope and timing of the disclosure requirements of Rule 26(a) and the presumptive limits on discovery imposed under these rules or by local rules. Rather, the change is made because the provisions addressing the use of conferences with the court to control discovery are more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process.

The desirability of some judicial control of discovery can hardly be doubted. Rule 16, as revised, requires that the court set a time for completion of discovery and authorizes various other orders affecting the scope, timing, and extent of discovery and disclosures. Before entering such orders, the court should consider the views of the parties, preferably by means of a conference, but at the least through written submissions. Moreover, it is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.

As noted above, former subdivision (f) envisioned the development of proposed discovery plans as an optional procedure to be used in relatively few cases. The revised rule directs that in all cases not exempted by local rule or special order the litigants must meet in person and plan for discovery. Following this meeting, the parties submit to the court their proposals for a discovery plan and can begin formal discovery. Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case.

To assure that the court has the litigants' proposals before deciding on a scheduling order and that the commencement of discovery is not delayed unduly, the rule provides that the meeting of the parties take place as soon as practicable and in any event at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). (Rule 16(b) requires that a scheduling order be entered within 90 days after the first appearance of a defendant or, if earlier, within 120 days after the complaint has been served on any defendant.) The obligation to participate in the planning process is imposed on all parties that have appeared in the case, including defendants who, because of a pending Rule 12 motion, may not have yet filed an answer in the case. Each such party should attend the meeting, either through one of its attorneys or in person if unrepresented. If more parties are joined or appear after the initial meeting, an additional meeting may be desirable.

Subdivision (f) describes certain matters that should be accomplished at the meeting and included in the proposed discovery plan. 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.

The parties are directed under subdivision (a)(1) to make the disclosures required by that subdivision at or within 10 days after this meeting. In many cases the parties should use the meeting to exchange, discuss, and clarify their respective disclosures. In other cases, it may be more useful if the disclosures are delayed until after the parties have discussed at the meeting the claims and defenses in order to define the issues with respect to which the initial disclosures should be made. As discussed in the Notes to subdivision (a)(1), the parties may also need to consider whether a stipulation extending this 10-day period would be appropriate, as when a defendant would otherwise have less than 60 days after being served in which to make its initial disclosure. 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.

The report is to be submitted to the court within 10 days after the meeting and should not be difficult to prepare. In most cases counsel should be able to agree that one of them will be responsible for its preparation and submission to the court. Form 35 has been added in the Appendix to the Rules, both to illustrate the type of report that is contemplated and to serve as a checklist for the meeting.

The litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan. If they cannot agree on all aspects of the plan, their report to the court should indicate the competing proposals of the parties on those items, as well as the matters on which they agree. Unfortunately, there may be cases in which, because of disagreements about time or place or for other reasons, the meeting is not attended by all parties or, indeed, no meeting takes place. In such situations, the report--or reports--should describe the circumstances and the court may need to consider sanctions under Rule 37(g).

By local rule or special order, the court can exempt particular cases or types of cases from the meet-and-confer requirement of subdivision (f). In general this should include any types of cases which are exempted by local rule from the requirement for

a scheduling order under Rule 16(b), such as cases in which there will be no discovery (*e.g.*, bankruptcy appeals and reviews of social security determinations). In addition, the court may want to exempt cases in which discovery is rarely needed (*e.g.*, government collection cases and proceedings to enforce administrative summonses) or in which a meeting of the parties might be impracticable (*e.g.*, actions by unrepresented prisoners). Note that if a court exempts from the requirements for a meeting any types of cases in which discovery may be needed, it should indicate when discovery may commence in those cases.

Subdivision (g). Paragraph (1) is added to require signatures on disclosures, a requirement that parallels the provisions of paragraph (2) with respect to discovery requests, responses, and objections. The provisions of paragraph (3) have been modified to be consistent with Rules 37(a)(4) and 37(c)(1); in combination, these rules establish sanctions for violation of the rules regarding disclosures and discovery matters. Amended Rule 11 no longer applies to such violations.

2000 Amendment

Purposes of amendments. The Rule 26(a)(1) initial disclosure provisions are amended to establish a nationally uniform practice. The scope of the disclosure obligation is narrowed to cover only information that the disclosing party may use to support its position. In addition, the rule exempts specified categories of proceedings from initial disclosure, and permits a party who contends that disclosure is not appropriate in the circumstances of the case to present its objections to the court, which must then determine whether disclosure should be made. Related changes are made in Rules 26(d) and (f).

The initial disclosure requirements added by the 1993 amendments permitted local rules directing that disclosure would not be required or altering its operation. The inclusion of the “opt out” provision reflected the strong opposition to initial disclosure felt in some districts, and permitted experimentation with differing disclosure rules in those districts that were favorable to disclosure. The local option also recognized that--partly in response to the first publication in 1991 of a proposed disclosure rule--many districts had adopted a variety of disclosure programs under the aegis of the Civil Justice Reform Act. It was hoped that developing experience under a variety of disclosure systems would support eventual refinement of a uniform national disclosure practice. In addition, there was hope that local experience could identify categories of actions in which disclosure is not useful.

A striking array of local regimes in fact emerged for disclosure and related features introduced in 1993. *See* D. Stienstra, *Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (Federal Judicial Center, March 30, 1998) (describing and categorizing local regimes). In its final report to Congress on the CJRA experience, the Judicial Conference recommended reexamination of the need for national uniformity, particularly in regard to initial disclosure. Judicial Conference, *Alternative Proposals for Reduction of Cost and Delay: Assessment of Principles, Guidelines and Techniques,* 175 F.R.D. 62, 98 (1997).

At the Committee's request, the Federal Judicial Center undertook a survey in 1997 to develop information on current disclosure and discovery practices. *See* T. Willging, J. Shapard, D. Stienstra & D. Miletich, *Discovery and Disclosure Practice, Problems, and Proposals for Change* (Federal Judicial Center, 1997). In addition, the Committee convened two conferences on discovery involving lawyers from around the country and received reports and recommendations on possible discovery amendments from a number of bar groups. Papers and other proceedings from the second conference are published in 39 Boston Col. L. Rev. 517-840 (1998).

The Committee has discerned widespread support for national uniformity. Many lawyers have experienced difficulty in coping with divergent disclosure and other practices as they move from one district to another. Lawyers surveyed by the Federal Judicial Center ranked adoption of a uniform national disclosure rule second among proposed rule changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes. *Discovery and Disclosure Practice, supra,* at 44-45. National uniformity is also a central purpose of the Rules Enabling Act of 1934, as amended, 28 U.S.C. §§ 2072-2077.

These amendments restore national uniformity to disclosure practice. Uniformity is also restored to other aspects of discovery by deleting most of the provisions authorizing local rules that vary the number of permitted discovery events or the length of depositions. Local rule options are also deleted from Rules 26(d) and (f).

Subdivision (a)(1). The amendments remove the authority to alter or opt out of the national disclosure requirements by local rule, invalidating not only formal local rules but also informal "standing" orders of an individual judge or court that purport to create exemptions from--or limit or expand--the disclosure provided under the national rule. *See* Rule 83. Case-specific orders remain proper, however, and are expressly required if a party objects that initial disclosure is not appropriate in the circumstances of the action. Specified categories of proceedings are excluded from initial disclosure under subdivision (a)(1)(E). In addition, the parties can stipulate to forgo disclosure, as was true before. But even in a case excluded by subdivision (a)(1)(E) or in which the parties stipulate to bypass disclosure, the court can order exchange of similar information in managing the action under Rule 16.

The initial disclosure obligation of subdivisions (a)(1)(A) and (B) has been narrowed to identification of witnesses and documents that the disclosing party may use to support its claims or defenses. "Use" includes any use at a pretrial conference, to support a motion, or at trial. The disclosure obligation is also triggered by intended use in discovery, apart from use to respond to a discovery request; use of a document to question a witness during a deposition is a common example. The disclosure obligation attaches both to witnesses and documents a party intends to use and also to witnesses and to documents the party intends to use if--in the language of Rule 26(a)(3)--"the need arises."

A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use. The obligation to disclose information the party may use connects directly to the exclusion sanction of Rule 37(c)(1). Because the disclosure obligation is limited to material that the party may use, it is no longer tied to particularized allegations in the pleadings. Subdivision (e)(1), which is unchanged, requires supplementation if information later acquired would have been subject to the disclosure requirement. As case preparation continues, a party must supplement its disclosures when it determines that it may use a witness or document that it did not previously intend to use.

The disclosure obligation applies to "claims and defenses," and therefore requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. It thereby bolsters the requirements of Rule 11(b)(4), which authorizes denials "warranted on the evidence," and disclosure should include the identity of any witness or document that the disclosing party may use to support such denials.

Subdivision (a)(3) presently excuses pretrial disclosure of information solely for impeachment. Impeachment information is similarly excluded from the initial disclosure requirement.

Subdivisions (a)(1)(C) and (D) are not changed. Should a case be exempted from initial disclosure by Rule 26(a)(1)(E) or by agreement or order, the insurance information described by subparagraph (D) should be subject to discovery, as it would have been under the principles of former Rule 26(b)(2), which was added in 1970 and deleted in 1993 as redundant in light of the new initial disclosure obligation.

New subdivision (a)(1)(E) excludes eight specified categories of proceedings from initial disclosure. The objective of this listing is to identify cases in which there is likely to be little or no discovery, or in which initial disclosure appears unlikely to contribute to the effective development of the case. The list was developed after a review of the categories excluded by local rules in various districts from the operation of Rule 16(b) and the conference requirements of subdivision (f). Subdivision (a)(1)(E) refers to categories of "proceedings" rather than categories of "actions" because some might not properly be labeled "actions." Case designations made by the parties or the clerk's office at the time of filing do not control application of the exemptions. The descriptions in the rule are generic and are intended to be administered by the parties--and, when needed, the courts--with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories. The exclusion of an action for review on an administrative record, for example, is intended to reach a proceeding that is framed as

an "appeal" based solely on an administrative record. The exclusion should not apply to a proceeding in a form that commonly permits admission of new evidence to supplement the record. Item (vii), excluding a proceeding ancillary to proceedings in other courts, does not refer to bankruptcy proceedings; application of the Civil Rules to bankruptcy proceedings is determined by the Bankruptcy Rules.

Subdivision (a)(1)(E) is likely to exempt a substantial proportion of the cases in most districts from the initial disclosure requirement. Based on 1996 and 1997 case filing statistics, Federal Judicial Center staff estimate that, nationwide, these categories total approximately one-third of all civil filings.

The categories of proceedings listed in subdivision (a)(1)(E) are also exempted from the subdivision (f) conference requirement and from the subdivision (d) moratorium on discovery. Although there is no restriction on commencement of discovery in these cases, it is not expected that this opportunity will often lead to abuse since there is likely to be little or no discovery in most such cases. Should a defendant need more time to respond to discovery requests filed at the beginning of an exempted action, it can seek relief by motion under Rule 26(c) if the plaintiff is unwilling to defer the due date by agreement.

Subdivision (a)(1)(E)'s enumeration of exempt categories is exclusive. Although a case-specific order can alter or excuse initial disclosure, local rules or "standing" orders that purport to create general exemptions are invalid. *See* Rule 83.

The time for initial disclosure is extended to 14 days after the subdivision (f) conference unless the court orders otherwise. This change is integrated with corresponding changes requiring that the subdivision (f) conference be held 21 days before the Rule 16(b) scheduling conference or scheduling order, and that the report on the subdivision (f) conference be submitted to the court 14 days after the meeting. These changes provide a more orderly opportunity for the parties to review the disclosures, and for the court to consider the report. In many instances, the subdivision (f) conference and the effective preparation of the case would benefit from disclosure before the conference, and earlier disclosure is encouraged.

The presumptive disclosure date does not apply if a party objects to initial disclosure during the subdivision (f) conference and states its objection in the subdivision (f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to "opt out" of disclosure unilaterally. It does provide an opportunity for an objecting party to present to the court its position that disclosure would be "inappropriate in the circumstances of the action." Making the objection permits the objecting party to present the question to the judge before any party is required to make disclosure. The court must then rule on the objection and determine what disclosures--if any--should be made. Ordinarily, this determination would be included in the Rule 16(b) scheduling order, but the court could handle the matter in a different fashion. Even when circumstances warrant suspending some disclosure obligations, others--such as the damages and insurance information called for by subdivisions (a)(1)(C) and (D)--may continue to be appropriate.

The presumptive disclosure date is also inapplicable to a party who is "first served or otherwise joined" after the subdivision (f) conference. This phrase refers to the date of service of a claim on a party in a defensive posture (such as a defendant or third-party defendant), and the date of joinder of a party added as a claimant or an intervenor. Absent court order or stipulation, a new party has 30 days in which to make its initial disclosures. But it is expected that later-added parties will ordinarily be treated the same as the original parties when the original parties have stipulated to forgo initial disclosure, or the court has ordered disclosure in a modified form.

Subdivision (a)(3). The amendment to Rule 5(d) forbids filing disclosures under subdivisions (a)(1) and (a)(2) until they are used in the proceeding, and this change is reflected in an amendment to subdivision (a)(4). Disclosures under subdivision (a)(3), however, may be important to the court in connection with the final pretrial conference or otherwise in preparing for trial. The requirement that objections to certain matters be filed points up the court's need to be provided with these materials. Accordingly, the requirement that subdivision (a)(3) materials be filed has been moved from subdivision (a)(4) to subdivision (a)(3), and it has also been made clear that they--and any objections--should be filed "promptly."

Subdivision (a)(4). The filing requirement has been removed from this subdivision. Rule 5(d) has been amended to provide that disclosures under subdivisions (a)(1) and (a)(2) must not be filed until used in the proceeding. Subdivision (a)(3) has been amended to require that the disclosures it directs, and objections to them, be filed promptly. Subdivision (a)(4) continues to require that all disclosures under subdivisions (a)(1), (a)(2), and (a)(3) be in writing, signed, and served.

"Shall" is replaced by "must" under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends that the amendments to Rules 26(a)(1)(A) and (B) be changed so that initial disclosure applies to information the disclosing party "may use to support" its claims or defenses. It also recommends changes in the Committee Note to explain that disclosure requirement. In addition, it recommends inclusion in the Note of further explanatory matter regarding the exclusion from initial disclosure provided in new Rule 26(a)(1)(E) for actions for review on an administrative record and the impact of these exclusions on bankruptcy proceedings. Minor wording improvements in the Note are also proposed.

Subdivision (b)(1). In 1978, the Committee published for comment a proposed amendment, suggested by the Section of Litigation of the American Bar Association, to refine the scope of discovery by deleting the "subject matter" language. This proposal was withdrawn, and the Committee has since then made other changes in the discovery rules to address concerns about overbroad discovery. Concerns about costs and delay of discovery have persisted nonetheless, and other bar groups have repeatedly renewed similar proposals for amendment to this subdivision to delete the "subject matter" language. Nearly one-third of the lawyers surveyed in 1997 by the Federal Judicial Center endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions. *Discovery and Disclosure Practice, supra*, at 44-45 (1997). The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the "subject matter" involved in the action.

The amendments proposed for subdivision (b)(1) include one element of these earlier proposals but also differ from these proposals in significant ways. The similarity is that the amendments describe the scope of party-controlled discovery in terms of matter relevant to the claim or defense of any party. The court, however, retains authority to order discovery of any matter relevant to the subject matter involved in the action for good cause. The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal Judicial Center. *See Discovery and Disclosure Practice, supra*, at 44. Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good-cause standard warranting broader discovery is meant to be flexible.

The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action. The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable.

In each instance, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.

The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.

The amendments also modify the provision regarding discovery of information not admissible in evidence. As added in 1946, this sentence was designed to make clear that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible. The Committee was concerned that the "reasonably calculated to lead to the discovery of admissible evidence" standard set forth in this sentence might swallow any other limitation on the scope of discovery. Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence. As used here, "relevant" means within the scope of discovery as defined in this subdivision, and it would include information relevant to the subject matter involved in the action if the court has ordered discovery to that limit based on a showing of good cause.

Finally, a sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. *See 8 Federal Practice & Procedure* § 2008.1 at 121. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. *Cf. Crawford-El v. Britton*, 118 S.Ct. 1584, 1597 (1998) (quoting Rule 26(b)(2)(iii) and stating that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly").

GAP Report

The Advisory Committee recommends changing the rule to authorize the court to expand discovery to any "matter"--not "information"--relevant to the subject matter involved in the action. In addition, it recommends additional clarifying material in the Committee Note about the impact of the change on some commonly disputed discovery topics, the relationship between cost-bearing under Rule 26(b)(2) and expansion of the scope of discovery on a showing of good cause, and the meaning of "relevant" in the revision to the last sentence of current subdivision (b)(1). In addition, some minor clarifications of language changes have been proposed for the Committee Note.

Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action, but "standing" orders imposing different presumptive limits are not authorized. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them. This change is not intended to interfere with differentiated case management in districts that use this technique by case-specific order as part of their Rule 16 process.

Subdivision (d). The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case, but "standing" orders altering the moratorium are not authorized.

Subdivision (f). As in subdivision (d), the amendments remove the prior authority to exempt cases by local rule from the conference requirement. The Committee has been informed that the addition of the conference was one of the most successful changes made in the 1993 amendments, and it therefore has determined to apply the conference requirement nationwide. The categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are exempted from the conference requirement for the reasons that warrant exclusion from initial disclosure. The court may order that the conference need not occur in a case where otherwise required, or that it occur in a case otherwise exempted by subdivision (a)(1)(E). "Standing" orders altering the conference requirement for categories of cases are not authorized.

The rule is amended to require only a "conference" of the parties, rather than a "meeting." There are important benefits to face-to-face discussion of the topics to be covered in the conference, and those benefits may be lost if other means of conferring were routinely used when face-to-face meetings would not impose burdens. Nevertheless, geographic conditions in some districts may exact costs far out of proportion to these benefits. The amendment allows the court by case-specific order to require a face-to-face meeting, but "standing" orders so requiring are not authorized.

As noted concerning the amendments to subdivision (a)(1), the time for the conference has been changed to at least 21 days before the Rule 16 scheduling conference, and the time for the report is changed to no more than 14 days after the Rule 26(f) conference. This should ensure that the court will have the report well in advance of the scheduling conference or the entry of the scheduling order.

Since Rule 16 was amended in 1983 to mandate some case management activities in all courts, it has included deadlines for Completing these tasks to ensure that all courts do so within a reasonable time. Rule 26(f) was fit into this scheme when it was adopted in 1993. It was never intended, however, that the national requirements that certain activities be completed by a certain time should delay case management in districts that move much faster than the national rules direct, and the rule is therefore amended to permit such a court to adopt a local rule that shortens the period specified for the completion of these tasks.

"Shall" is replaced by "must," "does," or an active verb under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends adding a sentence to the published amendments to Rule 26(f) authorizing local rules shortening the time between the attorney conference and the court's action under Rule 16(b), and addition to the Committee Note of explanatory material about this change to the rule. This addition can be made without republication in response to public comments.

2006 Amendment

Subdivision (a). Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses. The term "electronically stored information" has the same broad meaning in Rule 26(a)(1) as in Rule 34(a). This amendment is consistent with the 1993 addition of Rule 26(a)(1)(B). The term "data compilations" is deleted as unnecessary because it is a subset of both documents and electronically stored information.

[Subdivision (a)(1)(E).] Civil forfeiture actions are added to the list of exemptions from Rule 26(a)(1) disclosure requirements. These actions are governed by new Supplemental Rule G. Disclosure is not likely to be useful.

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in

a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of -- and the ability to search -- much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

The responding party has the burden as to one aspect of the inquiry -- whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26(b)(2)(C), through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver

has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

Subdivision (f). Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on "issues relating to disclosure or discovery of electronically stored information"; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See* *Manual for Complex Litigation* (4th) § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26(b)(2)(B). Rule 26(f)(3) explicitly directs the parties to discuss the form or forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient. Rule 34(b) is amended to permit a requesting party to specify the form or forms in which it wants electronically stored information produced. If the requesting party does not specify a form, Rule 34(b) directs the responding party to state the forms it intends to use in the production. Early discussion of the forms of production may facilitate the application of Rule 34(b) by allowing the parties to determine what forms of production will meet both parties' needs. Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be

particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. *Cf. Manual for Complex Litigation* (4th) § 11.422 ("A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.

Rule 26(f) is also amended to provide that the parties should discuss any issues relating to assertions of privilege or of protection as trial-preparation materials, including whether the parties can facilitate discovery by agreeing on procedures for asserting claims of privilege or protection after production and whether to ask the court to enter an order that includes any agreement the parties reach. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege and work-product protection. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege or protection are often difficult to identify. A failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter. Efforts to avoid the risk of waiver can impose substantial costs on the party producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called "metadata") is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection -- sometimes known as a "quick peek." The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements -- sometimes called "clawback agreements"-- that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent forfeiture or waiver of privilege or protection that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case-management or other order. If the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to establish a parallel procedure to assert privilege or protection as trial-preparation material after production, leaving the question of waiver to later determination by the court.

2007 Amendment

The language of Rule 26 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 26(a)(5) served as an index of the discovery methods provided by later rules. It was deleted as redundant. Deletion does not affect the right to pursue discovery in addition to disclosure.

Former Rule 26(b)(1) began with a general statement of the scope of discovery that appeared to function as a preface to each of the five numbered paragraphs that followed. This preface has been shifted to the text of paragraph (1) because it does not accurately reflect the limits embodied in paragraphs (2), (3), or (4), and because paragraph (5) does not address the scope of discovery.

The reference to discovery of “books” in former Rule 26(b)(1) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Amended Rule 26(b)(3) states that a party may obtain a copy of the party's own previous statement “on request.” Former Rule 26(b)(3) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke Rule 34 to obtain a copy of the party's own statement.

Rule 26(e) stated the duty to supplement or correct a disclosure or discovery response “to include information thereafter acquired.” This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present rule.

Former Rule 26(e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were to be supplemented “at appropriate intervals.” A prior discovery response must be “seasonably * * * amend[ed].” The fine distinction between these phrases has not been observed in practice. Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct “in a timely manner.”

Former Rule 26(g)(1) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended Rule 26(g)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided “promptly * * * after being called to the attorney's or party's attention.”

Former Rule 26(b)(2)(A) referred to a “good faith” argument to extend existing law. Amended Rule 26(b)(1)(B)(i) changes this reference to a “nonfrivolous” argument to achieve consistency with Rule 11(b)(2).

As with the Rule 11 signature on a pleading, written motion, or other paper, disclosure and discovery signatures should include not only a postal address but also a telephone number and electronic-mail address. A signer who lacks one or more of those addresses need not supply a nonexistent item.

Rule 11(b)(2) recognizes that it is legitimate to argue for establishing new law. An argument to establish new law is equally legitimate in conducting discovery.

2010 Amendment

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and--with three specific exceptions--communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including--for many experts--an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts--one for purposes of consultation and another to testify at trial--because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered, rather than the "data or other information" disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)

(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any “preliminary” expert opinions. Protected “communications” include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and “the party's attorney” should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the “party's attorney” concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii)--that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

2015 Amendment

Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." At the same time, Rule 26(g) was added. Rule 26(g) provided that signing a discovery request, response, or objection certified that the request, response, or objection was "not unreasonable or unduly burdensome or expensive, given the needs of the case, the

discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." The parties thus shared the responsibility to honor these limits on the scope of discovery.

The 1983 Committee Note stated that the new provisions were added "to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c) ... On the whole, however, district judges have been reluctant to limit the use of the discovery devices."

The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: "[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as "limitations", no longer an integral part of the (b)(1) scope provisions. That appearance was immediately offset by the next statement in the Note: "Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery."

The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues." Addressing these and other limitations added by the 1993 discovery amendments, the Committee Note stated that [t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery ...'

The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment made in 2000 that added a new sentence at the end of (b)(1): "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)]." The Committee Note recognized that "[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b)(1)." It explained that the Committee had been told repeatedly that courts were not using these limitations as originally intended. "This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information -- perhaps the only information -- with respect to that part of the determination.

A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called “information asymmetry.” One party -- often an individual plaintiff -- may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that “[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.” The 1993 Committee Note further observed that “[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.” What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized “the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.” Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

So too, consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that “[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.”

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule adds: “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.” Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.

The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were “other incidents of the same type, or involving the same product”; “information about organizational arrangements or filing systems”; and “information that could be used to impeach a likely witness.” Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears “reasonably calculated to lead to the discovery of admissible evidence” is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the “reasonably calculated” phrase to define the scope of discovery “might swallow any other limitation on the scope of discovery.” The 2000 amendments sought to prevent such misuse by adding the word “Relevant” at the beginning of the sentence, making clear that “‘relevant’ means within the scope of discovery as defined in this subdivision ...” The “reasonably calculated” phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that “Information within this scope of discovery need not be admissible in evidence to be discoverable.” Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case-specific sequences of discovery.

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan -- issues about preserving electronically stored information and court orders under Evidence Rule 502.

Notes of Decisions (1465)

Fed. Rules Civ. Proc. Rule 26, 28 U.S.C.A., FRCP Rule 26
Including Amendments Received Through 12-1-15

End of Document

NH Superior Court Civil Rule 22

RULE 22. AUTOMATIC DISCLOSURES

Currentness

(a) Materials that Must Be Disclosed. Except as may be otherwise ordered by the court for good cause shown, a party must without awaiting a discovery request, provide to the other parties:

(1) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support his or her claims or defenses, unless the use would be solely for impeachment, and, unless such information is contained in a document provided pursuant to Rule 22 (a)(2), a summary of the information believed by the disclosing party to be possessed by each such person;

(2) a copy of all documents, electronically stored information, and tangible things that the disclosing party has in his or her possession, custody or control and may use to support his or her claims or defenses, unless the use would be solely for impeachment;

(3) a computation of each category of damages claimed by the disclosing party together with all documents or other evidentiary materials on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(4) for inspection and copying, any insurance agreement or policy under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(b) Time for Disclosure. Unless the court orders otherwise, the disclosures required by Rule 22(a) shall be made as follows:

(1) by the plaintiff, not later than 30 days after the defendant to whom the disclosure is being made has filed his or her Answer to the Complaint; and

(2) by the defendant, not later than 60 days after the defendant making the disclosure has filed his or her Answer to the Complaint.

(c) Duty to Supplement. Each party has a duty to supplement that party's initial disclosures promptly upon becoming aware of the supplemental information.

(d) Sanctions for Failure to Comply. A party who fails to timely make the disclosures required by this rule may be sanctioned as provided in Rule 21.

Credits

[Adopted May 22, 2013, effective October 1, 2013. Comment amended July 24, 2014, effective September 1, 2014.]

Editors' Notes

COMMENT

This rule, formerly PAD Rule 3, accomplishes a major change from prior New Hampshire practice in that it requires both the plaintiff and the defendant to make automatic initial disclosures of certain information without the need for a discovery request from the opposing party. Although there was a similar but not identical requirement in the so-called "fast-track" section of former Superior Court Rule 62(II), the rule was used very little and therefore does not provide a significant base of experience for this rule. Nonetheless, such a base of experience can be found in federal court practice, where an automatic disclosure regimen in some form has been in existence since 1993, and appears to have worked reasonably well. Requiring parties to make prompt and automatic disclosures of information concerning the witnesses and evidence they will use to prove their claims or defenses at trial will help reduce "gamesmanship" in the conduct of litigation, reduce the time spent by lawyers and courts in resolving discovery issues and disputes, and promote the prompt and just resolution of cases.

Section (a) of Rule 22 is taken largely from Rule 26(a)(1) of the Federal Rules of Civil Procedure. It differs from the federal rule, however, in that, unlike the federal rule, this rule does not permit the disclosing party to merely provide "the subjects" of the discoverable information known to individuals likely to have such information, Fed. R. Civ. P. 26(a)(1)(A)(i), and "a description by category and location" of the discoverable materials in the possession, custody or control of the disclosing party, Fed. R. Civ. P. 26(a)(1)(A)(ii). Rather, the rule requires that the disclosing party actually turn over to the opposing party a copy of all such discoverable materials, Rule 22(a)(2), and also requires that the disclosing party provide a summary of the information known to each individual identified under Rule 22(a)(1) unless that information is contained in the materials disclosed under Rule 22(a)(2). This more comprehensive discovery obligation does not impose an undue burden on either plaintiffs or defendants and will help to insure that information and witnesses that will be used by each party to support its case will be disclosed to opposing parties shortly after the issues have been joined.

Subsection (a)(3) of the rule also differs somewhat from the language of comparable Fed. R. Civ. P. 26(a)(1)(A)(iii), in that the rule eliminates reference to "privileged or protected from disclosure" information as being excepted from the disclosure obligation imposed by the subsection. By so doing, the intention is not to eliminate the ability of a party to object on privilege or other proper grounds to the disclosures relating to the computation of damages or the information on which such computations are based. However, genuine claims of privilege as a basis for avoiding disclosure of information pertinent to the computation of damages will be rare and, to the extent such claims do exist, the ability to assert the privilege is preserved elsewhere in the rules. Therefore, there is no need to make a specific reference to privileged or otherwise protected materials in this rule.

The time limits established in section (b) of the rule are reasonable and will promote the orderly and expeditious progress of litigation. The proposed rule differs from the initial disclosure proposal embodied in the Pilot Project Rules of the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS), in that, unlike ACTL/IAALS Rule 5.2, the rule does not require the plaintiff to make its initial disclosures before the time when the defendant is required to file its Answer. The plaintiff should have the benefit of the defendant's Answer before making its initial disclosure since the Answer will in all likelihood inform what facts are in dispute and therefore will need to be proved by the plaintiff.

Section (c) of the rule is taken directly from ACTL/IAALS Pilot Project Rule 5.4 and its substance is generally consistent with Federal Rule 26(e) and Rule 21(g). It should be noted, however, that this rule differs from Rule 21(g). Rule 21(g) sets forth

the general rule governing discovery and contains introductory language stating that there is no duty to supplement responses and then sets forth very broad categories of exceptions from this general rule. Section (c) of this rule, relating only to materials that must be disclosed pursuant to the automatic disclosure requirements of Rule 22, is worded in positive terms to require supplementation of responses whenever the producing party becomes aware of supplemental information covered by the rule's initial disclosure requirements.

Section (d) of the rule references Rule 21 and permits the court to impose any of the sanctions specified in that rule if a party fails to make the disclosures required of it by this rule in a timely fashion.

NH Superior Court Civil Actions Rule 22, NH R SUPER CT CIV Rule 22
The state court rules are current with amendments received through August 15, 2015.

End of Document

West's Nevada Revised Statutes Annotated
Rules of Civil Procedure for the Nevada District Courts
III Pleadings and Motions

Rules of Civil Procedure, Rule 16.1
Formerly cited as NV ST Rule 16.1

RULE 16.1. MANDATORY PRE-TRIAL DISCOVERY REQUIREMENTS

Currentness

<Text of rule effective for all civil proceedings except proceedings in the Family Division of the Second and Eighth Judicial District Courts and in all domestic relations cases in the judicial districts without a family division as of February 1, 2006. For text of rule applicable to proceedings in the Family Division of the Second and Eighth Judicial District Courts and all domestic relations cases in judicial districts without a family division effective February 1, 2006, see following version of Rule 16.1.>

(a) Required Disclosures.

(1) Initial Disclosures. Except in proceedings exempted or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) The name and, if known, the address and telephone number of each individual likely to have information discoverable under Rule 26(b), including for impeachment or rebuttal, identifying the subjects of the information;

(B) A copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and which are discoverable under Rule 26(b);

(C) A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) For inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business 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 and any disclaimer or limitation of coverage or reservation of rights under any such insurance agreement.

These disclosures must be made at or within 14 days after the Rule 16.1(b) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 16.1(c) case conference report. In ruling on the objection, the court must determine what disclosures--if any--are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 16.1(b) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed

its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under NRS 50.275, 50.285 and 50.305.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The court, upon good cause shown or by stipulation of the parties, may relieve a party of the duty to prepare a written report in an appropriate case. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; 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; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and 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.

Unless otherwise stipulated or ordered by the Court, if the witness is not required to provide a written report, the initial disclosure must state the subject matter on which the witness is expected to present evidence under NRS 50.275, 50.285 and 50.305; a summary of the facts and opinions to which the witness is expected to testify; the qualifications of that witness to present evidence under NRS 50.275, 50.285 and 50.305, which may be satisfied by the production of a resume or curriculum vitae; and the compensation of the witness for providing testimony at deposition and trial, which is satisfied by production of a fee schedule.

(C) These disclosures shall be made at the times and in the sequence directed by the court.

(i) In the absence of extraordinary circumstances, and except as otherwise provided in subdivision (2), the court shall direct that the disclosures shall be made at least 90 days before the discovery cut-off date.

(ii) If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), the disclosures shall be made within 30 days after the disclosure made by the other party. This later disclosure deadline does not apply to any party's witness whose purpose is to contradict a portion of another party's case in chief that should have been expected and anticipated by the disclosing party, or to present any opinions outside of the scope of another party's disclosure.

(D) The parties must supplement these disclosures when required under Rule 26(e)(1).

(3) Pretrial Disclosures. In addition to the disclosures required by Rule 16.1(a)(1) and (2), a party must provide to other parties the following information regarding the evidence that it may present at trial, including impeachment and rebuttal evidence:

(A) The name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present, those witnesses who have been subpoenaed for trial, and those whom the party may call if the need arises;

(B) The designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) An appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under NRS 48.025 and 48.035, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rules 16.1(a)(1) through (3) must be made in writing, signed, and served.

(b) Meet and Confer Requirements.

(1) Attendance at Early Case Conference. Unless the case is in the court annexed arbitration program or short trial program, within 30 days after filing of an answer by the first answering defendant, and thereafter, if requested by a subsequent appearing party, the parties shall meet in person to confer and 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 subdivision (a)(1) of this rule and to develop a discovery plan pursuant to subdivision (b)(2). The attorney for the plaintiff shall designate the time and place of each meeting which must be held in the county where the action was filed, unless the parties agree upon a different location. The attorneys may agree to continue the time for the case conference for an additional period of not more than 90 days. The court, in its discretion and for good cause shown, may also continue the time for the conference. Absent compelling and extraordinary circumstances, neither the court nor the parties may extend the time to a day more than 180 days after an appearance is served by the defendant in question.

Unless otherwise ordered by the court or the discovery commissioner, parties to any case wherein a timely trial de novo request has been filed subsequent to an arbitration, need not hold a further in person conference, but must file a joint case conference report pursuant to subdivision (c) of this rule within 60 days from the date of the de novo filing, said report to be prepared by the party requesting the trial de novo.

(2) Planning for Discovery. The parties shall develop a discovery plan which shall indicate the parties' views and proposals concerning:

(A) What changes should be made in the timing, form, or requirement for disclosures under Rule 16.1(a), including a statement as to when disclosures under Rule 16.1(a)(1) were made or will be made;

(B) 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;

(C) What changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(D) Any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c); and

(E) An estimated time for trial.

(c) Case Conference Report. Within 30 days after each case conference, the parties must file a joint case conference report or, if the parties are unable to agree upon the contents of a joint report, each party must serve and file a case conference report which, either as a joint or individual report, must contain:

(1) A brief description of the nature of the action and each claim for relief or defense;

(2) A proposed plan and schedule of any additional discovery pursuant to subdivision (b)(2) of this rule;

(3) A written list of names exchanged pursuant to subdivision (a)(1)(A) of this rule;

(4) A written list of all documents provided at or as a result of the case conference pursuant to subdivision (a)(1)(B) of this rule;

(5) A calendar date on which discovery will close;

(6) A calendar date, not later than 90 days before the close of discovery, beyond which the parties shall be precluded from filing motions to amend the pleadings or to add parties unless by court order;

(7) A calendar date by which the parties will make expert disclosures pursuant to subdivision (a)(2), with initial disclosures to be made not later than 90 days before the discovery cut-off date and rebuttal disclosures to be made not later than 30 days after the initial disclosure of experts;

(8) A calendar date, not later than 30 days after the discovery cut-off date, by which dispositive motions must be filed;

(9) An estimate of the time required for trial; and

(10) A statement as to whether or not a jury demand has been filed.

After any subsequent case conference, the parties must supplement, but need not repeat, the contents of prior reports. Within 7 days after service of any case conference report, any other party may file a response thereto objecting to all or a portion of the report or adding any other matter which is necessary to properly reflect the proceedings occurring at the case conference.

(d) Discovery Disputes.

(1) Where available or unless otherwise ordered by the court, all discovery disputes (except those presented at the pretrial conference or trial) must first be heard by the discovery commissioner.

(2) Following each discovery motion before a discovery commissioner, the commissioner must prepare and file a report with the commissioner's recommendations for a resolution of each unresolved dispute. The commissioner may direct counsel to prepare the report. The clerk of the court shall forthwith serve a copy of the report on all parties. Within 5 days after being served with a copy, any party may serve and file written objections to the recommendations. Written authorities may be filed with an objection, but are not mandatory.

(3) Upon receipt of a discovery commissioner's report and any objections thereto, the court may affirm, reverse or modify the commissioner's ruling, set the matter for a hearing, or remand the matter to the commissioner for further action, if necessary.

(e) Failure or Refusal to Participate in Pretrial Discovery; Sanctions.

(1) If the conference described in Rule 16.1(b) is not held within 180 days after an appearance by a defendant, the case may be dismissed as to that defendant upon motion or on the court's own initiative, without prejudice, unless there are compelling and extraordinary circumstances for a continuance beyond this period.

(2) If the plaintiff does not file a case conference report within 240 days after an appearance by a defendant, the case may be dismissed as to that defendant upon motion or on the court's own initiative, without prejudice.

(3) If an attorney fails to reasonably comply with any provision of this rule, or if an attorney or a party fails to comply with an order entered pursuant to subsection (d) of this rule, the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:

(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);

(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).

(f) Complex Litigation. In a potentially difficult or protracted action that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems, the court may, upon motion and for good cause shown, waive any or all of the requirements of this rule. If the court waives all the requirements of this rule, it shall also order a conference pursuant to Rule 16 to be conducted by the court or the discovery commissioner.

(g) Proper Person Litigants. When a party is not represented by an attorney, the party must comply with this rule.

Credits

Added, eff. Jan. 1, 1988. As amended, eff. Jan. 1, 2005; Jan. 1, 2013.

Editors' Notes

DRAFTER'S NOTE 2004 AMENDMENT

Subdivision (a) is amended to conform to the 1993 and 2000 amendments to Rule 26(a) of the federal rules, with some notable exceptions. Consistent with the federal rule, the revised rule imposes an affirmative duty to disclose certain basic information without a formal discovery request.

Subdivision (a)(1) incorporates the federal rule but adopts the "subject matter" standard for the scope of discovery that is retained in revised Rule 26(b) of the Nevada rules. Paragraph (1) also retains the Nevada requirement that impeachment witnesses and documents be disclosed, whereas the federal rule exempts impeachment evidence. Paragraph (1)(C) is intended to apply to special damages, not general or other intangible damages. Paragraph (1)(D) expands on the federal rule by requiring disclosure and production of liability policy denials, limitations or reservations of rights.

Subdivision (a)(2) imposes an additional duty to disclose information regarding expert testimony and requires that certain experts must prepare a detailed and complete written report. But unlike its federal counterpart, subdivision (a)(2)(B) allows the court to relieve a party of this duty upon a showing of good cause. The requirement of a written report applies only to an expert who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony. Given this limitation, a treating physician could be deposed or called to testify without any requirement for a written report. See Fed. R. Civ. P. 26(a) advisory committee note (2000). The expert witness disclosures and written reports are not part of the initial disclosure under paragraph (1). Instead, subdivision (a)(2)(C) contemplates that the court will set the time for such disclosures but that they must be made at least 90 days before the discovery cut-off date absent extraordinary circumstances. This provision differs from its federal counterpart, which allows the disclosures to be made at least 90 days before the trial date or the date the case is to be ready for trial.

Subdivision (a)(3) retains the Nevada requirement for pretrial disclosure of impeachment and rebuttal evidence and the names of witnesses who have been subpoenaed for trial. Unlike the federal rule, there is no requirement that the information disclosed be filed with the court.

Subdivision (b) is repealed in its entirety. New subdivision (b)(1) incorporates the requirement under former Rule 16.1(a) of attendance at an early case conference. It is based on Rule 26(f) of the federal rules, but is tailored to practice in state court and, unlike the federal rule, it requires the parties to meet in person. The rule also retains deadlines that are unique to Nevada. Subdivision (b)(2) incorporates provisions of Rule 26(f) of the federal rules regarding planning for discovery. But the Nevada provision expands the subjects to be discussed at the early case conference beyond those listed in the federal rule to include an estimated time for trial.

Subdivision (c) is amended to reflect the new disclosure provisions of subdivision (a). The requirements for a case conference report are more detailed and extensive than those in Rule 26(f) of the federal rules and include specific time periods for the close of discovery, filing of motions to amend pleadings or add parties, expert disclosures, and filing of dispositive motions.

Subdivision (d) retains the Nevada provisions on discovery disputes with some revisions.

DRAFTER'S NOTE 2012 AMENDMENT

Subdivision (a)(2)(B) specifies the information that must be included in a disclosure of expert witnesses who are not otherwise required to provide detailed written reports. A treating physician is not a retained expert merely because the patient was referred to the physician by an attorney for treatment. These comments may be applied to other types of non-retained experts by analogy. In the context of a treating physician, appropriate disclosure may include that the witness will testify in accordance with his or her medical chart, even if some records contained therein were prepared by another healthcare provider. A treating physician is not a retained expert merely because the witness will opine about diagnosis, prognosis, or causation of the patient's injuries, or because the witness reviews documents outside his or her medical chart in the course of providing treatment or defending that treatment. However, any opinions and any facts or documents supporting those opinions must be disclosed in accordance with subdivision (a)(2)(B).

Notes of Decisions (22)

Civ. Proc. Rules, Rule 16.1, NV ST RCP Rule 16.1
Current with amendments received through 11/15/15

West's Nevada Revised Statutes Annotated
Rules of Civil Procedure for the Nevada District Courts
V Depositions and Discovery

Rules of Civil Procedure, Rule 26
Formerly cited as NV ST Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

Currentness

(a) Discovery Methods. At any time after the filing of a joint case conference report, or not sooner than 10 days after a party has filed a separate case conference report, or upon order by the court or discovery commissioner, any party who has complied with Rule 16.1(a)(1) may obtain discovery by one or more of the following additional methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or Rule 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) Limitations. By order, the court may alter the limits in these rules or set limits on the number of depositions and interrogatories, the length of depositions under Rule 30 or the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c) of this rule.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of

the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Rule 16.1(a)(2)(B) or 16.2(a)(3), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by 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 preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(d) Sequence and Timing of Discovery. After compliance with subdivision (a) of this rule, unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

As amended, eff. Sept. 27, 1971; Jan. 1, 2005.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under Rule 16.1 or 16.2 or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired, if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Rule 16.1(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(f) Form of responses. Answers and objections to interrogatories or requests for production shall identify and quote each interrogatory or request for production in full immediately preceding the statement of any answer or objections thereto. Answers, denials, and objections to requests for admission shall identify and quote each request for admission in full immediately preceding the statement of any answer, denial, or objection thereto.

Added, eff. Feb. 11, 1986; Jan. 1, 2005.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure and report made pursuant to Rules 16.1(a)(1), 16.1(a)(3), 16.1(c), 16.2(a)(2), 16.2(a)(4), and 16.2(d) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection, is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass, obscure, equivocate or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request,

response, or objection was made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Added, eff. Jan. 1, 1988; Jan. 1, 2005.

(h) Demand for Prior Discovery. Whenever a party makes a written demand for discovery which took place prior to the time the party became a party to the action, each party who has previously made discovery disclosures, responded to a request for admission or production or answered interrogatories shall make available to the demanding party the document(s) in which the discovery disclosures and responses in question are contained for inspection and copying or furnish to the demanding party a list identifying each such document by title and upon further demand shall furnish to the demanding party, at the expense of the demanding party, a copy of any listed discovery disclosure or response specified in the demand or, in the case of document disclosure or request for production, shall make available for inspection by the demanding party all documents and things previously produced. Further, each party who has taken a deposition shall make a copy of the transcript thereof available to the demanding party at the latter's expense.

Added, eff. Feb. 11, 1986. As amended, eff. Jan. 1, 2005.

Credits

As amended, eff. Sept. 27, 1971; Jan. 1, 2005; July 1, 2008.

Editors' Notes

DRAFTER'S NOTE 2004 AMENDMENT

The initial-disclosure provisions in Rule 26(a) of the federal rules, as amended in 2000, are adopted as modified in Rule 16.1(a) of the Nevada rules; only other discovery methods are retained as part of Rule 26(a) of the Nevada rules.

Subdivision (b) retains the Nevada rule as to the scope of discovery--“any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Thus, the Nevada rule does not conform to the 2000 amendments to its federal counterpart which limits the scope of discovery to “any matter, not privileged, that is relevant to the claim or defense of any party,” except upon a showing of “good cause.”

The insurance discovery provisions in subdivision (b)(2) of the former rule have been amended and moved to Rule 16.1(a)(1)(D).

Subdivision (b)(2)(iii) does not incorporate the weighing provisions that were added to the federal rule in 1993 but instead retains the language in the Nevada rule, which was based on the federal provision as it was adopted in 1983.

Expert discovery under subdivision (b)(4) is modified consistent with expert disclosure under revised Rule 16.1(a)(2). The provisions of former subdivision (b)(5) regarding demands for expert witness lists and the exchange of reports and writings, are repealed as unnecessary under the new expert disclosure provisions in Rule 16.1. New subdivision (b)(5) conforms to the federal rule.

Subdivision (c) is amended to conform to the 1993 amendment to subdivision (c) of the federal rule. The amendment requires that the parties meet and confer in an effort to resolve discovery disputes before seeking a protective order from the court. The party filing a motion for a protective order must include a certificate stating that the parties met and conferred, or, if the moving party is unable to get opposing parties to meet and confer regarding the dispute, indicating the moving party's efforts in attempting to arrange such a meeting.

Subdivision (d) is amended to clarify that once the parties have complied with the provisions of subdivision (a) of the rule, the parties may use any method of formal discovery provided in the rules in any sequence unless the court orders otherwise. The provision is similar to subdivision (d) of the federal rule, but it does not include the first sentence of the federal rule, which provides that with certain exceptions, the parties may not commence formal discovery until after they have met and conferred as required by subdivision (f) of the federal rule (cf. NRCP 16.1(b)). The parties must comply with subdivision (a) of the Nevada rule.

Subdivision (e) is amended to conform to the 1993 amendments to subdivision (e) of the federal rule. The rule is amended to provide that the requirement for supplementation applies to disclosures required by Rule 16.1(a). Paragraph (1) is amended to address when a party must supplement disclosures made under Rule 16.1(a) and to require supplementation of expert reports and depositions. Paragraph (2) is amended to address the duty to supplement responses to formal discovery requests including interrogatories, requests for production and requests for admissions. Like its federal counterpart, paragraph (2) does not include deposition testimony. However, under paragraph (1), a party must supplement information provided through a deposition of an expert from whom a report is required under Rule 16.1(a)(2)(B). Paragraphs (3) and (4) of the former rule are repealed.

Subdivision (f) of the former rule is repealed as duplicative of provisions in Rules 16 and 16.1. To avoid redesignating the remaining subdivisions, former subdivision (f) is replaced with the language from former subdivision (j) regarding the form of responses to discovery requests. There is no federal counterpart to this provision.

Subdivision (g) is amended to conform to the 1993 amendments to subdivision (g) of the federal rule. Paragraph (1) is added to require signatures on certain disclosures required by Rule 16.1. Paragraph (2) retains language from the former rule for signatures on discovery requests, responses, and objections with some revisions to conform to the 1993 amendments to the federal rule. Paragraph (3) retains language from the former rule regarding sanctions if a certification is made in violation of the rule with modifications to make it consistent with Rules 37(a)(4) and 37(c)(1)--in combination, these rules provide sanctions for violation of the rules regarding disclosures and discovery matters.

Subdivision (h) is amended to address technical issues. It has no federal counterpart. The provision is retained because it clarifies responsibilities to exchange discovery with new parties.

Subdivision (i) of the former rule is repealed in favor of a strong scheduling order under Rule 16 that will set discovery deadlines.

ADVISORY COMMITTEE'S NOTE

Revised in 1971 in accordance with the federal amendments, effective July 1, 1970, but with subsection (f) added.

Notes of Decisions (62)

Civ. Proc. Rules, Rule 26, NV ST RCP Rule 26
Current with amendments received through 11/15/15

End of Document

West's Alaska Statutes Annotated
Alaska Court Rules
Rules of Civil Procedure
Part V. Depositions and Discovery

Rules of Civil Procedure, Rule 26

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

Currentness

(a) Required Disclosures; Methods to Discover Additional Matter. Disclosure under subparagraphs (a)(1), (2), and (3) of this rule is required in all civil actions, except those categories of cases exempted from the requirement of scheduling conferences and scheduling orders under Civil Rule 16(g), adoption proceedings, and prisoner litigation against the state under AS 09.19.

(1) *Initial Disclosures.* Except to the extent otherwise directed by order or rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the factual basis of each of its claims or defenses;

(B) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information and whether the attorney-client privilege applies;

(C) the name and, if known, the address and telephone number of each individual who has made a written or recorded statement and, unless the statement is privileged or otherwise protected from disclosure, either a copy of the statement or the name and, if known, the address and telephone number of the custodian;

(D) subject to the provisions of Civil Rule 26(b)(3), a copy of, or a description by category and location of, all documents, electronically stored information, data compilations, and tangible things that are relevant to disputed facts alleged with particularity in the pleadings;

(E) subject to the provisions of Civil Rule 26(b)(3), all photographs, diagrams, and videotapes of persons, objects, scenes and occurrences that are relevant to disputed facts alleged with particularity in the pleadings;

(F) each insurance agreement under which any person carrying on an insurance business 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;

(G) all categories of damages claimed by the disclosing party, and a computation of each category of special damages, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such claims are based, including materials bearing on the nature and extent of injuries suffered; and

(H) the identity, with as much specificity as may be known at the time, of all potentially responsible persons within the meaning of AS 09.17.080, and whether the party will choose to seek to allocate fault against each identified potentially responsible person.

Unless otherwise directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subsection (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) In addition to the disclosures required by subparagraph (a)(1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Evidence Rules 702, 703, or 705.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; 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; the 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 study and 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.

(C) These disclosures shall be made at the times and in the sequence directed by the court. The parties shall supplement these disclosures when required under subparagraph (e)(1).

(D) No more than three independent expert witness may testify for each side as to the same issue in any given case. For purposes of this rule, an independent expert is an expert from whom a report is required under section (a)(2)(B). The court, upon the showing of good cause, may increase or decrease the number of independent experts to be called.

(3) *Pretrial Disclosures.* In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

These disclosures shall be made at the times and in the sequence directed by the court. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) *Form of Disclosures.* Unless otherwise directed by the court, all disclosures under subparagraphs (a)(1) and (2) shall be made in writing, signed, and served in accordance with Rule 5.

(5) *Methods to Discover Additional Matter.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Limitations.*

(A) The court may alter the limits in these rules on the number of depositions and interrogatories, the length of depositions under Rule 30, and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under paragraph (c).

(B) 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)(2)(C). The court may specify conditions for the discovery.

(3) *Trial Preparation: Materials.* Subject to the provisions of subparagraph (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

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

(4) *Trial Preparation: Experts.*

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under section (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by 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 preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subparagraph; and (ii) with respect to discovery obtained under section (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by 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, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the judicial district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified

terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery.

(1) *Timing of Discovery--Non-Exempted Actions.* In an action in which disclosure is required under Rule 26(a), a party may serve up to ten of the thirty interrogatories allowed under Rule 33(a) at the times allowed by section (d)(2)(C) of this rule. Otherwise, except by order of the court or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by paragraph (f).

(2) *Timing of Discovery--Exempted Actions.* In actions exempted from disclosure under Rule 26(a), discovery may take place as follows:

(A) For depositions upon oral examination under Civil Rule 30, a defendant may take depositions at any time after commencement of the action. The plaintiff must obtain leave of court if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service under Rule 4(e) if authorized, except that leave is not required (i) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (ii) the plaintiff seeks to take the deposition under Civil Rule 30(a)(2)(C).

(B) For depositions upon written questions under Civil Rule 31, a party may serve questions at any time after commencement of the action.

(C) For interrogatories, requests for production, and requests for admission under Civil Rules 33, 34, and 36, discovery requests may be served upon the plaintiff at any time after the commencement of the action, and upon any other party with or after service of the summons and complaint upon that party.

(3) *Sequence of Discovery.* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under paragraph (a) or Civil Rule 26.1(b) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under paragraph (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Meeting of Parties; Planning for Discovery and Alternative Dispute Resolution. Except when otherwise ordered and except in actions exempted from disclosure under Rule 26(a), the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, including whether an alternative dispute resolution procedure is appropriate, to make or arrange for the disclosures required by subparagraph (a)(1), and to develop a proposed discovery plan and a proposed alternative dispute resolution plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing or form of disclosures under paragraph (a), including a statement as to when the disclosures under subparagraph (a)(1) were made or will be made and what are appropriate intervals for supplementation of disclosure under Rule 26(e)(1);

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

(4) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(5) the plan for alternative dispute resolution, including its timing, the method of selecting a mediator, early neutral evaluator, or arbitrator, or an explanation of why alternative dispute resolution is inappropriate;

(6) whether a scheduling conference is unnecessary; and

(7) any other orders that should be entered by the court under paragraph (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 and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

(g) [Applicable to cases filed on or after August 7, 1997.] Limited Discovery; Expedited Calendaring. In a civil action for personal injury or property damage involving less than $100,000 in claims, the parties shall limit discovery to that allowed under District Court Civil Rule 1(a)(1) and shall avail themselves of the expedited calendaring procedures allowed under District Court Civil Rule 4.

Credits

[Amended effective July 15, 1990; July 15, 1994; July 15, 1995; July 15, 1997; August 7, 1997; August 7, 1997; July 15, 1998; October 15, 2005; April 15, 2009; October 15, 2014.]

Editors' Notes

NOTE

Note to SCO 1281: Paragraph (g) of this rule was added by ch. 26, § 40, SLA 1997. According to § 55 of the Act, the amendment to Civil Rule 26 applies "to all causes of action accruing on or after the effective date of this Act." The amendment to Rule 26 adopted by paragraph 1 of this order applies to all cases filed on or after August 7, 1997. See paragraph 17 of this order. The change is adopted for the sole reason that the legislature has mandated the amendment.

Ch. 26, § 10, SLA 1997 repeals and reenacts AS 09.17.020 concerning punitive damages. New AS 09.17.020(e) prohibits parties from conducting discovery relevant to the amount of punitive damages until after the fact finder has determined that an award of punitive damages is allowed. This provision applies to causes of action accruing on or after August 7, 1997. See ch. 26, § 55, SLA 1997. According to § 48 of the Act, new AS 09.17.020(e) has the effect of amending Civil Rule 26 by limiting discovery in certain actions.

Section 2 of chapter 95 SLA 1998 amends AS 09.19.050 to state that the automatic disclosure provisions of Civil Rule 26 do not apply in prisoner litigation against the state. According to section 13 of the act, this amendment has the effect of changing Civil Rule 26 "by providing that the automatic disclosure provisions of the rule do not apply to litigation against the state brought by prisoners."

Note to SCO 1647: The supreme court has approved certain procedures for Anchorage cases that vary from those specified in this rule. Civil Rule 26(a)(1) sets out a procedure to be used "[e]xcept to the extent otherwise directed by order or rule," and sets a timeline for disclosures "[u]nless otherwise directed by the court." Civil Rule 26(f) also sets out a procedure to be used "except when otherwise ordered." In Anchorage, Administrative Order 3AO-03-04 (Amended) applies to modify the procedures set out in subdivisions (a)(1) and (f). That Order, commonly referred to as the Anchorage Uniform Pretrial Order, was issued and adopted according to the provisions of Administrative Rule 46, and is available on the court system's website at http:/ /www.courts.alaska.gov/orders-cr16-26.htm.

Rules Civ. Proc., Rule 26, AK R RCP Rule 26
Current with amendments received through October 15, 2015

End of Document

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Rules of Civil Procedure
Chapter 4. Disclosure and Discovery

C.R.C.P. Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE

Currentness

(a) Required Disclosures. Unless otherwise ordered by the court or stipulated by the parties, provisions of this Rule shall not apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings.

(1) **Disclosures.** Except to the extent otherwise directed by the court, a party shall, without awaiting a discovery request, provide to other parties the following information, whether or not supportive of the disclosing party's claims or defenses:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the claims and defenses of any party and a brief description of the specific information that each such individual is known or believed to possess;

(B) a listing, together with a copy of, or a description by category, of the subject matter and location of all documents, data compilations, and tangible things in the possession, custody or control of the party that are relevant to the claims and defenses of any party, making available for inspection and copying such documents and other evidentiary material, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34;

(C) a description of the categories of damages sought and a computation of any category of economic damages claimed by the disclosing party, making available for inspection and copying pursuant to C.R.C.P. 34 the documents or other evidentiary material relevant to the damages sought, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34; and

(D) any insurance agreement under which any person carrying on an insurance business 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, making such agreement available for inspection and copying pursuant to C.R.C.P. 34.

Disclosures shall be served within 28 days after the case is at issue as defined in C.R.C.P. 16(b)(1). A party shall make the required disclosures based on the information then known and reasonably available to the party and is not excused from making such disclosures because the party has not completed investigation of the case or because the party challenges the sufficiency of another party's disclosure or because another party has not made the required disclosures. Parties shall make these disclosures in good faith and may not object to the adequacy of the disclosures until the case management conference pursuant to C.R.C.P. 16(d).

(2) **Disclosure of Expert Testimony.**

(A) In addition to the disclosures required by subsection (a)(1) of this Rule, a party shall disclose to other parties the identity of any person who may present evidence at trial, pursuant to Rules 702, 703, or 705 of the Colorado Rules of Evidence together with an identification of the person's fields of expertise.

(B) Except as otherwise stipulated or directed by the court:

(I) Retained Experts. With respect to a witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony, the disclosure shall be made by a written report signed by the witness. The report shall include:

(a) a complete statement of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the data or other information considered by the witness in forming the opinions;

(c) references to literature that may be used during the witness's testimony;

(d) copies of any exhibits to be used as a summary of or support for the opinions;

(e) the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;

(f) the fee agreement or schedule for the study, preparation and testimony;

(g) an itemization of the fees incurred and the time spent on the case, which shall be supplemented 14 days prior to the first day of trial; and

(h) 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.

The witness's direct testimony shall be limited to matters disclosed in detail in the report.

(II) Other Experts. With respect to a party or witness who may be called to provide expert testimony but is not retained or specially employed within the description contained in subsection (a)(2)(B)(I) above, the disclosure shall be made by a written report or statement that shall include:

(a) a complete description of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the qualifications of the witness; and

(c) copies of any exhibits to be used as a summary of or support for the opinions. If the report has been prepared by the witness, it shall be signed by the witness.

If the witness does not prepare a written report, the party's lawyer or the party, if self-represented, may prepare a statement and shall sign it. The witness's direct testimony expressing an expert opinion shall be limited to matters disclosed in detail in the report or statement.

(C) Unless otherwise provided in the Case Management Order, the timing of the disclosures shall be as follows:

(I) The disclosure by a claiming party under a complaint, counterclaim, cross-claim, or third-party claim shall be made at least 126 days (18 weeks) before the trial date.

(II) The disclosure by a defending party shall be made within 28 days after service of the claiming party's disclosure, provided, however, that if the claiming party serves its disclosure earlier than required under subparagraph 26(a)(2)(C)(I), the defending party is not required to serve its disclosures until 98 days (14 weeks) before the trial date.

(III) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subparagraph (a)(2)(C)(II) of this Rule, such disclosure shall be made no later than 77 days (11 weeks) before the trial date.

(3) [There is no Colorado Rule--see instead C.R.C.P. 16(c).]

(4) **Form of Disclosures; Filing.** All disclosures pursuant to subparagraphs (a)(1) and (a)(2) of this Rule shall be made in writing, in a form pursuant to C.R.C.P. 10, signed pursuant to C.R.C.P. 26(g)(1), and served upon all other parties. Disclosures shall not be filed with the court unless requested by the court or necessary for consideration of a particular issue.

(5) **Methods to Discover Additional Matters.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, pursuant to C.R.C.P. 34; physical and mental examinations; and requests for admission. Discovery at a place within a country having a treaty with the United States applicable to the discovery must be conducted by methods authorized by the treaty except that, if the court determines that those methods are inadequate or inequitable, it may authorize other discovery methods not prohibited by the treaty.

(b) Discovery Scope and Limits. Unless otherwise modified by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General.** Subject to the limitations and considerations contained in subsection (b)(2) of this Rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible in evidence to be discoverable.

(2) **Limitations.** Except upon order for good cause shown and subject to the proportionality factors in subsection (b)(1) of this Rule, discovery shall be limited as follows:

(A) A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2). The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. 26, 28, 29, 30, 31, 32, and 45.

(B) A party may serve on each adverse party 30 written interrogatories, each of which shall consist of a single question. The scope and manner of proceeding by means of written interrogatories and the use thereof shall otherwise be governed by C.R.C.P. 26 and 33.

(C) A party may obtain a physical or mental examination (including blood group) of a party or of a person in the custody or under the legal control of a party pursuant to C.R.C.P. 35.

(D) A party may serve each adverse party requests for production of documents or tangible things or for entry, inspection or testing of land or property pursuant to C.R.C.P. 34, except such requests for production shall be limited to 20 in number, each of which shall consist of a single request.

(E) A party may serve on each adverse party 20 requests for admission, each of which shall consist of a single request. A party may also serve requests for admission of the genuineness of up to 50 separate documents that the party intends to offer into evidence at trial. The scope and manner of proceeding by means of requests for admission and the use thereof shall otherwise be governed by C.R.C.P. 36.

(F) In determining good cause to modify the limitations of this subsection (b)(2), the court shall consider the following:

(I) whether the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(II) whether the party seeking discovery has had ample opportunity by disclosure or discovery in the action to obtain the information sought;

(III) whether the proposed discovery is outside the scope permitted by C.R.C.P. 26(b)(1); and

(IV) whether because of the number of parties and their alignment with respect to the underlying claims and defenses, the proposed discovery is reasonable.

(3) **Trial Preparation: Materials.** Subject to the provisions of subsection (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials

in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is:

(A) a written statement signed or otherwise adopted or approved by the person making it, or

(B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) **Trial Preparation: Experts.**

(A) A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2)(B)(I) of this Rule whose opinions may be presented at trial. Each deposition shall not exceed 6 hours. On the application of any party, the court may decrease or increase the time permitted after considering the proportionality criteria in subsection (b)(1) of this Rule. Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.

(B) A party may, through interrogatories or by 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 preparation for trial, and who is not expected to be called as a witness at trial only as provided by C.R.C.P. 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subsection (b)(4); and (ii) with respect to discovery obtained pursuant to subsection (b)(4)(B) of this Rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(D) Rule 26(b)(3) protects from disclosure and discovery drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded, and protects communications between the party's attorney and any witness disclosed under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(I) relate to the compensation for the expert's study, preparation, or testimony;

(II) identify facts or data that the party's attorney provided and which the expert considered in forming the opinions to be expressed; or

(III) identify the assumptions that the party's attorney provided and that the expert relied on in forming opinions to be expressed.

(5)(A) **Claims of Privilege or Protection of Trial Preparation Materials.** When a party withholds information required to be disclosed or provided in discovery by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) If information produced in disclosures or 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. After being notified, a party must not review, use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and shall give notice to the party making the claim within 14 days if it contests the claim. If the claim is not contested within the 14-day period, or is timely contested but resolved in favor of the party claiming privilege or protection of trial-preparation material, then the receiving party must also promptly return, sequester, or destroy the specified information and any copies that the receiving party has. If the claim is contested, the party making the claim shall present the information to the court under seal for a determination of the claim within 14 days after receiving such notice, or the claim is waived. The producing party must preserve the information until the claim is resolved, and bears the burden of proving the basis of the claim and that the claim was not waived. All notices under this Rule shall be in writing.

(c) Protective Orders. Upon motion by a party or by the person from whom disclosure is due or discovery is sought, accompanied by a certificate 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, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

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

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(d) Timing and Sequence of Discovery. Except when authorized by these Rules, by order, or by agreement of the parties, a party may not seek discovery from any source before service of the Case Management Order pursuant to C.R.C.P. 16(b)(18). Any discovery conducted prior to issuance of the Case Management Order shall not exceed the limitations established by C.R.C.P. 26(b)(2). Unless the parties stipulate or the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures, Responses, and Expert Reports and Statements. A party is under a duty to supplement its disclosures under section (a) of this Rule when the party learns that the information disclosed is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process, including information relating to anticipated rebuttal but not including information to be used solely for impeachment of a witness. A party is under a duty to amend a prior response to an interrogatory, request for production or request for admission when the party learns that the prior response is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process. With respect to experts, the duty to supplement or correct extends both to information contained in the expert's report or statement disclosed pursuant to section (a)(2)(B) of this Rule and to information provided through any deposition of the expert. If a party intends to offer expert testimony on direct examination that has not been disclosed pursuant to section (a)(2)(B) of this Rule on the basis that the expert provided the information through a deposition, the report or statement previously provided shall be supplemented to include a specific description of the deposition testimony relied on. Nothing in this section requires the court to permit an expert to testify as to opinions other than those disclosed in detail in the initial expert report or statement except that if the opinions and bases and reasons therefor are disclosed during the deposition of the expert by the adverse party, the court must permit the testimony at trial unless the court finds that the opposing party has been unfairly prejudiced by the failure to make disclosure in the initial expert report. Supplementation shall be performed in a timely manner.

(f) [No Colorado Rule--See C.R.C.P. 16].

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subsections (a)(1) or (a)(2) of this Rule shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, or response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the request, response, or objection

and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the request, response or objection is:

(A) Consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who made the certification, the party on whose behalf the disclosure, request, response or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

Credits

Repealed and Adopted eff. Jan. 1, 1995. Amended eff. Jan. 9, 1995, for all cases filed on or after that date; Jan. 1, 1998; July 1, 2001; Jan. 1, 2002; amended Oct. 20, 2005, eff. Jan. 1, 2006; Jan. 1, 2012; Sept. 18, 2014; effective July 1, 2015 for cases filed on or after July 1, 2015.

Editors' Notes

COMMENTS

1995

SCOPE

[1] Because of its timing and interrelationship with C.R.C.P. 16, C.R.C.P. 26 does not apply to domestic relations, mental health, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings. However, the Court in those proceedings may use C.R.C.P. 26 and C.R.C.P. 16 to the extent helpful to the case. In most instances, only the timing will need to be modified.

COLORADO DIFFERENCES

[2] Revised C.R.C.P. 26 is patterned largely after Fed.R.Civ.P. 26 as amended in 1993 and 2000 and uses substantially the same numbering. There are differences, however. The differences are to fit disclosure/discovery requirements of Colorado's case/trial management system set forth in C.R.C.P. 16, which is very different from its Federal Rule

counterpart. The interrelationship between C.R.C.P. 26 and C.R.C.P. 16 is described in the Committee Comment to C.R.C.P. 16.

[3] The Colorado differences from the Fed.R.Civ.P. are: (1) timing and scope of mandatory automatic disclosures is different (C.R.C.P. 16(b)); (2) the two types of experts in the Federal Rule are clarified by the State Rule (C.R.C.P. 26(a)(2)(B)), and disclosure of expert opinions is made at a more realistic time in the proceedings (C.R.C.P. 26(a)(2)(C)); (3) sequenced disclosure of expert opinions is prescribed in C.R.C.P. 26(a)(2)(C) to avoid proliferation of experts and related expenses; (4) the parties may use a summary of an expert's testimony in lieu of a report prepared by the expert to reduce expenses (C.R.C.P. 26(a)(2)(B)); (5) claiming privilege/protection of work product (C.R.C.P. 26(b)(5)) and supplementation/correction provisions (C.R.C.P. 26(e)) are relocated in the State Rules to clarify that they apply to both disclosures and discovery; (6) a Motion for Protective Order stays a deposition under the State Rules (C.R.C.P. 121 § 1-12) but not the Federal Rule (Fed.R.Civ.P. 26(c)); (7) presumptive limitations on discovery as contemplated by C.R.C.P. 16(b)(1)(VI) are built into the rule (see C.R.C.P. 26(b)(2)); (8) counsel must certify that they have informed their clients of the expense of the discovery they schedule (C.R.C.P. 16(b)(1)(IV)); (9) the parties cannot stipulate out of the C.R.C.P. 26(b)(2) presumptive discovery limitations (C.R.C.P. 29); and (10) pretrial endorsements governed by Fed.R.Civ.P. 26(a)(3) are part of Colorado's trial management system established by C.R.C.P. 16(c) and C.R.C.P. 16(d).

[4] As with the Federal Rule, the extent of disclosure is dependent upon the specificity of disputed facts in the opposing party's pleading (facilitated by the requirement in C.R.C.P. 16(b) that lead counsel confer about the nature and basis of the claims and defenses before making the required disclosures). If a party expects full disclosure, that party needs to set forth the nature of the claim or defense with reasonable specificity. Specificity is not inconsistent with the requirement in C.R.C.P. 8 for a “short, plain statement” of a party's claims or defenses. Obviously, to the extent there is disclosure, discovery is unnecessary. Discovery is limited under this system.

FEDERAL COMMITTEE NOTES

[5] Federal “Committee Notes” to the December 1, 1993 and December 1, 2000 amendments of Fed.R.Civ.P. 26 are incorporated by reference and where applicable should be used for interpretive guidance.

[6] The most dramatic change in C.R.C.P. 26 is the addition of a disclosure system. Parties are required to disclose specified information without awaiting a discovery demand. Such disclosure is, however, tied to the nature and basis of the claims and defenses of the case as set forth in the parties' pleadings facilitated by the requirement that lead counsel confer about such matters before making the required disclosures.

[7] Subparagraphs (a)(1)(A) and (a)(1)(B) of C.R.C.P. 26 require disclosure of persons, documents and things likely to provide discoverable information relative to disputed facts alleged with particularity in the pleadings. Disclosure relates to disputed facts, not admitted facts. The reference to particularity in the pleadings (coupled with the requirement that lead counsel confer) responds to the concern that notice pleading suggests a scope of disclosure out of proportion to any real need or use. To the contrary, the greater the specificity and clarity of the pleadings facilitated by communication through the C.R.C.P. 16(b) conference, the more complete and focused should be the listing of witnesses, documents, and things so that the parties can tailor the scope of disclosure to the actual needs of the case.

[8] It should also be noted that two types of experts are contemplated by Fed.R.Civ.P. and C.R.C.P. 26(a)(2). The experts contemplated in subsection (a)(2)(B)(II) are persons such as treating physicians, police officers, or others who may testify as expert witnesses and whose opinions are formed as a part of their occupational duties (except when the person is an employee of the party calling the witness). This more limited disclosure has been incorporated into the State Rule because it was deemed inappropriate and unduly burdensome to require all of the information required by C.R.C.P. 26(a)(2)(B)(I) for C.R.C.P. 26(a)(2)(B)(II) type experts.

2001 COLORADO CHANGES

[9] The change to C.R.C.P. 26(a)(2)(C)(II) effective July 1, 2001, is intended to prevent a plaintiff, who may have had a year or more to prepare his or her case, from filing an expert report early in the case in order to force a defendant to prepare a virtually immediate response. That change clarifies that the defendant's expert report will not be due until 90 days prior to trial.

[10] The change to C.R.C.P. 26(b)(2)(A) effective July 1, 2001 was made to clarify that the number of depositions limitation does not apply to persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2).

[11] The special and limited form of request for admission in C.R.C.P. 26(b)(2)(E) effective July 1, 2001, allows a party to seek admissions as to authenticity of documents to be offered at trial without having to wait until preparation of the Trial Management Order to discover whether the opponent challenges the foundation of certain documents. Thus, a party can be prepared to call witnesses to authenticate documents if the other party refuses to admit their authenticity.

[12] The amendment of C.R.C.P. 26(b)(1) effective January 1, 2002 is patterned after the December, 2000 amendment of the corresponding Federal rule. The amendment should not prevent a party from conducting discovery to seek impeachment evidence or evidence concerning prior acts.

2015

[13] Rule 26 sets the basis for discovery of information by: (1) defining the scope of discovery (26(b)(1)); (2) requiring certain initial disclosures prior to discovery (26(a)(1)); (3) placing presumptive limits on the types of permitted discovery (26(b)(2)); and (4) describing expert disclosure and discovery (26(a)(2) and 26(b)(4)).

[14] Scope of discovery.

Perhaps the most significant 2015 amendments are in Rule 26(b)(1). This language is taken directly from the proposed Fed. R. Civ. P. 26(b)(1). (For a more complete statement of the changes and their rationales, one can read the extensive commentary proposed for the Federal Rule.) First, the slightly reworded concept of proportionality is moved from its former hiding place in C.R.C.P. 26(b)(2)(F)(iii) into the very definition of what information is discoverable. Second, discovery is limited to matters relevant to the specific claims or defenses of any party and is no longer permitted simply because it is relevant to the "subject matter involved in the action." Third, it is made clear that while evidence need not be admissible to be discoverable, this does not permit broadening the basic scope of discovery. In short, the concept is to allow discovery of what a party/lawyer *needs* to prove its case, but not what a party/lawyer *wants* to know about the subject of a case.

[15] Proportionality analysis.

C.R.C.P. 26(b)(1) requires courts to apply the principle of proportionality in determining the extent of discovery that will be permitted. The Rule lists a number of non-exclusive factors that should be considered. Not every factor will apply in every case. The nature of the particular case may make some factors predominant and other factors insignificant. For example, the amount in controversy may not be an important consideration when fundamental or constitutional rights are implicated, or where the public interest demands a resolution of the issue, irrespective of the economic consequences. In certain types of litigation, such as employment or professional liability cases, the parties' relative access to relevant information may be the most important factor. These examples show that the factors cannot be applied as a mathematical formula. Rather, trial judges have and must exercise discretion, on a case-by-

case basis, to effectuate the purposes of these rules, and, in particular, abide by the overarching command that the rules "shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action." C.R.C.P. 1.

[16] Limitations on discovery.

The presumptive limitations on discovery in Rule 26(b)(2)-- *e.g.*, a deposition of an adverse party and two other persons, only 30 interrogatories, etc.--have not been changed from the prior rule. They may, however, be reduced or increased by stipulation of the parties with court approval, consistent with the requirement of proportionality.

[17] Initial disclosures.

Amendments to Rule 26(a)(1) concerning initial disclosures are not as significant as those to Rule 26(b)(1). Nonetheless, it is intended that disclosures should be quite complete and that, therefore, further discovery should not be as necessary as it has been historically. In this regard, the amendment to section (a)(1) adds to the requirement of disclosing four categories of information and that the disclosure include information "whether or not supportive" of the disclosing party's case. This should not be a significant change from prior practice. In 2000, Fed. R. Civ. P. 26(a)(1) was changed to narrow the initial disclosure requirements to information a party might use to support its position. The Colorado Supreme Court has not adopted that limitation, and continues to require identification of persons and documents that are relevant to disputed facts alleged with particularity in the pleadings. Thus, it was intended that disclosures were to include matter that might be harmful as well as supportive. (Limiting disclosure to supportive information likely would only encourage initial interrogatories and document requests that would require disclosure of harmful information.)

Changes to subsections (A) (persons with information) and (B) (documents) of Rule 26(a)(1) require information related to claims for relief and defenses (consistent with the scope of discovery in Rule 26(b)(1)). Also the identification of persons with relevant information calls for a "brief *description* of the *specific* information that each individual is known or believed to possess." Under the prior rule, disclosures of persons with discoverable information identifying "the subjects of information" tended to identify numerous persons with the identification of "X is expected to have information about and may testify relating to the facts of this case." The change is designed to avoid that practice and obtain some better idea of which witnesses might actually have genuinely significant information.

[18] Expert disclosures.

Retained experts must sign written reports much as before except with more disclosure of their fees. The option of submitting a "summary" of expert opinions is eliminated. Their testimony is limited to what is disclosed in detail in their report. Rule 26(a)(2)(B)(I).

"Other" (non-retained) experts must make disclosures that are less detailed. Many times a lawyer has no control over a non-retained expert, such as a treating physician or police officer, and thus the option of a "statement" must be preserved with respect to this type of expert, which, if necessary, may be prepared by the lawyers. In either event, the expert testimony is to be limited to what is disclosed in detail in the disclosure. Rule 26(a)(2)(B)(II).

[19] Retained or non-retained experts.

Non-retained experts are persons whose opinions are formed or reasonably derived from or based on their occupational duties.

[20] Expert discovery.

The prohibition of depositions of experts was perhaps the most controversial aspect of CAPP. Many lawyers, particularly those involved in professional liability cases, argued that a blanket prohibition of depositions of experts would impair lawyers' ability to evaluate cases and thus frustrate settlement of cases. The 2015 amendment permits limited depositions of experts. Retained experts may be deposed for up to 6 hours, unless changed by the court, which must consider proportionality. Rule 26(b)(4)(A).

The 2015 amendment also requires that, if a deposition reveals additional opinions, previous expert disclosures must be supplemented before trial if the witness is to be allowed to express these new opinions at trial. Rule 26(e). This change addresses, and prohibits, the fairly frequent and abusive practice of lawyers simply saying that the expert report is supplemented by the "deposition." However, even with the required supplementation, the trial court is not required to allow the new opinions in evidence. *Id.*

The 2015 amendments to Rule 26, like the current and proposed version of Fed. R. Civ. P. 26, emphasize the application of the concept of proportionality to disclosure and discovery, with robust disclosure followed by limited discovery.

[21] Sufficiency of disclosure of expert opinions and the bases therefor.

This rule requires detailed disclosures of "all opinions to be expressed [by the expert] and the basis and reasons therefor." Such disclosures ensure that the parties know, well in advance of trial, the substance of all expert opinions that may be offered at trial. Detailed disclosures facilitate the trial, avoid delays, and enhance the prospect for settlement. At the same time, courts and parties must "liberally construe, administer and employ" these rules "to secure the just, speedy, and inexpensive determination of every action." C.R.C.P. 1. Rule 26(a)(2) does not prohibit disclosures that incorporate by specific page reference previously disclosed records of the designated expert (including non-retained experts), provided that the designated pages set forth the opinions to be expressed, along with the reasons and basis therefor. This Rule does not require that disclosures match, verbatim, the testimony at trial. Reasonableness and the overarching goal of a fair resolution of disputes are the touchstones. If an expert's opinions and facts supporting the opinions are disclosed in a manner that gives the opposing party reasonable notice of the specific opinions and supporting facts, the purpose of the rule is accomplished. In the absence of substantial prejudice to the opposing party, this rule does not require exclusion of testimony merely because of technical defects in disclosure.

Notes of Decisions (393)

Rules Civ. Proc., Rule 26, CO ST RCP Rule 26
Current with amendments received through August 15, 2015

West's Utah Code Annotated
State Court Rules
Utah Rules of Civil Procedure (Refs & Annos)
Part V. Depositions and Discovery

Utah Rules of Civil Procedure, Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCLOSURE AND DISCOVERY

Currentness

(a) Disclosure. This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) *Initial disclosures.* Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, serve on the other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

(a)(2) *Timing of initial disclosures.* The disclosures required by paragraph (a)(1) shall be served on the other parties:

(a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and

(a)(2)(B) by the defendant within 42 days after filing of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.

(a)(3) *Exemptions.*

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) *Expert testimony.*

(a)(4)(A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the **Utah** Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) Timing for expert discovery.

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days

thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(D) Multiparty actions. In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the **Utah** Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) *Pretrial disclosures.*

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the **Utah** Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

(b)(1) *In general.* Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the **Utah** Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) *Proportionality.* Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) *Burden.* The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) *Electronically stored information.* A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(5) *Trial preparation materials.* A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) *Statement previously made about the action.* A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) *Trial preparation; experts.*

(b)(7)(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) Expert employed only for trial preparation. Ordinarily, a party may not, by interrogatories or otherwise, 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. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(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.

(b)(8) *Claims of privilege or protection of trial preparation materials.*

(b)(8)(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.

(c)(1) *Methods of discovery.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) *Sequence and timing of discovery.* Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c)(3) *Definition of tiers for standard discovery.* Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) *Definition of damages.* For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) *Limits on standard fact discovery.* Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs(a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery

1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,000 or more	30	20	20	20	210

(c)(6) *Extraordinary discovery.* To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a request for extraordinary discovery under Rule 37(a).

(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

(d)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(d)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b).

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Credits

[Effective May 2, 2005; amended effective November 1, 2007; November 1, 2008; November 1, 2011; March 6, 2012; April 1, 2013; May 1, 2015.]

Editors' Notes

ADVISORY COMMITTEE NOTES

Disclosure requirements and timing. Rule 26(a)(1). The 2011 amendments seek to reduce discovery costs by requiring each party to produce, at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief, with a description of their expected testimony. In this respect, the amendments build on the initial disclosure requirements of the prior rules. In addition to the disclosures required by the prior version of Rule 26(a)(1), a party must disclose each fact witness the party may call in its case-in-chief and a summary of the witness's expected testimony, a copy of all documents the party may offer in its case-in-chief, and all documents to which a party refers in its pleadings.

Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be identified. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. A party is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony. As the information becomes known, it should be disclosed. No summaries are required for adverse parties, including management level employees of business entities, because opposing lawyers are unable to interview them and their testimony is available to their own counsel. For uncooperative or hostile witnesses any summary of expected testimony would necessarily be limited to the subject areas the witness is reasonably expected to testify about. For example, defense counsel may be unable to interview a treating physician, so the initial summary may only disclose that the witness will be questioned concerning the plaintiff's diagnosis, treatment and prognosis. After medical records have been obtained, the summary may be expanded or refined.

Subject to the foregoing qualifications, the summary of the witness's expected testimony should be just that--a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1)(e.g., “The witness will testify about the events in question” or “The witness will testify on causation.”). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. This information is important because of the other discovery limits contained in the 2011 amendments, particularly the limits on depositions.

Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those that a party reasonably believes it may use at trial, understanding that not all documents will be available at the outset of a case. In this regard, it is important to remember that the duty to provide documents and witness information is a continuing one, and disclosures must be promptly supplemented as new evidence and witnesses become known as the case progresses.

The amendments also require parties to provide more information about damages early in the case. Too often, the subject of damages is deferred until late in the case. Early disclosure of damages information is important. Among other things, it is a critical factor in determining proportionality. The committee recognizes that damages often require additional discovery, and typically are the subject of expert testimony. The Rule is not intended to require expert disclosures at the outset of a case. At the same time, the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages.

The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

The 2011 amendments also change the time for making these required disclosures. Because the plaintiff controls when it brings the action, plaintiffs must make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later. The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

The time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would be not begin to run until that motion is resolved.

Finally, the 2011 amendments eliminate two categories of actions that previously were exempt from the mandatory disclosure requirements. Specifically, the amendments eliminate the prior exemption for contract actions in which the amount claimed is $20,000 or less, and actions in which any party is proceeding pro se. In the committee's view, these types of actions will benefit from the early disclosure requirements and the overall reduced cost of discovery.

Expert disclosures and timing. Rule 26(a)(3). Expert discovery has become an ever-increasing component of discovery cost. The prior rules sought to eliminate some of these costs by requiring the written disclosure of the expert's opinions and other background information. However, because the expert was not required to sign these disclosures, and because experts often were allowed to deviate from the opinions disclosed, attorneys typically would take the expert's deposition to ensure the expert would not offer “surprise” testimony at trial, thereby increasing rather than decreasing the overall cost. The amendments seek to remedy this and other costs associated with expert discovery by, among other things, allowing the opponent to choose either a deposition of the expert or a written report, but not both; in the case of written reports, requiring more comprehensive disclosures, signed by the expert, and making clear that experts will not be allowed to testify beyond what is fairly disclosed in a report, all with the goal of making reports a reliable substitute for depositions; and incorporating a rule that protects from discovery most communications between an attorney and retained expert. Discovery of expert opinions and testimony is automatic under Rule 26(a)(3) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

Disclosures of expert testimony are made in sequence, with the party who bears the burden of proof on the issue for which expert testimony will be offered going first. Within seven days after the close of fact discovery, that party must disclose: (i) the expert's curriculum vitae identifying the expert's qualifications, publications, and prior testimony; (ii) compensation information; (iii)

a brief summary of the opinions the expert will offer; and (iv) a complete copy of the expert's file for the case. The file should include all of the facts and data that the expert has relied upon in forming the expert's opinions. If the expert has prepared summaries of data, spreadsheets, charts, tables, or similar materials, they should be included. If the expert has used software programs to make calculations or otherwise summarize or organize data, that information and underlying formulas should be provided in native form so it can be analyzed and understood. To the extent the expert is relying on depositions or materials produced in discovery, then a list of the specific materials relied upon is sufficient. The committee recognizes that experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids may be prepared and disclosed later, as part of the Rule **26**(a)(4) pretrial disclosures when trial is imminent.

Within seven days after this disclosure, the party opposing the retained expert may elect either a deposition or a written report from the expert. A deposition is limited to four hours, which is not included in the deposition hours under Rule **26**(c)(5), and the party taking it must pay the expert's hourly fee for attending the deposition. If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to “lock in” the expert's testimony. But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

The report or deposition must be completed within 28 days after the election is made. After this, the party who does not bear the burden of proof on the issue for which expert testimony is offered must make its corresponding disclosures and the opposing party may then elect either a deposition or a written report. Under the deadlines contained in the rules, expert discovery should take less than three months to complete. However, as with the other discovery rules, these deadlines can be altered by stipulation of the parties or order of the court.

The amendments also address the issue of testimony from non-retained experts, such as treating physicians, police officers, or employees with special expertise, who are not retained or specially employed to provide expert testimony, or whose duties as an employee do not regularly involve giving expert testimony. This issue was addressed by the Supreme Court in Drew v. Lee, 2011 UT 15, wherein the court held that reports under the prior version of Rule **26**(a)(3) are not required for treating physicians.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule **26**(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule **26**(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule **26**(a)(4)(E) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure e of non-retained expert opinions is the same as that for retained experts under Rule **26**(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. Rules **26**(a)(4)(E) and **26**(a)(1)(A)(ii) are not intended to elevate form over substance--all they require is that a party fairly inform its opponent that opinion testimony may

be offered from a particular witness. And because a party who expects to offer this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition.

Finally, the amendments include a new Rule 26(b)(7) that protects from discovery draft expert reports and, with limited exception, communications between an attorney and an expert. These changes are modeled after the recent changes to the Federal Rules of Civil Procedure and are intended to address the unnecessary and costly procedures that often were employed in order to protect such information from discovery, and to reduce "satellite litigation" over such issues.

Scope of discovery--Proportionality. Rule 26(b). Proportionality is the principle governing the scope of discovery. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation.

In the past, the scope of discovery was governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." These broad standards may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they did little to advance two equally important objectives of the rules of civil procedure--the speedy and inexpensive resolution of every action. Accordingly, the former standards governing the scope of discovery have been replaced with the proportionality standards in subpart (b)(1).

The concept of proportionality is not new. The prior rule permitted the Court to limit discovery methods if it determined that "the discovery was unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." The Federal Rules of Civil Procedure contains a similar provision. See Fed. R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked either under the Utah rules or federal rules.

Under the prior rule, the party objecting to the discovery request had the burden of proving that a discovery request was not proportional. The new rule changes the burden of proof. Today, the party seeking discovery beyond the scope of "standard" discovery has the burden of showing that the request is "relevant to the claim or defense of any party" and that the request satisfies the standards of proportionality. As before, ultimate admissibility is not an appropriate objection to a discovery request so long as the proportionality standard and other requirements are met.

The 2011 amendments establish three tiers of standard discovery in Rule 26(c). Ideally, rules of procedure should be crafted to promote predictability for litigants. Rules should limit the need to resort to judicial oversight. Tiered standard discovery seeks to achieve these ends. The "one-size-fits-all" system is rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule is deemed proportional for cases with different amounts in controversy.

Any system of rules which permits the facts and circumstances of each case to inform procedure cannot eliminate uncertainty. Ultimately, the trial court has broad discretion in deciding whether a discovery request is proportional. The proportionality standards in subpart (b)(2) and the discovery tiers in subpart (c) mitigate uncertainty by guiding that discretion. The proper application of the proportionality standards will be defined over time by trial and appellate courts.

Standard and extraordinary discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Rule 26(c) provides for three separate "tiers" of limited, "standard" discovery that are presumed to be proportional to the amount and issues in controversy in the action, and that the parties may conduct as a matter of right. An aggregation of all damages sought by all parties in an action dictates the applicable tier of standard discovery, whether such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers of standard discovery are set forth in a chart that is embedded in the body of the

rule itself. “Tier 1” describes a minimal amount of standard discovery that is presumed proportional for cases involving damages of $50,000 or less. “Tier 2” sets forth larger limits on standard discovery that are applicable in cases involving damages above $50,000 but less than $300,000. Finally, “Tier 3” prescribes still greater standard discovery for actions involving damages in excess of $300,000. Deposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes. The tiers also provide presumptive limitations on the time within which standard discovery should be completed, which limitations similarly increase with the amount of damages at issue. A statement of discovery issues will not toll the period. Parties are expected to be reasonable and accomplish as much as they can during standard discovery. A statement of discovery issues may result in additional discovery and sanctions at the expense of a party who unreasonably fails to respond or otherwise frustrates discovery. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for non-monetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of $300,000 or more, in which case Tier 3 applies. The committee determined these standard discovery limitations based on the expectation that for the majority of cases filed in the **Utah** State Courts, the magnitude of available discovery and applicable time parameters available under the three-tiered system should be sufficient for cases involving the respective amounts of damages.

Despite the expectation that standard discovery according to the applicable tier should be adequate in the typical case, the 2011 amendments contemplate there will be some cases for which standard discovery is not sufficient or appropriate. In such cases, parties may conduct additional discovery that is shown to be consistent with the principle of proportionality. There are two ways to obtain such additional discovery. The first is by stipulation. If the parties can agree additional discovery is necessary, they may stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is proportional to what is at stake in the litigation and counsel for each party certifies that the party has reviewed and approved a budget for additional discovery. Such a stipulation should be filed before the close of the standard discovery time limit, but only after reaching the limits for that type of standard discovery available under the rule. If these conditions are met, the Court will not second-guess the parties and their counsel and must approve the stipulation.

The second method to obtain additional discovery is by a statement of discovery issues. The committee recognizes there will be some cases in which additional discovery is appropriate, but the parties cannot agree to the scope of such additional discovery. These may include, among other categories, large and factually complex cases and cases in which there is a significant disparity in the parties' access to information, such that one party legitimately has a greater need than the other party for additional discovery in order to prepare properly for trial. To prevent a party from taking advantage of this situation, the 2011 amendments allow any party to request additional discovery. As with stipulations for extraordinary discovery, a party requesting extraordinary discovery should do so before the close of the standard discovery time limit, but only after the party has reached the limits for that type of standard discovery available to it under the rule. By taking advantage of this discovery, counsel should be better equipped to articulate for the court what additional discovery is needed and why. The requesting party must demonstrate that the additional discovery is proportional and certify that the party has reviewed and approved a discovery budget. The burden to show the need for additional discovery, and to demonstrate relevance and proportionality, always falls on the party seeking additional discovery. However, cases in which such additional discovery is appropriate do exist, and it is important for courts to recognize they can and should permit additional discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute.

Protective order language moved to Rule 37. The 2011 amendments delete in its entirety the prior language of Rule **26**(c) governing motions for protective orders. The substance of that language is now found in Rule 37. The committee determined it was preferable to cover requests for an order to compel, for a protective order, and sanctions in a single rule, rather than two separate rules.

Consequences of failure to disclose. Rule **26**(d). If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being able to use evidence that a party fails properly to disclose provides a powerful incentive

to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

LEGISLATIVE NOTE

(1) The amended language in paragraph (b)(1) is intended to incorporate long-standing protections against discovery and admission into evidence of privileged matters connected to medical care review and peer review into the **Utah** Rules of Civil Procedure. These privileges, found in both **Utah** common law and statute, include Sections **26**-25-3, 58-13-4, and 58-13-5, UCA, 1953. The language is intended to ensure the confidentiality of peer review, care review, and quality assurance processes and to ensure that the privilege is limited only to documents and information created specifically as part of the processes. It does not extend to knowledge gained or documents created outside or independent of the processes. The language is not intended to limit the court's existing ability, if it chooses, to review contested documents in camera in order to determine whether the documents fall within the privilege. The language is not intended to alter any existing law, rule, or regulation relating to the confidentiality, admissibility, or disclosure of proceedings before the **Utah** Division of Occupational and Professional Licensing. The Legislature intends that these privileges apply to all pending and future proceedings governed by court rules, including administrative proceedings regarding licensing and reimbursement.

(2) The Legislature does not intend that the amendments to this rule be construed to change or alter a final order concerning discovery matters entered on or before the effective date of this amendment.

(3) The Legislature intends to give the greatest effect to its amendment, as legally permissible, in matters that are pending on or may arise after the effective date of this amendment, without regard to when the case was filed.

LAW REVIEW AND JOURNAL COMMENTARIES

Appellate highlights. Rodney R. Parker and Julianne P. Blanch, 28-FEB **Utah** B.J. 38 (January/February, 2015).
Are medical records now off limits? An examination of Sorenson v. Barbuto. S. Grace Acosta, 22 **Utah** B.J. 17 (May/June, 2009).
Case Law Developments: The Work-Product Doctrine. Lauder, 1996 **Utah** L. Rev. 265 (1996).
Case Law Developments: Work Product Protection for an Insurer's Claim File. Smith, 1997 **Utah** L. Rev. 137 (1997).
AN EXPERT FOR ALL SEASONS: EXPERT TESTIMONY USUALLY REQUIRED, AND UNUSUALLY SPECIFIC. TANNER LENART, 27-APR **UTAH** B.J. 61 (2014).
How to Take an Out-of-State Deposition. Bushnell, 14 **Utah** B.J. 28 (Jan./Feb. 2001).
Standard 19. Donald J. Winder and Lance F. Sorenson, 20 **Utah** B.J. 41 (January/February 2007).
Talkin' ‘bout a revolution?: **Utah** overhauls its rules of civil discovery. Marc Therriern, 2011 **Utah** L. Rev. 669 (2011).

UNITED STATES CODE ANNOTATED

In general, see FRCP Rule **26** et seq.

Relevant Notes of Decisions (163)

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Notes of Decisions listed below contain your search terms.

In general

Trial court mooted for appeal purported creditor's argument that court erred in dismissing his debt collection claims for failure to comply with rules of civil procedure by not arranging for scheduling conference, in debtor's motion to dismiss for failure to prosecute, where court acknowledged that rule requiring a scheduling conference did not apply because some of the defendants were not represented by counsel, and court determined that the change in its analysis did not affect its original conclusion to

dismiss for failure to prosecute. Velander v. LOL of **Utah**, LLC, 2015, 2015 UT App 171, 2015 WL 4130505. Appeal and Error 781(4)

Injured driver's failure to designate his witness as expert precluded consideration of witness' proposed opinion testimony regarding proper inspection and repair of tie rods on all terrain vehicle, in driver's action against mechanic for negligent inspection and repair of tie rods. Warenski v. Advanced RV Supply, 2011, 257 P.3d 1096, 685 **Utah** Adv. Rep. 50, 2011 UT App 197, certiorari denied 268 P.3d 192. Pretrial Procedure 45

An attorney has a responsibility to use the available discovery procedures to diligently represent her client, and in civil matters, Rules of Civil Procedure provide the means to do this. Rules of Prof.Conduct, Rule 1.3. Brown v. Glover, 2000, 16 P.3d 540, 408 **Utah** Adv. Rep. 12, 2000 UT 89, on remand 2001 UT App 52, 2001 WL 298577. Attorney And Client 112; Pretrial Procedure 11; Pretrial Procedure 24

Where wife filed divorce complaint and, before service of summons and without notice to husband, a hearing was held in which wife testified and thereafter an order for service of summons by publication was obtained and default of husband was entered upon his failure to answer and divorce was granted on basis of testimony which had been given by wife previously, court had no legal evidence before it upon which to grant divorce and exceeded its jurisdiction when it attempted to grant a divorce without first having taken legal evidence. U.C.A.1953, 30-3-4; Rules of Civil Procedure, rule **26** et seq. Treutle v. District Court of Salt Lake County, 1958, 7 **Utah** 2d 155, 320 P.2d 666. Divorce 146

Under Rules of Civil Procedure, pleadings are restricted to the task of general notice-giving, and the deposition-discovery process is invested with the vital role in the preparations of trial. Rules of Civil Procedure, rule 8(a). Blackham v. Snelgrove, 1955, 3 **Utah** 2d 157, 280 P.2d 453. Pleading 1; Pretrial Procedure 16; Pretrial Procedure 61

Construction and application

Rule with respect to discovery must be applied with common sense and within reasonable bounds consistent with its objective. Rules of Civil Procedure, rules 1(a), 30(b), 33. State By and Through Road Commission v. Petty, 1966, 17 **Utah** 2d 382, 412 P.2d 914. Pretrial Procedure 13

Nature and purpose of discovery

Rules authorizing discovery sanctions are aimed at encouraging good faith compliance with the discovery obligations imposed under the rules of civil procedure, and provide the court with the authority to sanction those who fail to live up to the requirements of those rules. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Purpose of discovery rules is to facilitate fair trials with full disclosure of all relevant testimony and evidence. Roundy v. Staley, 1999, 984 P.2d 404, 374 **Utah** Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Pretrial Procedure 14.1

Discovery rules were intended to make procedure as simple and efficient as possible by eliminating any useless ritual, undue rigidities or technicalities and to remove elements of surprise or trickery, and accordingly rules should be liberally construed. Rules of Civil Procedure, rules 1(a), **26**(b), 33. Ellis v. Gilbert, 1967, 19 **Utah** 2d 189, 429 P.2d 39. Pretrial Procedure 15

The objects and purposes of the Rules of Civil Procedure concerning discovery are to develop the truth and prevent surprise. Rules of Civil Procedure, rules **26**(b), 30(b), 34. Mower v. McCarthy, 1952, 122 **Utah** 1, 245 P.2d 224. Pretrial Procedure 15

Because the courts at common law allowed parties to conceal from each other up to the time of trial the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, the equitable remedy of bills

for discovery to assist the prosecution or defense of an action pending in a court at law arose. Larson v. Salt Lake City, 1908, 34 **Utah** 318, 97 P. 483. Pretrial Procedure 14.1

Actions and proceedings in which discovery is available

Discovery is to be liberally permitted in condemnation cases. **Utah** Dept. of Transp. v. Rayco Corp., 1979, 599 P.2d 481. Pretrial Procedure 21

Right to discovery and grounds for allowance or refusal, generally

Former client violated discovery deadline by serving discovery on attorney in legal malpractice action on the last day for discovery, because attorney did not have time in which to respond. Dahl v. Harrison, 2011, 265 P.3d 139, 695 **Utah** Adv. Rep. 4, 2011 UT App 389, certiorari denied 275 P.3d 1019. Pretrial Procedure 25

Insofar as discovery will aid in eliminating noncontroversial matters and in identifying, narrowing and clarifying issues on which contest may prove to be necessary, it should be liberally permitted. Rules of Civil Procedure, rules 1(a), 30(b), 33. State By and Through Road Commission v. Petty, 1966, 17 **Utah** 2d 382, 412 P.2d 914. Pretrial Procedure 17.1; Pretrial Procedure 335

The fact that a party having peculiar knowledge of a matter fails to bring it forward does not furnish any basis for the court to make an order requiring such party to divulge his knowledge before trial to the adverse party, or to supply him with the means of obtaining it. Larson v. Salt Lake City, 1908, 34 **Utah** 318, 97 P. 483. Pretrial Procedure 17.1

Discretion of court

The trial court's failure to grant motorist's wife's request to extend the discovery deadlines so she could amend her expert designation list was not an abuse of discretion; the depositions of highway patrol officers occurred before wife's expert disclosures and reports were due, and wife admitted that she learned during the depositions which officer was most knowledgeable about the highway patrol diagram she desired to admit into evidence at trial, and thus which officer should be designated as an expert. Solis v. Burningham Enterprises Inc., 2015, 2015 UT App 11, 778 **Utah** Adv. Rep. 44, 2015 WL 178249. Pretrial Procedure 25

A trial court must exclude an expert witness disclosed after expiration of the established deadline unless the court chooses to exercise its equitable discretion. Callister v. Snowbird Corp., 2014, 2014 UT App 243, 771 **Utah** Adv. Rep. 43, 2014 WL 5305967. Pretrial Procedure 45

An abuse of discretion in the amount of a discovery sanction award may be demonstrated by showing that the district court relied on an erroneous conclusion of law or that there was no evidentiary basis for the trial court's ruling. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 961

To show that a trial court abused its discretion in choosing which discovery sanction to impose, a party must show either that the sanction is based on an erroneous conclusion of law or that the sanction lacks an evidentiary basis. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 961

Trial court did not abuse its discretion by awarding seller attorney fees incurred on seller's second motion for discovery sanctions, in purchaser's declaratory judgment action against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill and recover payments previously made, where information that seller had sought in discovery was pertinent to seller's defense, and purchaser's eventual admission, that crane trailer purchaser touted in a bank application was never built, should have been disclosed much earlier in the discovery process. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Trial courts have broad discretion regarding discovery matters, including protective orders. Smith v. Smith, 1999, 995 P.2d 14, 384 **Utah** Adv. Rep. 30, 1999 UT App 370, rehearing denied, certiorari denied 4 P.3d 1289. Pretrial Procedure 19; Pretrial Procedure 41

Generally, trial court is granted broad latitude in handling discovery matters. R & R Energies v. Mother Earth Industries, Inc., 1997, 936 P.2d 1068, 313 **Utah** Adv. Rep. 33, rehearing denied. Pretrial Procedure 19

Time, place, and manner requirements relating to discovery are committed to the discretion of the tribunal. Bennion v. **Utah** State Bd. of Oil, Gas & Min., 1983, 675 P.2d 1135. Pretrial Procedure 19

Tribunal has sufficient discretion to require discovery practices that are fair and effective in circumstances of pending controversy. Bennion v. **Utah** State Bd. of Oil, Gas & Min., 1983, 675 P.2d 1135. Pretrial Procedure 11

Wide latitude of discretion is vested in trial judge in determining whether good cause exists for requiring production of documents. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 **Utah** 2d 310, 495 P.2d 1254. Pretrial Procedure 336

Discovery methods and procedure

Burden is on the discovering party to be diligent in using the available procedures to obtain discovery, and to notify the court when a problem in doing so arises. Rules Civ.Proc., Rule 37. Brown v. Glover, 2000, 16 P.3d 540, 408 **Utah** Adv. Rep. 12, 2000 UT 89, on remand 2001 UT App 52, 2001 WL 298577. Pretrial Procedure 24

Sequence, timing, and condition of cause

The failure of third-party plaintiff property owners to take any steps in pursuit of their claim against title company between the time they purchased the cause of action back from bankruptcy trustee and the expert disclosure deadline was unjustified, and thus, the trial court did not abuse its discretion by declining to relieve the property owners of the automatic exclusion of their expert for their failure to disclose; even if the property owners were confused about their role in the case when the bankruptcy trustee was substituted, any doubt regarding their authority and responsibility to pursue their claim should have been resolved after they bought back the cause of action at auction. R.O.A. General, Inc. v. Chung Ji Dai, 2014, 2014 UT App 124, 761 **Utah** Adv. Rep. 10, 2014 WL 2441850. Pretrial Procedure 45

A discovery request must be served early enough that the responding party will have a full thirty days in which to respond before the discovery deadline. Dahl v. Harrison, 2011, 265 P.3d 139, 695 **Utah** Adv. Rep. 4, 2011 UT App 389, certiorari denied 275 P.3d 1019. Pretrial Procedure 25

Trial court properly granted protective order prohibiting any further discovery against county, in connection with action in which landowners challenged county's approval of construction of railroad loading facility, on basis that all of plaintiffs' substantive claims against county had been resolved when plaintiffs had earlier been granted partial summary judgment. Harper v. Summit County, 1998, 963 P.2d 768, 348 **Utah** Adv. Rep. 7, certiorari granted 982 P.2d 87, affirmed in part, reversed in part **26** P.3d 193, 414 **Utah** Adv. Rep. 21, 2001 UT 10, rehearing denied. Pretrial Procedure 25

Trial court did not err in striking student's motions to compel discovery after motion disposing of the case had been granted, since student could have preserved his right to discovery by seeking continuance of hearing on his first motion and, in view of dismissal, no purpose would be served by defendants' responding to outstanding request for discovery. Reece v. Board of Regents of State of **Utah**, 1987, 745 P.2d 457. Pretrial Procedure 25

Scope of discovery--In general

Trial court acted within its discretion in granting protective order to limit plaintiff's discovery in action seeking recognition of an unsolemnized marriage, where plaintiff's counsel failed to meet with defendant's counsel or schedule a meeting, and order was granted two weeks before trial, after plaintiff had submitted certificate of readiness for trial one year earlier. Richards v. Brown, 2009, 222 P.3d 69, 642 **Utah** Adv. Rep. 25, 2009 UT App 315, certiorari granted 225 P.3d 880, affirmed on other grounds 274 P.3d 911, 704 **Utah** Adv. Rep. 39, 2012 UT 14. Pretrial Procedure 41

"Rebuttal evidence," which party need not disclose pursuant to discovery request, is that which a party may or may not use, depending on the testimony elicited at trial. (Per Greenwood, Associate P.J., with one Judge concurring in result.) Roundy v. Staley, 1999, 984 P.2d 404, 374 **Utah** Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Pretrial Procedure 38

Use of discovery should not be extended to permit ferreting unduly into detail, nor to have effect of cross-examining opposing party or his witnesses nor should it be distorted into fishing expedition in hope that something may be uncovered, but should be confined within proper limits of enabling parties to find out essential facts for legitimate objectives. Rules of Civil Procedure, rules 1(a), 30(b), 33. State By and Through Road Commission v. Petty, 1966, 17 **Utah** 2d 382, 412 P.2d 914. Pretrial Procedure 28

One means of accomplishing objectives of new Rules of Civil Procedure is to permit discovery of information which will aid in eliminating noncontroversial matters and identifying, narrowing and clarifying the issues on which contest may prove to be necessary. Rules of Civil Procedure, rules 1(a), 30(b), 33. State By and Through Road Commission v. Petty, 1966, 17 **Utah** 2d 382, 412 P.2d 914. Pretrial Procedure 27.1

---- Relevancy and materiality, scope of discovery

Ultimate objective of lawsuit is determination of dispute, and whatever helps attain that objective is "relevant" to lawsuit, within discovery rule. Rules of Civil Procedure, rule **26**(b). Ellis v. Gilbert, 1967, 19 **Utah** 2d 189, 429 P.2d 39. Pretrial Procedure 31

---- Probable admissibility at trial, scope of discovery

Report written by former engineer for truck manufacturer was not sufficiently connected to testimony of manufacturer's door latch expert to justify its admission in products liability action brought against truck manufacturer in order to impeach its expert; manufacturer's expert could not properly lay the foundation for the engineer's report because he was not involved in its preparations, and when questioned about his reliance on the engineer's report, expert stated that he had read the engineer's report, eliminated it from the possibilities, and did his own work. Clayton v. Ford Motor Co., 2009, 214 P.3d 865, 632 **Utah** Adv. Rep. 12, 2009 UT App 154, certiorari denied 221 P.3d 837. Evidence 560

Provision of discovery rule authorizing discovery of testimony even though it would not be admissible is not a restriction on inquiry allowed into any matter which is relevant to subject matter of action. Rules of Civil Procedure, rule **26**(b). Ellis v. Gilbert, 1967, 19 **Utah** 2d 189, 429 P.2d 39. Pretrial Procedure 32

---- Witnesses, scope of discovery

No expert report is required where the expert is the party's treating physician. Brussow v. Webster, 2011, 258 P.3d 615, 684 **Utah** Adv. Rep. 44, 2008 UT 6, 2011 UT App 193, certiorari denied 268 P.3d 192. Pretrial Procedure 39

In judicially imposing a deadline for the disclosure of witness lists in a civil case, a court must explicitly, either orally or in writing, impose a month and day deadline. Rules Civ.Proc., Rule 37(b)(2). Rehn v. Rehn, 1999, 974 P.2d 306, 363 **Utah** Adv. Rep. 8, 1999 UT App 41. Pretrial Procedure 40

Requiring condemnor to answer as to what it contended was fair market value of property taken was proper, in condemnation proceeding, even though condemnor may have based his claim as to such value upon advice it had received from expert witnesses. Rules of Civil Procedure, rule 33. State By and Through Road Commission v. Petty, 1966, 17 **Utah** 2d 382, 412 P.2d 914. Pretrial Procedure 39

Requiring condemnor to state names and addresses of its witnesses in condemnation case was not improper particularly where they were supposed to be experts and credence to be given their testimony depended to large extent upon their qualifications. Rules of Civil Procedure, rule 33. State By and Through Road Commission v. Petty, 1966, 17 **Utah** 2d 382, 412 P.2d 914. Pretrial Procedure 40

Railroad's records of conclusions stated by its experts as to cause of railroad accident in which plaintiff's husband was killed were not discoverable even though denial of discovery would cause prejudice, hardship or injustice. Rules of Civil Procedure, rules **26**(b), 30(b), 34. Mower v. McCarthy, 1952, 122 **Utah** 1, 245 P.2d 224. Pretrial Procedure 379

Under Rules of Civil Procedure, writing which reflects the conclusions of an expert based on assumed facts, but not containing evidence of events, conditions, circumstances and similar matters, is not discoverable. Rules of Civil Procedure, rules **26**(b), 30(b), 34. Mower v. McCarthy, 1952, 122 **Utah** 1, 245 P.2d 224. Pretrial Procedure 379

---- Insurance, generally, scope of discovery

A showing of breach of express contract by insurer is not a condition precedent to an insured seeking discovery in connection with ongoing litigation of a bad faith claim. Christiansen v. Farmers Ins. Exchange, 2005, 116 P.3d 259, 523 **Utah** Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Pretrial Procedure 37

Information underlying vehicle valuation comparison (VVC) completed by defendant motorist's insurer was irrelevant to automobile accident case brought by plaintiff truck owners, where defendant's stipulation in open court that she would not use the VVC at trial removed any need plaintiffs had for information to impeach the VVC and where plaintiffs had never suggested they would rely on the VVC at trial, and thus, information underlying the VVC was not subject to discovery. Rules Civ.Proc., Rule **26**(b)(1); Rules of Evid., Rule 401. Major v. Hills, 1999, 980 P.2d 683, 369 **Utah** Adv. Rep. 24, 1999 UT 44. Pretrial Procedure 36.1

Information in possession of uninsured motorist (UM) carrier on similar accidents and injuries, its internal policies and procedures for handling UM claims, and internal aspects of processing of insured's claim were irrelevant in insured's tort suit in which carrier had intervened to dispute uninsured motorist's liability and damages, and, thus, information sought in interrogatories was not subject to discovery; information about other accidents and injuries would not assist in determining degree of negligence or dollar value of insured's injuries, and information on internal policies and procedures would be related only to hypothetical bad faith claim. Rules Civ.Proc., Rule **26**(b)(1). Chatterton v. Walker, 1997, 938 P.2d 255, 312 **Utah** Adv. Rep. 3, rehearing denied. Pretrial Procedure 283

Copy of automobile liability policy of defendant motorist should be produced for plaintiff upon proper demand, but information regarding insurance should not be disclosed to jury. Rules of Civil Procedure, rules **26**(b), 33. Young v. Barney, 1967, 20 **Utah** 2d 108, 433 P.2d 846. Pretrial Procedure 381

Defendant in automobile accident case must answer in discovery procedure whether she was insured, name of insurer, and amount of coverage. Rules of Civil Procedure, rules 1(a), 16, **26**(b), 33. Ellis v. Gilbert, 1967, 19 **Utah** 2d 189, 429 P.2d 39. Pretrial Procedure 180

Privileged matters--In general

Materials which are subject of protective order under Utah Rule of Civil Procedure governing protection from discovery for trade secret or other confidential research, development, or commercial information are not privileged for purposes of Freedom of Information Act trade secret exemption; rather, determination of whether documents contain trade secrets under Freedom of Information Act exemption is to be made solely by applying express exemption for trade secrets and confidential commercial or financial information found in exemption itself. 5 U.S.C.A. § 552(b)(4, 5); Utah Rules Civ.Proc., Rule 26(c)(7). Anderson v. Department of Health and Human Services, 1990, 907 F.2d 936. Records 59

The burden is on the party asserting a privilege to establish that the material sought is protected from discovery. Allred v. Saunders, 2014, 2014 UT 43, 2014 WL 5334034. Privileged Communications and Confidentiality 26

Trial court did not abuse its discretion by entering protective order prohibiting ethanol plant builder from obtaining discovery from city, which purchased electricity generated using energy from geothermal energy producer, of information that was allegedly secret, proprietary, and confidential, in builder's action against producer, claiming that producer had underpaid builder under settlement agreement requiring producer to pay builder amount based on percentage of producer's gross geothermal energy sales revenues; producer submitted affidavits demonstrating that builder was competitor of producer, and information was clearly outside realm of relevant information and was highly sensitive information that might have given builder competitive edge against producer in future energy ventures. Rules Civ.Proc., Rule 26(c). R & R Energies v. Mother Earth Industries, Inc., 1997, 936 P.2d 1068, 313 Utah Adv. Rep. 33, rehearing denied. Pretrial Procedure 41; Privileged Communications And Confidentiality 402

When statutory confidential information privilege or the common-law executive privilege is asserted in opposition to request for discovery, trial court must make an independent determination of extent to which the privilege applies to the material sought to be discovered; such determination is a result of the ad hoc balancing of the interests in the disclosure of the materials, and the government's interests in their confidentiality. U.C.A.1953, 78-24-8; Rules Civ.Proc., Rule 26(b)(1). Madsen v. United Television, Inc., 1990, 801 P.2d 912. Privileged Communications And Confidentiality 354

Where transcript of testimony given by railroad employees in railroad's own investigation of railroad accident did not constitute the reports of railroad accidents required by Federal statutes, discovery of transcript under Rules of Civil Procedure was not prohibited by those Federal statutes. Rules of Civil Procedure, rules 26(b), 30(b), 34; 45 U.S.C.A. §§ 38, 40, 41. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 389

---- Work product, privileged matters

Any material that would not have been generated but for the pendency or imminence of litigation receives attorney work product protection; by contrast, documents produced in the ordinary course of business or created pursuant to routine procedures or public requirements unrelated to litigation do not qualify as attorney work product. Schroeder v. Utah Attorney General's Office, 2015, 2015 UT 77, 794 Utah Adv. Rep. 109, 2015 WL 5037832. Pretrial Procedure 359

Documents created as part of a government actor's official duties receive no protection from disclosure under work product doctrine even if the documents are likely to be the subject of later litigation. Schroeder v. Utah Attorney General's Office, 2015, 2015 UT 77, 794 Utah Adv. Rep. 109, 2015 WL 5037832. Pretrial Procedure 359

Opinion work product, which includes mental impressions, conclusions, opinions or legal theories of an attorney or party, is afforded higher protection than fact work product; however, to utilize the opinion work product privilege, the party asserting it has the burden to establish that it is applicable. Southern Utah Wilderness Alliance v. Automated Geographic Reference Center, Division of Information Technology, 2008, 200 P.3d 643, 620 Utah Adv. Rep. 8, 2008 UT 88. Pretrial Procedure 35

Acts performed by a public employee in the performance of his official duties are not prepared in anticipation of litigation or for trial merely by virtue of the fact that they are likely to be the subject of later litigation; instead they are performed in the ordinary course of business and are not protected from disclosure under the work product doctrine. Southern Utah Wilderness

Alliance v. Automated Geographic Reference Center, Division of Information Technology, 2008, 200 P.3d 643, 620 **Utah** Adv. Rep. 8, 2008 UT 88. Pretrial Procedure 36.1

Trial court could not order that death-sentenced defendant produce all documents relating to defendant's communications with appointed post-conviction counsel and pro-bono attorneys who originally represented defendant, for purposes of State's response to defendant's claim that he received ineffective assistance of post-conviction counsel, in motion to set aside default judgment dismissing post-conviction petition, until State first made showing that it had substantial need for documents which it could not, without undue hardship, obtain by other means, that communications were at issue, and that documents had been edited to prevent unnecessary disclosure of irrelevant information. Menzies v. Galetka, 2006, 150 P.3d 480, 567 **Utah** Adv. Rep. 15, 2006 UT 81. Criminal Law 1590

There is a sense in which an attorney's mental impressions, conclusions, and opinions of an attorney constitute the facts of the case and therefore may be discoverable; however, this exception must be applied very carefully in ineffective assistance of counsel cases because a discovery policy whereby counsel's files can be freely accessed in subsequent proceedings has the potential to significantly impair the trial preparation process. Menzies v. Galetka, 2006, 150 P.3d 480, 567 **Utah** Adv. Rep. 15, 2006 UT 81. Criminal Law 1590

Certain materials otherwise subject to discovery are, upon appropriate objection, protected from disclosure and introduction into evidence because of their creation by an attorney in preparation for litigation. Rules Civ.Proc., Rule **26**(b)(3). Featherstone v. Schaerrer, 2001, 34 P.3d 194, 432 **Utah** Adv. Rep. 6, 2001 UT 86, rehearing denied. Pretrial Procedure 359

“Peace letter” in which insurer of both passenger who was injured in head-on collision, and driver of oncoming vehicle, had allegedly made unconditional promise to pay any judgment rendered against driver in action arising from collision, was prepared in anticipation of litigation, and thus was protected from discovery by attorney work-product privilege, even though letter was not prepared by an attorney. Rules Civ.Proc., Rule **26**(b)(3). Green v. Louder, 2001, 29 P.3d 638, 426 **Utah** Adv. Rep. 25, 2001 UT 62. Pretrial Procedure 359

Therapy records of husband, wife, and children which independent custody evaluator relied on in recommending that wife's visitation be supervised were not prepared in anticipation of litigation, as required for discovery of documents prepared in anticipation of litigation. Rules Civ.Proc., Rule **26**(b)(3). Smith v. Smith, 1999, 995 P.2d 14, 384 **Utah** Adv. Rep. 30, 1999 UT App 370, rehearing denied, certiorari denied 4 P.3d 1289. Divorce 85

Surveillance videotape of plaintiff was not protected from disclosure as attorney work-product in automobile negligence action, where videotape was prepared in anticipation of introduction at trial. (Per Greenwood, Associate P.J., with one Judge concurring in result.) Rules Civ.Proc., Rule **26**(b)(1). Roundy v. Staley, 1999, 984 P.2d 404, 374 **Utah** Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Pretrial Procedure 383

While procedural rule mandates that protection against discovery of attorney's or representative's mental impressions, conclusions, opinions or legal theories be provided, such protections would not screen information directly at issue. Rules Civ.Proc., Rule **26**(b)(3). Salt Lake Legal Defender Ass'n v. Uno, 1997, 932 P.2d 589, 309 **Utah** Adv. Rep. 11. Criminal Law 627.5(6)

In prisoner's action for postconviction relief based on claim of ineffective assistance of trial counsel, “at issue” exception to work product immunity did not apply across the board to documents and files in possession of legal defense association which had employed prisoner's trial counsel, but would only apply upon special showing by state for specific document; client's adversary was seeking access to files rather than client, at issue was performance of counsel during preparation and trial rather than solely counsel's internal processes in compiling file, and ineffective assistance of counsel was in significant part question of behavior observable from record and ascertainable from counsel's testimony. U.S.C.A. Const.Amend. 6; Rules Civ.Proc., Rule **26**(b)(3). Salt Lake Legal Defender Ass'n v. Uno, 1997, 932 P.2d 589, 309 **Utah** Adv. Rep. 11. Criminal Law 1590

Documents in insurance claim file may qualify for work-product protection if there is sufficient evidence to show that documents were prepared in anticipation of litigation. Rules Civ.Proc., Rule **26**(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Documents in liability insurer's claim file, including insured horse owner's statement to adjuster following motor vehicle collision with horse, could be found to be protected as work product in tort action by injured passenger against owner; owner informed police of fear of suit for his animal causing the accident, insurer investigated pursuant to attorney's instructions for potential legal claims, and evidence thus indicated that documents were prepared in anticipation of litigation. Rules Civ.Proc., Rule **26**(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Whether document prepared by insurer is prepared in anticipation of litigation and is protected work product is question of fact to be determined by trial court on basis of evidence before it. Rules Civ.Proc., Rule **26**(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Court of Appeals erroneously concluded that document generated in investigation of accident involving insured and third party is generally discoverable; rather, documents in insurance claim file may be protected as work product. Rules Civ.Proc., Rule **26**(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Case-by-case approach applies to determining whether documents in insurance claim file are protected work product prepared in anticipation of litigation; trial court should consider nature of requested documents, reason for preparation of documents, relationship between preparer of document and party seeking its protection from discovery, relationship between litigating parties, and any other facts relevant to the issue. Rules Civ.Proc., Rule **26**(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Attorney need not be involved for document in insurance claim file to be deemed work product prepared in anticipation of litigation. Rules Civ.Proc., Rule **26**(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Report prepared by insurance adjuster was not entitled to work-product protection; fact that no attorney was involved in preparation of claim file suggested that it was prepared in ordinary course of business, and not in anticipation of litigation. Rules Civ.Proc., Rule **26**(b)(3). Askew v. Hardman, 1994, 884 P.2d 1258, certiorari granted 892 P.2d 13, reversed 918 P.2d 469. Pretrial Procedure 381

Documents which convey mental impressions, conclusions, opinions, or legal theories of attorney or party will be afforded heightened protection under work-product privilege as “opinion work product.” Rules Civ.Proc., Rule **26**(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 359

Attorney involvement is only one factor to be weighed in reaching conclusion of whether documents sought in discovery are protected by work-product privilege; plain language of rule does not require that attorney be involved in preparation of material. Rules Civ.Proc., Rule **26**(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 359

Fact that no attorney was involved may suggest that document was prepared in ordinary course of business and not in anticipation of litigation, so that work-product privilege would not apply. Rules Civ.Proc., Rule **26**(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 359

Inquiry to determine whether document was prepared in anticipation of litigation for purposes of work-product privilege should focus on primary motivating purpose behind creation of document; if primary purpose behind creation of document is not to

assist in pending or impending litigation, then work-product protection is not justified. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 359

Inaction and delay of one year in filing motion for protective order constituted independent waiver of right to work product privilege over mining company memoranda discussing claim by mining partner of contractual requirement for independent feasibility study. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Mining company waived work-product privilege for memoranda discussing mining partner's claim regarding contract requirement for independent feasibility study where mining company allowed memoranda to become part of general reading file circulated among its employees without much regard for confidentiality and, as a result, employee obtained copies of memoranda and turned them over to mining partner; work-product protection was waived when disclosure substantially increased opportunity for potential adversaries to obtain information. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Inadvertent disclosure by mining company of memoranda discussing results of internal investigation resulted in waiver of work-product privilege regarding memoranda where mining company voluntarily produced memoranda in response to demand for production of documents, memoranda were used during five different depositions, and mining company did not file motion for protective order until full year after it knew that opponent had memoranda and until three months after their last use. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Letter whose tone is threatening but which does not state intent to pursue litigation is insufficient to allow party to invoke work-product protection to protect in-house report prompted by letter. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Mere possibility that litigation may occur, even mere fact that litigation does eventually ensue, is insufficient to cloak materials with mantle of work-product protection. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 35

For written materials to fall under work-product protection, three criteria must be met: material must be documents and tangible things otherwise discoverable, prepared in anticipation of litigation or for trial, by or for another party or for or by that party's representative; even if these requirements are met, however, privilege does not apply if party seeking discovery can show need for information and that it cannot be obtained without substantial hardship. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 35; Pretrial Procedure 359

Memoranda of mining company in response to letter from mining partner stating that mining company had not provided independent feasibility study as required by agreement were not written to assist in pending or impending litigation so that work-product privilege would not apply, even though mining partner filed lawsuit two and one-half years after letter, where letter addressed wrongs perceived by partner but did not threaten litigation, letter expressed partner's interest in purchasing mine from mining company, and memoranda were apparently written in ordinary course of business as part of mining company investigation to determine whether feasibility study had been performed. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Document must have been either created for use in pending or impending litigation or intended to generate ideas for use in such litigation to meet “prepared in anticipation of litigation or for trial” element of work product doctrine. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 801 P.2d 909. Pretrial Procedure 359

There are three essential requirements for materials to be protected by work product doctrine: material must consist of documents or tangible things; material must be prepared in anticipation of litigation or for trial; and material must be prepared by or for another party or by or for that party's representative. Rules Civ.Proc., Rule **26**(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 801 P.2d 909. Pretrial Procedure 35; Pretrial Procedure 359

Letter to attorney outlining retainer agreement and setting plan for allocating costs and burdens among clients in event they should be involved in litigation was not protected by work product doctrine; although letter was prepared because of threatened suit against clients, its primary purpose was not to assist in pending or impending litigation. Rules Civ.Proc., Rule **26**(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 801 P.2d 909. Pretrial Procedure 371

Condemnor's witness' appraisal report did not lie within protection of attorney's work product immunity from discovery, and refusal to order production of report for use in condemnee's cross-examination of such witness in eminent domain proceeding was prejudicial error. Rules of Civil Procedure, rules 1(a), **26**(b)(4)(A); Const. art. 1, § 22. **Utah** Dept. of Transp. v. Rayco Corp., 1979, 599 P.2d 481. Eminent Domain 262(5); Pretrial Procedure 379

Record of emissions from defendant's smelter facilities, which plaintiffs suing for damage to their motor vehicles allegedly caused by emissions sought to examine, and which had been forwarded to defendant's legal counsel allegedly in anticipation of litigation, did not qualify as a "privileged communication." Jackson v. Kennecott Copper Corp., 1972, 27 **Utah** 2d 310, 495 P.2d 1254. Pretrial Procedure 359; Privileged Communications And Confidentiality 142

In Rules of Civil Procedure which allow discovery of various documents but which prohibit discovery of "any part of the writing" which is attorney's work product, use of the words "the writing" was proper and correct to refer to the writing of which discovery is sought, the reference being to a definite writing, and prohibition would be so construed to be in harmony with the purpose of protecting the work product of the attorney. Rules of Civil Procedure, rules **26**(b), 30(b), 34. Mower v. McCarthy, 1952, 122 **Utah** 1, 245 P.2d 224. Pretrial Procedure 359

Where denial of discovery of document would have caused prejudice, hardship and injustice, document was discoverable without regard to whether it was prepared in anticipation of litigation or in preparation for trial. Rules of Civil Procedure, rules **26**(b), 30(b), 34. Mower v. McCarthy, 1952, 122 **Utah** 1, 245 P.2d 224. Pretrial Procedure 359

Proceedings to secure production of documents and things--In general

Trial court did not abuse its discretion in excluding, as a discovery sanction, evidence of attorney fees incurred by assignee of deed of trust beneficiary after discovery cutoff date, and denying its request for additional attorney fees, in action against purchasers to foreclose on property purchasers acquired at a sheriff's sale, where purchasers requested that beneficiary produce "copies of all documents or other items" that it intended to introduce into evidence, and assignee's response stated that it had not yet designated documents for trial; under amended version of rule on a party's duty to supplement discovery responses, assignee had a duty seasonably to amend its prior response. Rules Civ.Proc., Rule **26**(e). American Interstate Mortg. Corp. v. Edwards, 2002, 41 P.3d 1142, 439 **Utah** Adv. Rep. 20, 2002 UT App 16. Pretrial Procedure 403; Pretrial Procedure 434

Even if unamended version of rule requiring parties to supplement discovery responses applied, trial court did not abuse its discretion in imposing discovery sanctions excluding evidence of attorney fees incurred by assignee of deed of trust beneficiary after discovery cutoff, and denying assignee's request for additional attorney fees, in assignee's foreclosure action; assignee's responses to discovery requests were varied and contradictory, and responses did not identify what documents purchasers were entitled to inspect. Rules Civ.Proc., Rule **26**(e). American Interstate Mortg. Corp. v. Edwards, 2002, 41 P.3d 1142, 439 **Utah** Adv. Rep. 20, 2002 UT App 16. Pretrial Procedure 403; Pretrial Procedure 434

Order compelling plaintiff to produce documents she alleged had been altered by defendants was essentially one demanding a response to discovery, not requiring document production only, and thus, even though plaintiff alleged that no altered documents

existed, she was required to state so in written response. Rules Civ.Proc., Rules 26(c), 34(b), 37(b)(2)(C). Hales v. Oldroyd, 2000, 999 P.2d 588, 391 Utah Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. Pretrial Procedure 403

---- Affidavits and showing, proceedings to secure production of documents and things

Good cause for production of documents is shown where the full, accurate disclosure of facts, which it is the purpose of the discovery process to secure, could not be accomplished through other means. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 405

Party moving for order compelling production of documents must make showing not only that the documents are relevant and are in the possession of the other party, but that the documents sought are necessary for proof of the case and either cannot be obtained in any other way or that obtaining them another way would involve extraordinary expense that the moving party should not in fairness be expected to bear. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 404.1

Determination that showing of good cause had been made to compel corporation operating smelter facilities to produce records of emissions for examination by plaintiffs who claimed their motor vehicles were damaged by acid or other harmful substances flowing into air about the smelter facilities was not an abuse of discretion. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 405

Defendant corporation asserting that record of emissions from smelter facilities which had been forwarded to legal counsel was not subject to discovery had burden of proving that the record was a privileged communication. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Privileged Communications And Confidentiality 173

Elements of prejudice, hardship, or injustice necessary to the discovery of documents prepared in anticipation of litigation or in preparation for trial are sufficiently shown where party seeking discovery is with due diligence, unable to obtain evidence of some material facts, events, conditions and circumstances which the discovery will probably reveal, and where, because of this situation, the party is unable to adequately prepare the case for trial. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 404.1

On motion for production of transcript of testimony by railroad employees given in railroad's investigation of 1944 accident, although plaintiff's showing on motion was only that her case was weak and was not necessarily that she had been unable to obtain evidence of the cause of the accident, in view of fact that witnesses who knew facts were employed by defendant and that until recently many of them were unknown to plaintiff and that facilities and equipment involved in the accident had at all times been under control of defendant and had not been available to plaintiff for inspection, showing was sufficient for granting of motion. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 404.1

---- Determination, proceedings to secure production of documents and things

Trial court was required, under the new evidence exception to the law of the case doctrine, to reconsider previous order denying seller discovery sanctions on seller's first motion for sanctions, when trial court awarded seller sanctions on seller's second motion for discovery sanctions in declaratory judgment action purchaser brought against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill, where both sanction motions involved seller's discovery requests seeking information on purchaser's asserted collaboration with a crane broker on a custom designed crane trailer, purchaser's prior responses implied that the information existed though purchaser asserted that seller's requests were overbroad, and by the time that seller made second motion for sanctions purchaser had admitted that the trailer was never built. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Courts 99(6)

When official confidence privilege is claimed, trial court must balance competing interests through an in camera examination of the materials for which the privilege is claimed; such review enables trial court to allow or disallow discovery as to individual items for which the privilege is claimed, or to excise or edit from individual items those matters which it determines to come within the scope of the privilege, or to take other protective measures pursuant to civil procedure rule. Rules Civ.Proc., Rule **26**(c); U.C.A.1953, 78-24-8. Madsen v. United Television, Inc., 1990, 801 P.2d 912. Privileged Communications And Confidentiality 351

Although ability of movant seeking order for production of documents to obtain the desired information by other means is relevant in determining existence of good cause, the real question is whether the movant can obtain the facts without production of the documents. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 **Utah** 2d 310, 495 P.2d 1254. Pretrial Procedure 411

Question whether portions of writings sought by discovery come within prohibitions protecting attorney's work product and expert's conclusions should be determined without permitting opposing counsel to see the questioned matter and, to do this, the parts of the transcript which it is claimed are not discoverable should be submitted to the court for it to decide. Rules of Civil Procedure, rules **26**(b), 30(b), 34. Mower v. McCarthy, 1952, 122 **Utah** 1, 245 P.2d 224. Pretrial Procedure 411

Objections and protective orders

Patient waived her objection to hospital's use as trial exhibit a Computed Tomography (CT) scan that was not specifically identified during pretrial discovery process, in medical malpractice action, as patient specifically designated the CT scan as a trial exhibit and then used select images from it at trial, and patient failed to object to the listing of all of patient's medical records when she submitted her other objections to the hospital's trial exhibits. Turner v. University of **Utah** Hosp., 2011, 271 P.3d 156, 698 **Utah** Adv. Rep. 51, 2011 UT App 431, certiorari granted 280 P.3d 421, reversed 310 P.3d 1212, 741 **Utah** Adv. Rep. 51, 2013 UT 52. Pretrial Procedure 413.1

Insurer failed to show good cause for a protective order against discovery in insureds' bad faith suit, even though they had not yet established breach of contract; the claims of breach of express contract and bad faith were premised on distinct duties that gave rise to divergent and severable causes of action. Christiansen v. Farmers Ins. Exchange, 2005, 116 P.3d 259, 523 **Utah** Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Pretrial Procedure 41

A party seeking a protective order has the burden of showing that good cause exists for issuance of that order. Christiansen v. Farmers Ins. Exchange, 2005, 116 P.3d 259, 523 **Utah** Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Pretrial Procedure 41

District court is entrusted with broad discretion in dealing with discovery matters, including protective orders. In re Discipline of Pendleton, 2000, 11 P.3d 284, 405 **Utah** Adv. Rep. 3, 2000 UT 77. Pretrial Procedure 41

The failure to respond in writing to a discovery request is not excused on the basis that the discovery is objectionable, absent a written objection or motion for a protective order. Rules Civ.Proc., Rules **26**(c), 34(b). Hales v. Oldroyd, 2000, 999 P.2d 588, 391 **Utah** Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. Pretrial Procedure 41

Trial court did not abuse its discretion in issuing protective order preventing wife from discovering therapy records of husband, wife, and children which independent custody evaluator relied on in recommending that wife's visitation be supervised, where affidavits of child therapist and guardian ad litem stated release of records could be damaging to the children and the protective order was less restrictive of discovery than a similar protective order wife later requested. Rules Civ.Proc., Rule **26**(c)(4). Smith v. Smith, 1999, 995 P.2d 14, 384 **Utah** Adv. Rep. 30, 1999 UT App 370, rehearing denied, certiorari denied 4 P.3d 1289. Divorce 86

Rule of civil procedure providing for protective orders upon showing of good cause applies to public records, including judicial records, under the Public and Private Writings Act; the Act is intended to apply to documents filed in court in the absence of a specific order of court to the contrary. U.C.A.1953, 78-**26**-1 to 78-**26**-8; Rules Civ.Proc., Rules **26**, **26**(c), Const. Art. 8, § 4. Carter v. **Utah** Power & Light Co., 1990, 800 P.2d 1095. Records 32; Records 34

Pretrial depositions filed with clerk of court but not used by the litigants in court are "judicial records" and thus "public writing" subject to public access under the Public and Private Writings Act, absent a showing of good cause necessary to secure a protective order from the court; rule providing for sealing of such depositions is not a mandate for secrecy but is intended to safeguard the integrity of the depositions. U.C.A.1953, 78-**26**-1 to 78-**26**-8; Rules Civ.Proc., Rules 5(d), **26**(c), 30(f)(1); Judicial Administration Rules 4-202, 4-502(4); Const. Art. 8, § 12. Carter v. **Utah** Power & Light Co., 1990, 800 P.2d 1095. Records 32

Sanctions for failure to disclose--In general

When reviewing the imposition of discovery sanctions, appellate courts first consider whether the district court has made a factual finding that the party's behavior merits sanctions, and any such finding will be upheld unless it is clearly erroneous. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 1024.3

District court made a factual finding that purchaser's behavior merited a discovery sanction, in purchaser's declaratory judgment action against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill and recover payments previously made, though the district court's finding stated that purchaser's positions in response to seller's discovery motions were inconsistent, where the court's imposition of a not insignificant sanction demonstrated that the court did not accept purchaser's explanations for the inconsistencies. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Though a district court must find on the part of the noncomplying party willfulness, bad faith, fault, or persistent dilatory tactics frustrating the judicial process, prior to entering discovery sanctions, a trial court need not specifically state that willfulness, bad faith, fault, or persistent dilatory tactics are present to impose sanctions. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Trial court was within its discretion in striking all but two of gym member's experts as sanction for member's failure to comply with discovery, in member's action for injuries sustained in trip and fall in gym parking lot; member filed expert designation well after deadline had passed, failed to include expert reports, identified one expert by first name only, and after a stipulated extension, only provided a report from only one of five designated experts. Johnson v. Gold's Gym, 2009, 206 P.3d 302, 626 **Utah** Adv. Rep. 6, 2009 UT App 76, certiorari denied 215 P.3d 161. Pretrial Procedure 45

Necessary prerequisite to imposition of sanction for party's failure to cooperate in discovery is order that brings the offender squarely within possible contempt of court. Rules Civ.Proc., Rules **26**(f), 37(b)(2). Berrett v. Denver and Rio Grande Western R. Co., Inc., 1992, 830 P.2d 291, certiorari denied 836 P.2d 1383. Pretrial Procedure 44.1

---- Dismissal or striking of pleading, sanctions for failure to disclose

Trial court did not abuse its discretion in dismissing plaintiff's complaint as discovery sanction, where plaintiff failed to respond in any way to court order compelling her to produce documents she alleged had been altered, and record indicated that plaintiff had repeatedly delayed in responding to discovery, failed to timely file pleadings, and failed to timely provide specific witness lists. Rules Civ.Proc., Rules **26**(c), 34(b), 37(b)(2)(C). Hales v. Oldroyd, 2000, 999 P.2d 588, 391 **Utah** Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. Pretrial Procedure 46; Pretrial Procedure 435

---- Preclusion of evidence or witnesses, sanctions for failure to disclose

Expert report which contained three new damages theories not disclosed during discovery was inadmissible in secondary lender's action against borrower and bank for unjust enrichment, fraud, and other tort claims; secondary lender disclosed during initial discovery period that its damages "constitute the funds advanced, together with interest at the legal rate, less the payment received" from primary lender and clarified in response to request for admission that he sought interest at the legal rate as provided by statute, report included three new damages theories, including the benefit of the bargain rule, the modified benefit of the bargain rule, and the comparable rate of return theory, secondary lender's citation to statute was insufficient to constitute disclosure of the "computation of any category of damages claimed by the disclosing party," and borrower and bank were prejudiced by the late disclosure due to their inability to discover asserted essential facts such at secondary lender's loan history and ability to lend money to others in lieu of loan which ultimately went to borrower. Bodell Const. Co. v. Robbins, 2009, 215 P.3d 933, 636 **Utah** Adv. Rep. 3, 2009 UT 52. Pretrial Procedure 45

Plaintiff's attorney should have anticipated that his failure to comply with defendant's discovery requests would result in sanctions of not allowing one witness to testify and limiting the testimony of another witness at negligence trial, and thus, relief from judgment on grounds that attorney was "surprised" by the sanctions was not warranted, even though attorney claimed he notified defense counsel orally of his intent to call a number of witnesses at trial, where attorney did not produce documents and expert reports in response to discovery requests and failed to supplement interrogatories, and attorney failed to identify witnesses in writing with required disclosures for expert witnesses. Rukavina v. Sprague, 2007, 170 P.3d 1138, 588 **Utah** Adv. Rep. 18, 2007 UT App 331. Pretrial Procedure 45; Pretrial Procedure 313; Pretrial Procedure 434

Trial court did not abuse its discretion in excluding independent medical examiner's testimony that it was nearly impossible that fall in parking lot caused plaintiff's back injury as discovery sanction for defendant's failure to supplement its responses to interrogatories asking defendant to articulate its affirmative defenses, where defendant did not provide examiner's causation opinion until three days before trial. Rules Civ.Proc., Rules **26**, 37(b)(2). Stevenett v. Wal-Mart Stores, Inc., 1999, 977 P.2d 508, 365 **Utah** Adv. Rep. 10, 1999 UT App 80. Pretrial Procedure 312

Trial court did not abuse its discretion in limiting independent medical examiner's testimony that it was nearly impossible that fall in parking lot caused plaintiff's back injury as discovery sanction for defendant's failure to give complete answer in its interrogatories regarding affirmative defenses it would assert, where defendant did not provide examiner's causation opinion until three days before trial. Rules Civ.Proc., Rules **26**, 37(b)(2). Stevenett v. Wal-Mart Stores, Inc., 1999, 977 P.2d 508, 365 **Utah** Adv. Rep. 10, 1999 UT App 80. Pretrial Procedure 312

Expert witnesses

Evidence supported finding that motorist's wife failed to timely disclose her intent to rely on highway patrol officer as an expert witness, in negligence action against defendant driver and others following fatal automobile accident; motorist's wife disclosed that officer would be a trial witness, but failed to designate officer as an expert. Solis v. Burningham Enterprises Inc., 2015, 2015 UT App 11, 778 **Utah** Adv. Rep. 44, 2015 WL 178249. Pretrial Procedure 39

The expert disclosure discovery rule contemplates that all persons who may provide opinion testimony based on experience or training will be identified, but that only retained or specially employed experts are required to also provide an expert report. Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 **Utah** Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 40

Treating physicians do not fall into the category of "retained or specially employed" expert witnesses, and expert reports as mentioned in the expert disclosure discovery rule are not required for treating physicians who will testify as experts. Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 **Utah** Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 39; Pretrial Procedure 40

Treating physicians must be disclosed as expert witnesses under the expert disclosure discovery rule if they will provide opinion testimony based on their experience or training. Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 **Utah** Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 40

Plaintiff's disclosure of his intent to call treating physicians as fact witnesses was not sufficient to allow the admission of their expert opinions on causation in negligence action; treating physicians were required to be designated as experts if they were to provide expert testimony. Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 **Utah** Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 45

Third-party plaintiff property owners' challenge to the trial court's dismissal of their claim against title company for failure to prosecute, after they purchased their cause of action back from bankruptcy trustee, was moot, given their inability to establish damages after the automatic exclusion of their expert report for failing to comply with the discovery rules regarding disclosure of expert witnesses. R.O.A. General, Inc. v. Chung Ji Dai, 2014, 2014 UT App 124, 761 **Utah** Adv. Rep. 10, 2014 WL 2441850. Pretrial Procedure 587

Court of Appeals reviews district court's exclusion of expert for abuse of discretion. Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 **Utah** Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707. Appeal and Error 961

Any error in district court's permitting psychiatric physician to testify as an expert was invited by Office of Professional Conduct (OPC) in attorney disciplinary proceeding, so that OPC could not take advantage of the alleged error on appeal; OPC asked physician on cross-examination to opine on causation of attorney's misconduct, thus “opening the door” to the very kind of expert testimony of which OPC complained on appeal. In re Discipline of Corey, 2012, 274 P.3d 972, 705 **Utah** Adv. Rep. 40, 2012 UT 21. Attorney And Client 57

An expert report in pretrial discovery in divorce proceedings is required only if not otherwise stipulated by the parties or ordered by the court. Liston v. Liston, 2011, 269 P.3d 169, 698 **Utah** Adv. Rep. 24, 2011 UT App 433. Divorce 85

Former client's expert disclosures in legal malpractice case were not timely, because they were clearly inadequate. Dahl v. Harrison, 2011, 265 P.3d 139, 695 **Utah** Adv. Rep. 4, 2011 UT App 389, certiorari denied 275 P.3d 1019. Pretrial Procedure 44.1

Formal disclosure of experts is not pointless; knowing the identity of the opponent's expert witnesses allows a party to properly prepare for trial, including attempting to disqualify the expert testimony, retaining rebuttal experts, and holding additional depositions to retrieve the information not available because of the absence of a report. Brussow v. Webster, 2011, 258 P.3d 615, 684 **Utah** Adv. Rep. 44, 2008 UT 6, 2011 UT App 193, certiorari denied 268 P.3d 192. Pretrial Procedure 40

Whether the cost rule allows recovery for expert preparation time is a question of law, and the trial court's legal conclusions are reviewed for correctness. Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 **Utah** Adv. Rep. 15. Appeal and Error 842(2); Costs 208

Fees for expert time spent preparing for depositions are recoverable, as long as the fees are reasonable. Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 **Utah** Adv. Rep. 15. Costs 187

When determining reasonableness of expert fees for time spent preparing for depositions, factors that can but are not required to be considered include the number of hours spent preparing for the deposition, the amount of material needing to be reviewed, the scope of the deposition, and the time between the expert's preparation of the report and the taking of the deposition. Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 **Utah** Adv. Rep. 15. Costs 187

Expert testimony changed

Changes to expert's deposition after again reviewing patient's records and reading a deposition of another expert were new testimony, rather than change or supplementation, and, therefore, were properly struck in medical malpractice action; the changes did not revise incorrect information and were not minor. Daniels v. Gamma West Brachytherapy, LLC, 2009, 221 P.3d 256, 640 **Utah** Adv. Rep. 8, 2009 UT 66, rehearing denied. Pretrial Procedure 202

Written expert report

Good cause did not exist for townhome association's failure to comply with deadline for submitting expert report specified in amended case management order in construction defect action, such that trial court did not abuse its discretion in excluding association's expert, despite argument that association had agreement with developer to modify order to extend deadline; third-party defendants had also agreed to be bound by order, and reliance on agreement with only some defendants was unreasonable and did not justify extension of discovery deadline. Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 **Utah** Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707. Pretrial Procedure 45

Townhome association's failure to timely disclose its expert in construction defect action was not harmless, such that trial court did not abuse its discretion in excluding expert, despite contention that association's final expert report would be "largely identical" to its preliminary report; preliminary report failed to properly identify association's expert in such a way as to enable developer and subcontractors to depose expert, attempt to disqualify expert, or retain rebuttal experts, report did not address scope of claimed damages, and substantial discovery would need to be revisited or performed to respond to disclosure. Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 **Utah** Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707. Pretrial Procedure 45

Treating physician who planned to testify at trial was not retained or specially employed to testify, and therefore was not required to file written expert report pursuant to rule governing production of written expert reports in action by motorcyclist against driver of automobile arising from automobile accident; plain language of rule suggested that a "retained or specially employed" expert was a person a party hired and paid to express a particular expert opinion for the purposes of litigation, and the substance, sources, or scope of the physician's proposed testimony was irrelevant, as the court simply looked to the status of the individual as a treating physician. Drew v. Lee, 2011, 250 P.3d 48, 678 **Utah** Adv. Rep. 4, 2011 UT 15. Pretrial Procedure 379

Jurisdiction

Trial courts may determine jurisdiction on affidavits alone, permit discovery, or hold an evidentiary hearing. (Per Durham, J., with one Justice concurring and two Justices concurring in the result.) Phone Directories Co., Inc. v. Henderson, 2000, 8 P.3d 256, 402 **Utah** Adv. Rep. 7, 2000 UT 64. Courts 39; Pretrial Procedure 24

Admissibility of evidence

Plaintiff's untimely designation of expert witnesses prejudiced defendant in negligence action arising out of automobile accident, and therefore trial court properly excluded testimony of witnesses, where untimely disclosure impaired defendant's ability to defend against plaintiff's claims because defendant did not have opportunity to depose expert witnesses, and fact witnesses' memories could have faded due to protracted nature of the litigation. Brussow v. Webster, 2011, 258 P.3d 615, 684 **Utah** Adv. Rep. 44, 2008 UT 6, 2011 UT App 193, certiorari denied 268 P.3d 192. Pretrial Procedure 45

Sufficiency of evidence

Evidence was sufficient to establish that purchaser of construction cranes and associated goodwill engaged in actions that warranted the imposition of discovery sanctions, in purchaser's declaratory judgment action against seller seeking to rescind its obligation to pay for goodwill and recover payments previously made; there was evidence that purchaser was aware at hearing on seller's second motion to compel that seller was seeking information regarding the time frame of purchaser's asserted

collaboration with a crane broker on a custom designed crane trailer, that purchaser's responses implied that the subject matter of the requests was extant though purchaser objected that the requests were overbroad, that seller was thus encouraged to pursue the information through additional discovery and judicial resources, and that purchaser through reasonable inquiry could have determined that the trailer was never built. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Summary judgment

Purpose of discovery and of summary judgment procedures is to furnish method of searching out and facilitating resolution of issues which are not in dispute, and of settling rights of parties without time, trouble and expense of trial, and it is indispensable to carrying out of that purpose that parties furnish essential information when it is requested in conformity with rules of procedure. Rules of Civil Procedure, rules 31, 33, 37, 56(c). Transamerica Title Ins. Co. v. United Resources, Inc., 1970, 24 **Utah** 2d 346, 471 P.2d 165. Judgment 178; Pretrial Procedure 14.1; Pretrial Procedure 15

New trial

There was no error in denial of new trial on theory of surprise testimony where pretrial statement of officer who investigated accident, stating that plaintiff had said that he could not get out of way of automobile before it struck him, was not necessarily inconsistent with officer's trial testimony that plaintiff said he had “sprinted” across the road, and since the “surprise” claimed could not be so categorized since it could have been easily guarded against by the utilization of available discovery procedures. Rules of Civil Procedure, rules **26** et seq., 59, 59(a)(3). Anderson v. Bradley, 1979, 590 P.2d 339. New Trial 90; New Trial 95

Plaintiff in automobile accident case was not entitled to a new trial on the ground that he was surprised by testimony of defendant's expert witness regarding the cause of plaintiff's transient ischemic attacks, since plaintiff failed to timely object to the witness' testimony; in view of the fact that defendant, in answer to an interrogatory, had stated in substance that she would call the witness to testify concerning Raynaud's disease, an objection by plaintiff should have been immediately made when the witness at trial mentioned transient ischemic attacks and added “which I imagine, would be pertinent to address here.” Rules of Civil Procedure, rules **26**(e)(1), 59(a)(3). Jensen v. Thomas, 1977, 570 P.2d 695. New Trial 97

Costs

In order to support award of prevailing costs for copies of depositions of patient and her husband, and members of patient's family, copies had to be essential to prevailing hospital's defense of malpractice case; finding that costs were “reasonable and necessary” was insufficient by itself, even if plaintiff's deposition was included in trial record and several depositions were used for impeachment. Young v. State, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 154; Costs 208

Absent showing that deposition of patient's expert was necessary to develop hospital's defense to malpractice claim, prevailing hospital would not be entitled to award of costs for deposition, notwithstanding fact that expert's opinion was necessary for patient to make her case. Young v. State, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 154

Prevailing party may recover deposition costs as long as the trial court is persuaded that the depositions were taken in good faith and, in the light of the circumstances, appeared to be essential for the development and presentation of the case. Young v. State, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 154

Costs of depositions not used at trial may be recovered if the trial court determines, in addition to finding that deposition was taken in good faith, that the deposition was essential to the case, either because the deposition was used in some meaningful way at trial or because the development of the case was of such a complex nature that the information provided by the deposition could not have been obtained through less expensive means of discovery. Young v. State, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 154

Copies of patient's depositions of hospital's doctors were not essential to hospital's defense of malpractice claim, as would permit hospital to recover cost of copies as prevailing party in suit, where depositions were of hospital's own employees, were used only by plaintiff in her case in chief, and hospital had other methods of acquiring information contained in depositions. Young v. State, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 154

Witness fee of $1,000 paid by hospital to secure attendance of patient's expert at his deposition, to extent it exceeded witness fee allowed by statute, was not recoverable by hospital as part of prevailing party costs. U.C.A.1953, 21-5-4; Rules Civ.Proc., Rule 30(a). Young v. State, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 187

Review--In general

If a finding that a party's conduct merits discovery sanctions has been made and upheld on appeal, an appellate court will not disturb the amount of the sanction unless abuse of discretion is clearly shown. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 961

Denial of motion for a protective order is reviewed for an abuse of discretion, but to extent that the denial is based on the district court's interpretation of binding case law, it is reviewed for correctness. Christiansen v. Farmers Ins. Exchange, 2005, 116 P.3d 259, 523 **Utah** Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Appeal And Error 840(4); Appeal And Error 961

Generally, the trial court is granted broad latitude in handling discovery matters, and appellate courts will not find abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court's rulings. Thurston v. Workers Compensation Fund of **Utah**, 2003, 83 P.3d 391, 490 **Utah** Adv. Rep. 9, 2003 UT App 438. Appeal And Error 961; Pretrial Procedure 19

Trial court's grant of protective discovery order and order disqualifying counsel are reviewed for an abuse of discretion. Rules Civ.Proc., Rule **26**. Spratley v. State Farm Mut. Auto. Ins. Co., 2003, 78 P.3d 603, 2003 UT 39, rehearing denied. Appeal And Error 949; Appeal And Error 961

Assignee of deed of trust beneficiary did not preserve for appellate review claim that trial court improperly applied the amended version of rule on a party's duty to supplement discovery responses, instead of the unamended version, in action to foreclose on property acquired by purchasers at a sheriff's sale; assignee did not raise that issue at trial, and argued it for the first time in his appellate brief. Rules Civ.Proc., Rule **26**(e). American Interstate Mortg. Corp. v. Edwards, 2002, 41 P.3d 1142, 439 **Utah** Adv. Rep. 20, 2002 UT App 16. Appeal And Error 199

Trial courts have broad discretion in matters of discovery, and their determinations regarding such matters are reviewed for abuse of discretion. Green v. Louder, 2001, 29 P.3d 638, 426 **Utah** Adv. Rep. 25, 2001 UT 62. Appeal And Error 961; Pretrial Procedure 19

Failure to require defendant in automobile negligence action to disclose surveillance videotape of plaintiff and the identity of its preparer was harmful error in action in which videotape and preparer's testimony were admitted to show plaintiff's injuries were less severe than she alleged; while jury did not reach damages issue because it found plaintiff more than 50 percent at fault in accident, the determination of liability hinged on parties' credibility, and plaintiff's credibility was directly undermined by evidence in question. (Per Greenwood, Associate P.J., with one Judge concurring in result.) Rules Civ.Proc., Rule **26**(b)(1). Roundy v. Staley, 1999, 984 P.2d 404, 374 **Utah** Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Appeal And Error 1043(6)

Trial court committed prejudicial error in denying tort plaintiff's discovery request for report prepared by defendant's insurance adjuster where defendant did not demonstrate that denial of discovery request was not prejudicial. Rules Civ.Proc., Rule **26**(b)

(3). Askew v. Hardman, 1994, 884 P.2d 1258, certiorari granted 892 P.2d 13, reversed 918 P.2d 469. Appeal And Error 1043(6); Pretrial Procedure 381

Allegedly erroneous admission of testimony of defense expert who was identified for plaintiff 12 days before trial did not prejudice plaintiff; expert was one of five defense experts in response to testimony of plaintiff's 15 experts; and plaintiff thoroughly cross-examined expert. Rules Civ.Proc., Rules **26**(e)(1), 61; U.C.A.1953, 41-6-46(1)(1981). Onyeabor v. Pro Roofing, Inc., 1990, 787 P.2d 525. Appeal And Error 1043(1)

Refusal of court to permit defendant in special statutory action to remove city commissioner from malfeasance in office from taking depositions of witnesses, was error, but did not result in any prejudice to commissioner who had examined testimony which witnesses had given before grand jury, received answers to interrogatories submitted to district attorney and had procured substantially all discoverable information in action. U.C.A.1953, 77-7-1, 77-7-2, 77-7-11; Rules of Civil Procedure, rules 1, 61, 81. State v. Geurts, 1961, 11 **Utah** 2d 345, 359 P.2d 12. Appeal And Error 1170.6; Pretrial Procedure 61

---- Standard of review, review

In reviewing the imposition of discovery sanctions, an appellate court applies a two-part approach: (1) the court considers whether the district court was justified in ordering sanctions, and (2) the court then reviews the type and amount of sanctions for abuse of discretion. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 840(4); Appeal and Error 961

An appellate court will affirm an award of discovery sanctions so long as the findings appear in the lower court's opinion or elsewhere to sufficiently indicate the factual basis for the ultimate conclusion, or where there is evidence in the record to support the award. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 1024.3

Rules **Civ**. Proc., Rule **26**, UT R RCP Rule **26**
current with amendments received through December 1, 2015.

End of Document

Arizona Revised Statutes Annotated
Rules of Civil Procedure for the Superior Courts of Arizona (Refs & Annos)
V. Depositions and Discovery (Refs & Annos)

16 A.R.S. Rules of Civil Procedure, Rule 26.1

Rule 26.1. Prompt disclosure of information

Currentness

(a) Duty to Disclose, Scope. Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

(1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.

(2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.

(3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

(5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

(7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.

(8) The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party

to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

COURT COMMENT TO 1991 AMENDMENT

In March, 1990 the Supreme Court, in conjunction with the State Bar of Arizona, appointed the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged with the task of studying problems pertaining to abuse and delay in civil litigation and the cost of civil litigation.

Following extensive study, the Committee concluded that the American system of civil litigation was employing methods which were causing undue expense and delay and threatening to make the courts inaccessible to the average citizen. The Committee further concluded that certain adjustments in the system and the Arizona Rules of Civil Procedure were necessary to reduce expense, delay and abuse while preserving the traditional jury trial system as a means of resolution of civil disputes.

In September, 1990 the Committee proposed a comprehensive set of rule revisions, designed to make the judicial system in Arizona more efficient, more expeditious, less expensive, and more accessible to the people. It was the goal of the Committee to provide a framework which would allow sufficient discovery of facts and information to avoid “litigation by ambush.” At the same time, the Committee wished to promote greater professionalism among counsel, with the ultimate goal of increasing voluntary cooperation and exchange of information. The intent of the amendments was to limit the adversarial nature of proceedings to those areas where there is a true and legitimate dispute between the parties, and to preclude hostile, unprofessional, and unnecessarily adversarial conduct on the part of counsel. It was also the intent of the rules that the trial courts deal in a strong and forthright fashion with discovery abuse and discovery abusers.

After a period of public comment and experimental implementation in four divisions of the Superior Court in Maricopa County, the rule changes proposed by the Committee were promulgated by the Court on December 18, 1991, effective July 1, 1992.

COMMITTEE COMMENT TO 1991 AMENDMENT

This addition to the rules is intended to require cooperation between counsel in the handling of civil litigation. The Committee has endeavored to set forth those items of information and evidence which should be promptly disclosed early in the course of litigation in order to avoid unnecessary and protracted discovery as well as to encourage early evaluation, assessment and possible disposition of the litigation between the parties.

It is the intent of the Committee that there be a reasonable and fair disclosure of the items set forth in Rule 26.1 and that the disclosure of that information be reasonably prompt. The intent of the Committee is to have newly discovered information exchanged with reasonable promptness and to preclude those attorneys and parties who intentionally withhold such information from offering it later in the course of litigation.

The Committee originally considered including in Rule 26.1(a)(5) a requirement for disclosure of all cases in which an expert had testified within the prior five (5) years. The Committee recognized in its deliberations that information as to such cases might be important in certain types of litigation and not in others. On balance, it was decided that it would be burdensome to require this information in all cases.

COMMITTEE COMMENT TO 1996 AMENDMENT

Rule 26.1(a)(3). With regard to the degree of specificity required for disclosing witness testimony, it is the intent of the rule that parties must disclose the substance of the witness' expected testimony. The disclosure must fairly apprise the parties of the information and opinion known by that person. It is not sufficient to simply describe the subject matter upon which the witness will testify.

Rule 26.1(a)(5) was not intended to require automatic production of statements. Production of statements remains subject to the provisions of Rule 26(b)(3).

Rule 26.1(a)(6). A specially retained expert as described in Rule 26(b)(4)(B) is not required to be disclosed under Rule 26.1.

(b) Time for Disclosure; a Continuing Duty.

(1) The parties shall make the initial disclosure required by subdivision (a) as fully as then possible within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or the Court shortens or extends the time for good cause. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. In domestic relations cases involving children whose custody is at issue, the parties shall make disclosure regarding custody issues no later than 30 days after mediation of the custody dispute by the conciliation court or a third party results in written notice acknowledging that mediation has failed to settle the issues, or at some other time set by court order.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or additional information is discovered or revealed. Such additional or amended disclosures shall be made seasonably, but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party. A party seeking to use information which that party first disclosed later than (A) the deadline set in a Scheduling Order, or (B) in the absence of such deadline, sixty (60) days before trial, must seek leave of court to extend the time for disclosure as provided in Rule 37(c)(2) or (c)(3).

(3) All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

COMMITTEE COMMENT TO 1991 AMENDMENT

The Committee does not intend to affect in any way, any party's right to amend or move to amend or supplement pleadings as provided in Rule 15.

COURT COMMENT TO 1991 AMENDMENT

The above rule change was part of a comprehensive set of rule revisions proposed by the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged in March, 1990 with the task of proposing rules to reduce discovery abuse and to make the judicial system in Arizona more efficient, expeditious, and accessible to the people.

For more complete background information on the rule changes proposed by the Committee, see Court Comment to Rule 26.1(a).

(c) Deleted effective Dec. 1, 1996.

(d) Signed Disclosure. Each disclosure shall be made in writing under oath, signed by the party making the disclosure.

(e) Deleted effective Dec. 1, 1996.

COMMITTEE COMMENT TO 1991 AMENDMENT

Rule 26.1(e) is intended specifically to deal with the party and/or attorney who makes intentionally inaccurate or misleading responses to discovery.

COURT COMMENT TO 1991 AMENDMENT

The above rule change was part of a comprehensive set of rule revisions proposed by the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged in March, 1990 with the task of proposing rules to reduce discovery abuse and to make the judicial system in Arizona more efficient, expeditious, and accessible to the people.

For more complete background information on the rule changes proposed by the Committee, see Court Comment to Rule 26.1(a).

(f) Claims of Privilege or Protection of Trial Preparation Materials.

(1) *Information Withheld*. When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

(2) *Information Produced*. If a party contends that information subject to a claim of privilege or of protection as trial-preparation material has been inadvertently disclosed or produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has made and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

STATE BAR COMMITTEE NOTE
2008 Amendment

As with its federal counterpart, the amendment is intended merely to place a “hold” on further use or dissemination of an inadvertently produced document that is subject to a privilege claim until a court resolves its status or the parties agree to an appropriate disposition. The amendment, however, “does not address whether the privilege or protection

that is asserted after production was waived by the production." Fed. R. Civ. P. 26(b)(5)(B), Advisory Committee Notes on 2006 Amendment.

(g) Deleted effective Dec. 1, 1996.

Credits

Added Dec. 20, 1991, effective July 1, 1992. Amended May 30, 1996, effective Dec. 1, 1996; Nov. 22, 1996, effective March 1, 1997; Sept. 5, 2007, effective Jan. 1, 2008; Dec. 20, 1991, effective July 1, 1992; July 31, 2014, effective July 31, 2014, subject to the applicability provisions of Arizona Supreme Court Order No. R-13-0017.

Editors' Notes

GUIDELINES FOR RULE 26.1 [WITHDRAWN]

Court Note

Rule 26.1 Guidelines have been withdrawn because of rule changes and court opinions that have been adopted or issued since the Guidelines were adopted.

APPLICATION

<Order R-05-0008 dated October 10, 2005, effective January 1, 2006, provided, "with respect to family law cases pending as of January 1, 2006, that if disclosure was previously made pursuant to Rule 26.1, Arizona Rules of Civil Procedure, further disclosure shall not be required under Rule 49 or 50 of the Arizona Rules of Family Law Procedure, except for the duty to seasonably supplement the earlier disclosure.">

<The text of this rule which is effective March 1, 1997 is inapplicable to cases which are set for trial between March 1 and April 30, 1997.>

Notes of Decisions (90)

16 A. R. S. Rules Civ. Proc., Rule 26.1, AZ ST RCP Rule 26.1
Arizona State court rules are current with amendments received through 10/15/15

TX Rules of Civil Procedure, Rule 194.2

194.2. Content

Currentness

A party may request disclosure of any or all of the following:

(a) the correct names of the parties to the lawsuit;

(b) the name, address, and telephone number of any potential parties;

(c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);

(d) the amount and any method of calculating economic damages;

(e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;

(f) for any testifying expert:

(1) the expert's name, address, and telephone number;

(2) the subject matter on which the expert will testify;

(3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;

(4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:

(A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and

(B) the expert's current resume and bibliography;

(g) any indemnity and insuring agreements described in Rule 192.3(f);

(h) any settlement agreements described in Rule 192.3(g);

(i) any witness statements described in Rule 192.3(h);

(j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

(k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party;

(l) the name, address, and telephone number of any person who may be designated as a responsible third party.

Credits

Aug. 5, 1998, Nov. 9, 1998 and Dec. 31, 1998, eff. Jan. 1, 1999. Amended by order of March 3, 2004, eff. March 3, 2004.

Notes of Decisions (50)

Vernon's Ann. Texas Rules Civ. Proc., Rule 194.2, TX R RCP Rule 194.2

Rules of Civil Procedure, Rules of Evidence, and Rules of Appellate Procedure are current with amendments received through September 1, 2015. Bar Rules, Rules of Disciplinary Procedure, Code of Judicial Conduct, and Rules of Judicial Administration are current with amendments received through September 1, 2015. Other state court rules and selected county rules are current with rules verified through June 1, 2015.

EX. 4

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A Study of Civil Case Disposition Time in U.S. District Courts

Donna Stienstra

Federal Judicial Center

May 2015

Contents

Introduction

This report summarizes the Federal Judicial Center's research for the Court Administration and Case Management Committee on the Most Congested Courts (MCC) Project.[1] The Center submitted an earlier memorandum to the Committee on courts that dispose of their cases most slowly.[2] The present report is a full and final report to the Committee on the Center's development of a new type of caseload analysis, use of that analysis to identify courts with slower and faster disposition times, and the findings from interviews with selected districts with slower and faster disposition times.

Overall, during this project, the Center:

- developed a new method for identifying districts that are not keeping up with their caseloads, as measured by case disposition time;
- developed an analysis of case disposition time, by nature of suit, for each of the ninety-four district courts;
- identified seven districts that have particularly long disposition times on a significant number of different case types (the "most congested courts");
- in summer 2013, provided the caseload analyses to and conducted interviews with the chief judge and clerk of court in the seven districts with slower case disposition times to determine the sources of delay;
- in November 2013, submitted to the Committee's Case Management Subcommittee a confidential memo on the districts with delayed civil case disposition times, which presented findings from the interviews with these districts;
- identified seven districts that have particularly short disposition times for a significant portion of their caseload (the "expedited courts"); and
- in fall 2014, provided the caseload profiles to and conducted interviews with the chief judge and clerk of court in the seven districts with faster disposition times to determine the procedures these districts use to expedite their caseloads.

To complete the project, we are providing this final report, which presents a history of the MCC Project, an overview of the Center's development of a new method of caseload analysis, and the findings from the interviews with the fourteen districts selected for the study.

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1. We had valuable assistance and guidance from the Case Management Subcommittee at key stages of the project and thank the members for their help: Judge Richard Arcara (chair), Judge Roger Titus, Judge Dan Hovland, Judge Marcia Crone, Judge Sean McLaughlin, Judge Charles Coody, Larry Baerman, clerk of court representative to the committee, and Jane MacCracken, staff to the committee. I especially appreciate the participation of Judge Arcara, Larry Baerman, and Jane MacCracken in the interview process. Their participation was invaluable in conducting the interviews and interpreting the information obtained. And I am very grateful to my colleague Margaret Williams for the caseload analysis on which the Most Congested Courts Project relies.

2. The Center submitted its report on the courts with delayed civil case disposition times on November 20, 2013. Given the confidential nature of some of the court-specific findings, the report is not a public document.

Although the close examination of specific districts is completed with this report, there is one important respect in which the Most Congested Courts Project will continue indefinitely. Periodically the Center will update the caseload analysis for each of the ninety-four district courts and will provide each district with its analysis. The Committee approved this distribution at its December 2014 meeting because the analyses have been well received by and helpful to the districts that have received them. Each of the ninety-four districts has received the first transmission of its own caseload analysis, in the form of a case disposition time dashboard prepared by the Center and reviewed by the Case Management Subcommittee. The long-term goal is for the districts to access their caseload analyses at an intranet website. In the meantime, the Center will provide the analyses individually to each district.

MCC Project Origin and Goals

Before presenting findings from interviews with the courts, we briefly recap the purpose and methodology of the Most Congested Courts Project.

In 2001, the Judicial Conference asked the Court Administration and Case Management Committee to monitor the caseloads of the district courts, identify districts with significant caseload delay, and offer assistance to those districts. The Administrative Office (AO) developed a composite measure of caseload delay, ranked the ninety-four district courts on this measure, and identified the most delayed 25% as the "most congested courts" ("MCCs"). Approximately once every two years, the Committee then sent a letter to the chief judge of each MCC to alert the court to its ranking and to suggest a variety of remedies, including such actions as use of visiting judges, attendance at workshops, and consideration of case-management practices recommended in guides and manuals.

Some districts responded with explanations for their status, others with polite thanks, and some not at all. Over the first ten years of the Committee's efforts, it became clear that membership on the list of MCCs changed little and that the Committee's letters had limited effect. The Committee decided that it needed a new approach to the problem of courts with caseload delays and asked the Center to develop a new method for identifying and assisting courts where civil case disposition times are lengthy.

The New Analysis for Identifying District Courts with Delayed Civil Case Disposition Times

The Committee wanted the new method to provide the Committee and courts with better information about caseload delay so assistance could be more targeted. If the problem lies in habeas cases, for example, a quite different remedy might be needed than if the problem lies in patent cases. Working with the Committee's Case Management Subcommittee, the Center developed a method that examines district caseloads at the case type level—that is,

an analysis that gives a district information about the status of each case type, or nature of suit (NOS), in its civil caseload.[3]

The new method compares the average disposition time for each case type within a district to the average disposition time for each case type nationally. To develop the measure, the Center first calculated a national average disposition time for each of the nearly 100 nature of suit codes across all ninety-four districts combined. The Center then calculated the average disposition time for each nature-of-suit code for each district for the past three years.[4] In the final step of the analysis, the Center compared each district's average disposition time for each nature-of-suit code to the national historical average.

To help districts understand the analysis, the Center developed a graphic presentation that relies on colors to show a district which cases it is disposing of faster or slower than the national average—deep red for very slow, pink for slow, yellow for near the national average, light green for fast, and deep green for very fast. The Center used tables and bar charts to present the results of the analysis (see Attachment 1[5]). Because of the graphic presentation—the colors in particular—districts quickly understand where they are having problems disposing of cases and where they are doing well. More recently, the Center has developed a case disposition dashboard for presenting the results of the analysis. The dashboard also provides disposition times graphically and relies on the same color scheme, but uses a simpler graphic and also presents more information by providing the specific cases included in each NOS group (see Attachment 2 for a description of the dashboard).

Using either approach, the new analysis tells the Committee which districts have fallen seriously behind the national average in disposing of their civil caseloads, which districts are doing much better than the national average, and exactly which types of cases are most seriously delayed in the districts with delayed civil case disposition times. The new analysis does not, however, provide a single score or a method for ranking districts. Rather, it requires examination of each district to see whether a district has either a large number of case types that take more than 15% longer to dispose of than the national average or a smaller number of case types that take much, much longer (e.g., 100% longer) than the national average to terminate. If a district meets these criteria, it merits attention by the Committee.

The new analyses of case disposition time have proven to be very helpful to the courts and have been well received by the fourteen districts selected by the Committee for further discussions (see descriptions below of interviews conducted with these courts). These districts unanimously expressed their intent to use the new analyses for serious, district-

3. The analysis and the graphics produced by the analysis were developed by Margaret Williams, Senior Research Associate, of the Center's Research Division.

4. To reduce risk that a year of unusual activity would skew averages, the Center chose a three-year time frame. Longer or shorter time frames could be used, as could other comparisons, such as averages for courts of the same size.

5. The initial version of the analysis grouped the civil natures of suit into four categories (or "quartiles")—faster, fast, slow, and slower natures of suit—and included an average disposition time for criminal felony cases as well. A second generation presentation—a case disposition dashboard—does not group the natures of suit nor include the criminal felony caseload.

specific, and data-driven assessments of case-management practices. Several districts said they had, in fact, already made significant changes in case-management practices after reviewing the new caseload analyses.

Interviews: A New Approach to Assisting Districts with Delayed Civil Case Disposition Times

Based on a recommendation from the Center, the Committee agreed that the better approach to assisting courts with caseload delays would be to interview them rather than sending letters. The Committee also agreed that each district should receive its own caseload analysis, since the Committee members themselves had found the graphics exceptionally helpful in understanding their own court's caseload. Working with the new case disposition analysis and the Case Management Subcommittee, the Center identified districts that differed from the national average in either having a high number of civil case types that were delayed or in having extreme delay, even if in a smaller number of civil case types. Of the initial set of fourteen districts that met these criteria, the Subcommittee selected seven that were seriously delayed. Then-chair of the Committee, Judge Julie Robinson, sent these districts the Center's new case disposition analysis and an invitation to be interviewed, which all seven districts accepted.[6]

Because the issue of delay was potentially sensitive, the Committee agreed that it would be helpful to the Center's research staff to have a judge member of the Committee participate in the interviews. In the end, each interview was conducted by a judge member, the clerk of court representative to the Committee, a member of the Committee staff, and myself.[7] In each district, we interviewed the chief judge and clerk of court to try to understand more fully why their civil caseloads had become delayed and what kinds of targeted assistance might help them dispose of civil cases more quickly.[8] Because the seven districts were geographically disbursed, we conducted most of the interviews by telephone.

Typically each chief judge opened the discussion with an explanation of the district's caseload challenges and steps the district had taken or was planning to take to address caseload delays. Most of the districts had prepared "talking points"—and, in some districts, documentary material—for the interview. The interview team had not asked the districts to make such preparations, but they clearly were well prepared for the interview and wanted to open by providing information they felt was important for the Committee to know.[9]

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6. Because the report on the most congested courts is confidential but this report on the expedited districts very likely will be a public report, we do not identify the most congested districts.

7. The Committee member was Judge Richard Arcara, who also chairs the Case Management Subcommittee; the clerk of court representative was Larry Baerman; and the Committee staff member was Jane MacCracken.

8. The interviews took place between March and September 2013. In several districts, additional judges or court staff joined the chief judge and clerk for the interview.

9. Attachment 3 provides an example email showing the information sent to a district before the interview to help the chief judge and clerk of court understand the nature of the interview. The graphics sent for

Then, if the chief judge and clerk had not already addressed the case types that were both seriously delayed and accounted for a sizable portion of the district's caseload, the interview team asked the chief judge to talk about how these cases are handled by the court and why they might be delayed. This invitation usually generated considerable additional discussion.

The interviews generally lasted at least an hour and provided abundant information about problems encountered and actions taken by the seven selected districts. The chief judges and clerk of court were welcoming to the interviewers and generous in the information they provided. Without exception, they found the caseload analysis very helpful, particularly in identifying problems at the detailed level of individual case types. Several said the tables had opened up a dialogue in their court about how the court handles its cases, not only cases that were delayed but other cases as well, and had already led to some changes in procedure. Also without exception, the chief judges said they appreciated the Committee's inquiry and offers to help.

Challenges Identified in Districts with Delayed Civil Case Disposition Times

We relied on two sources of information for understanding civil case disposition delays in the seven courts selected for the study: the Center's caseload analyses and information the chief judge and clerk of court provided during the interviews. In reviewing the caseload analyses and talking with the courts, we focused on the case types that were both the most delayed and included the greatest number of cases. Because of their numbers, these case types have a larger impact on a district's overall disposition time, and, more importantly, delay in these cases affects a larger number of litigants.

The caseload analyses revealed how seriously delayed each district's caseload was and the case types that accounted for delay. Delays were very substantial in each district, even in case types that are typically disposed of quickly nationwide—for example, in one district the faster case types were disposed of eighty-one percent more slowly than the national average and in another these case types were disposed of seventy-two percent more slowly. In addition, the caseloads were delayed across many different case types.

From the caseload analysis, we could see a pattern across the seven districts. The most commonly delayed case types—i.e., found in five or more districts—were prisoner petitions to vacate a sentence or for habeas corpus, along with employment civil rights, ERISA, insurance, and "other" contract cases. Prisoner civil rights, foreclosure, and "other" statutory actions were delayed in four of the seven. Districts also had delayed disposition times in case types with large numbers of cases specific to that district—for example, marine personal injury cases in a district on a harbor; medical malpractice cases in a major medical center; copyright, patent, trademark, and antitrust cases in districts that are economic centers; and Social Security and consumer credit cases in districts that had experienced rapid increases in these case types. The two central points from this analysis were that in the courts with delayed case disposition times (1) delay was found across a large number of

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these interviews were the initial type prepared by the Center—i.e., the bar graphs and tables shown in Attachment 1—and not the more recently developed electronic dashboard shown in Attachment 2.

case types and was not limited to a few case types, and (2) several case types, involving large numbers of litigants—for example, prisoner cases, employment civil rights cases, and ERISA cases—were delayed in a majority of the seven districts.

From the interviews, we learned not only the districts' assessments of their problems but also that they were aware of their court's caseload delay before being contacted by the Committee and had been taking steps to resolve it. With regard to the specific reasons for delay, each district offered a number of explanations, some that had caused problems generally for the district and some that had caused problems for specific case types. Although there were idiosyncratic explanations and conditions in some districts, the reasons cited can be grouped into several categories—keeping in mind that these are perceived, and not quantitatively measured, causes.[10]

Criminal caseload

Four of the seven districts said their criminal caseloads were particularly demanding, because of either the sheer number of cases or case complexity (e.g., terrorism or death-eligible cases).

Circuit law

Circuit law required several districts to be deferential to the pleadings filed by pro se litigants. This deferential treatment of pleadings results in the courts having to deal with more amended complaints and, often, substantial motion practice and discovery disputes that do not occur in districts where circuit law is less deferential to the pleadings of pro se litigants.

Number and/or complexity of civil filings

In several districts, specialized litigation had emerged from economic activity in the district—e.g., litigation involving patents, financial and medical institutions, and contracts—and had given rise to voluminous and complex motions. In several others, specialized law firms had developed to litigate Social Security, ERISA, and consumer credit cases and, as a consequence, more such cases were being filed.

Resources

Three of the seven districts with delayed civil disposition times had long-term vacancies and several had no or few senior judges. Altogether, the seven courts with delayed disposition times had sixty-four judgeships and 434 vacant judgeship months for the five-year period 2010–2014 compared to seven courts with fast disposition times (see below), which had seventy-nine judgeships and 303 vacant judgeship months.[11] Most of the districts also

10. Although the districts provided explanations for some of their delayed case types, they also were sometimes unsure why a case type might have a longer-than-average disposition time. This was generally true, for example, for ERISA and FLSA cases.

11. Numbers are from the Federal Court Management Statistics, which can be found at http://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics. During the same years, the two groups of courts did not differ, on the whole, in the number of weighted filings. Three of the courts with delayed civil case disposition times had weighted filings averaging 500 to 600 cases per judge,

identified too few staff as a cause of delay, particularly too few pro se or staff law clerks who could help with voluminous complex motions or with prisoner litigation. Although the districts have looked for and often benefitted from outside help, they had found it difficult to get help for the most voluminous parts of their caseloads because of limits on the number of staff law clerks allocated to the courts and the reluctance of visiting judges to take a caseload consisting of motions and/or prisoner cases.

Human resource quality and organization

Four of the seven districts had had problems with the quality or organization of human resources, including law clerk problems in chambers, poor organization and lack of oversight of pro se law clerks, poor quality of pro se law clerks, and an underperforming judge.

Case-management practices

Two districts described case-management practices that delayed civil cases—in one, a tradition of judicial deference to lawyers, including lax enforcement of case schedules, and in another the liberal granting, until recently, of continuances.

Steps Taken by the Districts to Reduce Delayed Civil Case Disposition Times

Each of the seven districts had taken steps to try to solve the problem of civil caseload delay. These efforts fall into several categories.

Efforts to reorganize or reallocate work

Three districts with significant delays in prisoner litigation tried to improve the service provided by their pro se law clerks, experimenting with time limits, reallocating work between pro se clerks and chambers staff, and reassigning oversight responsibility for the pro se law clerks. One district, for example, had used the pro se law clerks to make sure pleadings in pro se cases were in order and to screen for IFP compliance under the PLRA. When the court transferred this screening to the clerk's office, it reduced the screening stage from four-to-five months to four-to-five days. This district also moved responsibility for non-prisoner pro se cases from the pro se law clerks to the magistrate judges. This district realized no improvement in civil disposition times, however, by putting magistrate judges on the civil case assignment wheel. In another effort to improve judicial resources, one district changed the assignment system for senior judges to make assignments more predictable; as a result, the senior judges took more cases.

Efforts to enhance resources

The districts with delayed disposition time have used a number of approaches to increase their staff and judge resources. Three districts have secured additional law clerks to work on motions, pro se cases, and Social Security cases. One district reported reducing its habeas backlog 39% by devoting two pro se clerks to these cases. In another approach to resolv-

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for example, but three of the courts with fast civil disposition times had weighted filings averaging over 600 cases per judge (Federal Court Management Statistics).

ing prisoner cases, a district had started working with a local law school clinic, which gave law students legal experience through work on pro se cases. One district turned to recalled magistrate judges, two others relied heavily on their own magistrate judges, and another benefitted from a large number of senior judges. Another strategy, relied on by three districts, was the use of visiting judges. Most of the districts, however, noted the reluctance of visiting judges to do the work that most needs to be done—i.e., deciding motions. One district had been able to secure visiting judge help with motions only by giving visiting judges full control of the cases through trial.

Efforts to change or enhance case-management procedures

The districts with delayed disposition time had also adopted a number of case-management practices they hoped would improve civil case processing. One had recently adopted a package of new case-management practices that included standardized discovery, standardized dates, and mandatory mediation for some types of cases; case management orientation and appointment of a mentor judge for new judges; and early conferences with lawyers and thus early identification of difficult issues in complex cases. Several districts in the same circuit had adopted electronic service to the U.S. Attorney's Office and the Department of Corrections in state habeas cases; one of these districts reported a sixty-day reduction in the time to serve. Four of the districts had mediation programs for civil cases, and one had recently started a differentiated case-tracking program. This district had also realized a reduction in case delay since ending the routine granting of continuances.

Efforts to provide assistance to pro se litigants

Two districts had made particular efforts to provide assistance to pro se litigants to help resolve these cases more quickly. One had established a mediation program at the court for pro se litigants and also provides a grant each year, from its attorney admissions fund, to support the local federal bar association's pro se clinic. A second provides mediation for pro se litigants in employment cases through collaboration with a local law school. This district has also established an outreach program to the bar and provides a day of training, involving the district's most respected judges, for attorneys who volunteer pro bono for pro se cases. The court reported that this program has greatly expanded the pro bono attorney pool, and over 100 cases have been provided full representation, saving considerable judge and staff time. This district coordinates its pro se assistance through a pro se office established by the court.

Future Assistance Suggested by Districts with Delayed Civil Case Disposition Times

In addition to efforts already made, the districts with delayed civil disposition times made suggestions for further actions that might help them dispose of their civil cases more quickly. These suggestions fall into two broad categories.

Resources

Most of the districts noted, first, the need for more judgeships and/or the need to fill vacancies. All recognized the limited prospects for such help, particularly new judgeships, and went on to identify other types of useful resources. All seven districts called for more law clerks. In some districts, additional law clerks would provide help with voluminous motions. In others, additional law clerks would help meet the demand of pro se cases. Districts with temporary law clerks called for a change in how these law clerks are funded and allocated. They specifically suggested that the appointment should be significantly longer than the current one-year term, which permits barely enough time for a law clerk to become familiar with the work. Another district suggested a visiting law clerk program. Two districts also called for more assistance from visiting judges but with an emphasis on visiting judges who are willing to handle motions.

Guidance and information on best practices

The districts had several suggestions for assistance or guidance that might be provided to courts with problems of caseload delay, as well as to courts generally. The Administrative Office and/or Federal Judicial Center might provide guidance, through a website or resource center, on how to use pro se law clerks more effectively, including position descriptions, advice on oversight and supervision, and options for organizing the pro se law clerk function and allocating pro se cases. The AO and Center might give the courts guidance on judicial case management practices, with particular emphasis on the methods used by judges who dispose of cases quickly. The AO and Center might also develop electronic tools that would help courts pull more information out of caseload data. The courts also suggested development of guidance on using mediation and setting up electronic service for prisoner pro se cases. When asked how best to disseminate information, a chief judge suggested that judges and clerks are more likely to pick up information at workshops—such as new judge training, the annual district and magistrate judge workshops, and the annual clerk of court conference—than to go online to search for information.

Interviews in Districts with Fast Civil Case Disposition Times

The Committee had been inclined to conduct interviews in the fastest—or "most expedited"—districts in addition to the delayed—or "most congested"—districts, and the interviews in the districts with delayed case disposition times confirmed the importance of doing so. First, the courts with delay had asked for information about practices used in districts with fast disposition times, but also, under its responsibility to identify and disseminate "best practices," the Committee wished to collect and publicize steps the courts were taking to resolve civil cases expeditiously.

Using the caseload analyses and working with the Case Management Subcommittee, the Center identified a set of districts that dispose of their civil cases very quickly. The Subcommittee selected seven of these districts for interviews. These districts, which are representative of large, medium, and small districts and were distributed across the country and circuits, were the following:

Central District of California	Northern District of Texas
Southern District of Florida	Western District of Washington
District of Maine	Eastern District of Wisconsin
Western District of Missouri	

Then-chair of the Committee, Judge Julie Robinson, sent a letter to the chief judges in these districts, inviting the chief judges to participate in the Most Congested Courts Project as examples of districts that were able to dispose of civil cases quickly. The letter included the Center's caseload analysis for that district. Each chief judge responded positively to the invitation. The same team of four interviewers then spoke by telephone with the chief judge and clerk of court in each district, this time focusing on steps the districts had taken to dispose of civil cases quickly.[12]

As in the courts with delayed civil case disposition times, typically each chief judge opened the interview, but in these districts the focus was on practices and rules used to move civil cases expeditiously. The chief judges and clerks were well prepared for the interviews and most proceeded through a list of practices and rules they thought might explain why their civil case disposition time was fast relative to the national average. The interview team was particularly interested in fast disposition times in case types that had long disposition times in most of the courts with delay and, if a chief judge or clerk did not address those case types, the interview team asked about practices that might explain the fast disposition times.

The interviews generally lasted at least an hour and provided a great deal of information about case-management practices and rules in the seven districts. The chief judges and clerk of court were very responsive in providing information and offered to be of further assistance if needed.

Procedures and Practices in Districts with Fast Civil Case Disposition Times

As in the districts with delayed disposition times, we relied on the Center's caseload analysis and our interviews to develop an understanding of courts that dispose of their civil cases quickly. The caseload graph and tables showed that the districts were not only expeditious overall but were expeditious across most types of cases. In fact, one of the districts disposed of every type of civil case, except four, near or faster than the national average. What explains the fast disposition times in these districts?

12. The interviews took place in October and November 2014. In one or two districts, additional judges or court staff joined the chief judge and clerk for the interview. Attachment 4 provides an example of information sent to each district shortly before the interview to inform them of the nature of the interview.

We looked for common case-management and case-assignment practices across all seven districts, thinking there might be specific practices, used by all, that could become concrete guidance for other courts—for example, having a uniform case-management order used by all judges; having magistrate judges on the civil case assignment wheel (or not); using R&Rs (or not); or providing mediation through a court-based process. We did not find that kind of uniformity across all, or even some, of the districts with fast civil disposition times or even across all judges in some districts. Although we did not find a single set of procedures or a package that, if adopted, would be the key to expeditious civil case dispositions, we did identify common characteristics across the courts with fast civil disposition times—most importantly, sufficient judicial resources, but also a commitment to and culture of early case disposition. This commitment and culture were manifest in several ways—early and active judicial case management, a court-wide approach to managing cases and solving problems, and extensive use of magistrate judges and staff law clerks. In the discussion below, keep in mind, as in the districts with delayed civil case disposition times, that we are presenting the courts' perceptions, and not a quantitative analysis, of the causes of fast civil case disposition times in these districts.

Sufficient judicial resources

In all but one of the districts, the chief judges pointed to an essential factor in their fast civil disposition times—sufficient judicial resources. Several chief judges noted this factor right at the outset of the interview. Not only were the districts fortunate to have had few vacant judgeship months, but they also had either a long-term, experienced bench or senior judges who still took a significant caseload, or both. In one district, where judicial resources were not as substantial because of a long-term need for additional judgeships, the court had maintained its fast civil disposition times through exceptionally long hours by judges and staff (but with the negative consequences of ill health and early judicial retirements).

Culture of early case disposition

In addition to sufficient judicial resources, all of the chief judges in the courts with fast civil disposition times were emphatic about their culture of early case disposition. Most of the courts were intentional about this culture—i.e., they pursued it deliberately, were committed to maintaining it, and spoke of it as central to the identity of the court. This commitment is expressed through fairly standard case-management practices—early judicial involvement in the case; early setting of a schedule; early identification of cases that can be disposed of by removal, remand, or dispositive motion; prompt decisions on motions so, as one chief judge said, "the lawyers can do their work"; and no continuances, which is generally achieved by requiring counsel to submit a proposed case schedule and then holding them to it. Above all, as described by the chief judges, their districts emphasized very early judicial involvement and control and very firm respect for the schedule.

Institutional approach to case disposition

The courts with fast civil disposition times have a number of court-wide practices and rules in place that support early judicial case management and enforcement of deadlines. But, significantly, most of these courts are not characterized by uniform practices across all

judges, which some might expect to be a hallmark of a court that disposes of its civil cases quickly. One chief judge described the court's bench as "highly individualistic" and another chief judge said the court was marked by "fierce individualism." Only two of the chief judges pointed to uniform time frames and uniform case-management orders as part of their courts' approach to civil litigation. Otherwise the courts' practices, and those of individual judges within any given court, vary considerably—for example, whether or not they hold Rule 16 scheduling conferences or in-person hearings on motions. But in these districts several other factors that support expeditious civil case processing are shared court-wide:

- The local rules emphasize early case management.
- The judges are committed to joint responsibility for the court's caseload. "If someone falls behind," said one chief judge, "we help each other out." "We're a team," said another. In one of the districts, a court-wide committee reviews the caseload and, if bottlenecks are seen, makes adjustments in case allocations.
- The courts assertively use reports on the status of the caseload to monitor individual judge and court-wide performance. These reports are detailed, and in most districts the court's own internal reports, not only the CJRA reports, identify the judges by name. The reports are issued frequently and are discussed at court meetings or individually between the chief judge and each other judge. The purpose, and effect, of the reports is to provide a case management tool and to encourage judges to keep their own caseloads within the court's norms.
- The courts have a history and culture of problem solving—or, as one chief judge said, "always wanting to improve." The caseload reports are an example of tools used by the courts to routinely examine how they are doing, but these reports are only one example of the kind of constant review used by these courts. Most of the chief judges described study groups and task forces that had taken on one or another issue—for example, delays in Social Security cases, problems of attorney access to prisoners located in distant prisons, and frequent appellate court reversal of prisoner cases involving medical malpractice—and had developed solutions for the problems. Many of these courts have also developed innovative approaches to such perennial issues as discovery disputes and voluminous summary judgment motions (see below for examples).

Extensive and effective role for magistrate judges

The role of magistrate judges varies greatly across the seven courts with fast civil disposition times—for example, in several districts they are on the wheel for assignment of a portion of the civil caseload, and in others they are not; in some they handle all civil pretrial matters, and in others they do not; in some they are responsible for the prisoner and/or Social Security caseloads, and in others they are not. Regardless of the specific duties of the magistrate judges, the chief judges noted their courts' determination to use that resource to the fullest possible extent and described the magistrate judges, in the words of one judge, as "an integral part of the team." They also emphasized the high level of respect accorded the magistrate judges by judges and attorneys, as well as efforts made to increase that respect—for example, by giving the magistrate judges work that puts them in the courtroom to heighten

their visibility and enhance their authority. Magistrate judges also participate in court governance, including, in one district, the critical committee that monitors case flow. Whatever a court's approach may be, according to the chief judges, full integration of the magistrate judges is central to expeditious case disposition.

Experienced and highly skilled staff law clerks

Many of the courts with fast civil disposition times also benefit from long term, highly experienced staff law clerks. They typically handle the court's pro se and prisoner caseloads and over time have developed efficient systems for screening these cases and moving them toward disposition. These systems vary from district to district, but the staff law clerks were typically described as being very good at "triaging" this caseload and keeping it current.

In addition to these characteristics that are common across the courts, the judges told us of a number of practices they believe have helped their court reduce delay in civil cases or solve a particular problem, such as a sudden rise in Social Security cases. We briefly describe these district-specific practices, along with several procedures adopted to more efficiently handle some of the types of cases that are often delayed in the districts with delayed civil case disposition times.

Calendars and scheduling

In the Southern District of Florida, the majority of judges follow a term calendar—i.e., the year is divided into twenty-six two-week terms. Immediately on case filing, the judge reviews the case, then brings the attorneys in two-to-four weeks after answer is filed to set a schedule for the case. The trial date is set for a specific two-week period, with most trial dates set within one year of case filing. Approximately twelve to fifteen cases are set for each two- week trial term.

The judges in the District of Maine assign all civil cases to one of seven tracks, each with its own timelines and distinct, uniform scheduling order.

The Western District of Missouri designates two weeks of each month for criminal trials to ensure compliance with the Speedy Trial Act.

In the Western District of Washington, civil trials are conducted on a clock. At a pretrial conference ten to fourteen days before trial, the judge and attorneys determine the number of days and hours for trial. A clock starts when trial begins; each morning the judge announces the number of minutes left to each side. Side bars are assessed against the losing side. The process not only streamlines trials but also provides predictability for jurors and attorneys and prompts greater cooperation among attorneys to avoid being docked time.

Discovery

To control discovery, the District of Maine gives cases on the standard track four months to complete both fact and expert discovery. In all cases, attorneys must attempt to resolve discovery disputes on their own and, if they cannot, must talk with a magistrate judge, who attempts to mediate the conflict. Only with the magistrate judge's consent may they file a discovery motion.

In the Western District of Missouri, Local Rule 37.1 prohibits the filing of discovery motions, which is intended to prompt attorneys to resolve discovery disputes on their own. If attorneys determine that they must file a discovery motion, they must include a justification for the motion. A teleconference is then scheduled by the judge.

Under a set of guidelines issued by the court, the Western District of Washington encourages attorneys to use the court-promulgated "Model Agreement Regarding Discovery of Electronically Stored Information." The model agreement is in the form of an order that can be issued by the assigned judge and includes general principles and specific guidance on electronic discovery, with an attachment that includes additional provisions for complex cases.

The Western District of Washington developed guidelines for "Best Practices for Electronic Discovery in Criminal Cases," which provide a general set of best practices, as well as guidelines for multi-defendant cases and an e-discovery checklist.

Summary judgment

Under District of Maine Local Rule 56, unless attorneys in standard track cases file a joint agreement on core matters related to summary judgment, they may not file summary judgment motions without a prefiling conference with the judge, which at minimum narrows issues and sometimes bypasses the need for a summary judgment motion altogether.

In the Northern District of Texas, Local Rule 56.2 permits only one motion for summary judgment per party unless otherwise directed by the presiding judge or permitted by law.

In an experimental procedure being used by one judge in the Eastern District of Wisconsin, attorneys may opt for a streamlined summary judgment process—the "Fast Track Summary Judgment" (FTSJ) process—to reach an early dispositive decision. In this process, the judge tolls unrelated discovery and parties must comply with a number of limits, including page limits on affidavits.

Motions generally

Under Local Civil Rule 7, judges in the Western District of Washington must rule on motions within thirty days of filing. At forty-five days, attorneys may remind the judge to rule. This practice ensures that cases with no merit are seen and decided quickly.

Mediation

The Central District of California provides three forms of settlement assistance to civil litigants: referral to a magistrate judge or district judge for a settlement conference (in practice, most referrals are to magistrate judges); selection of a mediator from the extensive private mediation market; or selection of a mediator from the court's panel of approved mediators. Except for a few exempt case types, all civil litigants are expected to select one of these forms of settlement assistance and to file their selection with the assigned judge prior to the Rule 16 scheduling conference. The local rules set a default deadline for the scheduling conference, subject to changes ordered by the judge after consultation with counsel. The judge issues a referral order at or soon after the Rule 16 conference.

The Mediation and Assessment Program (MAP) in the Western District of Missouri randomly assigns all civil cases, excluding a limited number of case types, to one of three

types of mediation providers: the court's magistrate judges, the MAP director, or a mediator in the private sector. Parties are required to mediate their case within seventy-five days of the "meet and greet" meeting required by Federal Rule of Civil Procedure 26(f). Parties may ask to opt out of the mediation process or may ask to use a different form of ADR through a written request to the MAP director.

Other

The Central District of California relies on a number of committees to govern the court. The Case Management and Assignment Committee is one of the most important. Each of the district's divisions is represented on the committee, which is composed of district judges, magistrate judges, and court staff. The committee, which has four scheduled meetings a year (and more as needed), watches the caseload and keeps it in balance, using caseload reports from the clerk and concerns brought to the committee by judges to diagnose problems and develop solutions.

The District of Maine has for many years assigned a single case manager to each case for the lifetime of the case. The case manager works closely with the judge and monitors case progress, calls attorneys if deadlines are not met, and manages all paperwork, notices, docketing, and any other matters for the case.

To ensure efficient practice by attorneys on the CJA panel, the Western District of Washington appointed a task force made up of judges, court staff, and representatives from the U.S. Attorney's Office and CJA panel, which led to adoption of "Basic Technology Requirements" for CJA panel attorneys. The requirements state the minimum technology standards CJA attorneys must meet, including requirements regarding computer equipment and software.

To ensure that all issues are ready for immediate decision, the Western District of Washington requires that all attorney filings be joint.

ADA cases

Some judges in the Southern District of Florida hold an early half-day hearing in ADA cases and issue an injunction while the defendant takes care of the problem (e.g., measuring the width of a door, which does not require experts). Cases generally settle promptly after this step.

ERISA cases

In the Central District of California, many district judges require joint briefs. The court also sets an early deadline for submission of the administrative record.

The District of Maine has an ERISA track with a very specific schedule. The magistrate judges' expertise in these cases helps to expedite them.

FLSA cases

A majority of the judges in the Southern District of Florida use a form order for FLSA cases. The order sets an early deadline for a statement of the claim.

Prisoner cases

In Maine, the U.S. Attorney's Office is added to the docket for habeas cases to ensure that that office automatically receives all notices. The court has an agreement with the Maine Attorney General's office for more efficient filing of prisoner cases.

The Western District of Missouri court has a memorandum of understanding with the Department of Corrections that prisoners may file habeas cases electronically, using equipment provided by the court.

The Northern District of Texas serves the state electronically in state habeas cases.

By agreement with the state prisons, prisoners may file electronically in the Eastern District of Wisconsin. The court also has an agreement with the prisons for more efficient service. And the court screens cases early and dictates orders of dismissal.

In the Eastern District of Wisconsin, the court is moving to electronic filing of all prisoner pleadings. Four prisons are included so far. The Wisconsin Department of Justice and one of the larger counties also have Memorandums of Understanding under which the Department or county accept service electronically on behalf of defendants, rather than requiring personal service or paperwork for a waiver. Some judges also screen prisoner cases in chambers, rather than send them to pro se law clerks because they have found it is often faster to dictate a screening order as they review the case activity. The same can be done on motions for extensions, discovery, protective orders, and other matters that arise in these cases.

Social Security cases

To keep Social Security cases on track, the Central District of California uses tight deadlines, permits no discovery or summary judgment motions without leave of court, and requires mandatory settlement conferences. In their management of these cases, most of the magistrate judges also require joint briefing.

In the District of Maine, the magistrate judges handle all Social Security cases and have developed a high level of expertise. When the court needed a solution because disposition times were close to exceeding CJRA requirements, the magistrate judge convened a task force of the Social Security bar. To shorten disposition times, the bar recommended an earlier deadline for remand motions and a decrease in the time permitted to attorneys to submit briefs. The magistrate judges also try to issue their reports and recommendations within thirty days of oral argument to enable the district judges to resolve appeals before the CJRA reporting deadlines.

In the Western District of Missouri, the magistrate judges are on the civil case assignment wheel and decide many of the Social Security cases on consent.

To meet a goal of six months to disposition in Social Security cases, the Northern District of Texas sets tight and firm briefing deadlines and permits no oral argument.

When Social Security case filings increased rapidly and the court started falling behind, the Western District of Washington took several steps to speed up the cases. First, it borrowed law clerks from the senior judges, had a full-day education program for them, and assigned them exclusively Social Security cases. The court also requested and received a re-

called magistrate judge. Third, a judge prepared statistics on the Social Security caseload, and the court then held a retreat to develop solutions. The court also created a bench/bar committee to obtain attorney input, which produced guidance on how judges could write more helpful opinions and altered the rules on length of briefs. Finally, the court held a full-day CLE workshop on Social Security cases for the bar. The court was able to catch up on the Social Security caseload in a year.

The Eastern District of Wisconsin focused on Social Security cases last year because a high reversal rate was causing significant cost and delay. After a meeting to discuss the problem with staff from the Social Security Administration, U.S. Attorneys' Office, and claimants' attorneys, a working group was formed that created a protocol for handling Social Security cases. The procedures include a form complaint, rules on service, and a briefing schedule. Most significantly in the court's view, the protocol also encourages claimants' attorneys to consult with the attorney for the government before filing the initial brief to explore whether a voluntary remand might be in order. A significant number of cases have been voluntarily remanded since the protocol became effective. The special procedures for Social Security cases are set out at the court's website under the tab "Efiling Procedures."

The Characteristics of Courts with Fast Civil Case Disposition Times

The information from our interviews with chief judges in the courts with fast civil case disposition times suggests they are fast for two primary reasons. First, the courts have sufficient judicial resources. Second, they are committed as a court to a core set of principles and practices—early judicial involvement in the case, setting deadlines and adhering to them, using magistrate judges to the fullest possible extent, effectively using staff law clerks, working as a team, actively using caseload reports to monitor court-wide and personal performance, and watching for and solving problems. These principles and practices are put into effect in diverse ways across the districts and across judges within a district—only two of the seven districts have uniform time frames and case-management orders, and many practices, such as the specific methods for setting case schedules and the role of magistrate judges, vary from district to district—but each court has procedures for, and a culture that supports, setting deadlines early and then monitoring and enforcing them. It is important to keep in mind, however, that this study is limited to review of disposition times and interviews in a small number of courts with only two—though very informed—respondents in each court. Additional understanding of disposition times in the trial courts would very likely be obtained through a more expansive study that includes quantitative measurement of the many practices and conditions that affect the management and disposition of civil and criminal cases

The Future of the Most Congested Courts Project

Perhaps one of the more interesting questions asked during the interviews was the question of benchmarks. As most of the chief judges and clerks understood, in an analysis based on

averages there will always be courts that fall above and below the average. Should courts below the average forever be labeled "most congested," even as both these courts and the average are improving? One of the judges suggested that the Committee consider developing benchmarks, which would provide fixed, not relative, measures against which courts could measure their performance.

Several chief judges also asked whether it was appropriate or informative to compare their district against the national average rather than against, for example, an average based on districts the same size or districts that had a similar number of vacant judgeships or a similar level of pro se filings. These chief judges suggested that a future stage of the project might consider developing additional analyses based on court size or other court characteristics.

The chief judges and clerks in the courts with delayed civil case disposition times also asked about the future of the Most Congested Courts Project. Regarding their own status, they were not concerned about the label but about their very real need for assistance. They wanted to know whether the Committee would stay involved with their courts and whether there would be any follow-on efforts. They understood that at a time of budget constraints they might not get additional resources, but they were concerned about the fairness of current resource allocations. They spoke of their desire for any information or guidance that would help them do their job better and be more efficient. And they genuinely appreciated the Committee's inquiry and desire to be helpful.

The courts with faster civil disposition times appreciated the Committee's interest, too, and the opportunity to discuss their practices. They also appreciated the opportunity for self-examination provided by the caseload analysis, and most had distributed them to other members of the court. One chief judge said, "This is a really healthy thing to do. Whether we're doing well or poorly in a couple of years, call us so we can go through this review again." More generally, across all the districts, the chief judges and clerks found the caseload analyses very helpful and many had sent the tables and graphs to other members of the court to prompt further discussion and to spur additional efforts to move the civil caseload quickly.

The interviews underscored several key points regarding the Committee's Most Congested Courts Project: (1) the courts appreciated the opportunity to be heard; (2) the courts with delayed civil disposition times would appreciate help accessing more re- sources, whether those resources are information, judges, or legal staff; (3) all the courts would like to learn more about rules and procedures that expedite civil cases; and (4) the caseload analysis was very helpful to the courts and prompted self-examination and change without need for a "dunning" letter from the Committee.

Given that the Committee's assignment from the Judicial Conference—to monitor district court caseloads—is a long-term assignment, the interviews suggest at least the following actions on the part of the Committee:

1. Disseminate more information to the courts about best practices, including best practices involving judicial case management, the organization and use of staff law clerks, and the use of visiting judges to supplement judicial resources that are missing in the courts with delayed civil case disposition times.

2. Update the caseload analysis at least yearly, make it easily available to all district courts (as already done and will be done on a continuing basis), and expand it to permit districts to compare themselves to other groupings, such as courts of their size or courts with similar caseloads.

3. Work with other Judicial Conference committees and the Administrative Office to explore whether more visiting judges can be provided, whether more staff law clerks can be provided, and whether temporary law clerks can be appointed for at least two years.

One additional step the Committee might consider is to ask the Center for a quantitative study that would take the understanding of case disposition time beyond the qualitative examination provided by the current study. Such a study would look at the effect on case disposition time of any practice or condition that can be readily measured—for example, judicial vacancies, the types (i.e., weightiness) of civil and criminal filings, the number of motions filed, the number of extensions granted, and the time between stages in a case. Such a study might help the Committee identify specific practices, beyond the general principles and approaches described by the present study, that support or impede expeditious civil case disposition time.

Attachment 1

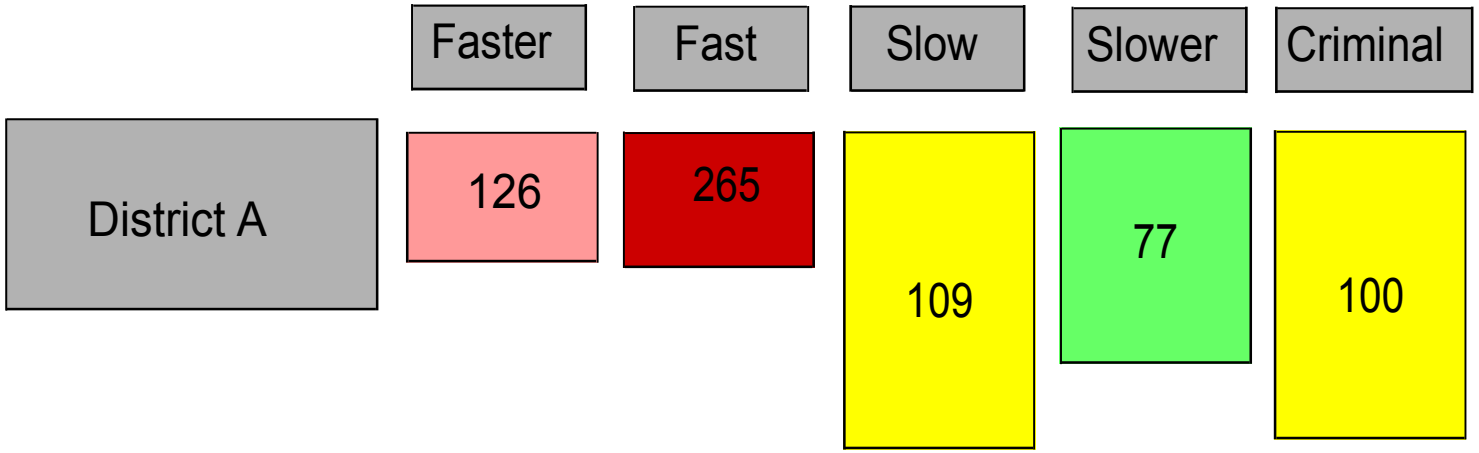
Example of Graphic and Tables Showing District Court Average Time to Disposition Compared to National Average Time to Disposition, by Civil Nature of Suit Code

Graphic and Tables Developed By
Margaret Williams
Federal Judicial Center

District A: 2010–2012

Average Disposition Time for the District Relative to the Average Disposition Time Nationwide

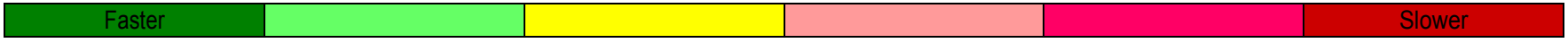
For Criminal Felony Cases and Civil Cases in Quartiles by Faster to Slower Groupings of Natures of Suit*



* Analysis and graphics developed by Margaret Williams, Senior Research Associate, Federal Judicial Center

District A: 2010–2012
Faster Quartile Cases
Ranked by Time*

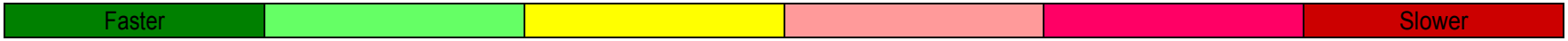
Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
BANKS AND BANKING	2.00	1	1	0.61	0.10
PRISONER - PRISON CONDITION	7.00	1	3	0.61	0.10
CONSUMER CREDIT	87.50	2	51	1.21	0.20
BANKRUPTCY APPEALS RULE 28 USC 158	132.92	13	66	7.88	1.31
CONTRACT FRANCHISE	196.00	1	68	0.61	0.10
TRADEMARK	198.33	6	72	3.64	0.61
PRISONER - CIVIL RIGHTS	235.38	29	83	17.58	2.93
CIVIL RIGHTS ADA OTHER	237.00	3	88	1.82	0.30
COPYRIGHT	299.11	9	98	5.45	0.91
NATURALIZATION APPLICATION	200.00	2	120	1.21	0.20
EMPLOYEE RETIREMENT INCOME SECURITY ACT	318.95	41	120	24.85	4.14
LABOR/MANAGEMENT RELATIONS ACT	291.20	5	122	3.03	0.50
MARINE CONTRACT ACTIONS	414.15	33	137	20.00	3.33
INTERSTATE COMMERCE	427.00	1	146	0.61	0.10
FORECLOSURE	294.60	5	159	3.03	0.50
RENT, LEASE, EJECTMENT	350.50	2	257	1.21	0.20
AIRLINE REGULATIONS	387.00	1	271	0.61	0.10
RECOVERY OF DEFAULTED STUDENT LOANS	568.00	10	399	6.06	1.01
TOTAL	258.15	165	126		



*Analysis and tables developed by Margaret Williams, Senior Research Associate, Federal Judicial Center

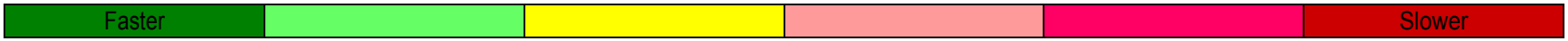
District A: 2010–2012
Fast Quartile Cases
Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
PRISONER PETITIONS -VACATE SENTENCE	239.85	61	75	26.29	6.16
CIVIL RIGHTS ACCOMMODATIONS	308.00	4	94	1.72	0.40
CONSTITUTIONALITY OF STATE STATUTES	287.00	1	99	0.43	0.10
PRISONER PETITIONS - HABEAS CORPUS	414.89	70	124	30.17	7.06
OTHER PERSONAL PROPERTY DAMAGE	576.17	6	142	2.59	0.61
DRUG RELATED SEIZURE OF PROPERTY	468.76	21	150	9.05	2.12
ASSAULT, LIBEL, AND SLANDER	523.00	5	178	2.16	0.50
OTHER REAL PROPERTY ACTIONS	477.18	11	189	4.74	1.11
OTHER STATUTORY ACTIONS	691.20	49	227	21.12	4.94
FAIR LABOR STANDARDS ACT	1278.67	3	358	1.29	0.30
ASBESTOS PERSONAL INJURY - PROD.LIAB.	4116.00	1	1280	0.43	0.10
TOTAL	852.79	232	265		



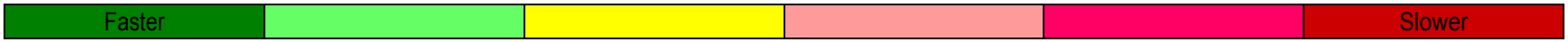
District A: 2010–2012
Slow Quartile Cases
Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
OTHER FORFEITURE AND PENALTY SUITS	197.53	15	59	5.15	1.51
D.I.W.C./D.I.W.W.	258.93	40	71	13.75	4.04
CIVIL RIGHTS VOTING	195.50	6	77	2.06	0.61
CIVIL RIGHTS ADA EMPLOYMENT	277.60	5	78	1.72	0.50
S.S.I.D.	281.08	25	80	8.59	2.52
MILLER ACT	287.79	14	100	4.81	1.41
OTHER LABOR LITIGATION	342.38	8	101	2.75	0.81
MARINE PERSONAL INJURY	400.00	23	104	7.90	2.32
INSURANCE	372.77	53	116	18.21	5.35
MOTOR VEHICLE PERSONAL INJURY	417.96	23	118	7.90	2.32
OTHER FRAUD	432.25	4	193	1.37	0.40
OTHER CONTRACT ACTIONS	663.42	66	212	22.68	6.66
TAX SUITS	754.67	9	109	3.09	0.91
TOTAL	375.53	291			



District A: 2010–2012
Slower Quartile Cases
Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
CIVIL (RICO)	9.33	3	2	0.99	0.30
SECURITIES, COMMODITIES, EXCHANGE	56.00	1	7	0.33	0.10
PERSONAL INJURY - PRODUCT LIABILITY	284.09	23	34	7.59	2.32
PATENT	153.00	1	58	0.33	0.10
OTHER PERSONAL INJURY	417.06	66	58	21.78	6.66
PROPERTY DAMAGE -PRODUCT LIABILTY	252.67	6	63	1.98	0.61
ENVIRONMENTAL MATTERS	328.79	29	64	9.57	2.93
AIRPLANE PERSONAL INJURY	296.75	4	64	1.32	0.40
OTHER CIVIL RIGHTS	235.45	88	81	29.04	8.88
OVERPAYMENTS UNDER THE MEDICARE ACT	303.00	2	92	0.66	0.20
LAND CONDEMNATION	618.50	2		0.66	0.20
FEDERAL EMPLOYERS' LIABILITY	425.00	1	94	0.33	0.10
CIVIL RIGHTS JOBS	403.33	21	151	6.93	2.12
TORTS TO LAND	673.25	4	158	1.32	0.40
MEDICAL MALPRACTICE	658.71	49	159	16.17	4.94
BANKRUPTCY WITHDRAWAL 28 USC 157	441.33	3	77	0.99	0.30
TOTAL	347.27	303			



Attachment 2

Explanation of the Civil Case Disposition Time Dashboard

Margaret Williams
Federal Judicial Center

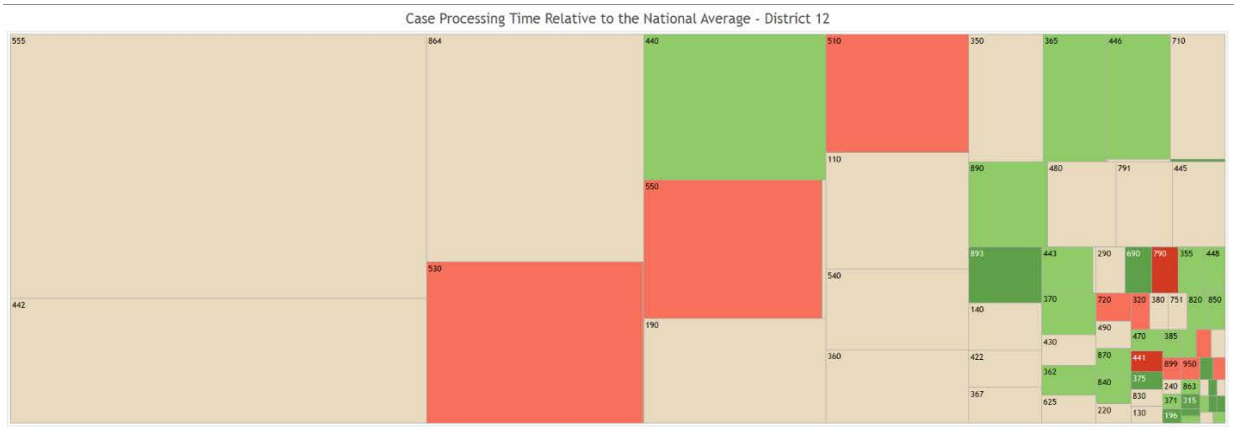
Civil Case Disposition Dashboard for U.S. District Courts

Courts often want to know how slowly or quickly they dispose of particular types of cases, relative to the national average. To that end, the Federal Judicial Center has compiled statistics on civil case terminations for each district and has placed the information in an electronic case termination dashboard. The dashboard allows a court to see its disposition time on each nature of suit, relative to the national average, and then drill down to the underlying case information. This drill down capability allows a court to see any problem areas where additional resources may be needed to help cases terminate more quickly. By looking at cases that terminated slowly in the past, courts can learn to better manage cases in the future.

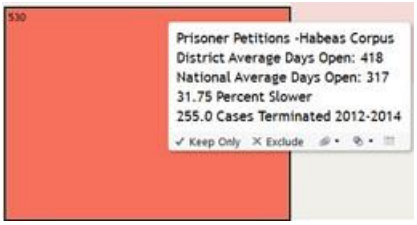
Understanding the Dashboard – Case Terminations

The basic idea behind a dashboard is to allow a court to see at a glance which nature of suit (NOS) codes it disposes of slowly and which NOS codes it disposes of quickly. This information is displayed in a treemap (see the example below for hypothetical District 12). The overall graphic represents the total terminated civil caseload in District 12 for calendar years 2012–2014. Each of the individual boxes is the proportion of the court's terminated civil caseload represented by each NOS code. Larger boxes mean the NOS code is a larger proportion of the civil caseload.

In treemaps, the color of the boxes is meaningful as well. Red boxes show NOS codes District 12 terminates slower than the national average: the dark red boxes are the slowest cases (more than 50% slower than the national average) and the light red boxes are slow but not as slow (16%–50% slower). Green boxes are the NOS codes the court terminates faster than the national average: again, the dark green boxes are the fastest cases (more than 50% faster), and the light green boxes are fast but not as fast (16%–50% faster). Boxes in beige show an NOS code disposed of in approximately the same time as the national average (within 15% of the national average).



As the user hovers over the boxes, a tooltip appears that provides the specific NOS description, the court's average case disposition time, the national average disposition time, the court's overall disposition score relative to the national average, and the number of cases the court terminated in this time period. In the example below, we can see that District 12 terminated NOS 530, Prisoner Petitions – Habeas Corpus, on average, in 418 days, which is 31.75% slower than the national average of 317 days. This NOS code is a relatively large proportion of the docket (it is the largest red box in the treemap above), with 255 cases terminated between 2012 and 2014.

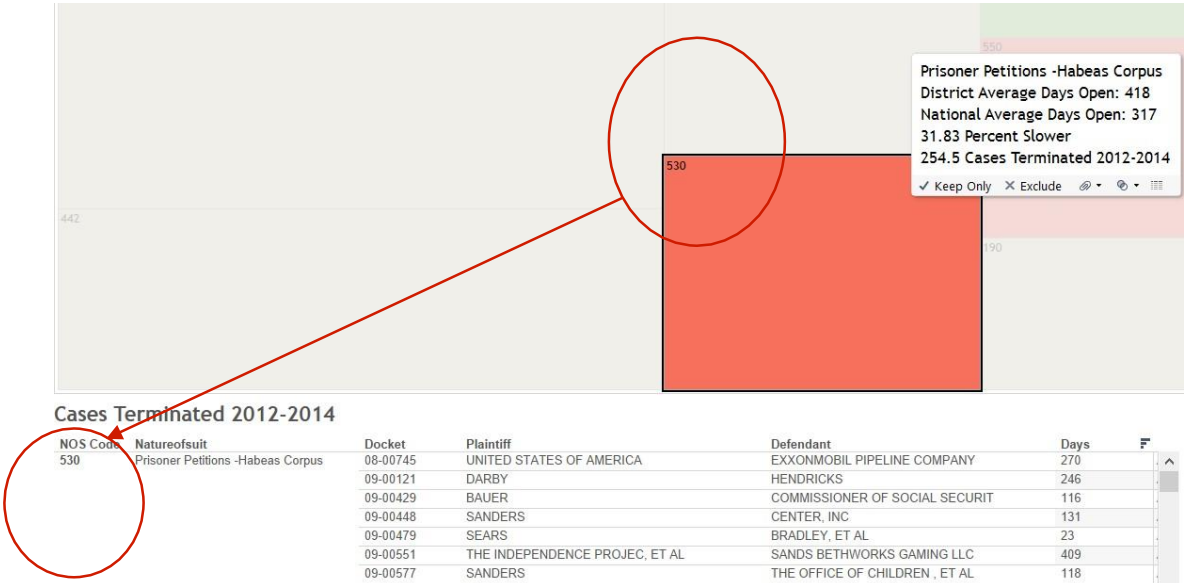


At the bottom of the dashboard, the user can see the cases used to calculate the district's average disposition times, organized by nature of suit and docket number (see below). Also listed are the plaintiffs and defendants for each case and the total number of days, from filing to termination, that the case was open.

Cases Terminated 2012-2014

NOS Code	Natureofsuit	Docket	Plaintiff	Defendant	Days
110	Insurance	05-00831	SMITH	SMITH	66
		08-00019	MAPP	GEORGIA DEPARTMENT OF C, ET AL	760
		09-00169	CULVER, ET AL	UNITED STATES OF AMERICA	94
		09-00375	HOLTCAMP	GLOBAL MEDICAL SAFETY DIVISION	822
		09-00574	NINO	MACY'S RETAIL HOLDINGS, INC.	383
		09-00713	BATISTE	LAWRENCE	380
		09-00780	ELLIS	JACKSON NATIONAL LIFE I, ET AL	324
		09-01055	BROOKS FARMS, INC.	AGRICOMMODITIES, INC., ET AL	564
		10-00222	JOHNSON	KEITH, ET AL	167
		10-00242	FRAZIER	HAYNES	748
		10-00502	GOMEZ	COLVIN	153
		10-00531	PERRY	FORT WAYNE CITY OF, IN, ET AL	70
		10-00611	BELL	MCCANN, ET AL	55
		10-00842	SHAKIR	DONAHOE, ET AL	64
		10-00858	SELLERS	SOCIAL SECURITY ADMINISTRATION	322
		10-00969	BAILEY	WALGREEN CO., ET AL	166

As the user clicks on each box in the treemap, the list of cases will filter to show only the cases within the selected nature of suit (see example on next page). To remove the filter, the user clicks on the selected box again and the screen reverts to the complete treemap.



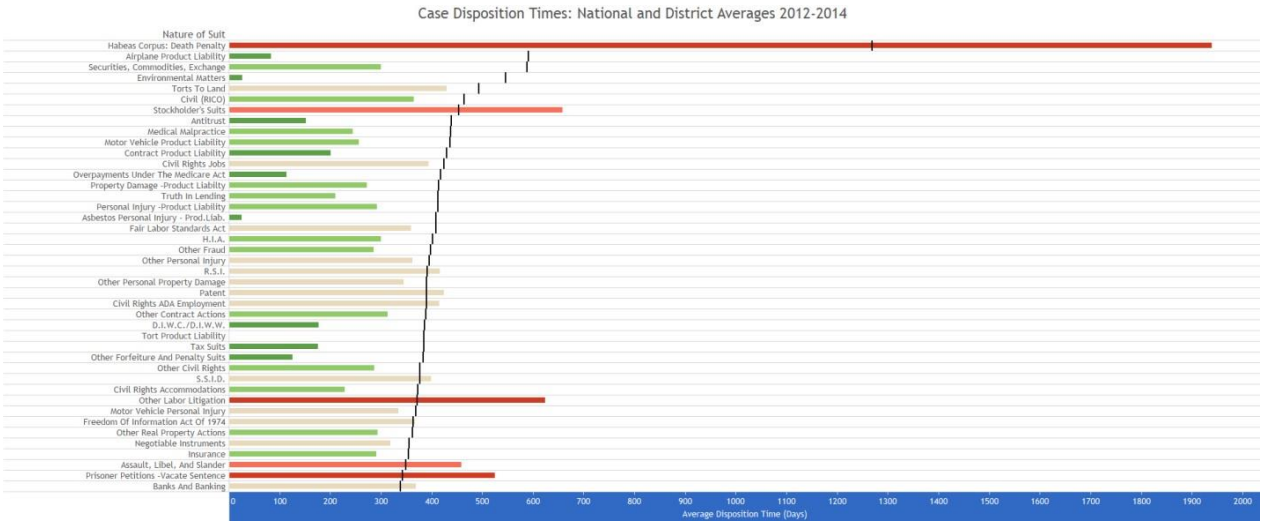
Cases Terminated 2012-2014

NOS Code	Natureofsuit	Docket	Plaintiff	Defendant	Days
530	Prisoner Petitions -Habeas Corpus	08-00745	UNITED STATES OF AMERICA	EXXONMOBIL PIPELINE COMPANY	270
		09-00121	DARBY	HENDRICKS	246
		09-00429	BAUER	COMMISSIONER OF SOCIAL SECURIT	116
		09-00448	SANDERS	CENTER, INC	131
		09-00479	SEARS	BRADLEY, ET AL	23
		09-00551	THE INDEPENDENCE PROJEC, ET AL	SANDS BETHWORKS GAMING LLC	409
		09-00577	SANDERS	THE OFFICE OF CHILDREN , ET AL	118
		09-00998	HICKS	SMITH	92
		10-00065	GATHERS	PEOPLE OF THE STATE OF NEW YOR	123
		10-00066	LANE	FEATHERS	1049
		10-00072	LITERAL	WARDEN TOLEDO CORRECTIONAL INS	490
		10-00102	FINN	COLVIN	899
		10-00147	CHANCE	PHARIS, ET AL	0
		10-00210	RIVAS	UNITED STATES OF AMERICA	117

If a court would like to know which cases were used to estimate their case disposition time for all NOS codes, they can download it directly from the software, or contact the FJC and we will provide it.

Understanding the Dashboard – National NOS Disposition Time

The second tab of the dashboard shows the average time to case disposition by NOS code, from the slowest to the fastest nationally, as well as a district's average time on each nature of suit. This tab presents the same basic information as the treemap (showing where a district is slower or faster than the national average) but in a different way. The bar is the district's average disposition time, and the black dash is the national average disposition time.



If a district is slower than the national average, the bar runs past the dash and is colored accordingly (dark red >50% slower, light red 16%–50% slower than the national average). If a district is faster than the national average, the bar stops before the black dash and is colored according to the time (dark green >50% faster, light green 16%–50% faster than the national average). District times within 15% of the national average are colored beige.

The sorting of the chart provides a different piece of information than the treemap: which cases take a long time, on average, for all districts to terminate and which ones are terminated, on average, much more quickly. While a court may know from experience that Habeas Corpus: Death Penalty cases are slow to terminate, seeing that they take, on average, twice as long nationwide as airplane product liability cases may be surprising. If courts are looking for a benchmark for case disposition time, the range of 400 and 500 days to termination is a good benchmark to keep in mind, as most civil case termination times fall into this range.

Who to Contact

Users with questions about how to use the dashboard or what other avenues might be explored may contact Margie Williams, Senior Research Associate, at the Federal Judicial Center (mwilliams@fjc.gov , 202-502-4080).

Attachment 3

Example Email Sent to Chief Judge and Clerk of Court in "Most Congested" Districts in Preparation for Telephone Interview

From: Donna Stienstra/DCA/FJC/USCOURTS
To: Chief Judge _____
Cc: Clerk of Court_____, Richard Arcara/NYWD/02/USCOURTS@USCOURTS, Larry Baerman/NYND/02/USCOURTS@USCOURTS, Jane MacCracken/DCA/AO/USCOURTS@USCOURTS
Date: _____
Subject: Preparation for conference call

Dear Chief Judge :

As you know, Judge Arcara, Larry Baerman, Jane MacCracken, and I will be talking with you and [clerk's name] on_____about the caseload of your district. The conversation is part of an initiative of the Court Administration and Case Management Committee (CACM), which was asked some years ago by the Judicial Conference Executive Committee to monitor district court caseloads.

Our conversation will be based on a set of tables you received several weeks ago. During the call we would like to talk with you about the types of cases that both (1) make up a substantial portion of your civil caseload and (2) are disposed of significantly more slowly than the national average for all district courts. The point of the discussion is to determine whether the court would want assistance in resolving the slower cases and what kind of assistance might be helpful.

We know your district's prisoner cases fit the description of large caseloads that are significantly slower than national averages in disposition time. For example, if you look at the table titled "Faster Quartile Cases", you can see that your district disposed of 633 prisoner civil rights cases in the years 2010-2012 and took, on average, 865 days to dispose of these cases -- or 205% longer than the national average. Habeas corpus cases, which are in the table labeled "Fast Quartile Cases", are another example, with 551 cases taking, on average, 680 days to dispose of, or 104% longer than the national average.

Below I list several additional case types we might discuss with you. You can find the information about these case types in the tables you received (which I have enclosed again below, along with information about how to interpret the tables). These case types accounted for a substantial number of the cases disposed of by your court in 2010-2012 and took substantially longer to dispose of than these case types did nationwide.

Faster Quartile	Consumer Credit	895 cases, 213 days to disposition	23% longer than the national ave.
	Foreclosure	114 cases, 264 days to disposition	43% longer than the national ave.
	ERISA	132 cases, 575 days to disposition	117% longer than the national ave.
Fast Quartile	Other Stat. Actions	162 cases, 400 days to disposition	31% longer than the national ave.
	FSLA	47 cases, 1029 days to disposition	188% longer than the national ave.
Slow Quartile	Insurance	66 cases, 518 days to disposition	58% longer than the national ave.
	Oth. Contr.Actions	200 cases, 574 days to disposition	67% longer than the national ave.
	Motor Vehicle PI	84 cases, 625 days to disposition	74% longer than the national ave.
Slower Quartile	Civil Rights Jobs	387 cases, 694 days to disposition	77% longer than the national ave.
	Other Civil Right	393 cases, 715 days to disposition	94% longer than the national ave.

During our conversation on_____, we'll be interested in your thoughts about the longer-than-average disposition times for the case types listed above, particularly what might explain the longer disposition times -- for example, characteristics of the cases themselves, relevant features of the bench or bar, or other conditions in the district. And if there are other case types or other features of the district you would like to discuss, we welcome your thoughts on those as well.

In the meantime, if you have any questions, please don't hesitate to call me. We look forward to talking with you.

Sincerely,

Donna Stienstra

Federal Judicial Center
Washington, DC
202-502-4081

Attachment: "Caseload Tables, [District Name], March 2013.pdf"

Attachment 4

Example Email Sent to Chief Judge and Clerk of Court in "Expedited" Districts in Preparation for Telephone Interview

From: Donna Stienstra/DCA/FJC/USCOURTS
To: Chief Judge _____
Cc: Clerk of Court_____, Richard Arcara/NYWD/02/USCOURTS@USCOURTS, Larry Baerman/NYND/02/USCOURTS@USCOURTS, Jane MacCracken/DCA/AO/USCOURTS@USCOURTS
Date: _____
Subject: Preparation for conference call

Dear Chief Judge :

I'm writing on behalf of Judge Richard Arcara, Larry Baerman, Jane MacCracken, and myself with regard to the conversation scheduled with you and {clerk of court name] next week. That conversation, which will focus on your district's civil caseload, is part of an initiative of the Court Administration and Case Management Committee (CACM), which was asked some years ago by the Judicial Conference Executive Committee to monitor district court caseloads. Last fall we talked with seven district courts that terminate their civil caseloads more slowly than the national average. This fall we're talking with seven courts that terminate their caseloads more quickly than the national average.

The call with you and [clerk's name] is scheduled for_____at_____. The call-in number is 888-398-2342# and the access code is 3487491#.

Our conversation will be based on a set of tables you received with a letter from Judge Julie Robinson, CACM Committee chair, August 15, 2014 (attached below). As you know from the letter, the CACM Committee selected your court for an interview because you dispose of your civil caseload expeditiously compared to average disposition times nationally.

The purpose of the call is to understand how caseloads move and to identify any procedures, best practices, judicial or staff habits, etc. that could be adopted by other courts to expedite their civil caseloads. During the call we would like to talk with you about practices your court uses that foster expedited disposition times for civil cases. These practices might include judicial case management procedures, methods for tracking the caseload and identifying bottlenecks, pilot projects used to expedite specific types of cases, use of clerk's office and chambers staff, role of the magistrate judges, articulation of goals for the court, relevant features of the bench or bar, or any other conditions in the district.

In addition to the general discussion outlined above, we're interested in several specific questions:

1. We'd like to know whether your court has had slow disposition times for some types of civil cases and has overcome those slow disposition times. If so, what did the court do to bring disposition times under control?

2. Your court has disposition times near or better than the national average for some types of cases that are very slow in courts with backlogged civil caseloads--e.g., ERISA cases, consumer credit cases, prisoner civil rights cases, habeas petitions, Social Security cases, and employment civil rights cases. What does your court do to keep these case types moving quickly to disposition?

3. Given your court's expeditious processing of most of its caseload, the occasional very slow case type stands out. What is the nature of the court's "Civil rights ADA other" cases, for example, that makes them

considerably slower than the national average in disposition time?

We look forward to talking with you and, later in the project, using your experience and best practices to assist other courts. Thank you for being willing to assist the Committee with this project.

If you have any questions before we talk next week, please don't hesitate to call me.

Sincerely,

Donna Stienstra

Federal Judicial Center
Washington, DC
202-502-4081

See attached file: “Civil Caseload Analysis, [district name].pdf”

TAB 4C

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 14, 2016

The Civil Rules Advisory Committee met at the Tideline Hotel in Palm Beach, Florida, on April 14, 2016. (The meeting was scheduled to carry over to April 15, but all business was concluded by the end of the day on April 14.) Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan M. Ericksen; Parker C. Folse, Esq. (by telephone); Professor Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Judge Brian Morris; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Former Committee Chair Judge David G. Campbell and former member Judge Paul W. Grimm also participated by telephone. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, liaison (by telephone), and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Joshua Gardner, Esq.. Rebecca A. Womeldorf,Esq., Derek Webb, Esq., and Julie Wilson, Esq., represented the Administrative Office. Judge Jeremy Fogel and Emery G. Lee, Esq., attended for the Federal Judicial Center. Observers included Henry D. Fellows, Jr. (American College of Trial Lawyers); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Alex Dahl, Esq.(Lawyers for Civil Justice); John K. Rabiej, Esq. (Duke Center for Judicial Studies); Natalia Sorgente (American Association for Justice); John Vail, Esq.; Valerie M. Nannery, Esq.; Henry Kelsen, Esq.; and Benjamin Robinson, Esq.

Judge Bates opened the meeting by welcoming everyone. He noted that Judge Pratter and Elizabeth Cabraser have completed serving their second terms and are due to rotate off the Committee. "We will miss you, but hope to see you frequently in the future." Judge Sutton also is completing his term as Chair of the Standing Committee, and Judge Harris is concluding his term with the Bankruptcy Rules Committee. They too will be missed.

Benjamin Mizer introduced Joshua Gardner, who will succeed Ted Hirt as a Department of Justice representative to the Committee. Gardner is a highly valued member of the Department, and makes time to teach civil procedure classes as an adjunct professor.

Judge Bates noted that the proposed amendments to Civil Rules 4, 6, and 82 remain pending in the Supreme Court. On this front, "no news is good news." The Minutes for the January meeting of the Standing Committee are in the agenda book for this meeting. The package of six proposed amendments to Rule 23 that had advanced at

the November meeting of this Committee was discussed. The Rule 23 discussion also described the decision to defer action on the growing number of decisions grappling with "ascertainability" as a criterion for class certification and with the questions raised by different forms of "pick-off" strategies that defendants use in attempts to moot individual class representatives and thus defeat class certification. The Rule 62 stay-of-execution proposal also was discussed. Apart from specific rules proposals, the ongoing efforts to educate bench and bar on the December 1, 2015 package of amendments were described. These efforts are "important, essential." Discussion also included the continuing efforts to develop pilot projects to test reforms that do not yet seem ready to be adopted as national rules.

November 2015 Minutes

The draft minutes of the November 2015 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Rebecca Womeldorf reported that, apart from the bills noted at the November meeting, there appear to be no new legislative activities the Committee should be tracking.

Rule 5

The history of the Committee's work on the e-filing and e-service provisions of Rule 5 was recounted. A year ago the Committee voted to recommend publication of amendments to reflect the growing maturity of electronic filing and service. Moving in parallel, the Criminal Rules Committee began a more ambitious project. Criminal Rule 49 has invoked the Civil Rules provisions for filing and service. The Criminal Rules Committee began to consider the possibility of adopting a complete and independent rule of their own. This development counseled delay in the Civil Rules proposals. The e-filing and e-service provisions in the Appellate, Bankruptcy, Civil, and Criminal Rules were developed together. The value of adopting identical provisions in each set of rules is particularly high with respect to filing and service, although it is recognized that differences in the rules may be justified by differences in the characteristics of the cases covered by each set of rules. The plan to recommend publication in 2015 was deferred.

The Criminal Rules Committee developed an independent Rule 49. The Subcommittee that developed the rule welcomed participation in their work and conference calls by representatives of the Civil Rules Committee. The Civil Rules provisions proposed now were substantially improved as a result of these discussions. The

differences from the proposals developed a year ago are discussed with the description of the current proposals.

Although filing is covered by Rule 5(d), which comes after the service provisions of Rule 5(b) in the sequence of subdivisions, it is easier to begin discussion with filing, which is the act that leads to service.

Present Rule 5(d)(3) allows e-filing when allowed by local rule, and also provides that a local rule may require e-filing "only if reasonable exceptions are allowed." Almost all districts have responded to the great advantages of e-filing by making it mandatory by requiring consent in registering as a user of the court's system. Reflecting this reality and wisdom, proposed Rule 5(d)(3) makes e-filing mandatory, except for filings "made by a person proceeding without an attorney."

Pro se litigants have presented more difficulty. Last year's draft also required e-filing by persons proceeding without an attorney, but directed that exceptions must be allowed for good cause and could be made by local rule. Work with the Criminal Rules Subcommittee led to a revision. The underlying concern is that many pro se litigants, particularly criminal defendants, may find it difficult or impossible to work successfully with the court's system. The current proposal allows e-filing by a person proceeding without an attorney "only if allowed by court order or by local rule." A further question is whether a pro se party may be required to engage in e-filing. Some courts have developed successful programs that require e-filing by prisoners. The programs work because staff at the prison convert the prisoners' papers into proper form and actually accomplish the filing. This provides real benefits to all parties, including the prisoners. The Criminal Rules Subcommittee, however, has been concerned that permitting a court to require e-filing might at times have the effect of denying access to court. Their concern with the potential provisions for Rule 5 arises from application of Rule 5 in proceedings governed by the Rules for habeas corpus and for § 2255 proceedings. Discussion of these issues led to agreement on a provision in proposed Rule 5(b)(3)(B) that would allow the court to require e-filing by a pro se litigant only by order, "or by a local rule that allows reasonable exceptions."

e-Service is governed by present Rule 5(b)(2)(E) and (3). (b)(2)(E) allows service by electronic means "that the person consented to in writing." (b)(3) allows a party to "use" the court's electronic facilities if authorized by local rule. Most courts now exact consent as part of registering to use the court's system. Proposed Rule 5(b)(2)(E) reflects this practice by eliminating the requirement for consent as to service through the court's facilities. One of the benefits of consulting with the Criminal Rules Subcommittee has been to change the reference to

"use" of the court's system. The filing party does not take any further steps to accomplish service — the system does that on its own. So the rule now provides for serving a paper by sending to a registered user "by filing it with the court's electronic filing system." Other means of e-service continue to require consent of the person to be served. The proposal advanced last year eliminated the requirement that the consent be in writing. The idea was that consent often is given, appropriately enough, by electronic communications. The Criminal Rules Subcommittee was uncomfortable with this relaxation. The current proposal carries forward the requirement that consent to e-service be in writing for all circumstances other than service by filing with the court.

The direct provision for service by e-filing with the court in proposed Rule 5(b)(2)(E) makes present Rule 5(b)(3) superfluous. The national rule will obviate any need for local rules authorizing service through the court's system. The proposals include abrogation of Rule 5(b)(3).

Finally, the recommendations carry forward the proposal to allow a Notice of Electronic Filing to serve as a certificate of service. Present Rule 5(d)(1) would be carried forward as subparagraph (A), which would direct filing without the present "together with a certificate of service." A new subparagraph (B) would require a certificate of service, but also provide that a Notice of Electronic Filing constitutes a certificate of service on any person served by filing with the court's electronic-filing system. It does not seem necessary to add to this provision a provision that would defeat reliance on a Notice of Electronic Filing if the serving party learns that the paper did not reach the person to be served. If it did not reach the person, there is no service to be covered by a certificate of service.

Discussion noted the continuing uncertainties about amending the provisions for e-filing and e-service without addressing the many parallel provisions that call for acts that are not filing or service. Many rules call for such as acts as mailing, or delivering, or sending, or notifying. Similar words that appear less frequently include made, provide, transmit[ted] return, sequester, destroy, supplement, correct, and furnish. Rules also refer to things written or to writing, affidavit, declaration, document, deposit, application, and publication (together with newspaper). On reflection, it appears that the question of refitting these various provisions for the electronic era need not be confronted in conjunction with the Rule 5 proposals. Rule 5 provides a general directive for the many rules provisions that speak to serving and filing. It can safely be amended without interfering with the rules that govern acts that are similar but do not of themselves involve serving or filing.

It was noted that the parallel consideration of e-filing and

e-service rules in the several advisory committees means that some work remains to be done in achieving as nearly identical drafting as possible, consistent with the differences in context that may justify some variations in substance. What appear to be style differences may in fact be differences in substance. It was agreed that the Committee Chair has authority to approve wording changes that resolve style differences as the several committees work to generate proposals to present to the Standing Committee in June. If some changes in substance seem called for, they likely will be of a sort that can be resolved by e-mail vote.

Rule 62: Stays of Execution

Judge Bates introduced the Rule 62 proposals by noting that this project has been developed as a joint effort with the Appellate Rules Committee. A Rule 62 Subcommittee chaired by Judge Matheson has developed earlier versions and the current proposal.

Judge Matheson noted that earlier Rule 62 proposals were discussed at the April 2015 and November 2015 meetings. The Subcommittee worked to revise and simplify the proposal in response to the concerns expressed at the November meeting. The Subcommittee reached consensus on the three changes that provided the initial impetus for taking on Rule 62. The proposal: (1) extends the automatic stay from 14 days to 30 days, and eliminates the "gap" between expiration of the stay on the 14th day and the express authority in Rule 62(b) to order a stay pending disposition of Rule 50, 52, 56, or 60 motions made as late as 28 days after judgment is entered; (2) expressly recognizes that a single security can be posted to cover the period between expiration of the automatic stay and completion of all proceedings on appeal; and (3) expressly recognizes forms of security other than a bond.

Discussion in the Standing Committee in January focused on only one question: why is the automatic stay extended to 30 days rather than 28? The answer seemed to be accepted — it may be 28 days before the parties know whether a motion that suspends appeal time will be made, and if appeal time is not suspended 30 days allows a brief interval to arrange security before expiration of the 30-day appeal time that governs most cases.

After the Standing Committee meeting, the Subcommittee made one change in the proposed rule text, eliminating these words from proposed (b)(1): " * * * a stay that remains in effect until a designated time[~~, which may be as late as issuance of the mandate on appeal,~~] * * *." The Subcommittee concluded that it may be desirable to continue the stay beyond issuance of the mandate. There may be a petition for rehearing, or a petition for certiorari, or post-mandate proceedings in the court of appeals. And the Committee Note was shortened by nearly forty percent.

Discussion began with a question about proposed Rule 62(b)(1): "The court may at any time order a stay that remains in effect until a designated time, and may set appropriate terms for security or deny security." Present Rule 62 "does not mention a stay without a bond. It happens, but ordinarily only in extraordinary circumstances." If there is no intent to change present practice, something should be said to indicate that a stay without security is disfavored. And it might help to transpose proposed paragraph (2) with (1), so that the nearly automatic right to a stay on posting bond comes first. That would emphasize the importance of security.

Judge Matheson noted that earlier drafts had expressly recognized the court's authority to deny a stay for good cause, and to dissolve a previously issued stay. Those provisions were deleted, but that was because they would have enabled the court to defeat what has been seen as a nearly automatic right to obtain a stay on posting security. Proposed (b)(1) is all that remains. In a sense it carries over from the Committee's first recent encounter with Rule 62. Before the Time Project, the automatic stay lasted for 10 days and the post-judgment motions that may suspend appeal time had to be made within 10 days. The Time Project created the "gap" in present Rule 62 by extending the automatic stay only to 14 days, while extending the time for motions under Rules 50, 52, and 59 to 28 days. A judge asked the Committee whether the court can order a stay after 14 days but before a post-judgment motion is made. The Committee concluded at the time that the court always has inherent power to control its own judgment, including authority to enter a stay during the "gap" without concern about any negative implications from the express authority to enter a stay pending disposition of a motion once the motion is actually made. The Subcommittee thought that proposed (b)(1) is a useful reflection of abiding inherent authority.

This observation was met by a counter-observation: Is the proposed rule simply an attempt to codify existing practice? If so, should it recognize the cases that say that only extraordinary circumstances justify a stay without security? The need to be clear about the relationship with present practice was pointed out from a different perspective. The Committee Note says that proposed subdivisions (c) and (d) consolidate the present provisions for stays in actions for an injunction or receivership, and for a judgment or order that directs an accounting in an action for patent infringement. Does that imply that some changes in present practice are embodied in proposed subdivision (b), as they are in proposed subdivision (a)? The response was that proposed subdivision (b)(2) clearly incorporates several changes over practice under the supersedeas bond provisions of present Rule 62(d). Under the proposed rule, a party may obtain a stay by bond at any time after judgment enters, without waiting for an appeal to be taken. The new rule would expressly recognize a single security

for the duration of post-judgment proceedings in the district court and all proceedings on appeal. It would expressly recognize forms of security other than a bond. So too, the automatic stay is extended, and the court is given express power to "order otherwise." The decision not to change the meaning of the present provisions that would be consolidated in proposed Rule 62(c) and (d) does not carry any implications, either way, as to proposed Rule 62(b)(1).

Judge Matheson asked whether, if a standard for denying a stay is to be written into rule text, it should be "good cause" or "extraordinary circumstances." Some uncertainty was expressed about what standard might be written in. "Extraordinary circumstances" may be too narrow.

A Committee member asked what experience the district-judge members have with these questions. The answers were that judges seldom encounter questions about stays of execution. One judge suggested that because questions seldom arise, judges will read the rule text carefully when a question does arise. It is important that the rule text say exactly what the rule means. A similar suggestion was that it would be better to resist any temptation to supplement rule text with more focused advice in the Committee Note. The Committee should decide on the proper approach and embody it in the rule text.

Proposed Rule 62(b)(1) will be further considered by the Subcommittee, consulting with Judge Gorsuch as liaison from the Standing Committee, with the purpose of reaching consensus on a proposal that can be advanced to the Standing Committee in June as a recommendation for publication. If changes are made that require approval by this Committee, Committee approval will be sought by electronic discussion and vote.

Rule 23

Judge Dow introduced the Rule 23 Subcommittee report. The Subcommittee continued to work hard on the package of six proposals that was presented for consideration at the November Committee meeting. Much of the work focused on the approach to objectors, and particularly on paying objectors to forgo or abandon appeals. Working in consultation with representatives of the Appellate Rules Committee, the drafts that would have included amendments of Appellate Rule 42 have been abandoned. The current proposal would amend only Civil Rule 23(e). In addition, a seventh proposal has been added. This proposal would revise the Rule 23(f) amendment to include a 45-day period to seek permission for an interlocutory appeal when the United States is a party. It was developed with the Department of Justice, and had not advanced far enough to be presented at the November meeting.

The rule texts shown in the agenda materials, pp. 96-99, have been reviewed by the style consultants. Only a few differences of opinion remain.

Notice. Two of the proposed amendments involve Rule 23(c)(2)(B). The first reflects a common practice that, without the amendment, may seem to be unauthorized. When a class has not yet been certified, it has become routine to address a proposal to certify a class and approve a settlement by giving "preliminary" certification and sending out a notice that, in a (b)(3) class, includes a deadline for requesting exclusion, as well as notice of the right to appear and to object. The so-called preliminary certification is not really certification. Certification occurs only on final approval of the settlement and the class covered by the settlement. This amendment would expand the notice provision to include an order "ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)." That makes it clear that an opt-out deadline is properly set by this notice. Generally, settlement agreements call for an opt-out period that expires before actual certification with final approval of the settlement.

The second change in Rule 23(b)(2)(B) is to address the means of notice. The Subcommittee worked diligently in negotiating the words and sequence of words. The Note explains that the choice of means of notice is a holistic, flexible concept. Different sorts of class members may react differently to different media. A rough illustration is provided by the quip that a class of people who are of an age to need hearing aids respond by reading first-class mail, and trashing e-mail. A class of younger people who wear ear buds, not hearing aids, trash postal mail and read e-mail. The Note emphasizes that no one form of notice is given primacy over other forms. The Note further emphasizes the need for care in developing the form and content of the notice.

Discussion began by expressing discomfort with the direction that notice "must" include individual notice to all members who can be identified through reasonable effort. **[does anyone recall the specific example Judge Ericksen gave? I did not hear it.]** The proposal carries forward the language of the present rule, but there is a continuing tension between "must" and the softer requirement that notice only be the best that is practicable under the circumstances. A determination of practicability entails a measure of discretion. Part of the tension arises from the insistence of the style consultants that the single sentence drafted by the Subcommittee was too long: "the best notice that is practicable under the circumstances, — by United States mail, electronic means, or other appropriate means — including individual notice to all members who can be identified through reasonable effort."

Further discussion reflected widespread agreement that "the best notice that is practicable under the circumstances" and "reasonable effort" establish a measure of discretion that may be thwarted by the two-sentence structure that, in a second stand-alone sentence, says that "the notice must include individual notice to all members who can be identified through reasonable effort." The style change seems to approach a substantive change. It will be better to draft with only one "must," so as to emphasize what is the best practicable notice. That approach will avoid any unintended intrusion on the process by which courts elaborate on the meaning of "practicable" and "reasonable."

One suggested remedy was to delete from rule text the references to examples of means — "United States mail, electronic means, or other appropriate means." The examples could be left to the Committee Note. But that would strain the practice that bars Note advice that is not supported by a change in rule text.

As to the choice of means, it was noted that some comments have suggested that careful analysis of actual responses in many cases show that postal mail usually works better than electronic notice. The Committee Note may benefit from some revision. But e-mail notice is happening now, and it may help to provide official authority for it.

The drafting question was resolved by adopting this suggestion:

> * * * the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by United States mail, electronic means[,] or other appropriate means.

As revised, the Committee approved recommendation of this proposal for Standing Committee approval to publish this summer.

Frontloading. Proposed Rule 23(e)(1)(A) focuses on ensuring that the court is provided ample information to support the determination whether to send out notice of a proposed settlement to a proposed class. The underlying concern is that the parties to a proposed settlement may join in seeking what has been inaccurately called preliminary certification and notice without providing the court much of the information that bears on final review and approval of the settlement. If important information comes to light only after the notice stage and at the final-approval stage, there is a risk that the settlement will not withstand close scrutiny. The results are costly, including a second round of notice to a perhaps disillusioned class if the action persists through a second attempt to settle and certify.

Early drafting efforts included a long list of categories of information the proponents of settlement must provide to the court. The list has been shortened to more general comments in the Committee Note. The rule text also has been changed to clarify that it is not the court's responsibility to elicit the required information from the parties, rather it is the parties that have the duty to provide the information to the court.

The idea is transparency and efficiency. The information, initially required to support the court's determination whether to send notice, also supports the functions of the notice itself. It enables members to make better-informed decisions whether to opt out, and whether to object. Good information may show there is no reason to object. Or it may show that there is reason to object, and provide the support necessary to make a cogent objection.

The Subcommittee discussed at length the question whether the rule text should direct the parties to submit all information that will bear on the ultimate decision whether to certify the class proposed by the settlement and approve the settlement. The difficulty is that the objection process may identify a need for more information. And in any event, the parties may not appreciate the potential value of some of the information they have. It would be too rigid to prohibit submission at the final-approval stage of any information the parties had at the time of seeking approval of notice to the class. But at the same time, it is important that the parties not hold back useful information that they have. Alan Morrison has suggested that the Note should say something like this: "Ordinarily, the proponents of the settlement should provide the court with all the available supporting materials they intend to submit at the time they seek notice to the class, which would make this information available to class members." The Committee agreed that the Subcommittee should consider this suggestion and, if it is adopted, determine the final wording.

An important difference remains between the Subcommittee and the style consultants. The information required by (e)(1)(A) is to support a determination, not findings, that notice should be given to the class. The Subcommittee draft requires "sufficient" information to enable these determinations. The style consultants prefer "enough" information. If they are right that "enough" and "sufficient" carry exactly the same meaning, why worry about the choice? But, it was quipped, "we think 'enough' is insufficient."

"Sufficient" found broad support. A quick Google search found British authority for different meanings for "enough" and "sufficient." It was suggested that "sufficient" is qualitative, while "enough" is quantitative. "Sufficiency," moreover, is a concept used widely in the law, particularly in addressing such matters as the sufficiency of evidence.

The outcome was to transpose the two words: "~~sufficient~~ information sufficient to enable" the court's determination whether to send notice. This form better underscores the link between information and determination, and creates a structure that will not work with "enough." The Committee believes that this question goes to the substance of the provision, not style alone.

A different question was raised. Proposed Rule 23 (e)(1)(B) speaks of showing that the court will likely be able to approve the proposed settlement "under Rule 23(e)(2)," and "certify the class for purposes of judgment on the proposal." (e)(2) does not say anything about certification beyond the beginning: "If the proposal would bind class members * * *." That might be read to authorize creation of a settlement class that does not meet the tests of subdivision (b)(1), (2), or (3). The proposed Committee Note, at p. 102, line 131, repeats the focus on the likelihood the court will be able to certify a class, but does not pin it down.

The Subcommittee agreed that, having discussed the possibility of recommending a new "(b)(4)" category of class action, it had decided not to pursue that possibility. One possibility would be to amend the Committee Note to amplify the reference to certifying a class: "likely will be able, after the final hearing, to certify the class under the standards of Rule 23(a) and (b)." That leaves the question whether this approach relies on the Note to clarify something that should be expressed in rule text. Perhaps something could be done in (e)(1)(B)(ii), though it is not clear what — "certify the class under Rule 23(a) and (b) for purposes of judgment on the proposal" might do it.

It was pointed out that the provision for notice of a proposed settlement applies not only when a class has not yet been certified but also when a class has been certified before a settlement proposal is submitted. This dual character is reflected in (e)(1)(B)(ii)'s reference to the likely prospect that the court will, at the end of the notice and objection period, be able to certify a class not yet certified. The purpose of the proposal is to ensure the legitimacy of the common practice of sending out notice before a class is certified. There are two steps. Settlement cannot happen without certifying a class. But the common habit has been to refer to the act that launches notice and, in a (b)(3) class, the opt-out period, as preliminary certification. That led to attempts to win permission for interlocutory appeal under Rule 23(f), most prominently seen in the NFL concussion litigation. Perhaps the Committee Note should say something, but there is no apparent problem in the rule language.

One possible remedy might be to expand the tag line for Rule 23(e)(2): "Approval of the proposal and certification of the class [for settlement purposes]." But that might be misleading, since (e)(2) does not refer to certification criteria.

It was observed again that when a class has not already been certified, the court does not certify a class in approving notice under (e)(1). Certification comes only as part of approving the settlement after considering the criteria established by (e)(2). Certification of the class and approval of the settlement are interdependent. The settlement defines the class. The court approves both or neither; it cannot redefine the class and then approve a settlement developed for a different class. Not, at least, without acceptance by the proponents and repeating the notice process for the newly defined class.

A resolution was proposed: Add a reference to Rule 23(c)(3) to (e)(2): "If the proposal would bind class members under Rule 23(c)(3), the court may approve it only * * *." This was approved, with "latitude to adjust" if the Subcommittee finds adjustment advisable. Corresponding language in the Committee Note might read something like this, adding on p. 103, somewhere around line 122: "Approval under Rule 23(e)(2) is required only when class members would be bound under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must determine whether the class may be certified under the standards of Rule 23(a) and (b)."

The proposed Rule 23(e)(2) criteria for approving a proposed settlement were discussed briefly. They are essentially the same as the draft discussed at the November meeting. They seek to distill the many factors expressed in varying terms by the circuits, often carrying forward with lists established thirty years ago, or even earlier. Tag lines have been added for the paragraphs at the suggestion of the style consultants.

The Committee approved a recommendation that the Standing Committee approve proposed Rule 23(e)(1) and (2) for publication this summer.

Objectors. In all the many encounters with bar groups and at the miniconference last fall, there was virtually unanimous agreement that something should be done to address the problem of "bad" objectors. The problem is posed by the objector who files an open-ended objection, often copied verbatim from routine objections filed in other cases, then "lies low," saying almost nothing, and — after the objection is denied — files a notice of appeal. The business model is to create, at low cost, an opportunity to seek advantage, commonly payment, by exploiting the cost and delay generated by an appeal.

Part of the Rule 23(e)(5) proposal addresses the problem of routine objections by requiring that the objection state whether it applies only to the objector, to a specific subset of the class, or to the entire class. It also directs that the objection state with specificity the grounds for the objection. The Committee Note says

that failure to meet these requirements supports denial of the objection.

Another part of the proposal deletes the requirement in present Rule 23(e)(5) that the court approve withdrawal of an objection. There are many good-faith withdrawals. Objections often are made without a full understanding of the terms of the settlement, much less the conflicting pressures that drove the parties to their proposed agreement. Requiring court approval in such common circumstances is unnecessary.

At the same time, proposed Rule 23(e)(5)(B) deals with payment "in connection with" forgoing or withdrawing an objection, or forgoing, dismissing, or abandoning an appeal from a judgment approving the proposed settlement. No payment or other consideration may be provided unless the court approves. The expectation is that this approach will destroy the "business model" of making unsupported objections, followed by a threat to appeal the inevitable denial. A court is not likely to approve payment simply for forgoing or withdrawing an appeal. Imagine a request to be paid to withdraw an appeal because it is frivolous and risks sanctions for a frivolous appeal. Or a contrasting request to approve payment to the objector, not to the class, for withdrawing a forceful objection that has a strong prospect of winning reversal for the class or a subclass. Approval will be warranted only for other reasons that connect to withdrawal of the objection. An agreement with the proponents of the settlement and judgment to modify the settlement for the benefit of the class, for example, will require court approval of the new settlement and judgment and may well justify payment to the now successful objector. Or an objector or objector's counsel may, as the Committee Note observes, deserve payment for even an unsuccessful objection that illuminates the competing concerns that bear on the settlement and makes the court confident in its judgment that the settlement can be approved.

The requirement that the district court approve any payment or compensation for forgoing, dismissing, or abandoning an appeal raises obvious questions about the allocation of authority between district court and court of appeals if an appeal is actually taken. Before a notice of appeal is filed, the district court has clear jurisdiction to consider and rule on a motion for approval. If it rules before an appeal is taken, its ruling can be reviewed as part of a single appeal. The Subcommittee has decided not to attempt to resolve the question whether a pre-appeal motion suspends the time to appeal. Something may well turn on the nature of the motion. If it is framed as a motion for attorney fees, it fits into a well-established model. If it is for payment to the objector, matters may be more uncertain — it may be something as simple as an argument that the objector should be fit into one subclass rather than another, or that the objector's proofs of injury have been

dealt with improperly.

After the agenda materials were prepared, the Subcommittee continued to work on the relationship between the district court and the court of appeals. It continued to put aside the question of appeal time. But it did develop a new proposed Rule 23(e)(5)(C) to address the potential for overlapping jurisdiction when a motion to approve payment is not made, or is made but not resolved, before an appeal is docketed. The proposal is designed to be self-contained, operating without any need to amend the dismissal provisions in Appellate Rule 42. "The question is who has the case." The proposal, as it evolved in the Subcommittee, reads:

> (C) *Procedure for Approval After Appeal*. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

Invoking the indicative ruling procedure of Rule 62.1 facilitates communication between the courts. The district court retains authority to deny the motion without seeking a remand. It is expected that very few motions will be made simply "for" approval of payment, and that denial will be the almost inevitable fate of any motion actually made. But if the motion raises grounds that would lead the district court either to grant the motion or to want more time to consider the motion if that fits with the progress of the case on appeal, the court of appeals has authority to remand for that purpose.

Representatives of the Appellate Rules Committee have endorsed this approach in preference to the more elaborate earlier drafts that would amend Appellate Rule 42.

The first comment was that it is extraordinary that it took so long to reach such a sensible resolution.

The next reaction asked how this proposal relates to waiver. If an objector fails to make an objection with the specificity required by proposed Rule 23(e)(5)(A), for example, can the appeal request permission to amend the objection? Isn’t this governed by the usual rule that you must stand by the record made in the district court? And to be characterized as procedural forfeiture, not intentional waiver? The purpose of (e)(5)(A) is to get a useful objection; an objection without explanation does not help the court’s evaluation of the proposed settlement. Pro se objectors often fail to make helpful objections. So a simple objection that the settlement "is not fair" is little help if it does not explain the unfairness. At the same time, the proposed Committee Note recognizes the need to understand that an objector proceeding without counsel cannot be expected to adhere to technical legal

standards. The Note also states something that was considered for rule text, but withdrawn as not necessary: failure to state an objection with specificity can be a basis for denying the objection. That, and forfeiture of the opportunity to supply specificity on appeal, is a standard consequence of failure to comply with a "must" procedural requirement. The courts of appeals can work through these questions as they routinely do with procedural forfeiture. Forfeiture, after all, can be forgiven, most likely for clear error. It is not the same as intentional waiver.

The Committee approved a recommendation that the Standing Committee approve publication of proposed Rule 23(e)(5) this summer.

Interlocutory appeals. The proposals would amend Rule 23(f) in two ways.

The first amendment adds language making it clear that a court of appeals may not permit appeal "from an order under Rule 23(e)(1)." This question was discussed earlier. The Rule 23(e)(1) provisions regulating notice to the class of a proposed settlement and class certification are only that — approval, or refusal to approve, notice to the class. Despite the common practice that has called this notice procedure preliminary certification, it is not certification. There is no sufficient reason to allow even discretionary appeal at this point.

The Committee accepted this feature without further discussion.

The second amendment of Rule 23(f) extends the time to file a petition for permission to appeal to 45 days "if any party is the United States" or variously described agencies or officers or employees. The expanded appeal time is available to all parties, not only the United States. This provision was suggested by the Department of Justice. As with other provisions in the rules that allow the United States more time to act than other parties are allowed, this provision recognizes the painstaking process that the Department follows in deciding whether to appeal, a process that includes consultation with other government agencies that often have their own elaborate internal review procedures.

Justice Nahmias reacted to this proposal by a message to Judge Dow asking whether state governments should be accorded the same favorable treatment. Often state attorneys general follow similarly elaborate procedures in deciding whether to appeal. A participant noted that he had been a state solicitor general, and that indeed his state has elaborate internal procedures. At the same time, he noted that the state procedures were not as time-consuming as the Department of Justice procedures.

This question prompted the suggestion that perhaps states should receive the same advantages as the United States. But this question arises at several points in the rules, often in provisions allowing extra time for action by the United States. The appeal time provisions in Appellate Rule 4 are a familiar example, as well as the added time to answer in Rule 12. And at least on occasion, the states are accorded the same favorable treatment as the United States. Appellate Rule 29 allows both the United States and a state to file an amicus brief without first winning permission. It may be that these questions of parity deserve consideration as a separate project. There might be some issues of line drawing. If states get favorable treatment, what of state subdivisions? Actions against state or local officials asserting individual liability? Should large private organizations be allowed to claim equally complex internal procedures — and if so, how large?

The concluding observation was that extending favorable treatment to the United States will leave states where they are now. The amendment will not disadvantage them; it only fails to provide a new advantage. Nor need it be decided whether the time set by a court rule, such as Rule 23(f), is subject to extension in a way that a statute-based time period cannot be.

A separate question was framed by a sentence appearing in brackets in the draft Committee Note at p. 107, lines 408-409 of the agenda book. This sentence suggested that the 45-day time should apply as well in "an action involving a United States corporation." There are not many "United States corporation[s]." Brief comments for the Department of Justice led to the conclusion that this sentence should be deleted.

The Class Action Fairness Act came into the discussion with a question whether any of the Rule 23 proposals might run afoul of statutory requirements. CAFA provides an independent set of rules that must be satisfied. It has provisions relating to settlement, including notice to state officials of proposed settlements. But nothing in the proposed amendments is incompatible with CAFA. Courts can fully comply with statutory requirements in implementing Rule 23.

The Committee voted to recommend proposed Rule 23(f) to the Standing Committee to approve for publication this summer.

Ongoing Questions. The Subcommittee has put aside for the time being some of the proposals it has studied, often at length.

"Pick-off" offers raise one set of questions, addressed by a number of drafts that illustrate different possible approaches. The questions arise as defendants seek to defeat class certification by acting to moot the claims of individual would-be representatives. The problem commonly arises before class certification, and often

before a motion for certification. One reason for deferring action was anticipation of the Supreme Court's decision in the Campbell-Ewald case. The decision has been made, and the Subcommittee has been tracking early reactions in the courts. It is more difficult to track responses by defendants. One recent district-court opinion deals with an effort to moot a class representative by attempting to make a Rule 67 deposit in court of full individual relief. The attempt was rejected as outside the purposes of Rule 67. Other attempts are being made to bring mooting money into court, responding to the part of the Campbell-Ewald opinion that left this question open, and to the separate opinions suggesting that mootness might be manufactured in this way. The question whether to propose Rule 23 amendments remains under consideration.

Consideration of offers that seek to moot individual representatives has led also to discussion of the possibility that Rule 23 should be amended by adopting explicit provisions for substituting new representatives when the original representatives fail. The rule could be narrow. One example of a narrow rule would be one that addresses only the effects of involuntary mooting by defense acts that afford complete relief. A broad rule could reach all circumstances in which loss of one or more representatives make it desirable or necessary to find replacements.

Discussion of substitute representatives began with the observation that it can be prejudicial to the defendant when class representatives pull out late in the game. An illustration was offered of a case in which a former employee sought injunctive relief on behalf of a class. He retired. He could not benefit from injunctive relief that would benefit only current employees. The plaintiffs sought to amend the complaint to substitute a new representative. But they acted after expiration of the time for amendments allowed by the scheduling order. And they had not been diligent, since the impending retirement was well known. "It would have been different if the representative had been hit by a bus," an unforeseeable event that could justify amending the scheduling order.

A different anecdote was offered by a judge who asked about the size of a proposed payment for services by the representative plaintiff. The response was that the representative deserved extra because he had rejected a pick-off offer.

It was asked whether judges understand now that they have authority to allow substitution of representatives. An observer suggested that it would be good to adopt an explicit substitution rule. A representative seeks to assume a trust duty to act on behalf of others. And after a class is certified, a set of trust beneficiaries is established. It would help to have an affirmative statement in the rule that recognizes substitution of trustees.

The Committee agreed that the Subcommittee should continue to consider the advantages of adopting an express rule to confirm, and perhaps regularize, existing practices for substituting representatives.

Finally, the Subcommittee continues to consider the questions raised by the growing number of decisions that grapple with the question whether "ascertainability" is a useful concept in deciding whether to certify a class. The decisions remain in some disarray. But the question is being actively developed by the courts. Continuing development may show either that the courts have reached something like consensus, or that problems remain that can be profitably addressed by new rule provisions.

The Committee thanked the Subcommittee for its long, devoted, and successful work.

Pilot Projects

Judge Bates introduced the work on pilot projects by noting that the work is being advanced by a Subcommittee that includes both present and former members of this Committee and the Standing Committee. Judge Campbell, former chair of this Committee, chairs the Subcommittee. Other members include Judge Sutton, Judge Bates, Judge Grimm (a former member of this Committee), Judge Gorsuch, Judge St. Eve, John Barkett, Parker Folse, Virginia Seitz, and Edward Cooper. Judge Martinez has joined the Subcommittee work as liaison from the Committee on Court Administration and Case Management.

Judge Campbell began presenting the Subcommittee's work by noting that the purpose of pilot projects is to advance improvements in civil litigation by testing proposals that, without successful implementation in actual practice, seem too adventuresome to adopt all at once in the national rules.

The Subcommittee has held a number of conference calls since this Committee discussed pilot projects last November. Two projects have come to occupy the Subcommittee: Expanded initial disclosures in the form of mandatory early discovery requests, and expedited procedures.

Mandatory Initial Discovery. The mandatory early discovery project draws support from many sources, including innovative federal courts and pilot projects in ten states. The Subcommittee held focus-group discussions by telephone with groups of lawyers and judges from Arizona and Colorado, states that have developed enhanced initial disclosures. Another conference call was held with lawyers from Ontario and British Columbia to learn about initial disclosures in Canada. "People who work under these disclosure systems like them better than the Federal Rules of Civil

Procedure."

The draft presented in the agenda materials has been considered by the Case Management Subcommittee of the Committee on Court Administration and Case Management. They have reflected on the draft in a thoughtful letter that will be considered as the work goes forward.

Judge Grimm took the lead in drafting the initial discovery rule.

Mandatory initial discovery would be implemented by standing order in a participating court. The order would make participation mandatory, excepting for cases exempted from initial disclosures by Rule 26(a)(1)(B), patent cases governed by local rule, and multidistrict litigation cases. Because the initial discovery requests defined by the order include all the information covered by Rule 26(a)(1), separate disclosures under Rule 26(a)(1) are not required.

The Standing Order includes Instructions to the Parties. Responses are required within the times set by the order, even if a party has not fully investigated the case. But reasonable inquiry is required, the party itself must sign the responses under oath, and the attorney must sign under Rule 26(g).

The discovery responses must include facts relevant to the parties' claims or defenses, whether favorable or unfavorable. This goes well beyond initial disclosures under Rule 26(a)(1), which go only to witnesses and documents a party "may use." The Committee on Court Administration and Case Management may raise the question whether the requirement to respond with unfavorable information will discourage lawyers from making careful inquiries. Experience in Arizona, Colorado, and Canada suggests lawyers will not be discouraged.

The time for filing answers, counterclaims, crossclaims, and replies is not tolled by a pending motion to dismiss or other preliminary motion. This provision provoked extensive discussion within the Subcommittee. An answer is needed to frame the issues. Suspending the time to answer would either defer the time to respond to the discovery requests or lead to responses that might be too narrow, broader than needed for the case, or both. The Subcommittee will consider whether to add a provision that allows the court to suspend the time to respond, whether for "good cause" or on a more focused basis.

The times to respond are subject to two exceptions. If the parties agree that no party will undertake any discovery, no initial discovery responses need be filed. And initial responses may be deferred, one time, for 30 days if the parties certify that

they are seeking to settle and have a good-faith belief that the dispute will be resolved within 30 days of the due date for their responses.

Responses, and supplemental responses, must be filed with the court. The purpose of this requirement is to enable the court to review the responses before the initial conference.

The initial requests impose a continuing duty to supplement the initial responses in a timely manner, with a final deadline. The draft sets the time at 90 days before trial. The Court Administration and Case Management Committee has suggested that it may be better to tie the deadline to the final pretrial conference. Later discussion recognized that the final pretrial conference may indeed be the better time to choose.

The parties are directed to discuss the mandatory initial discovery responses at the Rule 26(f) conference, to seek to resolve any limitations they have made or will make, to report to the court, and to include in the report the resolution of limitations invoked by either party and unresolved limitations or other discovery issues.

As a safeguard, the instructions provide that responses do not constitute an admission that information is relevant, authentic, or admissible.

Rule 37(c)(1) sanctions are invoked.

The mandatory initial discovery requests themselves follow these instructions in the Standing Order.

The first category describes all persons who have discoverable information, and a fair description of the nature of the information.

The second category describes all persons who have given written or recorded statements, attaching a copy of the statement when possible, but recognizing that production is not required if the party asserts privilege or work-product protection.

The third category requires a list of documents, ESI, and tangible things or land, "whether or not in your possession, custody, or control, that you believe may be relevant to any party’s claims or defenses." If the volume of materials makes individual listing impracticable, similar documents or ESI may be grouped into specific categories that are described with particularity. A responding party "may" produce the documents, or make them available for inspection, instead of listing them.

The fourth category requires a statement of the facts relevant

to each of the responding party's claims or defenses, and of the legal theories on which each claim or defense is based.

The fifth category requires a computation of each category of damages, and a description or production of underlying documents or other evidentiary material.

The sixth category requires a description of "any insurance or other agreement under which an insurance business or other person or entity may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse a party."

The seventh provision authorizes a party who believes that responses in categories three, five, or six are deficient to request more detailed or thorough responses.

The Standing Order has separate provisions governing the means of providing hard-copy documents and ESI.

Hard-copy documents must be produced as they are kept in the ordinary course of business.

When ESI comes into play, the parties must promptly confer and attempt to agree on such matters as requirements and limits on production, disclosure, and production; appropriate searches, including custodians and search terms "or other use of technology assisted review"; and the form for production. Disputes must be presented to the court in a single joint motion, or, if the court directs, a conference call with the court. The motion must include the parties' positions and separate certifications by counsel under Rule 26(g). Absent agreement of the parties or court order, ESI identified in the initial discovery responses must be produced within 40 days after serving the response. Absent agreement, production must be in the form requested by the receiving party; if no form is requested, production may be in a reasonably usable form that will enable the receiving party to have the same ability as the producing party to access, search, and display the ESI.

Finally, the Subcommittee has begun work on a User's Manual to help pilot judges implement the project. It will cover such familiar practices as early initial case-management conferences, reluctance to extend the times for initial discovery responses, and prompt resolution of discovery disputes.

Judge Grimm added that the Subcommittee also had considered an extensive amount of information about experience with initial disclosures under the Civil Justice Reform Act. It also reviewed experience with the initial disclosure requirement first adopted in 1993, a more extensive form than the watered-down version adopted in 2000. Further help was found in the 1997 conference at Boston College Law School with lawyers, judges, and professors. In

addition to Arizona and Colorado, a number of other state disclosure provisions were studied. "This was a comprehensive approach to what can be found."

Judge Sutton asked what the Standing Committee will be asked to approve. This proposal is more developed than the proposals for earlier pilot projects have been. But there will have to be refinements along the way to implementation. That is the ordinary course of development. The goal will be to ask the Standing Committee to approve the pilot conceptually, while presenting as many of the details as can be managed. Judge Bates agreed that "refinements are inevitable."

Discussion began with a practicing lawyer's observation that he had been skeptical about the ability of lawyers to find ways to avoid the requirement in the 1993 rule that unfavorable information be disclosed. But this pilot is worth doing. "Let's 'go big' with something that has a potential to make major changes in the speed and efficiency of federal litigation." The discussions with the groups in Arizona and Colorado, and the lawyers in Canada, provided persuasive evidence that this can work. "They live and work with many of these ideas. And they find the ideas not only workable, but welcome." The proposal results from intense effort to learn from actual experience. The effort will continue through the time of seeking approval from the Judicial Conference in September, and on to the stage of actual implementation.

This view was seconded by "a veteran of 1993." The 1993 rule failed because the Committee did not work closely enough with the bar, and was not able to provide persuasive evidence that the required disclosures could work. A pilot will provide the data to support broader disclosure innovations.

An initial question observed that much of the conversation refers to this project as involving initial disclosure. But the standing order refers to "requests": does the duty to respond depend on having a party promulgate actual discovery requests? The answer is that the pilot's standing order adopts a set of mandatory initial discovery requests. The requests are addressed to all parties, and must be responded to in the same way as ordinary discovery requests under Rules 33 and 34.

Thinking about implementation of the pilot project has assumed that it should be adopted only in districts that can ensure participation by all judges in the district. That may make it impossible to launch the project in any large district, but it seems important to involve a large district or two. Discussion of this question began with the observation that the pilot project embodies great ideas, but that it will be easier to "sell" them if they can be tested in large districts. At the same time, it is not realistic to expect that all judges in a large district will be

willing to sign on, even in the face of significant peer pressure from other judges. A separate question asked whether there might be some advantage of being able to compare outcomes in cases assigned to participating and nonparticipating judges in the ordinary random-assignment practices of the district. Emery Lee responded that there could be an advantage, but that the balance between advantage and disadvantage would depend on the judges in the two pools. This prompted the observation that there is reason to be concerned about self-selection into or out of pilot projects. A judge suggested that participation in the pilot "should not be terribly onerous." It may be better to leave the program as one that expects unanimity, understanding that a pilot district might allow a judge to opt out for individual reasons. Another judge thought that his court could achieve near-unanimity: "Judges on my court take pride in what they do." Several members agreed that the project should not be changed by, for example, adopting an explicit 80% threshold. Perhaps it is better to leave it as a preference for districts in which all judges participate in the pilot, recognizing that the need to enlist one or more large districts may lead to negotiation. One approach would be to design the project to say that all judges "should," not "must" participate. A judge noted that success will depend on willingness and eagerness to participate. In his relatively small district, "our senior judges are not eager."

A more difficult question is raised by recognition of the possibility that some sort of exception should be adopted that allows a court to suspend the time to answer when there is a motion to dismiss. "In my district we get many well-considered motions to dismiss." They can pretty much be identified on filing. A lot of them are government cases. Another big set involve "200-page" pro se complaints that will require much work to answer. This observation was supported by the Department of Justice. The goal of speedy development of the case is important, but many motions to dismiss address cases that should not be in court at all. If the case is subject to dismissal on sovereign-immunity grounds, for instance, the government should be spared the work of answering and disclosing. In other cases, the claim may challenge a statute on its face, pretermitting any occasion for disclosure or discovery — why not invoke the ordinary rule that suspends the time to answer? A judge offered a different example: "Many cases have meritorious but flexible motions to dismiss." A diversity complaint, for example, may allege only the principal place of business of an LLC party. The citizenship of the LLC members needs to be identified to determine whether there is diversity jurisdiction. Further time is needed to decide the motion. Yet another judge observed that setting the time to respond to the initial mandatory requests at 30 days after the answer can enable action on the motion to dismiss.

A further suggestion was that there are solid arguments on both sides of the question whether a pleading answer should be

required before the court acts on a motion to dismiss. "The usefulness of responses turns to a significant degree on the parties' ability to understand the issues." But if the time to answer is deferred pending disposition of a motion to dismiss, it may be difficult to devise a suitable trigger for the duty to respond to the initial mandatory requests. And if the duty to respond is always deferred until after a ruling on a motion to dismiss, the result may be to encourage motions to dismiss.

A judge agreed that further thought is needed, particularly for jurisdictional motions and cases in which the government is a party. But he noted that he has conferences that focus both on motions and the merits. "If there is too much possibility of deferring the time to answer, we may suffer."

A lawyer member suggested that the line could be drawn at motions arguing that the defendant cannot be called on to respond in this court. These motions would go to questions like personal jurisdiction and subject-matter jurisdiction. They would not include motions that go to the substance of the claim.

Another troubling example was offered: a claim of official immunity may be raised by motion to dismiss. Elaborate practices have grown up from the perception that one function of the immunity is to protect the individual defendant from the burdens of discovery as well as the burden of trial.

An analogy was suggested in the variable practices that have grown up around the question whether discovery should be allowed to proceed while a motion to dismiss remains under consideration.

A judge offered "total support" for the project, recognizing that further refinements are inevitable. One part of the issues raised by motions to dismiss might be addressed through the timing of ESI production, which may be the most onerous part of the initial mandatory discovery responses. The draft recognizes that ESI production can be deferred by the court or party agreement.

Judge Campbell agreed that this question deserves further thought.

Model orders provided another subject for discussion. A judge suggested that some judges, including open-minded innovators, would resist model orders because they think their own procedures work better. They may hesitate to buy into a full set of model orders. But Emery Lee said that model orders will be needed for research purposes. And Judge Campbell thought that the good idea of developing model orders could be pursued by looking for standard practices in Arizona and other states with expansive pretrial disclosures.

The Committee approved a motion to carry the initial mandatory discovery pilot project program forward to the Standing Committee for approval for submission to the Judicial Conference in September. The Committee recognizes that the Subcommittee will continue its deliberations and make further refinements in its recommendations.

Expedited Procedures. Judge Campbell introduced the expedited procedures pilot project by observing that it rests on principles that have been proved in many courts, by many judges, and in many cases. The project is designed not to test new procedures, but to change judicial culture.

The project has three parts: The procedural components; means of measuring progress in pilot courts; and training.

These practices provide the components of the pilot: (1) prompt case-management conferences in every case; (2) firm caps on the time allocated for discovery, to be set by the court at the conference and to be extended no more than once, and only for good cause and on a showing of diligence by the parties; (3) prompt resolution of discovery disputes by telephone conferences; (4) decisions on all dispositive motions within 60 days after the reply brief is filed; and (5) setting and holding firm trial dates.

The metrics to be measured are these: (1) if it can be measured, the level of compliance with the practices embodied in the pilot; (2) trial dates in 90% of civil cases set within 14 months of case filing, and within 18 months in the remaining 10% of cases; and (3) a 25% reduction in the number of categories of cases in the district "dashboard" that are decided slower than the national average, bringing the court closer to the norm. (The "dashboard" is a tool developed for use by the Committee on Court Administration and Case Management. It measures disposition times in all 94 districts across many different categories of cases. Each district's experience in each category is compared to the national average. The dashboard is described in the article by Donna Stienstra set out as an exhibit to the Pilot Projects report. The chief judge of each district got a copy of that district's dashboard last September.)

Training and collaboration will have these components: (1) an initial one-day training session by the FJC, followed by additional FJC training every six months, or possibly every year; (2) quarterly meetings by judges in the pilot district to discuss best practices, what is working and what is not working, leading to refinements of case-processing methods to meet the pilot goals; (3) making judges from outside the district available as resources during the quarterly district conferences; (4) at least one bench-bar conference a year to talk with lawyers about how well the pilot is working; and (5) a 3-year period for the pilot.

This pilot "has a lot of moving parts, but not as many as the mandatory initial disclosure pilot."

Judge Fogel and Emery Lee responded to a question about the likely reaction of pilot-district judges to exploring individual disposition times. They answered that in many settings researchers are wary of compiling individual-judge statistics because many judges are sensitive to these matters. But the problem is reduced in a pilot project because the districts volunteer. They also pointed out that it will be necessary to compile a lot of pre-pilot data to compare to experience under the pilot. "The CACM-FJC model helps." At the same, the question whether individual judges' "dashboards" would become part of the public data must be approached with caution and sensitivity.

Judge Fogel also noted that it is important to avoid the problem of eager volunteers. The FJC has a very positive reaction to the pilot. It will be useful to engage in a project designed to see what happens with a training program.

It was noted that Judge Walton, writing for the CACM Case Management Subcommittee, raised questions regarding the deadline for decisions on dispositive motions. "[T]here are some practical considerations that may make compliance" difficult. Individual calendar and trial schedules may interfere. Supplemental briefing may be required after the reply brief. And added time may be required in cases that deserve extensive written decisions because of novel or unsettled issues of law or extensive summary-judgment records. The deadline might be extended to 90 days. Or it could be framed as a target time for disposing of a designated fraction of dispositive motions in all cases. Or it could be framed in aspirational terms, as "should" rather than "must."

The trial-date target also was questioned. Perhaps it is not ambitious enough — even today, a large proportion of all cases are resolved in 14 months or less.

The Committee adopted a recommendation that the Standing Committee approve the Expedited Procedures pilot project for submission to the Judicial Conference in September. As with the initial mandatory discovery pilot, it will be recognized that approval of the concept will entail further work by the Subcommittee, at times in conjunction with the FJC, the Committee on Court Administration and Case Management, and perhaps others.

Other Proposals

Several other proposals are presented by the agenda materials. Some have carried over from earlier meetings. Others respond to new suggestions for study. Each came on for discussion.

RULE 5.2: REDACTING PROTECTED INFORMATION

Rule 5.2 requires redaction from paper and electronic filings of specified items of private information. It was initially adopted in conjunction with Appellate Rule 25(a)(5), Bankruptcy Rule 9037, and Criminal Rule 49.1. It has seemed important to achieve as much uniformity among these four rules as proves compatible with the different settings in which each operates.

The Committee on Court Administration and Case Management referred to the Bankruptcy Rules Committee a problem that seems to arise with special frequency in bankruptcy filings. Bankruptcy courts are receiving creditors' requests to redact previously filed documents that include material that the privacy rules forbid. These requests may involve thousands of documents filed in numerous courts. The immediate question was whether Bankruptcy Rule 9037 should be amended to include an express procedure for moving to redact previously filed documents. The prospect that different bankruptcy courts may become involved with the same questions arising from simultaneous filings suggests a particular need for a nationally uniform procedure, even if satisfactory but variable procedures might be crafted by each court acting alone.

The Bankruptcy Rules Committee has responded by creating a draft Rule 9037(h) that would establish a specific procedure for a motion to redact. The central feature of the procedure is a copy of the filing that is identical to the paper on file with the court except that it redacts the protected information. The court would be required to "promptly" restrict public access both to the motion and the paper on file. The restriction would last until the ruling on the motion, and beyond if the motion is granted. Public access would be restored if the motion is denied.

Judge Harris explained that bankruptcy courts receive hundreds of thousands of proofs of claim. "The volume is great." Redaction of information filed in violation of the rules is not as good as initial compliance. But there is good reason to have a uniform redaction procedure. If the court cannot restrict access until redaction is actually accomplished, the motion to redact may itself draw searches for the private information. The proposed Rule 9037(h) relies on the assumption that the CM/ECF system can immediately restrict access when a motion to redact is filed. If not, the motion just makes things worse.

Judge Sutton asked whether the Bankruptcy Rules Committee "is in a rush to publish." Judge Harris answered that the Committee is ready to wait so that all advisory committees can come together on uniform language.

Clerk-liaison Briggs noted that "we get a lot of improper failures to comply with Rule 5.2. We have an established procedure

that immediately denies access."

Further discussion confirmed the wisdom of the Bankruptcy Rules Committee's willingness to defer publication of their draft Rule 9037(h) pending work in the other committees. "One train is pretty far ahead of the others." Waiting for parallel development and publication will provide a better opportunity for uniformity.

One possible outcome might be that the Administrative Office and other bodies could develop procedures that automatically respond to the filing of a motion to redact by closing off public access to the paper addressed by the motion. If that could be done, there might be no need for a new set of rules provisions. But the work should continue, recognizing that this happy outcome may not come to pass.

RULE 30(b)(6): 16-CV-A

Members of the council and Federal Practice Task Force of the ABA Section of Litigation, acting in their individual capacities, submitted a lengthy examination of problems encountered in practice under Rule 30(b)(6). Rule 30(b)(6) allows a party to depose an entity, whether a party or not a party, on topics designated in the notice. The entity is required to designate one or more witnesses to testify on its behalf, providing "information known or reasonably available to the organization."

The idea that there are problems in implementing Rule 30(b)(6) is not new to the Committee. Extensive work was done in 2006 in response to proposals made by a Committee of the New York State Bar Association. The topic was considered again in 2013 in response to proposals made by the New York City Bar. Each time, the Committee concluded that there is little opportunity to adopt new rule text that would provide effective remedies for problems that are often case-specific and that often reflect deliberate efforts to subvert or misuse the Rule 30(b)(6) process.

Many of the present proposals involve issues that were considered in the earlier work. One example is that Rule 30(b)(6) does not require the entity to designate as a witness the "most knowledgeable person." Another example is questions that go beyond the topics listed in the notice. Questions addressing a party's contentions in the litigation are yet another example.

The question is whether the Committee should take up these questions in response to this third expression of anguish from a third respected bar group. The request, rather than urge specific answers, is that the Committee "undertake a review of the Rule and the case law developed under it with the goal of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice * * *." It is clear that Rule

30(b)(6) "continues to be a source of unhappiness." On the other hand, to paraphrase Justice Jackson, there is a risk that pulling one misshapen stone out of the grotesque structure may disrupt a careful balance. So "many litigants find Rule 30(b)(6) an extremely important tool to discover important information. Others find it an enormous pain."

Discussion began by noting that three important groups have now suggested the need to attempt improvements.

Committee members could not, on the spot, identify any clear circuit splits on the meaning or administration of Rule 30(b)(6). It may be helpful to explore this question.

It was noted that it is difficult to impose sanctions for not providing the most knowledgeable person.

It also was noted that there is an acute problem of producing witnesses who are not prepared.

So it was observed that the rule should be enforceable, and adding complications will make enforcement more difficult.

A lawyer member said that he confronts problems with Rule 30(b)(6) "constantly, all over the country, and even in sister cases. The Rule is constantly a source of controversy. Proper preparation issues will never go away." The recurring issues of interpretation and application show that as hard as it may be to make the Rule better, we should feel an obligation to address these issues. The problems are not going away. Another look would be useful.

Full agreement was expressed with this view.

A judge observed that the 2015 discovery amendments raise the prospect that proportionality may become a factor in administering Rule 30(b)(6). It might help to confront this integration head-on as part of a Rule 30(b)(6) project.

It was agreed that Rule 30(b)(6) should move to the active agenda. Judge Bates will appoint a subcommittee to deal with the problems.

RULE 81(c)(3): 15-CV-A

This item was carried forward from the agenda for the November 2015 meeting.

The question was framed by 15-CV-A as a potential misstep in the 2007 Style Project. The question is best understood in the full frame of Rule 81(c).

Rule 81(c) begins with (c)(1): "These rules apply to a civil action after it is removed from a state court." Applying the rules is important — a federal court could not function well with state procedure, it would be awkward to attempt to blend state procedure with federal procedure, and the very purpose of removal may be to seek application of federal procedure.

Rule 81(c)(3) provides special treatment for the procedure for demanding jury trial. It begins with a clear proposition in (3)(A): a party who expressly demanded a jury trial before removal in accordance with state procedure need not renew the demand after removal.

A second clear step is provided by Rule 81(c)(3)(B): if all necessary pleadings have been served at the time of removal, a jury trial demand must be served within 14 days, measured for the removing party from the time of filing the notice of removal and measured for any other party from the time it is served with a notice of removal. This provision avoids the problem that otherwise would arise in applying the requirement of Rule 38(b)(1) that a jury demand be served no later than 14 days after serving the last pleading directed to the issue.

The third obvious circumstance departs from the premise of Rule 81(c)(3)(B): All necessary pleadings have not been served at the time of removal. Subject to the remaining two variations, it seems safe to rely on Rule 81(c)(1): Rule 38 applies after removal.

The fourth circumstance arises when state law does not require a demand for jury trial at any time. Up to the time of the Style Project, this circumstance was clearly addressed by Rule 81(c)(3)(A): "If the state law **does** not require an express demand for jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own." The direction was clear. The underlying policy is to balance competing interests. There is a fear that a party may rely after removal on familiar state procedure — absent this excuse, the right to jury trial could be lost for failure to file a timely demand under Rule 38 after removal. At the same time, the importance of establishing whether the case is to be set for jury trial reflected in Rule 38 is recognized by providing that the court can protect itself by an order setting a time to demand a jury trial, and by further providing that a party can protect its interest by a request that the court must honor by setting a time for a demand.

The Style Project changed "does," the word highlighted above, to "did." That change opens the possibility of a new meaning for this fifth circumstance: "[D]id not require an express demand" could be read to excuse any need to demand a jury trial when state law does require an express demand, but sets the time for the

demand at a point after the time the case was removed. The question was raised by a lawyer in a case that was removed from a court in a state that allows a demand to be made not later than entry of the order first setting the case for trial. The court ruled, in keeping with the Style Project direction, that the change from "does" to "did" was intended to be purely stylistic. The exception that excuses any demand applies only if state law does not require an express demand for jury trial at any point.

The question put by 15-CV-A can be stated in narrow terms: Should the Style Project change be undone, changing "did" back to "does"? That would avoid the risk that "did" will be read by others to mean that a jury demand is not required after removal if, although state procedure does require an express demand, the time set for the demand in state court occurs at a point after removal. There is at least some ground to expect that the ambiguous "did" may cause some other lawyers to misunderstand what apparently was intended to be a mere style improvement.

A broader question is whether a party should be excused from making a jury demand if, although a demand is required both by Rule 38 and by state procedure, state procedure sets the time for making the demand after the time the case is removed. It is difficult to find persuasive reasons for dispensing with the demand in such circumstances. And there is much to be said for applying Rule 38 in the federal court rather than invoking state practice.

A still broader question is whether it is time to reconsider the provision that excuses the need for any jury demand when a case is removed from a state that does not require a demand. Both the court and the other parties find it important to know early in the case whether it is to be tried to a jury. Present Rule 81(c)(3)(A) recognizes this value in the provision that allows the court to require a demand, and that directs that the court must require a demand if a party asks it to do so. In effect this rule transfers the burden of establishing whether the case is to be tried to a jury from a party who wants jury trial to the court and the other parties. The evident purpose is to protect against loss of jury trial by a party who does not familiarize itself with federal procedure even after a case is removed to federal court. It may be that the time has come to insist on compliance with Rule 38 after removal, just as the other rules apply after removal.

Discussion began with the question whether it would be useful to change "did" back to "does" now, holding open for later work the question whether to reconsider this provision. Two judges responded that it is important to know, as early as possible, whether a case is to be tried to a jury. Rather than approach the question in two phases, it will better to consider it all at once.

The Committee agreed to study the sketch of a simplified Rule

81(c)(3) presented in the agenda materials:

> (3) *Demand for a Jury Trial.* Rule 38(b) governs a demand for jury trial unless, before removal, a party expressly demanded a jury trial in accordance with state law. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one[1] if the party serves a demand within 14 days after:
> (A) it files a notice of removal, or
> (B) it is served with a notice of removal filed by another party.
>
> [1] This version simply tracks the current rule. It might be shortened: "If all necessary pleadings have been served at the time of removal, a demand must be served within 14 days after the party * * *."

If there is some discomfort with the 14-day deadline, it could be set at 21 days.

15-CV-EE: Four Suggestions

Social Security Numbers: Rule 5.2 allows a filing to include the last four digits of a social security number. The suggestion is that the last four digits can be used to reconstruct a full number for any number issued before the last few years. This risk was known at the time Rule 5.2 and the parallel provisions in other rules were adopted. The decision to allow the last four digits to be filed was made deliberately in response to the special need to have the last four digits in bankruptcy filings and the desire to have parallel provisions in all the rules. The Committee concluded that Rule 5.2 should not be amended unless another advisory committee believes the question should be studied further.

Forma pauperis affidavits: This suggestion is that an affidavit stating a person's assets filed to support an application to proceed in forma pauperis should be protected by requiring filing under seal and ex parte review. Other parties could be allowed access for good cause and subject to a protective order. Unsealing could be allowed in redacted form. The purpose is to protect privacy. Committee discussion recognized the privacy interest, but concluded that the proposal should be put aside. Ex parte consideration would make difficult problems for institutional defendants that confront a party who frequently files forma pauperis actions. Requiring long-term preservation of sealed papers is not desirable. Sealing is itself a nuisance. Recognizing forma pauperis status expends a public resource, conferring a public benefit. And the interest in privacy concern may be lessened by the experience that "no one has any interest" in most i.f.p. filings. The Committee voted to close consideration of this suggestion.

Copies of Unpublished Authorities: This proposal is drawn verbatim from Local Rule 7.2, E.D. & S.D.N.Y. The rule, in some detail, requires a lawyer to provide a pro se party with a copy of cases and other authorities cited by the lawyer or by the court if the authority is unpublished or is reported exclusively on computerized databases. Discussion reflected agreement that this practice can be a good thing. Some judges do it without benefit of a local rule. But not all do, and it cannot be assumed that all lawyers do it. A lawyer will supply the court with a truly inaccessible authority, and that may entail providing it to other parties. And even large institutions may not have ready access to everything that is out there. The committee agreed that although this local rule is an attractive idea, it is not an idea that should be embodied in a national rule. The practice might prove worthy of a place on the agendas of judicial training programs.

Pro se e-filing: This suggestion is addressed by the proposals for e-filing and e-service discussed earlier in the meeting.

PLEADING STANDARDS: 15-CV-GG

This suggestion is that Rule 8(a)(2) and the appendix of forms that was abrogated on December 1, 2015 "are so misleading as to be plain error." The underlying proposition is that although the Supreme Court wrote its Twombly and Iqbal opinions as interpretations of Rule 8(a)(2), anyone who relies on the rule text will be grievously misled as to contemporary federal pleading standards. The question thus is whether the time has come to take on a project to consider whether the pleading standards that have evolved in the last nine years should be addressed by more explicit rule language. The project would attempt to discern whether there is any standard that can be articulated in rule language, and make one of at least three broad choices: confirm present practice; heighten pleading standards beyond what courts have developed in response to the Supreme Court's opinions; or reduce pleading standards to establish some more forgiving form of "notice pleading." The Committee has considered this question repeatedly. Brief discussion concluded that it is not yet time to undertake a project on general pleading standards.

RULE 6(d) AND "MAKING" DISCLOSURES

This suggestion arises from the need to read carefully through the provisions of Rules 26(a)(2)(D)(2) and 26(a)(3)(B) in relation to Rule 6(d). Rule 6(d) provides an additional three days to act after service is made by specified means when the time to act is set "after service" ["after being served" as the rule may soon be amended]. The provisions in Rule 26 direct that disclosure of a rebuttal expert be "made" within 30 days after the other party's disclosure, and that objections to pretrial disclosures be made within 14 days after the disclosures "are made." The concern is

that although these provisions set times that run from the time a disclosure is "made," not the time it is served, some unwary readers may overlook the distinction and rely on Rule 6(d). The Committee concluded that this suggestion should be closed.

15-CV-JJ: Pro se e-filing

This suggestion urges that pro se litigants be allowed to use e-filing. As with 15-CV-EE, noted above, this topic is addressed by the pending proposals to amend Rule 5.

Third-Party Litigation Financing: 15-CV-KK

This suggestion follows up an earlier submission that the Committee should act to require disclosure of third-party financing arrangements. It provides additional information about developments in this area, including materials reflecting interest in Congress. But it does not urge immediate action. Instead, it urges the Committee "to take steps soon to achieve greater transparency about the growing use of TPLF in federal court litigation." Discussion noted that "this is a hot topic in the MDL world." It was noted that third-party funding raises difficult questions of professional responsibility. The Committee decided, as it had earlier, that this topic should remain open on the agenda without seeking to develop any proposed rules now.

Rule 4: Service on Individual Federal Employees: 15-CV-LL

This suggestion says that it can prove difficult to effect service on a federal employee who is made an individual defendant. Locating a home address can be hard, particularly as to those whose permanent address is outside the District of Columbia. It is not clear whether service can be made by leaving a copy of the summons and complaint at the defendant’s place of federal work, in the manner authorized by Rule 5(b)(2)(B)(i) for service of papers after the summons and complaint. Two amendments are suggested: authorizing service by leaving the summons and complaint at the defendant’s place of work, or requiring the agency that employs the defendant to disclose a residence address. Discussion began by observing that the Enabling Act may not authorize a rule directing a federal agency to disclose an employee’s address. It also was noted that similar problems can arise in attempting to serve state and local government employees. The Department of Justice thinks that service by leaving at the defendant’s place of work is a bad idea. The Committee concluded that although there may be real problems in making service in some circumstances, they cannot be profitably addressed by amending Rule 4. This suggestion is closed.

15-CV-NN: Minidiscovery and Prompt Trial

This suggestion by Judge Michael Baylson, a former Committee

member, proposes a new rule for "Mini Discovery and Prompt Trial." The rule would expand initial disclosure of documents, require responses to interrogatories within 14 days, limit depositions among the parties to 4 per side at no more than 4 hours each, allow third-party discovery only on showing good cause, allow no more than 10 requests for admissions, and set the period for discovery (including expert reports) at 90 days. Motions for summary judgment would be permitted only for good cause, defined as potentially meritorious legal issues, and not for insufficiency of the evidence. Discussion noted that a rule amendment would be required to authorize a court to forbid filing a motion for summary judgment, although a court can require a pre-motion conference to discuss the matter. Judge Pratter observed that Judge Baylson is a persuasive advocate for this proposal. It was suggested that judges should be encouraged to experiment along these lines. But it was concluded that it would be premature to consider rulemaking now. There is a big overlap between this proposal and the practices that will be explored in the two pilot projects approved by the Committee in earlier actions.

15-CV-OO: Time Stamps, Seals, Access for Visually Impaired

This set of suggestions addresses several issues that do not lend themselves to resolution by court rule. The concern that improvements are needed in access to courts for the visually impaired is particularly sympathetic. Emery Lee will investigate whether PACER is accessible.

Rule 58: Separate Document

Judge Pratter brought to the Committee's attention a Third Circuit decision that found an appeal timely only because judgment had not been entered on a separate document. The catch was that the dismissal order included a footnote that set out the district court's "opinion." The ruling that the appeal was timely reflects many other applications of Rule 58. The separate document requirement was added to Rule 58 to establish a bright-line point to start the running of appeal time. It has been interpreted to deny separate-document status to very brief orders that provide even minimal explanation in addition to a direction for judgment. For many years the result was that appeal time — and the time for post-judgment motions — never began to run in cases that were finally resolved without entry of judgment on an appropriately "separate" document. This problem was resolved by amendments made to Rule 58 in 2002. Rule 58(c) now provides that when entry of judgment on a separate document is required, judgment is entered on the later of two events: when it is set out in a separate document, or 150 days after it is entered in the civil docket.

Judge Pratter said that judges on her court have the desirable practice of providing brief explanations for judgments that do not

warrant formal opinions. But that means that if a judge inadvertently fails to enter a still briefer separate document, appeal time expands from 30 days to 180 days (150 days plus 30 days). Is this desirable? The summary of the work done in 2002, and repeated by the Appellate Rules Committee in 2008, shows deliberate choices carefully made in creating and maintaining the present structure. Rather than reconsider these choices now, perhaps the Committee can find a mechanism that will foster compliance with the separate-document requirement.

Discussion suggested that the problem is not in the rule. "We simply need to do it better." The courtroom deputy clerk should be educated in the responsibility to ensure entry of judgment on a separate document whenever the court intends a final judgment. Some circuits have managed educational efforts that have been successful, at least in immediate effect.

This agenda item was closed.

Respectfully Submitted

Edward H. Cooper
Reporter