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The Scope of Discovery

Key Concepts



- The discovery process, where a party learns about the other party's facts and evidence
- The 3 primary objectives of discovery:
 - To understand the other party's case;
 - To cabin the other party's evidence; and
 - To obtain concessions and admissions
- The general parameters for the discovery process

Introduction



“Discovery” refers to the stage of litigation where each party has the opportunity to obtain information and documents from other parties. Although discovery is a relatively modern process—historically, parties did not have the right to conduct discovery—it has become the most time-intensive and expensive stage of the litigation process.

Discovery includes a number of processes for this exchange of information. Rule 26 provides for some automatic disclosures of some of the basic categories of information—witness names, document categories, expert reports, etc.—without waiting for a request from another party. Rule 33 authorizes the use of interrogatories—written questions that another party must answer. Rule 34 authorizes requests to inspect (or copy) documents and other things. Rules 30 and 32 provide for depositions—oral interrogation of witnesses under oath. Rule 35 allows a party to request that a doctor conduct a mental or physical examination of another party. Rule 36 provides for requests for admissions. Finally, Rule 37 contains procedures for the court to police compliance with the discovery rules.

Chapter 13 will explore the individual discovery mechanisms. This chapter covers Rule 26, the omnibus discovery rule. In addition to the automatic disclosures mentioned above, Rule 26 defines the scope of discovery—what a party can and cannot obtain from other parties. It also contains limits on what must be produced, based on considerations like the attorney-client privilege. It contains some special provisions related to electronic discovery, and sets forth procedures for initial discovery planning.

A. The Rule

Rule 26 has seven sections:

- The first section, 26(a), requires parties to make specified disclosures at three junctures: at the outset of a case; at the expert phase of the case; and shortly before the trial—these are covered in the next chapter;
- The second section, 26(b), describes the scope of discovery and the limitations on what is discoverable;
- The third section, 26(c), allows a party to seek a protective order when the party believes the other party is being unreasonable;
- The fourth section, 26(d), addresses the timing and sequence of discovery;
- The fifth section, 26(e), requires parties to supplement discovery responses;
- The sixth section, 26(f), establishes procedures for a discovery planning conference among the parties; and
- The seventh section, 26(g), holds the signer of discovery requests, responses, and objections responsible for any abuse or misuse of the discovery process.

Rather than consider these sections in the order that they appear in the Rule, we will start with a discussion of what is and is not discoverable.

B. Discovery Scope

1. Rule 26(b): Discovery Scope and Limits

Rule 26(b) creates a broad definition of what is discoverable, then carves out some categories of information and documents that are not discoverable.

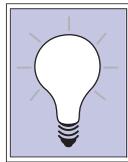
THE RULE

Rule 26(b)(1)

Scope in General

- (1) Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any **non-privileged** 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.**¹

EXPLANATION



The scope of discovery is intended to be very broad or liberal, and the reporters are full of cases that expressly discuss how broad discovery is in federal court. Thus,

Rule 26(b) allows discovery of any matter that is “**relevant** to any party's claims or defenses.”

The FRCP do not define “**relevant**,” but evidence is deemed relevant under the rules of evidence if it has **any tendency** to make a fact more or less probable.

¹ Note: the language printed here is the language proposed in the amendments that were, at the time of this printing, scheduled to go into effect on December 1, 2015, unless vetoed or modified by Congress. One of the effects of these amendments is to move the concept of proportionality from a limitation on the frequency and extent of discovery in Rule 26(b)(2) to a part of the core definition of the scope of discovery in Rule 26(b)(1). The amendment also adds a list of factors the court may consider in making the proportionality analysis.

The definition was actually narrowed somewhat in 2000—it used to allow discovery of any matter that was relevant to “the subject matter” of the litigation. In response to criticism that discovery was too broad (and too expensive), Rule 26(b)(1) was amended to limit discovery to matters relevant to “claims or defenses” in the case. Thus, a party cannot file a complaint asserting one claim, then conduct discovery designed to support a related second claim. Many states continue to use the “relevant to the subject matter” standard for determining the scope of relevancy.

EXAMPLES & ANALYSIS

EXAMPLE: Pablo buys a car from Dan’s Discount Cars based in part on Dan’s warranty that the car would run properly for three months and in part on Dan’s representation that the car had only been driven by a little old lady on Sundays. One month later the car dies, Dan refuses to fix it, and Pablo files a breach of warranty action in federal court. Pablo believes that the car was not driven only on Sundays by a little old lady, but has no evidence to support such an accusation yet. May Pablo serve discovery asking for Dan’s proof that the car was only driven by a little old lady on Sundays?

Analysis: The issue is whether the discovery relates to a claim in the case. The case currently does not have a claim or defense related to the representation about the little old lady, so discovery about that representation is outside the scope of discovery—Pablo cannot conduct discovery to develop a new claim. Pablo might argue that the alleged representation is related to the warranty claim. This would ultimately be a matter of the court’s discretion, but would probably be deemed outside the scope of discovery.

The last sentence of Rule 26(b)(1) is also important. It provides that the information sought in discovery does not need to be **admissible to be discoverable**.

EXAMPLE: In discovery in Pablo’s suit against Dan’s Discount Cars, Dan asks Pablo whether any mechanics have offered opinions as to

the cause of the problems with Pablo's car. At trial, the rule against hearsay—essentially, out-of-court statements—might prevent Pablo from testifying about a mechanic's statements. Pablo objects to the request on the basis that it calls for hearsay. Is this a proper objection?

Analysis: Although the rule against hearsay might prevent Dan from asking Pablo to describe the mechanic's words at trial, Dan could call the mechanic to the stand to testify. This live first-hand testimony would not be hearsay, and would therefore be admissible. Accordingly, the discovery is proper because it is relevant to a claim or defense in the case, regardless of whether it would be admissible.

Note the use of the word “nonprivileged” in the standard for discoverable information. Rule 26(b)(1) excludes privileged matter from the scope of discoverable material, and Rule 26(b)(5) provides the procedures for handling privileged matters.

C. Limits on Discovery

After defining the scope of discovery, Rule 26(b) proceeds to impose a number of limits on discovery.

Rule 26(b)(2)(A) provides that the court may alter the limits that the subsequent rules set for the number of interrogatories and depositions or the length of depositions, and may limit the number of requests for admission, which are not limited by Rule 36 (the rule addressing requests for admission). Some courts have adjusted these limits by local rule.

Rule 26(b)(2)(B) allows a party not to produce “**electronically stored information**” if it would be unreasonably burdensome or expensive to produce it. It also establishes a process for asking the court to require the party to produce information withheld on this basis.

It is now settled law that ESI is discoverable just like paper documents. The Rules are deliberately vague about what is included, in recognition that the forms of storing data will change more

Electronically Stored Information, or ESI, is the term of art for all electronic data under the Rules. All litigators should be familiar with this term.

rapidly than the Supreme Court can amend the rules. So Twitter feeds are covered even though the Rules do not mention Twitter (in fact, Twitter was in its infancy when the ESI rules were written, so the concept is working). As are word processing documents, spreadsheets, databases, electronic calendar entries, etc. A party must produce such ESI found in the party's file and email servers and backup systems, on any shared or internet based storage systems (*e.g.*, the "cloud"), on employees' desktops, laptops, smart phones, and home computers, and anywhere else ESI is stored.

IN PRACTICE



Electronic discovery frequently dominates the discovery process, both in terms of time and cost. Most "smoking gun" documents are found in ESI these days—in part because most communications, internal and external, are now electronic and in part because people are less thoughtful about what they say in emails, text messages, and other forms of electronic communication. Many large firms have ESI specialists, and there is an industry of consultants who support litigators and companies in managing ESI.

Rule 26(b)(2)(C) provides that the court "must" limit discovery if the discovery is unreasonably cumulative or duplicative or is outside the scope of discovery permitted by Rule 26(b)(1).

1. Trial Preparation Materials

Rule 26(b)(3) protects "documents and tangible things that are prepared in anticipation of litigation or for trial" by a party or its representative (including its attorney).

The protection for trial preparation materials has its origin in a 1947 decision from the United States Supreme Court, *Hickman v. Taylor*. Because this case created the work product doctrine, now embodied in Rule 26(b)(3), an excerpt is reprinted below.

What the Rules call "**Trial Preparation Materials**" is the rough equivalent of what is often called "Attorney Work Product."

FROM THE COURT

Hickman v. Taylor

329 U.S. 495 (1947)

Supreme Court of the United States

This case presents an important problem under the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, as to the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen.

Examination into a person's files and records, including those resulting from the professional activities of an attorney, must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work. At the same time, public policy supports reasonable and necessary inquiries. Properly to balance these competing interests is a delicate and difficult task.

On February 7, 1943, the tug 'J. M. Taylor' sank while engaged in helping to tow a car float of the Baltimore & Ohio Railroad across the Delaware River at Philadelphia. The accident was apparently unusual in nature, the cause of it still being unknown. Five of the nine crew members were drowned. Three days later the tug owners and the underwriters employed a law firm, of which respondent Fortenbaugh is a member, to defend them against potential suits by representatives of the deceased crew members and to sue the railroad for damages to the tug.

A public hearing was held on March 4, 1943, before the United States Steamboat Inspectors, at which the four survivors were examined. This testimony was recorded and made available to all interested parties. Shortly thereafter, Fortenbaugh privately interviewed the survivors and took statements from them with an eye toward the anticipated litigation; the survivors signed these statements on March 29. Fortenbaugh also interviewed other persons believed to have some information relating to the accident and in some cases he made memoranda of what they told him. At the time when Fortenbaugh secured the statements of the survivors, representatives of two of the deceased crew members had

been in communication with him. Ultimately claims were presented by representatives of all five of the deceased; four of the claims, however, were settled without litigation. The fifth claimant, petitioner herein, brought suit in a federal court under the Jones Act on November 26, 1943, naming as defendants the two tug owners, individually and as partners, and the railroad.

One year later, petitioner filed 39 interrogatories directed to the tug owners. The 38th interrogatory read:

State whether any statements of the members of the crews of the Tugs 'J. M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug 'John M. Taylor'. Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports.

Supplemental interrogatories asked whether any oral or written statements, records, reports or other memoranda had been made concerning any matter relative to the towing operation, the sinking of the tug, the salvaging and repair of the tug, and the death of the deceased. If the answer was in the affirmative, the tug owners were then requested to set forth the nature of all such records, reports, statements or other memoranda.

The tug owners, through Fortenbaugh, answered all of the interrogatories except No. 38 and the supplemental ones just described. While admitting that statements of the survivors had been taken, they declined to summarize or set forth the contents. They did so on the ground that such requests called 'for privileged matter obtained in preparation for litigation' and constituted 'an attempt to obtain indirectly counsel's private files.' It was claimed that answering these requests 'would involve practically turning over not only the complete files, but also the telephone records and, almost, the thoughts of counsel.'

In connection with the hearing on these objections, Fortenbaugh made a written statement and gave an informal oral deposition explaining the circumstances under which he had taken the statements. But he was not expressly asked in the deposition to produce the statements. The District Court for the Eastern District of Pennsylvania, sitting en banc, held that the requested matters were not privileged. 4 F.R.D. 479. The court then decreed that the tug owners and Fortenbaugh, as counsel and

agent for the tug owners forthwith 'Answer Plaintiff's 38th interrogatory and supplemental interrogatories; produce all written statements of witnesses obtained by Mr. Fortenbaugh, as counsel and agent for Defendants; state in substance any fact concerning this case which Defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda and produce Mr. Fortenbaugh's memoranda containing statements of fact by witnesses or to submit these memoranda to the Court for determination of those portions which should be revealed to Plaintiff.' Upon their refusal, the court adjudged them in contempt and ordered them imprisoned until they complied.

The Third Circuit Court of Appeals, also sitting en banc, reversed the judgment of the District Court. 153 F.2d 212. It held that the information here sought was part of the 'work product of the lawyer' and hence privileged from discovery under the Federal Rules of Civil Procedure. The importance of the problem, which has engendered a great divergence of views among district courts, led us to grant certiorari.

The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

In urging that he has a right to inquire into the materials secured and prepared by Fortenbaugh, petitioner emphasizes that the deposition-discovery portions of the Federal Rules of Civil Procedure are designed to enable the parties to discover the true facts and to compel their disclosure wherever they may be found. It is said that inquiry may be made

under these rules, epitomized by Rule 26, as to any relevant matter which is not privileged; and since the discovery provisions are to be applied as broadly and liberally as possible, the privilege limitation must be restricted to its narrowest bounds. On the premise that the attorney-client privilege is the one involved in this case, petitioner argues that it must be strictly confined to confidential communications made by a client to his attorney. And since the materials here in issue were secured by Fortenbaugh from third persons rather than from his clients, the tug owners, the conclusion is reached that these materials are proper subjects for discovery under Rule 26.

As additional support for this result, petitioner claims that to prohibit discovery under these circumstances would give a corporate defendant a tremendous advantage in a suit by an individual plaintiff. Thus in a suit by an injured employee against a rail-road or in a suit by an insured person against an insurance company the corporate defendant could pull a dark veil of secrecy over all the pertinent facts it can collect after the claim arises merely on the assertion that such facts were gathered by its large staff of attorneys and claim agents. At the same time, the individual plaintiff, who often has direct knowledge of the matter in issue and has no counsel until some time after his claim arises could be compelled to disclose all the intimate details of his case. By endowing with immunity from disclosure all that a lawyer discovers in the course of his duties, it is said, the rights of individual litigants in such cases are drained of vitality and the lawsuit becomes more of a battle of deception than a search for truth.

But framing the problem in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory. Discovery concededly may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant. The problem thus far transcends the situation confronting this petitioner. And we must view that problem in light of the limitless situations where the particular kind of discovery sought by petitioner might be used.

We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the

relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries. As indicated by Rules 30(b) and (d) and 31(d), limitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26(b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.

We also agree that the memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. It is unnecessary here to delineate the content and scope of that privilege as recognized in the federal courts. For present purposes, it suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.

But the impropriety of invoking that privilege does not provide an answer to the problem before us. Petitioner has made more than an ordinary request for relevant, non-privileged facts in the possession of his adversaries or their counsel. He has sought discovery as of right of oral and written statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired. He has sought production of these matters after making the most searching inquiries of his opponents as to the circumstances surrounding the fatal accident, which inquiries were sworn to have been answered to the best of their information and belief. Interrogatories were directed toward all the events prior to, during and subsequent to the sinking of the tug. Full and honest answers to such broad inquiries would necessarily have included all pertinent information gleaned by Fortenbaugh through his interviews with the witnesses. Petitioner makes no suggestion, and we cannot assume, that the tug owners or Fortenbaugh were incomplete or dishon-

est in the framing of their answers. In addition, petitioner was free to examine the public testimony of the witnesses taken before the United States Steamboat Inspectors. We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney Fortenbaugh without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice. For aught that appears, the essence of what petitioner seeks either has been revealed to him already through the interrogatories or is readily available to him direct from the witnesses for the asking.

The District Court, after hearing objections to petitioner's request, commanded Fortenbaugh to produce all written statements of witnesses and to state in substance any facts learned through oral statements of witnesses to him. Fortenbaugh was to submit any memoranda he had made of the oral statements so that the court might determine what portions should be revealed to petitioner. All of this was ordered without any showing by petitioner, or any requirement that he make a proper showing, of the necessity for the production of any of this material or any demonstration that denial of production would cause hardship or injustice. The court simply ordered production on the theory that the facts sought were material and were not privileged as constituting attorney-client communications.

In our opinion, neither Rule 26 nor any other rule dealing with discovery contemplates production under such circumstances. That is not because the subject matter is privileged or irrelevant, as those concepts are used in these rules. Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is

essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain un-written. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena

or court order. That burden, we believe, is necessarily implicit in the rules as now constituted.

Rule 30(b), as presently written, gives the trial judge the requisite discretion to make a judgment as to whether discovery should be allowed as to written statements secured from witnesses. But in the instant case there was no room for that discretion to operate in favor of the petitioner. No attempt was made to establish any reason why Fortenbaugh should be forced to produce the written statements. There was only a naked, general demand for these materials as of right and a finding by the District Court that no recognizable privilege was involved. That was insufficient to justify discovery under these circumstances and the court should have sustained the refusal of the tug owners and Fortenbaugh to produce.

But as to oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

Denial of production of this nature does not mean that any material, non-privileged facts can be hidden from the petitioner in this case. He need not be unduly hindered in the preparation of his case, in the discovery of facts or in his anticipation of his opponents' position. Searching interrogatories directed to Fortenbaugh and the tug owners, production of written documents and statements upon a proper showing and direct interviews with the witnesses themselves all serve to reveal the facts in Fortenbaugh's possession to the fullest possible extent consistent with public policy. Petitioner's counsel frankly admits that he wants the oral statements only to help prepare himself to examine witnesses and to make sure that he has overlooked nothing. That is insufficient under the circumstances to permit him an exception to the policy underlying

the privacy of Fortenbaugh's professional activities. If there should be a rare situation justifying production of these matters, petitioner's case is not of that type.

We fully appreciate the wide-spread controversy among the members of the legal profession over the problem raised by this case. It is a problem that rests on what has been one of the most hazy frontiers of the discovery process. But until some rule or statute definitely prescribes otherwise, we are not justified in permitting discovery in a situation of this nature as a matter of unqualified right. When Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.

We therefore affirm the judgment of the Circuit Court of Appeals.

Mr. Justice JACKSON, concurring.

* * *

The primary effect of the practice advocated here would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice as petitioner urges secondarily but certainly.

* * *

It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case. It seems equally clear that discovery should not nullify the privilege of confidential communication between attorney and client. But those principles give us no real assistance here because what is being sought is neither evidence nor is it a privileged communication between attorney and client.

To consider first the most extreme aspect of the requirement in litigation here, we find it calls upon counsel, if he has had any conversations with

any of the crews of the vessels in question or of any other, to 'set forth in detail the exact provision of any such oral statements or reports.' Thus the demand is not for the production of a transcript in existence but calls for the creation of a written statement not in being. But the statement by counsel of what a witness told him is not evidence when written plaintiff could not introduce it to prove his case. What, then, is the purpose sought to be served by demanding this of adverse counsel?

Counsel for the petitioner candidly said on argument that he wanted this information to help prepare himself to examine witnesses, to make sure he overlooked nothing. He bases his claim to it in his brief on the view that the Rules were to do away with the old situation where a law suit developed into 'a battle of wits between counsel.' But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.

The real purpose and the probable effect of the practice ordered by the district court would be to put trials on a level even lower than a 'battle of wits.' I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him. Even if his recollection were perfect, the statement would be his language permeated with his inferences. Every one who has tried it knows that it is almost impossible so fairly to record the expressions and emphasis of a witness that when he testifies in the environment of the court and under the influence of the leading question there will not be departures in some respects. Whenever the testimony of the witness would differ from the 'exact' statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's 'inexact' statement could lose nothing by saying, 'Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not.' Of course, if this practice were adopted, that scene would be repeated over and over again. The lawyer who delivers such statements often would find himself branded a deceiver afraid to take the stand to support his own version of the witness's conversation with him, or else he will have to go on the stand to defend his own credibility—perhaps against that of his chief witness, or possibly even his client.

Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness. But he steps out of professional character to do it. He regrets it; the profession discourages it. But the practice advocated here is one which would force him to be a witness, not as to what he has seen or done but as to other witnesses' stories, and not because he wants to do so but in self-defense.

And what is the lawyer to do who has interviewed one whom he believes to be a biased, lying or hostile witness to get his unfavorable statements and know what to meet? He must record and deliver such statements even though he would not vouch for the credibility of the witness by calling him. Perhaps the other side would not want to call him either, but the attorney is open to the charge of suppressing evidence at the trial if he fails to call such a hostile witness even though he never regarded him as reliable or truthful.

* * *

I agree to the affirmance of the judgment of the Circuit Court of Appeals which reversed the district court.

CASE ANALYSIS & QUESTIONS

1. What was the plaintiff seeking in discovery?
2. Was it protected by the attorney-client privilege? Why or why not?
3. Was there any other way for the plaintiffs to get the information?
4. What did Fortenbaugh do at the trial court level to protect his documents?
5. Why did the Court feel that the plaintiffs were not entitled to the documents in question?

6. What was the legal source of authority for the protection that the Court announced?
7. Does the protection established in *Hickman* prevent the plaintiffs from learning the facts of the dispute?
8. What content was the Court protecting?
9. Did the Court create any exceptions?
10. Is the protection set forth in *Hickman* any different from the one codified in Rule 26(b)(3)?

After *Hickman* was decided, the federal Rules were modified in 1970 to add Rule 26(b)(3), which essentially codified the work product protection. Rule 26(b)(3) uses the term “trial preparation materials” and is similar, but not identical, to the protection established in *Hickman*.

THE RULE

Rule 26(b)(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 mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.

a. Contours of the Rule 26(b)(3) Trial Preparation Materials Protection

As in *Hickman*, the concept behind the protection is that opposing parties are not entitled to the litigation strategy of the party or its attorneys. There are some important aspects of the trial preparation materials protection worth noting. First, the protection is limited to “documents and tangible things”—this doctrine does not apply to oral communications (but if oral communications involve an attorney, they may be protected under the attorney-client privilege). Also note that the protection applies only to the documents themselves, not to the underlying facts. So if the defendant saw that the light was red, the defendant cannot shield that fact from discovery by putting it in a document prepared in anticipation of litigation.

b. In Anticipation of Litigation

Another critical requirement is that the documents have been prepared “in anticipation of litigation.” Courts generally require that the primary purpose of the preparation of the document was litigation, and that it was not prepared in the ordinary course of business. The litigation need not have been actually filed, so long as it was reasonably anticipated—so a threatening letter can support the protection. Documents that are prepared in the ordinary course of business or for some reason other than in anticipation of litigation are not protected, even if they are material to the litigation and are provided to the attorney—a party cannot shield a document from discovery by providing it to counsel.

c. Obtaining Trial Preparation Materials

The protection that Rule 26(b)(3) creates is not absolute. A party may obtain another party’s trial preparation materials by showing that the materials are otherwise discoverable and that the party has “substantial need” for the materials, and cannot obtain their substantial equivalent without undue hardship. If a party is required to produce trial preparations materials, the party will be permitted to **redact** the mental impressions, conclusions, opinions, or legal theories of the attorney or representative concerning the litigation.

“**Redact**” means to remove, edit out, or excise, so that the balance of the document can be produced without revealing the protected or privileged matter.

d. Statements

There is an exception to the trial preparation material protection for statements made by a party. Any party or other person may obtain a copy of the person's own prior statement about the action or its subject matter. A statement is a signed or adopted written statement or any recording of the person's oral statement.

EXAMPLES & ANALYSIS

EXAMPLE: Prime Pinball Machines sues Delaney Distributor for losses caused by a fire at Delaney's warehouse. Prior to the filing of the lawsuit, Delaney had asked its attorney to investigate the cause of the fire and prepare a report, using consultants the attorney would hire. Prime seeks the report in discovery, and Delaney objects that it is trial preparation material. Is Delaney correct?

Analysis: The question is whether litigation was reasonably anticipated at the time of the investigation, since litigation was not yet filed. Given the hiring of an attorney, the answer is likely yes.

EXAMPLE: Suppose that the attorney gave an oral presentation to upper management at Delaney about the investigation and the potential outcome of any ensuing litigation. Is that presentation protected as trial preparation materials?

Analysis: No. Trial preparation materials must be documents or other tangible things, not oral statements. But, the presentation would likely be an attorney-client privileged communication.

EXAMPLE: The lawyer also interviewed two eyewitness employees of Delaney, and typed up statements which they signed. Can Prime obtain copies of the statements?

Analysis: The exception regarding statements only applies to a statement of the person seeking a copy of the statement. Therefore, this exception does not allow Prime to obtain a copy of the statements. If the witnesses are still available and still remember their observations, this information

is available to Prime—Prime can interview the witnesses itself or depose them—and thus the statements are protected trial preparation materials. If the witnesses are no longer available and there are no additional witnesses with the same information, then Prime can likely obtain copies of the statements.

EXAMPLE: Suppose that the attorney took photographs of the warehouse during the investigation and incorporated them into the report. After the investigation Delaney hired a company to clean up and repair the warehouse so Delaney could resume operations. Are the photographs protected trial preparation materials or can Prime obtain them?

Analysis: Since they are “other tangible things” that were prepared in anticipation of litigation, they are trial preparation materials. However, because the condition of the warehouse after the fire is no longer observable or photographable because the warehouse was cleaned and restored, Prime has no other source of equivalent information, and can likely obtain copies of the photos. If so, any notes by the attorney could be redacted.

EXAMPLE: Now suppose in the above Example that the investigation was not conducted by an attorney, but rather by an engineer employed by Delaney. Is the report still trial preparation material?

Analysis: Yes. Trial preparation material is protected if created by any representative of a party, not just attorneys. Delaney would still need to demonstrate that it reasonably anticipated litigation at the time of the investigation, which might be more difficult since counsel was not involved. Remember, the attorney-client privilege and the trial preparation materials protection are not co-extensive; some trial preparation materials are not protected by the attorney-client privilege, and some privileged materials are not trial preparation material.

2. Trial Preparation: Experts

Most information regarding the party’s testifying experts is exchanged pursuant to the automatic disclosures in Rule 26(a), as discussed in the next

chapter. Rule 26(b)(4) imposes the following limitations regarding discovery of experts:

a. Depositions

A party may only depose an expert engaged by another party if the other party has identified the expert as someone who may testify at trial.

b. Drafts

Drafts of an expert's reports are not discoverable.

c. Communications Between a Party and its Experts

Such communications are protected from discovery unless they: relate to the expert's compensation; identify facts or data that the attorney provided to the expert and that the expert considered in forming the opinions; or identify assumptions that the attorney provided to the expert and that the expert relied on in forming the opinions.

d. Consulting Experts

Ordinarily, a party does not need to provide information in discovery regarding an expert who is retained or specially employed in anticipation of litigation if the expert is not expected to testify at trial. There is an exception to this limit for "exceptional circumstances." An example would be where the consulting expert was the only one to examine the scene of an incident and the scene was not adequately preserved, so that opposing counsel has no other source of the information observed at the scene.

IN PRACTICE



Trial attorneys often initially hire experts as consulting experts to shield them from discovery. Then, if the expert's opinions are helpful and circumstances otherwise so warrant, the attorney will convert the expert to a testifying expert, notifying opposing counsel and disclosing the required information at that time. This conversion typically occurs at the time when expert disclosures are due.

EXAMPLES & ANALYSIS

EXAMPLE: Attorney Albert is representing Toxic Chemicals R Us in a tort claim brought by a plaintiff claiming his illness was caused by exposure to the company's chemicals. Albert hires Edmund, a toxicologist, to review the scientific literature and give Albert his unbiased, non-advocacy opinions about whether the company's chemicals could have caused the illness. During the course of this relationship, Edmund sends Albert articles and they discuss the articles on telephone calls. Opposing counsel Amy serves interrogatories asking for the identity of all of Toxic Chemicals' experts, document requests seeking communications with such experts, and a request to schedule the depositions of such experts. Is Amy entitled to this discovery?

Analysis: No. Edmund is a consulting expert. Under Rule 26(b)(4)(D), no discovery is allowed for consulting experts unless it is impracticable to obtain that information from any other source. No such circumstances are present for Edmund.

EXAMPLE: In the above Example, Edmund concludes that the science does not support causation, and Albert decides to use Edmund as a testifying expert. What discovery is permitted regarding Edmund at that point?

Analysis: Once Edmund is converted to a testifying expert, Edmund will have to produce an expert report (discussed in the next chapter), Amy can take his deposition, and Amy can obtain any communications relating to Edmund's compensation, facts that Albert provided to Edmund and that he considered in forming his opinions, and assumptions that Albert provided to Edmund that Edmund relied upon. Albert does not need to produce any other types of communications or any drafts of Edmund's report.

EXAMPLE: Edna is a traffic accident reconstruction expert. She is hired as a consulting expert by the plaintiff's attorney shortly after an accident, and examines the scene. The plaintiffs file suit 11 months later. By the time the defense counsel hires an expert, the skid marks and broken glass are no longer present at the scene. The defendant now wants to depose Edna. Is this allowed?

Analysis: This is the type of situation where the exception for consulting experts applies. Edna has information about the scene that is not available from any other source. The plaintiff may have to make Edna available for deposition, although if Edna has photographs of the scene the court might deem those sufficient. If Edna is deposed, she will not be required to testify about the plaintiff's legal strategy.

3. Protecting Privileged or Trial Preparation Materials

Rule 26(b)(5) describes the procedure for withholding information based on a privilege or the trial preparation doctrine. It requires that the party expressly assert the privilege and describe the nature of the documents or information withheld on the basis of the privilege in sufficient detail that other parties can assess the assertion of the privilege. Privileged communications are typically listed in a “privilege log”—a chart that lists the document, the nature of the privilege asserted, all of the participants in the communication, and enough of a description of the document to support the privilege without actually disclosing the communication.

“Privileged communications” refers to communications subject to a formal evidentiary privilege, and ordinarily does not extend to confidential, embarrassing, or proprietary information like trade secrets. Some privileges are codified by federal or state law, and others are based on **common law**. Under Federal Rule of Evidence 501, privileges may be determined by state law even if a case as a whole is governed by federal law.

“**Common law**” refers to legal principles that are developed by the courts through case law, in contrast to laws developed by the legislature in statutes.

a. The Attorney-Client Privilege

The attorney-client privilege is the most commonly asserted privilege. It protects communications but does not shield the facts underlying the communication from discovery. The following are the typical elements of the attorney-client privilege:

- A communication;
- Between an attorney and client;
- Designed to facilitate legal representation;

- Made in confidence; and
- Not waived.

The leading attorney-client privilege case in the federal courts is *Upjohn v. United States*, 449 U.S. 383 (1981), in which the Supreme Court deemed privileged a company's use of questionnaires and interviews conducted in response to a government inquiry.

b. Other Privileges

In addition to the attorney-client privilege, other commonly recognized privileges include the:

- Fifth Amendment Privilege against self-incrimination;
- National Security Privilege (which allows the government to resist disclosures that might endanger foreign policy objectives and especially citizens or soldiers);
- Priest-Penitent Privilege (which applies to confessions made to religious authority figures);
- Marital Testimonial Privilege (which prevents disclosure of communications between spouses);
- Critical Self-Examination Privilege (where entities are assessing what went wrong following an incident or conducting a critical examination of potential problems in their processes); and
- Deliberative Process Privilege (which protects the internal deliberative process of governments and governmental agencies).

c. Inadvertent Production

Although parties generally strive to identify and withhold privileged documents, sometimes they produce privileged documents despite these efforts. As a general rule, disclosure of a privileged communication to persons who do not have a legitimate need to be privy to the communication results in waiver of the privilege. Thus, disclosure to an adverse party would constitute waiver. However, if a privileged document is inadvertently produced in discovery despite good faith efforts to screen for privileged documents, the producing party may be able to recall or "claw back" the privileged docu-

ment and preserve the privilege. See the discussion of document production under Rule 34 for a more detailed discussion of this process.

EXAMPLES & ANALYSIS

EXAMPLE: Carl hires Andrew as his attorney in connection with a lawsuit alleging that Carl shot his neighbor's dog, which barked all night. They meet and Carl describes the situation for Andrew and gives Andrew his gun. Carl asks Andrew to prepare a short memorandum summarizing the law. The opposing counsel serves discovery asking for the facts relating to the shooting, the discussion between Carl and Andrew, and the memo. Andrew objects that the facts were discussed between counsel and the facts and the discussion are privileged. Is Andrew correct?

Analysis: Andrew is two-thirds right. The discussion between Andrew and Carl is privileged, and Andrew's memorandum to Carl is also privileged. However, the facts themselves are not privileged, and describing the facts to counsel does not render the facts privileged. Thus, Andrew and Carl would have to respond to discovery inquiring about the facts.

EXAMPLE: In the above Example, opposing counsel requests an opportunity to examine the gun. Andrew objects on the grounds that Carl provided the gun to him during an attorney-client privileged meeting. Is Andrew correct?

Analysis: No. A party cannot shield relevant evidence by turning it over to the party's lawyer.

D. Protective Orders

Rule 26(c) authorizes a party from whom discovery is sought to obtain an order from the court preventing or limiting the discovery.

THE RULE

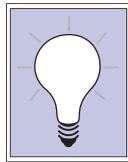
Rule 26(c)

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.

* * *

EXPLANATION



When a party feels that the discovery sought by an opposing party is unreasonable, overly burdensome, or inappropriate in some fashion, Rule 26(c) allows the party to seek a protective order from the court. The order can prohibit the discovery altogether or it can limit the scope or terms and conditions of the discovery.

Protective orders are not necessary for individual interrogatories or document requests that a party deems objectionable. Rather, a party only needs to state an objection to such requests, and the burden shifts to the seeking party to file a motion to compel a response. Instead, protective orders are more commonly aimed at conduct at depositions or when a party believes that entire topics of discovery should be limited or excluded.

IN PRACTICE



One of the most common types of protective order addresses confidential information, such as trade secrets or other intellectual property or sensitive information. While confidential information is discoverable, parties do not want confidential information used or distributed outside the litigation. Often, the parties will enter into a stipulated protective order specifying how confidential information is to be handled.

1. Meet and Confer. Rule 26(c) requires a party to “meet and confer” with opposing counsel to attempt to resolve its discovery dispute with the other party before seeking a protective order, and to certify to the court that it has done so. This is a common obligation throughout the discovery process, and **local rules** often add additional “meet and confer” obligations.

In addition to the federal rules, each district has **local rules** which supplement (but cannot contradict) the federal rules. Practitioners must comply with both sets of rules.

2. Attorney’s Fees. The prevailing party in a motion to compel is entitled to its attorney’s fees under Rule 26(c) (3), which provides that the provisions of Rule 37 governing the award of attorney’s fees apply to Rule 26(c) motions. Under these provisions, the court must award the prevailing party its attorney’s fees in bringing or defending the motion unless the court finds the losing party’s position was “substantially justified” or other circumstances make an award of fees unjust.

IN PRACTICE



Most courts do not like to award attorney’s fees. Furthermore, most motions involve multiple issues and the court often rules in favor of each party on at least one issue. Accordingly, although the award of attorney’s fees is technically mandatory under Rule 37, fee awards are the exception.

EXAMPLES & ANALYSIS

EXAMPLE: Percy has sued Del’s Discount for unfair trade practices. Percy serves an interrogatory asking Del’s for information regarding every transaction it has made since it started conducting business in 1924. Responding would be enormously expensive, and Del’s believes that anything happening more than five years ago is irrelevant. Can, and should, Del’s seek a protective order limiting its obligation to respond to the prior five years?

Analysis: Technically, Del’s could seek a protective order, but typically Del’s would just object to the interrogatory as unreasonably burdensome to the extent it seeks information more than five years old, and provide only information from the past five years. If Percy feels strongly, he can seek an order compelling Del’s to produce earlier information under Rule 37 (as discussed in Chapter 14). If Del’s thought the issue was likely to be an ongoing problem, that might cause Del’s to seek a protective order generally limiting the scope of discovery to the past five years.

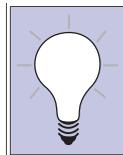
EXAMPLE: Now suppose Percy seeks to take the deposition of a series of customers of Del’s from the 1980s? Can, and should, Del’s seek a protective order prohibiting those depositions?

Analysis: Yes—assuming research supports the argument. Del’s has no ability to instruct these customers not to answer questions at the depositions, so the only way to prevent them is to obtain a protective order.

E. Conference of the Parties

In most cases in federal court (and in some state court cases), the parties must meet near the beginning of the case and before discovery has started to conduct a conference to discuss a variety of discovery issues and develop a discovery plan to submit to the court.

EXPLANATION



1. Timing. The parties must conduct the discovery conference at least 21 days before the court conducts its initial Rule 16 status conference.

2. Topics. At the conference, the parties should discuss the following topics:

- The amount of time needed for discovery (and the resulting deadline for completing discovery);
- Preservation of evidence;

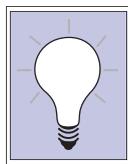
- Any changes to the timing, form, or requirement for the automatic disclosures under Rule 26(a);
- The subjects for discovery and whether discovery should be conducted in phases;
- The handling of electronically stored information;
- Issues related to privileged information, including any agreements for the handling of inadvertently produced privileged matter;
- Any changes to the limits on various forms of discovery;
- Any protective orders contemplated; and
- Settlement.

3. Discovery Plan. Following the conference, the parties must prepare a written discovery plan that memorializes their agreement on the issues upon which they have reached agreement, and states their different positions on issues where they cannot reach agreement. Most judges or districts have standard forms for the discovery plan, and require the parties to complete and submit that form as their discovery plan.

F. Timing and Sequence of Discovery

Discovery does not commence until the parties have conducted the initial discovery conference required by Rule 26(f). After that conference, Rule 26(d) provides that each party can conduct discovery in any sequence it chooses.

EXPLANATION



1. Motion to Set Sequence. If a party believes that a certain sequence is appropriate, or that certain discovery phases should not occur until others are completed, the party must file a motion for a protective order under Rule 26(c) setting the sequence or timing for discovery.

2. Each Discovery Event Is Independent. Discovery by one party does not require any other party to delay its discovery—each party’s discovery is independent of other discovery. Even an overdue discovery response by party A does not excuse other parties from responding timely to party A’s discovery.

EXAMPLES & ANALYSIS

EXAMPLE: Pippa serves document requests on Darlene. Darlene then issues a deposition notice to Pippa. Pippa does not believe it is fair to begin depositions until the documents have been produced, to avoid surprises. May Pippa refuse to participate in the deposition until the documents have been produced?

Analysis: No. If Darlene insists on beginning depositions before she has produced her documents, Pippa’s recourse is to file a motion for a protective order under Rule 26(c), not to simply refuse to appear for the deposition.

EXAMPLE: Pippa serves interrogatories on Darlene. The date for Darlene’s response passes and she does not serve responses. Darlene then serves interrogatories on Pippa. May Pippa refuse to respond to Darlene’s interrogatories until she responds to hers?

Analysis: No. One party’s failure to respond to discovery does not excuse opposing parties from responding to similar discovery. If Pippa believes she is prejudiced and Darlene is not willing to give Pippa an extension of time, Pippa’s recourse is to file a motion for a protective order asking the court to allow her to defer responding until Darlene responds to her interrogatories.

IN PRACTICE



Typically, parties conduct basic written discovery first—interrogatories and document requests—followed by depositions. The idea is that you can typically only depose a witness one time, so you want to have the documents and certain information in hand before you start the depositions. However, in some cases, it makes sense to take certain depositions at the outset of the case to pin the witness’s story down or to preserve recollections.

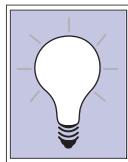
G. Stipulations Modifying Discovery Procedures

Rule 29 authorizes the parties to enter into stipulations modifying the time periods for taking or responding to discovery, the limits on discovery, the manner of taking depositions, and most other aspects of the discovery process. The primary limitation on such stipulations is that the parties may not, without court approval, make a stipulation that interferes with the time set by the court for the close of discovery, for a motion, or for trial.

H. Supplementing Discovery Responses

Parties have a duty under Rule 26(e) to supplement their disclosures and discovery responses if they learn that the disclosure or response was “incomplete or incorrect.”

EXPLANATION



1. Timing. Rule 26(e) does not set a time for supplementing disclosures or responses. Rather, it vaguely requires that the supplements be served “in a timely manner.” If there is a dispute, it would ultimately be up to the judge’s discretion as to whether the supplement was served in a timely manner.

2. Information Already Disclosed. There is no requirement that a party formally supplement a prior response if the information rendering a disclosure or response incomplete or incorrect has already come out during the discovery process or in writing.

EXAMPLES & ANALYSIS

EXAMPLE: Pam sues her employer for gender discrimination. Pam responds to an interrogatory asking for each action that the employer has taken that was discriminatory, providing a list. After the discovery response, Pam believes she is passed over for a promotion because of her gender. Pam does not supplement the response because it was complete and correct when she made it. Is Pam correct?

Analysis: No. The duty to supplement applies to information obtained after the disclosure or response. Pam will not be allowed to offer evidence regarding the promotion at trial unless she supplements the disclosure in a timely manner.

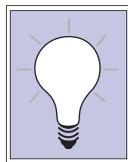
EXAMPLE: Pam responds to an interrogatory asking about her years of employment by stating that she worked at her prior job for seven years. During her deposition, she testifies that she worked at her prior job for five years, which was the accurate length of time. Must Pam supplement her incorrect interrogatory response?

Analysis: No. Because the information has already been brought out in the deposition, there is no need to supplement the response, even though incorrect.

I. Signing Disclosures and Discovery Requests, Responses and Objections

Every disclosure and every discovery request, response, and objection must be signed by an attorney of record under Rule 26(g). The signature certifies that the disclosure is complete and accurate, and that the discovery request, response, or objection is not unreasonably burdensome or expensive, is served for a proper purpose and not to harass or delay, and is based on existing law or a good faith basis for extending or modifying existing law.

EXPLANATION



1. Certification as to Disclosures. With respect to the disclosures required by Rule 26(a), the attorney's signature certifies that the disclosure is complete and correct as of the time it is made.

2. Certification as to Discovery Requests, Responses, and Objections. By signing a discovery request, response, or objection, the attorney is certifying that the document is:

- consistent with the rules and warranted by existing law or a non-frivolous argument for extending, modifying, or reversing existing law;
- not made for any improper purpose such as to harass, cause delay, or increase the cost of litigation; and
- neither unreasonable nor unduly burdensome or expensive.

3. Sanctions. If a certification violates this rule, the court must sanction the signer, the party, or both. The nature of the sanction is not specified, except to say that it should be an “appropriate sanction” and may include attorney’s fees incurred as a result of the violation.

EXAMPLES & ANALYSIS

EXAMPLE: Pilar sues her employer, Data Management, alleging a pattern of discrimination against women over the past ten years of her employment. Pilar serves an interrogatory asking Data to list for each employee over the past ten years that employee’s starting salary, starting position, and gender. Data Management has had 8,000 employees over that period of time, and Pilar’s attorney, Amy, knows that gathering that information would be expensive and burdensome for Data. Has Amy violated Rule 26(g) by serving an interrogatory that is unduly burdensome and expensive?

Analysis: No. This information is clearly relevant to the litigation, and there is a proper purpose for it, so it would be quite unlikely to be deemed a violation of the certification. The issue would more likely play out by Data objecting to the interrogatory as being unreasonably burdensome and expensive, and then providing a more limited scope of information. Pilar could then file a motion to compel a more complete response, and the court might ultimately have to determine whether ten years of data about all employees was warranted under all the circumstances or whether a more limited scope was appropriate.

EXAMPLE: In the Example above, Amy serves interrogatories asking for the salaries of the top officers of Data. Amy believes she can justify this request by arguing that the information may enable her

to prove that the gender discrimination extends all the way to the top. Amy does not really believe that this data is relevant to whether Pilar received discriminatory treatment, but believes that the officers will be reluctant to have that information become public knowledge, and hopes that they will make a settlement offer to avoid disclosing the information. Has Amy violated Rule 26(g)?

Analysis: Likely yes. Amy can recognize that a side effect of conducting legitimate discovery is to create settlement leverage, but if her sole or primary purpose is to harass or embarrass the officers, that is not a “proper purpose” of conducting discovery. Of course, proving her primary purpose may be difficult.

EXAMPLE: In the Example above, Data objects to the request for the salary information of the officers on the grounds of an “officer privilege.” Data admits that there is no legal authority supporting an “officer privilege,” but contends that there should be one to prevent this exact type of dirty litigation tactic. Has Data’s attorney violated Rule 26(g) by interposing that objection?

Analysis: The issue is whether Data really has a good faith basis for contending that the law should be extended to create an “officer privilege.” Given the reluctance in the law to establish new privileges, this might be difficult for Data to establish.

IN PRACTICE



Allegations of violations of Rule 26(g) are rare, and an award of sanctions is even rarer. Moreover, courts do not like sanctions motions. Therefore, attorneys should reserve sanctions motions for truly outrageous conduct.

IN PRACTICE

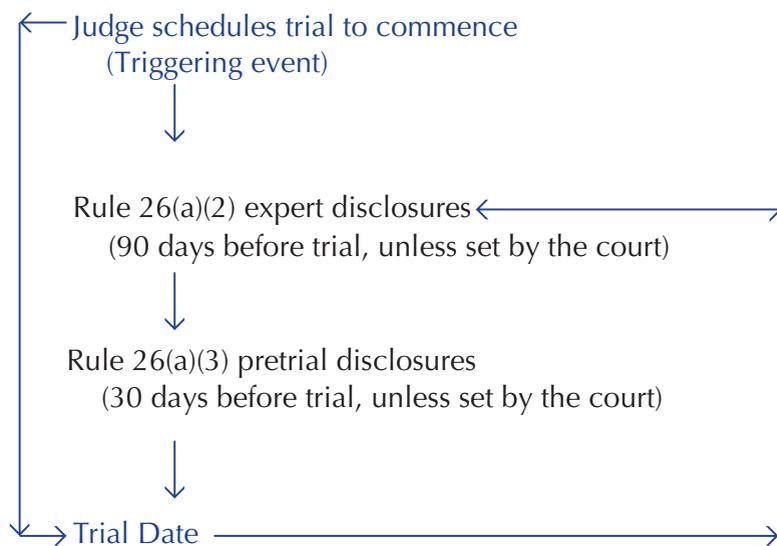
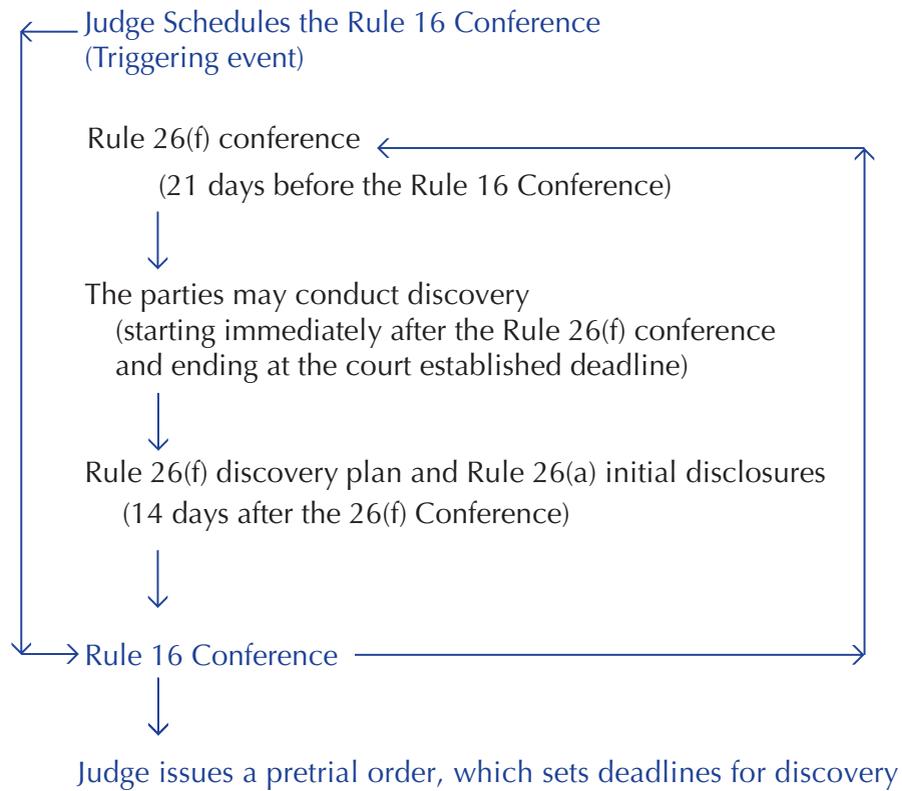


Although perhaps not as glamorous as trial, discovery is where the vast majority of cases are won or lost, and where most litigators spend the majority of their time. Only a small fraction of cases actually make it to trial—some estimates put the number below 2% of the cases filed. Therefore, an attorney's skill at obtaining and mastering the important documents, taking and defending the important depositions, and serving thoughtful interrogatories and requests for admission often makes the difference between a favorable outcome and a disappointed client.

In order to conduct discovery effectively, it is important to plan the discovery thoroughly at the outset of the case. In general, it is difficult to take effective depositions until you have all the documents, so attorneys typically conduct written discovery prior to conducting depositions. Parties have 30 days to respond to written discovery, and often ask for extensions of time. So if the court gives you 4 months to conduct fact discovery, you need to plan carefully in order to conduct written discovery, review and digest the responses and documents, and conduct depositions in that time frame.

A good discovery plan will analyze each of the elements of the claims and defenses, and identify the evidence that the party will need to establish its claims and defenses. It will specify where there are gaps in the evidence, and what discovery techniques the party will use to fill those gaps. In this fashion, discovery can be conducted with focus and purpose.

Flow Chart of Discovery Sequence



ADDITIONAL EXERCISES

Dennis sells Paula a baseball that, he said, Babe Ruth hit out of the park in Boston in 1916, before he was traded to the Yankees. Paula learns that the ball is not genuine and sues Dennis for fraud and breach of contract. Consider the following questions that arise during discovery in this action:

1. Dennis files a motion to dismiss for lack of personal jurisdiction. Paula sends interrogatories relating to Dennis's contacts with the forum state. **Must Dennis respond to these interrogatories?**
2. While the motion to dismiss is pending, Paula serves interrogatories and document requests. Dennis objects on the ground that it is improper and unduly burdensome to require him to respond to discovery until the court rules on the motion to dismiss. Paula moves to compel Dennis to respond. **How would a court likely rule?**
3. Paula asks Dennis to identify any sports memorabilia authenticators that he took the ball to prior to the sale. Dennis objects on the grounds that any statement by an authenticator would be inadmissible hearsay. Assume Dennis is correct about the hearsay issue—**is this a proper basis for Dennis to decline to respond to the discovery?**
4. Paula's attorney photographed the baseball and took it to a consulting expert who scanned it with an imaging device which revealed the nature of the core and windings (to see if they were consistent with baseballs in 1916). The baseball was subsequently lost. **Must Paula provide the photographs and images in discovery? Must she make the consulting expert available for deposition?**
5. Paula learned that the ball was not genuine when she took it to a sports memorabilia shop to try to sell it. She would like to call the store owner as a witness to testify as to the lack of provenance for the ball. **Must Paula disclose him as an expert and have him prepare an expert report?**

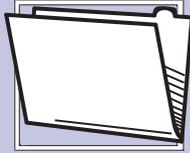
David sues Peggy, his boss and the owner of the bar where David worked as a bartender, claiming that Peggy fired him because he refused to engage in sexual conduct with her. Peggy answers the complaint, contending that David was sexually harassing the customers at the bar and stealing money from the cash register. Consider the following questions that arise during discovery in this action:

1. Peggy sends an interrogatory to David asking for the name of all of his sexual partners during the past five years while he worked at the bar. ***Is this information discoverable? What measures can David take to avoid or limit disclosure of this information?***
2. David notices Peggy's deposition. Peggy sends a letter to David stating that she needs his documents and interrogatory answers in order to prepare for her deposition, and that she objects to a deposition prior to his discovery responses. David responds with a letter stating that he intends to go forward with the deposition, and expects her to appear as noticed. ***Who is right, and what should each party do to protect his or her rights in this situation?***
3. Peggy sends an interrogatory to David asking for his income tax returns for the past five years while he worked at the bar. ***Is this information discoverable? What measures can David take to avoid or limit disclosure of this information?***
4. Peggy hires an investigator to try to find customers who have been harassed by David. The investigator interviews ten customers and prepares notes of the interviews. David seeks the notes in discovery. ***Is David entitled to them? Why or why not?***
5. Peggy's attorney asks her to prepare a memorandum summarizing the facts that support her claim against David. Peggy prepares the memorandum and sends it to her attorney. Attached to the memorandum is a video tape that Peggy believes shows David harassing a customer. David sends document requests that would cover both the memorandum and the tape, and Peggy lists them as attorney-client privileged on a privilege log. ***Is David entitled to them? Why or why not?***

6. Peggy tells her attorney that she told David that “a relationship with his boss could be good for his career,” but says that she was just joking. David sends an interrogatory asking whether Peggy ever made any remarks linking David’s continued employment to a sexual relationship with Peggy. Peggy says to her attorney, “Our conversation was privileged, right? I don’t want to disclose those facts.” **Can Peggy’s attorney object on the grounds of attorney-client privilege and decline to respond?**

7. Peggy asks David for any records reflecting tips that he received while working at the bar. David used an app on his phone to track his tips, but never printed the data or transferred it to his computer. **Must David produce the data from his phone?**

Quick Summary



- The scope of discovery is limited to information related to claims and defenses in the case, but is very broadly construed.

- Privileged documents and documents prepared in anticipation of litigation may be withheld, but should promptly be listed on a privilege log, and certain communications with experts are shielded from discovery.

- At the outset, the parties confer to make a discovery plan, which is submitted to the court and forms the basis of the court’s Case Management Order, which governs the course of discovery.

- Discovery may proceed in any sequence.

- A party must supplement disclosures and discovery responses that it subsequently learns were or have become incomplete or incorrect.

- Each discovery document must be signed, and the signature acts as a certification that the disclosures are accurate and that the discovery documents are consistent with the law and the Rules, not served for an improper purpose, and not unreasonably burdensome or expensive.