OBTAINING EVIDENCE IN U.S. COURTS-THE CIVIL DISCOVERY PROCESSS

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* Advisory Committee Notes on 2015 Amendments to Rule 26(b)(1) printed at end

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Introduction: Discovery in United States courts, with a focus here on federal courts under the Federal Rules of Civil Procedure,[1] is time-consuming and expensive. Discovery includes both written question and answers (interrogatories), mandatory and often extensive disclosure of relevant documents, and oral discovery depositions of fact and expert witnesses. Even in the fastest federal dockets, such as the Eastern District of Virginia in which I practice, approximately four to five months are allocated for discovery. Very little judicial oversight of the discovery process takes place, unless and until a party moves to compel disclosure that a party has withheld or moves for protection from discovery sought. Once a court steps in, however, trial courts have considerable discretion over discovery matters.

A. Written Discovery

1. **Mandatory Initial Disclosures** – Rule 26(a)(1): Automatic Disclosures

- Mandatory disclosures are 14 days after a Rule 26(f) discovery conference of the parties.
- Must make initial disclosures based on information then reasonably available
- Cannot refuse to make disclosure on grounds party has not fully investigated the case or because another party has not made its disclosures.
- What must be disclosed: Rule 26(a)(1)(A)
  - Names and contact information for persons likely to have discoverable information, that the party may use to support its claims or defenses
  - Copy of, or description by category and location, of all documents the party may use to support its claims or defenses
  - Computation of damages by category, and make available for inspection such documents
  - Any insurance policy that may apply

[1] The Federal Rules of Civil Procedure are promulgated by the United States Supreme Court, pursuant to statutory authority. Most states have adopted rules based on these federal rules.

- Rule requires service of disclosures with the court, but the majority of local rules state they do not need to be filed with the court
- Generally, discovery is NOT to be filed with the court

2. **Interrogatories**– Rule 33: Questions and Answers

- Typically served early in litigation and they are the first step in discovery
- Limited to 25 written interrogatories unless court allows more
- Opinions or contentions as to fact or application of law to fact may be asked – Rule 33(a)(2)
- Objections must be stated or potentially waived
- Answers must be verified by the party
- Answers may be used in evidence as a statement of the party, though they are not binding admissions and may be amended or supplemented
- Answers may also be used to support or oppose a motion for summary judgment
- A party's business records may be produced in lieu of answering an interrogatory when the burden of extracting the answer would be substantially equal for each party – Rule 33(d)

3. **Requests for Production of Documents and Things** – Rule 34

- Typically requests for production (RFP) are served with interrogatories
- Unlike interrogatories, there is no express limit to the number of RFPs
- As such, RFPs are often lengthy and extensive, even in relatively simple cases
- RFPs may seek anything within the scope of discovery under Rule 26
- Duty to disclose requested material is very broad: anything that is non-privileged and is relevant to any party's claim or defense, unless it was prepared in anticipation of litigation, pertains to expert witnesses, or would be unreasonably burdensome to produce.
- A party may request a protective order (see section below for grounds)
- Without any limit (unless court imposes one) on number of RFPs, it is typical to get additional RFPs during litigation, as a party learns more about a case

4. **Requests for Admissions** – Rule 36: Closer to Trial or Summary Judgment

- Written request to admit truth of any matters relating to facts, the application of law to fact, or opinions about either, and the genuineness of any described documents.
- Purpose—require your opponent to admit relevant facts not in controversy, paring down witnesses and evidence to prove these facts at trial
- Duty to respond: must "fairly respond to the substance of the matter;" must qualify an answer or deny in part as specified, if good faith requires it
- Party may test sufficiency of answers; losing party to such a motion pays the movant's fees to bring the motion - Rule 36(a)(6)

- There is no express limit to the number of RFAs, though courts at their discretion may limit the number
- Admissions may be used against an opponent as evidence at trial or to support a motion, such as for summary judgment

B. Depositions - Rules 30 – 32

- Parties have right to depose opponents and fact and expert witnesses—discovery depositions are the rule and not the exception
- No leave of court is required to take a deposition of any person unless taking more than 10 depositions
- Used as a routine tool to gather information and test the credibility of parties and witnesses
- Depositions are often critical to case evaluation
- Depositions are taken before a private stenographer (a "court reporter"), also can videotape if desired. There is no judicial presence at depositions, though in conflicts (such as a refusal to answer), parties may call a judge or continue the deposition to obtain a judicial ruling.
- Because is it a discovery deposition, the only limit to the questioning is the scope of discovery. Can ask almost anything tangentially related to a case and also background questions about a witness.
- All objections except as to form of question are reserved
- Party and fact witness depositions typically take place after interrogatories and document requests have been answered but before expert reports are due; expert witness depositions take place last typically
- Non-parties may be deposed pursuant to Rule 45 (within 100 miles of the person)

- Use of Depositions at Trial is Limited – Rule 32(a)(2) – (8):
  - Discovery depositions are generally not evidence at trial, unless a witness is unavailable.
  - To use depositions at trial, court must find the witness is unavailable: dead, more than 100 miles away; illness/infirmity; beyond the scope of subpoena power; or upon exceptional circumstances.
  - However, a party deposition may be used by an opponent for "any purpose" (ie. substantive evidence)
  - Also, any deposition may be used to impeach the deponent at trial

- *De bene esse* Depositions: Rule 32(a)(4)
  - For witnesses who are found to be unavailable for trial under Rule 32(a)(4), parties may seek to take a *de bene esse* deposition. Purpose is to take evidence for trial, not for discovery.
  - Are the exception not the rule, proponent of testimony must satisfy Rule 32(a)(4) that witness is unavailable for trial
  - There is no judicial presence; all objections must be made but no ruling obtained at the time.
  - Often done after the close of discovery and it is anticipated a witness will be unavailable for trial

- What we in the US refer to as *de bene esse* depositions appear to be the only permissible use of depositions in English courts.

- Written depositions are provided for in the Rules, but rarely done
- Depositions may be used to support dispositive motions such as summary judgment—therefore is a great tool to get to resolution and avoid trial in appropriate cases

- Depositions are a great fact-finding tool in US courts. We usually learn a lot about a case from depositions, and each side gets to test their opponent's witnesses' knowledge, demeanor, and credibility. It is illuminating to see live how your client and witnesses perform under adversarial questioning, and likewise with your opponent's witnesses. We have found depositions reveal the worst of your case. It allows a reasonably informed evaluation of a case before trial. There is no substitute for face to face interaction with your adversary and witnesses.

C. Scope of Discovery and Protection from Discovery

- Scope Defined - Rule 26(b)(1): discovery sought must be
  - Relevant to any claim or defense, *and*
  - Proportional to the needs of the case

- Express factors to consider:
  - importance of the issues at stake in the action
  - amount in controversy
  - parties' relative access to relevant information
  - importance of the discovery in resolving the issues
  - whether the burden or expense of the proposed discovery outweighs its likely benefit
- Need not be admissible in evidence to be discoverable.
- US courts have long construed relevancy liberally to ensure litigation proceeds with "the fullest possible knowledge of the issues and facts before trial." *Hickman v. Tayler*, 329 U.S. 495, 501 (1947).
- The need for discovery is balanced against the burden imposed on the producing party
- See this in the provision for electronically stored information (ESI): need not provide information that is "not reasonably accessible because of undue burden or cost." Rule 26(b)(2)(B) (however, even upon such a showing, a court has discretion to order discovery of ESI for good cause, and upon weighing the factors of Rule 26(b)(2)(C)).

- 2015 Amendments

  - Rule 26 was revised extensively effective December 2015. The scope of discovery was rewritten to add the concept of proportionality. The factors to consider are, however, drawn from a previous part of Rule 26.
  - For better understanding of these amendments, I have attached the Advisory Committee Notes to the 2015 Amendments. From these notes, it appears the

drafters did not intend to significantly alter the scope of discovery, but rather to put more emphasis on the consideration of proportionality. This focus may, indeed, result in a marginal shift to restrict the scope of discovery.
    - Certain provisions that may have broadened the scope of discovery were eliminated, including language often used to justify a discovery request: the concept of a request being "reasonably calculated to lead to the discovery of admissible evidence."
    - It remains to be seen how or if that language affects the scope of discovery US courts will allow.

- Grounds to Object to Discovery
    - Outside the scope– either not relevant, or apply the balancing test of factors in Rule 26(b)(1)
    - Unreasonably cumulative or duplicative
    - "[C]an be obtained from some other source that is more convenient, less burdensome, or less expensive." This is the basis for the classic objection on unduly burdensome grounds.

- Protective Orders: court may, for good cause, issue an order "to protect a party from annoyance, embarrassment, oppression, or undue burden or expense."

- Privileged Material – Withhold but Privilege Log Required – Rule 16(b)(5)
    - Attorney-client privileged material falls outside the scope of discovery
    - Information withheld on grounds of privilege or trial-preparation material - party must expressly say so and identify the nature of documents or things sufficient to enable opponent to assess the claim

D. Discovery on Non-Parties: Subpoena – Rule 45

- May be compelled to produce documents and things or permit and inspection
- May be compelled to give discovery deposition
- No leave of court required to issue non-party subpoenas
- Attorneys issuing subpoenas must take reasonable steps to avoid imposing undue burden or expense on non-party, duty not to use for improper purposes
- Indeed, because attorneys practicing in the issuing court can sign/issue subpoenas, there is no court supervision of the subpoena power unless and until the non-party moves to quash

E. Sanctions – Rule 37

- Failure to disclose information or witness identity in Initial Disclosures – party may not offer as evidence that information or witness' testimony, unless failure to disclose was substantially justified or harmless
- Disclosure of information after a motion to compel is filed – court will still require offending party to pay reasonable expenses incurred in making the motion unless failure to disclose was substantially justified

- Court has wide discretion to impose other sanctions for failure to make disclosures or participate in discovery, including:
    - Substantive –matters or facts be deemed established/admitted
    - Evidentiary presumption against offending party
    - Prohibit making claims or defenses at trial, or introducing evidence
    - Dismissal of action
    - Default judgment against offending party
    - Attorney's fees and expenses related to failure to disclose—against the offending party *and even the party's attorney!*

F. Observations

- Discovery is significantly broader in the United States system than in comparative systems.

- The scope of discovery is broad—anything relevant to a claim or defense—though consideration must be given to whether discovery is proportional to the case. Accordingly, the duty to participate in discovery can be onerous.

- The ability to take discovery depositions of right is a great fact-finding tool in the US system, and it appears to be defining to our system comparatively. We can take oral depositions of parties, compel oral depositions of non-parties, and ask almost anything in deposition.

- Parties and counsel largely control the pace and content of discovery in the American system to a large degree— most discovery tools are of right, and do not require leave of court. The court steps in after there is a dispute as to the appropriateness of a discovery request.

- So, if filing suit or being sued in the US – you can assume discovery will be a lengthy, somewhat onerous process. However, the benefit from this process is you will get a substantive pretrial evaluation of your opponent and his witnesses and evidence. You will have had an opportunity to sit face-to-face with witnesses and question them about anything relevant to the lawsuit. In our experience, the discovery process, tedious as it can be, allows parties and lawyers to confidently assess the strengths and weaknesses of a case sufficient to successfully mediate before trial or clarify issues so they can be resolved on summary judgment. So, in our experience, this lengthy and involved discovery process often results in big saved expenses at trial.

Advisory Committee Notes on December 2015 Amendments to Rule 26

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.

Fed. R. Civ. P. 26, 2015 comm. note (emphasis added).