Introduction

Numerous changes have occurred in discovery practice since the publication of the second edition of this book three years ago. Some of the changes reflect new rules of procedure, particularly regarding electronically stored information (ESI), while other changes are a response to judicial opinions interpreting the rules.

As observed in both previous editions of this book, much has been written about courtroom advocacy in civil trials and appeals in the federal courts, but far less commentary is available on pretrial discovery and, in particular, the disputes that arise in discovery. The dearth of writing on this topic is a problem, because lawyers and clients today devote enormous amounts of time, effort, and expense to discovery. More often than not, discovery, and not trial, is the central battleground of a case. Most civil lawsuits in federal court end before trial, either by pretrial settlement or on dispositive motion. In either case, the fruits of discovery can be critical to the outcome. The need for analytical and strategic guidance on problems in discovery is heightened by the fact that much of it is handled by relatively inexperienced lawyers, and in the case of document production, legal assistants.

This book is written to address that need. It describes the problems that civil litigators encounter most frequently in pretrial discovery and presents suggestions and strategies for solving these problems. Following a background discussion on the scope and types of discovery, discovery problems are presented as hypotheticals (many of which the authors have encountered in their experience) followed by a discussion that includes the law and helpful practice tips. In this edition, particular emphasis has been placed on discussion and interpretation of the new rules, and evolving case law, concerning discovery of ESI.

OVERVIEW

Rules 26–37 and Rule 45 of the Federal Rules of Civil Procedure, which embrace pretrial discovery, were meant to simplify and rationalize civil
litigation by emphasizing reciprocal pretrial disclosure. The framers of the Federal Rules thought that cases would more likely settle or be resolved by dispositive motion if each side had a thorough pretrial understanding of its adversary’s case. Of course, as the world has become more complex, the discovery rules have themselves become more complex. Amidst the complications, two truths have emerged. First, anyone who aspires to be a competent civil litigator must master the rules of pretrial discovery. Second, that process takes time and experience.

Originally adopted in 1938, the discovery provisions of the Federal Rules of Civil Procedure remained largely unchanged until 1970, when the belief that discovery was being abused triggered the first wave of significant amendments. There were additional amendments in 1980 and again in 1983 (it was then that Rule 26(b) was amended to empower the court to limit the frequency and extent of discovery methods). In 1993, despite concerted opposition from the bar, the U.S. Supreme Court approved extensive amendments to Rule 26, including the crucial feature of mandatory initial disclosures. Yet another series of amendments was adopted in 2000, incorporating, among other changes, a uniform national standard for mandatory disclosures. In 2006, important changes concerning discovery of ESI were introduced. This area of law presents new challenges to even the most experienced civil litigators. One of the goals of this book is to show how such challenges can be met and overcome.

Generally speaking, attorneys have at their disposal the following discovery instruments under the Federal Rules of Civil Procedure:

- Written interrogatories (Rule 33);
- Production of documents and things and entry upon land for inspection and other purposes (Rule 34);
- The issuance of subpoenas (Rule 45);
- Physical and mental examinations (Rule 35);
- Depositions upon written questions (Rule 31);
- Oral depositions (Rule 30); and
- Request for admissions and genuineness of documents (Rule 36).

Appendix 1 contains the current (2009) version of the discovery rules, that is, Rules 26–37 and Rule 45. The following summary, which identifies only key elements of the rules, obviously is not a substitute for reading and understanding each rule. In addition—and this is a crucial point—the rules cannot be fully understood without consulting each U.S. district court’s complementary local rules on discovery. They, too, are required reading for a federal litigator, but are beyond the scope of this
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Finally, practitioners who are used to relying on state rules should take care to note the differences in interpretation between the state courts and the federal courts, even when the language of a particular rule is identical or similar.

RULE 26: GENERAL PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE

Rule 26 is central to all discovery. It should be consulted at the outset of litigation and whenever a specific discovery device is being used. Rule 26(a) identifies three distinct types of discovery disclosures. The first, “initial disclosures,” is addressed in Rule 26(a)(1)(A). This rule requires a party to disclose certain information to the other side at the start of the lawsuit, without awaiting a discovery request from the adverse party. The required information includes the name, telephone number, and address of each individual likely to have discoverable information—that the disclosing party may use to support its claims or defenses. The disclosing party must also produce a copy (or a description by category and location) of all documents and ESI in the possession, custody, or control of the party and a computation of any category of damages claimed by the disclosing party.

The 2000 changes to the discovery rules rescinded the power of the district courts to adopt local rules that “opted out” of the Rule 26(a)(1)(A) initial disclosures. As some courts had in fact opted out, this change greatly expanded the number of cases in which disclosures must be made. Additionally, the 2000 changes narrowed the scope of initial disclosures to information in each category that the disclosing party “may use” to support its claims or defenses. Previously, disclosure was required of information applicable to each topic covered by the rule even if the disclosing party did not intend to rely on such information in its case, and even if the information might be harmful to the disclosing party.

The second of the Rule 26 disclosures, spelled out in subsection (a)(2), requires each party to disclose the identity of any expert it may use as a witness at trial, as well as a report—prepared for and signed by the expert—setting forth the following: the expert’s opinions, data, and other information considered in forming his or her opinions; exhibits that support the opinion; the expert’s qualifications and publications; the rate of compensation of the expert; and a list of other cases in which the expert has participated for at least the preceding four years. For witnesses who are not retained as testifying experts, but who may qualify to give
opinion testimony under Evidence Rules 702, 703, and 705, Rule 26(a) (2)(C) requires that the party intending to call the witness must provide a summary of the facts and opinions to which the witness is expected to testify. The deadline for expert disclosures is usually set forth in a scheduling order adopted by the court.

The third of the disclosures, set forth in Rule 26(a)(3), requires specific “pretrial disclosures.” Each party must disclose the address and telephone number of each witness it may call at trial. The parties must also identify deposition excerpts intended to be offered in lieu of trial testimony, as well as documents and exhibits that may be introduced or used at trial. Unless otherwise ordered by the court, these disclosures must be made not later than 30 days before trial.

Rule 37(c)(1) puts teeth into the Rule 26(a) mandatory disclosures by precluding a party that fails to provide information, or identify a witness, from using that information or witness, at trial or in support of any motion, if the party was required to have disclosed the witness or information, unless there was substantial justification for failing to make the disclosure or the failure was harmless.

After describing required disclosures, Rule 26 defines the scope of adversary discovery. Rule 26(b)(1) provides that discovery embraces any matter not privileged that is relevant to the claims or defenses raised in the pleadings, even if it does not constitute admissible evidence. Beyond this limit, discovery is only permitted of facts relevant to the “subject matter” of the litigation, but only on a showing of good cause. This language was added in 2000 to narrow the scope of discovery from the previous standard, which permitted discovery of any unprivileged information relevant to the “subject matter” of the litigation—not just the claims and defenses. Even as limited, however, the scope of permissible discovery remains broad.

Rule 26(b)(2) establishes a key discovery management tool that is too frequently overlooked. It allows the court, on its own initiative or upon motion of a party, to limit discovery if, after employing a multifactor cost/benefit analysis, it determines that the discovery sought would be too cumulative, expensive, or burdensome.

Rule 26(b)(3) provides that trial preparation materials are not discoverable except upon a showing that the party seeking such discovery has substantial need of the materials in preparing for trial and is unable, without undue hardship, to obtain a substantial equivalent of the materials by other means. The rule further provides that in ordering discovery of such materials, the court must still protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or
other representative of a party concerning the litigation. In sum, Rule 26(b)(3) codifies the “work product” objection to discovery.

Rule 26(b)(4) authorizes depositions and other discovery of experts.

Rule 26(b)(5) provides that if a party claiming privilege or work product withholds information that is otherwise discoverable, it must describe the nature of the document or communication withheld to enable the other party to assess the applicability of the privilege or protection. It also provides a mechanism for asserting attorney-client privilege or work-product protection even after there has been disclosure of the privileged or protected information, but any determination of whether waiver has occurred must be made in accordance with Evidence Rule 502.

Rule 26(c) authorizes the issuance of protective orders to limit discovery, with the proviso that the movant must certify that it has conferred with the adverse party in an effort to resolve the dispute, or has at least attempted to do so. The prevailing party in such dispute is entitled to seek an award of expenses.

Rule 26(d) governs the timing and sequence of discovery: Generally, a party may not seek discovery before the parties have conferred as required by Rule 26(f), but once discovery is initiated, it may be conducted in any sequence, and it is not grounds for delay of one party’s discovery that an adverse party is conducting discovery.

Rule 26(e) sets forth the predicates for mandatory supplementation of disclosures and discovery responses. A party is under a duty to supplement at appropriate intervals its disclosures and prior responses to interrogatories, requests for production of documents, and requests for admissions. Experts are required to supplement their reports and responses to depositions by the time the party’s pretrial disclosures under Rule 26(a)(3) are due.

Rule 26(f) sets forth the general requirement for a prediscovery conference among counsel to discuss the issues in the case and potential for settlement, and to endeavor to develop a discovery plan. Of particular note is the requirement in Rule 26(f)(C) that the discovery plan must address any issues concerning discovery of ESI, including the forms in which it should be produced.

Finally, Rule 26(g) mandates that an attorney of record or, in the case of an unrepresented party, the party itself sign all disclosures, discovery requests, responses, and objections. That signature certifies that the disclosure is complete and correct as of the date made and that the discovery request, response, or objection conforms to the rules and is not interposed for an improper purpose. Rule 26(g)(3) provides for sanctions if the rule is violated.
RULE 27: DEPOSITIONS BEFORE ACTION
OR PENDING APPEAL

A person who wants to perpetuate testimony before suit has been initiated may file a verified petition in the U.S. district court stating (1) that the petitioner expects to be a party to an action, (2) that the petitioner is presently unable to bring the action, (3) the subject matter of the expected action, (4) the facts that the petitioner desires to establish by the proposed testimony, (5) the names of the persons the petitioner expects will be adverse parties, (6) the names and addresses of the persons to be examined and the substance of the testimony that petitioner expects to elicit, and (7) a request for an order authorizing the deposition(s) of such persons. Notice must be given to potential adverse parties. This procedure is also available for cases on appeal as to evidence needed to perpetuate the record for use in the event of further fact-finding proceedings.

RULE 28: PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

A deposition in the United States must be taken before an officer authorized to administer oaths and take testimony. A deposition abroad may be taken pursuant to any applicable treaty, convention, or letter of request, or upon notice before a person authorized to administer oaths or commissioned by the court.

RULE 29: STIPULATIONS REGARDING DISCOVERY PROCEDURE

Parties may stipulate regarding discovery procedures. Federal and local rules and pretrial orders cannot be avoided or changed, however, absent court order.

RULE 30: DEPOSITIONS UPON ORAL EXAMINATION

Rule 30(a) establishes when an oral deposition may be taken—with and without leave of court. Rule 30(b) sets forth the notice requirements for an oral deposition ("reasonable notice" if documents are not sought, 30 days’ notice if documents are sought) as well as the methods of recording the deposition and the mechanism for production of documents and things at a deposition (referring the proponent to Rule 34).
Rule 30(b)(6) allows a party to name as the deponent an entity, as distinct from an individual. In that case, the requesting party must designate with reasonable particularity the matters for which the examination is requested. The entity so named must designate one or more officers, directors, or agents on its behalf and may set forth for each person designated the matters as to which the person will testify. The designee’s testimony is not limited to his or her personal knowledge of the topics identified in the notice of deposition, but includes information “known or reasonably available” to the designating organization. Rule 32(a)(2) states that the deposition of a Rule 30(b)(6) designee may be used at trial by an adverse party for “any purpose.”

Rule 30(c) sets forth the procedures for taking a deposition, administration of the oath, and making objections. Rule 30(d) provides that objections to questions must be stated concisely and in a nonargumentative and nonsuggestive manner. Instructions not to answer may be given only when necessary to preserve a privilege or enforce a limitation directed by the court, or to present a motion to terminate a deposition for abusive or bad-faith conduct under Rule 30(d)(4). Rule 30(d)(2) limits the deposition of an individual party or witness to one day of seven hours. However, the court must allow additional time consistent with Rule 26(b)(2) if needed for fair examination of the deponent. Under Rule 30(d)(3), if counsel conducts himself or herself in an improper fashion, frustrates the fair examination of a deponent, or interposes impediments or delays, the court may impose sanctions including the reasonable costs and attorney’s fees incurred by any parties as a result of the misconduct.

Rule 30(e) provides that, if requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review it, and if there are any changes in form or substance, to sign a statement reciting such changes and the reasons for making them.

**RULE 31: DEPOSITIONS UPON WRITTEN QUESTIONS**

Parties that want to take a deposition upon written questions shall serve them upon every other party. An adverse party may then serve cross-questions, and the initiating party may serve redirect questions. Copies of the notice and all questions served are delivered by the party seeking the deposition to the officer designated in the notice; that officer then proceeds to take the deposition of the witness and prepares, certifies, and files or mails the deposition, attaching a copy of the notice and the questions received by the officer.
RULE 32: USE OF DEPOSITIONS IN COURT PROCEEDINGS

The deposition of an adverse party and its Rule 30(b)(6) designee may be used for any purpose. The deposition of a witness may be used for any purpose if the witness is dead; more than 100 miles from the place of trial or out of the country; unable to attend because of age, illness, or infirmity; or due to other exceptional circumstances. The deposition of a party or witness may also be used to contradict or impeach the trial testimony of that person. However, the deposition of a party cannot be used against that party if it was served with notice of the deposition less than 11 days before its commencement and the party filed a motion for protective order promptly upon receiving such notice (which motion remained pending at the time of the deposition). Objections to the competency of a witness or the relevance or materiality of testimony are not waived for failure to make them during the deposition unless the ground(s) for the objection could have been obviated if stated at that time.

RULE 33: INTERROGATORIES TO PARTIES

Rule 33(a) provides for the issuance of interrogatories. There may not be more than 25 interrogatories, including subparts, unless the court allows or the parties so stipulate. Further, absent leave of court or stipulation, interrogatories may not be served before the time specified in Rule 26(d) (generally, until after the parties have conferred to evaluate the case and settlement possibilities and plan discovery). Rule 33(b) sets forth the procedure for answers and objections to interrogatories. Rule 33(b)(4) states that a failure to state with specificity all grounds for objection to an interrogatory waives the unstated objection unless the court later permits it for good cause shown. Rule 33(c) allows for the use of interrogatory answers as evidence at trial to the extent permitted by the rules of evidence. Rule 33(d) provides for the option to produce business records in lieu of a narrative answer to an interrogatory where such answer may be derived from the business records of the party upon whom the interrogatory has been served and the burden of retrieving that information from the records is substantially the same for both parties.

RULE 34: PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

Responses to requests for production are due 30 days after service. The response shall address each request, either permitting inspection or object-
ing and stating the reasons for the objection. The party making production must produce the documents in one of two ways—either in the form in which they are kept in the usual course of business, or alternatively, organized and labeled to correspond with the categories in the request. A recent amendment to Rule 34 expressly authorizes requests for production of ESI in a form “reasonably usable” by the requesting party. A nonparty can be compelled to produce documents as provided in Rule 45.

**RULE 35: PHYSICAL AND MENTAL EXAMINATIONS OF PERSONS**

The court may order a party to submit to a physical or mental examination when such condition is in controversy. The order can be made only upon a motion for good cause shown and upon notice to the person to be examined and to all parties.

**RULE 36: REQUESTS FOR ADMISSION**

A party may serve an unlimited number of requests for admissions or genuineness of documents. Each matter as to which an admission is requested shall be stated separately. If the request seeks admission that a document is genuine, it must be attached unless it has already been produced or made available for inspection. A matter is deemed admitted unless a response to the request is served within 30 days, subject to an agreement or order modifying the time limit. When an objection is made, the grounds must be stated. Lack of knowledge is not an acceptable response unless it is accompanied by a statement that reasonable inquiry has been made.

A party who has requested admissions may move to determine the sufficiency of the responses. Admissions are deemed conclusive absent court order permitting withdrawal or amendment of the admission.

**RULE 37: FAILURE TO MAKE DISCLOSURE OR COOPERATE IN DISCOVERY: SANCTIONS**

Rule 37(a) provides that a party may move to compel disclosure and for sanctions if another party fails to make disclosure required by Rule 26(a), answers a question under Rule 30 or 31, fails to make a designation under Rule 30(b)(6) or Rule 31(a), fails to answer an interrogatory under Rule 33, or fails to respond to a document request under Rule 34.

A Rule 37 motion must certify that the movant, in good faith, has conferred or attempted to confer with the party not making the disclosure
or response in an effort to secure the information without court action. The court may order the party or deponent whose conduct necessitated the motion, or the attorney advising the conduct that necessitated the motion, or both of them, to pay the moving party its reasonable expenses incurred in making the motion, including attorney’s fees, unless the court determines that the opposing party’s nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust.

Rule 37(a)(4) contains the extremely important, but often overlooked, requirement that an incomplete or evasive discovery disclosure, response, or answer, whether to written discovery or a deposition question, is deemed to be a failure to disclose, respond, or answer.

Rule 37(b) provides for sanctions for failure to be sworn or answer a question at deposition after being ordered to do so by the court. It also permits a court to impose sweeping, and potentially case-determinative, sanctions against a party that refuses to obey an order directing discovery. The sanctions include ordering that certain facts be taken as established at trial; refusing to allow the disobedient party to support or oppose designated claims at trial; striking pleadings or parts thereof; staying or dismissing the action; and rendering a default judgment.

Under Rule 37(c), absent substantial justification or a showing that the violation is harmless, the failure of a party to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), bars that party from using as evidence at trial any witness or information not so disclosed. Rule 37(d) permits the imposition of sanctions against a party that fails to attend its own deposition or to answer interrogatories or document production requests, and Rule 37(g) establishes sanctions that may be issued against a party or attorney who fails to participate in good faith in the development and submission of a discovery plan as required by Rule 26(f).

**RULE 45: SUBPOENA**

When seeking disclosure of testimony or documents from persons who are not parties, a party may obtain and serve a subpoena pursuant to Rule 45. Generally, a subpoena is valid if served and returnable within the district of the court that has issued it, or if served anywhere outside the district within 100 miles of the place where the deposition or trial is to occur. A subpoena may be valid if served under other circumstances identified in the rule, as well. A subpoena commanding the production of documents and things, or for the inspection of a premises prior to trial,
must be served on all parties to the litigation, as well as to the person or entity ordered to make the production. Rule 45(c) establishes procedures to protect nonparties from abusive subpoenas. Although not yet finally approved, the Advisory Committee for the Rules of Civil Procedure has proposed important modifications to Rule 45 to streamline, simplify, and make more efficient the use of subpoenas for discovery from nonparties.

With this summary of the Rules’ basic discovery features in mind, we now proceed to actual discovery problems and their solutions.