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Moore's AnswerGuide: Federal Discovery Practice

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1 Moore's AnswerGuide: Federal Discovery Practice About the Consulting Editors

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1-1 Moore's AnswerGuide: Federal Discovery Practice 1.syn

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PART A: PROCEDURAL CONTEXT

1-1 Moore's AnswerGuide: Federal Discovery Practice § 1.01

§ 1.01 Procedural Context--Developing a Discovery Plan

Planning for discovery is a fundamental part of any litigation, and can have a marked impact in understanding, shaping, litigating, and resolving a case. Discovery planning sets the road map for the entire case. It reveals the facts, evidence, and issues on which the case will turn, as well as the delivery and demeanor of potential witnesses and experts.

For both plaintiff's and defendant's counsel, the discovery planning process will help determine which discovery methods to employ, and which issues must be proved or refuted at trial. It also will show which witnesses and experts will be effective or should be attacked, and what evidence is required to prove the elements of the cause of action or defense. Further, early, thorough, and organized investigation can help determine the chances of settlement before trial, depending on the strength of the evidence.



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1-1 Moore's AnswerGuide: Federal Discovery Practice § 1.02

§ 1.02 Checklist for Planning and Preparing for Discovery

☐ Plan and prepare for discovery:

○ Identify key issues in case. *See § 1.03 below*.

○ Conduct discovery with continuing reference to issues and facts necessary to prove or disprove them. *See § 1.03 below*.

○ Establish discovery plan as part of litigation plan at outset of case, and update discovery plan as needed. *See § 1.04 below*.

○ Conduct relevant legal research to determine elements of claims and defenses, fact patterns supporting liability or defenses, and damages recoverable. *See § 1.05 below*.

○ Review relevant jury instructions to focus on how courts have instructed juries in similar cases. *See § 1.05 below*.

○ Conduct client interviews to establish basic facts of case, prepare pleadings, learn important points in controversy, determine potential witnesses, and prepare client for discovery. *See § 1.06 below*.

○ Review relevant documents and electronically stored information in client's custody to prepare for Rule 26(a) mandatory disclosure, develop understanding of key facts, and prepare for depositions. *See § 1.07 below*.

○ Conduct reasonable inquiry for discovery as required by Rule 26(g). *See § 1.08*

below.

☐ Plan and prepare for investigation and informal discovery, including the following:

○ Conduct early investigation to help plan case and preserve evidence that may degrade or disappear. *See § 1.08[1] below*.

○ Gather evidence by informal means from third parties to avoid expense of discovery. *See § 1.08[2] below*.

○ Investigate personal injury actions immediately, if appropriate, to preserve participants' recollections. *See § 1.08[3] below*.

○ Conduct site investigations immediately, if appropriate, before scene is altered or repaired. *See § 1.08[4] below*.

○ Inspect medical and hospital records, if appropriate, and obtain list of staff involved. *See § 1.08[5] below*.

○ Review public and other accessible records, including government agency filings, court records, police and fire reports, accident investigations, business records, and news accounts. *See § 1.08[6] below*.

○ Obtain information from unrepresented witnesses immediately to preserve recollections and obtain witness statements. *See § 1.09 below*.

○ Use investigators and technical consultants such as fingerprint specialists and handwriting experts, if appropriate. *See § 1.10 below*.

○ Protect results of informal discovery through attorney-client privilege. *See § 1.11 below*.

○ Protect results of informal discovery through work product doctrine. *See § 1.12 below*.

☐ After action has commenced, begin preparations for formal discovery. *See §§ 1.13*, *1.14 below*.

☐ Determine whether case is specifically exempted from initial disclosure requirements under Rule 26(a)(1)(B). *See § 1.13[1] below*.

☐ If case is not specifically exempted from initial disclosure requirements under Rule 26(a)(1)(B):

○ General rule: await completion of Rule 26(f) conference before conducting formal

discovery.

○ If formal discovery needed before Rule 26(f) conference, reach stipulation with opposing parties or move for court order allowing for early discovery.

○ With other attorneys of record and all unrepresented parties that have appeared in the case, arrange a Rule 26(f) conference to occur at least 21 days before scheduling conference is held or Rule 16(b) scheduling order is due. *See § 1.14 below*.

○ In advance of Rule 26(f) conference, gather information for *Fed. R. Civ. P. 26(a)(1)* initial disclosures. *See § 1.13 below*.

○ Participate in Rule 26(f) conference. *See § 1.14 below*.

☐ Consider the nature and basis of the claims and defenses and the possibility for a prompt settlement or resolution of the case. *See § 1.14[1] below*.

☐ Make or arrange for disclosures required by Rule 26(a)(1):

○ Make disclosures at or within 14 days after the Rule 26(f) conference. *See § 1.13[1][a] below*.

○ For party first served or otherwise joined after Rule 26(f) conference, make disclosures within 30 days after being served or joined unless different time is set by stipulation or court order.

☐ Object to initial disclosures if appropriate. *See § 1.14[3] below*.

☐ Develop proposed discovery plan. *See § 1.14[3] below*.

☐ Address any other matters required under local rules. *See § 1.14[3] below*.

☐ Submit to court written report outlining discovery plan within 14 days after conference. See *§ 1.14[3] below*.

☐ Within 90 days after appearance of defendant and within 120 days after complaint has been served on a defendant, court will issue scheduling order that, among other things, establishes a discovery cut-off.

☐ Before discovery cut-off date prescribed by court in scheduling order, conduct formal discovery:

○ Take deposition of any person, including party, without leave of court. *See §*

1.21[1] below.

○ Serve interrogatories on another party. *See § 1.21[2] below*.

○ Obtain documents, electronically stored information, and things from another party. *See § 1.21[3] below*.

○ Inspect personal and real property of another party. *See § 1.21[3] below*.

○ Seek physical and mental examinations of another party if mental or physical condition is in controversy and there is good cause for examination. *See § 1.21[4] below*.

○ Serve requests for admission on another party for any matter relevant to litigation. *See § 1.21[5] below*.

☐ Consider strategy regarding order of use of discovery methods. *See § 1.22 below*:

○ Ordinarily, serve interrogatories and request documents before conducting depositions.

○ Normally take depositions only after reviewing documents, which provide framework for understanding person's involvement in case.

○ Consider whether there are significant advantages to taking early depositions.

○ Delay deposing key actors and experts until all facts are known and case is more developed.

○ If appropriate, stipulate around discovery limits.

☐ Certify discovery requests and responses as required by Rule 26(g). *See § 1.16. below*.

☐ File discovery requests and responses if used in proceeding. *See § 1.17 below*.

☐ Supplement or correct discovery responses, if appropriate. *See § 1.18 below*.

☐ Seek protective orders for abusive discovery, if appropriate. *See § 1.19 below*.

☐ Evaluate cost of discovery that will be passed along to client. *See § 1.20 below*.

☐ In cases subject to Rule 26(a) disclosure requirements: *See § 1.13 below*.

- ○ General rule: at least 90 days before trial date, or date case is set to be ready for trial, make expert witness disclosures required by Rule 26(a)(2).

- ○ If evidence is solely to contradict or rebut evidence on same subject matter identified by another party, disclosure must be made within 30 days after other party's disclosure. *See § 1.09[1][b] below*.

- ○ At least 30 days before trial date, provide to other parties and file with the court the pretrial disclosures required by Rule 26(a)(3).

- ○ Within 14 days after party has made Rule 26(a)(3) disclosures, serve and promptly file objections to those disclosures.

☐ Find and assess experts.

☐ Find and assess witnesses.

☐ **Search by Topic:** Civil Procedure > Discovery



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1-1 Moore's AnswerGuide: Federal Discovery Practice § 1.03

§ 1.03 Understanding Importance of Planning

Planning for discovery begins with an understanding of the issues in the case. Otherwise, it is impossible to know what information to obtain to prove a case or defense at trial. Before a complaint is filed, the plaintiff's lawyer must identify the key issues and facts in the case.

The duty of pre-filing investigation imposed by *Fed. R. Civ. P. 11* requires diligent inquiry before the lawsuit begins. The same duty applies to defense counsel before filing an answer or any pre-answer motions. *See Fed. R. Civ. P. 11(b).*

Conducting discovery with continuing reference to the issues and facts serves to:

1. Permit discovery to be conducted with a clear purpose, saving time and money.

2. Maximize the use of discovery--limited by the press of time, the strictures of the court, or cost constraints.

3. Ensure that discovery will be completed well in advance of trial.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* Ch. 11.
- *Fed. R. Civ. P. 11(b)* (representations when attorney or party presents papers to court).
- *Fed. R. Civ. P. 11(c)* (sanctions for violating Rule 11(b)).



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1-1 Moore's AnswerGuide: Federal Discovery Practice § 1.04

§ 1.04 Establishing Plan at Onset of Litigation

Counsel should establish a litigation plan, including a discovery plan, at the earliest possible time and update it periodically as the litigation progresses. In view of the importance of discovery, careful planning is crucial. Counsel should use discovery methods for specified reasons and with clear objectives in mind. A comprehensive discovery plan serves as the final roadmap of what needs to be established or accomplished at trial.

As a general rule, parties must, at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider a detailed discovery plan (among other issues). *See Fed. R. Civ. P. 26(f)(1)*; *see also §§ 1.14*, *4.09 below*.

PRACTICE RESOURCES:

- *Fed. R. Civ. P. 16(b)* (pretrial conference; scheduling).
- *Fed. R. Civ. P. 26(f)* (discovery conference).



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1-1 Moore's AnswerGuide: Federal Discovery Practice § 1.05

§ 1.05 Conducting Legal Research and Reviewing Relevant Jury Instructions

The first step in creating a discovery plan is to conduct legal research and review relevant jury instructions to determine:

1. Elements of the claims and defenses.

2. Fact patterns supporting liability or that may be used as a defense.

3. Types of damages recoverable.

Because the extent of discovery undertaken is likely to hinge on the value of the case, it is helpful to research jury verdicts for similar cases in the district where the case is filed. Services that publish jury verdict information generally provide settlement information for cases that have recently settled, which can be even more useful than jury verdicts.

Once basic research has been completed, counsel should generate a list of the facts needed to prosecute or defend the action. The process of establishing required facts often begins with information in the custody or control of the client or others with whom informal access may be sought. *See § 1.08 below* (discussion of informal discovery).

PRACTICE RESOURCES:

- *Modern Federal Jury Instructions,* Chs. 71-91.



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1-1 Moore's AnswerGuide: Federal Discovery Practice § 1.06

§ 1.06 Conducting Client Interviews to Establish Basic Facts

[1] Setting Up Interviews

Client interviews are a critical component of discovery planning. In most circumstances, the parties know the factual background, potential witnesses, and key documents that will be the core of the overall discovery plan.



Strategic Point:

If possible, contact the person to be interviewed in advance. Advance notice makes the interview more efficient and may eliminate the need for follow-up interviews. During that initial contact, provide a summary of the nature of the action and mention the matters to be covered in the interview. To the extent possible, identify the significant disputed issues in the suit, particularly the issues on which the interviewee is expected to shed some light. This will help the interviewee recall pertinent information and begin collecting the documents or evidence that otherwise would have to be located after the interview. In addition, if meeting with someone whom the client contact knows but whom you have never met, consider having the client contact make the first communication with the interviewee and explain why the interview is necessary and appropriate. This can serve to place the interviewee at ease and make the interview more effective.

[2] Meeting With Client to Prepare Pleadings

Whether representing a plaintiff or a defendant, developing the facts of a case normally begins with an interview with the client, the client's survivor, or, in the case of an organization, knowledgeable members of the organization. When representing the plaintiff, the interview will be a necessary prelude to preparing the complaint. When representing a defendant, counsel should review the complaint with the client to become familiar with the underlying facts and to prepare an answer or consider a pre-answer motion. *See generally Moore's AnswerGuide: Federal Pretrial Motion Practice* . During the initial meeting with the client, begin formulating a discovery plan to assure evidentiary support of the allegations in the pleadings.

[3] Eliciting Necessary Facts Through Client Interview

Eliciting facts from the attorney's own client resembles the subsequent conduct of discovery from the adversary. It may be difficult to assemble a body of facts that are sufficiently particular and well-founded to constitute potential evidence. Even a cooperative individual's recollection may have to be prodded, and will often have to be refreshed with documents. In the course of client interviews, use any pleadings on file and all relevant documents to structure the interview.

[4] Limiting Note-Taking by Client During Interview

There is no reason for the client or any employees to take notes or make memoranda about the substance of attorney-client interviews. At most, they need to keep track of the documents to search for after the interview. Even if the client takes notes during attorney-client meetings, the notes may be protected from discovery as work product that reflects the opinions and theories of counsel. Although the client should be careful to keep interview notes confidential, inadvertent disclosure of these notes will not necessarily waive the work product protection afforded by *Fed. R. Civ. P. 26(b)(3)*. For discussion of work product protection waiver, *see § 3.45 below*.

[5] Establishing List of Potential Witnesses Through Initial Interviews

The initial interviewing and fact-collecting process is the first step in establishing who should be deposed, who should give written statements, and who should be subjected only to informal discovery. In the early stages of the interviewing process, counsel should learn the names of people who have firsthand knowledge of the events giving rise to the lawsuit and the location and nature of documents that bear on the issues. This information can be used to prepare a list of potential deponents, which may be refined through the use of interrogatories and document requests.

[6] Preparing Client for Future Discovery During Initial Interview

During interviews with the client or the client's agents, begin to lay the groundwork for later preparation of those people for future discovery, including their own depositions. Tell the client about questions they may be expected to answer and documents they may be expected to produce.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.70*.
- *Federal Evidence Practice Guide § 2.06*.
- *Fed. R. Civ. P. 26(b)(3)* (trial preparation materials).



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1-1 Moore's AnswerGuide: Federal Discovery Practice § 1.07

§ 1.07 Reviewing Relevant Documents and Electronically Stored Information in Client's Possession, Custody, or Control

[1] Preparing for Mandatory Initial Disclosure of Documents and Electronically Stored Information

Evaluation of the client's documents and electronically stored information is essential when planning for discovery. In most cases, even before any formal discovery demands are made, the parties must exchange documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment. *See Fed. R. Civ. P. 26(a)(1)*; *see also § 1.13 and* Ch. 6 *below*.

[2] Developing Understanding of Key Facts Underlying Case Theory

Early review of the client's documents and electronically stored information provides an opportunity to begin developing the theory of the case, which facilitates efficient use of discovery. Document review supports the development of a coherent narrative, which will later be substantiated with evidence.



Strategic Point:

A thorough review of the client's documents and electronically stored information can suggest additional theories of liability or potential defenses to develop in the course of discovery. Although the documents that are most damaging to a case can be those in the client's files, often some of the most helpful documents are also in the client's control.

[3] Evaluating and Setting Client Expectations

A review of the client's documents and electronically stored information can provide a cross-check on the client's perspective of the case. Although the advocate's role is to put the best light possible on the facts at hand, lawyers in the early stages of a case sometimes can be swayed by the client's accounts of the facts. Clients may overstate the strength of their position. Although the process of lowering the client's expectations is delicate, seeking explanations of apparent inconsistencies between the documentary record and the client's version of events is one way to approach this issue.

[4] Preparing for Depositions

Review the client's files to help identify the principal actors in the events leading to the lawsuit, and to develop a list of potential persons to be interviewed or deposed.



Strategic Point:

Reviewing documents and electronically stored information in the possession, custody, or control of the client can help prepare the client for being deposed by an adversary. The client should never see a damaging item for the first time at a deposition.

[5] Conducting "Reasonable Inquiry" for Discovery

The attorney or unrepresented party has a duty of "reasonable inquiry" with respect to discovery. Breach of this duty may result in substantial sanctions. *See Fed. R. Civ. P. 26(g)*; *see also §§ 18.35 -18.38 below*.

An early review of the client's files saves time when the adverse party serves a production request under *Fed. R. Civ. P. 34* (*see* Ch. 5 *below*). Some lawyers, acting on the assumption that the contents of their client's files will do their case more harm than good, let the client, rather than the attorney's staff, search for responsive documents in the expectation that the job may be done less rigorously. However, Rule 26(g)'s duty of reasonable inquiry requires a diligent search when responding to a production request. The reasonable inquiry duty mandated by *Fed. R. Civ. P. 11*, which applies to signed pleadings, has been specifically extended to responses to discovery under Rule 26(g) as well. Failure to search diligently for responsive material, whether by the attorney or the client, may result in sanctions. *See, e.g., Metro. Opera Ass'n v. Local 100, Hotel Emples. & Rest. Emples. Int'l Union, 212 F.R.D. 178, 222 (S.D.N.Y. 2003)* (ordering default judgment against client based on counsel's failure to comply with Rule 26(g) duties).

Although there are times when counsel may not want to examine a client's relevant files, this should be a carefully considered decision. Lawyers are under a duty to maximize the client's resources and avoid wasteful expenditures, but in the practice of prudent, defensive law, it is better to prepare fully by reviewing all the files than to risk a malpractice action from the failure to do so.



Strategic Point:

Remember that "possession, custody, or control" is a fairly broad concept. Be sure to ask the client where all records relevant to the action are kept (e.g., other or satellite offices, off-site storage facilities, back-up disks or drives, and home offices). It often helps to ask the client to explain its filing system, as thinking about how and where information is kept may jog the client's memory about the very existence of relevant material.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.152, 26.154.*
- *Fed. R. Civ. P. 11* (signing pleadings, motions and other papers).
- *Fed. R. Civ. P. 26(a)(1)* (initial disclosures).
- *Fed. R. Civ. P. 26(g)* (signing disclosures and discovery requests).

- *Fed. R. Civ. P. 34* (producing documents, things, and electronically stored information).



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1-1 Moore's AnswerGuide: Federal Discovery Practice § 1.08

§ 1.08 Conducting Factual Investigation and "Informal" Discovery

[1] Value of Early Investigation

Delay in investigating a case can result in some evidence disappearing or its value or content diminishing. Recollections fade over time and documents are mislaid or destroyed. The condition of an injured party will inevitably change. Physical evidence will disappear; skid marks on a highway will be worn away by use and weather; a faulty machine will be repaired; a dangerous stairway will be replaced. Early investigation of the facts facilitates proper planning for the case, including an outline for formal discovery. The early compilation of potential evidence helps in the preparation of factual investigation and legal research.

[2] Gathering Evidence on Informal Basis

If the circumstances of the case do not require early or aggressive formal discovery, and the client's knowledge of the case has been exhausted, then counsel should gather as much evidence or information about the case as possible from independent, or third-party, sources through informal discovery methods, because:

1. Formal discovery is more time-consuming and expensive than informal investigation.

2. Formal discovery involves disclosure of the matters discovered to opposing counsel.

3. Formal discovery often involves disclosure of theories of the case.

It is unlikely that all these benefits or objectives of informal discovery will be achieved or preserved to the time of trial. Usually, opposing counsel will at some point discover what has already been found through informal investigation. However, the temporary advantage of knowing more about the case than the adversary, and the luxury of evaluating and refining the legal and factual theories before witnesses, documents, and contentions are disclosed, can be significant.

Informal investigation of the case should commence as early as possible, in some cases within days of the events that gave rise to the controversy. Plaintiff's counsel will often begin this investigation before filing a lawsuit. Defense counsel may get a similar chance at pre-filing investigation if the client notifies the attorney that a lawsuit is threatened or expected.

[3] Investigation in Personal Injury Actions

Informal investigation of the facts is particularly important in personal injury cases. The accident itself usually will have happened abruptly. The recollections of witnesses and participants will be fleeting and often colored by the trauma of the event. Even investigating officers experience better memory of a particular incident if they are asked about it shortly after their involvement. If they have investigated another 100 accidents since the accident in question, details that were not in the written report may have faded from their memories. Unlike a commercial case, which is typically based primarily on documents, the investigation of a personal injury case is more likely to require on-site inspection and more interviews with witnesses who are not connected to the parties.

Personal injury cases will often call for early investigation of one or more (and frequently all) of the following subjects:

1. The accident scene;

2. Other relevant physical objects, such as vehicles and equipment; and

3. Medical and hospital records.

The investigation should include:

1. A prompt visit to the accident scene;

2. A "walk-through" of the accident scene with the client;

3. A critical examination at the scene of the client's and other witnesses' versions of the accident;

4. Photographs of evidentiary quality, taken by a professional photographer;

5. Measurements, diagrams, and surveys of the accident scene; and

6. Determination of the availability of witnesses who have not yet come forward.



Strategic Point:

It may help to bring the client to the scene of the accident to give a portrayal of the events that took place, and indeed discussing the case at the scene of the accident might aid in refreshing a faded recollection of accident details. In addition, depending on the issues in the case, adequate accident scene investigation may require the services of an expert, such as an accident reconstruction specialist.

PRACTICE RESOURCES:

- *Damages in Tort Actions,* Ch. 75.
- *Personal Injury Defense Techniques*, Ch. 2.

[4] Conducting Site Investigations

Investigating the site where the events underlying a lawsuit occurred is a critical part of early informal investigation. Faulty structures or equipment will normally be corrected or repaired within a short period after the accident. Evidence,

including photographs, of the site's condition at the time of the accident should be obtained promptly. In addition, it may be necessary to conduct follow-up inspections after any subsequent repairs to learn the nature of the repair.

If cause and origin are in issue (e.g., an insurance claim for which arson or fraud is raised as a defense, or a negligence case for which the defendant's fault in causing the fire or explosion is in dispute), a determination of cause and origin must be made promptly, because physical evidence may disappear with the passage of time, and the condition of the premises may change. An inspection of this nature must be done by an expert; few lawyers are qualified to identify the cause of a fire or other physical event. Even if they were qualified, they would not be permitted to testify as an expert witness under the ethical rules forbidding an interested lawyer from being a witness.

Land does not disappear; therefore, at least in theory, land or other property involved in a case can be inspected and photographed at any time before trial. However, depending on the circumstances, buildings may be destroyed or the condition of the land altered mechanically, by the passage of time or by the effects of weather. If appropriate, promptly obtain photographs or other evidence that will show the property in its true, or original, condition.

PRACTICE RESOURCES:

- *Federal Evidence Practice Guide § 2.07[1].*
- *Premises Liability Law and Practice,* Ch. 20.

[5] Inspecting Medical and Hospital Records at the Treating Facility

Plaintiff's counsel should promptly investigate the original medical records when the plaintiff's medical treatment is in issue. Review of the original record, either before or during litigation, can be illuminating because writings that appear to be in the same ink on a copy may actually have been made in different colors on the original, thereby indicating that they were made at different times and perhaps by different people. Records often have marginal notes made after a copy has been sent to the patient or an attorney. Discharge summaries often contain damaging comments about the treatment.

A motion to preserve medical evidence may be necessary if the evidence is not routinely maintained for a long time. Some records and test results (e.g., videotapes of vascular or cardiac surgery) are kept only a short time. Also, use great specificity when requesting access to or copies of medical or hospital records. Many hospitals consider certain records as "outpatient records" (e.g., emergency room records) or not part of the hospital record at all (e.g., pathology slides, EKG monitor tapes, billing statements, the folders in which records are kept, etc.).

Another valuable record is a list of all hospital personnel, including nurses and volunteers, involved in the patient's care or assigned to the unit where the patient was treated. Even if their names do not appear on the chart, they may be familiar with the care received or may have witnessed treatment. In summary, request and review every conceivable document or thing that might shed light on the plaintiff's treatment or condition at the treating facility.

PRACTICE RESOURCES:

- *Medical Malpractice, §§ 22A.01, 22A.06.*

[6] Ascertaining Records Obtainable Without Formal Discovery

In commercial cases, a variety of public records, such as SEC or similar filings, can be obtained directly from the public entity without resort to formal discovery procedures. This is also true of a wide variety of documents potentially relevant in other types of cases, for example:

1. **Agency filings.** County, state, and federal agencies often have critical public information. For instance, the county recorder has records regarding property ownership; the Secretary of State has records regarding the structure and ownership of corporations; and the federal Patent and Trademark Office has patent and trademark filings available to the public. Agency websites and internet services specializing in public records may be used to expedite searches of public information.

2. **Court records.** Court records will identify pending and past litigation involving the adverse party indicating similar lawsuits. These records can speed up investigation of the current case.

3. **Police reports.** Police reports contain a near contemporaneous reconstruction of an accident or other events, the names and addresses of witnesses and, usually, a written account or accounts of the accident either as given by different witnesses or as interpreted by the police officer.

4. **Fire department reports.** Fire department reports contain information similar to information found in police reports, but also usually contain a preliminary assessment of the cause and place of origin of the fire as well as the number of points of origin.

5. **Transportation authority reports.** Accidents involving public carriers (buses, trains, and aircraft) will normally be investigated by a public transportation authority in addition to police departments, and the records of these investigations often are available without the use of a subpoena.

6. **Weather reports.** Weather reports and records may provide significant information.

7. **Certain hospital reports.** Hospital records normally are not released without the consent of the patient and thus will usually require formal discovery measures. However, some types of information available from hospitals are deemed "public" and can provide information concerning the fact, time, or duration of a patient's admission or treatment at the hospital or in its emergency ward.

8. **Newspaper and television news accounts.** Newspaper accounts of pertinent events often include the names of potential witnesses, as well as firsthand or secondhand accounts of the event itself. Local television stations often possess, and allow access to, videotape of news coverage of local events.

9. **Consumer reports.** Industry associations and consumer watchdog groups frequently collect reports that are not otherwise cataloged, and serve as a nationwide clipping service for companies or issues they follow.

10. **Trial attorney association reports.** Local, state, and national trial attorney associations organize data about particular products or companies, in addition to specific doctors or expert witnesses.

This list is not exhaustive. The realm of publicly available information that may be helpful will depend on the nature and facts of the particular case. Freedom of Information Act requests and similar state laws may be used to obtain publicly available information.

Locating public records is valuable because the information in them is generally admissible as evidence-in-chief. Public records are admissible at trial, even if they contain opinions or conclusions, as long as the opinions or conclusions are based on a factual investigation. *Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 161, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988)* (factual findings admissible under *Fed. R. Evid. 803(8)(C)* may be those which are made by the preparer of the report from disputed evidence).

PRACTICE RESOURCES:

- *Weinstein's Federal Evidence (2d ed.) § 803.10.*
- *Federal Evidence Practice Guide § 2.07.*
- *Fed. R. Evid. 803(8)(C)* (hearsay exception for public records and reports).



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§ 1.09 Obtaining Information from Witnesses

[1] Conducting Early Witness Interviews

Consider direct interviews with anyone not represented by counsel possessing information about events in the case in advance of formal discovery. Conduct witness interviews as soon as possible. Few individuals have photographic memories or the capacity for total recall. Most people forget seemingly unimportant events, especially those that do not involve them directly, and also compress their recollection of important events. This is especially true of sudden or sensational physical events, which, after being reviewed in both recollection and conversation, are reduced to the point where the more traumatic elements of the incident are preserved and peripheral details are lost.

[2] Determining Who to Interview

From the standpoint of case development, "witnesses" who can or should be interviewed are not limited to eyewitnesses, but include individuals or entities who have obtained secondhand or third-hand information concerning relevant events.

For instance, newspaper reporters are a good source of secondhand information. They will invariably have collected more names or facts than they included in their report of the event, and the articles submitted may have been substantially edited before publication. Newspaper reporters are usually cooperative. Reporters deal in factual information and appreciate its importance, and may even keep apprised of evolving facts in the hopes of writing a follow-up story.



Strategic Point:

It is not uncommon to request that a witness not talk to opposing counsel, or to request that if the witness decides to do so, to let you know. It is usually advisable to control access to your witness, and in normal circumstances will not be unethical to do so. Because your conversation is not privileged, it is always important to avoid the impression of coercion or unfairness, because improper tactics will invariably be revealed when the witness testifies.

[3] Arranging Witness Interviews

The best way to conduct a witness interview will depend on a variety of considerations, including:

1. The personality of the witness.

2. The age of the witness.

3. The physical or mental condition of the witness.

4. Possible bias of the witness.

5. The relationship of the witness to the parties and facts in the case.

Schedule the time and place of the interview to suit the convenience of the witness. Conduct the interview at a time, and in surroundings, where the witness can tell, and if necessary reflect on, the entire story. A neutral meeting place that is free of interruption allows for a productive interview.

[4] Taping Witness Interviews

If the witness does not object, tape the interview. If the witness does object, offer a copy of the tape. If the witness still objects, forego the taping but try to get an immediate written statement. Witnesses are reluctant to have interviews taped for a variety of reasons, including legitimate ones such as not feeling prepared or not wanting to be involved on the record. Never tape an interview surreptitiously. Taping an interview can have a downside; if the witness makes statements harmful to your case, the statements may become discoverable for unanticipated reasons.



Strategic Point:

It can be helpful to explain to the witness that part of the reason for the formality of a tape recorded interview is that it serves as a better substitute for a deposition than a mere statement. As most witnesses would rather not be deposed, anything that lessens the chance of a deposition should go a long way in securing the witness's cooperation. Of course, the witness should be informed that a tape recorded interview is no guarantee that a deposition will not be necessary later, either by the interviewing party or the opposing party.

[5] Interviewing Difficult Witnesses

Give special consideration to a reluctant or adverse witness. The reasons for reluctance or adversity can range from a feeling of not wanting to get involved to outright antagonism (or strong sympathy for the adverse party). In some situations, the witness may already have talked to the adversary's lawyer, who may have urged or instructed the witness not to talk to anyone else. Ask at the beginning of the interview whether anyone has told the witness not to cooperate. If the other side has interfered, contact them and suggest that it would be better for both sides to cooperate. Otherwise both sides will have to incur the additional expense of formal discovery when informal discovery will be all that is necessary.

There are a wide range of solutions to witness reluctance or antagonism. Consider the following strategies:

1. If the witness has no particular view of the case but simply does not want to be inconvenienced, appeal to the witness's sense of civic duty to provide important information. Ask the witness, for example, to imagine how he or she would feel if involved in an accident and some third party was reluctant to provide helpful information.

2. It is permissible, and usually effective, to tell the witness that, if he or she is not willing to discuss the case informally, a deposition may be necessary.

3. Point out that you do not wish to change the witness's story, but simply to understand it and learn what the witness has to say.

4. Suggest that knowing all the facts can more likely lead to a settlement.

5. Alleviate a concern that one party will have to pay damages by telling the witness that the party has insurance and will not have to pay money out of pocket.

Consider the following techniques when interviewing antagonistic witnesses:

1. Critically question the witness's story on the basis of known or likely facts.

2. Suggest different interpretations of ambiguous events.

3. Challenge the witness's ability to know or to have seen the facts or events in question.

4. Attack the witness's bias if one exists.

5. Urge the witness to view the events as an impartial observer.

[6] Obtaining Witness Statements

Generally, in accidents or similar cases, if the witness is worth interviewing and has knowledge of significant facts, it is worth obtaining a witness statement, especially if there is any chance that the witness's story might change under the pressure of the adversarial process.

Obtaining a witness statement typically raises two questions. The first is whether the statement should be prepared during the interview, or submitted later to the witness for review. Factors to consider are:

1. Whether the witness's story is simple or complex.

2. Whether there is any material risk that the witness will change the story (or become reluctant to review or sign the statement) in the time required to prepare the statement.

The second issue is whether the witness should be asked to sign the statement. If the statement is worth getting, it is worth having it signed. When the statement is written on the spot, it should be read to, or by, the witness, who should be asked to sign or initial each page. Any corrections made should also be initialed by the witness. If the witness, after speaking with the other side, later changes his or her story, this will obviate a claim that the statement was not read or understood and is not true.

A third, relatively unimportant, question is whether the statement should be written in the first person or the third person. In general, a short statement prepared by counsel and signed by the witness "on the spot" is best written in the first person, while a longer, more complex statement prepared by counsel is best written in the third person. When jurors hear the statement read in court, they will think that a shorter statement in the first person is more credible. They will naturally assume that a longer statement was drafted by someone other than the witness and then signed.

[7] Searching for Witnesses

Third-party witnesses sometimes cannot be located or are not forthcoming. In these circumstances, an active search for witnesses may be necessary and could entail methods such as door-to-door inquiries, newspaper advertisements, television appeals, or posting printed material in prominent locations near the scene of an accident.

Once the identities of witnesses are determined, it may be necessary to determine their whereabouts. Internet search sites or other publicly available computerized databases, as well as private investigators, may be used to locate hard-to-find witnesses.

PRACTICE RESOURCES:

- *Federal Evidence Practice Guide § 2.07[2].*



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§ 1.10 Using Investigators and Other Technical Consultants

[1] When Investigators and Technical Consultants Can Be Useful

Private investigators and other technical consultants (e.g., fingerprint, handwriting, and questioned document experts) can be helpful in many situations, from witness searches to more complex cases involving, for example:

1. Forgeries;

2. Employee theft;

3. Misuse of customer lists and trade secrets;

4. Private, commercial, and public fraud;

5. Kickbacks;

6. Feigned injuries and disabilities;

7. Missing persons;

8. Commercial or industrial "espionage" (e.g., wiretapping and other bugging);

9. Explosions; or

10. Fires, including arson.

When hiring these experts, engage competent professionals who can be effective witnesses.



Strategic Point:

Counsel should thoroughly check the background of the investigative professional to ascertain if he or she has the right training and experience for the task at hand. Check for industry-relevant experience (e.g., in a securities fraud case, perhaps a former investigator with the SEC or NASDAQ) and/or strong investigative qualifications (e.g., former policeman or FBI agent). Investigative services sometimes oversell their capabilities, so a thorough check of references is advised.

[2] Ensuring Ethical Behavior of Investigators

A paramount concern is the risk that a private investigator may use improper or illegal methods of investigation. These methods include, but are not limited to:

1. Entrapment;

2. Illegal wiretapping; and

3. The use of force or coercion to obtain statements or confessions.

An engagement letter to a private investigator should state flatly that the use of any illegal or unethical means of conducting the investigation is forbidden.

A party's use of an investigator might not be discovered by the adversary and might not be made known to the court or the jury. Among other possibilities, the investigator's work may be protected as work product (*see* §§ *3.41-3.45 below*). However, if the purpose of the investigator's work is to generate trial evidence and if that work is successful, the manner in which the evidence was obtained will almost certainly become known. No matter how small the chance that the adversary will learn of the investigator and his or her work, the consequences of that possibility should be carefully evaluated.

[3] Using Investigators Effectively

Counsel should carefully consider the pros and cons of using investigators to develop a case. The use of a private investigator to follow, observe, and photograph lapses on the part of a plaintiff feigning a permanent disability is common and within ethical guidelines, although some jurors may regard this practice as unfair. However, when photographs or videotapes show an allegedly disabled plaintiff engaging in vigorous physical activity (e.g., playing baseball, changing a tire, or working on a ladder painting a house), the jury is more likely to be offended by the plaintiff's bogus contentions than by the intrusiveness of the investigator's surveillance.

In contrast, the use of a private detective to develop "background information" on the plaintiff in a libel case, particularly if the information sought is unrelated to the subject matter of the defamatory statement, is likely to be viewed by the jury as fundamentally unfair. Generally, most judges and jurors view "digging up dirt" about a party or witness on subjects unrelated to the merits of the case as improper.

In sum, the use of private investigations is likely to be viewed as improper when:

1. The relevance of the work strays from the merits of the case; or

2. The investigator's activities encroach on traditional concepts of privacy.

PRACTICE RESOURCES:

- *Business Torts § 33.02*.



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§ 1.11 Protecting Results of "Informal" Discovery Through Attorney-Client Privilege

Under federal common law, the attorney-client privilege protects from formal discovery communications from a client to an attorney for the purpose of obtaining legal advice, provided the communications were intended to be confidential. *United States v. Zolin, 491 U.S. 554, 562, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989)* (central purpose of the privilege is to encourage full and frank communication between attorneys and their clients). These communications include client interviews, including interviews conducted in preparation of formal discovery.



Strategic Point:

In the informal discovery process, and indeed at all times, strive to provide as much protection as possible for all attorney-client communications. For instance, label all communications between the lawyer and client, or their agents, as confidential and privileged. This way, inadvertent disclosure is less likely. An attorney-client communication should never be disclosed to third parties or the adversary unless both lawyer and client are comfortable with the discovery by the adversary of not only the disclosed communication but also other communications within the subject matter of the disclosed communication.



Warning:

The client may waive the attorney-client privilege expressly, as when a client voluntarily turns over privileged documents, or implicitly, as when the client places otherwise privileged matters in controversy. *In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989)* (privilege is lost even if the disclosure was inadvertent); *Sedillos v. Board of Educ. of Sch. Dist. No. 1, 313 F. Supp. 2d 1091, 1094 (D. Colo. 2004)* (defendant cannot on the one hand claim as a defense that he relied on the advice of his counsel, waiving the attorney-client privilege to support that defense, while at the same time invoking the attorney-client privilege to prevent the plaintiffs from exploring fully the substance and circumstances of that advice).

For further discussion of the attorney-client privilege, *see §§ 3.14 -3.18 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.49*.
- *Weinstein's Federal Evidence (2d ed.)* Ch. 503.



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§ 1.12 Protecting Results of "Informal" Discovery Through Work Product Doctrine

The work product doctrine provides that a party may not obtain discovery of documents or other tangible things prepared in anticipation of litigation or trial by or for another party or that other party's representative, unless the following conditions are met:

1. The party seeking discovery has substantial need of the materials in the preparation of his or her case; and

2. The party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Fed. R. Civ. P. 26(b)(3)(A)(ii).

Moreover, in ordering discovery of these materials when the required showing has been made, the court must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. *Fed. R. Civ. P. 26(b)(3)(B).*

Work product protection applies to drafts of expert reports or disclosures required under Rule 26(a)(2), regardless of the form in which the draft is recorded. *Fed. R. Civ. P. 26(b)(4)(B).* In addition, with specified exceptions, communications between a party's attorney and any witness required to provide an expert report under Rule 26(a)(2)(B), regardless of the form of the communications, are granted work product protection. *Fed. R. Civ. P. 26(b)(4)(C).* The exceptions provide that such communications are not protected to the extent they:

- Relate to compensation for the expert's study or testimony;

- Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

- Identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

Fed. R. Civ. P. 26(b)(4)(C).

The purpose of the work product doctrine is to protect an attorney's mental processes so that the attorney can analyze and prepare for the client's case without interference from an opponent. *United States v. Adlman, 68 F.3d 1495, 1501 (2d Cir. 1995)* (doctrine establishes zone of privacy for strategic litigation planning and prevents one party from piggybacking on the adversary's preparation).



Strategic Point:

One step that can be taken to protect the attorney's mental processes and impressions from disclosure is to reflect their prevalence in prepared documents. For instance, if notes are taken from a witness interview, or a memorandum of the interview is drafted, it should be emphasized in the notes or memorandum that the document is not a verbatim recitation of the witness's statements but instead reflects the attorney's thoughts and impressions. The following disclaimer is an example: "This memorandum is not an attempt to make a verbatim recitation of what was said by the witness during the interview. This memorandum reflects impressions, recollections, and work product."

For further discussion of the work product doctrine, *see §§ 3.42 -3.43 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.70.*
- *Fed. R. Civ. P. 26(b)(3)* (limits on discovery of documents and things prepared in anticipation of litigation or for trial).
- *Fed. R. Civ. P. 26(b)(4)(B)* (trial preparation protection for draft reports or disclosures).
- *Fed. R. Civ. P. 26(b)(4)(C)* (trial preparation protection for communications between attorney and expert witnesses).



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1-1 Moore's AnswerGuide: Federal Discovery Practice § 1.13

§ 1.13 Understanding Mandatory Disclosure Obligations Under Rule 26(a)

[1] Overview

Since December 1993, the Federal Rules have required parties to make mandatory disclosures *without any discovery request* at specific stages in the litigation. *Fed. R. Civ. P. 26(a)*. Though not technically "discovery," compliance with disclosure obligations is an integral part of discovery planning.

Rule 26(a) provides for three categories of disclosures:

1. Initial disclosures. *See § 1.13[2] below*.

2. Disclosure of expert testimony. *See § 1.13[3] below*.

3. Pretrial disclosures. *See § 1.13[4] below*.

Fed. R. Civ. P. 26(a)(1)-(3).

Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served. *Fed. R. Civ. P. 26(a)(4)*.

[2] Initial Disclosures

Generally, a party must make *initial* disclosures at or within 14 days of the discovery conference held under *Fed. R. Civ. P. 26(f)*. This rule applies unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. *Fed. R. Civ. P. 26(a)(1)(C)*.

Initial mandatory disclosure requires parties to exchange information regarding the following:

1. Individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

2. Documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

3. Claims and calculations of damages; and

4. Insurance coverage.

Fed. R. Civ. P. 26(a)(1)(A).



Warning:

Certain types of actions are exempt from initial disclosure requirements (e.g., actions to enforce arbitration awards). Before making initial disclosures, counsel should verify that the action is not of a type listed in *Fed. R. Civ. P. 26(a)(1)(B)*; *see § 4.07[2] below*.



Strategic Point:

In cases involving more than just a few documents, the disclosing party will typically provide a description of the documents, not copies of the documents themselves. Based on the description, the other party will then seek access to desired documents through discovery. *See Fed. R. Civ. P. 26(a)(1)*, Committee Note of 1993.

Initial disclosures must not be filed unless they are used in the proceeding or the court orders filing. *See Fed. R. Civ. P. 5(d)(1).*

For further coverage of initial disclosures, *see* Ch. 4 *below*.

[3] Mandatory Disclosure of Expert Testimony

At least 90 days before trial, a party must disclose the identity of any proposed expert witnesses. *See Fed. R. Civ. P. 26(a)(2)(A)*. For each such expert witness retained or specially employed to provide expert testimony in the case, or whose duties as the party's employee regularly involve giving expert testimony, the disclosures must be accompanied by a written report prepared by the witness containing:

1. All opinions to be expressed, and the basis for them;

2. Facts or data considered by the witness in forming the opinions;

3. Exhibits to be used to summarize or support the opinions;

4. The witness's qualifications, including a list of publications authored by the witness within the preceding 10 years;

5. The witness's compensation; and

6. A listing of cases in which the witness testified as an expert at trial or deposition within the preceding four years.

Fed. R. Civ. P. 26(a)(2)(B).

For expert witnesses who are not required to provide a written report, the disclosure must state:

1. The subject matter on which the witness is expected to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*; and

2. A summary of the facts and opinions to which the witness is expected to testify.

Fed. R. Civ. P. 26(a)(2)(C).



Strategic Point:

Any opinion testimony based on "scientific, technical, or other specialized knowledge" is considered expert testimony subject to mandatory disclosure. *See Fed. R. Evid. 701.* Nevertheless, it can be difficult to determine whether a potential witness will be an expert witness, or a lay witness not subject to automatic disclosure. When in doubt, counsel should make the initial disclosure, or risk exclusion of the witness by the court.



Warning:

Counsel should be aware of potential work product issues when furnishing materials to an expert witness. Former versions of Rule 26 created uncertainty as to whether the work product protection is waived when an attorney provides work product materials to an expert witness. The uncertainty was based on an apparent conflict in the language of Rule 26. A former version of Rule 26(a)(2)(B) required that an expert report contain a complete statement of all of the "data or other information" considered by the expert in forming the opinions. Based on this language, many courts held that work product protection was waived for any document or information provided to a testifying expert, whether or not the expert relied on the information in preparing the expert report. *See, e.g., In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001)* . In 2010, Rule 26(a)(2)(B) was amended to replace the term "data or other information" with the term "facts or data." This amendment was intended to disapprove of cases that relied on the 1993 formulation in requiring disclosure of all attorney-expert communications. *Fed. R. Civ. P. 26(a)(2)(B)*, Committee Note of 2010; *see also §§ 3.42-3.44 below* .

Disclosures regarding expert testimony must not be filed unless they are used in the proceeding or the court orders filing. *See Fed. R. Civ. P. 5(d)(1).*

For further coverage of expert witness disclosures, *see §§ 12.07-12.14 below*.

[4] Pretrial Disclosures of Trial Evidence

At least 30 days before trial, a party must disclose, and file with the court, the following trial evidence, unless intended solely for impeachment:

1. The name, address, and phone number of each witness.

2. The designation of witnesses whose testimony is expected to be presented by way of deposition.

3. An identification of each document or exhibit.

Fed. R. Civ. P. 26(a)(3)(B).



Warning:

Evidence intended solely for impeachment is not subject to pretrial disclosure, but parties must disclose evidence that serves both impeachment and substantive purposes *See, e.g., Klonoski v. Mahlab 156 F.3d 255, 270 (1st Cir. 1998)* (weight of authority holds that video surveillance tape evidence is both impeaching and substantive and should be disclosed). It can prove challenging to determine in advance of trial whether the court will consider specific evidence to be solely for impeachment. If there is any doubt, therefore, counsel should disclose the evidence, or risk that the court will not admit the undisclosed evidence at trial.

For further coverage of pretrial disclosures, *see § 4.19 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice §§ 26.21 -26.28.*
- *Fed. R. Civ. P. 26(a)* (required disclosures).



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1-1 Moore's AnswerGuide: Federal Discovery Practice § 1.14

§ 1.14 Participating in Rule 26(f) Conference and Framing Discovery Plan

[1] Formal Discovery Generally Must Await Rule 26(f) Conference

Except in categories of proceedings exempted from disclosure under *Fed. R. Civ. P. 26(a)*, or when authorized under the Federal Rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). *Fed. R. Civ. P. 26(d)(1)*.

[2] Holding Rule 26(f) Conference to Discuss Case and Possible Settlement

Under Rule 26(f), the parties must confer, at least 21 days before a scheduling conference is held or a scheduling order is due under *Fed. R. Civ. P. 16(b)*, for the purpose of:

1. Discussing the nature and basis of the claims and defenses;

2. Discussing the possibility for a prompt settlement or resolution of the case;

3. Making or arranging for the initial mandatory disclosures required by Rule 26(a);

4. Discussing any issues relating to preserving discoverable information, particularly electronically stored information; and

5. Developing a proposed discovery plan.

Fed. R. Civ. P. 26(f)(1), (f)(2).

[3] Preparing Proposed Discovery Plan

The proposed discovery plan must indicate the parties' views and proposals concerning the following.

1. What changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when initial disclosures were made or will be made;

2. The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

3. Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

4. Any issues relating to claims of privilege or work product protection including, if the parties agree on a procedure to assert such claims after production, whether to ask the court to include the agreement in an order;

5. What changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

6. Any other discovery orders that should be entered by the court.

Fed. R. Civ. P. 26(f)(3).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may by order require that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule require that the conference between the parties under this subdivision occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference. *Fed. R. Civ. P. 26(f).*

For further discussion of the Rule 26(f) requirements, *see* Ch. 4 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.140 -26.146.*
- *Fed. R. Civ. P. 26(a)* (required disclosures).
- *Fed. R. Civ. P. 26(f)* (conference of the parties; planning for discovery).



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§ 1.15 Understanding Scope and Limits of Discovery

[1] Obtaining Discoverable Information

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. *Fed. R. Civ. P. 26(b)(1)*. The scope of discovery is broader than what is admissible at trial. Parties may discover information that appears reasonably calculated to lead to the discovery of admissible evidence. *Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351-352, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)* ; *see Lewis v. ACB Bus. Servs., Inc., 135 F.3d 389, 402-403 (6th Cir. 1998)* (discovery denied because it was relevant only to a claim had not been tried by consent of the parties and was barred by the statute of limitations).

For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. *Fed. R. Civ. P. 26(b)(1)*.

Exception:

A statute may expressly prohibit discovery of otherwise discoverable information. For example, *23 U.S.C. § 409* prohibits discovery of certain traffic safety reports compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, and *10 U.S.C. § 1102(b)* prohibits discovery of medical quality assurance records created by or for the Department of Defense. However, absent an express prohibition against disclosure, a statute barring disclosure of information will be narrowly construed. *St. Regis Paper Co. v. United States, 368 U.S. 208, 218, 82 S. Ct. 289, 7 L. Ed. 2d 240 (1961)* (discussing limited protection of census information); *see, e.g., Contratto v. Ethicon, Inc., 225 F.R.D. 593, 596 (N.D. Cal. 2004)* (public access to information about medical devices should not be affected and litigation over adverse events should continue without restriction, notwithstanding protections given to individual reporters of adverse events).

[2] Limiting the Scope of Discovery

By order, the court may alter the limits on the number of depositions and interrogatories, or the length of depositions under *Fed. R. Civ. P. 30*. By order or local rule, the court may also limit the number of requests for admissions under *Fed. R. Civ. P. 36. Fed. R. Civ. P. 26(b)(2)(A)*.

With respect to electronically stored information, a party does not have to provide discovery from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought bears the burden of making that showing. If that showing is made, the court may still order discovery from those sources if the requesting party shows good cause, and may specify conditions for the discovery. *Fed. R. Civ. P. 26(b)(2)(B)*. For discussion of discovery of electronically stored information, *see* Ch. 6 *below*.

The frequency and extent of use of any discovery method may be limited by the court if it determines that:

> 1. The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
>
> 2. The party seeking discovery has had ample opportunity through discovery in the action to obtain the information sought; or
>
> 3. The burden or expense of the proposed discovery outweighs its likely benefit under the circumstances.

Fed. R. Civ. P. 26(b)(2)(C).

For further discussion of the general scope of discovery, *see* Ch. 2 *below*.

[3] Stipulating Around Limitations of Discovery

Unless otherwise directed by the court, the parties may stipulate around the limitations of the various discovery rules. *Fed. R. Civ. P. 29*; *see, e.g., Bobrosky v. Vickers, 170 F.R.D. 411, 416 (W.D. Va. 1997)* (when parties have agreed in writing, the requirements of *Fed. R. Civ. P. 32* be waived and the depositions of witnesses may be used at trial in lieu of live testimony).

In most cases, these stipulations do not require court approval. However, if the stipulations could interfere with scheduling orders entered by the court, leave of court is required. *See Fed. R. Civ. P. 29(b)*.

For further discussion of discovery stipulations, *see* Ch. 15 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.41 -26.46, 29.02 -29.07*.
- *Fed. R. Civ. P. 26(b)(1)* (discovery scope in general).
- *Fed. R. Civ. P. 26(b)(2)* (limitations on frequency and extent of discovery).
- *Fed. R. Civ. P. 29* (stipulations regarding discovery procedure).



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§ 1.16 Certifying Discovery Requests and Responses

Every discovery request or response must be signed by counsel, whose signature constitutes a certification of the merits of the signed document *Fed. R. Civ. P. 26(g)(1)*. If a certification is made in violation of *Fed. R. Civ. P. 26* without substantial justification, the court must impose an appropriate sanction on the person who made the certification, the party represented by the person who made the certification, or both *Fed. R. Civ. P. 26(g)(3)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.151 -26.155.*
- *Fed. R. Civ. P. 26(g)* (certification of discovery requests, responses, and objections).



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§ 1.17 Understanding Filing Restrictions

As a general rule, discovery requests and responses are not filed with the court. The following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing. *Fed. R. Civ. P. 5(d)(1)*:

1. Depositions;

2. Interrogatories;

3. Requests for documents or to permit entry on land; and

4. Requests for admissions.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 5.33.*
- *Fed. R. Civ. P. 5(d)(1)* (required filings).
- *Fed. R. Civ. P. 32* (using depositions in court proceedings).



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§ 1.18 Supplementing Discovery Responses

Every discovery response must be supplemented or corrected whenever the party learns that the prior response was in some sense incomplete or incorrect, and that new information is not otherwise already made known to the other parties in the action. *Fed. R. Civ. P. 26(e)(1)*; *see also Sender v. Mann, 225 F.R.D. 645, 654 (D. Colo. 2004)* (supplemental disclosures should provide the opposing party with enough useful information to make informed decisions regarding discovery and trial preparation).

A party that without substantial justification fails to supplement discovery is not, unless the failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include informing the jury of the failure to make the disclosure. *Fed. R. Civ. P. 37(c)*. For discussion of sanctions for failure to supplement, *see §§ 18.08-18.12 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.131, 26.132.*
- *Fed. R. Civ. P. 26(e)(1)* (supplementation of disclosures and responses)
- *Fed. R. Civ. P. 37(c)* (failure to disclose; to supplement and earlier response, or to admit).



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§ 1.19 Seeking Protective Orders to Prevent Abusive Discovery

The discovery rules are designed to operate with a minimum of court supervision. However, if a party's pursuit of discovery becomes overzealous, the court may issue a protective order precluding or limiting discovery to protect any person subject to abusive discovery practices. *Fed. R. Civ. P. 26(c).*

There must be a showing of good cause to justify the issuance of a protective order. *See Fed. R. Civ. P. 26(c)(1).* A common ground for a protective order is that the sought discovery involves privileged materials or information. The moving party has the burden of establishing good cause. Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party opposing disclosure. The injury must be shown with specificity. Conclusory or stereotypical assertions are insufficient to show good cause. *Gulf Oil Co. v. Bernard, 452 U.S. 89, 102 n.16, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981)* (conclusory or stereotypical statements insufficient); *In re Terra Int'l, Inc., 134 F.3d. 302, 306-307 (5th Cir. 1998)* (conclusory allegation, without affidavits or other evidence is insufficient to meet burden of showing good cause).

For further discussion of protective orders, *see* Ch. 16 *below*. For further discussion of privilege, *see* Ch. 3 below.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.101 -26.108.*
- *Fed. R. Civ. P. 26(c)* (protective orders).



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§ 1.20 Evaluating Potential Cost of Discovery

Counsel should consider carefully the likely cost to the client when drafting a discovery plan, including:

1. Attorney's fees associated with drafting the particular discovery device, or preparing for and attending a deposition.

2. Attorney's fees associated with opposing objections to the discovery, including potential motion practice.

3. Stenographic fees associated with a deposition.

Although document discovery in document-intensive suits can involve enormous expenses in both fees and costs, most often the largest expense associated with discovery is preparing for and taking depositions. This is so even when the deponents are local and travel is unnecessary, because attorney time and court reporter costs are the major expenses. Accordingly, determining who to depose and planning for efficient depositions is critical to making the most of the lawyer's time and the client's money.



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§ 1.21 Considering Available Discovery Methods

[1] Depositions

The deposition is the most important and effective discovery tool. In addition to providing a procedure for in-depth examination of the factual underpinning of the claims and defenses, the deposition can be used to evaluate the credibility, presence, and demeanor of the witness. A witness's voice characteristics, predominant body language traits, and idiosyncratic tendencies all factor into an analysis of the likely credibility of the witness. The deposition also allows for more spontaneous responses than at trial.

Depositions are also critical to preserve necessary testimony of witnesses who may not be available for trial due to death, illness, or other causes. *See* Ch. 10 *below*.

A party may take the oral deposition of any party or nonparty, without leave of court, unless the person to be examined is confined in prison, or unless, without the written stipulation of the parties:

1. The proposed deposition would result in more than 10 depositions being taken.

2. The person to be deposed has already been deposed in the case.

Fed. R. Civ. P. 30(a)(2).

The deposition is scheduled before the time specified in *Fed. R. Civ. P. 26(d)*, unless the deposition notice properly states that the person to be examined is expected to leave the United States and will be unavailable for examination. A deposition is limited to one day of seven hours, unless the time is extended by the court or by stipulation of the parties. *Fed. R. Civ. P. 30(d)*.



Strategic Point:

Consider videotaping the deposition. There may be an advantage to videotaping if there is concern that the witness may not be available at trial, because videotaped testimony is more effective than a reading

of the transcript. Any party may, by providing prior written notice to the deponent and other parties, designate that the deposition will be taken by videotape as well as stenographically. *See Fed. R. Civ. P. 30(b)(3).*

For further discussion of depositions, *see* Ch. 8 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* Ch. 30.
- *Fed. R. Civ. P. 30* (oral depositions).

[2] Interrogatories

Interrogatories may be used only to seek information from another party, not from nonparty witnesses. *Fed. R. Civ. P. 33*; *see United States v. Lot 41, Berryhill Farm Estates, 128 F.3d 1386, 1397 (10th Cir. 1997)* (interrogatories wrongly propounded to nonparty). No more than 25 interrogatories may be served, including all discrete subparts, without leave of court or written stipulation. *Fed. R. Civ. P. 33(a).*

Much of the information generally sought through interrogatories must be made in the mandatory initial disclosure without a discovery request under *Fed. R. Civ. P. 26(a)*. However, when a court order or stipulation has varied the disclosures required, interrogatories may be used for the following purposes:

1. To identify persons with knowledge of relevant information.
2. To discover relevant documents.
3. To discover the factual basis for positions taken in the pleadings.
4. To discover the basis and method of computation of claimed damages.
5. To identify insurance information.

Interrogatories are relatively inexpensive, and are particularly well suited for technical and uncontroverted information. If properly prepared, written interrogatories can also be useful in holding the opposing party to particular factual claims and legal contentions at an early stage of the case and in serving as the basis for subsequent document demands, admission requests, and depositions.

For further discussion of interrogatories, *see* Ch. 7 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* Ch. 33.
- *Fed. R. Civ. P. 33* (interrogatories).

[3] Inspection of Documents, Electronically Stored Information, and Property

A party has the right to obtain discovery of documents, electronically stored information, and things, and to inspect

premises or personal property. There are no specified limitations on the number of demands for production that can be made. *See Fed. R. Civ. P. 34*. Consequently, the procedure provides a fruitful means of obtaining documentary insight into the issues and available proof, and a basis for deposing both parties and nonparty witnesses.

The demanding party is entitled to have discovery of all items that are in the possession, custody, or control of the responding party and that are relevant to the issues or that may lead to the ascertainment or disclosure of relevant evidence. *Fed. R. Civ. P. 26(b)(1)*; 34(a); *see also Fed. R. Civ. P. 26(a)(1)(A)(ii)* (initial disclosure requirement concerning documents, electronically stored information, and tangible things).

From the respondent's standpoint, care should be taken in preparing the written response to each production demand to ensure that the response is complete, accurate, and specific. Any objection to a demand must be explicitly stated. When a privilege is claimed, there must be a specific and adequate description of the withheld item, without intruding on the privileged content of the item. *Fed. R. Civ. P. 26(b)(5)(A)*; *see § 3.10 below*. A party objecting to only part of the request must permit inspection of the remaining parts. *Fed. R. Civ. P. 34(b)*



Strategic Point:

Although the responding party may bring a motion for a protective order against a demand for production under *Fed. R. Civ. P. 26(c)*, it is generally better practice to respond to the demand, stating specific reasons for the inability or refusal to produce. This places the burden on the demanding party to move to compel responses, and may often lead to an accommodation between the parties as to production without court intervention.

For further discussion of Rule 34 requests, *see* Ch. 5 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* Ch. 34.
- *Fed. R. Civ. P. 34* (requests for production and inspection).

[4] Physical and Mental Examinations

Physical or mental examinations are available only if both of the following conditions are met:

1. The mental or physical condition of a party or a person in a party's custody is "in controversy"; and
2. There is "good cause" for the examination.

Fed. R. Civ. P. 35; *see* *Schlagenhauf v. Holder, 379 U.S. 104, 118-119, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* .

A request for a physical or mental examination is the only discovery tool that requires a court order. The decision to grant or deny the request is within the court's discretion. *Schlagenhauf v. Holder, 379 U.S. 104, 118-119, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* (good-cause requirement is not a mere formality, but is a plainly expressed limitation on the use of Rule 35).

The order may be made on notice to the person to be examined and to all parties and must specify the following:

1. The time of the examination;

2. The place of the examination;

3. The manner of the examination;

4. The conditions of the examination;

5. The scope of the examination; and

6. The person who will conduct the examination.

Fed. R. Civ. P. 35(a).

If the examined party requests a copy of the examiner's report, the party requesting the examination must deliver to the examined party a copy of the detailed written report of the examiner setting out the following:

1. The examiner's findings, including the results of all tests;

2. The examiner's diagnoses and conclusions; and

3. Reports of all earlier examinations of the same condition.

Fed. R. Civ. P. 35(b).

By requesting and obtaining a report of the examination or by taking the deposition of the examiner, the examined party waives any privilege that party may have regarding the testimony of every other person who has examined or who may thereafter examine the party regarding the same mental or physical condition. *Fed. R. Civ. P. 35(b)(4).*

For further discussion of physical and mental examinations, *see* Ch. 11 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* Ch. 35.
- *Fed. R. Civ. P. 35* (physical and mental examinations).

[5] Requests for Admission

A party may serve a written request on any other party for the admission of any matter relevant to the litigation. The recipient must respond by admitting, denying, or setting forth reasons why the request cannot be either admitted or denied. *Fed. R. Civ. P. 36(a)(4).* For example, a request may be submitted for an admission that:

1. A particular person signed a contract with authority;

2. The amount of actual damages is a certain figure; or

3. Attached documents are genuine.

Requests for admission are valuable early in the discovery process to limit the amount of necessary discovery. Late in

the discovery process, they may sharply limit the need for trial witnesses.

At the onset of discovery, every important document for which authentication will be necessary should be identified, as should every important fact that is apparently not in dispute. To the extent that admissions of authenticity and facts are obtained, no further discovery on those items will be needed. Because admitted matters are conclusively established, requests for admissions can also facilitate summary judgment.

For further discussion of requests for admission, *see* Ch. 13 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* Ch. 36.
- *Fed. R. Civ. P. 36* (requests for admission).



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§ 1.22 Considering Sequencing of Discovery Methods

[1] Parties May Conduct Discovery in Any Sequence

Parties may conduct discovery in any sequence unless the court orders otherwise. On motion and for a party's or a witness's convenience, the court may issue an order prescribing the sequence of discovery. *Fed. R. Civ. P. 26(d)(2)*. Typically, a party wishing to establish a particular sequence of discovery will proceed by motion for a protective order. *Fed. R. Civ. P. 26(c)(1)*; *see also* Ch. 16 *below*. Both parties may conduct discovery at the same time. The fact that one party is conducting discovery does not operate to delay any other party's discovery. *Fed. R. Civ. P. 26(d)*.

Each of the methods of discovery provides different strategic advantages, and selection of the proper method or combination of methods is critical to efficient litigation. For example, if the availability of a key witness is limited, depose the witness early in litigation to preserve critical testimony. Likewise, if the opposing party is known to be careless in thought or rash in expression, depose that party first, rather than after counsel has had the opportunity to craft interrogatory responses that will have the effect of diminishing the spontaneity of deposition testimony.

Interrogatories demanding precise information regarding damages may provide a fertile ground for deposition questioning. Similarly, document demands may serve as the basis for strategic interrogation during deposition.

[2] Conventional Approach Is to Serve Interrogatories and Request Production Before Conducting Depositions

The three most commonly used methods of discovery provided for in the Federal Rules of Civil Procedure are often employed in the following sequence:

1. Written interrogatories under *Fed. R. Civ. P. 33*;

2. Requests for production under *Fed. R. Civ. P. 34*; and

3. Depositions on oral examination under *Fed. R. Civ. P. 30*.

In this approach, the lawyer, whether representing the plaintiff or defendant, first uses interrogatories to identify

individuals with knowledge and the location and description of potentially relevant material. Although the importance of interrogatories has arguably diminished in light of the initial mandatory disclosure requirements under *Fed. R. Civ. P. 26(a)*, interrogatories may also be used to begin exploring the contentions of the opposing party. Having used Rule 33 interrogatories to supplement the allegations of the pleadings and to lay the groundwork for further discovery, production of electronically stored information and documents can also be requested from the opposing party under Rule 34.



Strategic Point:

Although interrogatories may precede requests for production, the better practice is to initiate both these methods of discovery at the same time. The strongest reason for doing so is to compress the "pre-deposition phase" of the action. Although interrogatory answers may prompt the filing of a second set of requests for production, at least in the meantime the process of production and review has been set in motion.

In addition, counsel should consider requesting admissions under *Fed. R. Civ. P. 36*. The sometimes-ignored use of requests for admission of facts and genuineness of documents can reduce discovery costs by eliminating issues from dispute, thereby eliminating the need to conduct discovery on those admitted facts. *See § 1.21[5] above*.

Once the basic facts in the case are established through these initial forms of discovery, depositions may be planned accordingly.

[3] Advantages of Taking Depositions After Reviewing Documents

There are advantages to taking depositions only after having had access to the pertinent files of the adverse party and of the deponent in particular. These advantages are:

1. Documents prepared by the opposing party and its agents and employees serve as an invaluable check on the deposition testimony of those individuals;

2. The files provide a framework for understanding the involvement of a particular individual, and for outlining questioning of that person; and

3. To the extent that documents are of independent evidentiary importance, you may need to use the deposition to authenticate them, and to learn whether the author can explain away the apparent effect of what was written.

In determining the sequence in which to conduct discovery, counsel should review all available documents before taking depositions. It is worth pursuing even if review of documents will precede depositions by a matter of hours, as when a distant business has been sued in its local court for a limited sum, and counsel must make a single trip to the defendant's offices, reviewing and selecting documents one day, preparing questioning overnight, and beginning depositions the following day.

[4] When to Alter Conventional Sequence of Discovery

The sequencing of discovery is a strategic decision. If it appears that an early settlement of the litigation may hinge on making the weaknesses in the opposing side's case clear to them, the use of the "conventional" approach may be less suitable. Early settlement can also hinge on the opposing side's understanding the expense and often unpleasantness of litigation. These factors typically become prevalent once depositions begin. Consequently, early depositions can promote settlement by bringing the reality of litigation to the forefront sooner. Accordingly, counsel may wish to avoid

the delays involved in the more systematic approach discussed above.

A related reason for varying the sequence of discovery is the conviction that an early deposition of a critical witness may tilt the balance between the parties enough to promote early and favorable settlement without the expense of substantial additional discovery. Such a deposition is typically of a nonparty witness; counsel should already be aware of anything their own clients can say that might radically change the perception of the case. In addition, early depositions of nonparty witnesses who may be related to or friendly with the opposing party may thwart an opposing party's attempt to shield them from the rigors of discovery or curry favor with them.

Another exception can be made for an early deposition of a nonparty witness whose knowledge of the facts bearing on some important issue will be pivotal. In addition, some issues in the case may call for a deposition for which documents are not important, even if significant in the litigation as a whole. Typically this will be a deposition of a nonparty witness that is expected to provide testimony helpful to the case.

Counsel with access to a nonparty witness who will cooperate, but who may not be available to appear at trial, might choose to take that person's deposition at once because the testimony may be favorable and may be delivered without dependence on documents. Opposing counsel's opportunity to cross-examine will be less useful than it would be after further discovery by both sides. Such a deposition will preserve the testimony of the witness for trial if the witness becomes unavailable. *See Fed. R. Civ. P. 32(a)(4).*

[5] Sequencing of Depositions Merits Special Consideration

Because depositions are often the most useful discovery method, give special consideration to when depositions are conducted. The following general factors may affect the sequence of depositions in any given case:

1. *Considering the opponent's perception.* The early deposition of a key witness (before interrogatories have been answered and documents have been produced) may be desirable because the testimony may affect your opponent's perception of the case. You may decide to schedule that deposition to take place as soon as the preliminary stages of discovery are completed.

2. *Preserving testimony.* The possible future unavailability of a witness whose testimony counsel wishes to preserve will lead counsel to take that witness' deposition promptly.

3. *Deposing key witnesses first.* In a case in which the issues are relatively uncomplicated and the witnesses are few, depose the most important witness for the opposing party first. Because of the cost of depositions and the fact that most lawsuits settle, counsel should normally learn as much as possible in a short time about the basic issues in the case.

4. *Deferring depositions until after key facts are understood.* In a complex case, counsel who is concerned that opposing counsel is more familiar with the underlying facts should defer the depositions of key actors for the adverse party until counsel is sufficiently educated about the case.

5. *Deposing experts.* Counsel should typically delay the depositions of the opposing party's expert witnesses until late in the sequence. Because the experts will usually testify about opinions they have developed based on the underlying facts of the case, counsel should thoroughly understand those facts before deposing the experts.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.122*.
- *Fed. R. Civ. P. 26(d)* (timing and sequence of discovery).
- *Fed. R. Civ. P. 30* (depositions by oral examination).
- *Fed. R. Civ. P. 32(a)(4)* (use of deposition testimony at trial).
- *Fed. R. Civ. P. 33* (interrogatories).
- *Fed. R. Civ. P. 34* (requests for production and inspection).
- *Fed. R. Civ. P. 36* (requests for admission).



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Chapter 2 SCOPE OF DISCOVERY: RELEVANCE AND BURDEN

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§ 2.02 Checklist for Evaluating Relevance and Burden

§ 2.03 Understanding Relevance Requirement

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PART A: PROCEDURAL CONTEXT

1-2 Moore's AnswerGuide: Federal Discovery Practice § 2.01

§ 2.01 Procedural Context--Relevance and Burden

The initial exchange of factual information between the parties is accomplished through mandatory disclosure under the Federal Rules. Usually, that exchange proves to be insufficient to one or more of the parties. Through discovery, the parties may obtain additional factual information and materials to prove the various claims and defenses asserted in the pleadings. The available forms of discovery include depositions, interrogatories, requests for production or inspection, requests for admission, and physical or mental examinations.

Under Rule 26(b), in general, the scope of party-initiated discovery is limited to information that is not privileged, but is "relevant to any party's claim or defense". A stipulation or court order on a showing of good cause, however, may authorize discovery as to any information relevant to the "subject matter" of the action. Under either the "subject matter" or "claim or defense" standard, discovery may be sought as to any matter if the matter is itself admissible in evidence or the matter appears reasonably calculated to lead to the discovery of admissible evidence.

Determining whether to seek information through discovery, or whether to object to such discovery, requires consideration of the following questions:

1. Is the information sought within the scope of the proper relevance standard applicable under *Fed. R. Civ. P. 26(b)(1)*?

2. Is the information, even though relevant, subject to the limitations on the frequency or extent of discovery under *Fed. R. Civ. P. 26(b)(2)*?

3. Is the information, even though relevant, nevertheless protected from discovery by an available claim of privilege or work product protection?

This chapter focuses on the first two considerations. For discussion of limitations based on privilege or the work product doctrine, *see* Ch. 3 *below*.



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Chapter 2 SCOPE OF DISCOVERY: RELEVANCE AND BURDEN
PART B: EVALUATING RELEVANCE AND BURDEN

1-2 Moore's AnswerGuide: Federal Discovery Practice § 2.02

§ 2.02 Checklist for Evaluating Relevance and Burden

☐ Determine propriety of seeking discovery of materials or information. *See §§ 2.05*, *2.06*, *2.10 below*.

- ○ Matter to be discovered is relevant to claim or defense of any party in the action; or
- ○ Matter to be discovered is relevant to subject matter of action, if stipulation or court order on "good cause" shown permits broader standard of relevance.

☐ Consider whether matter to be sought through discovery is either admissible in evidence or appears reasonably calculated to lead to discovery of admissible evidence. *See § 2.04 below*.

☐ Consider whether matter to be discovered is subject to restriction on grounds of burden or expense. *See § 2.08 below*.

- ○ Discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.
- ○ Party seeking discovery has already had ample opportunity to obtain the information by discovery.
- ○ Burden or expense of the proposed discovery outweighs its likely benefit, considering needs of the case, amount in controversy, parties' resources, importance of issues at stake in action, and importance of discovery in resolving issues.

☐ Consider specific limitations on electronically stored information. *See § 2.08 below*.

☐ **Search by Topic:**

- ○ Civil Procedure > Discovery > Relevance
- ○ Civil Procedure > Discovery > Undue Burdens



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1-2 Moore's AnswerGuide: Federal Discovery Practice § 2.03

§ 2.03 Understanding Relevance Requirement

The scope of discovery is generally limited to information that is not privileged, but is "relevant to any party's claim or defense". Discovery may be sought as to any matter that is itself admissible in evidence, or appears "reasonably calculated to lead to the discovery of admissible evidence". *Fed. R. Civ. P. 26(b)(1)*; *see § 2.05 below*.

With this standard of the scope of discovery in mind, a party seeking discovery has substantial latitude in framing its discovery requests of both parties and nonparties.

Warning:

Seeking discovery of information that is clearly irrelevant or subject to a clear claim of privilege may expose the attorney (or client) to discovery sanctions. Similarly, opposing discovery by raising a frivolous claim of irrelevance or privilege may also merit sanctions. Even if relevant and not privileged, information should not be sought by counsel through discovery if doing so is unreasonable under the circumstances.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.40 -26.49*.
- *Fed. R. Civ. P. 26(b)(1)* (discovery scope and limits).



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1-2 Moore's AnswerGuide: Federal Discovery Practice § 2.04

§ 2.04 Distinguishing Admissibility at Trial

Information or materials sought through discovery need not be admissible at trial. Instead, discoverability is proper if the information is "reasonably calculated to lead to the discovery of admissible evidence". *Fed. R. Civ. P. 26(b)(1)*. A party seeking discovery of relevant evidence therefore need not establish the admissibility of the evidence, nor is inadmissibility a ground for objection to the discovery.

The Federal Rules of Evidence provide that several types of relevant evidence are nevertheless inadmissible for certain purposes. For example, an offer to pay medical expenses resulting from an injury is not admissible to prove liability for the injury. *Fed. R. Evid. 409*. This restriction, however, is expressly limited to the *admissibility* of the evidence, and the Evidence Rule in no way restricts the *relevance* of the information, nor its discoverability.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.42*.
- *Fed. R. Civ. P. 26(b)(1)* (discovery scope and limits).



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1-2 Moore's AnswerGuide: Federal Discovery Practice § 2.05

§ 2.05 Understanding "Claim or Defense" Standard

The scope of party-initiated discovery is limited to information that is not privileged, but is "relevant to any party's claim or defense". *Fed. R. Civ. P. 26(b)(1)*.

Technically, the "claim or defense" standard applicable under the Federal Rules is more narrow than the traditional standard of relevance to the "subject matter" of the action that was applied before the 2000 amendments to the discovery rules. *See Wrangen v. Pennsylvania Lumbermans Mut. Ins. Co., 593 F. Supp. 2d 1273, 1278 (S.D. Fla. 2008)* ("Put more simply, a matter is deemed to be irrelevant if it does not pertain to a claim or defense"). This earlier standard, however, continues to be recognized, as the rules permit discovery as to any matter relevant to the subject matter of the litigation under a stipulation of the parties or a court order on a showing of "good cause". *Fed. R. Civ. P. 26(b)(1)*; *see §§ 2.01*, *2.10*.

Warning:

The impact of the 2000 amendments to *Fed. R. Civ. P. 26(b)(1)* that added a "good cause" requirement for requests for discovery regarding the "subject matter involved" (as opposed to discovery as of right for the "claim or defense of any party") continues to evolve. *See, e.g., EEOC v. Caesars Entm't, Inc., 237 F.R.D. 428, 431-432 (D. Nev. 2006)* (noting judicial disagreement on impact of 2000 amendments). Some courts have downplayed the significance of the amendments. *See, e.g., Sanyo Laser Prods. v. Arista Records, 214 F.R.D. 496, 500 (S.D. Ind. 2003)* ("[t]he change, while meaningful, is not dramatic, and broad discovery remains the norm"). Nevertheless, counsel seeking "subject matter" discovery should be careful in citing pre-amendment case authority construing the rule that did not include the "good cause" requirement. Conversely, a party opposing discovery of such material will want to point out that pre-amendment case law interpreted a more permissive discovery rule.

The scope of relevance and available discovery is the same irrespective of the method of that discovery, whether by deposition, interrogatory, requests for production and inspection, requests for admission, or physical and mental examinations. *See Fed. R. Civ. P. 26(b)* (applying single relevance standard without regard to specific discovery methods).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.41, 26.43.*
- *Fed. R. Civ. P. 26(b)(1)* (discovery scope and limits).



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1-2 Moore's AnswerGuide: Federal Discovery Practice § 2.06

§ 2.06 Understanding Limitations on Relevance Standard

[1] Identity of Parties, Witnesses, or Other Persons Is Generally Discoverable

Discovery is appropriate as to relevant information relating to the identity and the location of any persons having knowledge of any discoverable matter, including potential witnesses or persons that might become parties to the action. *Fed. R. Civ. P. 26(b)(1).*

As a practical matter, the use of discovery to obtain the identities of persons having knowledge of relevant facts is superseded to some extent by the initial disclosure obligation that requires such information to be exchanged without request. *Fed. R. Civ. P. 26(a)(1)(A)(i)*; *see also* § *4.07 below*.

[2] Existence of Documents or Other Demonstrative Evidence Is Discoverable

Discovery is appropriate as to relevant information relating to the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things. *Fed. R. Civ. P. 26(b)(1).* Usually such information will be sought in order to obtain later actual production of the books, documents, or other tangible things. Even if the books, documents, or other tangible things are themselves privileged or otherwise inadmissible, discovery is appropriate as to their existence, description, nature, custody, condition, and location. *See Cox v. E.I. DuPont de Nemours & Co., 38 F.R.D. 396, 398 (D.S.C. 1965)* (party entitled to learn of existence and location of tangible thing even if production of thing cannot be compelled); *see also* Ch. 5 *below*.

As a practical matter, the use of discovery to obtain the identities of documents and things that a party possesses and may use to support its claims or defenses is superseded to some extent by the initial disclosure obligation that requires such information to be exchanged without request. *Fed. R. Civ. P. 26(a)(1)(A)(ii)*; *see also* § *4.07 below*.

[3] Financial Condition of Party May Be Discoverable

If the claims or defenses of the parties directly raise the issue of the financial condition of a party in a way that affects the merits of those claims or defenses, discovery into that party's financial condition is appropriate. *In re Bergeson, 112 F.R.D. 692, 694-696 (D. Mt. 1986)* (denying motion to quash subpoena of bank records when bank records were relevant as to loss sustained by party).

When the plaintiff seeks punitive damages, the ability of the defendant to pay any prospective judgment on punitive damages is relevant to the appropriate amount of that judgment, so that discovery of the defendant's net worth and financial condition is appropriate. *See, e.g., United States v. Autumn Ridge Condo. Ass'n, 265 F.R.D. 323, 327-328 (N.D. Ind. 2009)* (defendant's financial condition was relevant to punitive damages claim and plaintiff was not required to wait until it could establish that it was likely to obtain punitive damages).

[4] Discovery of Tax Returns Is Subject to Policy Favoring Confidentiality

While tax returns and related documents are not absolutely privileged, public policy favors confidentiality to encourage taxpayers to file complete and accurate returns. To order production of these documents when an objection is raised, the court must first find that the returns are relevant to the subject matter of the action, and then must find that there is a compelling need for discovery of the returns because the information contained in them is not otherwise readily obtainable. The burden of establishing relevance is on the party seeking production. Once that burden is satisfied, the burden shifts to the party opposing production to show that the information is otherwise readily obtainable. *See EEOC v. Ceridian Corp., 610 F. Supp. 2d 995, 997 (D. Minn. 2008)* (if party resisting discovery offers to show its earnings through W-2s and 1099s, disclosure of complete returns generally is not necessary); *A. Farber & Partners, Inc. v. Garber, 234 F.R.D. 186, 191 (C.D. Cal. 2006)* (tax returns of civil RICO defendant held discoverable).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.41[8], [10], 26.42, 26.44.*
- *Fed. R. Civ. P. 26(a)(1)* (initial disclosures).
- *Fed. R. Civ. P. 26(b)(1)* (discovery scope and limits).
- *United States v. Autumn Ridge Condo. Ass'n, 265 F.R.D. 323, 327-328 (N.D. Ind. 2009)* (court limited discovery to financial documents from past two years, finding that three years exceeded what was necessary to prove defendant's "current" financial worth).



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1-2 Moore's AnswerGuide: Federal Discovery Practice § 2.07

§ 2.07 Discovering Matters Affecting Jurisdiction or Venue

The "claim or defense" standard of relevance for discovery purposes includes matters relating to the propriety of subject matter jurisdiction, personal jurisdiction, or venue of the action, so that discovery into the facts underlying a determination of jurisdiction or venue is proper. *Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 n.13, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)* (discovery is available to ascertain facts bearing on jurisdiction or venue). Because jurisdiction and venue are preliminary issues, it is not uncommon for a federal court to restrict discovery on the merits until those preliminary issues have been resolved.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.41[11].*
- *Fed. R. Civ. P. 26(b)(1)* (discovery scope and limits).



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§ 2.08 Limiting Discovery That Is Cumulative or Unduly Burdensome

Even if discovery is sought as to relevant evidence, a federal court may nevertheless limit discovery if it determines that:

1. The sought material is unreasonably cumulative or duplicative, or is more readily obtainable from some other source;

2. The party seeking the information has had ample opportunity to obtain it; or

3. After balancing the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the sought discovery in resolving those issues, the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(2)(C); *see also* Ch. 16 *below*.

Since 2006, the Federal Rules have specifically addressed burden in the context of electronically stored information. A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible because of undue burden or cost. *Fed. R. Civ. P. 26(b)(2)(B)*. For further discussion, see Ch. 6 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.41[5].*
- *Fed. R. Civ. P. 26(b)(2)(B)* (specific limits on electronically stored information).
- *Fed. R. Civ. P. 26(b)(2)(C)* (when discovery limits are required).
- *D'Onofrio v. SFX Sports Group, Inc., 256 F.R.D. 277, 280 (D.D.C. 2009)* (there is always "some degree of imprecision in determining the appropriate temporal scope of discovery in wrongful termination cases," and court must simply "draw a reasonable line between the likely and the unlikely,"

barring discovery whose likely benefit is outweighed by its costs).



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1-2 Moore's AnswerGuide: Federal Discovery Practice § 2.09

§ 2.09 Resolving Disputes Over Relevance

If the parties are unable to agree on whether information or materials sought through discovery are relevant to the claims or defenses of the parties in the action, the district court may have to resolve the dispute. When a party served with a discovery request has objected to the discovery on the ground of relevance, the sufficiency of that objection may be tested by either:

1. A motion to compel served and filed by the party propounding the discovery request. *Fed. R. Civ. P. 37(a)*; *see* Ch. 17 *below*; or

2. A motion for a protective order served and filed by the objecting party. *Fed. R. Civ. P. 26(c)*; *see* Ch. 16 *below*.

Whether a matter is "relevant" for purposes of discovery is necessarily a fact-specific inquiry, so that the district court enjoys broad discretion to determine relevance. *See, e.g., Dees v. Hyundai Motor Mfg. Ala., LLC, 524 F. Supp. 2d 1348, 1350 (M.D. Ala. 2007)* (citing **Moore's**).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.41[7].*
- *Fed. R. Civ. P. 26(c)* (protective orders).
- *Fed. R. Civ. P. 37(a)* (motion for an order compelling disclosure or discovery).



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§ 2.10 Seeking Broader Discovery Through Stipulation or Court Order

Discovery may be undertaken as to any matter relevant to the "subject matter involved in the action" under either a stipulation of the parties, or a court order for good cause shown. *Fed. R. Civ. P. 26(b)(1)*. As a practical matter, the distinction between the "claim or defense" standard and the "subject matter" standard of relevance generally will not be of significance. If it appears, however, that material sought through discovery falls within the "subject matter" standard of relevance, but might not fall within the "claim or defense" standard, a stipulation to expand the scope of discovery should be considered. *See Fed. R. Civ. P. 29*; *see also* Ch. 15 *below*.

In the absence of a stipulation, the court may expand the scope of permissible discovery to the "subject matter" standard of relevance on a showing of good cause. The court should permit such enhanced discovery whenever doing so would be consistent with the overarching purposes of the discovery rules, i.e., to "promote fair trials, eliminate surprise, and achieve justice". *Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)* (discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.41[3].*
- *Fed. R. Civ. P. 26(b)(1)* (discovery scope and limits).
- *Fed. R. Civ. P. 29* (discovery stipulations).



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION

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[5] Privilege Must Be Claimed on Question-by-Question Basis

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[3] Privilege Applies to Both Confidential and Nonconfidential Information

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§ 3.40 Understanding Governing Law

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[3] Party Claiming Trade Secret Must Show Need to Protect Information

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§ 3.42 Applying Federal Law

§ 3.43 Defining Work Product

[1] Material to Be Protected Must Be Document or Other Tangible Thing

[2] Material Must Be Prepared by or for Party, Attorney, or Representative

[3] Material Must Be Prepared Because of Existing or Anticipated Litigation

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[4] Parties Must Distinguish "Fact" and "Opinion" Work Product

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[3] Disclosure to Co-Party or Other with Common Interest May Not Constitute Waiver

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[6] Placing Material in Controversy Waives Protection

[7] Claim of Protection May Be Asserted After Disclosure



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART A: PROCEDURAL CONTEXT

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.01

§ 3.01 Procedural Context--Privileges and Work Product Protection

In general, the scope of party-initiated discovery is limited to relevant information that is not privileged. A party served with a discovery request must determine whether an evidentiary privilege applies. If the party believes that the requested information infringes on some privilege, it must raise that objection promptly, either by asserting it in lieu of the discovery request or by moving for a protective order. The former option is often better, as it shifts the onus to the party seeking the discovery to move to compel in order to test the validity of the claim of privilege. The general rule is to assert an objection or seek a protective order only when the issue is worth fighting about and the objection or motion is likely to succeed. Otherwise the resisting party risks having to pay the other side's costs to either move to compel or oppose the motion.

If a party decides to assert a claim of privilege in lieu of a discovery response, it must do so expressly by stating the grounds for the claim of privilege and by sufficiently describing the materials so the validity of the claim may be assessed. Keeping a privilege log is one method for insuring that all steps are properly taken in asserting the claim. In fact some courts require a privilege log be maintained and produced as part of the discovery process. Failure to assert a privilege, or failure to follow proper procedures in making the assertion, may result in a waiver of the claim.

Discovery is available from nonparties to the litigation, and nonparties should also evaluate whether a valid claim of privilege exists when responding to discovery requests from a party. In asserting a privilege claim, a nonparty should follow the same procedures as a party. As with a party, the failure to properly assert a claim risks waiver of the privilege.

A party may also seek discovery from the government, whether or not the government is a party. Generally, the government may assert any evidentiary privilege available to a private litigant. But the government may also be able to resist discovery based on certain privileges that may be invoked only by the government and not a private party.

In assessing waiver issues, counsel should keep in mind that even an inadvertent disclosure may waive the privilege. The Federal Rules of Civil Procedure provide for a procedure to assert a privilege claim after disclosure. The Federal Rules of Evidence set forth specific rules that address the effect of inadvertent disclosure of (1) communications otherwise protected by the attorney-client privilege and (2) information otherwise protected under the work product doctrine.

In general, federal common law governs privileges in federal court. Because common law is constantly developing through court decisions, federal courts may recognize new evidentiary privileges. However, the recognition of new privileges is generally disfavored because privileges restrict access to the truth-finding function of the court.

State privilege law generally applies in federal court when the claims at issue are to be decided under state substantive law. One notable exception is work product protection. Because work product protection is found in a federal rule of procedure, *Fed. R. Civ. P. 26(b)(3)*, the required elements to invoke the work product protection are defined exclusively by federal law, even in a diversity, or other action in which a federal court applies state substantive law.



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PART B: APPLYING PRIVILEGE LAW

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.02

§ 3.02 Checklist for Applying Federal and State Privilege Law

☐ Consider whether discovery request calls for potentially privileged information under any of following evidentiary privileges or protections.

- ○ Attorney-client privilege. *See §§ 3.16 -3.17 below*.
- ○ Physician-patient privilege. *See § 3.20 below*.
- ○ Psychotherapist-patient privilege. *See §§ 3.22 -3.24 below*.
- ○ Clergy-penitent privilege. *See § 3.26 below*.
- ○ Marital privileges. *See § 3.28 below*.
- ○ *Fifth Amendment* privilege. *See § 3.30 below*.
- ○ Journalist privilege to protect sources. *See § 3.32 below*.
- ○ State law privileges. *See § 3.04[3] below*.
- ○ Governmental privileges. *See §§ 3.34 -3.38 below*.
- ○ Trade secrets. *See § 3.40 below*.
- ○ Work product protection. *See §§ 3.42 -3.44 below*.

☐ Consider whether waiver of privilege is possible through any of the following. *See §§ 3.09, 3.18, 3.23, 3.45 below.*

- ○ Failure to assert privilege.
- ○ Voluntary disclosure of privileged information.
- ○ Involuntary or compelled disclosure.
- ○ Inadvertent disclosure of privileged information.
- ○ Placing privileged matter in controversy.

☐ Determine whether to request return of privileged information. *See §§ 3.03, 3.10 below.*

☐ If responding party, assert any available claim of privilege in lieu of discovery response. *See §§ 3.10, 3.11, 3.13 below.*

- ○ Raise claim expressly.
- ○ State ground of claim of privilege.
- ○ Describe withheld materials.

☐ If propounding party, and responding party raises privilege claim, consider whether to test claim by motion to compel discovery. *See § 3.12 below.*

☐ **Search by Topic:** Civil Procedure > Discovery > Privileged Matters



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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.03

§ 3.03 Considering Options and Strategy When Material Sought in Discovery May Be Privileged

All discovery requests should be examined by both the propounding and responding parties for privilege issues. Review is especially critical for the responding party, as a failure to assert an available claim of privilege generally results in a waiver of the privilege. *See § 3.09 below*.



Strategic Point:

When the sheer volume of materials to be produced makes a quick and comprehensive document review for privilege issues impractical, the responding party may assert generally the attorney-client privilege and work product protection, identify the known documents subject to the privilege on a privilege log, and produce all documents then known to be nonprivileged. *See, e.g., PaineWebber Group, Inc. v. Zinsmeyer Trusts Pshp., 187 F.3d 988, 991-994 (8th Cir. 1999)* (discussing use of privilege log); *see also §§ 3.14 -3.18, 3.41 -3.45 below*. As additional documents are discovered and reviewed, they may then be added to the privilege log or produced as appropriate. *See § 3.13 below*.

If information that has been produced in discovery is later determined by the responding party to be subject to a claim of privilege, the responding party may notify any party that received the information of the privilege claim and the basis for it. After receiving notice, a receiving party must promptly return, sequester, or destroy the information, and any copies, and may not use or disclose the information until the claim is resolved. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. A receiving party may present the information to the court under seal for a determination of the claim and the producing party must preserve the information until the claim is resolved. *Fed. R. Civ. P. 26(b)(5)(B)*; *see § 3.10 below*.



Warning:

The inadvertent disclosure of privileged or protected information may result in a waiver. *See §§ 3.18[3], 3.45[2] below*.

Circuit Split:

When analyzing privilege waiver, most courts examine the totality of the circumstances surrounding the

disclosure including whether the privilege holder has made efforts reasonably designed to protect and preserve the privilege. *See, e.g., Gomez v. Vernon, 255 F.3d 1118, 1131-1132 (9th Cir. 2001)* (no waiver when reasonable means taken to preserve confidentiality of privileged material); *Quinby v. WestLB AG, 2007 U.S. Dist. LEXIS 51628, at *5 (S.D.N.Y. 2007)* (same); *Simon Prop. Group L.P. v. mySimon, Inc., 194 F.R.D. 644, 648 (S.D. Ind. 2000)* (same). However, some courts hold that any inadvertent disclosure waives the privilege. *See In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989)* (adopting a strict liability approach); *see also §§ 3.09, 3.18[3], 3.45[2] below*. With respect to the attorney-client privilege and work product protection, *Evidence Rule 502*, which took effect on September 19, 2008, now sets forth a set of standards under which parties can determine the consequences of an inadvertent disclosure. *See § 3.18[3], below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.47, 26.90 -26.91.*
- *Bender's Federal Practice Forms*, Form Nos. 26:70-26:72.
- *Federal Litigation Guide P 14.24.*
- *Fed. R. Civ. P. 26* (disclosures and discovery); *Fed. R. Evid. 502* (limitations on waiver).



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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.04

§ 3.04 Considering Applicable Law

[1] Federal Common Law Generally Governs Privileges

The scope of available discovery is limited to material that is not privileged. *Fed. R. Civ. P. 26(b)(1)*. The privileges generally available to a party in federal court, including in discovery proceedings, are those defined by federal common law. *Fed. R. Evid. 501*; *United States v. Gillock, 445 U.S. 360, 366, 100 S. Ct. 1185, 63 L. Ed. 2d 454 (1980)* (federal privileges are governed by common law); *see also § 3.04[3], [4] below* (discussing applicability of state law privileges).

[2] Federal Common Law May Recognize New Privileges

Federal common law is constantly developing through court decisions. The federal courts may recognize new evidentiary privileges. *See, e.g., Jaffee v. Redmond, 518 U.S. 1, 15, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)* (recognizing federal psychotherapist-patient privilege as part of federal common law); *see also §§ 3.21 -3.24 below*.

Such recognition, however, is generally disfavored, as privileges restrict access to proof, and are therefore a potential impediment to the truth-finding function of courts. *See, e.g., University of Pennsylvania v. EEOC, 493 U.S. 182, 189-199, 110 S. Ct. 577, 107 L. Ed. 2d 571 (1990)* (declining to expand *First Amendment* academic freedom to protect confidential peer review materials from disclosure); *see also Couch v. United States, 409 U.S. 322, 335-336, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973)* (no accountant-client privilege exists under federal law); *Harris v. United States, 413 F.2d 316, 319-320 (9th Cir. 1969)* (no privilege exists to shield communications between banker and depositor); *King v. E.F. Hutton & Co., 117 F.R.D. 2, 7-8 (D.D.C. 1987)* (although confidential, communications between a stockbroker and client are not privileged).

[3] Ascertaining When State Privilege Law May Apply

In a diversity case in federal court, the substantive law applied, including that as to privileges, is the law of the state. *Fed. R. Evid. 501*; *see also Pearson v. Miller, 211 F.3d 57, 65 (3d Cir. 2000)* (state privileges apply to claims arising under state law); *Shanks v. AlliedSignal, Inc., 169 F.3d 988, 992 (5th Cir. 1999)* (applying Texas state law absolute litigation privilege in a diversity jurisdiction suit to plaintiff's Texas state law claims).

In a federal question case, if state law provides the rule of decision as to a component of the claims or defenses asserted,

the state law of privilege applies. *Fed. R. Evid. 501. See, e.g., Davis v. Leal, 43 F. Supp. 2d 1102, 1108 (E.D. Cal. 1999)* (California law controlled privilege issues in suit brought by FDIC as receiver of failed bank because California law governed substantive issues in the case); *In re Megan-Racine Assocs., Inc., 189 B.R. 562, 569 (Bankr. N.D.N.Y. 1995)* (New York attorney-client privilege law applied in contract case against FDIC acting as receiver of failed bank because New York law governed whether underlying contracts were valid or breached).

Exception:

Because the work product protection is found in a federal rule of procedure, *Fed. R. Civ. P. 26(b)(3)*, work product is governed by federal law even in a diversity action. *See § 3.42 below*.

[4] Federal Privilege Law Applies in Action Involving Federal and State Claims

In cases involving both federal and state claims in which a privilege is applicable to both, federal law controls. *Virmani v. Novant Health, Inc., 259 F.3d 284, 287 (4th Cir. 2001)* ("[I]n a case involving both federal and state law claims, the federal law of privilege applies."); *Pearson v. Miller, 211 F.3d 57, 65 (3d Cir. 2000)* (federal privilege law applied to resolve discovery dispute concerning materials relevant to both federal and state claims); *Hancock v. Dodson, 958 F.2d 1367, 1372 (6th Cir. 1992)* (federal privilege law applied to all privilege claims in primarily federal question case with pendent state claims).

If the federal law does not conflict with the state law or the federal law is not well-developed, the court may apply the state privilege law as a matter of comity between the two systems. *See, e.g., In re Admin. Subpoena Blue Cross Blue Shield of Mass., Inc., 400 F. Supp. 2d 386, 390 (D. Mass. 2005)* ("As a matter of comity, federal courts recognize state privileges 'where this can be accomplished at no substantial cost to federal substantive and procedural policy.' "). However, if recognition of the state privilege could frustrate federal policy, it will not be applied. *See, e.g., Guadalupe Leon v. County of San Diego, 202 F.R.D. 631, 634-636 (S.D. Cal. 2001)* (refusing to apply state privilege shielding medical peer review records in federal civil rights action, as restriction of discovery could frustrate vigorous enforcement of federal constitutional rights).

In determining whether a federal court should recognize a state evidentiary privilege, the First Circuit has established a two-part test. First, the court must determine whether the state would recognize the privilege asserted by the party resisting discovery. Second, the court must determine whether the asserted privilege is extrinsically meritorious in its independent judgment. To determine the merits of the privilege, the court examines whether: (1) the communications originated with the expectation of nondisclosure; (2) confidentiality is essential to maintaining the relationship between the parties; (3) the relationship is vital and should be fostered; and (4) the injury that would inure to the relation by the disclosure of the communications would be greater than the benefit gained for the correct disposal of the litigation. *See Bennett v. Kent County Mem. Hosp., 623 F. Supp. 2d 246, 253 (D.R.I. 2009)* (court applied state peer review privilege in medical negligence case brought pursuant to federal Emergency Medical Treatment and Active Labor Act).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.47.*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 501.
- *Fed. R. Civ. P. 26* (disclosures and discovery).
- *Fed. R. Evid. 501* (law governing privileges).



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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.05

§ 3.05 Understanding Potential Impact of Federal Statutes

Though a comprehensive treatment of these provisions is beyond the scope of this publication, applicable federal statutory or regulatory law may prohibit or restrict the discovery of materials in the hands of private parties or state government agencies. *See, e.g., 23 U.S.C. § 409* (restricting discovery of any information compiled or collected by state agencies in connection with federal highway safety programs); *see also 45 C.F.R. § 164.508 et seq* . (regulations under Health Insurance Portability and Accountability Act for the discovery of medical and health information of individuals whose records are held by health plans, clearinghouses, or health care providers).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.52[6].*



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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.06

§ 3.06 Understanding Restrictions on Discovery of Information in Hands of Federal Government

A party to a federal action may seek discovery from the federal government, whether or not the government is also a party to the action. *See, e.g., United States v. Procter & Gamble Co., 356 U.S. 677, 681, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958)* (government is subject to rules of discovery). The government generally may claim any evidentiary privilege to resist discovery that would be available to a private litigant or nonparty witness. *See, e.g., In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 917-919 (8th Cir. 1997)* (recognizing governmental attorney-client privilege). The government may also be able to resist discovery based on certain evidentiary privileges available only to it under either federal common law or specific federal statutes. *See, e.g., 13 U.S.C. § 9(a)* (protecting census reports from compelled disclosure); *Baldrige v. Shapiro, 455 U.S. 345, 361, 102 S. Ct. 1103, 71 L. Ed. 2d 199 (1982)* (Census Act's strong policy of nondisclosure requires that even raw data be protected from discovery); *see also §§ 3.35 -3.38 below* (governmental privileges).

When there is no specific federal statutory provision applicable to information in the hands of the federal government, the availability of discovery or other disclosure of that information to the public is essentially the same as that established by the Freedom of Information Act (FOIA). *5 U.S.C. § 552*. FOIA provides generally that all documents should be available to the public, but provides numerous exceptions, including the following:

1. State secrets;

2. Personnel rules of agencies, or inter- and intra-agency communications;

3. Matters exempted by statute;

4. Trade secrets;

5. Personnel, medical, or other files when disclosure would constitute an invasion of privacy;

6. Investigatory files; or

7. Reports on financial institutions.

See 5 U.S.C. § 552(b); *see also §§ 3.34, 3.36-3.38 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.52*.
- *Weinstein's Federal Evidence (2d ed.) §§ 509.60 -509.64*.



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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.07

§ 3.07 Applying Burden of Proof

When an evidentiary privilege is raised as a ground for resisting discovery, the party asserting the privilege bears the burden of establishing its applicability. *Foster v. Hill, 188 F.3d 1259, 1264 (10th Cir. 1999)* (party raising privilege bears burden of proof). A party asserting a claim of privilege in lieu of a discovery response must raise that claim expressly by stating the ground of the claim of privilege, and by describing the withheld materials so that the validity of the claim may be judged. *Fed. R. Civ. P. 26(b)(5)(A)*; *Equal Rights Ctr. v. Post Props., Inc., 247 F.R.D. 208, 213 (D.D.C. 2008)* (nature of claim must be sufficiently described without revealing the privileged information); *see also § 3.10 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.47*.
- *Fed. R. Civ. P. 26* (disclosures and discovery).



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§ 3.08 Asserting Privilege As Nonparty

Because discovery is available from nonparties, and nonparties may also have valid evidentiary privileges, a nonparty may assert a claim of privilege in responding to a discovery request from a party. *See, e.g., SNK Corp. of Am. v. Atlus Dream Entertainment Co., 188 F.R.D. 566, 569-576 (N.D. Cal. 1999)* (deciding validity of claims of attorney-client privilege and work product protection raised by third party served with subpoena duces tecum). The nonparty should assert its claim of privilege in the same way as a party or risk waiver of the claim of privilege. *See Fed. R. Civ. P. 45(d)(2)* (claiming privilege or protection); *DG Creditor Corp. v. Dabah (In re DG Acquisition Corp.), 151 F.3d 75, 80 (2d Cir. 1998)* (discussing nonparty procedure for raising privilege claim); *see also § 3.36 below*.

For discussion of nonparty discovery, *see* Ch. 14 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 45.61*.
- *Bender's Federal Practice Forms* Form Nos. 45:21, 45:22, 45:45.
- *Fed. R. Civ. P. 26* (disclosures and discovery).
- *Fed. R. Civ. P. 45* (subpoena).



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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.09

§ 3.09 Avoiding Waiver of Privilege

A party asserting a claim of privilege in lieu of a discovery response must raise that claim expressly by stating the grounds for the claim, and by describing the withheld materials in a manner that allows other parties to judge the validity of the claim. *Fed. R. Civ. P. 26(b)(5)(A)*; *see § 3.10 below*. Some courts require the use of a privilege log as a method for invoking privilege in resisting discovery. *See § 3.13 below*. Failure to comply with these requirements may result in waiver. *See, e.g., Burlington Northern & Santa Fe Ry. v. United States Dist. Court, 408 F.3d 1142, 1147-1150 (9th Cir. 2005)* ("blanket" assertion of privilege along with failure to submit timely privilege log resulted in waiver due to inordinate delay in case); *Hurst v. F.W. Woolworth Co., 1997 U.S. Dist. LEXIS 1407, at *11 (S.D.N.Y. 1997)* (failure to provide privilege log may result in waiver depending on nature of violation, willfulness or cavalier disregard for rule's requirements, and harm that results to other parties). An asserted claim of privilege preserves only those grounds expressly stated. *Moloney v. United States, 204 F.R.D. 16, 21 (D. Mass 2001)* (party cannot assert one ground of privilege in initial discovery response, then raise wholly new grounds in response to motion to compel).

The failure to raise proper privilege objections may be excused if the other party is on notice of the objections. *EEOC v. Safeway Store, Inc., 2002 U.S. Dist. LEXIS 25200, at *2-*8 (C.D. Cal. 2002)* (no waiver when both parties aware defendant asserting privileges as to certain documents and plaintiff repeatedly requested and defendant promised to produce privilege log). However a waiver will likely be found if a party engages in protracted delay and evidences a disregard for the discovery rules. *See, e.g., Ritacca v. Abbott Labs., 203 F.R.D. 332, 335 (N.D. Ill. 2001)* (five month delay during which time defendant never mentioned its privilege objections inexcusable and unjustified). For discussion of sufficiency of assertion of privilege in response to a request for production of documents under *Fed. R. Civ. P. 34*, *see § 5.21 below*.

Exception:

Because national security interests are at issue with respect to the state secrets privilege, *see § 3.36 below*, the government's failure properly to invoke the privilege is unlikely to result in waiver. *See, e.g., United States ex rel. Schwartz v. TRW, Inc., 211 F.R.D. 388, 392-394 (C.D. Cal. 2002)* (court granted government additional time to raise state secrets privilege despite failure to do so in response to earlier subpoena).

Despite an available claim of privilege or work product protection, a voluntary disclosure of the information or

materials may constitute a waiver of the privilege. *Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 105 S. Ct. 1986, 85 L. Ed. 2d 372 (1985)* (voluntary disclosure by trustee of bankrupt corporation waived attorney-client privilege with respect to prebankruptcy communications). Because the instances of waiver through disclosure are most frequently encountered with respect to the attorney-client privilege and work product protection, these issues are discussed in detail in the discussions of those particular discovery protections. *See §§ 3.18, 3.45 below.*

If information later determined to be privileged was inadvertently disclosed in discovery, a procedure exists for the responding party to assert the privilege claim, and, if that claim is contested, for the receiving party to present the information to the court for resolution of the dispute. *Fed. R. Civ. P. 26(b)(5)(B).* However, even an inadvertent disclosure may result in a waiver depending upon the circumstances and the extent of the disclosure. *See § 3.03 above; see also §§ 3.10, 3.18[3] 3.45[2] below.*

Merely bringing an action generally does not waive any privilege that the plaintiff may enjoy. *Grandbouche v. Clancy, 825 F.2d 1463, 1467 (10th Cir. 1987)* (plaintiff did not waive claim of *First Amendment* privilege by bringing suit). If, however, the plaintiff's claims put at issue the very matters that the plaintiff wishes to shield from discovery, the privilege will be deemed to be waived. *See, e.g., Schoffstall v. Henderson, 223 F.3d 818, 823 (8th Cir. 2000)* (by claiming and seeking damages for extreme emotional distress, plaintiff placed mental condition at issue and thus waived any claim of psychotherapist-patient privilege); *see also §§ 3.18[4], 3.23, 3.45[6] below.* The same rule applies to privileges raised by a defendant. *Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162-1163 (9th Cir. 1992)* (raising advice of counsel as a defense waived attorney-client privilege as to those communications).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.47, 26.52.*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 511.
- *Fed. R. Civ. P. 26* (disclosures and discovery).
- *Fed. R. Civ. P. 34* (production of documents).
- *Hernandez v. Tanninen, 604 F.3d 1095, 1100-1101 (9th Cir. 2010)* (district court committed clear error in concluding that single disclosure constituted blanket waiver of party's attorney-client privilege and work product protection and mandamus review was appropriate because blanket waiver was "particularly injurious" in that it could result in compelled disclosure of matters far beyond scope of immediate waiver, including case strategy and all communications between attorney and client)



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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.10

§ 3.10 Raising Privilege Claim in Lieu of Discovery Response

If a claim of privilege or work product protection is to be asserted to resist discovery, the party must expressly assert that claim by either an objection to the sought discovery, or by seeking a protective order to prohibit or condition the sought discovery. *Fed. R. Civ. P. 26(b)(5)(A)*. For a discussion of protective orders, *see* Ch. 16 *below*. Any objection to discovery based on a claim of privilege must expressly disclose the particular evidentiary privilege on which the objector relies. *Fed. R. Civ. P. 26(b)(5)(A)*.

An asserted claim of privilege preserves only those grounds expressly stated. *Moloney v. United States, 204 F.R.D. 16, 21 (D. Mass 2001)* (party cannot assert one ground of privilege in initial discovery response, then raise wholly new grounds in response to motion to compel). If a claim of privilege is asserted as an objection to discovery, the objecting party must describe the documents, communications, or things not produced in a manner that, without revealing the actual privileged information, will permit the other parties to assess the applicability of the claimed privilege. *Fed. R. Civ. P. 26(b)(5)(A)(ii)*; *see also § 3.09 above*.

If information later determined to be privileged was inadvertently disclosed in discovery, a procedure exists for the responding party to assert the privilege claim and for the receiving party to contest the claim. The responding party may notify any party that received the information of the privilege claim and the basis for it. The notice should be in writing unless the circumstances preclude it. After receiving notice, a receiving party must promptly return, sequester, or destroy it and any copies, and may not use or disclose the information until the claim is resolved. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. A receiving party may present the information to the court under seal for a determination of the claim and the producing party must preserve the information until the claim is resolved. *Fed. R. Civ. P. 26(b)(5)(B)*; *see also St. Cyr v. Flying J, Inc.*, 2008 U.S. Dist. LEXIS 39962, at *7-*15 (M.D. Fla. 2008) (citing **Moore's** and noting that rule is not limited to electronically stored information).

Warning:

Fed. R. Civ. P. 26(b)(5)(B) does not address whether production in the discovery process constitutes a waiver, but merely provides the procedure for presenting such dispute to the court for resolution.

In a criminal trial, third parties may intervene to challenge the production of documents on the ground of privilege.

United States v. RMI Co., 599 F.2d 1183, 1186 (3d Cir. 1979) (persons affected by the disclosure of allegedly privileged materials may intervene in pending criminal proceedings and seek protective order); *see also § 3.08 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.90, 26.91.*
- *Bender's Federal Practice Forms* Form Nos. 26:70-26:72.
- *Federal Litigation Guide P 14.24.*
- *Fed. R. Civ. P. 26* (disclosures and discovery).



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.11

§ 3.11 Invoking Privilege Claim by Moving for Protective Order

If a discovery dispute cannot be resolved informally between the parties, a party or other person from whom discovery is sought can make a motion for a protective order, asserting good cause. *Fed. R. Civ. P. 26(c)*. The court may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, based on any of the reasons listed in Rule 26(c). *Fed. R. Civ. P. 26(c)*; *see also Shingara v. Skiles, 420 F.3d 301, 305 (3d Cir. 2005)* (discussing factors court should examine in determining whether to issue protective order); *Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 295 (2d Cir. 1979)* (discussing purpose of protective order).

A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted. *In re Terra Int'l, 134 F.3d 302, 306 (5th Cir. 1998)* (movant must demonstrate prejudice or harm by specific and particular facts). For discussion of protective orders, *see* Ch. 16 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.102, 26.104, 26.105.*
- *Bender's Federal Practice Forms* Form Nos. 26:100-26:200.
- *Federal Litigation Guide P 14.06.*
- *Fed. R. Civ. P. 26* (disclosures and discovery).



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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.12

§ 3.12 Opposing Privilege Claim by Moving to Compel Discovery

If the responding party raises a claim of privilege in order to resist discovery, the party propounding the discovery request may move to compel discovery. *Fed. R. Civ. P. 37(a)*. Presentation of a motion to compel, however, should not be automatic. Instead, whether to file a motion to compel requires a balancing of many factors, most notably the importance of the information sought and whether it can be obtained elsewhere, as well as the merits of the claim of privilege. *See, e.g., Amedisys, Inc. v. JP Morgan Chase Manhattan Bank (In re Nat'l Century Fin. Enters.), 298 B.R. 140, 143 (Bankr. S.D. Ohio 2003)* (denying motion to compel because no showing that discovery sought was relevant and proper); *Sonnino v. Univ. of Kan. Hosp. Auth., 220 F.R.D. 633, 640 (D. Kan. 2004)* (court cannot compel production of documents that are not in party's possession, custody or control). For discussion of motions to compel, *see* Ch. 17 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.02 -37.23*.
- *Bender's Federal Practice Forms* Form Nos. 26:30-26:32.
- *Federal Litigation Guide PP 14.40 -14.41*.
- *Fed. R. Civ. P. 37* (motion to compel disclosure or discovery).



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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.13

§ 3.13 Using Privilege Log

Courts recognize that a privilege log is one approach a party can use to establish that a privilege applies to certain documents and communications. Counsel should consider maintaining a privilege log as standard practice. *See, e.g., In re Grand Jury Investigation, 974 F.2d 1068, 1071 (9th Cir. 1992)* (privilege log coupled with affidavit met party's burden in demonstrating applicability of attorney-client privilege); *Alexander v. FBI, 186 F.R.D. 102, 107 (D.D.C. 1998)* (adopting privilege log approach); *Golden Trade, S.r.L. v. Lee Apparel Co., 1992 U.S. Dist. LEXIS 17739, at *11-*12 (S.D.N.Y. 1992)* (sufficiently detailed privilege log may be used to satisfy party's burden to establish factual basis for claim of privilege). With respect to documents, district courts have called for various elements to be included in the log, such as the following:

1. The date the document was prepared;

2. The identity of the person or persons who prepared the document;

3. The identity of any person or persons to whom the document was disseminated;

4. A brief description or summary of the contents of the document;

5. The specific privilege or protection allegedly applicable to the document; and

6. A description of how each element of the privilege or protection is met as to the document.

See, e.g., Petrovic v. City of Chicago, 2007 U.S. Dist. LEXIS 61245, at *5 (N.D. Ill. 2007) (listing elements for privilege log); *Cont'l Coal, Inc. v. Cunningham*, 2007 U.S. Dist. LEXIS 81718, at *2-*3 (D. Kan. 2007) (same) *AT&T v. Microsoft, 2003 U.S. Dist. LEXIS 8710, at *4-*5 (N.D. Cal. 2003)* (same).

The brief description or summary of the document provided in a privilege log should be specific enough for opposing counsel and the court to determine the applicability of the privilege, but should not be so detailed as to reveal the privileged information itself. *Fed. R. Civ. P. 26(b)(5)(A).*



Strategic Point:

When the attorney is neither the author nor the addressee of a document, but instead merely a "cc" recipient, be prepared to provide more detail to the description of the general nature and subject matter of the item in the privilege log. Courts are prone to be wary of entries that involve counsel only as a "cc" in light of the danger that a party has attempted to create privilege improperly by simply passing the document through counsel's hands. *See, e.g., Berlett v. Cargill, 1990 U.S. Dist. LEXIS 7461, at *5 (N.D. Ill. 1990)* ("[T]he mere presence of a lawyer's name at the top or bottom of a document is *not* the bell that causes the dog named Privilege to salivate.") (emphasis in original). Likewise, in scrutinizing an opponent's privilege log, pay particular attention to such "cc only" entries.

For further discussion of privilege logs, in connection with Rule 34 requests for production and inspection, *see § 5.21[1] below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.47*.
- *Fed. R. Civ. P. 26* (disclosures and discovery).



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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.14

§ 3.14 Checklist for Attorney-Client Privilege

☐ Assess status of client. *See §§ 3.15, 3.16 below.*

- ○ Determine if in attorney-client relationship.
- ○ Determine whether sought legal advice, whether or not attorney was retained.
- ○ Determine whether corporate issues apply.

☐ Assess status of attorney. *See § 3.15 below.*

☐ Determine whether communication to attorney was:

- ○ Related by client, or employee or agent of client. *See § 3.17[2] below.*
- ○ Made in confidence, i.e., without presence of any third party. *See § 3.15 below.*
- ○ Communicated for purpose of securing primarily opinion of law, legal services, or assistance in some legal proceeding. *See § 3.15 below.*
- ○ Not communicated for purpose of committing crime or fraud. *See § 3.17[6][a] below.*

☐ Determine whether disclosure of communication by attorney would tend to reveal underlying confidential communication of client to attorney. *See § 3.15 below.*

☐ Consider waiver issues. *See § 3.09 above; see also § 3.18 below*.

- ○ Express waiver.
- ○ Disclosure of communication, whether by voluntary, involuntary, or inadvertent disclosure.
- ○ Failure to assert privilege.
- ○ Implied waiver by placing privileged matter in controversy.
- ○ Effect of *Evidence Rule 502*.

☐ Claimant:

- ○ Keep privilege log. *See § 3.13 below*.
- ○ Consider motion for protective order under Rule 26(c). *See § 3.11 above*.

☐ Opponent:

- ○ Consider motion to compel under Rule 37(a). *See § 3.12 above*.

☐ Uncover and assess conflicts of interest.

☐ **Search by Topic:** Civil Procedure > Discovery > Privileged Matters > Attorney-Client Privilege



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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.15

§ 3.15 Understanding Federal Common Law Privilege

The attorney-client privilege is recognized as part of federal common law. *Swidler & Berlin v. United States, 524 U.S. 399, 403, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998)* ("[T]he interpretation of the privilege's scope is guided by 'the principles of the common law ... as interpreted by the courts ... in the light of reason and experience.' "). The attorney-client privilege applies if the following elements are established:

1. The asserted holder of the privilege is or sought to become a client;

2. The person to whom the communication was made:

    a. Is a member of the bar or the member's agent; and

    b. In connection with the communication is acting as a lawyer.

3. The communication relates to a fact of which the attorney was informed:

    a. By the client;

    b. Without the presence of strangers; and

    c. For the purpose of securing primarily an opinion of law, or legal services or assistance in some legal proceeding.

4. The communication is not for the purpose of committing a crime or tort.

5. The privilege has been:

    a. Claimed by the client; and

    b. Not waived by the client.

See, e.g., United States v. White, 950 F.2d 426, 429 (7th Cir. 1991) (setting forth elements of attorney-client privilege); *Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1492 (9th Cir. 1989)* (same); *Diversified Indus. v. Meredith, 572 F.2d 596, 601 (8th Cir. 1977)* (same); *ReedHycalog UK, Ltd. v. Baker Hughes Oilfield Operations Inc., 2008 U.S. Dist. LEXIS 24355, at *7-*8 (E.D. Tex. 2008)* (same).

The attorney-client privilege as defined by state privilege law applies in diversity actions, or when state law provides the rule of decision. *Fed. R. Evid. 501*; *see also Barton v. United States Dist. Court, 410 F.3d 1104, 1108 (9th Cir. 2005)* (applying California law in diversity action to determine whether attorney-client privilege attached to internet questionnaire posted by plaintiffs' attorneys for purpose of gathering information from prospective clients).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.49.*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 503.
- *Federal Litigation Guide P 10.23.*
- *Fed. R. Evid. 501* (law governing privileges).



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§ 3.16 Understanding Who May Assert Attorney-Client Privilege

[1] Ascertaining Holder of Attorney-Client Privilege

The client is the holder of the privilege, not the attorney. *United States v. Blackman, 72 F.3d 1418, 1424 (9th Cir. 1995)* ("[T]he attorney-client privilege protects the client, not the attorney."); *American Standard, Inc. v. Pfizer, Inc., 828 F.2d 734, 745 (Fed. Cir. 1987)* ("The privilege is that of the client, not that of the attorney"); *compare § 3.44[1] below* (discussing holder of protection in work product context).

[2] Considering Issues Regarding Corporate Entities

A corporation, governmental entity, or other artificial entity recognized as having a separate existence may be a "client" entitled to invoke the attorney-client privilege. *Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)* (corporation may be holder of attorney-client privilege). Employees at all levels of the company may invoke the privilege as long as the communications were made at the behest of corporate superiors for the purpose of obtaining legal advice. *Upjohn Co. v. United States, 449 U.S. 383, 389-395, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)* (attorney-client privilege extends to employee communications made at request of corporate superiors for purpose of obtaining legal advice).

There is no individual attorney-client privilege between corporate counsel and an employee unless it is clearly shown that the employee consulted the corporate counsel in his or her individual capacity and specifically requested personal representation. *United States v. Keplinger, 776 F.2d 678, 700 (7th Cir. 1985)* (corporate employee must specifically request individual representation); *see also In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 124 (3d Cir. 1986)* ("[A]ny privilege that exists as to a corporate officer's role and functions within a corporation belongs to the corporation, not the officer."); *Applied Tech. Int'l, Ltd. v. Goldstein, 2005 U.S. Dist. LEXIS 1818, at *9-*10 (E.D. Pa. 2005)* (setting forth factors to be considered in determining whether individual attorney-client privilege exists between employee and corporate counsel).

The attorney-client privilege applies to communications by any corporate employee to counsel when the communications concern matters within the scope of the employee's corporate duties, and the employee is aware that the information is being furnished to enable the attorney to provide legal advice or service to the corporation. *Upjohn Co. v. United States, 449 U.S. 383, 394, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)* (discussing application of privilege to

corporate employees).

The fact that a corporation may contain a large number of employees creates unique issues for purposes of applying the attorney-client privilege. In recognition of the diffuse nature of corporate decisionmaking, courts have routinely found that transmission of information and materials between employees when done in the process of obtaining legal advice does not defeat the privilege. *See, e.g., AT&T v. Microsoft, 2003 U.S. Dist. LEXIS 8710, at *8-*13 (N.D. Cal. 2003)* (e-mails and technical memoranda that were written by employees of defendant software developer concerned matters on which developer sought legal advice of patent counsel, and so were protected by attorney-client privilege); *Verschoth v. Time Warner, Inc., 2001 U.S. Dist. LEXIS 3174, at *5 (S.D.N.Y. 2001)* ("The attorney-client privilege protects from disclosure communications among corporate employees that reflect advice rendered by counsel to the corporation."); *In re Grand Jury 90-1, 758 F. Supp. 1411, 1413 (D. Colo. 1991)* (same). It follows that just as there are more potential participants in the privileged communication in the corporate context, there are more individuals in a position to waive the privilege through disclosure to third parties. For discussion of waiver, *see § 3.18 below*.

Expressly left open by the Supreme Court's decision in *Upjohn* is whether the lawyer-client privilege applies to communications by former employees concerning activities during their period of employment. *Upjohn Co. v. United States, 449 U.S. 383, 394 n. 3, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)* (declining to decide issue of former employees since it was not addressed by court below). The majority of courts deciding the issue have held that the *Upjohn* rationale necessarily extends the privilege to former corporate employees under the rationale that the attorney-client privilege is served by the certainty that conversations between the attorney and client will remain privileged after the employee leaves. *See, e.g., Better Gov't Bureau v. McGraw (In re Allen), 106 F.3d 582, 605 (4th Cir. 1997)* (extending *Upjohn* to former employees "in light of the purpose of the privilege"); *Admiral Ins. Co. v. United States Dist. Ct. for Dist. of Arizona, 881 F.2d 1486, 1493 (9th Cir. 1989)* (same); *Export-Import Bank of the United States v. Asia Pulp & Paper Co., Ltd., 232 F.R.D. 103, 112 (S.D.N.Y. 2005)* (same); *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC, 340 F. Supp. 2d 554, 557 (D. Pa. 2004)* (same); *Porter v. Arco Metals Co., 642 F. Supp. 1116, 1118 (D. Mont. 1986)* (same). Courts that have refused to extend the privilege to former employees have generally been following state law, or have concluded that the former employee had ceased being employed by the client before the relevant time period. *See, e.g., Infosystems, Inc. v. Ceridian Corp., 197 F.R.D. 303, 305 (D. Mich. 2000)* (privilege extended to former employees only as to those communications that occurred during the employment relationship); *Nakajima v. General Motors, 857 F. Supp. 100, 104 (D.D.C. 1994)* (D.C. law); *Barrett Industrial Trucks v. Old Republic Ins. Co., 129 F.R.D. 515, 517-518 (N.D. Ill. 1990)* (Illinois law); *Connolly Data Sys. v. Victor Technologies, 114 F.R.D. 89, 93-94 (S.D. Cal. 1987)* (California law).

When control of a corporation passes to new management either through a merger, takeover or succession, the attorney-client privilege passes as well. New management may assert or waive the privilege, with respect to communications made by former officers and directors. *Commodity Futures Trading Com v. Weintraub, 471 U.S. 343, 349, 105 S. Ct. 1986 ; 85 L. Ed. 2d 372 (1985)* (attorney-client privilege vests with new management on a change in control of a corporation). However, an entity that no longer functions as an on-going business may lose the ability to assert or waive the attorney-client privilege. *See Lopes v. Vieira, 688 F. Supp. 2d 1050, 1069 (E.D. Cal. 2010)* (insolvent and inactive limited liability company with no manager or officers, that had not complied with state law regarding its required corporate information, no longer retained authority to invoke attorney-client privilege).

[3] Ascertaining When Representative of Client May Assert Privilege

When the client is absent, incapacitated, or otherwise unable to assert an available claim of attorney-client privilege, the attorney or a legally appointed representative may claim the privilege on behalf of the client. *United States v. Blackman, 72 F.3d 1418, 1424-1425 (9th Cir. 1995)* (attorney served with subpoena for records could withhold them based on attorney-client privilege, but only if disclosure would convey substance of confidential communication of client). A legally appointed representative may also waive the attorney-client privilege. *See Commodity Futures Trading Com v. Weintraub, 471 U.S. 343, 358, 105 S. Ct. 1986 ; 85 L. Ed. 2d 372 (1985)* (voluntary disclosure by

trustee of bankrupt corporation waived attorney-client privilege with respect to prebankruptcy communications); *see also § 3.18[2] below*.

The attorney-client privilege survives the death of the client and may therefore be claimed by the decedent's personal representative. *Swidler & Berlin v. United States, 524 U.S. 399, 405, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998)* ("The general rule with respect to confidential communications ... is that such communications are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs.").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.49*.
- *Weinstein's Federal Evidence (2d ed.) § 503.22*.
- *Federal Litigation Guide PP 10.23, 16.07[2], [3]*.
- *Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 618 (7th Cir. 2009)* (privilege belongs to client, although attorney may assert privilege on client's behalf).



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§ 3.17 Understanding Scope of Attorney-Client Privilege

[1] Privilege Covers Confidential Communications Between Client and Attorney

Any confidential communication between an attorney and an actual or prospective client is privileged when the communication is made for the purpose of securing an opinion of law, legal services, or assistance in some legal proceeding. *See, e.g., Cavallaro v. United States, 284 F.3d 236, 245 (1st Cir. 2002)* (setting forth the essential elements of attorney-client privilege); *Advanced Cardiovascular Sys., Inc. v. C.R. Bard, Inc., 144 F.R.D. 372, 374-377 (N.D. Cal. 1992)* (technical information imparted to patent attorney to assist in completing patent application falls within attorney-client privilege as the communication was for purpose of assistance in legal proceeding).

The privilege protects from discovery specific communications between client and counsel, not the relevant underlying facts, data, or information. *See, e.g., GE v. Johnson, 2006 U.S. Dist. LEXIS 64907, at *43-*44 (D.D.C. 2006)* ("[T]he privilege only extends to 'those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.'"). On the other hand, a number of courts have concluded that when an attorney conducts a factual investigation in connection with the provision of legal services, any notes or memoranda documenting client interviews or other client communications in the course of the investigation are protected by the attorney-client privilege. *See, e.g., Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 620 (7th Cir. 2009)* (notes from interviews conducted by school board's attorneys investigating factual circumstances surrounding alleged abuse of plaintiff were protected by attorney-client privilege).

Communications between a client and counsel must be made to secure legal advice or assistance. Accordingly, when the communications primarily serve some other purpose, the communications are not protected. *See, e.g., Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B, 230 F.R.D. 398, 411 (D. Md. 2005)* (communications to attorney acting in role of business advisor not privileged).

Though usually the privilege is invoked as to communications from the client to the attorney, it also applies to communications from the attorney to the client in the course of providing legal advice. *Tax Analysts v. IRS, 117 F.3d 607, 618* (D.C. Cir. 1997) ("The privilege also protects communications from attorneys to their clients if the communications 'rest on confidential information obtained from the client.' ").

[2] Privilege Covers Communications With Agents

A client need not communicate directly with his or her attorney in order to ensure that the communication is protected by the attorney-client privilege. If the client communicates with an agent of the attorney, such as an investigator or other professional, and that agent has been hired by the attorney to assist with the legal representation of the client, the attorney-client privilege extends to communications with the attorney's agent. *See, e.g., United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1070 n.2 (N.D. Cal. 2002)* (client may communicate with counsel through secretary or paralegal and maintain privilege). The reverse is also true: information transmitted by an agent in response to counsel's privileged communication is protected by the attorney-client privilege. *Heriot v. Byrne, 257 F.R.D. 645, 666 n.15 (N.D. Ill. 2009)* (while there is no accountant-client privilege under federal law, material transmitted to and from accountant may fall under attorney-client privilege if accountant is acting as agent of attorney for purpose of providing legal advice). The purpose of the communication to the third-party must be for the purpose of obtaining legal advice from the attorney. *See, e.g., In re Grand Jury Proceedings, 220 F.3d 568, 570 (7th Cir. 2000)* (communications with accountant may be covered by attorney-client privilege if accountant is acting as attorney's agent for purpose of assisting with provision of legal advice). If the communication or advice sought from the third party is for any other purpose, no privilege attaches. *See, e.g., United States v. Bornstein, 977 F.2d 112, 116 (4th Cir. 1992)* (tax returns are primarily an accounting service, not a legal one, and accounting services are ordinarily not privileged).

Communications made by an agent or employee of a client to an attorney are within the attorney-client privilege if the communication was made for the purpose of securing legal advice or assistance for the client. *See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 394, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)* (employee communications); *see also § 3.16[2] above*.

[3] Privilege Covers Communications to or Among Clients with Common Interests

When parties share a common interest and are therefore pursuing a joint defense strategy, the sharing of privileged information among the parties or their attorneys does not waive the attorney-client privilege of any of the parties. *United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989)* (recognizing common interest rule as extension of attorney-client privilege).

The common interest privilege, frequently referred to as the joint defense doctrine, applies under the following conditions:

1. The communication is made by separate parties in the course of a matter of common interest;

2. The communication is designed to further that effort; and

3. The attorney-client privilege has not been waived.

*Modesto Irrigation Dist. v. Gutierrez, 2007 U.S. Dist. LEXIS 21949, at *45-*46 (E.D. Cal. 2007)* (setting forth requirements).

Rather than being considered an extension of the attorney-client privilege, the common interest doctrine is more appropriately characterized as a non-waiver doctrine, analyzed under standard waiver principles applicable to the attorney-client privilege and the work product doctrine. *In re Rivastigmine Patent Litig., 2005 U.S. Dist. LEXIS 20851, at *7-*8 (S.D.N.Y. 2005)* (common interest doctrine "is an exception to the general rule that the privilege is waived when confidential information is communicated to a third party"); *see also § 3.18 below*.

Circuit Split:

Some courts require a showing that the parties have more than merely "concurrent" legal interests. Rather, the parties must demonstrate a common legal as opposed to commercial interest. *See, e.g.,*

Broessel v. Triad Guar. Ins. Corp., 238 F.R.D. 215, 220 (D. Ky. 2006) (discussing the "narrow view" for common interest doctrine); *see also Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 446 (S.D.N.Y. 1995)* (adopting "narrow view"). Other courts have adopted a more expansive view of the doctrine, finding an anticipated legal interest sufficient. *See, e.g., Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308, 309 (N.D. Cal. 1987)* (no waiver of attorney-client privilege when patent owner seeking to sell one of its divisions disclosed its patent attorney's opinion letter to prospective purchaser in anticipation of litigation in which they would have a common interest).

The common interest doctrine does not require a complete unity of interests among the participants. *Value Prop. Trust v. Zim Co. (In re Mortgage & Realty Trust), 212 B.R. 649, 653 (Bankr. C.D. Cal. 1997)* (doctrine may apply when the parties' interests are adverse in substantial respects).

[4] Identity of Client Is Not Protected

The attorney-client privilege protects only confidential communications between counsel and the client. The mere fact of representation or the conditions of the attorney's employment by the client are not protected from discovery by the privilege. *See, e.g., United States v. Under Seal (In re Grand Jury Subpoena), 204 F.3d 516, 520 (4th Cir. 2000)* (general rule is identity of client, nature of fee arrangement and general terms of employment not protected by attorney-client privilege); *In re Grand Jury Matter No. 91-01386, 969 F.2d 995, 997 (11th Cir. 1992)* (same); *Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992)* (same); *see also Methode Elecs., Inc. v. Finisar Corp., 205 F.R.D. 552, 556 (N.D. Cal. 2001)* (improper for attorney to instruct client not to answer deposition question as to whether legal advice was sought as mere fact of seeking advice is not a confidential communication protected by attorney-client privilege).

Exception:

An attorney may be able to resist divulging the identity of the client or the fact of representation if, under the facts of the case, revealing that information would be tantamount to revealing a confidential communication between the client and the attorney. *See, e.g., In re Witnesses before Special March 1980 Grand Jury, 729 F.2d 489, 492 (7th Cir. 1984)* ("extremely narrow" exception to general rule exists when disclosure would implicate client in criminal wrongdoing, or when disclosure, in conjunction with information already provided, would be tantamount to revealing an "indubitably confidential communication"); *Baird v. Koerner, 279 F.2d 623, 632-633 (9th Cir. 1960)* (same); *see also In re Grand Jury Subpoenas, 803 F.2d 493, 496 (9th Cir. 1986)* (explaining and limiting *Baird*).

[5] Privilege Can Apply to Documentary Evidence

The attorney-client privilege attaches to documentary evidence to the extent that the documents contain communications otherwise within the scope of the privilege. *See, e.g., Clark v. Buffalo Wire Works Co., 190 F.R.D. 93, 96-97 (W.D.N.Y. 1999)* (notes containing confidential communications to attorney protected by privilege); *AT&T v. Microsoft, 2003 U.S. Dist. LEXIS 8710, at *8-*13 (N.D. Cal. 2003)* (e-mails and technical memoranda seeking legal advice of patent counsel protected).

The application of the attorney-client privilege turns on the nature and purpose of the communications between counsel and client, so that a client cannot create privilege by merely forwarding nonprivileged documents to counsel. *See, e.g., United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981)* (documents not otherwise protected by the attorney-client relationship are not immunized from discovery by mere delivery of documents to attorney); *Guzzino v. Felterman, 174 F.R.D. 59, 61 (W.D. La. 1997)* (same); *see also United States ex rel. Burroughs v. DeNardi Corp., 167 F.R.D. 680, 683 (S.D. Cal. 1996)* (relation of facts to attorney so that counsel could file False Claims action did not make facts subject to attorney-client privilege). *below*.

If documentary evidence contains both privileged and nonprivileged material, the documents may be redacted or otherwise edited to preserve the privileged portions while simultaneously granting access to the nonprivileged portions. *See, e.g., Cuno, Inc. v. Pall Corp., 121 F.R.D. 198, 204 (E.D.N.Y. 1988)* (nonprivileged portion of documents must be produced).

[6] Exceptions to Privilege

[a] Crime-Fraud Exception

The attorney-client privilege does not extend to communications between client and counsel made in furtherance of a future or ongoing crime or fraud. *United States v. Zolin, 491 U.S. 554, 562-564, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989)* (purpose of crime-fraud exception is to assure that seal of secrecy between lawyer and client does not extend to communications made for purpose of getting advice for commission of a fraud or crime). The crime or fraud may be that of either the client, the attorney, or both, and there is no requirement that the attorney be aware of the criminal or fraudulent intent. *Clark v. United States, 289 U.S. 1, 15, 53 S. Ct. 465, 77 L. Ed. 993 (1933)* (no requirement of conspiracy between attorney and client for exception to apply); *see also United States v. Under Seal (In re Grand Jury Proceedings #5), 401 F.3d 247, 252 (4th Cir. 2005)* (because client is holder of the privilege, attorney need not be aware of illegality).

The party asserting the applicability of the crime-fraud exception to the attorney-client privilege bears the burden of establishing the exception. *In re Grand Jury Investigation, 445 F.3d 266, 274 (3d Cir. 2006)* (burden on party invoking exception).

A prima facie case for the crime-fraud exception is established by demonstrating the following:

1. That the communications were in furtherance of an intended or present fraud or crime; and

2. There is some relationship between the communications and the illegality.

United States v. Martin, 278 F.3d 988, 1001 (9th Cir. 2002) (setting forth elements of exception).

In civil cases, the party seeking to preserve the privilege may introduce countervailing evidence showing why the exception does not apply. *See, e.g., UMG Recording, Inc. v. Bertelsmann AG (In re Napster Copyright Litig.), 479 F.3d 1078, 1093 (9th Cir. 2007)* (party asserting privilege has right to introduce countervailing evidence in civil case); *Haines v. Liggett Group, Inc., 975 F.2d 81, 96-97 (3d Cir. 1992)* (same); *In re Feldberg, 862 F.2d 622, 624 (7th Cir. 1988)* (same).

Circuit Split:

Courts have given varying interpretations of the standard of proof required to establish the crime-fraud exception. *See, e.g., In re Grand Jury Proceedings, 87 F.3d 377, 381 (9th Cir. 1996)* ("reasonable cause"); *In re Antitrust Grand Jury, 805 F.2d 155, 165-166 (6th Cir. 1986)* ("probable cause"); *In re Feldberg, 862 F.2d 622, 625-626 (7th Cir. 1988)* (evidence sufficient to require an explanation by the party asserting the privilege, which the court describes as less than a preponderance); *Haines v. Liggett Group, Inc., 975 F.2d 81, 95-96 (3d Cir. 1992)* (evidence which, if believed, would be sufficient to support a finding that the elements of the crime-fraud exception were satisfied); *In re Grand Jury Proceedings, 641 F.2d 199, 203 (5th Cir. 1981)* (same, except that evidence to the contrary is to be disregarded).

The exception can be proven through an *in camera* inspection of allegedly privileged material, if the party invoking the exception makes a threshold showing that the documents could potentially demonstrate the existence of the crime or

fraud. This showing must be made before an *in camera* review is ordered. *United States v. Zolin, 491 US 554, 570-572, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989)* (some showing must be made before court conducts *in camera* review).

Circuit Split:

At least one circuit has held that the court need not order an *in camera* review of documents before determining that the crime-fraud exception applies if non-privileged information establishes a prima facie case for the exception. *United States v. Under Seal (In re Grand Jury Proceedings #5), 401 F.3d 247, 253 (4th Cir. 2005)* (*in camera* hearing not required). Other courts have found that a district court must review allegedly privileged documents *in camera* before determining whether the crime-fraud exception applies. *See, e.g., In re Bankamerica Corp. Secs. Litig., 270 F.3d 639, 645 (8th Cir. 2001)* (noting that it could not find any case in which it affirmed an order to produce documents under the crime-fraud exception when the district court did not first review the documents *in camera*); *In re Antitrust Grand Jury, 805 F.2d 155, 168 (6th Cir. 1986)* (finding district court committed plain error by ruling that government established prima facie case of crime-fraud exception and ordering documents produced without examining documents *in camera)*.

[b] Suits for Malpractice

The institution of suit against an attorney does not automatically waive the attorney-client privilege. Rather, it is the disclosure of confidential communications, not the institution of suit that determines whether a party waives the privilege. *Industrial Clearinghouse, Inc. v. Browning Mfg. Div. of Emerson Electric Co., 953 F.2d 1004, 1007 (5th Cir. 1992)* ("[I]f a complaint against an attorney, or the attorney's response or testimony in the malpractice case, reveals confidential client communications, the client waives the privilege as to the subject matter of the disclosed communications."); *see §§ 3.18[4], 3.23 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.49*.
- *Weinstein's Federal Evidence (2d ed.) § 503.31*.
- *Federal Litigation Guide PP 10.23, 16.07, 18.01[6], 18.03[3]*.
- *Fed. R. Civ. P. 26* (disclosures and discovery).
- *Fed. R. Civ. P. 34* (production of documents).



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART C: ASSERTING ATTORNEY-CLIENT PRIVILEGE

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.18

§ 3.18 Waiving Attorney-Client Privilege

[1] Who May Waive Attorney-Client Privilege

The attorney-client privilege belongs to the client, and may be waived only by the client, not by the attorney. *Kevlik v. Goldstein, 724 F.2d 844, 850 (1st Cir. 1984)* (attorney may not unilaterally waive privilege); *compare § 3.44[1] below* (discussing holder of work product protection).

When asserted by a corporation, the privilege belongs to the corporation and may be waived by the corporation, even if the employee or officer seeks to keep the communications secret. An employee or former employee bears a substantial burden in establishing that the employee sought and obtained legal advice from corporate counsel in an individual capacityto employee in individual capacity). *United States v. Martin, 278 F.3d 988, 1000 (9th Cir. 2002)* (corporation's privilege does not automatically extend to employee in individual capacity); *see also § 3.16[2] above*.

[2] When Voluntary Disclosure Waives Privilege

Communications between an attorney and client must be confidential to be protected by the attorney-client privilege. A voluntary disclosure in the presence of a third party negates the required element of confidentiality. *In re Antunez de Mayolo, 2007 U.S. Dist. LEXIS 27912, at *19-*20 (D. Iowa 2007)* (attorney-client privilege did not attach to communications made in presence of third party); *see § 3.09 above; see also § 3.45[1] below* (discussing voluntary disclosure in work product context).

The voluntary disclosure may be made by the client directly or may be made by counsel with the express or implied permission of the client. *See, e.g., Weizmann Inst. of Sci. v. Neschis, 2004 U.S. Dist. LEXIS 4254, at *9 (S.D.N.Y. 2004)* (attorney-client privilege waived if holder of privilege discloses or consents to disclosure of any significant part of a privileged communication to third party or stranger to attorney-client relationship); *McMorgan & Co. v. First Cal. Mortgage Co., 931 F. Supp 703, 707-708 (N.D. Cal. 1996)* (finding waiver as to documents and related communications when attorney for corporation voluntarily cooperated with investigation by Department of Labor by submitting and testifying about certain documents).

Exception:

If a disclosure of privileged material to an opposing party occurs in the context of settlement negotiations

under an express agreement by the parties to preserve privilege, no waiver occurs so long as steps are taken to preserve confidentiality. *Akamai Techs., Inc. v. Digital Island, Inc., 2002 U.S. Dist. LEXIS 13515, at *16-*20 (N.D. Cal. 2002)* (no waiver when parties agreed to use privileged material for settlement purposes only and material clearly labeled as privileged and confidential); *see also Fed. R. Evid. 502(e)* (agreement on effect of disclosure in federal proceeding as binding only on parties to agreement, unless it is incorporated into a court order). But, absent a clear agreement, a waiver will be found. *In re Chrysler Motors Corp. Overnight Evaluation Program Litigation, 860 F.2d 844, 846 (8th Cir. 1988)* (disclosure during settlement negotiations constituted waiver when no agreement and no attempt to maintain confidentiality); *see also Atari Corp. v. Sega of Am., 161 F.R.D. 417, 419-420 (N.D. Cal. 1994)* (providing videotape as part of discovery to opposing party during settlement negotiations constituted voluntary disclosure that waived attorney-client privilege and work product protections).

Exception:

Waiver of privilege through disclosure is premised on *voluntary* disclosure, so that if a party is *compelled* to disclose privileged information, no waiver can be implied from the disclosure. *Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 651-652 (9th Cir. 1978)* (finding no waiver because rigorous discovery schedule required by court order in prior proceedings mandated party produce evidence without adequate opportunity for privilege review).

[3] When Inadvertent Disclosure Constitutes Waiver

Fed. R. Evid. 502 provides safeguards against waiver of the attorney-client privilege and work product protection by limiting both the scope of waiver and the circumstances under which waiver will be found. Under the rule, if a waiver is found, it applies only to the information disclosed and does not extend to undisclosed communications or information unless:

1. The waiver was intentional;

2. The disclosed and undisclosed communications or information concerned the same subject matter; and

3. Fairness dictated that they be considered together.

See Fed. R. Evid. 502(a).

Despite disclosure, a waiver is not be found under the following circumstances:

1. The disclosure was inadvertent;

2. Reasonable steps were taken by the holder to prevent the disclosure; and

3. Reasonable steps were taken by the holder to retrieve the inadvertently disclosed communications or information, including (if applicable) following the procedure in *Fed. R. Civ. P. 26(b)(5)(B).*

See Fed. R. Evid. 502(b); *see also § 3.10 above* (discussing procedure under *Fed. R. Civ. P. 26(b)(5)(B)*).

The Rule governs only disclosure made at the federal level, either in a federal proceeding or to a federal office or agency. *Fed. R. Evid. 502(a).* The Rule applies in federal court even in diversity cases or in other situations where state law provides the rule of decision. *Fed. R. Evid. 502(f)*; *see Fed. R. Evid. 501*; *see also § 3.04[3] above.*

State courts are bound by the Rule only under the following circumstances:

1. The disclosure was made at the federal level; and

2. A federal court entered an order providing that the disclosure did not constitute a waiver.

See Fed. R. Evid. 502(d); *Fed. R. Evid. 502*, Committee Note of Nov. 28, 2007.

A disclosure made in a state proceeding, that was not the subject of a state court order concerning waiver, does not operate as a waiver at the federal level under either of the following conditions:

1. The disclosure would not be a waiver had it been made in a federal proceeding; or

2. The disclosure would not be a waiver under the law of the state where the disclosure occurred.

See Fed. R. Evid. 502(c).

Under the Rule, parties in a federal proceeding can enter into a confidentiality agreement to protect against waiver in the proceeding. However, such agreement does not bind nonparties unless it was incorporated into a court order. *See Fed. R. Evid. 502(e).*



Warning:

A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances in which it is clear that the materials were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer, and abide by the instructions of the lawyer who sent them. Part of the duty to prevent and remedy inadvertent disclosure falls on the lawyer in receipt of that inadvertent disclosure. *Gomez v. Vernon, 255 F.3d 1118, 1131-1132 (9th Cir. 2001)* (*quoting* ABA Comm. on Ethics & Prof'l Responsibility, Formal Opinion 368 (1992)) (setting forth attorney's ethical obligations).

[4] Placing Matter in Controversy Waives Privilege

If the claims of a plaintiff put at issue the very matters that the plaintiff alleges are within the protection of the attorney-client privilege, the privilege is waived. *United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991)* ("[T]he privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications."). The same rule applies to defendants in an action, so that raising advice of counsel as a defense waives any attorney-client privilege as to communications between defendant and counsel on those particular claims *See, e.g., Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162-1163 (9th Cir. 1992)* (privilege waived to extent defendant claimed that its tax position reasonable because based on advice of counsel); *see also § 3.17[6][b] above* (malpractice claims).

An "advice of counsel" waiver arises when: (1) assertion of the privilege was a result of some affirmative act, such as filing suit by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to its defense. *See Anchondo v. Anderson, Crenshaw, & Assocs., L.L.C., 256 F.R.D. 661, 669 (D.N.M. 2009)* (party may waive attorney-client privilege by placing information protected by privilege in issue through some affirmative act for party's own benefit).

The Second Circuit has held that a party must actually rely on privileged advice from counsel to make a claim or defense in order to effect a waiver of the privilege under the "advice of counsel" theory. Absent reliance on the privileged information, there is no unfairness, and therefore, no reason to find a waiver of the privilege. *See In re*

County of Erie, 546 F.3d 222, 229 (2d Cir. 2008) (whether "fairness" requires disclosure is decided on case-by-case basis, and depends primarily on specific context in which privilege is asserted); *see also Trs. of the Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc., 266 F.R.D. 1, 13 (D.D.C. 2010)* (court adopted Second Circuit's approach and held that, to put advice "at issue" so as to forfeit privilege, party must rely on privileged advice from counsel "to make his claim or defense").



Strategic Point:

Under some circumstances, a defendant may assert that the plaintiff has impliedly waived the attorney-client privilege. For example, in a patent infringement action the defendant may assert inequitable conduct or fraud on the U.S. Patent and Trademark Office by the plaintiff and request production of documents that the plaintiff claims are privileged to demonstrate the guilty knowledge of the plaintiff. In such a case, the defendant should first move for *in camera* review of the contested documents, rather than outright disclosure. *See, e.g. Genentech, Inc. v. Insmed Inc., 233 F.R.D. 556, 558-562 (N.D. Cal. 2006)* (*in camera* review granted: if documents contained information probative of inventor's knowledge, they would be relevant to defense of inequitable conduct which could defeat patent infringement case).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.49.*
- *Weinstein's Federal Evidence (2d ed.) §§ 503.40 -503.43, 512.05.*
- *Bender's Federal Practice Forms* Form No. 26:32.
- *Fed. R. Civ. P. 26* (disclosures and discovery).
- *Fed. R. Evid. 501* (law governing privileges).
- *Fed. R. Evid. 502* (attorney-client privilege and work product limitations on waiver).



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART D: ASSERTING PHYSICIAN-PATIENT PRIVILEGE

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.19

§ 3.19 Checklist for Physician-Patient Privilege

☐ Determine whether federal statute or federal regulation applies. *See § 3.20[1] below*.

☐ Determine whether state privilege law applies. *See §§ 3.04[3], 3.04[4] above*. *See also § 3.20[2] below*.

- ○ Check state law definitions.
- ○ Check state law exceptions.

☐ Determine whether privilege claim has been properly raised. *See §§ 3.07-3.13 above*.

- ○ Determine if timely.
- ○ Determine if expressly raised.
- ○ Determine if grounds stated.
- ○ Determine if sufficient description of withheld material or testimony.

☐ Determine whether claim of privilege waived. *See § 3.09 above*.

☐ Claimant:

- Keep privilege log. *See § 3.13 above*.
- Consider motion for protective order under Rule 26(c). *See § 3.11 above*.

☐ Opponent:

- Consider motion to compel under Rule 37(a). *See § 3.12 above*.

☐ **Search by Topic:** Evidence > Privileges > Doctor-Patient Privilege



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.20

§ 3.20 Understanding Applicable Law

[1] No Federal Common Law Physician-Patient Privilege Exists

The physician-patient privilege is not recognized in the federal common law, federal statutes, or the U.S. Constitution. *Whalen v. Roe, 429 U.S. 589, 602 n.28, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977)* (no physician-patient privilege at common law); *Patterson v. Caterpillar, Inc., 70 F.3d 503, 506 (7th Cir. 1995)* ("[F]ederal common law does not recognize a physician-patient privilege."); *see also Washington v. Randall-Owens, 2007 U.S. Dist. LEXIS 28484, at *15 (E.D. Mich. 2007)* (noting that Congress has not codified the physician-patient privilege). In a federal question case in which federal law governs privileges, any physician-patient privilege that might be recognized by state law is inapplicable when inconsistent with the application of federal law. *Fed. R. Evid. 501*; *see also United States ex rel. Roberts v. QHG of Ind., Inc., 1998 U.S. Dist. LEXIS 23512, at *27 (N.D. Ind. 1998)* (Indiana law "void and of no effect" in determining issue of physician-patient privilege in federal False Claims Act case); *Galarza v. United States, 179 F.R.D. 291, 293-294 (S.D. Cal. 1998)* (state doctor-patient privilege inapplicable in Federal Tort Claims Act case); *see also § 3.04 above*.

Exception:

Though federal *common law* does not recognize any physician-patient privilege, federal *statutes* or *regulations* may provide an independent basis for restricting access to medical records. *United States ex rel. Chandler v. Cook County, 277 F.3d 969, 981-982 (7th Cir. 2002) , aff'd on other grounds, 538 U.S. 119 (2002)* (granting mandamus to review discovery order compelling production of patient records from county hospital when federal regulation restricted release of the data); *see also 45 C.F.R. § 164.508 et seq* . (regulations under Health Insurance Portability and Accountability Act for discovery of medical and health information of individuals whose records are held by health plans, clearinghouses, or health care providers); *see also § 3.05 above*.

[2] State Privilege Law Applies in Diversity Actions

In diversity actions, state law determines whether and how the physician-patient privilege applies. *Massachusetts Mut. Life Ins. Co. v. Brei, 311 F.2d 463, 466 (2d Cir. 1962)* (in diversity actions, state rule as to patient-physician privilege should govern as privilege rules are classified as substantive or quasi-substantive and not procedural); *see also Patton v. Novartis Consumer Health, Inc., 2005 U.S. Dist. LEXIS 15453, at *2-*3 (S.D. Ind. 2005)* (applying Indiana state law

on issue of physician-patient privilege in diversity action); *see also § 3.04 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.50[3].*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 514.
- *Bender's Federal Practice Forms* Form Nos. 26:30, 26:31.
- *Cappetta v. GC Servs. L.P., 266 F.R.D. 121, 126 (E.D. Va. 2009)* (court refused to quash subpoena seeking plaintiff's medical records on grounds of physician-patient privilege because federal courts have not recognized physician-patient privilege).



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART E: ASSERTING PSYCHOTHERAPIST-PATIENT PRIVILEGE

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.21

§ 3.21 Checklist for Psychotherapist-Patient Privilege

☐ Determine whether federal common law or state privilege law applies. *See § 3.04 above; § 3.22[1] below*.

☐ Determine whether there has been communication with licensed professional, and whether communication was confidential. *See § 3.22[2] below*.

☐ Determine whether privilege claim has been properly raised. *See §§ 3.07-3.13 above*.

- ○ Determine if timely.
- ○ Determine if expressly raised.
- ○ Determine if grounds stated.
- ○ Determine if sufficient description of withheld material or testimony.

☐ Determine whether claim of privilege waived. *See § 3.09 above*.

- ○ Determine if mental condition of patient is in controversy. *See § 3.23 below*.

☐ Determine whether exception to privilege applies.

- ○ Crime-fraud exception. *See § 3.24[1] below*.

- Dangerous patient exception. *See § 3.24[2] below*.

☐ Claimant:

- Keep privilege log. *See § 3.13 above*.
- Consider motion for protective order under Rule 26(c). *See § 3.11 above*.

☐ Opponent:

- Consider motion to compel under Rule 37(a). *See § 3.12 above*.

☐ **Search by Topic:** Evidence > Privileges > Psychotherapist-Patient Privilege



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.22

§ 3.22 Understanding Applicable Law

[1] Psychotherapist-Patient Privilege Is Part of Federal Common Law

Federal common law recognizes the psychotherapist-patient privilege. *Jaffee v. Redmond, 518 U.S. 1, 11-15, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)* (finding existence of psychotherapist-patient privilege under federal law); *see also § 3.04 above*.

[2] Understanding Confidential Communications with Licensed Professionals Protected

An absolute privilege exists for confidential communications between a licensed psychotherapist and patient in the course of diagnosis or treatment. The privilege extends to licensed social workers engaged in psychotherapy. *Jaffee v. Redmond, 518 U.S. 1, 11-15, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)* (holding that confidential communications between licensed psychotherapist or clinical social worker and client are protected under federal law).

Unlicensed professionals, such as social workers and professional counselors generally are not covered by the privilege. *See, e.g., United States v. Schwensow, 151 F.3d 650, 658 (7th Cir. 1998)* (volunteer telephone operators at Alcoholics Anonymous center not covered by the privilege); *In re Madison, 687 F. Supp. 2d 103, 122-123 (E.D.N.Y. 2009)* (noting that New York extends psychotherapist-patient privilege only to licensed social workers, district court refused to extend privilege to cover communications with unlicensed social workers); *Student 1 v. Williams, 206 F.R.D. 306, 310 (S.D. Ala. 2002)* (federal psychotherapist-patient privilege does not extend to unlicensed social workers or unlicensed professional counselors).

Exception:

The Ninth Circuit has extended the privilege to unlicensed counselors working at Employee Assistance Programs. *See, e.g., Oleszko v. State Comp. Ins. Fund, 243 F.3d 1154, 1157 (9th Cir. 2001)* (extending privilege because "EAP's purpose is to provide counseling. EAP personnel are trained as counselors, are held out as counselors in the workplace, and, like psychotherapists, their job is to extract personal and often painful information from employees in order to determine how best to assist them").

The communication must be confidential for the privilege to apply. *Siegel v. Abbottstown Borough, 2004 U.S. Dist. LEXIS 1284, at *9-*11 (M.D. Pa. 2004)* ("[C]onfidentiality is the foundation upon which the psychotherapist-patient

privilege rests."). If a patient makes a communication expecting it to be disclosed to a third party who is not involved in the patient's treatment, the privilege does not attach. *See, e.g., Kamper v. Gray, 182 F.R.D. 597, 599 (E.D. Mo. 1998)* (report of psychological evaluation of applicant for position of undercover police officer not privileged because applicant understood results would be submitted to employer).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.50[5].*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 504.



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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.23

§ 3.23 Waiving Psychotherapist-Patient Privilege by Placing Mental Condition in Controversy

The federal psychologist-patient privilege may be waived when the patient is a litigant and has placed his or her mental or emotional condition in controversy under certain circumstances.

Two circuit courts of appeal have held that a plaintiff does not waive the psychotherapist-patient privilege merely by asserting a claim for injuries that do not include emotional damage; a plaintiff does not forfeit the privilege by merely stating that he or she suffers from a condition such as depression or anxiety for which the plaintiff does not seek damages; a plaintiff may withdraw or formally abandon all claims for emotional distress in order to avoid forfeiting the psychotherapist-patient privilege; and a party's psychotherapist-patient privilege is not overcome when his or her mental state is put in issue only by another party. *See In re Sims, 534 F.3d 117, 134 (2d Cir. 2008)* (case of first impression in Second Circuit); *Koch v. Cox, 489 F.3d 384, 390-391 (D.C. Cir. 2007)* (plaintiff does not put mental state at issue merely by acknowledging that he or she suffers from depression, for which no recompense is sought).

Circuit Split:

Courts are split as to the type of conduct that constitutes a waiver. Courts have generally recognized two lines of cases characterized as either a broad view of waiver or a narrow approach. The broad view of waiver holds that when a party makes a claim for emotional distress damages, the privilege has been waived in its entirety. *See, e.g., Sarko v. Penn-Del Directory Co., 170 F.R.D. 127, 130 (E.D. Pa. 1997)* (privilege waived solely by placing emotional or mental condition in issue); *EEOC v. Danka Industries, 990 F. Supp. 1138, 1142 (E.D. Miss. 1997)* (same). Under the narrow approach, the privilege is waived only when the plaintiff introduces privileged communications in evidence either directly or by calling the particular psychotherapist as a witness. *See, e.g., Fitzgerald v. Cassil, 216 F.R.D. 632, 639 (N.D. Cal. 2003)* (narrow approach); *Vanderbilt v. Town of Chilmark, 174 F.R.D. 225, 228-229 (D. Mass. 1997)* ("privilege is waived if the communication between a psychotherapist and a patient is, itself, put at issue by the client" and used as evidence). Courts adopting this approach analogize the psychotherapist-patient privilege to the attorney-client privilege and hold that the same rules of waiver should apply. *See, e.g., Koch v. Cox, 489 F.3d 384, 391 (D.C. Cir. 2007)* (holding that litigant waives psychotherapist-patient privilege when litigant does sort of thing that would waive attorney-client privilege, such as basing his claim on the psychotherapist's communications with him or selectively disclosing part of privileged communication in order to gain advantage in litigation.). Under this approach, the mere assertion that the

defendant's alleged misconduct caused emotional harm to plaintiff is insufficient to waive the privilege. *See Hucko v. City of Oak Forest, 185 F.R.D. 526, 529 (N.D. Ill. 1999)* (plaintiff must take affirmative step in the litigation to place his or her diagnosis or treatment in issue, by offering evidence of psychiatric treatment or medical expert testimony to establish claim of emotional harm); *see also § 3.18[4] above*. A third, "middle approach," to the issue holds that a mere request for incidental damages for emotional distress or "garden variety" type claims of mental anguish or emotional distress do not waive the privilege, as contrasted with complex claims that allege a specific psychiatric disorder or severe mental anguish that prevents a person from working. *Cappetta v. GC Servs. L.P., 266 F.R.D. 121, 126 (E.D. Va. 2009)* (court adopted what it described as "middle ground approach to waiver" in ruling that no waiver flows from emotional damage claims incidental to other claims, or from claims in which emotional distress damages do not predominate); *Ruhlmann v. Ulster County Dep't of Soc. Servs., 194 F.R.D. 445, 451 (N.D.N.Y. 2000)* (privilege not waived by seeking incidental emotional distress damages); *see also Bargen v. United States, 2007 U.S. Dist. LEXIS 81639, at *3 (N.D. Cal. 2007)* (noting that claims for "unusually severe emotional distress," or for a "specific" or "ongoing" mental or emotional condition places mental condition in controversy waiving privilege).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.49[5], 26.50[5].*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 504.



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART E: ASSERTING PSYCHOTHERAPIST-PATIENT PRIVILEGE

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.24

§ 3.24 Applying Exceptions to Psychotherapist-Patient Privilege

[1] Crime-Fraud Exception

The First Circuit has recognized the crime-fraud exception when the purpose of the patient's communication is to further or promote a crime or fraud. *In re Grand Jury Proceedings (Violette), 183 F.3d 71, 77 (1st Cir. 1999)* ("Only when communications are intended directly to advance a particular criminal or fraudulent endeavor will their privileged status be forfeited by operation of this exception."). At least two other courts have expressly reserved the issue without deciding whether the exception should apply. *United States v. Auster, 517 F.3d 312, 320 (5th Cir. 2008)* (reserving the issue); *United States v. Chase, 340 F.3d 978, 992 n.8 (9th Cir. 2003)* (same); *see also § 3.17[6][a] above*.

[2] Dangerous-Patient Exception

A dangerous-patient exception may apply when determining whether a communication between a psychotherapist and patient is privileged.

Circuit Split:

Courts are split as to whether a dangerous-patient exception applies. The Ninth and Sixth Circuits have expressly declined to recognize a dangerous-patient exception to the federal psychotherapist-patient privilege. *United States v. Chase, 340 F.3d 978, 981 (9th Cir. 2003)* ("[T]here is no dangerous-patient exception to the federal psychotherapist-patient testimonial privilege."); *United States v. Hayes, 227 F.3d 578, 584-586 (6th Cir. 2000)* (same). The Fifth and Tenth Circuits have held that the exception does apply. *United States v. Auster, 517 F.3d 312, 320 (5th Cir. 2008)* (recognizing exception); *United States v. Glass, 133 F.3d 1356, 1360 (10th Cir. 1998)* (same).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.49[5], 26.50[5].*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 504.



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART F: ASSERTING CLERGY-PENITENT PRIVILEGE

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.25

§ 3.25 Checklist for Clergy-Penitent Privilege

☐ Determine whether federal common law or state privilege law applies. *See § 3.04 above*; *§ 3.26[1] below*.

☐ Determine whether there has been communication with clergy member. *See § 3.26[2] below*.

- ○ Determine if communication confidential.
- ○ Determine if communication made during spiritual counseling

☐ Determine whether privilege claim has been properly raised. *See §§ 3.07-3.13 above*.

- ○ Determine if timely.
- ○ Determine if expressly raised
- ○ Determine if grounds stated.
- ○ Determine if sufficient description of withheld material or testimony.

☐ Determine whether claim of privilege waived. *See § 3.09 above*.

☐ Claimant:

- Keep privilege log. *See § 3.13 above*.
- Consider motion for protective order under Rule 26(c). *See § 3.11 above*

☐ Opponent:

- Consider motion to compel under Rule 37(a). *See § 3.12 above*.

☐ **Search by Topic:** Evidence > Privileges > Clergy Communications



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART F: ASSERTING CLERGY-PENITENT PRIVILEGE

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.26

§ 3.26 Understanding Applicable Law

[1] Clergy-Penitent Privilege Is Part of Federal Common Law

Federal common law recognizes a clergy-penitent privilege. *Mullen v. United States, 263 F.2d 275, 280 (D.C. Cir. 1958)* (recognizing privilege); *see also Trammel v. United States, 445 U.S. 40, 51, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980)* (recognizing privilege in dicta); *Mockaitis v. Harcleroad, 104 F.3d 1522, 1532 (9th Cir. 1995)* (noting that "[t]he evidentiary [clergy-penitent] privilege as it has existed in the United States has been broadly recognized and affirmed in dicta by the Supreme Court"); *see also § 3.04[1] above*.

[2] Privilege Applies to Spiritual Counseling

The federal clergy-penitent privilege applies only to communications between a penitent and a clergyperson that are made to the minister in a spiritual capacity to obtain spiritual aid or counseling. *Mullen v. United States, 263 F.2d 275, 277 (D.C. Cir. 1958)* (privilege applies to any "confession by a penitent to a minister in his capacity as such to obtain such spiritual aid as was sought and held out").

[3] State Statutory Provisions Apply in Diversity Actions

In diversity actions, state statutory provisions determine whether and how the clergy-penitent privilege applies. *Mockaitis v. Harcleroad, 104 F.3d 1522, 1532 (9th Cir. 1997)* (applying Oregon statutory provisions and noting that "[a]ll fifty states have enacted statutes 'granting some form of testimonial privilege to clergy-communicant communications' "; *see also § 3.04 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.50[4].*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 506.



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART G: ASSERTING MARITAL PRIVILEGES

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.27

§ 3.27 Checklist for Marital Privileges

☐ Determine whether federal common law or state privilege law applies. *See § 3.04 above*; *§ 3.28[1] below*.

☐ Determine whether confidential marital communication privilege applies. *See § 3.28[2] below*:

- ○ Determine if valid marriage.
- ○ Determine if communication made during marriage.
- ○ Determine if communication confidential.
- ○ Determine if criminal activities exception applies.

☐ Determine whether adverse testimony privilege applies. *See § 3.28[3] below*:

- ○ Determine if valid marriage at time of testimony.
- ○ Determine if privilege holder is willing to testify against spouse.

☐ Determine whether privilege claim has been properly raised. *See §§ 3.07-3.13 above*:

- ○ Determine if timely.

- Determine if expressly raised
- Determine if grounds stated.
- Determine if sufficient description of withheld material or testimony.

☐ Determine whether claim of privilege waived. *See § 3.09 above*.

☐ Claimant:

- Keep privilege log. *See § 3.13 above*.
- Consider motion for protective order under Rule 26(c). *See § 3.11 above*.

☐ Opponent:

- Consider motion to compel under Rule 37(a). *See § 3.12 above*.

☐ **Search by Topic:** Evidence > Privileges > Marital Privileges



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART G: ASSERTING MARITAL PRIVILEGES

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.28

§ 3.28 Understanding Applicable Law

[1] Privileges Are Part of Federal Common Law

Federal common law recognizes two marital privileges:

1. The confidential communications privilege. *Wolfle v. United States, 291 U.S. 7, 13, 54 S. Ct. 279, 78 L. Ed. 617 (1934)* (recognizing privilege for confidential communications between spouses); *Blau v. United States, 340 U.S. 332, 333, 71 S. Ct. 301, 95 L. Ed. 306 (1951)* (same).

2. The adverse testimony privilege. *Trammel v. United States, 445 U.S. 40, 53, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980)* (setting forth requirements of adverse testimony privilege); *see also United States v. Griffin, 440 F.3d 1138, 1143 (9th Cir. 2006)* (discussing marital privilege under federal common law).

[2] When Privilege Exists for Confidential Marital Communications

Private communications between spouses are generally assumed to have been intended to be confidential and thus are privileged. *Wolfle v. United States, 291 U.S. 7, 13, 54 S. Ct. 279, 78 L. Ed. 617 (1934)* (marital communications privilege).

For the privilege to apply, the following elements must be present:

1. A valid marriage; and

2. A confidential communication.

United States v. Montgomery, 384 F.3d 1050, 1055 (9th Cir. 2004) (setting forth elements of marital communications privilege under federal law); *see also Knepp v. United Stone Veneer, LLC, 2007 U.S. Dist. LEXIS 65423, at *10-*11 (M.D. Pa. 2007)* (same).

The majority of courts hold that communicative acts are privileged. *See, e.g., United States v. Bahe, 128 F.3d 1440, 1443 (10th Cir. 1997)* (observing that acts between spouses intended to convey a confidential message are protected by

the martial communications privilege); *United States v. Estes, 793 F.2d 465, 467 (2d Cir. 1986)* (same); *United States v. Robinson, 763 F.2d 778, 783 (6th Cir. 1985)* (same); *United States v. Ferris, 719 F.2d 1405, 1408 (9th Cir. 1983)* (same); *United States v. Smith, 533 F.2d 1077, 1079 (8th Cir. 1976)* (same); *United States v. Lewis, 433 F.2d 1146, 1150 (D.C. Cir. 1970)* (same).

The marital communications privilege applies only to confidential communications between spouses, so that the simultaneous presence of a third party makes the privilege inapplicable. *Wolfle v. United States, 291 U.S. 7, 13, 54 S. Ct. 279, 78 L. Ed. 617 (1934)* (letter to wife that was dictated to stenographer could not be within marital communications privilege).

Exception:

The marital communications privilege does not apply to communications relating to a crime against the person or property of the spouse, or the person or property of a child of either spouse. *See, e.g., United States v. Bahe, 128 F.3d 1440, 1445 (10th Cir. 1997)* ("[T]he marital communications privilege should not apply to statements relating to a crime where a spouse or a spouse's children are the victims."); *United States v. White, 974 F.2d 1135, 1137-1138 (9th Cir. 1992)* (in prosecution for murder of child, privilege inapplicable to death threats made by defendant against spouse and victim); *United States v. Allery, 526 F.2d 1362, 1365 (8th Cir. 1975)* (exception applied); *United States v. Morris, 2006 U.S. Dist. LEXIS 71774, at *6 (M.D. Ala. Sept. 29, 2006)* ("A defendant spouse may not commit abuse or another offense and then hide behind the marital privilege to shield himself from criminal prosecution based on that abuse.").

Exception:

The marital communications privilege does not apply to communications having to do with present or future crimes in which both spouses are participants. *See, e.g., United States v. Marashi, 913 F.2d 724, 731 (9th Cir. 1990)* ("[T]he marital communications privilege does not apply to statements made in furtherance of joint criminal activity"); *see also United States v. Sims, 755 F.2d 1239, 1243 (6th Cir. 1985)* (adopting exception but narrowly construing it to apply only to "those conversations that pertain to patently illegal activity"); *see also §§ 3.17[6][a], 3.24[1] above*.

[3] When Privilege Exists for Spouse's Adverse Testimony

In order to invoke the marital adverse testimony privilege, the spouse from whom testimony is sought must be validly married under state law at the time of the sought testimony. *United States v. Lustig, 555 F.2d 737, 747-748 (9th Cir. 1977)* (because Alaska does not recognize common law marriage, defendant was not married and could not claim marital adverse testimony privilege); *see also United States v. Hakim, 2002 U.S. Dist. LEXIS 25886, at *5 (E.D. Pa. 2002)* ("While federal law governs the application of the spousal privilege the question of who is a spouse depends on the law of the domiciliary").

Exception:

The marital adverse testimony privilege is inapplicable when the marriage is a sham. *See, e.g., United States v. Saniti, 604 F.2d 603, 604 (9th Cir. 1979)* (recognizing sham marriage exception to the marital privilege of not having to testify against a spouse); *United States v. Apodaca, 522 F.2d 568, 571 (10th Cir. 1975)* ("[A]ppellant may not avail himself of the asserted privilege because it is based upon a fraudulent, spurious marriage that was not entered into in good faith.").

The marital adverse testimony privilege permits a spouse to elect not to provide adverse testimony against the other spouse in a criminal proceeding. The adverse testimony privilege belongs to the spouse from whom testimony is sought, not to the accused spouse, thus, the accused spouse may not invoke the privilege to exclude voluntary testimony. *Trammel v. United States, 445 U.S. 40, 51-53, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980)* (setting forth parameters of the privilege). The marital adverse testimony privilege lasts only as long as the marriage lasts, so that termination of the

marriage by death or divorce also terminates the privilege. *Campinas Found. v. Simoni, 2005 U.S. Dist. LEXIS 7574, at *9 (S.D.N.Y. 2005)* (adverse spousal testimony privilege does not apply once marriage is terminated).

Circuit Split:

Courts are split as to whether there should be an exception to the privilege against adverse spousal testimony when the spouses are joint participants in a crime. The Third, Second and Ninth Circuits have rejected the exception. *Appeal of Malfitano, 633 F.2d 276, 278 (3d Cir. 1980)* (rejecting a joint participants exception); *In re Grand Jury Subpoena United States, 755 F.2d 1022, 1028 (2d Cir. 1985)* , *vacated on other grounds sub nom. United States v. Koecher, 475 U.S. 133 (1986)* (same); *United States v. Ramos-Oseguera, 120 F.3d 1028, 1042 (9th Cir. 1997)* (same); *see also A.B. v. United States, 24 F. Supp. 2d 488, 493 (D. Md. 1998)* (rejecting exception). The Seventh Circuit has upheld the exception. *United States v. Van Drunen, 501 F.2d 1393, 1397 (7th Cir. 1974)* (recognizing exception); *see also United States v. Clark, 712 F.2d 299, 300 (7th Cir. 1983)* (reaffirming its holding in *Van Drunen*).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.42.*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 505.



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART H: ASSERTING FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.29

§ 3.29 Checklist for Privilege Against Self-Incrimination

☐ Determine whether *Fifth Amendment* privilege applies. *See §§ 3.07-3.13 above*; *§ 3.30 below*.

- ○ Determine if claimant is natural person.
- ○ Determine if claim is for testimony.
- ○ Determine if claimant has reasonable expectation of potential prosecution.

☐ Determine whether privilege claim has been properly raised. *See § 3.30 below*.

- ○ Consider that privilege must be claimed on question-by-question basis. *See § 3.30[5] below*.

☐ Claimant:

- ○ Keep privilege log. *See § 3.13 above*.
- ○ Consider motion for protective order under Rule 26(c). *See § 3.11 above*.

☐ Opponent:

- ○ Consider motion to compel under Rule 37(a). *See § 3.12 above*.

☐ **Search by Topic:** Evidence > Privileges > Self-Incrimination Privilege



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART H: ASSERTING FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.30

§ 3.30 Understanding Applicable Law

[1] Only Natural Persons Have Fifth Amendment Rights

The *Fifth Amendment* and the other provisions of the *Bill of Rights* establish the rights of individuals, so that only natural persons have *Fifth Amendment* rights. *See, e.g., Hale v. Henkel, 201 U.S. 43, 69-70, 26 S. Ct. 370, 50 L. Ed. 652 (1906)* (*Fifth Amendment* protects individuals not corporations); *United States v. White, 322 U.S. 694, 699, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944)* (*Fifth Amendment* applies only to natural persons).

Warning:

Corporations, associations, partnerships, labor unions, governmental bodies or agencies, and other artificial entities do not have *Fifth Amendment* rights and may not resist discovery on self-incrimination grounds. *Hale v. Henkel, 201 U.S. 43, 69-70, 26 S. Ct. 370, 50 L. Ed. 652 (1906)* (corporation); *United States v. White, 322 U.S. 694, 699, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944)* (labor union). An individual may not rely upon the privilege to avoid producing the records of such an entity which are in his possession in a representative capacity, even if these records might incriminate him personally. *Bellis v. United States, 417 U.S. 85, 88, 94 S. Ct. 2179, 40 L. Ed. 2d 678 (1974)* (explaining that individual cannot resist discovery of entity's records under *Fifth Amendment* privilege); *United States v. Blackman, 72 F.3d 1418, 1426-1427 (9th Cir. 1995)* (partner in law firm could not invoke *Fifth Amendment* as to production of documents belonging to firm).

[2] Privilege Extends to Testimony Only

The *Fifth Amendment* privilege protects only against compelled *testimony*, so that a person may be compelled to engage in certain *conduct* even if that conduct may produce incriminating evidence. *See, e.g., Schmerber v. California, 384 U.S. 757, 763-764, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)* (compelled blood sample).

A person may be compelled to produce documentary evidence even though the contents of those documents might incriminate the person. *See, e.g., Fisher v. United States, 425 U.S. 391, 409-410, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976)* (documents voluntarily prepared are not "compelled testimony" within meaning of the *Fifth Amendment*). The actual production of the documents, however, may have a testimonial aspect, and to the extent that it does, the privilege

protects the individual from compelled production. *United States v. Hubbell, 530 U.S. 27, 35-43, 120 S. Ct. 2037, 147 L. Ed. 2d 24 (2000)* (act of producing documents in response to subpoena may have "compelled testimony aspect" so that privilege applies).

[3] Reasonable Belief in Possibility of Potential Prosecution Is Sufficient

The *Fifth Amendment* provides protection whenever the holder of the privilege has a reasonable belief in the possibility of criminal prosecution, and there is no requirement that such a prosecution be imminent or even likely. *United States v. Boothe, 335 F.3d 522, 526 (6th Cir. 2003)* (*Fifth Amendment* privilege against self incrimination applies when there is "a reasonable fear of danger of prosecution"). But the risk of incrimination must be "real and appreciable." *United States v. Antelope, 395 F.3d 1128, 1134 (9th Cir. 2005)* (" 'If the threat is remote, unlikely, or speculative, the privilege does not apply' ").

Warning:

The *Fifth Amendment* provides protection only as to domestic criminal prosecutions, i.e., prosecution by the federal government, or one of the States or its political subdivisions. If the declarant fears foreign prosecution, the *Fifth Amendment* provides no protection. *United States v. Balsys, 524 U.S. 666, 669, 118 S. Ct. 2218, 141 L. Ed. 2d 575 (1998)* (concern of foreign prosecution is beyond scope of *Fifth Amendment*).

[4] Civil Litigant May Invoke Fifth Amendment

Although the *Fifth Amendment* provides protection only from criminal prosecution, a civil litigant may invoke the privilege, including in discovery, to avoid providing evidence that might be used in a subsequent criminal prosecution. *Kastigar v. United States, 406 U.S. 441, 444, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972)* (the *Fifth Amendment* privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory").

Warning:

Though the invocation of the *Fifth Amendment* may not be used against the claimant in criminal prosecutions, adverse inferences may be drawn from the invocation of the privilege in civil litigation. *Mitchell v. United States, 526 U.S. 314, 328, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999)* (explaining that the rule allowing adverse inferences in civil cases accommodates right against self-incrimination while still permitting civil litigation to proceed). *See Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc., 561 F.3d 1298, 1304 (11th Cir. 2009)* (trial court properly drew inference that party maintained ability to monitor opposing party's confidential emails after party invoked *Fifth Amendment* in response to questions about how he intercepted other party's privileged communications). If the invocation of the privilege is sufficiently prejudicial to the civil litigation opponent, the claims or defenses of the party claiming the privilege may be dismissed. *See Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc., 561 F.3d 1298, 1305 (11th Cir. 2009)* (dismissal "for hiding behind the *Fifth Amendment* may be employed as a remedy of last resort to prevent unfairness" after court has balanced relative weights of parties' competing interests); *Serafino v. Hasbro, Inc., 82 F.3d 515, 517-519 (1st Cir. 1996)* (discussing court's need to balance one party's *Fifth Amendment* privilege against unfairness to opponent and recognizing court's power to dismiss even in light a of a proper invocation of the privilege).

[5] Privilege Must Be Claimed on Question-by-Question Basis

The *Fifth Amendment* privilege does not operate as a blanket protection from questioning or discovery, but instead must generally be asserted on an issue-by-issue basis to be effective. *See, e.g., United States v. Blackman, 72 F.3d 1418, 1426 (9th Cir. 1995)* (IRS summons could not be resisted on *Fifth Amendment* grounds; instead, party must appear as

summoned and raise objection to particular questions); *United States v. Allshouse, 622 F.2d 53, 57 (3d Cir. 1980)* (*Fifth Amendment* privilege must be asserted as to each question); *United States v. Carlin, 2006 U.S. Dist. LEXIS 64910, at *3 (E.D. Pa. 2006)* ("blanket assertion" of privilege not allowed).

[6] Privilege Applies to State-Law Claims

Federal standards govern whether the self-incrimination privilege is asserted in state or federal court or on state law claims adjudicated in federal court. *See, e.g., Malloy v. Hogan, 378 U.S. 1, 11, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)* ("[T]he same standards must determine whether an accused's silence in either a federal or state proceeding is justified."); *Raimo v. Waddy, 2004 U.S. Dist. LEXIS 20499, at *5 (E.D. Pa. 2004)* (applying federal interpretation of right against self-incrimination because "unlike evidentiary privileges under *Fed. R. Evid. 501*, the privilege against self-incrimination is a right guaranteed by the United States Constitution"); *but see California v. Ramos, 463 U.S. 992, 1014, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983)* ("States are free to provide greater protections ... than the Federal Constitution requires"); *see also § 3.04 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.51*.
- *Weinstein's Federal Evidence (2d ed.) § 513.04*.
- *U.S. Const., amend. V*.
- *Fed. R. Civ. P. 26* (disclosures and discovery).
- *Fed. R. Civ. P. 34* (production of documents).
- *Fed. R. Evid. 501* (law governing privilege).
- *In re Grand Jury Subpoena Issued June 18, 2009, 593 F.3d 155, 158 (2d Cir. 2010)* (custodian of corporate records cannot refuse to produce corporate records on *Fifth Amendment* grounds, no matter how small the corporation is; even "a one-person corporation cannot avail itself of the *Fifth Amendment* privilege").



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART I: ASSERTING QUALIFIED PRIVILEGE OF JOURNALIST TO PROTECT SOURCES

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.31

§ 3.31 Checklist for Journalist's Privilege

☐ Determine whether qualified *First Amendment* privilege applies. *See § 3.32 below*.

☐ Determine whether claim of privilege can be defeated by need for information. *See § 3.32[2] below*.

☐ Determine whether privilege claim has been properly raised. *See §§ 3.07-3.13 above*. *See also § 3.32[3] -[5] below*.

- ○ Determine if timely.
- ○ Determine if expressly raised
- ○ Determine if grounds stated.
- ○ Determine if sufficient description of withheld material or testimony.

☐ Determine whether claim of privilege waived. *See § 3.09 above*.

☐ Claimant:

- ○ Keep privilege log. *See § 3.13 above*.
- ○ Consider motion for protective order under Rule 26(c). *See § 3.11 above*

☐ Opponent:

- ○ Consider motion to compel under Rule 37(a). *See § 3.12 above*.

☐ **Search by Topic:** Evidence > Privileges > Journalist's Privilege



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART I: ASSERTING QUALIFIED PRIVILEGE OF JOURNALIST TO PROTECT SOURCES

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.32

§ 3.32 Understanding Applicable Law

[1] First Amendment Protects Journalists

The majority of federal courts have recognized the propriety of a qualified journalists' privilege that derives from the *First Amendment* freedom of the press. *Branzburg v. Hayes, 408 U.S. 665, 680-682, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972)* (setting forth parameters of the privilege); *see also § 3.04 above*.

Circuit Split:

A majority of circuits have interpreted *Branzburg* as establishing a qualified privilege for journalists to resist compelled disclosure of information gathered in their work. *See, e.g, Shoen v. Shoen, 5 F.3d 1289, 1292 (9th Cir. 1993)* (interpreting *Branzburg* as establishing a qualified journalist's privilege). At least one circuit has interpreted *Branzburg* as denying a qualified *First Amendment* privilege to journalists. *Storer Communs. Inc. v. Giovan (In re Grand Jury Proceedings), 810 F.2d 580, 584 (6th Cir. 1987)* (rejecting position that qualified privilege exists).

[2] Privilege Is Qualified, Not Absolute

The privilege of a journalist to protect sources is qualified: it may be overcome by a showing that discovery of the materials sought from the journalist is appropriate under the circumstances. *Farr v. Pitchess, 522 F.2d 464, 468 (9th Cir. 1975)* (qualified privilege and the opposing need for disclosure must be "judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest").

[3] Privilege Applies to Both Confidential and Nonconfidential Information

Though the qualified journalist's privilege is designed generally to protect *confidential* sources of a journalist, confidentiality is not a prerequisite to the application of the privilege, as the privilege is designed to protect the news-gathering and dissemination process in general, not the specific context of confidential sources. *Titan Sports, Inc. v. Turner Broad. Sys. (In re Madden), 151 F.3d 125, 130 (3d Cir. 1998)* (test is whether individual is engaged in investigative, news-gathering process with intent to disseminate to public). That the information was not intended to be confidential, however, is an appropriate factor in considering whether discovery should be permitted. Generally, the privilege is narrower in those circumstances and the showing to overcome the privilege is less demanding. *Gonzales v.*

NBC, 194 F.3d 29, 35 (2d Cir. 1999) (for nonconfidential information, privilege is overcome by showing relevance to significant issue in case and that information is not readily obtainable from other sources); *see also Shoen v. Shoen, 5 F.3d 1289, 1295-1296 (9th Cir. 1993)* (reasoning that " 'the lack of a confidential source may be an important element in balancing the defendant's need for the material sought against the interest of the journalist in preventing production in a particular case' ").

[4] Privilege Applies to Any Information Intended to Be Disseminated to Public

Though the qualified journalist's privilege is often invoked as to members of the print or broadcast media, it is not so limited, and may be invoked by any person collecting information when the person has an intent to disseminate the information to the public. *See, e.g., Titan Sports, Inc. v. Turner Broad. Sys. (In re Madden), 151 F.3d 125, 130 (3d Cir. 1998)* (test is whether individual is engaged in investigative, news-gathering process with intent to disseminate to public); *Shoen v. Shoen, 5 F.3d 1289, 1292-1294 (9th Cir. 1993)* (author of investigative book is "journalist" entitled to invoke privilege).

[5] Party Seeking Discovery Must Show Requested Material Is Unavailable, Relevant, and Non-Cumulative

A litigant may be entitled to discovery despite a valid assertion of the qualified journalist's privilege by showing the following:

1. The requested material is unavailable despite exhaustion of all reasonable alternative sources;

2. The requested material is noncumulative; and

3. The requested material is clearly relevant to an important issue in the case.

Shoen v. Shoen, 48 F.3d 412, 416 (9th Cir. 1995) (setting forth test to overcome privilege).

The exhaustion element is applied fairly rigorously, so that the party seeking discovery must have exhausted all reasonable avenues of obtaining the desired information from another source. *Zerilli v. Smith, 656 F.2d 705, 713 (D.C. Cir. 1981)* ("Even when the information is crucial to a litigant's case, reporters should be compelled to disclose their sources only after the litigant has shown that he has exhausted every reasonable alternative source of information"); *see also § 3.07 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.48[1].*
- *U.S. Const. amend. I.*
- *Fed. R. Civ. P. 26* (disclosures and discovery).



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART J: ASSERTING DELIBERATIVE PROCESS PRIVILEGE

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.33

§ 3.33 Checklist for Deliberative Process Privilege

☐ Determine whether federal common law or state privilege law applies. *See § 3.04 above; see also § 3.34[1] below*.

☐ Determine whether government is withholding documents or testimony that reflects advisory opinions, recommendations, and deliberations. *See § 3.34 below*.

- ○ Determine if government decisionmaking process is involved. *See § 3.34[3] below*.
- ○ Determine if material withheld is pre-decisional. *See § 3.34[3] below*.
- ○ Determine if material withheld is related to process and not facts. *See § 3.34[6] below*.

☐ Determine whether claim has been properly raised. *See §§ 3.07-3.10, 3.13 above; see also § 3.34[4] -[7] below*.

- ○ Determine if formal claim of privilege was made after actual consideration by head of the department.
- ○ Determine if government provided precise and certain reasons for asserting confidentiality.
- ○ Determine if claim sufficiently identifies and describes information or documents sought to be shielded.

☐ Determine whether claim of privilege waived. *See § 3.09 above*.

☐ Claimant:

- ○ Keep privilege log. *See § 3.13 above*.
- ○ Consider motion for protective order under Rule 26(c). *See § 3.11 above*.

☐ Opponent:

- ○ Consider motion to compel under Rule 37(c). *See § 3.12 above*.

☐ **Search by Topic:** Evidence > Privileges > Government Privileges > Official Information Privilege > Deliberative Process Privilege



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.34

§ 3.34 Understanding Governing Law

[1] Federal Common Law Recognizes Qualified Deliberative Process Privilege

The deliberative process privilege allows the government to withhold documents or prevent testimony that reflects advisory opinions, recommendations, and deliberations comprising part of a process by which government decisions and policies are formulated. *See, e.g., Tigue v. United States DOJ, 312 F.3d 70, 76 (2d Cir. 2002)* (setting forth the parameters of the privilege); *FTC v. Warner Communications, Inc., 742 F.2d 1156, 1161 (9th Cir. 1984)* (same); *see § 3.04[1] above*.

[2] Privilege Protects Documents and Testimony

In most cases, litigants have invoked the deliberative process privilege to protect documents. *See, e.g. In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997)* (discussing the privilege in terms of documents and other materials); *North Pacifica, LLC v. City of Pacifica, 274 F. Supp. 2d 1118, 1120-1121 (N.D. Cal. 2003)* (noting that the privilege usually applies to documents). However, courts have applied the privilege to testimony as well as documents, and have made no distinction in the application of the privilege with respect to the two kinds of evidence. *See, e.g., Newport Pac., Inc. v. County of San Diego, 200 F.R.D. 628, 636-638 (S.D. Cal. 2001)* (discussing privilege with respect to depositions of legislative aides to county board); *Artfield Builders, Inc. v. Buffalo Grove, 1992 U.S. Dist. LEXIS 16328, at *4-*11 (N.D. Ill. 1992)* (discussing privilege with respect to depositions of village board members).

[3] Privilege Applies to Pre-Decisional Documents

The following two requirements must be met for the privilege to apply:

1. The information must be predecisional, meaning that it was prepared to assist the agency in making its decision; and

2. The information must be deliberative, in that it is actually related to the process by which policies formulated.

Nat'l Council of La Raza v. DOJ, 411 F.3d 350, 356 (2d Cir. 2005) (setting forth requirements); *Army Times*

Publishing Co. v. Department of Air Force, 998 F.2d 1067, 1069 (D.C. Cir. 1993) (same).

On the other hand, some courts have questioned whether the term "pre-decisional" should be strictly defined by these elements. First, these courts have concluded that the privilege should not turn on the ability to pinpoint a specific decision to which a document correlates because agencies are engaged in a continuing process of examining their policies. This process will generate memoranda that do not ripen into agency decisions. Second, it is misleading to suggest that the test is primarily temporal because the privilege may protect discussions occurring after the initial decision, such as, for example, continuing examination of existing policy. Instead, the court should focus on the purpose of the advice and whether disclosure of the communication would be the type that is likely to chill intra- and inter-agency discussion and decision-making. *See SEC v. Nacchio, 704 F. Supp. 2d 1099, 1110-1111 (D. Colo. 2010)* (fact that discussion post-dates particular decision does not automatically render that discussion discoverable).

[4] Privilege Applies to State Agencies

Though the privilege is primarily a creation of federal common law, it has also been applied to state agencies and political subdivisions of the state. *See, e.g., J.R. Norton Co. v. Arizmendi, 108 F.R.D. 647, 649 (S.D. Cal. 1985)* (California state labor agency); *North Pacifica, LLC v. City of Pacifica, 274 F. Supp. 2d 1118, 1121 (N.D. Cal. 2003)* (city council); *Newport Pac. Inc. v. County of San Diego, 200 F.R.D. 628, 638 (S.D. Cal 2001)* (legislative aides to local planning commission); *see also In re Grand Jury, 821 F.2d 946, 958-959 (3d Cir. 1987)* (in *dictum*, stating that deliberative process privilege for executive officials "provides a useful analogy for a confidentiality-based privilege for state legislators because executive agencies, like state legislators, engage in a wide variety of activities, including factual investigations for quasi-legislative rulemaking"); *United States v. Irvin, 127 F.R.D. 169, 172 (C.D. Cal. 1989)* ("[I]n terms of the alleged need for secrecy surrounding deliberations, there is no principled distinction between [local legislators] and those government officials who currently enjoy a deliberative process privilege.").

The Freedom of Information Act (FOIA) and its exemptions must be consulted as to discovery of information in the hands of the federal government. Exemption 5 of FOIA, *5 U.S.C. § 552(b)(5)*, is essentially a recognition of the deliberative process privilege as it applies to federal agencies. *DOI v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 9, 121 S. Ct. 1060, 149 L. Ed. 2d 87 (2001)* (discussing Exemption 5 as related to the deliberative process privilege); *see also § 3.06 above*.

[5] Government Agency Must Establish Applicability of Privilege

The government bears the burden of invoking the deliberative process privilege and establishing its applicability to the materials sought through discovery. *Redland Soccer Club v. Department of the Army, 55 F.3d 827, 853 (3d Cir. 1995)* (government bears initial burden to establish the privilege); *see also § 3.07 above*. The following three requirements must be met:

1. A department head having control over the requested information has formally claimed privilege;

2. The assertion of the privilege is based on actual personal consideration by that official; and

3. The information or documents to be shielded are identified and specified with an explanation of how the privilege applies.

Landry v. FDIC, 204 F.3d 1125, 1134-1135 (D.C. Cir. 2000) (setting forth requirements for assertion of privilege).

Once the government meets its initial burden, the party seeking discovery bears the burden of showing that its need for the documents outweighs the government's interest. *Redland Soccer Club v. Department of the Army, 55 F.3d 827, 853 (3d Cir. 1995)* (discussing requirements to overcome properly asserted privilege).

Circuit Split:

At least one circuit has held that only a department head may invoke the privilege. *United States v. O'Neill, 619 F.2d 222, 224 (3d Cir. 1980)* (requiring invocation by department head only). However, the majority of courts allow subordinates to assert the privilege on an agency's behalf. *See, e.g., Marriott Int'l Resorts, L.P. v. United States, 437 F.3d 1302, 1306 (Fed. Cir. 2006)* (noting circuit split and following majority rule); *Landry v. FDIC, 204 F.3d 1125, 1134-1135 (D.C. Cir. 2000)* (lesser executives may invoke privilege); *Branch v. Phillips Petroleum Co., 638 F.2d 873, 881 (5th Cir. 1981)* (same).

[6] Facts Relied on by Government Are Not Protected

The mere facts relied on to reach a decision generally fall outside the privilege. *Enviro Tech Int'l, Inc. v. United States EPA, 371 F.3d 370, 374 (7th Cir. 2004)* ("Consistent with its purpose, the deliberative process privilege typically does not justify the withholding of purely factual material"); *Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 483 (2d Cir. 1999)* ("purely factual material" generally not covered by the privilege). However, a court should be careful to order disclosure of those facts in a way that protects the agency's deliberative process relating to those facts. *See, e.g., FTC v. Warner Communications, Inc., 742 F.2d 1156, 1161 (9th Cir. 1984)* (memoranda not discoverable when facts underlying agency's deliberative process could not be severed from analysis itself); *cf. Providence Journal Co. v. United States Dep't of Army, 981 F.2d 552, 559 (1st Cir. 1992)* ("[S]egregable factual portions of the document might still be subject to compelled disclosure."); *EEOC v. Burlington Northern & Santa Fe Ry. Co., 621 F. Supp. 2d 603, 606 (W.D. Tenn. 2009)* (factual materials are not privileged unless they are inextricably intertwined with policy-making processes).

[7] Government's Interest Weighed Against Need for Information

Because the deliberative process privilege is a qualified privilege, it may be overcome when the party seeking discovery can show a particularized need for the information that outweighs the governmental interest in protecting the materials. *Hinckley v. United States, 140 F.3d 277, 285 (D.C. Cir. 1998)* (privilege may be overcome when reason to believe documents may shed light on government misconduct). However, relevance alone is not sufficient. *See, e.g., United States v. Farley, 11 F.3d 1385, 1390 (7th Cir. 1993)* (court must balance party's "particularized need for the documents against their nature and the effect of disclosure on the government"); *North Pacifica, LLC v. City of Pacifica, 274 F. Supp. 2d 1118, 1122-1126 (N.D. Cal 2003)* (privilege overcome in civil rights action alleging equal protection violation because testimony sought was highly relevant to claim, decision-making process of city council was central to litigation and information shielded had bearing on council's motive); *Newport Pac. Inc. v. County of San Diego, 200 F.R.D. 628, 638-641 (S.D. Cal. 2001)* (permitting deposition of legislative aides to board member when plaintiff made required showing of relevance and need).

The following are among the factors courts consider in determining whether the privilege must give way to a particularized need for discovery:

1. The relevance of the evidence;

2. The availability of other evidence;

3. The government's role in the litigation;

4. The extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions;

5. The interest of the litigants and society in accurate judicial fact finding;

6. The seriousness of the litigation and the issues involved;

7. The presence of issues concerning alleged governmental misconduct; and

8. The federal interest in the enforcement of federal law.

See, e.g., FTC v. Warner Communications, Inc., 742 F.2d 1156, 1161-1162 (9th Cir. 1984) (setting forth factors); *see also Tafas v. Dudas, 530 F. Supp. 2d 786, 801 (E.D. Va. 2008)* (same); *Tea Garden of Rattan, Inc. v. United States, 2003 U.S. Dist. LEXIS 24712, at *6 (D.V.I. 2003)* (same); *Zinker v. Doty, 637 F. Supp. 138, 141 (D. Conn. 1986)* (same).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.52[5].*
- *Fed. R. Civ. P. 26* (disclosures and discovery).
- *Fed. R. Civ. P. 34* (production of documents).



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.35

§ 3.35 Checklist for Governmental and Other Law Enforcement Privileges

☐ Determine whether state secrets privilege applies. *See § 3.36 below*.

- ○ Determine if government is withholding documents or information that involves military interests, national security or related subjects.
- ○ To extent possible, assess whether there is reasonable danger that disclosure will jeopardize national security.
- ○ Determine whether claims or defenses of parties cannot succeed without privileged material such that court should dismiss or grant summary judgment.

☐ Determine whether government has privilege to withhold identity of government informer. *See § 3.37 below*.

- ○ Determine whether informant is private citizen.
- ○ Determine whether personal safety of informant is at stake.
- ○ Determine whether defendant's right to prepare defense outweighs interests underlying privilege.
- ○ Determine whether defendant can set forth concrete reason for need for information.

☐ Determine whether government has privilege to withhold law enforcement information. *See § 3.38 below*.

- ○ Determine if documents or information is part of ongoing investigation.
- ○ Determine if disclosure of information would tend to undermine integrity of investigation.
- ○ Determine if claim has been made by the government and not invoked by private party.
- ○ Determine if affidavit or declaration filed by appropriate agency official.
- ○ Determine if sufficient description of risk of harm to government interests.

☐ Claimant:

- ○ Keep privilege log. *See § 3.13 above*.
- ○ Consider motion for protective order under Rule 26(c). *See § 3.11 above*.

☐ Opponent:

- ○ Consider motion to compel under Rule 37(a). *See § 3.12 above*.

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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.36

§ 3.36 Understanding Governmental Privilege to Withhold State Secrets

The state secrets privilege is a federal common law evidentiary privilege that permits the government to resist discovery when the sought documents or other information should be shielded to protect state secrets with respect to military interests, national security, or related subjects. *United States v. Reynolds, 345 U.S. 1, 7-8, 73 S. Ct. 528, 97 L. Ed. 727 (1953)* (recognizing state secrets privilege); *see also Kasza v. Browner, 133 F.3d 1159, 1165 (9th Cir. 1998)* (state secrets privilege); *see also § 3.04[1] above*.

The privilege belongs only to the government, and cannot be claimed or invoked by a private party. A formal claim of privilege must be made by the head of the department that has control over the matter, after actual personal consideration by the officer. *United States v. Reynolds, 345 U.S. 1, 7-8, 73 S. Ct. 528, 97 L. Ed. 727 (1953)* (setting forth the standards governing state secrets privilege). Even if the government is not a party, it may intervene to invoke the privilege. *Bareford v. General Dynamics Corp., 973 F.2d 1138, 1141 (5th Cir. 1992)* (government may intervene to prevent either party from gaining access to material covered by state secrets privilege). Because of the importance of the issues at stake, when the head of the department has not properly claimed the privilege, the court may grant additional time for the government to do so. *See, e.g., United States ex rel. Schwartz v. TRW, Inc., 211 F.R.D. 388, 393-394 (C.D. Cal. 2002)* (court granted government additional 60 days to raise state secrets privilege despite failure to do so in response to earlier subpoena).

Once the privilege properly is asserted, the court must assess the validity of the claim, determining whether there is a reasonable danger that disclosure will jeopardize national security. In making this assessment, the court must be careful not to disclose the very matter for which the privilege is claimed. *United States v. Reynolds, 345 U.S. 1, 7-8, 73 S. Ct. 528, 97 L. Ed. 727 (1953)* (discussing court's role in assessing privilege claim). The privilege is not to be invoked lightly, but the court must give deference to the government's determination. *Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 547 (2d Cir. 1991)* ("[T]he court must accord the 'utmost deference' to the executive's determination of the impact of disclosure on military or diplomatic security.").

If the state secrets privilege applies, and the claims or defenses of the parties cannot succeed without the protected matter, the court may have no choice but to dismiss the action or grant summary judgment. *Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998)* (if plaintiff cannot prove prima facie elements of claim with nonprivileged evidence, then court may dismiss claims as it would with any plaintiff who cannot prove case); *Bareford v. General Dynamics*

Corp., 973 F.2d 1138, 1141 (5th Cir. 1992) ("[I]f the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant"); *see also Molerio v. FBI, 749 F.2d 815, 825 (D.C. Cir. 1984)* (granting summary judgment where state secrets privilege precluded the government from using a valid defense).

Notwithstanding the plaintiff's ability to produce nonprivileged evidence, if the "very subject matter of the action" is a state secret, then the court should dismiss the plaintiff's action. *United States v. Reynolds, 345 U.S. 1, 11 n.26, 73 S. Ct. 528, 97 L. Ed. 727 (1953)* (such a case should be "dismissed on the pleadings without ever reaching the question of evidence, since it [is] so obvious that the action should never prevail over the privilege"); *see also Totten v. United States, 92 U.S. 105, 107, 23 L. Ed. 605 (1875)* ("Public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."); *Tenet v. Doe, 544 U.S. 1, 11, 125 S. Ct. 1230* ; *161 L. Ed. 2d 82 (2005)* (adhering to *Totten* and finding dismissal appropriate when state secrets privilege not sufficient to protect disclosure of information based on nature of cause of action).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.52[2].*
- *Weinstein's Federal Evidence (2d ed.) §§ 509.10 -509.13, 509.40 -509.46.*
- *Fed. R. Civ. P. 26* (disclosures and discovery).
- *Fed. R. Civ. P. 34* (production of documents and things).
- *Fed. R. Civ. P. 56* (summary judgment).



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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.37

§ 3.37 Understanding Governmental Privilege to Withhold Identity of Government Informant

The government has a qualified privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. *Roviaro v. United States, 353 U.S. 53, 59, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957)* ("The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation"). The qualified privilege to withhold an informant's identity must be applied in light of the fundamental requirements of fairness. *Roviaro v. United States, 353 U.S. 53, 60-62, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957)* (privilege overcome when disclosure of the informant's identity, or of contents of informant's communication, is relevant and essential to a fair determination of an action).

Whether an informant should be revealed is determined by balancing the public's interest in protecting the flow of information against an individual's right to prepare his defense. *Roviaro v. United States, 353 U.S. 53, 62, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957)* (finding disclosure necessary for a defendant's entrapment defense because informer was only witness who could support or contradict testimony of government witnesses). In determining whether justification for an exception to the privilege exists, the court must balance the interests underlying the privilege against the fundamental right to a fair trial, taking into account all relevant circumstances. *See United States v. Robinson, 144 F.3d 104, 106 (1st Cir. 1998)* (factors include nature of crime charged, defenses asserted, available means of proof, and significance of informant's roles). The defendant's need for disclosure must also be balanced against the personal safety of the witness. *See United States v. Tzannos, 460 F.3d 128, 138 (1st Cir. 2006)* ("When the government informant is not an actual participant or a witness to the offense, disclosure is required only in those exceptional cases where the defendant can point to some concrete circumstance that might justify overriding both the public interest in encouraging the flow of information and the informant's private interest in his or her own safety"); *see also McCray v. Castro, 2002 U.S. Dist. LEXIS 7259, at *25-*26 (N.D. Cal. 2002)* (raising nothing more than mere suspicion that information might be helpful is insufficient).

The qualified privilege to withhold an informant's identity applies to private citizens or other parties who assist law enforcement officers, and does not apply to the officers themselves. *Wahad v. FBI, 132 F.R.D. 17, 24 (S.D.N.Y. 1990)* ("[A] corrections officer, like a police officer, is not the proper subject of the informant privilege.").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.52[7].*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 510.
- *Fed. R. Civ. P. 26* (disclosures and discovery).



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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.38

§ 3.38 Understanding Governmental Privilege to Withhold Information to Assist Law Enforcement

The "official information privilege" is available to protect information collected by a law enforcement agency and may be asserted by the agency in a federal civil rights suit against it. *Branch v. Phillips Petroleum Co., 638 F.2d 873, 882 (5th Cir. 1981)* (recognizing the official information privilege as having "the ultimate goal" of protecting "the integrity of the administrative decisionmaking process").

Under the law enforcement investigative privilege, the government may also refuse to disclose the contents of an investigative file or other documents or information relating to an ongoing investigation if disclosure of the materials would tend to undermine the integrity of the investigation. *See, e.g., Coughlin v. Lee, 946 F.2d 1152, 1158 (5th Cir. 1991)* (recognizing a qualified privilege protecting investigative files in ongoing criminal investigations or information that would reveal the identity of confidential informants); *In re Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1988)* (privilege applies both to the files and to testimony about their contents).

Factors to be considered when evaluating a claim of law enforcement investigative privilege include the following:

1. Whether disclosure will thwart governmental processes by discouraging citizens from giving the government information;

2. The impact upon persons who have given information of having their identities disclosed;

3. The degree to which governmental self-evaluation and improvement will be chilled;

4. Whether the information is factual or evaluative;

5. Whether the party seeking discovery is an actual or potential defendant in any criminal proceeding pending or likely to follow;

6. Whether the police investigation has been completed;

7. Whether any interdepartmental proceedings have arisen or may arise from the investigation;

8. Whether the plaintiff's suit is non-frivolous and brought in good faith;

9. Whether the information sought is available through other discovery; and

10. The importance of the information sought to the plaintiff's case.

In re Sealed Case, 856 F.2d 268, 272 (D.C. Cir. 1988) (factors); *see also Tri-Star Airlines, Inc. v. Willis Careen Corp., 75 F. Supp. 2d 835, 840 (W.D. Tenn. 1999)* (same).

If the court determines that the law enforcement privilege applies, a strong presumption against lifting the privilege arises. To rebut that presumption, the party seeking disclosure must show that (1) its suit is not frivolous and is brought in good faith; (2) the information sought is not available through other discovery or from other sources; and (3) the information sought is important to the party's case. With respect to importance of the information, "compelling need" is required, even though the party asserting privilege has ultimate burden of showing that the privilege applies. *In re City of New York, 607 F.3d 923, 945 (2d Cir. 2010)* (disclosure of law enforcement materials intrudes into province of executive branch, and "[w]e do not take making such an intrusion lightly").

The law enforcement investigative privilege belongs to the government, not the person or entity investigated, so that only the government has standing to assert the privilege. *Association for Women in Science v. Califano, 566 F.2d 339, 343 (D.C. Cir. 1977)* (privilege belongs exclusively to the government); *see also Dean Foods Co. v. Eastman Chem. Co., 2001 U.S. Dist. LEXIS 25447, at *9 (N.D. Cal. 2001)* (same). To invoke the official information privilege in response to a discovery request, an agency must submit a declaration or affidavit, under oath or penalty of perjury, from a responsible official within the agency who has personal knowledge of the principal matters to be attested to in the affidavit or declaration at the time it files and serves its response to the discovery request.

The declaration must, among other things set forth the following:

1. Specifically identify the governmental or privacy interests that would be threatened by disclosure;

2. Specifically describe how disclosure of the requested information in the instant case would be harmful;

3. Describe how disclosure subject to a carefully crafted protective order would create a substantial risk of harm to significant governmental or privacy interests; and

4. Provide a projection of how much harm would be done to the threatened interests if the disclosure were made.

Ramirez v. County of Los Angeles, 231 F.R.D. 407, 411 (C.D. Cal. 2005) (discussing requirements for invoking the privilege); *see also National Congress for Puerto Rican Rights ex rel. Perez v. City of New York, 194 F.R.D. 88, 95 (S.D.N.Y. 2000)* (same); *see also § 3.07 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.48[1], 26.52[4].*
- *Weinstein's Federal Evidence (2d ed.) §§ 509.20 -509.24, 509.40 -509.46.*

- *Fed. R. Civ. P. 26* (disclosures and discovery).



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART L: ASSERTING TRADE SECRET PROTECTION

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.39

§ 3.39 Checklist for Asserting Trade Secret Protection

☐ Determine whether federal common law or state privilege law applies. *See § 3.04 above*. *See also § 3.40 below*.

☐ Review definition of trade secrets. *See § 3.40[1] below*.

☐ Determine whether there is a possibility of limited disclosure. *See § 3.40[2] below*.

☐ Determine whether privilege claim has been properly raised. *See §§ 3.07-3.13 above*; *§ 3.40[3] below*.

- ○ Determine if timely.
- ○ Determine if expressly raised.
- ○ Determine if grounds stated.
- ○ Determine if sufficient description of withheld material or testimony.

☐ Determine whether claim of privilege waived. *See § 3.09 above*.

☐ Claimant:

- ○ Keep privilege log. *See § 3.13 above*.

○ Consider motion for protective order under Rule 26(c). *See § 3.11 above, § 3.40[2] below*.

☐ Opponent:

○ Prepare to make showing of relevance and need, to overcome motion for protective order. *See § 3.40[2] below*.

○ Consider motion to compel under Rule 37(a). *See § 3.12 above*.

☐ **Search by Topic:** Evidence > Privileges > Trade Secrets



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART L: ASSERTING TRADE SECRET PROTECTION

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.40

§ 3.40 Understanding Governing Law

[1] Defining "Trade Secret"

Common law defines the term *trade secret* quite broadly: the definition includes any business data or process that gives its holder a better competitive position, and the value of which is dependent on or enhanced by secrecy. *Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984)* (*quoting* Restatement of Torts, § 757, Comment b, defining trade secret as "[a]ny formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it").

In a diversity action or other action in which state law provides the substantive law to be applied, the state law definition of "trade secret" may be apply. *See, e.g., Cal. Evid. Code § 1060(a)(1)* (defining trade secret under California law); *see also § 3.04 above*.

[2] Limited Disclosure May Be Allowed

A district court may protect a trade secret by requiring that the trade secret or other confidential information not be revealed or be revealed only in a specified way. *Fed. R. Civ. P. 26(c)(1)(G)*; *see also Avocent Redmond Corp. v. Rose Elecs., Inc., 242 F.R.D. 574, 577 (W.D. Wash. 2007)* (in fashioning appropriate protective order, court must evaluate competing interests of one party's right to broad discovery and the other party's ability to protect its confidential materials from misuse by competitors). With respect to a protective order issued pursuant to Rule 26(c)(1)(G), the district court is to undertake an individualized balancing of the interests that may be present in a particular case. *In re Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1988)* (remanding discovery order because district court did not "show engagement in this essential balancing process"); *see also § 3.11 above*, *§ 16.29 below*.

When determining counsel's access to the opposing parties' confidential information, a court should balance the risk of inadvertent disclosure of trade secrets and the risk of impairing the process of litigation by denying discovery. *See, e.g., Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1469 (9th Cir. 1992)* (upholding lower court's decision to issue protective order denying access to plaintiff's in-house counsel to defendant's trade secrets because of potential damage to defendant should trade secrets inadvertently become subject to misuse by its competitor); *U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468 (Fed. Cir. 1984)* (when in-house counsel is involved in "competitive decisionmaking" the risk of disclosure may outweigh the need for confidential information).

[3] Party Claiming Trade Secret Must Show Need to Protect Information

A party or other person resisting discovery bears the burden of establishing that the information sought constitutes a trade secret, and that the need to protect the information outweighs the need of the parties to obtain the information for the conduct of the litigation. *Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1131 (9th Cir. 2003)* (burden on party requesting protective order to demonstrate material is trade secret or other confidential information within scope of Rule 26(c) and that disclosure would cause an identifiable, significant harm); *see also Cook Group v. C.R. Bard, Inc. (In re Wilson), 149 F.3d 249, 252 (4th Cir. 1998)* ("To obtain a protective order under Rule 26(c), the party resisting discovery must establish that the information sought is covered by the rule and that it will be harmed by disclosure.").

Once the resisting party makes the requisite showing, the burden then shifts to the party seeking discovery to show that the information is relevant to the subject matter of the lawsuit and is necessary to prepare its case for trial. If the party seeking discovery shows both relevance and need, the court weighs the injury that disclosure might cause to the property against the moving party's need for the information. *See, e.g., In re Remington Arms Co., 952 F.2d 1029, 1032 (8th Cir. 1991)* (setting forth burden-shifting analysis); *Rywkin v. New York Blood Ctr., 1998 U.S. Dist. LEXIS 13490, at *7 (S.D.N.Y. 1998)* (same); *Groves v. USW, Local Union No. 15293, 2006 U.S. Dist. LEXIS 46721, at *2 (S.D. W. Va. 2006)* (same). For discussion of protective orders, *see* Ch. 16 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.105[8].*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 508.
- *Bender's Federal Practice Forms* Form Nos. 26:170-26:183.
- *Federal Litigation Guide P 14.25.*
- *Fed. R. Civ. P. 26(c)(1)(G)* (protective order regulating disclosure of trade secrets).



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART M: ASSERTING WORK PRODUCT PROTECTION

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.41

§ 3.41 Checklist for Asserting Work Product Protection

- ☐ Consider that federal law applies exclusively even on state law claims. *See § 3.42 below*.
- ☐ Determine whether material qualifies for work product protection. *See § 3.43 below*.
  - ○ Embodied in document or other tangible thing.
  - ○ Prepared by attorney, client, or representative of attorney or client.
  - ○ Prepared or produced because of ongoing litigation or anticipated future litigation.
- ☐ Determine whether privilege claim has been properly raised. *See §§ 3.07-3.13 above*.
  - ○ Client or attorney may claim work product protection. *See § 3.44[1] below*.
  - ○ Burden of proof on party claiming protection. *See § 3.44[2] below*.
- ☐ Determine type of work product to be protected. *See § 3.44[4] below*.
  - ○ Fact, i.e., "ordinary" work product.
  - ○ Opinion work product: opinions, mental impressions, or conclusions of attorney.
- ☐ Determine whether protected material can be discovered. *See § 3.44[3], [5] below*.

- Determine whether substantial need for materials; and
- Unavailability from other means without undue hardship.

☐ Determine whether claim of privilege waived. *See § 3.09 above*.

- Disclosure to adversary. *See § 3.45[1], [2] below*.
- Disclosure to third party. *See § 3.45[3] -[5] below*.
- Placing material in controversy. *See § 3.45[6] below*.

☐ Claimant:

- Keep privilege log. *See § 3.13 above*.
- Consider motion for protective order under Rule 26(c). *See § 3.11 above*.
- Consider claiming protection even if material has been disclosed. *See § 3.10 above; see also § 3.45[7] below*.

☐ Opponent:

- Consider motion to compel under Rule 37(a). *See § 3.12 above*.

☐ Find and assess experts.

☐ **Search by Topic:** Discovery > Privileged Matters > Work Product



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.42

§ 3.42 Applying Federal Law

Because the work product protection is found in a federal rule of procedure, *Fed. R. Civ. P. 26(b)(3)(A)*, the required elements to invoke the work product protection are defined exclusively by federal law, even in a diversity, or other actions in which a federal court applies state substantive law. *See, e.g., United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 966 (3d Cir. 1988)* ("Unlike the attorney client privilege, the work product privilege is governed, even in diversity cases, by a uniform federal standard embodied in *Fed. R. Civ. P. 26(b)(3)*"); *Holliday v. Extex, 447 F. Supp. 2d 1131, 1138 (D. Haw. 2006)* (work-product doctrine is a procedural immunity not an evidentiary privilege, therefore scope is determined by federal law even when applying state substantive law); *Connolly Data Systems, Inc. v. Victor Technologies, Inc., 114 F.R.D. 89, 95 (S.D. Cal. 1987)* (work product rule is procedural not substantive); *see also Times of Trenton Publ'g Corp. v. Pub. Util. Serv. Corp., 2005 U.S. Dist. LEXIS 34624, at *7 (D.N.J. 2005)* (in diversity case applying state law to analysis of attorney-client privilege issues and federal law to the work product doctrine); *see also §§ 3.04, 3.15 above.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.70[7], [8].*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 501.
- *Fed. R. Civ. P. 26* (disclosures and discovery).



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.43

§ 3.43 Defining Work Product

[1] Material to Be Protected Must Be Document or Other Tangible Thing

To be eligible for protection as attorney work product, materials sought through discovery must be either "documents" or "other tangible things." *Fed. R. Civ. P. 26(b)(3)(A)*; *see also Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995)* (conduct of attorney could not be work product). Moreover, even if a document or tangible thing is work product, the facts contained in the work product are not protected from discovery. *Garcia v. City of El Centro, 214 F.R.D. 587, 591 (S.D. Cal. 2003)* ("[B]ecause the work product doctrine is intended only to guard against the divulging of attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within the work product"); *see also Phillips Elecs. N. Am. Corp. v. Universal Elecs., 892 F. Supp. 108, 110 (D. Del. 1995)* ("[P]laintiff may not rely on Rule 26(b)(3) or claims of work product as a basis for refusing to respond to discovery requests seeking the disclosure of non-privileged facts"). However, a document may be redacted or otherwise edited if necessary to protect the work product. *Powell v. United States Dep't of Justice, 584 F. Supp 1508, 1520 (N.D. Cal. 1984)* (in context of work product, court must be sensitive to possibility that disclosure of facts in documents will reveal attorney's tactical or strategic thoughts); *see also § 3.17[5] above*.

Exception:

A document or other tangible thing produced by illegal or unethical conduct of a party or attorney will not be protected as attorney work product. *See, e.g., Smith v. WNA Carthage, L.L.C., 200 F.R.D. 576, 578 (E.D. Tex. 2001)* (clandestine recordings of witness interviews, whether by party or counsel, are not shielded under work product doctrine); *see also § 3.17[6][a] above*.

[2] Material Must Be Prepared by or for Party, Attorney, or Representative

To be eligible for protection as attorney work product, materials must be prepared by or for a party, or by or for a party's representative. *Fed. R. Civ. P. 26(b)(3)(A)* (representative includes an "attorney, consultant, surety, indemnitor, insurer or agent"). Accordingly, a document prepared by or for a nonparty to an action cannot be work product in that action, even if the nonparty admittedly prepared the document for other related litigation. *See In re Cal. Public Util. Comm'n, 892 F.2d 778, 781 (9th Cir. 1989)* (nonparty governmental agency could not assert work product protection for documents it prepared for separate administrative action); *Ramsey v. NYP Holdings, Inc., 2002 U.S. Dist. LEXIS 11728, at *18-*19 (S.D.N.Y. 2002)* ("[F]ederal courts have repeatedly held ... that a non-party witness may not invoke

work-product protection under [*Fed. R. Civ. P. 26(b)(3)(A)*] to preclude production of materials prepared by or for that witness, even if created in contemplation of the witness's own pending or anticipated litigation.").

Exception:

At least one court has found that the work product privilege of a *criminal defendant* does apply in a subsequent civil litigation in which the criminal defendant is the civil rights plaintiff. *See, e.g., Tennison v. City & County of San Francisco, 226 F.R.D. 615, 619-620 (N.D. Cal. 2005)* (substantial policy reasons including constitutional rights of a criminal defendant dictate that criminal defense attorney's files be given more protection than those of the prosecutor).

[3] Material Must Be Prepared Because of Existing or Anticipated Litigation

To be eligible for protection as attorney work product, materials must be "prepared in anticipation of litigation or for trial." *Fed. R. Civ. P. 26(b)(3)(A)*. This language clearly includes materials prepared for the particular action being litigated.

The litigation for which the materials were prepared, however, need not have already commenced; instead, work product protection extends to materials generated "because of" an identifiable prospect of future litigation. *See, e.g., United States v. Roxworthy, 457 F.3d 590, 593 (6th Cir. 2006)* (adopting "because of" standard in determining whether materials were prepared in anticipation of litigation); *United States v. Adlman (Adlman II), 134 F.3d 1194, 1202 (2d Cir. 1998)* (same). The "because of" test requires a finding that the party had a subjective belief that litigation was a real possibility, and that that belief was objectively reasonable. *See, e.g., In re Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998)* ("anticipation of litigation" inquiry is both subjective and objective); *Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1260 (3d Cir. 1993)* (same).

Materials produced in the ordinary course of business, however, do not enjoy work product protection merely because they prove to be of value in subsequent litigation. *United States v. Roxworthy, 457 F.3d 590, 593 (6th Cir. 2006)* ("[D]ocuments prepared in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes, are not covered by the work product privilege."); *see also National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 983 (4th Cir. 1992)* (same); *Elec. Data Sys. Corp. v. Steingraber, 2003 U.S. Dist. LEXIS 11818, at *16 (E.D. Tex. 2003)* (materials prepared as part of investigation to determine if employee was stealing or otherwise misusing company assets was not work product); *Miller v. Pancucci, 141 F.R.D. 292, 303 (C.D. Cal. 1992)* (police report prepared as matter of course after citizen complaint was not work product).

[4] Protection Extends Beyond Confidential Communications

The work product doctrine extends beyond confidential communications between the attorney and client to documents prepared in anticipation of litigation by or for the attorney. *See Tenn. Laborers Health & Welfare Fund v. Columbia/HCA Healthcare Corp. (in Re Columbia/HCA Healthcare Corp. Billing Practices Litig.), 293 F.3d 289, 304 (6th Cir. 2002)* (the "work product doctrine is distinct from and broader than the attorney-client privilege"); *United States v. Bergonzi, 216 F.R.D. 487, 492 (N.D. Cal. 2003)* (noting that there is no requirement, when determining whether the protection applies, that the attorney and client intend to maintain the material in confidence); *see also § 3.17[1] above*.

[5] Protection Does Not Expire

Work product protection, once attached to a document, does not expire merely because the litigation for which the document was produced has come to an end. *See FTC v. Grolier Inc., 462 U.S. 19, 25-28, 103 S. Ct. 2209, 76 L. Ed. 2d 387 (1983)* (although Rule 26(b)(3)(A) does not address the temporal scope of work-product immunity, "the literal language of the Rule protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation") (emphasis in original).

[6] Protection May Apply to Dual-Purpose Documents

If a document is created both in anticipation of litigation, and for a distinct, unrelated purpose, the document is not work product if the document would have been prepared irrespective of the prospect of litigation. *Bairnco Corp. Sec. Litig. v. Keene Corp., 148 F.R.D. 91, 103 (S.D.N.Y. 1993)* (finding documents not protected as work product because they were generated for purposes other than to assist in preparation for litigation). If, however, the other reason is inextricably intertwined with the litigation-related reason, the document is work product. *See, e.g., United States v. Torf (In re Grand Jury Subpoena), 357 F.3d 900, 907-909 (9th Cir. 2003)* (protection afforded if "under the totality of the circumstances ... it can fairly be said that the 'document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation' "; *Colonial Gas Co. v. Aetna Cas. & Sur. Co., 144 F.R.D. 600, 605 (D. Mass. 1992)* ("The pertinent test is: whether in light of the nature of the document and the factual situation in the particular case the document can fairly be said to have been prepared or obtained because of the prospect of litigation."); *cf. United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998)* ("[A] document created because of anticipated litigation ... does not lose work-product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation. Where a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within Rule 26(b)(3).").



Strategic Point:

When a document has been admittedly prepared for multiple reasons, the party trying to invoke work product protection should attempt to show that the prospect of litigation was a substantial factor in the mix of considerations, purposes, or forces that led to preparation of the document. *See, e.g., Jumpsport, Inc. v. Jumpking, Inc., 213 F.R.D. 329, 330-331 (N.D. Cal. 2003)* (litigation must be substantial factor); *Lewis v. UNUM Corp. Severance Plan, 203 F.R.D. 615, 623 (D. Kan. 2001)* (litigation must be primary motivating factor).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.70.*
- *Federal Litigation Guide P 10.24.*
- *Fed. R. Civ. P. 26* (disclosures and discovery).



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
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1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.44

§ 3.44 Claiming Work Product Protection

[1] Either Client or Attorney May Claim Work Product Protection

The work product protection may be claimed either by a party or by an attorney. *See, e.g., In re Green Grand Jury Proceedings, 492 F.3d 976, 980 (8th Cir. 2007)* (both the attorney and client are holders of the work product protection); *United States v. Under Seal (In re Grand Jury Proceedings #5), 401 F.3d 247, 250 (4th Cir. 2005)* ("Because the work product privilege protects not just the attorney-client relationship but the interests of attorneys to their own work product ... the attorney, as well as the client, hold the privilege."); *In re Special September 1978 Grand Jury (II), 640 F.2d 49, 63 (7th Cir. 1980)* (same); *Martin v. Valley Nat'l Bank, 140 F.R.D. 291, 321 (S.D.N.Y. 1991)* (noting that numerous courts have held that an attorney "may invoke the work-product rule in his own right even if the client cannot assert it or has not directed counsel to assert it"); *see also § 3.16[1] above*.

[2] Initial Burden of Proof Is on Party Claiming Work Product Protection

The party asserting that materials sought through discovery enjoy work product protection bears the initial burden of establishing that the doctrine applies. *Fed. R. Civ. P. 26(b)(5)(A)*; *see also Rabushka ex rel. United States v. Crane Co., 122 F.3d 559, 565 (8th Cir. 1997)* (burden met by providing detailed privilege log stating basis for claim of work product as to each document as well as affidavit of general counsel); *Onwuka v. Federal Express Corp., 178 F.R.D. 508, 512 (D. Minn. 1997)* (explaining that party asserting work product protection must demonstrate that withheld material meets the criteria of the doctrine); *see also §§ 3.07, 3.13 above*.

If the party resisting discovery carries its initial burden to show that work product protection is available, the burden of proof shifts, and the party seeking discovery must overcome the work product protection by showing substantial need for the materials and inability to obtain their equivalent without undue hardship. *Fed. R. Civ. P. 26(b)(3)(A)*; *see also Garcia v. City of El Centro, 214 F.R.D. 587, 591 (S.D. Cal. 2003)* (explaining burden-shifting process).

[3] Material May Be Discoverable on Showing of Substantial Need and Undue Hardship

The work product doctrine is not an absolute protection of materials from discovery; discovery is available when the requesting party shows a substantial need for the materials to prepare its case and that it cannot, without undue hardship, obtain the substantial equivalent of the materials by other means. *Fed. R. Civ. P. 26(b)(3)(A)(ii)*.

The determination as to whether the party requesting discovery has made the necessary showing to overcome work product protection turns primarily on the application of the following two factors:

1. Whether the sought information is an essential element in the requesting party's case; and

2. Whether the party can reasonably obtain the sought information from an alternate source.

Fletcher v. Union Pac. R.R., 194 F.R.D. 666, 670-671 (S.D. Cal. 2000) (citing **Moore's**) (setting forth test); *Hendrick v. Avis Rent A Car Sys., 916 F. Supp. 256, 260 (W.D.N.Y. 1996)* ("The burden is squarely on [the requesting party] to meet both prongs of this test."); *see also O'Connor v. Boeing N. Am., Inc., 216 F.R.D. 640, 643 (C.D. Cal. 2003)* ("substantial need" test not met when evidence sought is merely corroborative of other evidence in the case); *Fisher v. National R.R. Passenger Corp., 152 F.R.D. 145, 152 (S.D. Ind. 1993)* (burden not met when material sought can be obtained from alternate sources); *see also § 3.44[5] below.*

[4] Parties Must Distinguish "Fact" and "Opinion" Work Product

The federal courts recognize a distinction between "fact" work product and "opinion" work product. Fact work product refers to the work product of an attorney in collecting factual information, while opinion work product reflects the mental impressions, conclusions, opinions, or legal theories of an attorney. *See, e.g., Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 576 (9th Cir. 1992)* (document prepared by insurance adjuster as to range of potential damages in litigation was opinion work product). Fact work product is also known as "ordinary" work product. *See, e.g., In re Doe, 662 F.2d 1073, 1080 (4th Cir. 1981)* (discussing "fact" work product and "ordinary" work product interchangeably); *United States ex rel. Bagley v. TRW, Inc., 212 F.R.D. 554, 559 (C.D. Cal. 2003)* (" '[O]rdinary' or 'factual' work product ... consists of factual material prepared in anticipation of litigation or trial.").

[5] Test for Discovery of Opinion Work Product Is More Stringent

When a party seeks discovery of "opinion" work product, the party must make a showing beyond the basic substantial need/undue hardship test that applies to "fact" work product. *Upjohn Co. v. United States, 449 U.S. 383, 401-402, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)* (declining to decide whether any showing of necessity can overcome opinion work product protection but stating that showing of substantial need and undue hardship insufficient to compel disclosure); *see also § 3.44[3] above.*

Circuit Split:

Most courts hold that while factual work product is discoverable upon a showing of substantial need and undue hardship, opinion work product enjoys nearly absolute protection, and generally may only be discovered under extraordinary circumstances. *See, e.g., In re Green Grand Jury Proceedings, 492 F.3d 976, 981 (8th Cir. 2007)* (opinion work product discoverable only under "rare and exceptional circumstances" such as evidence of attorney misconduct); *In re Cendant Corp. Sec. Litig., 343 F.3d 658, 663 (3d Cir. 2003)* ("[C]ore or opinion work product receives greater protection than ordinary work product and is discoverable only upon a showing of rare and exceptional circumstances."); *Williamson v. Moore, 221 F.3d 1177, 1182 (11th Cir. 2000)* (requiring extraordinary circumstances); *Chaudhry v. Gallerizzo, 174 F.3d 394, 403 (4th Cir. 1999)* (requiring rare and exceptional circumstances). The Ninth Circuit applies a more lenient test allowing discovery when the need for the material is compelling. *See Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 577-578 (9th Cir. 1992)* (holding that opinion work product "may be discovered and admitted when mental impressions are *at issue* in a case and the need for the material is compelling," and stating that such a determination must be made on a case by case basis) (emphasis in original).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.70[5]*
- *Federal Litigation Guide P 10.24*
- *Fed. R. Civ. P. 26* (disclosures and discovery)



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Chapter 3 PRIVILEGES AND WORK PRODUCT PROTECTION
PART M: ASSERTING WORK PRODUCT PROTECTION

1-3 Moore's AnswerGuide: Federal Discovery Practice § 3.45

§ 3.45 Waiving Work Product Protection

[1] Effect of Voluntary Waiver

Because the work product protection is designed to restrict discovery of the protected materials from other parties to the action, voluntarily disclosing that information to an actual or potential adverse party is fundamentally inconsistent with work product protection and therefore waives the protection as to the disclosed materials. *See Tenn. Laborers Health & Welfare Fund v. Columbia/HCA Healthcare Corp. (in Re Columbia/HCA Healthcare Corp. Billing Practices Litig.), 293 F.3d 289, 306 (6th Cir. 2002)* (voluntary disclosure to adverse party is inconsistent with intent to invoke work product protection as it knowingly increases possibility opponent will obtain and use the material); *United States v. Massachusetts Inst. of Tech., 129 F.3d 681, 687 (1st Cir. 1997)* (same); *In re Doe, 662 F.2d 1073, 1082 (4th Cir. 1981)* (same); *see also §§ 3.09, 3.18[2] above*.

[2] When Inadvertent Disclosure Effects Waiver

Whether an unintended or inadvertent disclosure of attorney work product waives the protection of the doctrine is judged under the same test applicable to inadvertent disclosure of information subject to the attorney-client privilege. *United States v. Ary, 518 F.3d 775, 783 (10th Cir. 2008)* (applying attorney-client waiver law to determine waiver of work product protection); *see also In re Grand Jury (Impounded), 138 F.3d 978, 981 (3d Cir. 1998)* (same); *see also § 3.18[3] above*.

Note that the limitations on waiver in Evidence Rule 502 apply to inadvertent disclosure of attorney work product. *See Fed. R. Evid. 502*. For discussion of Rule 502, see *§ 3.18[3] above*.

[3] Disclosure to Co-Party or Other with Common Interest May Not Constitute Waiver

If a party or attorney discloses attorney work product to a coparty or other third party that has a common interest in the litigation, the disclosure waives work product protection only if it is made under circumstances that create a substantial danger that the disclosure will fall into the hands of an adverse party. *See, e.g., Cont'l Cas. Co. v. Under Armour, Inc., 537 F. Supp. 2d 761, 772 (D. Md. 2008)* (waiver found only under circumstances "in which there is a significant likelihood" that an adversary or potential adversary will obtain the material); *Samuels v. Mitchell, 155 F.R.D. 195, 200-201 (N.D. Cal. 1994)* (revealing work product to accounting firm acting as consultant did not waive protection);

*Gramm v. Horsehead Industries, Inc., 1990 U.S. Dist. LEXIS 773, at *16 (S.D.N.Y. 1990)* ("[D]isclosure to another person who has an interest in the information but who is not reasonably viewed as a conduit to a potential adversary will not be deemed a waiver of [work product] protection."); *see also § 3.17[3] above*.

[4] Disclosure to Government Agency May Waive Protection

When a party or attorney shares protected work product with a governmental agency, the extent of any waiver of the protection turns on whether or not the disclosure occurred in an adversarial context. If the party's interests are similar to the government's, the "common interest" rule will apply and the work product protection will be preserved. *See, e.g., United States ex rel. Burroughs v. DeNardi Corp., 167 F.R.D. 680, 685-686 (S.D. Cal. 1996)* (government and private party in action under False Claims Act have common interest, so that disclosure of work product does not waive protection); *Western Fuels Asso. v. Burlington N. R. Co., 102 F.R.D. 201, 203 (D. Wyo. 1984)* (common interest or joint defense privilege applies to work product protection). If, on the other hand, the party and the government are in an essentially adversarial position, the disclosure of work product is a waiver of the protection. *In re Steinhardt Partners, 9 F.3d 230, 234-236 (2d Cir. 1993)* (because SEC and bond trader were in adversarial position when trader provided work product to agency, work product protection waived as to subsequent litigation); *see also § 3.17[3] above*.

Note that *Federal Rule of Evidence 502* applies when a disclosure is made in a federal proceeding or to a federal officer or agency and waives work-product protection. In these cases, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if (1) the waiver is intentional, (2) the disclosed and undisclosed communications or information concern the same subject matter, and (3) they ought in fairness to be considered together. *See Fed. Evid. R. 502(a)*.

[5] Most Communications With Expert Witness Are Protected Work Product

In 2010, Rule 26(b)(4) was amended to provide work product protection for most communications between an attorney and a retained expert. *Fed. R. Civ. P. 26(b)(4)*, Committee Note of 2010. With specified exceptions, communications between a party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, are granted work product protection. The exceptions provide that such communications are not protected to the extent they:

> (1) Relate to compensation for the expert's study or testimony;
>
> (2) Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
>
> (3) Identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

Fed. R. Civ. P. 26(b)(4)(C).

Work product protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying. Although the rule does not protect communications between counsel and other types of expert witnesses, it also does not preclude protection under other doctrines such as privilege or independent development of the work product doctrine. *Fed. R. Civ. P. 26(b)(4)*, Committee Note of 2010.

Discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C) is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii); that is, that the party has a substantial need for the discovery and cannot obtain the

substantial equivalent without undue hardship. A party rarely will be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. *Fed. R. Civ. P. 26(b)(4)*, Committee Note of 2010.

Former versions of Rule 26 created uncertainty as to whether the work product privilege is waived when an attorney provides work product materials to an expert witness. The uncertainty was based on an apparent conflict in the language of Rule 26. A former version of Rule 26(a)(2)(B) required that an expert report contain a complete statement of all of the "data or other information" considered by the expert in forming the opinions, without express limitation. Based on this language, many courts held that work product protection was waived for any document or information provided to a testifying expert, whether or not the expert relied on the information in preparing the expert report. *See, e.g., In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001)* . In 2010, Rule 26(a)(2)(B) was amended to replace the term "data or other information" with the term "facts or data." This amendment was intended to disapprove of cases that relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. In addition, Rule 26(b)(4) was amended at the same time to provide work-product protection for draft reports and communications between a party's attorney and expert witnesses. *Fed. R. Civ. P. 26(a)(2)(B)*, Committee Note of 2010. The amendments to Rule 26(b)(4) were designed to protect work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to discovery. *Fed. R. Civ. P. 26(b)(4)(C)*, Committee Note of 2010.

Warning:

Although most communications between a party's attorney and expert witnesses are entitled to work product protection, when assisting expert witnesses, keep in mind that facts or data provided to an expert and considered in forming the opinions to be expressed are not protected. In addition, work product protection does not extend to assumptions that the attorney provided and that the expert relied on in forming the opinions to be expressed. *See Fed. R. Civ. P. 26(b)(4)(C)*.

[6] Placing Material in Controversy Waives Protection

Even if materials enjoy protection as attorney work product, the placing of those very materials in controversy in the action waives the work product protection. *United States v. Nobles, 422 U.S. 225, 239, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975)* (defense decision to call investigator as impeachment witness waived work product protection as to investigator's report); *see also §§ 3.18[4], 3.23 above*.

[7] Claim of Protection May Be Asserted After Disclosure

If information later determined to be protected as attorney work product was inadvertently disclosed in discovery, a procedure exists for the responding party to assert the protection claim and for the receiving party to contest the claim. The responding party may notify any party that received the information of the protection claim and the basis for it. The notice should be in writing unless the circumstances preclude it. After receiving notice, a receiving party must promptly return, sequester, or destroy the subject information, and any copies, and may not use or disclose the information until the claim is resolved. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. A receiving party may present the information to the court under seal for a determination of the claim and the producing party must preserve the information until the claim is resolved. *Fed. R. Civ. P. 26(b)(5)(B)*; *see also § 3.10 above*.

Warning:

Fed. R. Civ. P. 26(b)(5)(B) does not address whether production in the discovery process constitutes a waiver, but merely provides the procedure for presenting such dispute to the court for resolution. *See §§ 3.09, 3.10 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.70[6].*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 511.
- *Bender's Federal Practice Forms* Form Nos. 26:50-26:52.
- *Federal Litigation Guide P 10.24[6].*
- *Fed. R. Civ. P. 26* (disclosures and discovery).



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[4] Disclosures Must Be Made in Writing, Signed, and Served

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Chapter 4 PRETRIAL CONFERENCES AND MANDATORY DISCLOSURES
PART A: PROCEDURAL CONTEXT

1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.01

§ 4.01 Procedural Context--Pretrial Conferences and Mandatory Disclosures

Federal court practice encourages court involvement in managing litigation. Early and regular court involvement in the planning and conduct of litigation is intended to yield a more efficient, less expensive, and less rancorous process. The primary pretrial procedural devices to this end are the Rule 26(f) discovery conference and Rule 16 pretrial conferences and orders.

The Rule 26(f) conference (also referred to as the initial status, case management, or discovery conference) permits the parties to explore the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case. The meeting allows the parties to arrange for disclosures and develop a proposed discovery plan that reflects the parties' views. Discovery helps to remove surprise from trial preparation, enabling the parties to obtain the evidence necessary to evaluate and resolve their dispute. Discovery also narrows and clarifies the issues and facts that are in dispute and require trial. The initial Rule 26(f) conference is an important mechanism that can be used to streamline cases and promote judicial efficiency.

One aspect of the Rule 26(f) conference involves making or arranging for the disclosures required by Rule 26(a)(1). Rule 26(a)(1) requires parties to make "initial disclosures" of specified information early in the pretrial phase, without a formal discovery request from the opposing party. If it appears that a required disclosure is not appropriate in the circumstances of the case, objections may be stated in the Rule 26(f) discovery plan. Unexcused failure to make the required disclosures is a basis for sanctions.

Rule 26(a)(2) requires a party to make certain disclosures concerning expert witnesses without a formal discovery request from the opposing party. The key requirement is that the expert's report delivered to opposing counsel be complete, containing a comprehensive statement of all opinions to be offered by the witness, as well as the basis for the opinions, the data relied on, exhibits to be used, and other specified information. The expert will not be allowed to testify to opinions or matters not disclosed in the report. Note that questions often can arise concerning the discoverability of the data and information considered by the expert, some of which might be attorney work product. To the extent possible, counsel should avoid providing its opinion work product to any expert likely to be designated under Rule 26(a)(2).

Fed. R. Civ. P. 16 requires judges to fix deadlines for completing the major pretrial tasks and encourages judges to

participate actively in designing case-specific plans for positioning litigation as efficiently as possible for disposition by settlement, motion, or trial. Rule 16 authorizes and regulates the use of a wide range of case management tools and powers--principally through pretrial conferences. Participation in pretrial conferences requires parties to contemplate and articulate a plan of action throughout the course of litigation. Accordingly, it is extremely important at the earliest possible time, and certainly no later than the initial meeting between counsel, for counsel to develop an overall theme or theory for the case, and to identify its strengths and weaknesses. Well-prepared counsel can use Rule 16 conferences to affect the basic structure and timing of the pretrial process and to fix important terms of the trial itself.

Purposes of the final pretrial conference include:

1. Improving the quality of trial through more thorough preparation;

2. Facilitating settlement; and

3. Securing a just, speedy, and inexpensive determination.

The critical importance of the final pretrial order cannot be overemphasized. The order supersedes the pleadings, governs who may be called as witnesses (and possibly impeachment witnesses and rebuttal witnesses); may contain binding stipulations; and may limit the questions, evidence, exhibits, and legal theories to be presented at trial. Matters not preserved in the final pretrial order are eliminated from the case. If counsel is unprepared for the final pretrial conference, counsel exposes the client to the risk of unwarranted adverse rulings, including sanctions, and squanders an opportunity to affect the substance and shape of the trial.

Counsel must consult local rules as well as individual judges' standing orders for specific procedural requirements relating to pretrial conferences and mandatory disclosures.



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1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.02

§ 4.02 Checklist for Participating in Rule 26(f) Conference and Making Initial Disclosures

☐ Determine whether proceeding is exempt from Rule 26(f) conference and initial disclosure requirements. *See § 4.03 below*.

☐ If proceeding is not exempt, schedule initial conference of parties to be held at least 21 days before scheduling conference is held or scheduling order is due under *Fed. R. Civ. P. 16(b)*. *See § 4.04 below*.

- ○ Consult local rules, as well as individual judges' rules, regarding timing of initial conference of parties.
- ○ Seek guidance from the clerk of the court if unfamiliar with court or judge or unsure of their rules.
- ○ Review topics required to be discussed.
- ○ Note that discovery must generally await completion of Rule 26(f) conference.

☐ Ensure that appropriate persons attend the Rule 26(f) conference. *See § 4.06 below*.

☐ Draft Rule 26(f) report and proposed discovery plan for consultation with opposing counsel and parties. *See § 4.09 below*.

☐ Prepare Rule 26(f) proposed discovery plan at initial conference of parties. Consult local rules, as well as individual judges' rules, regarding contents of proposed discovery plan. *See § 4.09 below*.

☐ File report outlining discovery plan within 14 days after the initial conference of parties. Consult local rules, as well as individual judges' rules, regarding filing requirements and possible expedited deadlines. *See § 4.09 below*.

☐ **Search by Topic:** Civil Procedure > Pretrial Matters > Conferences



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1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.03

§ 4.03 Determining Whether Proceeding Is Exempt from Rule 26(f) Conference Requirement

The following categories of proceedings are exempt from the Rule 26(f) requirement that the parties confer to consider the nature of their claims and defenses, to consider the possibilities of settlement or resolution of the case, to make or arrange for the initial disclosures that Rule 26(a)(1) requires, and to develop a proposed discovery plan:

1. An action for review on an administrative record;

2. A forfeiture action in rem arising from a federal statute;

3. A petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

4. An action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

5. An action to enforce or quash an administrative summons or subpoena;

6. An action by the United States to recover benefit payments;

7. An action by the United States to collect on a student loan guaranteed by the United States;

8. A proceeding ancillary to proceedings in other courts; and

9. An action to enforce an arbitration award.

Fed. R. Civ. P. 26(a)(1)(B), (f)(1).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.22[3], 26.26, 26.142.*
- *Federal Litigation Guide P 10.31.*
- *Bender's Federal Practice Forms* Form Nos. 16:1-16:22.
- *Fed. R. Civ. P. 26(a)(1)(B)* (proceedings exempted from initial disclosure).
- *Fed. R. Civ. P. 26(f)(1)* (when discovery conference required).



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1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.04

§ 4.04 Understanding Timing Requirements

[1] Generally No Discovery May Occur Until Parties Have Rule 26(f) Conference

Except in exempted proceedings (*see § 4.03 above*), or when authorized under the Federal Rules or by order or agreement of the parties, a party may not seek discovery from any source before the Rule 26(f) conference. *Fed. R. Civ. P. 26(d)(1)*.

[2] Rule 26(f) Conference Must Occur at Least 21 Days Before Scheduling Conference or Order

The initial conference between opposing counsel mandated by Rule 26(f) is the parties' first pretrial conference. *Fed. R. Civ. P. 26(a), (f)*.

Timing:

Except in categories of cases exempted under Rule 26(a)(1)(B), *see § 4.03*, or when otherwise ordered, the parties must hold the Rule 26(f) conference as soon as practicable, and in any event at least 21 days before the Rule 16(b) scheduling conference is held or the scheduling order is due. *Fed. R. Civ. P. 26(f)(1)*.

Exception:

Local rules may provide for expedited schedules, *see § 4.04[3] below*.

[3] Expedited Schedules May Be Required Under Local Rules

If necessary to comply with a court's expedited schedule for Rule 16(b) conferences, the court may, by local rule:

1. Require that the Rule 26(f) conference occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b);

2. Require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties; or

3. Excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

Fed. R. Civ. P. 26(f)(4).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.143.*
- *Federal Litigation Guide P 10.31.*
- *Bender's Federal Practice Forms* Form Nos. 16:1-16:22.
- *Fed. R. Civ. P. 26(d)(1)* (timing of discovery).
- *Fed. R. Civ. P. 26(f)(4)* (expedited schedule for discovery conference).



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1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.05

§ 4.05 Understanding Topics to Be Discussed at Conference

At the Rule 26(f) conference, the parties must confer to accomplish the following:

1. Consider the nature and basis of their claims and defenses;

2. Consider the possibilities for a prompt settlement or other resolution of the case;

3. Consider if the parties will stipulate to a protective order as to documents produced in discovery;

4. Make or arrange for the required initial disclosures of documents and witnesses, required by *Fed. R. Civ. P. 26(a)(1)* (*see also § 4.07 below*);

5. Discuss any issues relating to preserving discoverable information, particularly electronically stored information; and

6. Develop a proposed discovery plan to assist in crafting an appropriate scheduling order.

Fed. R. Civ. P. 26(f)(2).

The Rule 26(f) conference should include a discussion of any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced. *Fed. R. Civ. P. 26(f)(3)(C).* The parties should cover whether they intend to produce such material, whether each other's software is compatible, whether there are any privilege issues requiring redaction, and how to allocate costs involved with the foregoing. *See In re Bristol-Myers Squibb Sec. Litig., 205 F.R.D. 437, 444 (D.N.J. 2002)* (defendants moved for an order requiring plaintiffs to pay for costs resulting from production of documents in response to discovery requests).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.143*.
- *Federal Litigation Guide P 10.31*.
- *Fed. R. Civ. P. 26(f)(2)* (conference content and parties' responsibilities).



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1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.06

§ 4.06 Understanding Who Must Participate in Rule 26(f) Conference

All parties and unrepresented parties must confer to discuss the nature and the basis of their claims and defenses. *Fed. R. Civ. P. 26(f)(2)*. Attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging for the conference and attempting in good faith to agree on the proposed discovery plan. *Fed. R. Civ. P. 26(f)(2)*.

The court may order the parties or attorneys to attend the conference in person. *Fed. R. Civ. P. 26(f)(2)*. Otherwise, the parties may conduct the conference by other means.



Strategic Point:

For the most part, the parties are not required to meet face-to-face unless the court orders that the parties or attorneys attend the conference in person. *Fed. R. Civ. P. 26(f)(2)*; *see Fed. R. Civ. P. 26(f)*, Committee Note of 2000. The parties may confer by telephone or email. However, the better practice is to meet in person. Meeting in person is more likely to further the objectives of the conference and establish a positive relationship with opposing counsel.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.143*.
- *Federal Litigation Guide P 10.31*.
- *Fed. R. Civ. P. 26(f)(2)* (conference content and parties' responsibilities).



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1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.07

§ 4.07 Complying With Rule 26(a)(1) Initial Disclosure Requirements

[1] Initial Disclosures Must Ordinarily Be Made Within 14 Days of Rule 26(f) Conference

Unless the court directs or the parties stipulate otherwise, or a party objects, the initial disclosures must be made within 14 days of the Rule 26(f) conference. *Fed. R. Civ. P. 26(a)(1)(C)*.

Any party joined after the Rule 26(f) conference has 30 days after being served or joined within which to make its initial disclosures. The court or the parties may modify the schedule for any subsequently joined party's initial disclosures. *Fed. R. Civ. P. 26(a)(1)(D)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.144*.
- *Federal Litigation Guide P 10.30*.
- *Fed. R. Civ. P. 26(a)* (initial disclosure).

[2] Categories of Cases Exempt From Initial Disclosure Requirements

The same categories of cases that are exempt from the Rule 26(f) conference requirement are exempt from the initial disclosure requirements. *Fed. R. Civ. P. 26(a)(1)(B)*; *see § 4.03 above*.

District courts retain authority to issue case-specific orders requiring initial disclosure in any case included within the enumerated list when appropriate. The parties may also stipulate that they will make the disclosures. Further, a court may order that the parties exchange information, even in proceedings exempted from initial disclosures and in cases in which the parties have stipulated to forego the initial disclosures, in the course of exercising its case management authority under Rule 16. *Fed. R. Civ. P. 26(a)(1)*, Committee Note of 2000; *see Fed. R. Civ. P. 16*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.22[3], 26.26, 26.142, 26.144.*
- *Federal Litigation Guide P 10.30.*
- *Fed. R. Civ. P. 26(a)(1)* (initial disclosure).

[3] Matters Subject to Initial Disclosure Requirements

In making the initial disclosures, the disclosing party must provide to the other parties all of the following:

1. The name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

Warning:

Disclosures must be specific; that is, a party does not comply with the disclosure requirements by listing broad generic categories such as "defendant's employees and representatives." *See Smith v. Pfizer, Inc., 265 F.R.D. 278, 283 (M.D. Tenn. 2010)* . In fact, a trial court may exclude witnesses identified only by category, or preclude the witness from testifying if the disclosures do not specify the content of the proffered testimony. *See Hernandez-Torres v. Intercontinental Trading, 158 F.3d 43, 49-50 (1st Cir. 1998)* .

2. A copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

3. A computation of each category of damages claimed by the disclosing party, making available for inspection and copying (*see Fed. R. Civ. P. 34*) the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

Warning:

Some courts have ruled that, to fulfill the initial disclosure requirement, a party must provide a computation supported by documents. Neither a calculation of damages alone nor production of undifferentiated financial documents without explanation is sufficient to fulfill the mandatory initial disclosure requirement. *See Gould Paper Corp. v. Madisen Corp., 614 F. Supp. 2d 485, 490 (S.D.N.Y. 2009)* (defendants who produced 629 pages of documents that allegedly detailed basis for damage claim, without explanation or "computation of each category of damages claimed," were precluded from presenting counterclaim for damages in breach of contract action).

4. For inspection and copying any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Fed. R. Civ. P. 26(a)(1)(A); *see also Lobato v. Ford, 2007 U.S. Dist. LEXIS 65574, at *16-*19 (D. Colo. 2007)* (review of case law on what is required under *Fed. R. Civ. P. 26(a)(1)*).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.144.*
- *Federal Litigation Guide P 10.30.*
- *Fed. R. Civ. P. 26(a)(1)* (initial disclosure).

[4] Investigation of Case

A party must make the initial disclosures based on then reasonably available information and is not excused from making disclosures because it has not fully completed its investigation of the case. *Fed. R. Civ. P. 26(a)(1)(E)*. Each disclosing party must conduct a sufficiently diligent investigation into the evidence it has or controls to permit it to disclose the information concerning each category of the required initial disclosures of which the party has or should have knowledge. *See Lintz v. American Gen. Fin., Inc., 1999 U.S. Dist LEXIS 12572, at *4-*5 (D. Kan. 1999)* (untimely disclosure of documents found in defendants "investigative file" was not harmless noncompliance with Federal Rules of Civil Procedure).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.144.*
- *Federal Litigation Guide P 10.30.*
- *Fed. R. Civ. P. 26(a)(1)(E)* (basis for initial disclosure).

[5] Review Documents and Electronically Stored Information for Privileged Material

Before complying with pretrial disclosure requirements, counsel should consider the possibility that some privileged information may be involved. A party asserting a privilege must make the claim expressly and describe the nature of the information not produced in a manner that, without revealing information itself privileged, will enable other parties to assess the applicability of the privilege. *Fed. R. Civ. P. 26(b)(5)(A)*. The party asserting a privilege must, at a minimum, claim the privilege and briefly describe the information withheld. *See Moloney v. United States, 204 F.R.D. 16, 21 (D. Mass. 2001)* (defense counsel did not interpose privilege claims at the deposition). The usual practice is for the parties to exchange "privilege logs" listing the documents and other information as to which privilege is claimed, and generally describing the information withheld. *See Klonoski v. Mahlab, 156 F.3d 255, 257-258 (1st Cir. 1998)* (discussing district court orders regarding privilege logs); *see also § 3.13* above.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.90.*
- *Federal Litigation Guide P 14.24.*
- *Fed. R. Civ. P. 26(b)(5)* (claiming privilege).

[6] Determine Whether Work Product Protection Applies

Counsel must review documents and electronically stored information that might be covered by work product protection. The work product doctrine provides that a party may not obtain discovery of documents, information, or other tangible things prepared in anticipation of litigation or trial by or for another party or that other party's representative, unless the party seeking discovery (1) has substantial need of the materials in the preparation of his or her case, and (2) the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. *See Fed. R. Civ. P. 26(b)(3)(A).*

In ordering discovery of such materials when the required showing has been made, the court must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. *See Fed. R. Civ. P. 26(b)(3)(B).*

A party asserting protection must make the claim expressly and describe the nature of the information not produced in a manner that, without revealing information itself protected, will enable other parties to assess the applicability of the protection. *Fed. R. Civ. P. 26(b)(5)(A).*

For discussion of work product protection, *see §§ 3.41 -3.45 above.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.70.*
- *Federal Litigation Guide P 13.03[2].*
- *Fed. R. Civ. P. 26(b)(3), (b)(5)* (protecting trial-preparation materials).

[7] Disclosures Must Be Made in Writing, Signed, and Served

Unless the court orders otherwise, all disclosures under Rule 26(a) must be made in writing, signed, and served. *Fed. R. Civ. P. 26(a)(4).* The signature on the initial or pretrial disclosure is a certification under *Fed. R. Civ. P. 26(g)(1)* that it is complete and correct as of the time when made.



Timing:

Disclosures under *Fed. R. Civ. P. 26(a)(1)* must not be filed until they are used in the proceeding or the court orders filing. *Fed. R. Civ. P. 5(d)(1).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.150 -26.155.*
- *Federal Litigation Guide P 22.121.*
- *Fed. R. Civ. P. 26(a)(4)* (form of disclosures).

[8] Parties Must Supplement Disclosures

A party who has made a Rule 26(a)(1) disclosure is under a duty to supplement or correct the disclosure to include

later-acquired information. *Fed. R. Civ. P. 26(e)*; *see, e.g., Dunkin Donuts v. Dough Boy Management, 2005 U.S. Dist. LEXIS 38253, at *23 (D.N.J. 2006)* (defendants had duty to supplement their initial disclosures as they acquired pertinent information). The burden is not on the opposing party to request updated information as it becomes available. *Adams v. Teck Cominco Alaska, Inc., 231 F.R.D. 578, 580 (D. Alaska 2005)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.131.*
- *Federal Litigation Guide P 12.45.*
- *Fed. R. Civ. P. 26(e)* (supplementing disclosures).

[9] Sanctions for Noncompliance

The penalty for failure to make any of the disclosures required by *Fed. R. Civ. P. 26(a)* without substantial justification can be costly and potentially pose a severe risk to the noncomplying party's case. *See Fed. R. Civ. P. 37(c)(1)* (authorizing evidence preclusion and other types of sanctions); *see also §§ 18.08-18.12 below.*

Generally, the sanction for failure to comply with Rule 26(a) disclosure requirements is "automatic and mandatory exclusion from trial of the omitted evidence" unless nondisclosure was justified or harmless. *See Happel v. Walmart Stores, Inc., 602 F.3d 820, 825 (7th Cir. 2010)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.06, 26.27.*
- *Fed. R. Civ. P. 37(c)(1)* (sanctions for failure to disclose).



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1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.08

§ 4.08 Complying With Rule 26(a)(2) Expert Disclosure Requirements

In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any expert witness it may use at trial to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*. *Fed. R. Civ. P. 26(a)(2)(A)*.

The disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

1. A complete statement of all opinions that the expert will express and their basis and reasons;

2. The facts or data considered by the expert in forming opinions;

3. Any exhibits to be used as a summary of or in support of the witness's opinions;

4. The witness's qualifications, including a list of all publications written by the witness within the preceding 10 years;

5. The compensation to be paid for the study and testimony; and

6. A list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Fed. R. Civ. P. 26(a)(2)(B).

Unless otherwise stipulated or ordered by the court, if an expert witness is not required to provide a written report, the party employing that witness must make certain summary disclosures. This disclosure must state the subject matter on which the witness is expected to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*. *Fed. R. Civ. P. 26(a)(2)(C)(i)*. This disclosure also must state a summary of the facts and opinions to which the witness is expected to

testify. *Fed. R. Civ. P. 26(a)(2)(C)(ii)*.

This disclosure is considerably less extensive than the written report required from retained experts under Rule 26(a)(2)(B), and the advisory committee has cautioned the courts against requiring "undue detail." *See Fed. R. Civ. P. 26(a)(2)(C)*, Committee Note of 2010.

This summary disclosure requirement is intended to include fact witnesses who also provide expert testimony, such as treating physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. *See Fed. R. Civ. P. 26(a)(2)(C)*, Committee Note of 2010.



Timing:

Expert witness disclosures must be made either at the time directed by the court or agreed to by stipulation or, in the absence of such an order or stipulation at least 90 days before the trial date or the date the case is to be ready for trial. *Fed. R. Civ. P. 26(a)(2)(D)(i)*. If, however, the expert testimony is offered solely as rebuttal evidence, the disclosures must be made within 30 days after the disclosure by the other party. *Fed. R. Civ. P. 26(a)(2)(D)(ii)*.

For further discussion of expert witness disclosure, and expert witness discovery, *see* Ch. 12 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.23*.
- *Fed. R. Civ. P. 26(a)(2)* (disclosure of expert testimony).



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1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.09

§ 4.09 Drafting and Filing Rule 26(f) Report and Proposed Discovery Plan

[1] Parties and Attorneys Must Participate in Good Faith

All parties and their attorneys must participate in good faith in the development and submission of the requisite proposed discovery plan. *Fed. R. Civ. P. 37(f)*; *see Fed. R. Civ. P. 26(f)(2)*.

Warning:

If a party or a party's attorney fails to participate in good faith, the court may require the party or attorney to pay the reasonable expenses, including attorney's fees, caused by the failure. *Fed. R. Civ. P. 37(f)*; *see §§ 18.23-18.27 below*.

[2] Contents of Plan

The proposed discovery plan must indicate the parties' views and proposals concerning:

1. What changes should be made in the timing, form, or requirement for disclosures under Rule 26(a) (initial disclosures), including a statement as to when the disclosures were made or will be made;

2. The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

3. Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

4. Any issues relating to claims of privilege or work product protection, including, if the parties agree on a procedure to assert such claims after production, whether to ask the court to include that agreement in an order;

5. What changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

6. Any other orders that the court should issue under Rule 16(b) (scheduling orders), Rule 16(c) (pretrial conferences), or Rule 26(c) (protective orders).

Fed. R. Civ. P. 26(f)(3).

This list is not exclusive. Other matters for consideration at the discovery conference and inclusion in the discovery plan include the time when any dispositive motions must be filed and when the case should be ready for trial. *See Fed. R. Civ. P. 26(f)*, Committee Note of 1993. The plan should also outline the competing positions of the parties on issues as to which they were unable, in good faith, to reach an agreement. *See Fed. R. Civ. P. 26(f)*, Committee Note of 1993.

[3] Responsibility for Filing Report Is Joint

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for submitting the written report to the court outlining the agreements they reached at their discovery conference. *Fed. R. Civ. P. 26(f)(2).*



Timing:

The report must be submitted within 14 days after the Rule 26(f) conference. District courts may, by local rule, require counsel to file their discovery plan report fewer than 14 days after the initial conference. *Fed. R. Civ. P. 26(f)(4)(B).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.145.*
- *Bender's Federal Practice Forms* Form No. 16:200.
- *Fed. R. Civ. P. 26(f)* (discovery conference).



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1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.10

§ 4.10 Checklist for Participating in Pretrial Conferences

☐ Determine whether proceeding is exempt under local rules from Rule 16 scheduling order requirements. *See § 4.13[1] below*.

☐ If not exempt, determine time scheduling order is due. *See § 4.13[3] below*.

☐ Determine method for prior contact between litigants and court. *See § 4.13[2] below*.

☐ Evaluate topics to be addressed by scheduling order. *See § 4.13[4] below*.

☐ Determine who will draft proposed scheduling order.

☐ Determine whether court will hold formal scheduling conference. *See § 4.13[6] below*.

- ○ Consult local rules, as well as individual judges' rules, regarding timing of scheduling conference of parties.
- ○ Seek guidance from the clerk of the court if unfamiliar with court or judge or unsure of their rules.
- ○ Review topics required to be discussed at scheduling conference. *See § 4.13[4] below*.

☐ If reasonably anticipated to be necessary, seek modification of scheduling order on showing of good cause. *See § 4.13[7] below*.

☐ If necessary and available, seek immediate appellate review. *See § 4.13[8] below*.

☐ Ascertain applicable procedure for final pretrial conference, consulting local rules, general orders, individual judge's standing orders, and plans. *See § 4.18 below*.

☐ Prepare for final pretrial conference. *See § 4.18[4] below*.

- ○ Review factual and legal bases of case, including contentions, summaries of proposed testimony, and judicial involvement to date.
- ○ Review all previous pleadings and rulings in case.
- ○ List witnesses, evidence, and exhibits for trial.
- ○ Review settlement possibilities with client.

☐ Draft any preliminary papers required by local rule, general orders, plans, and judge's standing orders.

☐ If required by local rule or individual judge's standing order, meet with opposing counsel before conference.

☐ Prepare and mark exhibits, as required by local rules and individual judge's standing orders.

☐ Participate in conference. *See § 4.18 below*.

☐ Prepare to respond candidly to court's inquiries.

☐ With regard to settlement, avoid any representations that contradict client's expectations and counsel's own settlement authority.

☐ Comply with requirements for drafting and filing pretrial order as required by local rules and individual judge's standing orders, keeping in mind that:

- ○ Order controls subsequent course of the action (*e.g.*, supersedes pleadings) unless modified by subsequent order. *See § 4.18[6] below*.
- ○ Order will be subject to modification only to prevent manifest injustice. *See § 4.18[7] below*.

- ☐ Consider whether to file objections to proposed final pretrial order.
- ☐ Consider having transcript of conference prepared for future reference in guiding the litigation.
- ☐ Prepare and file trial brief, if required or permitted by local rules.
- ☐ **Search by Topic:** Civil Procedure > Pretrial Matters > Conferences



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1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.11

§ 4.11 Understanding Role of Pretrial Conferences

Rule 16 is the principal source of authority for district courts to achieve the fundamental purpose stated in Rule 1 of securing "the just, speedy, and inexpensive determination of every action and proceeding." *Fed. R. Civ. P. 16*; *see Fed. R. Civ. P. 1*. Rule 16 authorizes and regulates the use of a wide range of case management tools and powers, principally through pretrial conferences, and authorizes a wide range of sanctions for violations of pretrial orders. *See Fed. R. Civ. P. 16*.

A federal court has discretion to direct the attorneys for the parties and any unrepresented parties to appear for a pretrial conference or conferences for case management purposes, including the following:

1. Expediting the disposition of the action, including narrowing issues and defenses;

2. Establishing early and continuing control so that the case will not be protracted because of lack of management;

3. Discouraging wasteful pretrial activities, including unnecessary discovery;

4. Improving the quality of the trial by requiring more thorough preparation; and

5. Facilitating settlement or the use of alternative dispute resolution mechanisms.

Fed. R. Civ. P. 16(a).

To allow judges to fashion case development plans that are tailored to the needs to individual cases, Rule 16 necessarily confers a great deal of discretion on the individual judges who apply it. *See S&W Enters. v. Southtrust Bank of Ala., 315 F.3d 533, 535 (5th Cir. 2003)* (appellate court owes a trial court broad discretion to preserve the integrity and purpose of a pretrial order). In addition, Rule 16 recognizes the authority of district courts, by local rule, to create specialized sets of procedures for various categories of actions. Responding to this invitation, many courts have adopted elaborate sets of specialized provisions that apply only to certain kinds of cases.

Warning:

The variety of practices under Rule 16 among sitting federal judges can be confusing. Therefore, at the outset, counsel must consult the local rules of the particular district, and also the individual judge's rules.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.02, 16.03.*
- *Federal Litigation Guide P 27.01.*
- *Fed. R. Civ. P. 16(a)* (pretrial conferences).



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§ 4.12 Understanding Local Terminology

Different district courts use different labels to describe pretrial conferences. The initial "meet and confer" contact between counsel is variously referred to as the Rule 26(f) conference or the discovery planning conference. *See § 4.03 above*. Further, district courts use different terms to refer to the first conference conducted by the judge or magistrate judge. Some districts label the conference a scheduling conference, while others call it an initial status conference, an initial pretrial conference, an initial case management conference, a Rule 16 conference, or a first discovery conference. This chapter uses the term scheduling conference in the general text, but uses each district's specific term in the local practice discussions.

District courts also use different labels to describe periodic, interim pretrial conferences authorized by *Fed. R. Civ. P. 16(c)*. District courts use the following terms: interim pretrial conferences, status conferences, discovery planning conferences, Rule 16 conferences, interim or intermediate case management conferences, and, as appropriate, settlement conferences. This chapter uses the term interim pretrial conference to refer to all pretrial conferences other than the scheduling conference and the final pretrial conference

Finally, courts use varying terms to refer to the final pretrial conference. *See § 4.18 below*. Local rules may prescribe the appropriate terminology.

PRACTICE RESOURCES:

- *Fed. R. Civ. P. 16* (pretrial conferences).
- *Fed. R. Civ. P. 26(f)* (discovery conferences).

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1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.13

§ 4.13 Preparing and Filing Scheduling Order

[1] Scheduling Order Mandatory Unless Exempted by Local Rule

Except in categories of actions expressly exempted by local district court rule, the judge or magistrate judge must enter a pretrial scheduling order after receiving the Rule 26(f) proposed discovery report from the parties (*see § 4.09 above*) or after consulting with the attorneys for the parties and any unrepresented parties by conference, telephone, mail, or other suitable means. *Fed. R. Civ. P. 16(b).*

The scheduling order is the court's primary method to control its calendar, assert control over the case management process, and define the parameters of the case. The requirement of a scheduling order affords the court with an opportunity to intervene early to set realistic deadlines for discovery and other aspects of pretrial case development, as well as to position the case for settlement, alternative dispute resolution, or trial.



Strategic Point:

A judge's failure to issue a mandatory scheduling order is not ordinarily deemed by appellate courts to be sufficient grounds, by itself, for any significant relief. Because it is probable that these failures are more often due to oversight than to deliberate decision, and because the absence of a scheduling order can result in lack of focus, inefficiency, and delays in disposition, if so inclined, counsel should consider proposing a scheduling order or request a scheduling or case management conference when a judge has failed to act in accordance with Rule 16's mandates. In some districts the clerk issues the initial scheduling order when the complaint is filed. If the judge fails to issue an order after the conference, the parties should try to stipulate or submit their proposed orders to the judge for approval.

PRACTICE RESOURCES:

- *Federal Litigation Guide P 27.20.*
- *Bender's Federal Practice Forms* Form Nos. 16:1-16:22.

- *Fed. R. Civ. P. 16(b)* (scheduling order).

[2] Judge and Litigants Must Have Contact Before Issuance of Scheduling Order

A federal judge may not issue a scheduling order without having first either received from the litigants the proposed discovery plan report, or consulted with the attorneys for the parties and any unrepresented parties by a scheduling conference (*see § 4.13[6] below*), telephone, mail, or other suitable means.

This preliminary contact serves the following purposes:

1. The court may assert control over the litigation and the parties from the outset.

2. The parties have an opportunity, at the outset, to inform the court of potential procedural, evidentiary, and substantive problems, as well as personal scheduling conflicts, that might affect the pretrial schedule.

3. The court may tailor the scheduling order to the needs of the individual case.

The scope and the nature of the matters on which the court seeks the parties' input varies considerably from court to court, judge to judge, and case to case. Some judges solicit only the most skeletal of input, simply asking for three proposed deadlines: to join parties and amend pleadings, to file motions, and to complete discovery. Other judges solicit detailed submissions not only on all mandatory and discretionary matters covered by Rule 16(b) (*see § 4.13[4] below*) but also on most of the subjects that are identified in Rule 16(c) as possible agenda items in any pretrial conference (*see § 4.14[5] below*). *Fed. R. Civ. P. 16(b), (c).*

Fed. R. Civ. P. 16 does not require that this initial contact between the judge and the litigants be in person or by telephone. The manner of contact is discretionary, and it is sufficient to solicit and receive input from counsel in writing or electronically. The receipt of a written report outlining the discovery plan is one method to satisfy this requirement. *Fed. R. Civ. P. 26(f).*

Warning:

Practices as to the initial contact between the judge and the litigants vary between courts, between individual judges in the same court, and between types of cases. Counsel should consult the relevant local rules, as well as any individual judges' rules and general or standing orders.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 16.11.*
- *Federal Litigation Guide P 27.22.*
- *Fed. R. Civ. P. 16(b)* (scheduling order).

[3] Time for Order

Regardless of whether a district court holds a formal scheduling conference, the scheduling order must be issued as soon as practicable, and in any event is due within 90 days of the date any defendant first enters its appearance (whether by answer or motion) or, if earlier, within 120 days of the date of service of the complaint on any defendant. *Fed. R. Civ. P. 16(b)(2).*



Strategic Point:

The timing of the scheduling order may present problems in multidefendant litigation. The trial court may issue the scheduling order before all defendants have been served and appear in the action. Local rules may permit a party, including a party added later in the case, to seek relief from an obligation imposed by *Fed. R. Civ. P. 16* or *26* or the Order Setting Initial Case Management Conference. As an alternative approach, it is always wise to request a stipulation of opposing counsel as to the scheduling order in the first instance. *See* Ch. 15 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 16.12*.
- *Fed. R. Civ. P. 16(b)* (scheduling order).

[4] Topics to be Addressed by Scheduling Order

The scheduling order *must* limit the time to join other parties, to amend the pleadings, to file substantive motions, and to complete discovery. *Fed. R. Civ. P. 16(b)(3)(A)*.

The scheduling order *may* also include:

1. Modifications of the times for disclosures under *Fed. R. Civ. P. 26(a)*, *(e)(1)*, and of the extent of the discovery to be permitted;

2. Provisions for disclosure or discovery of electronically stored material;

3. Any agreements the parties reach for asserting claims of privilege or of protection of trial-preparation material after production;

4. The dates for interim pretrial conferences, a final pretrial conference, and trial; and

5. Any other matters appropriate in the circumstances of the case.

Fed. R. Civ. P. 16(b)(3)(B).



Warning:

Consult local district court rules, as well as the individual judge's rules, for any provisions regarding topics to be addressed in the scheduling order.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 16.13[1], [2]*.
- *Federal Litigation Guide P 27.21*.
- *Fed. R. Civ. P. 16(b)* (scheduling order).

[5] Scheduling Order Controls Course of Litigation Unless Modified

The scheduling order controls the course of the litigation unless modified by the court. *Fed. R. Civ. P. 16(b)*. Scheduling orders are generally binding through the subsequent course of the litigation. Unless the party requests modification of the scheduling order (*see § 4.13[7]*), motions filed after the relevant deadlines may be denied solely on the basis that the motion was untimely. *See Smith v. School Bd., 487 F.3d 1361, 1366 (11th Cir. 2007)* (after deadline for motion has passed, party must show good cause why leave to amend the complaint should be granted). Nevertheless, trial courts should not so rigidly adhere to time limits as to sacrifice justice in the name of judicial efficiency. *Navellier v. Sletten, 262 F.3d 923, 941 (9th Cir. 2001)* (district court exercised a normal role in establishing time limits at trial and did not abuse its discretion).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 16.14*.
- *Federal Litigation Guide P 27.24*.
- *Bender's Federal Practice Forms* Form No. 16:500.
- *Fed. R. Civ. P. 16(b)* (scheduling order).

[6] Scheduling Conference Is Discretionary Unless Required by Local Rule

Federal judges may, but are not required to, hold a scheduling conference before issuing a scheduling order. Although the court and the parties must communicate before the court issues the scheduling order, that communication may be by:

1. Scheduling conference;
2. Report outlining the proposed discovery plan (*see § 4.09 above*);
3. Telephone communication;
4. Mail communication; or
5. Other suitable means.



Warning:

Consult the local rules of the particular district, as well as the individual judge's rules, regarding any scheduling conference requirements.

PRACTICE RESOURCES:

- *Federal Litigation Guide PP 27.30 -27.36*.

[7] Seeking Modification of Scheduling Order Based on Good Cause

A scheduling order may not be modified except by leave of court on a showing of good cause. *Fed. R. Civ. P. 16(b)(4)*.

The Rule 16(b) "good cause" standard, rather than the more liberal standard of *Fed. R. Civ. P. 15(a)*, governs a motion to amend pleadings filed after the deadline set in the scheduling order for amending the pleadings. *See Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294 (9th Cir. 2000)* (*Fed. R. Civ. P. 16(b)* standard proper when court had filed a pretrial scheduling order that established a timetable for amending the pleadings, and the deadline had expired before plaintiffs moved to amend); *see also Saewitz v. Lexington Ins. Co., 2005 U.S. App. LEXIS 10470, at *10-*12 (11th Cir. 2005)* (unpublished opinion) (court applied both Rule 16(b) "good cause" standard and *Fed. R. Civ. P. 15(a)* "good cause" standard).

The good cause standard primarily considers the diligence of the party seeking modification. *See Kassner v. 2nd Ave. Delicatessen, Inc., 496 F.3d 229, 243 (2d Cir. 2007)* (quoting *Fed. R. Civ. P. 16(b)*). Modification will be permitted only if the party seeking the extension demonstrates that the schedule cannot reasonably be met even with the exercise of due diligence. *See Southwestern Bell Tel. Co. v. City of El Paso, 346 F.3d 541, 546 (5th Cir. 2003)* (prejudice to plaintiff from defendant's untimely and likely unsuccessful counterclaims justified the denial of leave to amend); *Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Co., 607 F. Supp. 2d 600, 602 (S.D.N.Y. 2009)* ("good cause" is lacking when moving party had knowledge of facts supporting amended pleading for years and could have made motion to amend within specified time period). If the party was not diligent, the inquiry ends and the motion to modify should be denied. *Zivkovic v. Southern Cal. Edison Co., 302 F.3d 1080, 1087-1088 (9th Cir. 2002)* (plaintiff did not demonstrate diligence in complying with the dates set by district court).

The party seeking modification should demonstrate diligence in working with the court in crafting a new scheduling order, and should show that the party filed the request for modification as soon as practicable. *See Jackson v. Laureate, Inc., 186 F.R.D. 605, 608 (E.D. Cal. 1999)* (plaintiff satisfied none of the diligence inquiries).

As a general rule, neither the parties nor their counsel have the authority to stipulate or otherwise agree to changes in a scheduling order. Furthermore, mere stipulations by the parties do not constitute good cause for modification of a scheduling order. *See Hernandez v. Mario's Auto Sales, Inc., 617 F. Supp. 2d 488, 493 (S.D. Tex. 2009)* (purpose of discovery order is to allow *court* to control and expedite pretrial matters). Nevertheless, some judges will modify a scheduling order based on the parties' stipulation, but the parties should still apply to the court for approval.



Strategic Point:

A court is far more likely to respond favorably to a motion seeking an extension if counsel files the motion promptly on discovering scheduling difficulties and does not wait until the last minute to file the request. A request filed after the passage of the relevant deadline may in fact violate local rules.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 16.14.*
- *Federal Litigation Guide P 27.24.*
- *Bender's Federal Practice Forms* Form No. 16:500.
- *Fed. R. Civ. P. 16(b)(4)* (modifying a schedule).

[8] Seeking Appellate Review of Scheduling Order

In general, most scheduling orders are interlocutory in nature, rather than final. *See Miera v. First Sec. Bank, N.A., 776 F.2d 902, 906 (10th Cir. 1985)* (interlocutory nature of pretrial orders generally precludes appellate review). They deal

with preliminary matters, and may still be modified by the court during the pretrial period. *See Fed. R. Civ. P. 16(b), (d).* Review is ordinarily deferred until after final judgment; however, a timely objection must be registered with the trial court. *See Jauregui v. City of Glendale, 852 F.2d 1128, 1133-1134 (9th Cir. 1988)* (pretrial order establishing facts of discrimination in employment).

Exception:

In rare circumstances, a scheduling order may be immediately appealable either by direct appeal or by writ of mandamus. *See Miera v. First Sec. Bank, N.A. 776 F.2d 902, 906 (10th Cir.1985)* (citing **Moore's**, pretrial orders that effectively resolve all triable issues are reviewable). This could occur concerning (1) a decision whether an action must be heard by a district court composed of three judges, or (2) a pretrial order establishing liability. *See Miera v. First Sec. Bank, N.A. 776 F.2d 902, 906 (10th Cir.1985)* (citing **Moore's**).

Challenges to a trial court's management of a case and the preclusive effect of a pretrial order are reviewed for abuse of discretion. *Southwestern Bell Tel. Co. v. City of El Paso, 346 F.3d 541, 549 (5th Cir. 2003)* (district court did not abuse its discretion in denying leave to amend); *Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607-609 (9th Cir. 1992)* (summary judgment properly granted after plaintiff's failure to join necessary defendant prior to deadline).

District courts have broad discretion to supervise the pretrial phase of litigation, including setting reasonable time limits. The decision to modify a scheduling order is within the trial court's broad discretion to expedite the completion of trials. *See Navellier v. Sletten, 262 F.3d 923, 941 (9th Cir.2001)* (trial courts have broad authority to set time limits to prevent undue delay, waste, or needless introduction of cumulative evidence).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.38[2], 202.07, 202.11.*



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Chapter 4 PRETRIAL CONFERENCES AND MANDATORY DISCLOSURES
PART C: PARTICIPATING IN PRETRIAL CONFERENCES

1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.14

§ 4.14 Participating in Interim Pretrial Conferences

[1] Interim Pretrial Conferences Offer Opportunity to Review Pretrial Developments and Streamline Case

An interim pretrial conference provides an opportunity for the presiding judicial officer and counsel to revisit the issues in the case; to determine whether the case is progressing as scheduled; and to refine the operative scheduling or interim pretrial order. Judges and counsel are encouraged not to assume that the case will develop as fashioned in the scheduling order. As disclosures, discovery, motion activity, and developments external to the litigation present the parties with new information or change the litigation circumstances, judges and counsel may make adjustments to the original plan, or even move the pretrial process in a different direction.

Interim pretrial conferences may cover virtually any procedural or substantive issue relevant to the case. In particular, developments in the discovery process will most likely be relevant to the parties' views about settlement. Therefore, settlement is almost always revisited at interim pretrial conferences.

Warning:

The Federal Rules of Civil Procedure rules do not prescribe specific procedures for interim pretrial conferences. Rather, local rules, and more typically, individual judge's rules may specify conference procedures.

[2] Judge May Hold One or More Interim Pretrial Conferences

The assigned judge or magistrate judge has discretion to hold one or more interim pretrial conferences. *See Fed. R. Civ. P. 16(a)*. Whether any interim pretrial conferences will be held is a matter committed to the sound discretion of the assigned district judge or magistrate judge. *See Mescal v. United States, 161 F.R.D. 450, 451-452 (D.N.M. 1995)* .

Factors relevant to the decision to hold one or more interim pretrial conferences include:

1. The case management philosophy of the assigned judge;

2. The complexity of the case;

3. The expertise or experience of counsel; and

4. The level of cooperation or friction between counsel or across party lines.

Local district court rules may require judges to hold interim pretrial conferences in specified categories of cases, or in specified circumstances. Counsel should consult the individual judge's rules, which often contain provisions regarding interim pretrial conferences, as well as any general or standing orders.

[3] Requesting Interim Pretrial Conference

If a case might benefit from an interim pretrial conference, counsel should consider making a request to the assigned judge. A request for an interim pretrial conference signifies that counsel are taking pretrial responsibilities seriously.

Counsel are usually better able than the assigned judge to observe developing pretrial matters. Counsel should state any changed circumstances that give rise to the need for a conference, explain how a conference would contribute to the pretrial case development process, and propose an agenda.

[4] Attending Interim Pretrial Conference

Rules and practices related to participation in interim case management conferences are not materially different from the rules and practices for scheduling or initial case management conferences. *See § 4.13 above*. At a minimum, every unrepresented party and at least one attorney for each represented party must participate in every interim pretrial conference unless otherwise ordered by the court. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone to consider possible settlement of the dispute. *Fed. R. Civ. P. 16(c)*.

At least one of the participating attorneys for each represented party must have authority to enter stipulations and make admissions with respect to any matter that he or she should reasonably anticipate may be discussed at the conference. *Fed. R. Civ. P. 16(c)*. Courts may impose a broad range of sanctions if no appearance is made on behalf of a party at an interim pretrial conference. *Fed. R. Civ. P. 16(f)*.

Attendance requirements for interim pretrial conferences are ordinarily determined by the nature of the conference and the topics to be addressed.

[5] Topics for Consideration at Interim Pretrial Conference

All subjects listed in Rule 16(b) and (c) may appear on the agenda at an interim conference. *See § 4.13[4] above*. Rule 16(c) provides that the following matters may be considered and acted on at any pretrial conference.

1. Formulating and simplifying the issues, and eliminating frivolous claims or defenses;

2. Amending the pleadings if necessary or desirable;

3. Obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

4. Avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under *Fed. R. Evid. 702*;

5. Determining the appropriateness and timing of summary adjudication under *Fed. R. Civ. P. 56*;

6. Controlling and scheduling discovery, including orders affecting disclosures and discovery pursuant to *Fed. R. Civ. P. 26* and *Fed. R. Civ. P. 29-37*;

7. Identifying witnesses and documents;

8. Scheduling the filing and exchange of any pretrial briefs;

9. Setting dates for further conferences and for trial;

10. Referring matters to a magistrate judge or special master;

11. Settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

12. Determining the form and content of the pretrial order;

13. Disposing of pending motions;

14. Adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

15. Ordering a separate trial pursuant to *Fed. R. Civ. P. 42(b)* with respect to a claim, counterclaim, crossclaim, third-party claim, or particular issue;

16. Ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for judgment as a matter of law under *Fed. R. Civ. P. 50(a)*, or a judgment on partial findings under *Fed. R. Civ. P. 52(c)*;

17. Establishing a reasonable limit on the time allowed for presenting evidence; and

18. Facilitating in other ways the just, speedy, and inexpensive disposition of the action.

Fed. R. Civ. P. 16(c).



Strategic Point:

Although Rule 16(c) broadly describes the topics that may be addressed at the interim pretrial conferences over the course of the litigation, topics such as the identification of disputed legal and factual issues and the control and scheduling of disclosures and discovery, are more likely to be addressed at the beginning and interim stages of the pretrial period. Other items, such as reviewing remaining claims and defenses, are more likely to be considered at the final pretrial conference. *See § 4.18 below*.



Warning:

Because individual judges' rules often set forth additional interim pretrial conference topics, counsel must consult these rules as well as local rules.

A judge may consider and propose the use of a court-appointed expert at a scheduling or interim pretrial conference. *See*

Fed. R. Evid. 706. A court-appointed expert may help provide an early foundation for stipulations, reduce the scope of discovery, facilitate early settlement, reduce the adversarial nature of the proceedings and conflicts between the parties' experts, and potentially identify, clarify, and narrow the disputed issues.



Strategic Point:

Although this procedure is relatively rare, it can be an effective tool to propose, particularly if the proponent is confident regarding an appropriate issue.

[6] Interim Pretrial Conference Orders

After any Rule 16 pretrial conference, the court "should" enter an order reciting all actions taken and rulings made. *Fed. R. Civ. P. 16(d)*.

Interim pretrial conference orders control the subsequent course of the action unless modified by subsequent order. *Fed. R. Civ. P. 16(d)*.



Strategic Point:

Counsel should consult the local rules, as well as the individual judge's rules, to determine whether interim pretrial conference orders are required, and if so, the requirements of the order and whether it is counsel's responsibility to draft a proposed order. Even when an order is not required, counsel should nevertheless consider requesting the opportunity to present a proposed order, or at least a memorandum summarizing the results of the conference. An order (or memorandum) stating the decisions and stipulations made at the pretrial conference assists the parties in keeping track of the litigation; reduces the risk of confusion, friction between parties, inefficiency, and unfairness; and provides a record for appellate review.

[7] Seeking Modification of Interim Pretrial Conference Orders

Interim pretrial conference orders are subject to modification. The standard that judges apply in deciding whether to grant a party's request to modify an interim pretrial conference order is the same standard used when determining whether to modify the scheduling order. *See Fed. R. Civ. P. 16*, Committee Note of 1993. Accordingly, a party must show good cause before the court will grant a request to modify an interim pretrial conference order. *See § 4.13[7] above*.



Strategic Point:

A showing of good cause ordinarily requires that counsel establish an inability to meet the scheduled deadlines despite exercising due diligence. Accordingly, counsel should describe with specificity the actions that have been taken to comply with the order. Counsel should also propose a new schedule that will make the case ready for trial--ready as quickly as possible under the changed circumstances. The proposed new dates should be as close to the dates originally fixed as feasible, and that fact should be pointed out in the request.

[8] Seeking Appellate Review of Interim Pretrial Conference Orders

In general, interim pretrial conference orders are interlocutory in nature, rather than final. They deal with preliminary and procedural matters, leading up to, but not including, trial, and may still be modified by the court on a showing of

good cause. *Fed. R. Civ. P. 16(b), (d)*. Because the court is still able to make adjustments as needed, no irreversible legal consequences generally flow from these orders. Therefore, appellate review of most interim pretrial conference orders must await a final judgment in the action. *See In re Recticel Foam Corp., 859 F.2d 1000, 1002 (1st Cir.1988)* (final pretrial order).

Challenges to the trial court's management of a case are reviewed for abuse of discretion. For example, trial courts have broad authority to impose and enforce reasonable time limits for each side's presentation of the case. *See Harris v. Dinesh Chand, 506 F.3d 1135, 1141 (8th Cir. 2007)* (district court did not abuse its discretion in imposing time limits on the presentation of evidence). However, trial courts may not rigidly adhere to time limits so as to "sacrifice justice in the name of efficiency." *General Signal Corp. v. MCI Telecommunications Corp., 66 F.3d 1500, 1509 (9th Cir. 1995)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.60, 16.61, 16.62, 16.63.*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 706.
- *Federal Litigation Guide PP 27.51, 27.54, 27.56, 27.57.*
- *Fed. R. Civ. P. 16(c)* (pretrial conferences).
- *Fed. R. Civ. P. 16(d)* (pretrial orders).



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1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.15

§ 4.15 Participating in Settlement Conferences

Although settlement may be discussed at every pretrial conference, courts may also hold conferences specifically for the purpose of discussing and encouraging settlement. *Fed. R. Civ. P. 16(c)(2)(I)*. Federal jurisprudence encourages pretrial settlement discussions and favors the settlement of civil actions. However, although the presiding judicial officer has discretion in determining the applicable settlement conference procedure, federal judicial officers may not coerce settlement. *See Kothe v. Smith, 771 F.2d 667, 669 (2d Cir.1985)* (judge abused the sanction power by imposing a sanction on appellant only for failure to settle before the first day of trial).

Settlement conference statements, if required, ordinarily outline the facts of the case, the contentions of the parties, and the damages. Counsel should consult the individual judge's rules to determine whether settlement conference statements must be filed.

Settlement conferences may be beneficial to the litigants even if an early settlement is not achieved. The advantages of settlement conferences include the following:

1. Assisting the parties in understanding the factual and legal issues in the case, including identifying the strengths and weaknesses of their own positions;

2. Highlighting remaining disclosure, discovery, or motion practice needed to position the case for settlement or trial;

3. Providing an opportunity for extended dialogue across party lines regarding the pertinent evidence and law;

4. Offering the litigants an opportunity to present the equities of their case to a representative of the court system.



Strategic Point:

Counsel should consult the local rules, as well as the individual judge's rules, to determine whether

settlement conferences are mandatory or discretionary, and whether counsel may initiate a request for a settlement conference. Federal district court judges typically refer the settlement conference to a magistrate judge, special master, or other neutral mediator, particularly in nonjury cases. Settlement prospects may be enhanced when the person hosting the negotiations is a sitting judge other than a judge assigned to try the case.

Warning:

If the district judge volunteers involvement in settlement discussions, and seeks the consent of all parties to that involvement, a dilemma is presented, particularly in nonjury cases. Counsel should make every possible effort to find others who have participated in settlement conferences with the assigned judge, in an effort to gain as much insight as possible into the judge's settlement approach.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 16.53[9].*
- *Federal Litigation Guide P 27.58.*



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1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.16

§ 4.16 Handling of Pretrial Activity by Magistrate Judges

[1] Magistrate Judge May Handle Significant Pretrial Activity

As a result of the congested dockets in district courts and the need to allocate judicial resources, district judges may appoint magistrate judges to handle significant pretrial activity, particularly with respect to scheduling and planning. *See 28 U.S.C. § 636.*

[2] Scope of Assignments Varies

The types of assignments that may be given to magistrate judges vary significantly, even within the same court. Some district judges assign all responsibility for handling all discovery disputes in all their cases to magistrate judges, while others almost never refer discovery matters to magistrate judges, and others selectively refer particular discovery disputes to magistrate judges. Further, some judges assign substantial case management responsibilities to magistrate judges, whereas others never assign substantial case management responsibilities.

Parties have no right to demand that their case be handled by a particular magistrate judge. Accordingly, a motion to disqualify a magistrate judge will not be granted on the ground that the parties disagree with the appointment. Also, a magistrate judge may be assigned to determine more than one pretrial matter in a particular case without raising the issue of bias. *See Proa v. NRT Mid Atlantic Inc., 608 F. Supp. 2d 690, 693 (D. Md. 2009)* (district court rejected parties' argument that same magistrate judge could not be assigned to handle both discovery and settlement in single case).

Counsel should consult the local rules of the particular district, as well as the individual judge's rules, regarding assignment of cases to magistrate judges.

Referring case management, discovery, or settlement work to magistrate judges can be advantageous because the magistrate judge may be able to devote substantially more time to the case than district judges. The magistrate judge may be better able to learn the details of the pertinent evidence and law and provide closer supervision and more detailed guidance concerning the development of the case. However, the referral may also result in delay stemming from requests for review of the magistrate judge's findings, proposed findings, or recommendations.

[3] Seeking Review of Magistrate Judge's Ruling

Procedures for review of a magistrate judge's ruling are ordinarily prescribed by local rule.

When reconsidering a magistrate judge's ruling or report and recommendation, the standard of review applied by a district court varies with the type of decision made and the basis for the decision. Interlocutory scheduling orders issued by a magistrate judge, for example, may be reviewable by a district judge under the *clearly erroneous* or the *abuse of discretion standard*.

The *clearly erroneous* standard is applied to findings of fact made by magistrate judges that support rulings on non-dispositive motions, or the exercise of case-management discretion. *See 28 U.S.C. § 636(b)(1)(A)*

When reviewing aspects of a magistrate judge's decision that involve interpretations of applicable law, district courts apply the *contrary to law* standard, meaning de novo review. District judges also apply the de novo standard when ruling on objections to a magistrate judge's report and recommendation on a potentially dispositive motion. *See 28 U.S.C. § 636(b)(1), (c)(4)*; *Fed. R. Civ. P. 72*.

Parties may ask the assigning judge to reconsider a scheduling order entered by a magistrate judge by filing a challenge within 14 days after being served with a copy of the order. Any objections not timely filed are waived. *Fed. R. Civ. P. 72(a)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.04[2][a][i]*; *72.11*.
- *Federal Litigation Guide P 27.02*.
- *Practice Before Federal Magistrates* Chs. 12, 13, 15.
- *28 U.S.C. § 636* (jurisdiction, powers, and assignment of magistrate judges).
- *Fed. R. Civ. P. 72* (magistrate judges).
- *Oracle USA, Inc. v. SAP AG, 264 F.R.D. 541, 546 (N.D. Cal. 2009)* (discovery sanctions are nondispositive unless imposition of sanction would be dispositive of party's claim or defense).
- *SEC v. Merrill Scott & Assocs., Ltd., 600 F.3d 1262, 1269 (10th Cir. 2010)* (magistrate judge may not issue final order directly appealable to court of appeals; properly filed objections resolved by district court are prerequisite to court of appeals review).



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1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.17

§ 4.17 Handling of Pretrial Activity by Masters

[1] Referring Case to Master Is Exception

Relying on their inherent authority and *Fed. R. Civ. P. 53*, district judges may appoint a master to perform a wide range of pretrial functions, including assigning responsibility for case management, discovery, settlement, and ADR processes; and conducting evidentiary hearings for major pretrial motions.

Referrals are ordinarily made in complex or unusually contentious jury cases, in nonjury actions for matters of account and difficult computation of damages, in nonjury actions on a showing that the appointment is required by some exceptional condition, and when the parties consent to the appointment of a magistrate judge to serve as master. *See Fed. R. Civ. P. 53(a)*. A magistrate judge is subject to the masters rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under Rule 53. *Fed. R. Civ. P. 53(h)*.

Referrals to a master are the exception rather than the rule and occur with less frequency than referrals to magistrate judges. *See Fed. R. Civ. P. 53(a)*.



Strategic Point:

Referring case management, discovery, or settlement work to masters can be advantageous because the special master may be able to devote substantially more time to the case than a district judge. The master may be better able to learn the details of the pertinent evidence and law and provide closer supervision and more detailed guidance concerning the development of the case. However, the referral may cause significant additional costs and delay. The district court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay. *Fed. R. Civ. P. 53(a)(3)*.

[2] Prior Notice and Hearing Required

The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment. *Fed. R. Civ. P. 53(b)(1)*.

[3] Authority of Master

Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to fairly and efficiently perform the assigned duties. The master may by order impose on a party any noncontempt sanction, and may recommend a contempt sanction against a party and sanctions against a nonparty. *Fed. R. Civ. P. 53(c)(2)*. A master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence, unless the appointing order expressly directs otherwise. *Fed. R. Civ. P. 53(c)(1)(C)*.

A master is not required to follow the Federal Rules of Evidence or Federal Rules of Civil Procedure when performing adjudicatory functions, absent a reference order that requires the master to do so. *See United States v. Clifford Matley Family Trust, 354 F.3d 1154, 1161 (9th Cir. 2004)* ("[a]n order referring a case to a special master is the source and the limit of the master's duties and powers").

[4] Compensation

In general, the court fixes the master's compensation before or after judgment on the basis and terms stated in the order of appointment. However, the court may set a new basis and terms after notice and an opportunity to be heard. *Fed. R. Civ. P. 53(g)(1)*. The court determines whether the master's compensation is to be charged to a party, the parties, or paid out of a fund or subject matter of the action that is in the court's custody or control. *See Fed. R. Civ. P. 53(g)(2)*.

[5] Seeking Review of Master's Determination

After the master files the required report or recommendation, or enters and files an order, any party may, within 21 days of service, object to it, or move to adopt or modify it. *Fed. R. Civ. P. 53(f)(2)*.

In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard, may receive evidence, and may take any of the following actions:

1. Adopt or affirm;

2. Modify;

3. Wholly or partly reject or reverse; or

4. Resubmit to the master with instructions.

Fed. R. Civ. P. 53(f)(1).

The trial court must ordinarily decide de novo any party's timely objections to findings of fact made or recommended by the master. However, the parties may stipulate, with the trial court's consent, that the master's findings (1) will be reviewed for clear error, or (2) will be final respecting matters that were referred to the master with the consent of all of the parties or matters relating to pretrial or post-trial proceedings. *Fed. R. Civ. P. 53(f)(3)*. The court must decide de novo all objections to conclusions of law made or recommended by a master. *Fed. R. Civ. P. 53(f)(4)*. The court may set aside a master's ruling on a procedural matter only for an abuse of discretion, unless the order of appointment establishes a different standard of review. *Fed. R. Civ. P. 53(f)(5)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.04[2][a][ii], 16.53[8], 53.10, 53.12, 53.42.*

- *Federal Litigation Guide P 27.03*.

- *Fed. R. Civ. P. 53* (masters).

- *Hofmann v. EMI Resorts, Inc., 689 F. Supp. 2d 1361, 1374 (S.D. Fla. 2010)* (special master appointed by court assumes duties and obligations of judicial officer, and is generally subject to Code of Conduct for United States Judges).



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1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.18

§ 4.18 Participating in Final Pretrial Conference

[1] Local Rules Must Be Consulted

A district court judge may, but is not required to, hold a final pretrial conference under the Federal Rules. *See Fed. R. Civ. P. 16(e)*. District court judges have discretion to determine whether to hold the conference and to set the conference agenda.



Warning:

Counsel must consult the district's local rules, as well as the individual judge's standing orders, to determine whether a conference will be required and to ascertain the applicable procedures and agenda.

Different district courts use different labels to describe pretrial conferences. Courts use the terms pretrial conference, final pretrial conference, or case management conference. Local rules may prescribe the appropriate terminology.

[2] At Least One Attorney for Each Party Attends Final Pretrial Conference

The final pretrial conference must be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties. *Fed. R. Civ. P. 16(e)*. At least one of the participating attorneys for each party must have authority to enter into stipulations and to make admissions regarding all matters that might reasonably be anticipated to be discussed. *Fed. R. Civ. P. 16(c)(1)*.

Additional attendance requirements may be imposed by local rules or by the individual judge's standing orders.

[3] Final Pretrial Conference Is Held Near Time of Trial

The final pretrial conference is held as close to the time of trial as is reasonable under the circumstances. *Fed. R. Civ. P. 16(e)*. How close to the trial date is reasonable under the circumstances is left to the sound discretion of the assigned judge. *Fed. R. Civ. P. 16*, Committee Note of 1983.

Relevant factors in setting the conference date include:

1. The complexity of the case;

2. The number of parties;

3. The amount and nature of the evidence likely to be proffered at trial;

4. The number, difficulty, and importance of unresolved issues;

5. The relative clarity or obscurity of the applicable law; and

6. The need for specialized jury instructions.

A key variable that can affect a judge's decision about when to hold the final pretrial conference is the implementation of pretrial disclosures under *Fed. R. Civ. P. 26(a)(3)*. *See § 4.19 below*. The court coordinates the timing of the final pretrial disclosures and the listing of objections mandated by the rule. In most circumstances, the court will need to give counsel at least three weeks between the time they make their final pretrial disclosures and the time they file their final pretrial conference statements. It is likely to take counsel that long to digest what they learn through the disclosures, to develop lists of possible objections, to confer in an effort to resolve as many disputes as possible without judicial intervention, to prepare any necessary motions in limine, and to frame oppositions to those motions.



Strategic Point:

Counsel who conclude that the date that the court has fixed for the final pretrial conference is appreciably too close to or too far in advance of the trial date might propose an alternative schedule. Such a proposal is likely to receive the best reception if made jointly, in writing, and if the proposal describes with particularity why the change is necessary.



Timing:

Most judges have their own formula and work backwards from the trial date to set the schedule. Time is allocated to allow for all anticipated motions and other matters. If there is a particular need to deviate from the judge's schedule, the need should be raised at the conference.



Warning:

An extensive number of in limine motions may create a problem for the court if there is not enough time between their filing and the date of the final pretrial conference.

[4] Agenda Items for Final Pretrial Conference

The primary purpose of a final pretrial conference is to formulate a specific plan for trial, including a program for facilitating the admission of evidence. *Fed. R. Civ. P. 16(e)*. A detailed plan might address the following matters:

1. The juncture at which opening statements will be made (a defendant may elect to give some or all of its opening statement after the plaintiff has presented its case in chief), and the scope, content, and time allotted for the opening statements;

2. The order in which each witness will testify (except those called solely for impeachment or rebuttal) or each deposition excerpt will be read, and the time allotted for each direct and cross-examination;

3. The sequence in which documentary and other exhibits will be introduced, and identification of the witnesses who will sponsor the exhibits;

4. When any demonstrations will be performed or site visits made;

5. The junctures, if any, at which interim summarizations or arguments may be presented by counsel; and

6. The scope, content, and time allotted for the closing arguments, and the order in which they will be presented.

Although the primary purpose of a final pretrial conference is to formulate a specific plan for the trial of the action (*Fed. R. Civ. P. 16(e)*), counsel should consult the local rules and the individual judge's standing orders for any specific final pretrial conference agenda requirements. Along with the many possible procedural and logistical items pertaining to the trial, counsel should anticipate the resolution of any remaining discovery or disclosure disputes, and if appropriate, the need for any orders mandating the prompt completion of any unfinished but clearly necessary discovery activity.

Warning:

Counsel should consider that any subject listed in *Fed. R. Civ. P. 16(c)* (*see § 4.14[5] above*) is fair game at the conference. These matters will be addressed from the perspective of organizing, streamlining, and expediting the trial rather than discovery.

[5] Preparing Final Pretrial Order

After any Rule 16 pretrial conference, including a final pretrial conference, an order "should" be entered reciting all actions taken and rulings made. *Fed. R. Civ. P. 16(d)*. Rule 16 does not specify who prepares the order. Counsel should consult the local rules, as well as the individual judge's standing orders, to determine whether a final pretrial conference order is required, and if so, the requirements of the order, and whether it is counsel's responsibility to draft the proposed order.

For illustrative purposes, a final pretrial order should clearly address the following topics:

1. Facts establishing jurisdiction and venue;

2. A statement of the case;

3. The date and time that the trial will commence;

4. All rulings made at the final pretrial conference, and any earlier rulings that still govern;

5. A summary of all factual and legal issues to be tried, and any issues to be severed and tried separately;

6. A final list of witnesses to be called, identifying the subject of their testimony and any deposition excerpts to be read;

7. Expert witnesses to be called, and a summary of their qualifications;

8. Exhibits and visual aids to be presented at trial, identification of exhibits to be admitted without objection, and summary of any objections;

9. Discovery excerpts from stenographic and video depositions, responses to interrogatories, and requests for admission;

10. Undisputed facts and judicially noticed facts;

11. Order of proof, including procedures for presenting testimony and exhibits;

12. Whether additional or specified evidence is precluded;

13. If jury trial, procedures for selection, management, and instruction of jury, including deadlines for submitting proposed voir dire questions and jury instructions;

14. If non-jury trial, proposed findings of fact and conclusions of law;

15. Any objections that are sustained, denied, or deemed waived;

16. Status of discovery, disclosure, and motions;

17. Procedures for consolidation, severance, or transfer of cases;

18. Estimated length of trial;

19. Verdict stipulations; and

20. Statement that the order may not be modified except to prevent manifest injustice.

See, e.g., Manual for Complex Litigation (4th ed.) §§ 11.61-11.67; *Civil Litigation Management Manual, Pt. VI (Federal Judicial Center) (3d ed.)*.



Strategic Point:

Most federal judges require a final pretrial order. Even if a final pretrial conference order is not required, counsel should nevertheless consider requesting the opportunity to present a proposed order. An order stating the decisions and stipulations made at the final pretrial conference reduces the risk of confusion, and provides a record for appellate review.



Warning:

Some local rules require the use of a specified form. Counsel should consult the local rules, as well as the judge's standing orders to determine proper procedure.

[6] Final Pretrial Order Defines Scope of Trial

The court will issue an order after the final pretrial conference, reciting all actions taken at the conference. *Fed. R. Civ. P. 16(d)*. This final pretrial order supersedes the pleadings. *Rockwell Int'l Corp. v. United States, 549 U.S. 457, 127 S. Ct. 1397, 1409, 167 L. Ed. 2d 190, 207 (2007)* (inclusion of a claim in pretrial order is deemed to amend any previous pleadings which did not include claim).

The final pretrial order guides and controls the subsequent course of the action unless modified by a subsequent order. *Fed. R. Civ. P. 16(e)*.

Warning:

The critical importance of the final pretrial order cannot be overemphasized. The final pretrial order supersedes the pleadings and governs who may be called as witnesses (and possibly impeachment witnesses and rebuttal witnesses); may contain binding stipulations; and may limit the questions, evidence, exhibits, and legal theories to be presented at trial. *See Southern Cal. Retail Clerks Union v. Bjorklund, 728 F.2d 1262, 1264 (9th Cir. 1984)* ("existence of references to this issue in the record of the case compiled before the pretrial orders is irrelevant"). In other words, the parties are bound by the order's contents and cannot assert at trial claims raised in the pleadings but omitted from the order. *Rockwell Int'l Corp. v. United States, 549 U.S. 457, 127 S. Ct. 1397, 167 L. Ed. 2d 190, 207 (2007)* (claims, issues, defenses, or theories of damages not included in pretrial order are waived even if they appeared in the complaint). *See Dream Games of Arizona, Inc. v. PC Onsite, 561 F.3d 983, 996 (9th Cir. 2009)* ("parties are bound by statements of claims made in pretrial order" and plaintiff could not present secondary infringement liability claim in its copyright infringement action because pretrial order did not mention secondary infringement liability).

Exception:

If an issue omitted from the final pretrial order is tried without objection, the objection is waived and the pretrial order is deemed amended to conform to the proof. *See Fed. R. Civ. P. 15(b)(2).*

[7] Modification of Final Pretrial Order

Because the purpose of the final pretrial order is to guide the course of the litigation, it should not be changed without significant reasons and is modifiable only to prevent manifest injustice. *Fed. R. Civ. P. 16(e).* Rule 16 does not define manifest injustice. However, the manifest injustice standard is more stringent than the standards applied when deciding whether to grant motions to modify orders entered after earlier pretrial conferences. *See Fed. R. Civ. P. 16*, Committee Note of 1983.

Circuits describe a variety of factors when determining the propriety of modifying a pretrial order, and the circumstances of each case must be taken into account. However, the following is a distilled list.

1. Should the moving party have anticipated the circumstances that give rise to the motion for modification and should that party have taken steps to ensure that the terms of the original final pretrial order did not serve as an obstacle to the course of action that party now wants to follow at trial?

2. Whether granting the motion unfairly impairs the opposing party's ability to litigate the merits of the case.

3. Whether the party resisting the proposed change should have known that the moving party intended to proceed in the manner proposed in the motion for modification. Did the party resisting the proposed change in fact know that the moving party intended to proceed as it now proposes? Did the moving party manifest its intent to proceed in the proposed manner in earlier papers or statements, even though it failed to have that intention reflected in the final pretrial order?

4. Whether granting the motion would reward or encourage excessively tactical approaches to litigation (such as sandbagging or surprise). Is the need for the change the result of a good faith oversight, or is it accompanied by a more culpable state of mind?

5. The degree of harm to the moving party's ability to litigate fairly the merits if the motion were denied. How likely is it that the proposed change would have an effect on the outcome at trial?

6. Whether modifying the order as proposed by the moving party would impose unjustifiable expenses or disruptions on another party.

7. Whether the proposed changes are extensive or modest.

8. The amount of litigation investment that would be wasted if the motion were denied. Did the parties, or the moving party, devote substantial pretrial resources (such as discovery and motion work) to developing for trial the matter omitted from the final pretrial order?

9. The amount of harm that granting the motion to modify the pretrial order would do to the efficiency and orderliness of the trial process. How much additional burden would be imposed on jurors or court staff?

10. The amount of harm that granting the motion would do to the courts' interest in maximizing the care and energy with which parties prepare for final pretrial conferences. How well, generally, did the moving party prepare for and participate in the final pretrial conference? How seriously did the moving party take its pretrial responsibilities overall?

See Moore's Federal Practice (3d ed.) § 16.78[4][b].



Strategic Point:

The party seeking to modify the order bears the burden of establishing the manifest injustice that will occur if the order is not modified. *See Koch v. Koch Indus., Inc., 203 F.3d 1202, 1222 (10th Cir. 2000)* (final pretrial order may be modified only to prevent manifest injustice, and burden of demonstrating manifest injustice is on party moving for modification). Manifest injustice may be difficult to establish. If feasible, counsel should consider crafting the argument in terms of seeking clarification of the final pretrial conference order.

[8] Appellate Review of Final Pretrial Order

In general, most final pretrial orders are interlocutory in nature, rather than final. They deal with preliminary matters, leading up to, but not including, trial, and may still be modified by the court on a showing of manifest injustice. *Fed. R. Civ. P. 16(e)*; *see § 4.18[7] above*.

Although critically important in narrowing issues, clarifying factual contentions, and structuring the trial, a final pretrial order is a procedural step. Because the court is able to reassess the content of a final pretrial order and make adjustments as needed, no irreversible legal consequences flow from these orders. Therefore, most final pretrial orders are not subject to immediate appellate review; rather, appellate review ordinarily must await a final judgment in the action. *See In re Recticel Foam Corp., 859 F.2d 1000, 1002 (1st Cir. 1988)* (court declined to enter a writ of mandamus to review).

The court of appeals reviews a district court's case management decisions under the "abuse of discretion" standard. The court of appeals may reverse a district court's case management decision if the district court relied on an erroneous view of the law, made a clearly erroneous assessment of the evidence, or struck an unreasonable balance of the relevant factors. *Doe v. Advanced Textile Corp., 214 F.3d 1058, 1069 (9th Cir. 2000)* (abuse of discretion to deny plaintiffs permission to proceed anonymously in the early stage of the litigation).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.70-16.79*.
- *Federal Litigation Guide PP 27.71 -27.74*.
- *Bender's Federal Practice Forms* Form Nos. 16:200, 16:210.
- *Fed. R. Civ. P. 16(e)* (final pretrial conference).



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Chapter 4 PRETRIAL CONFERENCES AND MANDATORY DISCLOSURES
PART C: PARTICIPATING IN PRETRIAL CONFERENCES

1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.19

§ 4.19 Making Pretrial Disclosures

[1] Pretrial Disclosures Required 30 Days Before Trial

Unless otherwise directed by the court, Rule 26(a)(3) disclosures must be made at least 30 days before trial. *Fed. R. Civ. P. 26(a)(3)(B).*

[2] Pretrial Disclosures Encompass Information About Witnesses, Documents, Exhibits, and Other Evidence

In addition to the disclosures required by *Fed. R. Civ. P. 26(a)(1)* and *(a)(2)*, a party must provide to other parties and promptly file with the court information regarding the evidence that it may present at trial other than solely for impeachment:

> 1. The name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;
>
> 2. The designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and
>
> 3. An identification of each document or other exhibit, including summaries of other evidence, separately identifying those that the party expects to offer and those that the party may offer if the need arises.

Fed. R. Civ. P. 26(a)(3)(A).

Pretrial disclosure of information solely for impeachment is not required. *Fed. R. Civ. P. 26(a)(3).* If information is both substantive and impeaching, it must be disclosed. *Klonoski v. Mahlab, 156 F.3d 255, 270 (1st Cir. 1998)* (district court abused its discretion in allowing excerpts from letters in evidence when they were not disclosed prior to trial and did not fall within impeachment exception).

[3] Objections to Certain Evidence Must Be Filed Within 14 Days

Within 14 days after a party makes disclosures pursuant to Rule 26(a)(3), unless a different time is specified by the court, a party may serve and promptly file a list disclosing the following objections:

> 1. Any objections to the use under *Fed. R. Civ. P. 32(a)* of a deposition designated by another party under *Fed. R. Civ. P. 26(a)(3)(A)(ii)*; and
>
> 2. Any objection, together with the grounds for it, that may be made to the admissibility of materials identified under *Fed. R. Civ. P. 26(a)(3)(A)(iii)* (regarding identification of documents and other exhibits).

Fed. R. Civ. P. 26(a)(3)(B).

Objections not so disclosed, other than objections under *Fed. R. Evid. 402* and *403*, are waived unless excused by the court for good cause. *Fed. R. Civ. P. 26(a)(3)(B).*

[4] Disclosures Must Be Made in Writing, Signed, and Served

Unless the court orders otherwise, all disclosures under *Fed. R. Civ. P. 26(a)(1)-(3)* must be made in writing, signed, and served. *Fed. R. Civ. P. 26(a)(4).*

The signature on the pretrial disclosure is a certification that it is complete and correct as of the time when made. *Fed. R. Civ. P. 26(g)(1)(A).*

Warning:

The court may later impose sanctions if it finds certification was made without substantial justification. *Fed. R. Civ. P. 26(g)(3).*

[5] Parties Must Supplement or Correct Disclosures to Include Later-Acquired Information

A party who has made a pretrial disclosure under *Fed. R. Civ. P. 26(a)(3)* is under a duty to supplement or correct the disclosure to include later-acquired information. *Fed. R. Civ. P. 26(e)(1).*

Warning:

This duty with regard to later-acquired information continues even after the trial has started.

With respect to testimony of an expert from whom a report is required, the duty extends to both information contained in the report and to information provided through a deposition of the expert. Any additions or changes to this information must be disclosed by the time the Rule 26(a)(3) disclosures are due. *Fed. R. Civ. P. 26(e)(2).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.24.*
- *Federal Litigation Guide PP 9.12, 9.15, 9.17.*
- *Bender's Federal Practice Forms* Form No. 26:20.

- *Fed. R. Civ. P. 26(a)(3)* (pretrial disclosures).
- *Fed. R. Civ. P. 26(e)* (duty to supplement disclosures).



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Chapter 4 PRETRIAL CONFERENCES AND MANDATORY DISCLOSURES
PART C: PARTICIPATING IN PRETRIAL CONFERENCES

1-4 Moore's AnswerGuide: Federal Discovery Practice § 4.20

§ 4.20 Imposing Sanctions to Enforce Pretrial Duties

[1] Sanctionable Conduct

Courts may impose sanctions if a party or party's attorney fails to attend a scheduled pretrial conference, or to substantially prepare for the conference without sufficient excuse. *Fed. R. Civ. P. 16(f)*; *see Fed. R. Civ. P. 37(b)(2)(A)(ii)-(vii)*; *see also Ha-Lo Indus., Inc. v. Your Favorite Producers, Inc., 164 F.R.D. 233, 234 (N.D. Ill. 1995)* (sanctions may be imposed if lead counsel does not attend a final pretrial conference, but instead sends a substantially unprepared attorney).

Courts have broad authority to sanction a party or an attorney who fails to participate in good faith in a pretrial conference. *Fed. R. Civ. P. 16(f)*; *see Fed. R. Civ. P. 37(b)(2)(A)(ii)-(vii)*. Courts may also impose sanctions for failing to participate in good faith in the development and submission of a proposed discovery plan. *Fed. R. Civ. P. 26(f)*, *37(f)*. In addition, courts may impose sanctions if a party or party's attorney fails to obey a pretrial order without sufficient excuse. *Fed. R. Civ. P. 16(f)*; *see Fed. R. Civ. P. 37(b)(2)(A)(ii)-(vii)*.

Warning:

Local rules may authorize the imposition of sanctions for failing to comply with local rules. *See Fed. R. Civ. P. 83(b)* (authorizing judges to regulate practice through local rules); *see also Zambrano v. Tustin, 885 F.2d 1473, 1479 (9th Cir. 1989)* (addressing reach of sanctioning authority under local rules).

[2] Bad Faith Not Required

The imposition of sanctions under Rule 16 does not require that the party was acting (or not acting) in bad faith. *See Tracinda Corp. v. DaimlerChrysler AG, 502 F.3d 212, 242-243 (3d Cir. 2007)* (citing Moore's). Thus, sanctions are possible for negligently failing to appear as required. *See Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762, 769 (9th Cir.2001)* (inasmuch as attorney did not notify parties beforehand of his nonappearance, district court's imposition of sanctions pursuant to *Fed. R. Civ. P. 16* and local rules for Central District of California was appropriate).

[3] Sanctions May Be Imposed on Motion or Sua Sponte

Sanctions for failing to comply with a pretrial order or other pretrial conference obligation may be imposed on motion or on the judge's own initiative. The court may sanction a party, a party's attorney, or both. *Fed. R. Civ. P. 16(f).*

Warning:

Rule 16(f) is an area in which courts often act sua sponte to impose sanctions because a failure to appear or to follow the pretrial order often imposes significant burdens on the court itself.

[4] Offending Party Must Have Notice and Opportunity to Show Cause

The offending party must be afforded notice and an opportunity to show cause why sanctions should not be imposed before sanctions may be imposed. *See Ayers v. City of Richmond, 895 F.2d 1267, 1270 (9th Cir. 1990)* (attorney received notice and opportunity to be heard when district court issued order to show cause and held hearing).

[5] Court Has Broad Discretion to Select Appropriate Sanction

Rule 16(f) leaves courts with broad discretion in fashioning a remedy by making such orders as are "just". *Fed. R. Civ. P. 16(f), 37(b)(2)(A)(ii)-(vii).* The remedies listed in Rule 16(f) are neither mandatory nor exhaustive. *See Tracinda Corp. v. DaimlerChrysler AG, 502 F.3d 212, 242 (3d Cir. 2007)* (very broad discretion which district courts have to "use sanctions where necessary" to ensure compliance with pretrial orders).

In exercising its discretion, the court may examine the factors such as the following:

1. The nature and consequences of the violation;

2. The extent and nature of the alleged violation, and its effect on the other parties (e.g., prejudice);

3. The mental state or degree of culpable behavior; willfulness, recklessness, negligence, or bad faith is not required, but may affect the severity of the sanction;

4. Who is responsible for the violation: counsel, party, or both;

5. Whether the violation resulted from forces beyond the party's control;

6. Whether the violation is an isolated incident or part of a pattern of conduct; and

7. Public interest matters, such as the effect of the violation on the administration of justice, the public policy favoring expeditious resolution of litigation, docket management, and the availability of less drastic sanctions.

See Thompson v. Housing Auth. of L.A., 782 F.2d 829, 831-832 (9th Cir. 1986) .

In lieu of or in addition to any other sanction, the judge will require the party or the attorney representing that party or both to pay the reasonable expenses incurred because of any noncompliance with Rule 16, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust. *Fed. R. Civ. P. 16(f).*

The range of sanctions available for failing to comply with a pretrial order or other pretrial conference obligation is broad, and includes:

1. Reprimand;

2. Imposition of costs, including attorney's fees, caused by the violation;

3. Exclusion of evidence, witnesses, or a claim or defense;

4. Striking pleadings or parts of pleadings;

5. Granting or denying additional time for discovery;

6. Continuing or staying the proceedings;

7. Contempt;

8. Dismissal of a claim or the action; and

9. Default judgment.

See Fed. R. Civ. P. 16(f), 37(b)(2).

Sanctions are not a frequent occurrence. In determining the appropriate sanction, the specific facts are very important, including how much prejudice has been caused, both to the other parties and to the court. Courts will sometimes rule in favor of a monetary sanction over dismissal or default judgment in order to minimize the risk of reversal. Typically, dismissal is appropriate as a sanction under Rule 16(f) only when a party has engaged in a pattern of disobedience or noncompliance with court orders. *See Kerwin v. Remittance Assistance Corp., 559 F. Supp. 2d 1117, 1126 (D. Nev. 2008)* (defendant failed to demonstrate pattern of willful misconduct on part of plaintiff that typically justifies dismissal instead of lesser sanction).

For further discussion of sanctions, *see* Ch. 18 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.91, 16.93.*
- *Federal Litigation Guide PP 27.80 -27.82.*
- *Bender's Federal Practice Forms* Form Nos. 16:501, 16:502.
- *Fed. R. Civ. P. 16(f)* (sanctions in connection with pretrial conferences).
- *Fed. R. Civ. P. 37(b)(2)* (listing types of discovery sanctions).



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Chapter 5 REQUESTS FOR PRODUCTION AND INSPECTION

1-5 Moore's AnswerGuide: Federal Discovery Practice 5.syn

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§ 5.13 Preparing Request for Production or Inspection

[1] Written Request Must Specify Items Individually or by Category

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§ 5.20 Drafting Response

[1] Response Must Be in Writing and Specify Items Individually or by Category

[2] Response Should Conform to Designation of Items and Categories In the Request

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[4] Responding Party Must Clearly Specify Reasons for Each Objection

[5] Responding Party Must Comply With Unobjectionable Parts of Request

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Chapter 5 REQUESTS FOR PRODUCTION AND INSPECTION
PART A: PROCEDURAL CONTEXT

1-5 Moore's AnswerGuide: Federal Discovery Practice § 5.01

§ 5.01 Procedural Context--Requests for Production and Inspection

The Rule 34 request for production of documents, electronically stored information, and other tangible items is an important device for discovering information and preserving documentary and physical evidence for use at trial.

Advantages of Rule 34 requests for production and inspection include the following:

1. Rule 34 requests allow a party to obtain documents and electronically stored information not provided in the Rule 26(a) initial disclosures;

2. Discovery of documents and electronically stored information can effectively lead to the discovery of other relevant materials and witnesses, and provide the critical exhibits for trial, a clearer understanding of the facts of the case, and sometimes support for new claims or counterclaims;

3. Parties may make an unlimited number of requests under the Federal Rules, although the assigned judge may limit the number on a case-by-case basis;

4. The types of documents and electronically stored information that can be sought are usually broad, including e-mails, word processing files and data compilations, and, in limited circumstances, the responding party's computer system;

5. By accessing and inspecting land, premises, and physical objects, parties can gather information, or physical evidence for use later at trial;

6. Parties may use production and inspection requests in conjunction with depositions;

7. Documents, electronically stored information, and tangible items can provide an effective substitute for witnesses who are unavailable or possess faulty memory due to the passage of time; and

8. Evidence created contemporaneously with the events at issue may be obtained without being influenced by counsel preparation.

Disadvantages of requests for production and inspection include the following:

1. This form of discovery can be expensive, and the requesting party may be required to pay part of the expenses of production;

2. Examination and analysis of large amounts of irrelevant information may be necessary;

3. Propounding a large number of requests may encourage the responding party to serve the propounding party with its own lengthy list of requests;

4. Responding to requests can be very expensive and disruptive to a client, especially if the requests seek electronically stored information;

5. Rule 34 requests often generate objections, discovery motion practice, and consequent delays in the proceedings; and

6. Rule 34 requests will often seek broad categories of documents and electronically stored information related generally to the dispute at issue, and thus may reveal less about case needs and strategy than interrogatories or depositions, which frequently require more specific questions.

Regardless of any perceived advantage or disadvantage, requests for production or inspection will often yield the most important, if not the only, means of acquiring from the opposing side the physical, documentary, and electronically stored evidence necessary to litigate a case. Documents and information produced through the Rule 34 process may be crucial in shaping the rest of discovery, as they often drive deposition questioning, and the documents may become useful as evidence at trial. Rule 34 requests can be decisive to the success or failure of the litigation.



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Chapter 5 REQUESTS FOR PRODUCTION AND INSPECTION
PART B: PLANNING REQUESTS FOR PRODUCTION AND INSPECTION

1-5 Moore's AnswerGuide: Federal Discovery Practice § 5.02

§ 5.02 Checklist For Planning Requests for Production and Inspection

☐ Review Rule 34.

☐ Choose the best method for obtaining production or inspection of item. *See § 5.03 below*.

- ○ Sequence all discovery methods for maximum effectiveness.
- ○ Consider alternate sources to identify items for requests for production and inspection.
- ○ For nonparty, consider Rule 45 and subpoena items not in the possession, custody, or control of party to the cause of action.

☐ Prevent destruction of document or item. *See § 5.04 below*.

- ○ Determine whether party is likely to destroy document or item as part of a routine practice or policy.
- ○ Consider using interrogatories to reveal relevant practices or policies.

☐ Determine what may be requested under Rule 34 and any related activities. *See § 5.05 below*.

- ○ Documents or electronically stored information, such as writings, drawings, graphs, charts, photographs, sound recordings and data compilations (which may consist of electronic or digital files such as e-mails, word processing documents, spreadsheets, and

databases) may be requested.

○ Tangible items other than documents, which may include, for example, physical substances, mechanical devices, or computer hardware such as disk drives and backup tapes may be requested.

○ Entry onto land or a particular premise to inspect, copy, sample, or conduct other investigative tests on the land itself, objects located on the land, or processes or operations occurring on the land may be requested.

○ Consider relevant activities related to production or inspection of documents, items or land, such as measuring, surveying, photographing, testing, or sampling, among other activities.

☐ Determine who is subject to Rule 34 requests. *See § 5.06 below*.

○ Rule 34 is applicable to all parties to civil action.

○ For nonparty consider Rule 45.

☐ Assess limits on the number of Rule 34 requests. *See § 5.07 below*.

○ Generally, no limit to number of requests.

○ Court may limit number of requests under general discovery rules.

☐ Consider other procedures for production of documents, electronically stored information, and tangible items. *See § 5.08 below*.

○ Mandatory initial disclosures.

○ Include request for production in notice of deposition, when relevant.

○ Subpoena nonparty if document, item or land is in nonparty's possession, custody or control.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Requests for Production and Inspection



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Chapter 5 REQUESTS FOR PRODUCTION AND INSPECTION
PART B: PLANNING REQUESTS FOR PRODUCTION AND INSPECTION

1-5 Moore's AnswerGuide: Federal Discovery Practice § 5.03

§ 5.03 Choosing Best Method for Obtaining Production or Inspection

[1] Strategic Choice of Discovery Methods

Creating an effective strategy for discovery and implementing a plan of action is vital to achieving the optimal resolution for a case. A party has a limited number of depositions, interrogatories, and, in some jurisdictions, requests for admissions. Also, a party typically has only one opportunity to depose a witness, and will generally want to ask witnesses about relevant documents. Therefore, it is usually preferable to serve requests for production before serving interrogatories or requests for admissions, or conducting depositions. As part of Rule 26(a)'s initial disclosures (*see § 4.07 above*), a party will be required to disclose the identity and location of documents on which it will rely in proving its claims or defenses. With that information, counsel should be in a position to propound a first set of requests for production.

There is no timetable applicable to all cases for the staging of different discovery devices, and counsel should consider the value of coordinating the methods. A request for production or inspection must set forth the items to be produced or inspected, and describe each item with reasonable particularity. *Fed. R. Civ. P. 34(b)(1)*. Consequently, unless the previous interactions between the parties, or the Rule 26(a) mandatory disclosures provide an accurate and thorough source of identification of pertinent documents and tangibles, other discovery methods might prove beneficial. These other discovery methods may include depositions, especially depositions of custodians of records (*see* Ch. 8 *below*), interrogatories directed to a description of documents that address relevant facts (*see* Ch. 7 *below*), and requests for admission (*see* Ch. 13 *below*).

Electronically stored information is of critical importance (*see* Ch. 6 *below*). Requests for production of electronically stored information may be challenging in terms of gaining knowledge of an opponent's computer systems, record retention policies, electronic document storage arrangements, and the types of information stored sufficient to fashion production requests with the requisite specificity. Counsel may need to employ multiple discovery devices in order to obtain information to make appropriate Rule 34 requests. For items not in the possession, custody, or control of another party to the action, consider using other discovery methods, such as a subpoena. *See Fed. R. Civ. P. 45*; *see also* Ch. 14 *below*.

[2] Alternate Sources to Help Identify Items

Because it may prove difficult to describe items in a Rule 34 request for production or inspection with reasonable particularity, parties may choose to explore sources of information other than the opposing party, such as the client, individuals similarly situated to the opposing party, Internet sites, press articles, and regulatory agency files. Parties also may hire a private investigator to pursue this information. Informal discovery of a party's previous litigations can often be very productive. Briefs or other documents filed in other litigations and filings with regulatory agencies could contain admissions relevant to the present litigation, or could lead to the discovery of other admissible evidence. Casting a wide net for discovery research purposes may help focus requests for production or inspection. A benefit of seeking information outside the litigation process is that--unlike the use of formal discovery--informal discovery may be initiated before commencement of the action.

[3] Use of Subpoena for Items Not in Possession, Custody, or Control of Party

A party seeking production or inspection of items not in the possession, custody, or control of another party to the action should consider use of the subpoena procedure under Rule 45 to obtain access of the item from a nonparty. If a dispute is likely over whether a party has possession, custody, or control over documents, such as when related corporate entities are involved, a party should consider using simultaneously a request to produce under Rule 34 and a subpoena under Rule 45. In some instances, a subpoenaed entity may be less likely to litigate objections to production. At the same time, using a nonparty subpoena for documents may require an additional appearance by counsel in the discovery dispute that can increase delay and expense. For coverage of subpoenas, *see* Ch. 14 *below*.

Rule 34 requires a party to produce all relevant documents, even those not in the party's actual possession, if the party has a lawful right to obtain them from another person or entity. *See Alexander v. FBI, 194 F.R.D. 299, 301 (D.D.C. 2000)* ("control" is not defined as possession but as legal right to obtain documents on demand). A party cannot avoid production through the simple device of transferring the documents to another person or entity such as the party's lawyer, accountant, insurer, or corporate subsidiary. When this avoidance device is used, the party is deemed to have retained control of the document and is required to have the document returned in order to comply with the production request. *See Poole v. Textron, Inc., 192 F.R.D. 494, 501 (D. Md. 2000)* ("control" under *Fed. R. Civ. P. 34* is to be broadly construed so that partvven though party may not actually possess documents).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 34.02*.
- *Federal Litigation Guide PP 13.01 -13.04*, *13.07*, *13.100*, *20.01 -20.08*.
- *Bender's Federal Practice Forms* Form Nos. 34:1-34:6.
- *Fed. R. Civ. P. 34* (requests for production and inspection).
- *Fed. R. Civ. P. 45* (subpoena).



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1-5 Moore's AnswerGuide: Federal Discovery Practice § 5.04

§ 5.04 Preventing Destruction of Documents

Parties have an obligation to manage and retain documents and evidence that they have reason to believe will be relevant to a pending litigation. The key to document management lies in planned organization. Counsel should determine, as early as possible, whether other parties are likely to destroy materials that may be responsive to a Rule 34 request, for example as part of a company's routine document retention/destruction policy or operation of its electronic information system. If so, consider a notice to the custodian of records, an action seeking preservation of evidence, or a stipulation or order preserving the documents. Rule 34 requires that the producing party make the original documents available for inspection or copying in either the same order as they are ordinarily kept, or by producing them in the order, with label, that corresponds with the categories of the request. *Fed. R. Civ. P. 34(b)(2)(E)(i)* (producing the documents or electronically stored information).

Other discovery devices, such as interrogatories (*see* Ch. 7 *below*), can help reveal a company's document retention policies and the method of operation of its electronic information system, and whether it has destroyed any relevant items. If a request for production and inspection has been timely made and documents are subsequently destroyed then sanctions may be imposed (*see* Ch. 18 *below*).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 34.16[3], [4].*
- *Federal Litigation Guide* Ch. 15.
- *Fed. R. Civ. P. 37* (failure to make disclosures or to cooperate in discovery; sanctions).



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1-5 Moore's AnswerGuide: Federal Discovery Practice § 5.05

§ 5.05 Determining What May Be Requested Under Rule 34

[1] Party May Request Production of Documents for Inspection or Copying

The scope of discovery is broad because it is the principal fact-finding method in the formal litigation process. The primary purpose of discovery is to remove surprise from trial preparation and to enable the parties to obtain evidence necessary to evaluate and resolve their dispute. *Quiksilver, Inc. v. Kymsta Corp, 247 F.R.D. 579, 582 (C.D. Cal. 2007)* . Courts may permit production of any nonprivileged documents, electronically stored information, and tangible items that contain information relevant to a claim or defense. *See Fed. R. Civ. P. 26(b)(1)* (general scope of discovery); *see also* Chs. 2, 3 *above*.

Requested documents, electronically stored information, or items need not be admissible if they may lead to admissible evidence. A party may obtain discovery of a relevant document, electronically stored information, or tangible item under Rule 34 even if it would be inadmissible in evidence at trial, provided that discovery of the relevant item appears reasonably calculated to lead to the discovery of admissible evidence. *Fed. R. Civ. P. 26(b)(1)*; *see Payne v. Howard, 75 F.R.D. 465, 469 (D.D.C. 1977)* (information sought through discovery "reasonably calculated" to lead to admissible evidence is determined on case-by-case basis and depends on nature of claims, timing, and precise involvement of the parties, among other considerations); *see also § 2.04 above*.

[2] Party May Request Production of Tangible Items for Inspection, Sampling, Testing, and Copying

Rule 34 allows any party to serve on any other party a request to produce and permit the requesting party, or someone else acting on the requesting party's behalf, to inspect and copy, test, or sample any tangible items that constitute or contain discoverable matters, and which are in the possession, custody, or control of the party on whom the request is served. *Fed. R. Civ. P. 34(a)(1)*.

In addition to inspecting and copying items sought under Rule 34, parties may request an opportunity to test or sample materials. Such an opportunity may be important for both electronically stored information and hard-copy materials. *See Fed. R. Civ. P. 34(a)(1)*, Committee Note of 2006. Complete or partial destructive testing of an object may be permitted by courts, on a case by case determination, taking into account the nature of the claims and defenses among other considerations inherent in each case. *See Dabney v. Montgomery Ward & Co., 761 F.2d 494, 497-498 (8th Cir. 1985)* (court did not abuse its discretion by denying request for destructive testing given timing of request, prior rulings, and

totality of circumstances).

[3] Party May Request Permission to Enter Land for Inspection, Sampling, and Copying Tangible Items

Any party may serve on any other party a request to enter on designated land or other property in the possession or control of the served party for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property. *Fed. R. Civ. P. 34(a)(2)*. However, Rule 34 does not authorize a district court to order a nonparty to permit entry on its land by a party. *Pollitt v. Mobay Chemical Corp., 95 F.R.D. 101, 106 (S.D. Ohio 1982)* (plaintiff's motion for order to enter land of a nonparty overruled, even though defendant's counsel had been previously invited to enter and inspect nonparty's premises).

[4] Electronically Stored Information Is Discoverable

Electronically stored information is discoverable under Rule 34. This includes writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained. If necessary, the responding party must translate the information into a reasonably usable form. *Fed. R. Civ. P. 34(a)(1)*.

Under Rule 34, a request for production of "documents" includes electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and documents. *See Fed. R. Civ. P. 34(a)(1)*, Committee Note of 2006.

For discussion of Rule 34 requests involving electronically stored information, *see* Ch. 6 *below*.

[5] Requested Documents, Electronically Stored Information, and Items Must Be Within General Scope of Discovery

A party may request production or access to documents, electronically stored information, and tangible items that are within the broad scope of discovery specified in Rule 26(b)(1), namely, matters not privileged that are relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible items, and the identity and the location of persons having knowledge of any discoverable matter. *Fed. R. Civ. P. 26(b)(1)*. For "good cause" parties may request discovery of any matter relevant to the subject matter involved in the action. *Fed. R. Civ. P. 26(b)(1)*, *34(a)*; *Mallinckrodt Chemical Works v. Goldman, Sachs & Co., 58 F.R.D. 348, 353 (S.D.N.Y. 1973)* (demand for documents must satisfy requirement of relevance under Rule 26(b)(1) as incorporated by reference in Rule 34(a)); *see also* Ch. 2 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 34.02[1]*, *34.12* et seq.
- *Federal Litigation Guide PP 13.03*, *20.08 -20.11*.
- *Bender's Federal Practice Forms* Form Nos. 34:1-34:4.
- *Fed. R. Civ. P. 26(b)(1)* (discovery scope and limits; scope in general).
- *Fed. R. Civ. P. 34* (requests for production and inspection).



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1-5 Moore's AnswerGuide: Federal Discovery Practice § 5.06

§ 5.06 Determining Who Is Subject to Rule 34 Discovery

Rule 34 production of documents, electronically stored information, or entry on land is limited to parties to a civil action. *Fed. R. Civ. P. 34(a)*; *see United States ex rel. Schwartz v. TRW, Inc., 211 F.R.D. 388, 392 (C.D. Cal. 2002)* (nonparty must be served request for production under Rule 45 subpoena procedure); *Williams v. IRS, 345 F. Supp. 591, 594 (D. Del. 1972)* (no discovery rights under federal rules in tax court proceeding). For Rule 34 purposes, the "party" is the actual claimant or defendant in civil litigation currently pending in a United States district court. *See In re Greenwood Air Crash, 161 F.R.D. 387, 394-398 (S.D. Ind. 1995)* (in wrongful death action, minor children were actual claimants, as statutory beneficiaries, and qualified as "parties" under Rule 34).

Class action litigation initiated by or against a party under Rule 23 may involve many persons. Only persons named in the litigation are considered "parties" for purposes of Rule 34 discovery. Consequently, in class action litigation, requests for production may not be served on absent class members without a strong showing of necessity. *See Enterprise Wall Paper Mfg. Co. v. Bodman, 85 F.R.D. 325, 327 (S.D.N.Y. 1980)* (court denied defendant's attempt for limited discovery of absent class members). In appropriate circumstances, the court may order production and inspection of documents and other tangible items from absent class members. *Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1004-1005 (7th Cir. 1971)* (if trial judge determines that justice requires absent parties to furnish certain information, it has power to authorize use of interrogatories or Rule 34 requests); *see also Fed. R. Civ. P. 23(d)(1)(C)* (in conducting class action, court may impose conditions on representative parties or on intervenors).

"Control" under Rule 34 is broadly construed so that party may be obligated to produce documents requested even though the party may not actually possess the documents. A party need not be the owner of the document or tangible item for that party to be required to produce it. *See Fed. R. Civ. P. 34(a)*; *McCoy v. Southwest Airlines Co., 208 F.R.D. 617, 621 (C.D. Cal. 2002)* (airline required to produce manual of aircraft manufacturer).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 34.03.*
- *Federal Litigation Guide PP 13.01[4], 20.04.*

- *Fed. R. Civ. P. 34* (requests for production or inspection).



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§ 5.07 Assessing Limits on Number of Rule 34 Requests

Unlike other discovery methods, Rule 34 does not limit the number of requests for production or inspection that a party may propound. *See Fed. R. Civ. P. 34*. The court, nevertheless, may limit the number of Rule 34 requests under the general discovery provisions of the Federal Rules. *See Fed. R. Civ. P. 26(b)(2)*; *Nestle Foods Corp. v. Aetna Casualty & Surety Co., 135 F.R.D. 101, 106-107 (D.N.J. 1990)* (court limited number of claim files insurer must produce because of burdensomeness); *see also* Ch. 2 *above*. Further, the court may make any order that justice requires to protect parties from annoyance, embarrassment, oppression, or undue burden or expense. *Fed. R. Civ. P. 26(c)* (protective orders); *see* Ch. 16 *below*.

Warning:

Counsel should review local district court rules to determine whether there are restrictions on the number of Rule 34 requests a party may propound.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 34.02[3]*.
- *Federal Litigation Guide P 20.05*.
- *Fed. R. Civ. P. 26(b)(2)* (limitations on frequency and extent of discovery).
- *Fed. R. Civ. P. 26(c)* (protective orders).



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§ 5.08 Considering Other Procedures for Requiring Production

[1] Rule 26(a) Initial Disclosures May Require Production

Each party in a civil action is generally required, as part of mandatory initial disclosure, to produce a copy, or description by category and location, of all documents, electronically stored information, and tangible items that are in the possession, custody, or control of the party, and that the disclosing party may use to support any claim or defense. *Fed. R. Civ. P. 26(a)(1)(A)(ii)*; *see § 4.07 above*.

[2] Party May Include Request for Production in Notice of Deposition

A party may use a deposition notice to request that another party bring specified documents and tangible things to the scheduled deposition. Such a list of documents is treated as a request for production of documents under Rule 34 and Rule 34's procedures apply to the requests. *See Fed. R. Civ. P. 30(b)(2)*.

For discussion of depositions, *see* Ch. 8 *below*.

[3] Party May Serve Subpoena on Nonparty to Obtain Documents, Electronically Stored Information, and Tangible Items

Using the Rule 45 subpoena, a party may require that a *nonparty* produce and permit inspection, copying, testing or sampling of designated documents, books, electronically stored information, or other tangible items in the possession, custody or control of the person, or to permit inspection of premises, at a time and place specified in the subpoena and thus facilitate a deeper discovery of the facts related to the case. *Fed. R. Civ. P. 45(a)(1)(C)*.

For coverage of subpoenas to nonparties, *see* Ch. 14 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 34.02[2], [4], [5], 45.02[3].*

- *Federal Litigation Guide PP 13.07, 20.06.*
- *Fed. R. Civ. P. 26* (duty to disclose; general provisions governing discovery).
- *Fed. R. Civ. P. 30* (deposition by oral examination).
- *Fed. R. Civ. P. 45* (subpoena).



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§ 5.09 Checklist for Requesting Production or Inspection

☐ Consider early requests for production or inspection. *See § 5.10 below*.

- Parties may generally serve a request for production or inspection only after the action has been commenced, after discovery conference, or after deadlines for parties to make their initial disclosures.
- To determine which items to request, review responses and answers to previously used discovery tools, including depositions, interrogatories, and requests for admission.
- Early requests will preserve items for use later at trial, and may help frame the rest of discovery, especially depositions.

☐ Consider motion to shorten time to respond. *See § 5.11 below*.

☐ Evaluate time restrictions on requests for production or inspection. *See § 5.12 below*.

- Requesting party may choose any reasonable time for production provided that date of production is at least 30 days after service of request plus three days if service is by mail or electronic delivery.
- Shorter or longer time may be directed by the court or by written agreement of the parties.

☐ Prepare requests. *See § 5.13 below*.

- ○ Number requests sequentially.

- ○ Specify duties of responding party such as to conduct a reasonable search, respond specifically and completely to each request, permit inspection to extent request is not objectionable, supplement responses as appropriate, list privilege documents on a log, and produce documents as kept in usual course of business.

- ○ Define terms that will be used throughout requests.

- ○ Specify items to be produced and inspected with particularity, with description sufficient to enable reasonable person to determine precisely documents or items requested.

- ○ Specify reasonable place and manner of production and inspection that does not place unreasonable relative expense and burden on parties.

- ○ Specify form or forms in which electronically stored information is to be produced.

☐ Certify requests. *See § 5.14 below*.

- ○ If requesting party is represented by attorney, request must be signed by at least one attorney of record.

- ○ If requesting party is not represented by an attorney, party must sign requests personally and state his or her address.

- ○ Serve request on all parties to the action unless the court directs otherwise.

- ○ Retain custody of original of the request and original response.

☐ Serve requests. *See § 5.15 below*.

☐ Determine whether requests should be filed. *See § 5.16 below*.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Requests for Production and Inspection



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§ 5.10 Considering Advantages of Early Requests

Securing documents, electronically stored information, other tangible items, and inspection of premises early in the litigation process is advantageous because the analysis of this material will assist in establishing facts to formulate a case and discovery strategy. Also, the analysis will facilitate more productive and thorough depositions by enabling the requesting party to ask witnesses about the documents.

Items tendered by the responding party may reveal other claims, crossclaims, or defenses and allow the requesting party to amend its complaint, cross-complaint, or answer in a timely fashion. Another advantage to early requests is the ability to properly review, prepare and preserve the items produced for maximum use later at trial.

However, a party may not obtain documents merely to determine whether it has a claim for relief, as all requested documents and tangible items must be relevant to a claim or defense. *See Fed. R. Civ. P. 26(b)(1)*; *see also § 2.05 above*.

For discussion of time restrictions on Rule 34 discovery, see *§ 5.12 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 34.10*.
- *Federal Litigation Guide PP 13.02, 20.07*.

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§ 5.11 Considering Motion to Shorten Time to Respond

A party generally has 30 days after the service of a Rule 34 request to serve a response. However, the requesting party may move to shorten the response period or the time to respond may be shortened by stipulation of the parties. *See Fed. R. Civ. P. 29, 34(b)(2)(A)*; *see also § 15.04[2] below*. Absent a court's discretionary order or stipulation of the parties, a party may not be compelled to respond prior to the end of the 30-day period. *See Garcia v. Texas Dep't of Human Servs., 2003 U.S. Dist. LEXIS 23876, at *2-*3 (W.D. Tex. 2003)* (without parties' agreement or court order, unilateral attempt to shorten discovery time in Rule 34 request was improper).

The court may shorten the time for a response to enable the parties to prepare properly for a motion (e.g., a motion for preliminary injunction or an opposition to an order to show cause), trial, or another discovery deadline. *See Daumer v. Allstate Ins. Co., 1992 U.S. Dist. LEXIS 16184, at *2-*4 (E.D. Pa. 1992)* (requiring requesting party to establish why shorter time for response to meet another deadline would be reasonable); *but see Gavenda v. Orleans County, 182 F.R.D. 17, 20 (W.D.N.Y. 1997)* (court denied plaintiff's motion to shorten response time to two days before discovery cutoff date because demand would have impermissibly conflicted with the previously defined discovery period).

Strategic Point:

The requesting party should move for a response to a request for production of documents or electronically stored information or inspection of tangible objects at the earliest possible date if there is a probability that evidence could be imminently altered or destroyed, either intentionally, accidentally, or by the passage of time. *See Barsoum v. N.Y. City Hous. Auth., 202 F.R.D. 396, 399 (S.D.N.Y. 2001)* (sanctions may be imposed under Rule 34 for spoliation of evidence). If there is danger of this happening, also consider moving for a protective order. *See Fed. R. Civ. P. 26(c)*; *see also* Ch. 16 *below*.

PRACTICE RESOURCES:

- *Federal Litigation Guide PP 13.04[2.-5], 20.11[2.-5].*
- *Bender's Federal Practice Forms* Form No. 34:60.

- *Fed. R. Civ. P. 29(b)* (stipulations about discovery procedure).
- *Fed. R. Civ. P. 34(b)(2)(A)* (time to respond).



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§ 5.12 Evaluating Time Restrictions on Requests for Production or Inspection

[1] Request Is Premature if Made Prior to Filing of Complaint

Rule 34 is available to obtain production and access only after a civil action has been commenced by the filing of a complaint. *Fed. R. Civ. P. 34(a)* (Rule 34 may only be used by party to civil action). For example Rule 34(a)(2) does not allow a pre-action entry on the land of another for discovery purposes. *But see McNierney v. Long Island R.R., 215 F.R.D. 458, 459 (S.D.N.Y. 2003)* (as Rule 34 applies only after a cause of action has begun, the court did not exclude pre-action discovery of photographing an accident scene when the evidence is relevant and would inevitably have been discovered).

In some circumstances, Rule 27 permits perpetuation proceedings prior to an action to preserve evidence that may be lost if not immediately preserved. *See Fed. R. Civ. P. 27*; *see also* Ch. 10 *below*. Parties may be able to use the perpetuation mechanisms of Rule 27 to submit Rule 34 requests prior to an action or pending appeal. Such Rule 34 requests may be made on a restricted basis, subject to court approval. *See Martin v. Reynolds Metals Corp., 297 F.2d 49, 56 (9th Cir. 1961)* (authorizing use of Rule 34 and Rule 35 discovery in pre-litigation perpetuation).

[2] Request Is Premature if Made Prior to Discovery Conference

The earliest time for a Rule 34 request is governed by the interaction of Rules 16, 26, and 34, with the general rule that, absent leave of court or a written stipulation, a Rule 34 request may not be served prior to the discovery conference specified in Rule 26(f), which is used by the parties to develop a proposed discovery plan. *See Fed. R. Civ. P. 16*, *26*, *34*. After the discovery conference, the parties may control the timing of their requests for production or inspection, subject to the court's orders regarding the scheduling of discovery.

[3] Request May Not Be Made Later Than 30 Days Prior to Discovery Deadline

In a civil action, the district court will enter a scheduling order setting the time for completion of discovery, also known as discovery cutoff date. *Fed. R. Civ. P. 16(b)*. Because parties are allowed 30 days to respond to requests for production, requests must be served at least 30 days prior to completion of the discovery deadline. A party may, howver, seek leave of court to serve Rule 34 requests that would require production or inspection after the cutoff date. *See Fed. R. Civ. P. 34(b)(2)(A)*.

Warning:

Check local rules for guidance as to whether the request must allow time for response before the discovery cutoff date and related matters. In some jurisdictions, requests that call for a response after the discovery cutoff are not enforceable except by order of the court for good cause shown. The "discovery cutoff" is the date by which all responses to written discovery are due as set by the court. Thus, all requests must be served at least 30 days prior to the discovery cutoff. *See Fed. R. Civ. P. 34(b).*

[4] Request Must Set Reasonable Time for Inspection

The request for production must specify a reasonable time for inspection of the produced documents and tangible items, along with copying and testing activities. Furthermore, the time specified in the request must be at least 30 days after service of the request. However, the court may on motion permit a longer or shorter time to produce the requested documents. *Fed. R. Civ. P. 34(b)(2)(A).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 34.02[2], 34.03[2][a], 34.10.*
- *Bender's Federal Practice Forms* Form No. 26:300.
- *Federal Litigation Guide PP 13.02, 20.07.*
- *Fed. R. Civ. P. 26(d)* (timing and sequence of discovery).
- *Fed. R. Civ. P. 27* (depositions to perpetuate testimony).



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§ 5.13 Preparing Request for Production or Inspection

[1] Written Request Must Specify Items Individually or by Category

A Rule 34 request for production or inspection must be in writing and should be drafted like any other court document with a proper caption, as well as definitions, because it must be served on the parties. *See Fed. R. Civ. P. 34(a)*. The written request must specify the items to be produced and inspected, either by individual item or by category. *Fed. R. Civ. P. 34(b)(1)(A)*.

[2] Request Must Specify Items With Reasonable Particularity

The request must set forth the items to be produced and inspected with reasonable particularity. The request should place a party on reasonable notice of what is called for and what is not. *See Bruggeman ex rel. Bruggeman v. Blagojevich, 219 F.R.D. 430, 436 (N.D. Ill. 2004)* (court deemed party's Rule 34 request overbroad and vague).

[3] Request Must Specify Reasonable Place and Manner of Inspection

A request for production or inspection must specify a reasonable place and manner of making the inspection and performing the related acts such as copying and testing. *Fed. R. Civ. P. 34(b)(1)(B)*.

The parties may dispute the place and manner of inspection because of the relative expense and burden placed on the parties. The fact that production of documents might be expensive or burdensome is generally not a justification for refusing to produce or allow inspection. However, these factors may serve as the basis for a court order affecting the location or manner of the production.

Usually the requesting party asks for copies of documents to be delivered to its counsel's office.

Regarding electronic stored information, a request for production may specify the form of production of the electronically stored information. *Fed. R. Civ. P. 34(b)(1)(C)*; *see § 6.11[3] below*.



Strategic Point:

A party requesting *electronic* documents should consider requesting that the documents be produced in electronic form, not merely printed out and produced in paper form. The electronic form sometimes contains information not available on the printed record, such as the date the document was created and edited.

[4] Request Must Specify Reasonable Time for Inspection

A request for production or inspection must specify a reasonable time for making the inspection and performing the related acts such as copying, testing, and sampling. *Fed. R. Civ. P. 34(b)(1)(B)*. The requesting party may select a reasonable time, provided that the date of production is at least 30 days after service of the request, plus three days if service is by mail or electronic delivery. *See Fed. R. Civ. P. 5(b)(2)(E)*, *6(d)*, *34(b)(2)(A)*. However, a shorter or longer time may be directed by the court or by written agreement of the parties, with court approval required if the agreed date conflicts with a court-ordered discovery or trial schedule. *Fed. R. Civ. P. 29(b)*, *34(b)(2)(A)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 34.11*, *34.12*.
- *Federal Litigation Guide PP 13.04*, *13.100*, *20.11*.
- *Bender's Federal Practice Forms* Form Nos. 34:1-34:6.
- *Fed. R. Civ. P. 34(b)(1)* (contents of request).



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§ 5.14 Certifying Request

Like other types of discovery requests, Rule 34 requests are subject to Rule 26(g)'s certification requirement. If the requesting party is represented by an attorney, the request must be signed by at least one attorney of record. The attorney must include his or her address. If unrepresented, the party must sign the requests personally and state his or her address, e-mail address, and telephone number. *Fed. R. Civ. P. 26(g)(1)*.

Warning:

If the attorney, or party, fails to certify the request properly, the other parties need not respond to the request, and the court will strike the request unless it is promptly signed after the requesting party has been notified of the omission. *Fed. R. Civ. P. 26(g)(2)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 34.16*.
- *Federal Litigation Guide PP 13.05, 20.12*.
- *Fed. R. Civ. P. 26(g)* (signing disclosures and discovery requests, responses, and objections).



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1-5 Moore's AnswerGuide: Federal Discovery Practice § 5.15

§ 5.15 Serving Request

The requesting party must serve the request on the party to whom the request is directed and also on all other parties to the action, unless the court directs otherwise. *Fed. R. Civ. P. 34(a)*. Service is made by any permitted method under Rule 5, including by mailing a copy to the lawyers for the other parties. *See Fed. R. Civ. P. 5(a)* (every paper relating to discovery required to be served on party must be served on each party).

PRACTICE RESOURCES:

- *Federal Litigation Guide PP 13.06, 20.13.*
- *Fed. R. Civ. P. 5* (service and filing of pleadings and other papers).



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1-5 Moore's AnswerGuide: Federal Discovery Practice § 5.16

§ 5.16 Determining Whether Request or Response Should be Filed

Rule 34 requests and responses are not to be filed with the court until they are used in the proceeding or the court orders filing. *Fed. R. Civ. P. 5(d)(1).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 5.33.*
- *Fed. R. Civ. P. 5(d)* (filing).



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1-5 Moore's AnswerGuide: Federal Discovery Practice § 5.17

§ 5.17 Checklist for Responding to Request for Production or Inspection

☐ Consider applicable time limits for response. *See § 5.18 below*.

- ○ Responding party must serve a written response within 30 days after service of the request, unless the court directs otherwise or the parties agree to a shorter or longer time in writing, with court approval required if the agreed date conflicts with a prior court-ordered discovery or trial schedule.
- ○ However, the responding party has three additional days to serve the response if service of the request was by mail or electronic delivery.

☐ Review documents to determine applicability of privileges or work product doctrine. *See § 5.21 below*.

☐ Determine how to respond to each request. *See § 5.19 below*.

- ○ Decide whether to object to all or some of items requested, stating specific reasons for the objection.
- ○ Note that party may object to some items of requested production while responding to unobjectionable items.
- ○ Consider response that specifies good faith, reasonable alternative production and that specifies definite scope, time, place, or manner of production.
- ○ Determine whether to file a motion for protective order instead of, or in addition to,

response to production or inspection request.

☐ Draft response. *See § 5.20 below*.

- ○ Begin with specification of items, individually or by category, in conformance to numbering of requests.
- ○ State that responding party will permit inspection and related activities as requested, or that responding party objects to request or portion of request.
- ○ Draft objections, if applicable, along with a statement clearly specifying grounds.

☐ Consider merits of refusing to produce or allow inspection. *See § 5.21 below*.

☐ Certify and serve response. *See § 5.22 below*.

- ○ Certify response to request for production and inspection.
- ○ If requesting party is represented by an attorney, request must be signed by at least one attorney of record.
- ○ If requesting party is not represented by an attorney then party must sign requests personally and state his or her address, e-mail address, and telephone number.
- ○ Serve response on requesting party and on all other parties to the action unless the court directs otherwise.

☐ Consider merits of moving for protective order. *See § 5.23 below*.

☐ Produce documents, electronically stored information, or tangible things. *See § 5.24 below*.

☐ Supplement responses to request, as appropriate.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Requests for Production and Inspection



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1-5 Moore's AnswerGuide: Federal Discovery Practice § 5.18

§ 5.18 Exercising Timely Response

[1] Time Limit For Written Response Is Generally 30 Days

The responding party must serve some type of written response within 30 days after the service of a Rule 34 request (plus an additional time of three days if served by mail or electronic delivery), unless a shorter or longer time is directed by the court or agreed to in writing by the parties. *Fed. R. Civ. P. 34(b)(2)(A).*

Only a written response will be effective to prevent sanctions or other potential negative effects of failure to respond to the request. *See Smith v. Conway Org., Inc., 154 F.R.D. 73, 76 (S.D.N.Y. 1994)* (attorney work product objection waived because objection to document request made five months after request).



Strategic Point:

It is not unusual for the responding party to seek an extension of time to serve written responses and/or produce. Courts expect parties to accord each other the courtesy of reasonable extensions. Also, a requesting party that refuses a reasonable extension can expect its own request for an extension or some other professional courtesy to be rejected. Thus, unless the other party has been abusive with extensions or time is pressing, it is usually appropriate to grant requests for extensions.

[2] Time Limit May Be Altered by Court Order or by Agreement

The 30-day response period may be made shorter or longer by direction of the court or by written stipulation of the parties, with court approval required if the agreed date conflicts with a prior court-ordered discovery or trial schedule. *Fed. R. Civ. P. 34(b)(2)(A)*; *see Fed. R. Civ. P. 29(b)*; *see also § 15.04[2] below*. The attorneys typically work together to set a reasonable time for production without the necessity of filing a motion, but the court may set the time if necessary.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 34.13[1].*
- *Federal Litigation Guide PP 14.02, 20.20.*
- *Fed. R. Civ. P. 5(b)* (service: how made).
- *Fed. R. Civ. P. 6* (computing and extending time; time for motion papers).



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§ 5.19 Considering Options for Response

For each requested item, the responding party must determine how to respond based on whether the request is relevant to a claim or defense of a party, the reasonableness of the time, manner, and location of the request, the burdensomeness of the request, and other case-specific concerns.

A responding party's options include the following:

1. If the party has possession, custody, or control of the requested items, and has no objections to the proposed production or inspection, then the party can serve a response that agrees to the time, place, and manner of the requested production or inspection.

2. The party can serve an objection to the items requested or the time, method, and manner of the requested production or inspection, stating the specific reasons for the objection. A party must respond to those requests, or portions of requests, to which no objection is advanced.

3. The party can serve a response that specifies a good faith, reasonable, alternative production and that specifies a definite scope, time, place or manner.

4. The party may move for a protective order (*see § 5.23 below*).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 34.13 -34.14.*
- *Federal Litigation Guide PP 14.01, 14.41.*
- *Fed. R. Civ. P. 26(c)* (protective order).



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1-5 Moore's AnswerGuide: Federal Discovery Practice § 5.20

§ 5.20 Drafting Response

[1] Response Must Be in Writing and Specify Items Individually or by Category

A response to a request for production or inspection must be in writing because it must be served on the parties. *See Fed. R. Civ. P. 34(a)*. The response must refer to each individual item or category in the request. The response to a request for inspection must state for each item or category that inspection and related activities will be permitted as requested, unless the party objects to the request, in which event the reasons for the objection must be stated. If objection is made to only part of an item or category, that part must be specified and inspection permitted of the remaining parts. *See Fed. R. Civ. P. 34(b)*.

The response to a request for production must contain an individualized and complete response to each request, and, unless an objection is raised, be accompanied by production of the documents or electronically stored information responsive to that request, regardless of whether those documents, or that information, have already been produced. If there are no documents or information responsive to a request, that should be stated in the response. *See Fed. R. Civ. P. 34(b)*.



Strategic Point:

Note for document management purposes that if the producing party responds to the request and produces by category, it must still keep a set of the documents as they were maintained in the usual course of business, because it may be necessary later to know the file folder title or in whose file a document was found.

[2] Response Should Conform to Designation of Items and Categories In the Request

The responding party should designate each item and category in the response with the same numeral or letter as in the request, and must present the response in the same order as in the request. *See Fed. R. Civ. P. 34(b)(2)(B)*.



Strategic Point:

It may be helpful to reprint each request and insert the response to each request after the specific request, resulting in a document containing all requests and their corresponding responses. This precludes the need to refer to two documents to find both the requests and responses.

[3] Response May Address Form of Production For Electronically Stored Information

Regarding electronically stored information, if the responding party objects to the requested form or forms for producing electronically stored information specified in the request, or if no form was specified in the request, the responding party must state the form or forms it intends to use to produce electronically stored information. *Fed. R. Civ. P. 34(b)(2)(D).*

Unless the parties otherwise agree, or the court otherwise orders, if the request does not specify the form or forms for producing electronically stored information, the responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. *Fed. R. Civ. P. 34(b)(2)(E)(ii).* The responding party need not produce the same electronically stored information in more than one form. *Fed. R. Civ. P. 34(b)(2)(E)(iii).*

If the parties cannot agree on the form of production of electronically stored information, they must meet and confer to attempt to resolve the matter before the requesting party can move to compel production. If the parties cannot agree, the court will not be limited to the forms chosen by either party or the forms specified in Rule 34 for situations when there is no court order or party agreement. *See Fed. R. Civ. P. 37(a)(3)(B)*; *Fed. R. Civ. P. 34(b)*, Committee Note of 2006.

For further discussion of discovery of electronically stored information, *see* Ch. 6 *below.*

[4] Responding Party Must Clearly Specify Reasons for Each Objection

A responding party must state the specific reason for objecting for each request that is objectionable. *Fed. R. Civ. P. 34(b)(2)(C).*

General, boilerplate objections at the beginning of a set of responses are not sufficient to support a refusal to produce documents or permit inspection. Likewise, a general or boilerplate objection to any individual request is improper, particularly when the objecting party fails to submit any evidentiary declarations supporting the objection in response to a motion to compel further answers. *A. Farber & Partners, Inc. v. Garber, 234 F.R.D. 186, 188 (C.D. Cal. 2006)* (court found defendant's boilerplate objections to Rule 34 requests improper and granted plaintiff's motion to compel and awarded attorney's fees).

[5] Responding Party Must Comply With Unobjectionable Parts of Request

If an item or category is objectionable only in part, the responding party must comply with the unobjectionable portions of the request. *Fed. R. Civ. P. 34(b)(2)(C).*

When a responding party makes non-complying objections, the court also has the option to require that the responding party state its objection more completely or clearly. *See Harris v. United States, 121 F.R.D. 652, 655 (W.D.N.C. 1988)* (court required more complete response as it could not determine whether the materials withheld were producible).

[6] Certification of Response

If the responding party is represented by an attorney, the response must be signed by at least one attorney of record. The attorney must include his or her address, e-mail address, and telephone number. If unrepresented, the party must certify the response by signing personally and stating his or her address. *Fed. R. Civ. P. 26(g)(1).*

Warning:

If the attorney, or party, fails to certify the response properly, the response may be treated as ineffective, and objections asserted in the response may be deemed waived unless the response is promptly signed after the requesting party has been notified of the omission. *See Fed. R. Civ. P. 26(g)(2).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 34.13, 34.14.*
- *Federal Litigation Guide PP 14.03 -14.05, 14.07, 20.21.*
- *Bender's Federal Practice Forms* Form Nos. 34:80, 34:81.
- *Fed. R. Civ. P. 26* (duty to disclose; general provisions governing discovery).
- *Fed. R. Civ. P. 34* (requests for production and inspection).
- *Fed. R. Civ. P. 37* (failure to make disclosures or to cooperate in discovery; sanctions).



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1-5 Moore's AnswerGuide: Federal Discovery Practice § 5.21

§ 5.21 Refusing to Produce or Allow Inspection

[1] Establishing Privilege Claim

The requirements and methods of stating a privilege claim, and counter arguments against such a claim, can become a source of disagreement among the parties. Under Rule 34, a party need not produce privileged or attorney work product material. *Fed. R. Civ. P. 34(a)*; *see Fed. R. Civ. P. 26(b)(1)*; *see also* Ch. 3 *above*. A party withholding information under a claim of privilege or work product must make the claim expressly and describe the nature of the documents withheld in a manner that enables the requesting party to assess the claim. *See Fed. R. Civ. P. 26(b)(5)(A)*. This is usually done by producing a privilege log. *See § 3.13 above*. A party receiving a privilege log should carefully examine it to determine whether documents and other items listed are being legitimately withheld.

The methods employed to establish a privilege claim require the party asserting a privilege to make a prima facie showing that the privilege protects the information it intends to withhold from production. This may be accomplished through a privilege log or, if ordered by the court, an in camera review. A privilege log is a list of documents or other items with a substantiation of a privilege claim on an item-by-item basis, without disclosing the contents of the items. *See § 3.13 above* (discussing items to be included in privilege log).



Warning:

A party should be careful to disclose only what is necessary to establish the privilege, and nothing more. The protection of a privileged communication is extinguished by disclosure to another person, including the opposing party (*see §§ 3.09*, *3.18*, *3.45 above*). The party claiming privilege should not specify in a privilege log (*see § 3.13 above*) the actual contents of the communication and an in camera review may be necessary to conclude matters on this point.



Strategic Point:

Because compiling a privilege log within the 30-day period may be exceedingly difficult, the responding party should attempt at the earliest possible time, and certainly no later than before the 30-day response period, to secure an appropriate agreement or stipulation from the relevant parties. If that fails, counsel

may opt to apply for a protective order under Rule 26(c).

For further discussion of privileges and work product protection, *see* Ch. 3 *above*.

[2] Asserting Work Product Protection

For work product protection to be available, the material in question must:

1. Be a document, item of electronically stored information or tangible thing;

2. Which was prepared in anticipation of litigation; and

3. Was prepared by or for a party, or by or for its representative.

See Fed. R. Civ. P. 26(b)(3).

If the conditions are satisfied, the burden shifts and the party seeking discovery must show substantial need for the materials and the inability without undue hardship to obtain the substantial equivalent of the materials by an alternative method. Opinion work product, which contains counsel's mental impressions or legal strategies, enjoys nearly absolute immunity and can be discovered only in compelling circumstances. *See Fed. R. Civ. P. 26(b)(3).* A party's assertion of work product protection must be express and must describe the nature of the documents, communications, electronically stored information, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of work-product protection, such as by producing a privilege log. *Fed. R. Civ. P. 26(b)(5)(A).*

For further discussion of work product protection, *see* Ch. 3 *above*.

[3] Claiming Lack of Relevance to Claim or Defense of Party

A party may not request production or access to documents, electronically stored information, and tangible items that are not relevant either to the claim or defense of any party or, absent good cause shown, to the subject matter involved in the action. *Fed. R. Civ. P. 34(a)*; *see Fed. R. Civ. P. 26(b).* Consequently, irrelevance is a ground to object to a request, and should be stated clearly.

For further discussion of the relevance requirement, *see* Ch. 2 *above*.

[4] Claiming Lack of Possession, Custody, or Control

A party may not be compelled to produce items that are not within either its possession, custody, or control, and a party may object to any request for production of items the party does not possess, or have in its custody or control. *See Fed. R. Civ. P. 34(a)(1).* The party seeking production of the material bears the burden of showing that the material is in the possession, custody, or control of the responding party. *See United States v. International Union of Petroleum & Indus. Workers, AFL-CIO, 870 F.2d 1450, 1452 (9th Cir. 1989)* (case involved subpoena for records).

Concerning electronically stored information that is not readily accessible, the responding party need not provide discovery of electronically stored information from sources that it identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the responding party from whom discovery is sought bears the burden of making that showing. If that showing is made, the court may still order discovery from those sources if the requesting party shows good cause, and may specify conditions for the discovery. In making a good cause determination, the court will consider the generally applicable limitations on discovery imposed

by Rule 26(b)(2)(C). *See Fed. R. Civ. P. 26(b)(2)(B)*; *see also* Ch. 6 *below*.

[5] Objecting to Request That Is Unduly Cumulative or Burdensome

Generally, a party may request production of materials within the scope of discovery allowed by Rule 26(b)(1). *Fed. R. Civ. P. 34(a)*. However, a court may limit discovery if:

1. The discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

2. The party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

3. The burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(2)(C); *see EEOC v. United States Bakery, 2004 U.S. Dist. LEXIS 11350, at *5-*6 (D. Or. 2004)* (motion to compel inspection denied because it would likely unnecessarily disrupt defendant's operations); *see also* Ch. 2 *above*.

If discovery requests are relevant, the fact that they involve work, which may be time consuming and expensive, is not sufficient to render them objectionable. *See Beyer v. Medico Ins. Group, 266 F.R.D. 333, 337 (D.S.D. 2009)* (fact that answering discovery requests will be burdensome and expensive is not, in itself, reason for court to refuse to order discovery).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 34.13[2], 34.14[2], 34.16*.
- *Federal Litigation Guide PP 14.05, 14.09, 14.20 -14.29, 20.23*.
- *Fed. R. Civ. P. 26(b)* (discovery scope and limits).
- *Fed. R. Civ. P. 34* (requests for production and inspection).



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§ 5.22 Serving Response on All Parties

The responding party must serve the response on the party who requested the production, and also on all other parties to the action, unless the court directs otherwise. *Fed. R. Civ. P. 34(b)*; *see Fed. R. Civ. P. 5(a)(1)(C)* (every paper relating to discovery required to be served on party must be served on each party.

PRACTICE RESOURCES:

- *Federal Litigation Guide P 14.08*.
- *Fed. R. Civ. P. 5* (service and filing of pleadings and other papers).
- *Fed. R. Civ. P. 34* (requests for production and inspection).



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§ 5.23 Moving for Protective Order

The recipient of a request for production or inspection may move the court where the action is pending for a protective order to prevent all or part of the production or inspection. To obtain a protective order, the moving party must show good cause, and must certify that the moving party has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the discovery dispute without court action. *Fed. R. Civ. P. 26(c)(1)*; *see also* Ch. 16 *below*.

PRACTICE RESOURCES:

- *Bender's Federal Practice Forms Form Nos. 26:100-26:200.*
- *Federal Litigation Guide PP 14.06, 20.22.*
- *Fed. R. Civ. P. 26(c)* (protective orders).



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§ 5.24 Producing Documents, Electronically Stored Information, or Tangible Things

[1] Place of Production

The request for production must specify a reasonable place for inspection, copying, and testing of the produced documents, electronically stored information, and tangible items. When the parties cannot agree on a reasonable place, the court may order the requesting party to conduct the inspection at a reasonable location, considering factors such as:

1. The distance from the parties' locations;

2. Whether the amount of materials requested would make copying and transporting burdensome or expensive;

3. Whether the materials are needed by the responding party to transact its business.

[2] Manner of Production

The responding party must produce documents for inspection in either of the following ways:

1. As they are kept in the usual course of business; or

2. Organized and labeled to correspond with categories specified in the request for production.

Fed. R. Civ. P. 34(b).

The responding party must produce electronically stored information in the form or forms specified in the request, or in the form or forms specified in the response. *Fed. R. Civ. P. 34(b)(2)(E)(ii)*; *see also* Ch. 6 *below*.

Typically, documents are stamped or labeled with a sequential letter and numeric designation known as a "Bates stamp" or "document control number" to provide a means to record those documents that have been produced and to identify the documents for future reference.

Warning:

Counsel should remove privileged and non-responsive documents before Bates stamping a set of documents. If the documents are Bates stamped first, with privileged and non-responsive documents removed later, there will be gaps in the numbering, which will raise questions about why documents have been withheld.

Often, parties will stipulate to a protective order (not to be confused with a motion of the same name), signed by the court, that governs access to produced documents. Such a protective order can provide different levels of access: "confidential," "attorney's eyes only," etc.

[3] Inspection and Copying of Produced Material

In some cases access to the produced material may be a logistical concern. The responding party must produce and permit the requesting party to inspect and copy any designated documents, electronically stored information, and other tangibles, including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations. If the responding party produces copies of documents, the requesting party may still need to see the originals--for example, if the copies are difficult to read. If necessary, the responding party must translate any electronically stored information included in the request into reasonably usable form. *Fed. R. Civ. P. 34(b)(2)(E)(ii)*. However, Rule 34 does not grant unrestricted, direct access to a responding party's electronically stored information, nor does it give the requesting party the right to conduct the actual search. Rather, Rule 34 allows a requesting party to inspect and to copy the item, whether it is a document, disk, or other device resulting from the responding party's translation of the data into a reasonably usable form. *See § 6.15 below*.

The court may direct the manner of production in certain instances. In complex litigation concerning electronic data files, the requesting party itself should check the accuracy of a produced data compilation, for example, to review for any oversight or improper conduct on the part of the responding party.

[4] Testing of Produced Tangible Items

The requesting party is generally entitled to test or sample the tangible items produced in response to a request for production. *Fed. R. Civ. P. 34(a)(2)*. However, if a test or sample would entirely or partially destroy the tangible item, the court may preclude testing or control the manner of testing to ensure that evidence is preserved and the rights of the responding party are protected. In the case of destructive testing, the court applies a balancing test between the "costs" of the alteration of the object and the "benefits" of ascertaining the true facts of the case. Alternative means of ameliorating those "costs" and alternative non-destructive means of obtaining the facts should be considered in evaluating the benefits of destructive tests. The court may balance factors such as the following:

1. Whether the proposed testing is reasonable, necessary, and relevant to proving the movant's case;

2. Whether the non-movant's ability to present evidence at trial will be hindered, or whether the non-movant will be prejudiced in some other way;

3. Whether there are any less prejudicial alternative methods of obtaining the evidence sought; and

4. Whether there are adequate safeguards to minimize prejudice to the non-movant, particularly the non-movant's ability to present evidence at trial.

Mirchandani v. Home Depot, U.S.A., Inc., 235 F.R.D. 611, 614 (D. Md. 2006) (motion by purchasers to conduct destructive testing on bolt in ladder, which was in purchasers' possession, was more properly viewed as motion for protective order under Rule 26(c) and applicable standard for considering proposed testing remained same regardless of

whether motion was made under Rule 34(a)(1) or Rule 26); *see also Dabney v. Montgomery Ward & Co., 761 F.2d 494, 497-498 (8th Cir. 1985)* (court did not abuse its discretion by denying request for destructive testing given timing of request, prior rulings, and totality of circumstances).

[5] Responsibility for Expenses of Production and Inspection of Documents, Electronically Stored Information, and Tangible Items

Ordinarily, the presumed responsibility for the expenses of complying with requests for production are allocated as follows:

> 1. The responding party pays the expense of complying with discovery requests by producing and providing access to the material, including the expense of converting data compilations into a usable form through the required use of the responding party's devices.
>
> 2. The responding party pays the expense of inspecting, copying, and testing the requested material.

The court may vary the presumed expense responsibilities, and require either party to pay discovery expenses related to Rule 34 production, under a cost shifting analysis. Note that the court has discretion to shift presumed costs. A court may shift the presumed cost of Rule 34 production when the presumed allocation of cost would impose an undue burden on the party who is responsible for the particular expense. *See Fed. R. Civ. P. 26(b)*; *OpenTV v. Liberate Techs, 219 F.R.D. 474, 476-477 (N.D. Cal. 2003)* (court ordered parties equally to share cost of extracting source code from defendant's database and defendant was solely to bear cost of copying source code once it was extracted).

For further discussion of cost-shifting, *see § 6.20 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 34.14*.
- *Federal Litigation Guide PP 14.50 -14.53, 15.11 -15.12*.
- *Fed. R. Civ. P. 26* (duty to disclose; general provisions governing discovery).



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Chapter 6 MANAGEMENT AND DISCOVERY OF ELECTRONICALLY STORED INFORMATION

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§ 6.syn Synopsis to Chapter 6: MANAGEMENT AND DISCOVERY OF ELECTRONICALLY STORED INFORMATION

§ 6.01 Procedural Context--Managing and Discovering Electronically Stored Information

§ 6.02 Checklist for Managing Electronically Stored Information

§ 6.03 Preserving Computer-Based Documents as Potential Evidence

§ 6.04 Notifying Party to Stop Records Destruction In Accordance With Records Disposition Policy

§ 6.05 Administering Electronic Records During Ongoing Litigation

§ 6.06 Avoiding Destruction of Documents During Back-Up Procedure

§ 6.07 Checklist for Requesting Electronically Stored Information

§ 6.08 Understanding Discoverability of Electronically Stored Information

[1] Electronically Stored Information Is Discoverable

[2] "Deleted" Electronically Stored Information May Be Discoverable

[3] Data Relied On By Experts Must Be Disclosed

[4] Production of Electronically Stored Information in Specific Format May Be Requested

§ 6.09 Addressing Discovery of Electronically Stored Information Early in Litigation

[1] Initial Disclosures Precede Start of Formal Discovery

[2] Discovery of Electronically Stored Information Must Be Addressed at Pretrial Conferences

§ 6.10 Understanding Duty to Preserve Electronic Evidence

[1] Duty to Preserve Evidence Is Triggered by Knowledge of Litigation or Imminent Litigation

[2] Preservation Duties Detailed in the Zubulake Cases

[a] Preservation Duties For Parties Under Zubulake IV

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[3] Order for Preservation of Evidence May Be Obtained

[4] Sanctions May Be Imposed for Failure to Preserve Evidence

[a] Sanctions May Be Imposed for Violation of Preservation Order

[b] Court Has Inherent Authority to Impose Sanctions for Destruction of Evidence

§ 6.11 Using Discovery Methods to Gather Evidence in Form of Electronically Stored Information

[1] Available Methods

[a] Interrogatories

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PART A: PROCEDURAL CONTEXT

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§ 6.01 Procedural Context--Managing and Discovering Electronically Stored Information

Early recognition that electronic information contained on computer systems will be an issue in a lawsuit is crucial to ensure that the parties to the litigation are aware of relevant evidence, and their duty to preserve it. Early recognition ensures that there is adequate time to notify the parties to adjust and/or stop their records-disposition practices, including disposition of records in back-up systems.

If a party has reasonable concern that computer-based information may be imminently destroyed, that party may seek expedited discovery or a court order on preservation.

When dealing with electronically stored information, discovery plans should address issues relevant to computer based information, such as the methods of searching for, locating, retrieving, producing, inspecting and preserving the information.

After there has been a preliminary exchange of information, focused interrogatories and document requests may be used to obtain additional relevant information. As more information is obtained, steps should be taken to narrow the search of computer records by, for example, limiting the search to a specific time period, computers of selected individuals, and specific back-up systems.

In general, the sooner information about the parties' respective computer systems is exchanged in the litigation, the better. For example in commercial litigation involving electronic information, the name and version of software applications, including custom applications, should be identified at the outset of the litigation. Other items that should be identified include: any record-disposition policy; the frequency and nature of back-up systems; the media used to store backed-up data, and the names and e-mail addresses of key individuals familiar with pertinent computer systems. These items should be disclosed pursuant to Rule 26(a)(1) initial disclosures, and, if not disclosed initially, they should be requested.



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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.02

§ 6.02 Checklist for Managing Electronically Stored Information

☐ Requesting party:

○ Request responding party to stop or adjust its record-retention policy if it seems necessary to prevent the loss of potentially relevant information. *See § 6.04 below*.

○ Serve specifically tailored discovery requests for electronically stored information. *See §§ 6.03, 6.11 below*.

☐ Responding party:

○ Preserve electronically stored potentially relevant information in litigant's possession, custody or control. *See § 6.03 below*.

○ Safeguard against inadvertent loss of relevant computer-based information. Back up files and recover residual-deleted files. *See §§ 6.03, 6.05 below*.

○ In ongoing litigation, either halt all destruction of records or transfer data to another storage medium. *See § 6.05 below*.

○ Halt any routine recycling of magnetic tapes containing relevant information at the start of litigation. *See § 6.06 below*.

○ Collect preliminary information to enable responses to discovery requests, e.g., names and versions of software applications, frequency and nature of backup systems, record disposition policy, key persons with knowledge of the facts at issue and with

knowledge of the relevant computer systems. *See § 6.01 above*.

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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.03

§ 6.03 Preserving Computer-Based Documents as Potential Evidence

Litigants have an affirmative duty to preserve potentially relevant information in their possession, custody or control. *See Danis v. USN Communs., Inc., 2000 U.S. Dist. LEXIS 16900, at *4, *53 (N.D. Ill. 2000)* (essential to duty of production of information is threshold duty to preserve documents and other information); *see also William T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)* (party has duty to preserve what it knows or reasonably should know to be relevant evidence).

The duty to preserve relevant evidence extends to electronically stored information. This includes any type of information that is stored electronically. *See Fed. R. Civ. P. 34(a)(1)(A).*

The duty to preserve evidence arises not only after suit is filed, but also extends to the pre-litigation period when a party reasonably should know that the evidence may be relevant to anticipated litigation. *See Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)* .

The scope of the duty to preserve is broad, proportionate with the extent of allowable discovery. *See Fed. R. Civ. P. 26(b)(1)*; *see also* Ch. 2 *above*. Although relevant evidence must be preserved, litigants are not required to retain every document in their possession after the start of a lawsuit. *See Danis v. USN Communs., Inc., 2000 U.S. Dist. LEXIS 16900, at *99 (N.D. Ill. 2000)* (duty to preserve does not require litigants to keep every document in their files) (citing **Moore's**).



Strategic Point:

To avoid the risk of sanctions for destroying electronically stored evidence, the scope of electronically stored information that needs to be preserved should be identified early. The requesting party should tailor its discovery requests to include only electronically stored information that is relevant, and the responding party should take measures to safeguard against the inadvertent destruction of relevant evidence.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37A.10.*
- *Fed. R. Civ. P. 26(b)(1)* (material sought in discovery must be relevant).
- *Fed. R. Civ. P. 34(a)(1)(A)* (production of electronically stored information).



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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.04

§ 6.04 Notifying Party to Stop Records Destruction In Accordance With Records Disposition Policy

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. *Treppel v. Biovail Corp., 249 F.R.D. 111, 118 (S.D.N.Y. 2008)* ; *Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)* (Zubulake IV). Thus, if litigation is contemplated, counsel should notify the opposing party to stop or adjust its record-disposition policies in order to prevent the loss of potentially relevant information.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37A.57[1], 37A.10[4].*
- *Bender's Federal Practice Forms* Form Nos. 26:600, 26:601
- *Fed. R. Civ. P. 37(e)* (sanctions protection).



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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.05

§ 6.05 Administering Electronic Records During Ongoing Litigation

In a large business entity that is involved in multiple lawsuits on an ongoing basis, administering a reasonable records retention policy can be problematic. Destroying records may involve evidence relevant to some ongoing litigation.

Warning:

Absent exceptional circumstances, sanctions may not be imposed on a party under the Federal Rules for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system. *See Fed. R. Civ. P. 37(e)*. However, this protection from sanctions applies only to sanctions under the Federal Rules. Sanctions may still be imposed under other sources of authority or rules of professional responsibility. *See Fed. R. Civ. P. 37(e)* Committee Note of 2006.

Warning:

The most sensible course of action for business entities involved in ongoing litigation is to halt all destruction, or to provide some alternative means of storing data, such transferring it to another storage medium. Sanctions imposed on parties for destruction of relevant evidence after litigation has commenced can be severe. *See* Ch. 18 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37A.58[5].*



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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.06

§ 6.06 Avoiding Destruction of Documents During Back-Up Procedure

It is common for organizations to back-up their computer-based data, often using large magnetic tape reels. These reels can be reused, overwriting earlier backed-up data, and replacing it with newer back-up data. Litigants have the duty to ensure that relevant electronic evidence is not destroyed when litigation is imminent or ongoing.



Warning:

Routine recycling of magnetic tapes that may contain relevant information should be stopped as soon as litigation has begun.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37A.57[4].*



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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.07

§ 6.07 Checklist for Requesting Electronically Stored Information

☐ Identify sources of discoverable electronic information. *See § 6.08 below*.

- ○ E-mail.
- ○ Voicemail.
- ○ Computer hard drives.
- ○ Network servers.
- ○ Laptops.
- ○ Employee's home computers.
- ○ Peripheral storage devices.
- ○ PDAs.
- ○ DVDs.
- ○ CDs.
- ○ Back-up tapes or other back-up systems.

- ○ Archived files.
- ○ Deleted files.
- ○ Electronic bulletin boards.

☐ Address scope of discovery of electronically stored information at discovery planning conference or pretrial conference. *See § 6.08 below*.

☐ Inform other party of duty to preserve relevant evidence in form of electronically stored information. *See § 6.09 below*.

☐ Obtain stipulated preservation order, or move for preservation order if consent to stipulation cannot be obtained. *See § 6.10 below*.

☐ Seek sanctions if responding party failed to preserve evidence. *See § 6.10 below*.

☐ Use interrogatories to discover details of opposing party's electronic information systems, and document back-up policies. *See § 6.11 below*.

☐ Depose opposing party's person most knowledgeable about electronic information systems, back-ups, record management, storage, destruction and retention policies, and parties responsible for those activities. *See § 6.11 below*.

☐ Request inspection of computers, network, and other electronic storage equipment. *See § 6.11 below*.

☐ Request production of computer records and other electronically stored information. *See § 6.11 below*.

☐ Follow up with requests for after-acquired or discovered computer records or other electronically stored information. *See § 6.11 below*.

☐ Move to compel further responses or production if necessary. *See § 6.12 below*.

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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.08

§ 6.08 Understanding Discoverability of Electronically Stored Information

[1] Electronically Stored Information Is Discoverable

E-mail and other electronically stored information are subject to the discovery requirements of Rule 26(a)(1) initial disclosures, Rule 34(a) production requests, and/or Rule 45 subpoenas. *See Fed. R. Civ. P. 26(a)(1)*, *34(a)*, *45*.

Rule 34 procedures apply only to production from parties. Rule 45 procedures apply to production of documents from nonparties. *See Fed. R. Civ. P. 34(a)*; 45(d)(1); *see also § 6.21 below*.

Electronically stored information that is subject to discovery encompasses many forms of data. *See § 6.03 above*. The types of electronically stored information subject to discovery include:

1. Voicemail;

2. E-mail;

3. Deleted e-mail;

4. Data files;

5. Program files;

6. Back-up files;

7. Archival tapes;

8. Temporary files;

9. System history files;

10. Website information in textual, graphic or audio format;

11. Website files;

12. Cache files;

13. "Cookies"; and

14. Other information not visible in a printed document, and computer tapes and hard drives.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37A.01 -37A.05, 37A.11.*
- *Fed. R. Civ. P. 26(a)(1)* (discovery requirements).
- *Fed. R. Civ. P. 34(a)* (production requests).
- *Fed. R. Civ. P. 45* (subpoenas).

[2] "Deleted" Electronically Stored Information May Be Discoverable

Residual data remaining when electronically stored information is "deleted" may be discoverable. *See Simon Prop. Group L.P. v. MySimon, Inc.,194 F.R.D. 639, 640 (S.D. Ind. 2000)* (computer records, including deleted records, are subject to discovery under *Fed. R. Civ. P. 34*); *see also Scotts Co. LLC v. Liberty Mut. Ins. Co., 2007 U.S. Dist. LEXIS 43005, at *16 (S.D. Ohio 2007)* (deleted information is discoverable if relevant), *see also Playboy Enters. v. Welles, 1999 U.S. Dist. LEXIS 12895, at *8-*9 (S.D. Cal. 1999)* (requesting party given access to hard drives to retrieve deleted e-mails that were held to be properly requested documents).

Recovery of deleted files can be expensive, so the responding party may obtain a protective order or an order for cost-shifting if recovering deleted files is an undue burden. *See §§ 6.19, 6.20 below.*

Under the ABA's Civil Discovery Standards, unless the requesting party can establish a substantial need for the information (at a minimum identifying specific items that pertain directly to a central issue), a responding party does not have a duty to restore data deleted in the regular course of business, but not completely erased from computer memory. American Bar Association Civil Discovery Standards 29(a)(iii).

PRACTICE RESOURCES:

- American Bar Association Civil Discovery Standards 29(a)(iii).

[3] Data Relied On By Experts Must Be Disclosed

Along with the identity of testifying experts, all facts or data considered in forming the expert's opinions must be disclosed. *See Fed. R. Civ. P. 26(a)(2)(B).* This includes any electronically stored information.

Data relied on by a *non-testifying* expert is discoverable "on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the subject by other means." *See Fed. R. Civ. P. 26(b)(4)(D)(ii)*; *see also Fed. R. Civ. P. 26(b)(4)(E)* (payment of fees and expenses).

For further discussion of expert disclosure and discovery, *see* Ch. 12 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37A.21*.
- *Fed. R. Civ. P. 26(a)(2)(B)* (testifying experts).
- *Fed. R. Civ. P. 26(b)(4)(D)* (non-testifying experts).
- *Fed. R. Civ. P. 26(b)(4)(E)* (fees and expenses).

[4] Production of Electronically Stored Information in Specific Format May Be Requested

The requesting party may ask for production of electronically stored information in one or more specific formats, such as hard-copy printouts, on CD-ROM, or posted to a website. *See Fed. R. Civ. P. 34(b)*.

Unless the parties agree, or the court orders otherwise, a party does not have to produce the same electronically stored information in more than one format. *See Fed. R. Civ. P. 34(b)(2)(E)(iii)*.



Warning:

If the costs of production in an alternative format are not proportional to the benefit of the requesting party, the court may order cost-shifting. *See § 6.20 below*.



Strategic Point:

As a general rule, electronically stored information should be requested in electronic format. It is advantageous to make such a request for several reasons:

1. Electronically stored information often contains data that is not present when the data is printed out, such as who created the document, when it was created, and any edits.

2. Electronically stored information is searchable electronically. This is helpful for example when a large collection of e-mails has been produced, in electronic format, it is possible to search for key words or phrases.

3. E-mails have attachments and if produced in printed form, it may be difficult to determine which of the attachments belong to which e-mails.

When requesting electronically stored information in electronic format, counsel should ensure that it has the necessary programs to access and retrieve the data. If not, counsel should request the necessary programs from the responding party.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37A.44*.

- *Fed. R. Civ. P. 34(b)(2)(E)(iii)* (absent agreement or court order production needs to be in only one format).



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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.09

§ 6.09 Addressing Discovery of Electronically Stored Information Early in Litigation

[1] Initial Disclosures Precede Start of Formal Discovery

Disclosure of electronically stored information must be made at the start of litigation before formal discovery requests are served. Rule 26(a)(1) requires the parties to provide each other with a copy of, or a description by category and location of, all documents, *electronically stored information* and tangible things that are in the possession, custody or control of that party, and that the disclosing party may use to support its claims or defenses unless solely for impeachment. *See Fed. R. Civ. P. 26(a)(1)(A)(ii)*; *see also § 4.07 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37A.20*.
- *Bender's Federal Practice Forms* Form Nos. 26:600, 26:601
- *Fed. R. Civ. P. 26(a)(1)* (initial disclosures).

[2] Discovery of Electronically Stored Information Must Be Addressed at Pretrial Conferences

Pretrial conferences may be used to narrow the scope of electronically stored information. This can be accomplished through a Rule 26(f) discovery plan conference, or a Rule 16 pretrial conference. *See Fed. R. Civ. P. 16*, *26(f)*.

Before a Rule 26(f) conference, the parties are required to meet and confer. This must be done as soon as practicable, or at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b). At this preliminary "meet and confer," the parties must consider the nature and basis of their claims and defenses, the possibilities for a prompt settlement or resolution of the case, make or arrange for the disclosures required by Rule 26(a)(1), and discuss any issues relating to preserving discoverable information, and develop a proposed discovery plan. *See Fed. R. Civ. P. 26(f)*.

At a Rule 26(f) conference, it is advisable to discuss the following:

1. Whether each side possesses electronically stored information;

2. Whether parties intend to produce such material;

3. The native formats in which the material is available;

4. The form or forms that electronically stored information should be produced;

5. Whether any privilege issues require redaction; and

6. How to allocate costs for the foregoing issues.

See Hopson v. Mayor and City Council of Baltimore, 232 F.R.D. 228, 245 (D. Md. 2005) (cites to revised Civil Discovery Standards for the American Bar Assocation for issues the parties should discuss in formulating a discovery plan); *see also In re Bristol-Myers Squibb Sec. Litig., 205 F.R.D. 437, 444 (D.N.J. 2002)* (a *Fed. R. Civ. P. 26(f)* meet-and-confer should include electronic discovery issues).

At the discovery-planning conference, parties are directed to address any issue relating to the assertion of a privilege or protection claim. The parties should discuss whether they can reach an agreement on the consequences of inadvertent disclosure of privileged or protected matter, including whether the privilege or protection is waived, to facilitate the discovery process. Such agreements can include "clawback" provisions designed to permit a producing party to retrieve inadvertently disclosed confidential information, or "quick peek" provisions designed to permit the requesting party an opportunity to examine all information on condition that neither agreement prevents the producing party from asserting a privilege or protection claim. The parties may request the court to incorporate the agreement into the court's case-management order, which may support the viability of the privilege or protection claim in subsequent litigation.

For further discussion of discovery conferences, *see* Ch. 4 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37A.24, 37A.25.*
- *Bender's Federal Practice Forms* Form Nos. 26:602, 26:603, 26:604.
- *Fed. R. Civ. P. 16* (pretrial conferences).
- *Fed. R. Civ. P. 26(f)* (discovery plan conferences).
- American Bar Association Civil Discovery Standards 29.
- *Manual for Complex Litigation(4th ed.)* § 11.446.



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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.10

§ 6.10 Understanding Duty to Preserve Electronic Evidence

[1] Duty to Preserve Evidence Is Triggered by Knowledge of Litigation or Imminent Litigation

A party's duty to preserve evidence is triggered when the party has notice that the evidence is relevant to the litigation, or when the party should have known that the evidence may be relevant to future litigation. *See Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)* (litigation hold must be put in place immediately upon anticipation of litigation).



Warning:

Retained counsel has the responsibility to advise the client of the duty to preserve evidence. *See* American Bar Association Civil Discovery Standards 10.

Leading cases on electronic evidence preservation include the fourth and fifth cases in the *Zubulake* line of opinions. *See Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004)* (*Zubulake V*) (sanctions issued against a defendant that failed to preserve relevant e-mails, and failed to produce relevant e-mails in a timely fashion); *Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216, (S.D.N.Y. 2003)* (*Zubulake IV*) (destruction of back-up tapes found to be in bad faith, but because they were not relevant, no adverse jury instructions were issued).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37A.10[3].*
- American Bar Association Civil Discovery Standards 10.

[2] Preservation Duties Detailed in the *Zubulake* Cases

[a] Preservation Duties For Parties Under *Zubulake IV*

Zubulake IV sets forth specific guidelines concerning a party's preservation duties once the party reasonably anticipates

litigation. Key guidelines include the following:

1. A party anticipating litigation must implement a litigation hold, suspending its routine document retention/destruction policy.

2. In general, a litigation hold does not apply to inaccessible backup tapes.

3. A litigation hold can apply to backup tapes storing documents of key players to the existing or threatened lawsuit.

4. A corporation's duty to preserve is not unlimited.

5. The duty to preserve extends to individuals likely to have relevant information, such as:

- Any documents or tangible things created by individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses;

- Documents prepared for those individuals to the extent those documents can be easily identified (e.g., from the "to" field in e-mails);

- Information relevant to the claims or defenses of any party; and

- Information that is relevant to the subject matter of the litigation.

6. Parties must retain all relevant documents in existence at the time the duty to preserve attaches, and created thereafter. The litigants can chose how to retain the relevant documents because there are many ways to manage electronic data.

See Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217-218 (S.D.N.Y. 2003) .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37A.10[1] -[3], 37A.11.*

[b] Preservation Duties For Attorneys Under *Zubulake V*

Zubulake V sets forth specific guidelines concerning an attorney's preservation duties. Key guidelines include the following:

1. Counsel must issue a litigation hold at the outset of litigation, or whenever litigation is reasonably anticipated.

2. Counsel must instruct all employees to produce electronic copies of their relevant active files, and make sure that all back-up media retained is identified and stored in a safe place.

3. Counsel must become familiar with the client's documentation retention policies and data retention architecture.

4. Counsel should consider running a system-wide keyword search, and then preserve a copy of each

"hit."

See Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432-434 (S.D.N.Y. 2004) .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37A.10[5].*

[3] Order for Preservation of Evidence May Be Obtained

An order for preservation of evidence may be obtained that may later serve to facilitate sanctions for spoliation or violation of the order. Types of orders for preservation of evidence that may be obtained include the following:

1. An order for expedited discovery, *i.e.*, before completion of Rule 26(a)(1) initial disclosures or the Rule 26(f) discovery plan conference, may be obtained under Rule 26(d) when a party reasonably suspects the opposing party may destroy relevant electronically stored information in the course of normal business operations. *See Fed. R. Civ. P. 26(d), 37(b).*

2. A seizure order under Rule 64(b) or an ex parte restraining order may be obtained in exceptional circumstances when imminent destruction of electronically stored information essential to the case is likely and no other less intrusive means are available to get the information. *See Fed. R. Civ. P.64(b), 65.*

Warning--Responding Party:

A responding party has an independent obligation to preserve evidence on notice of litigation. A warning or order is not necessary to impose the obligation. Destroying or failing to preserve evidence may result in sanctions, adverse instructions to the jury, and even criminal prosecution. *See § 6.10[4] below.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37A.23 -37A.26, 37A.50.*
- *Bender's Federal Practice Forms* Form Nos. 26:600-26:604

[4] Sanctions May Be Imposed for Failure to Preserve Evidence

[a] Sanctions May Be Imposed for Violation of Preservation Order

A party who destroys electronically stored information in violation of an order to preserve that information may be subject to sanctions. *See Fed. R. Civ. P. 37(b)(2)*; *see also* Ch. 18 *below.*

[b] Court Has Inherent Authority to Impose Sanctions for Destruction of Evidence

The court has inherent power to sanction a party who is on notice of litigation or potential litigation, and fails to preserve relevant electronically stored information in its possession. This inherent power includes the power to enter a wide range of sanctions, such as a default judgment or dismissal, or an award of fees or costs. *See Chambers v. NASCO, Inc., 501 U.S. 32, 45, 49-50, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* (dismissal of case as appropriate sanction under certain circumstances; less severe sanctions such as assessing costs also valid); *see also* Ch. 18 *below.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37A.50, 37A.55 -37A.57.*



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Chapter 6 MANAGEMENT AND DISCOVERY OF ELECTRONICALLY STORED INFORMATION
PART C: REQUESTING ELECTRONICALLY STORED INFORMATION

1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.11

§ 6.11 Using Discovery Methods to Gather Evidence in Form of Electronically Stored Information

[1] Available Methods

[a] Interrogatories

Interrogatories (*Fed. R. Civ. P. 33*) can be used to identify the types and sources of electronically stored information that may contain relevant evidence. Interrogatories can also be used to identify the persons with knowledge of the opposing party's electronic information storage and retention policies.

Interrogatories can inquire into matters such as the following:

1. The type of equipment used;

2. How data is stored;

3. Storage policies and procedures;

4. Whether any relevant computer records have been deleted; and

5. The identity of management personnel with knowledge of that equipment and those policies and procedures.

6. To discover if the responding party uses an Internet service provider (ISP).

7. To discover if the responding party posts messages on electronic bulletin boards or in chat rooms.

If the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, interrogatories may be answered by making business records, including electronically stored information, available for inspection and copying. *See Fed. R. Civ. P. 33(d).*

For further discussion of interrogatories, *see* Ch. 7 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37A.22.*
- *Fed. R. Civ. P. 33(d)* (business records made available for inspection).

[b] Person-Most-Knowledgeable Depositions

To develop an overall discovery strategy, it is useful to take the deposition of the opposing party's "person most knowledgeable" regarding the electronic information systems and storage policies and procedures.

The deposition notice must contain the following:

1. A description of the information requested sufficient to enable the opposing party to identify the person most knowledgeable in the area; and

2. A statement as to what topics the deposition will cover, such as: computer equipment, software, maintenance, storage, security, retention policies and procedures, destruction policies and procedures, and back-up and archive policies and procedures.

See Fed. R. Civ. P. 30(b)(2), (b)(6).

For further discussion of depositions, *see* Ch. 8 *below*.

[c] Requests for Inspection or Copying

A party may request inspection or copying of any tangible thing that is discoverable. This includes a demand for a physical inspection of the opposing party's electronic information system including servers and hard drives. *See Fed. R. Civ. P. 34(a)*; *see also Fed. R. Civ. P. 34*, Committee Note of 2006; *see also § 6.11[3][a] below*.



Strategic Point--Requesting Party:

A qualified forensic expert, who can generally be retained from major accounting or investigative firms, should be employed for the inspection of the opposing party's electronic information systems. If such an expert is used, the demand for inspection should be accompanied by the expert's declaration describing the method of inspection and how the material will be located and downloaded.

For further discussion of Rule 34 requests for inspection and copying, *see* Ch. 5 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37A.22.*
- *Bender's Federal Practice Forms* Form No. 34:6.
- *Fed. R. Civ. P. 30(b)(2)(6)* (proper contents of a person-most-knowledgeable deposition notice).
- *Fed. R. Civ. P. 33(d)* (business records made available for inspection).

- *Fed. R. Civ. P. 34(a)* (requests for inspection and/or copying).

[2] Requesting Electronically Stored Information

[a] Requesting Party Must Demonstrate the Need and Likelihood of Finding Relevant Matters

The Rule 26(b)(2) proportionality test applies to on-site inspection of computers. *See Fed. R. Civ. P. 26(b)(2).*



Strategic Point--Requesting Party:

Due to the intrusive nature of an on-site inspection, the requesting party should demonstrate that it is likely to lead to the recovery of relevant matter, and that no form of less intrusive discovery exists. *See Playboy Enters. v. Welles, 60 F. Supp. 2d 1050, 1055 (S.D. Cal. 1999)* (computer hard drive inspection allowed when evidence of recovering deleted e-mails likely, and no damage would result to opposing party's computer).



Strategic Point--Responding Party:

Consider whether it would be appropriate to object to a request for an on-site inspection as unnecessarily intrusive. Because computers contain privileged matters, allowing the propounding party access to information stored on hard drives and servers that contain attorney-client privileged information may result in privilege waiver. *See §§ 6.22 -6.26 below.*

[b] Confidentiality Protocol to Ensure Privileged Information Is Protected

If the court orders inspection and/or mirror imaging of a computer hard drive, a protocol to ensure protection of confidential and privileged information will be necessary.

Such a protocol may entail:

1. The appointment of a neutral expert, selected by the parties or appointed by the court to perform technical tasks;

2. A protective order signed by the neutral expert requiring the expert to file a report with the court and barring disclosure to the plaintiffs;

3. Copying limited to files reasonably likely to contain materials potentially relevant to the case; and

4. The expert being required to provide all copied electronic files to defendant's counsel to be reviewed for privilege and responsiveness.

See Simon Prop. Group L.P. v. MySimon, Inc., 194 F.R.D. 639, 641 (S.D. Ind. 2000) (protocol for mirror imaging of hard drives).

Other courts have ordered similar protocols. *See Rowe Entm't v. William Morris Agency Inc., 205 F.R.D. 421, 432-433 (S.D.N.Y. 2002)* (confidentiality protocol); *see also Playboy Enters. v. Welles, 60 F. Supp. 2d 1050, 1054-1055 (S.D. Cal. 1999)* (confidentiality protocol to protect computer hard drive).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37A.32[5][d]*, 37A.33.
- *Bender's Federal Practice Forms* Form No. 34:6.

[3] Format and Content of Production of Electronically Stored Information

[a] Specify Format of Production of Electronically Stored Information

A request for the production of electronically stored information identified through interrogatories, depositions, and inspection requests may specify the form in which electronically stored information is to be produced. *See Fed. R. Civ. P. 34(a), (b)(1)(C)*; *see also § 6.11[1] [c] above*.



Strategic Point:

To avoid having information produced in an unusable form, the form of production should be addressed early in the litigation. There is no single form of production that is appropriate for all types of data in all cases. For example, production of computer-readable images might be sufficient for the vast majority of requested data, but if raw data is produced, then the appropriate applications, file structures, manuals, and other tools necessary for the proper translation and use of the data must be provided. Similarly, files for which metadata is essential to the understanding of the primary data must be produced in an appropriate format. *See Manual for Complex Litigation (4th ed.)* § 11.446.

[b] Responding Party Must Produce All Responsive Information Within Its Possession, Custody or Control

A party must produce all information responsive to a request for production when that information is in the party's "possession, custody or control." *See Fed. R. Civ. P. 34(a)*.

Information is considered to be within a party's possession, custody or control if the party has *actual* possession, custody or control, or has the legal right to obtain the information on demand. *See United States v. Petroleum & Indus. Workers, 870 F.2d 1450, 1452 (9th Cir. 1989)* (control defined as the legal right to obtain on demand).

The duty to seek information can include information on computers and other devices that employees use for business purposes away from the office. *See, e.g., Simon Prop. Group L.P. v. MySimon, Inc., 194 F.R.D. 639, 641 (S.D. Ind. 2000)* (inspection of computers, including computers at home, used by four named employees ordered by court).

The general rule that a party is not required to "create" or generate responsive materials under Rule 34, but is only required to produce items in the responding party's possession or control, applies to electronically stored information as well as traditional paper documents. *See Mon River Towing, Inc. v. Industry Terminal, 2008 U.S. Dist. LEXIS 45369 at *3 (W.D. Pa. June 10, 2008)* (although party may be required to produce print-out of information stored on computer, responding party was not required to produce "report" of computer data requested by opposing party because this would entail creation of new document rather than "a print-out of computer data").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37A.05, 37A.11[1]*, 37A.44[1].

- *Fed. R. Civ. P. 34* (requests for production and inspection).
- *Manual for Complex Litigation (4th ed.)* § 11.446.



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§ 6.12 Moving to Compel Discovery if Responding Party Fails to Comply With Discovery Request

The requesting party may move for an order compelling discovery if the responding party objects to the request for production or fails to comply with all or any part of the request. *See Fed. R. Civ. P. 34(b), 37(a)(3)(B).*

Warning:

If the responding party fails to produce relevant evidence in response to a discovery request, the court may impose sanctions under Rule 37 unless the failure was substantially justified. *See Fed. R. Civ. P. 37(a)(5).* Separate sanctions may be warranted if it is clear that the responding party has ignored its obligations. It is unlikely, however, that a court will impose sanctions for an initial failure to produce. Courts are usually reluctant to impose sanctions unless the responding party has violated a previous order to produce and has required the propounding party to seek a second court order requiring production.

Absent exceptional circumstances, sanctions may not be imposed on a party under Rule 37 for failing to provide electronically stored information lost as a result of routine, good faith operation of an electronic information system. *See Fed. R. Civ. P. 37(e).*

For further discussion of motions to compel, *see* Ch. 17 *below*.

PRACTICE RESOURCES:

- *Bender's Federal Practice Forms* Form Nos. 26:190, 26:191, 26:192.
- *Fed. R. Civ. P. 34* (request for production).
- *Fed. R. Civ. P. 37(a)(3)(B)* (motion to compel discovery response).
- *Fed. R. Civ. P. 37(e)* (sanctions generally not available for failure to produce information lost through routine operation of electronic information systems).



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§ 6.13 Checklist for Responding to Requests for Electronically Stored Information

☐ Implement plan to preserve evidence upon awareness of litigation or potential litigation. *See § 6.09 above*.

- ○ Determine what electronically stored information is relevant to claims or defenses of the parties.
- ○ Notify client's employees of duty to preserve records.
- ○ Preserve back-up systems.
- ○ Suspend routine record retention and destruction procedures that could potentially destroy relevant records.

☐ Perform diligent search and reasonable inquiry in compliance with demand for production. *See § 6.09 above*.

☐ Determine whether to resist discovery request on the grounds that irrelevant material is requested. *See § 6.16[1] below*.

☐ Identify privileged and/or confidential information contained in materials to be inspected or produced, and determine whether to object to discovery request based on privilege or confidentiality. *See § 6.16[2] below*.

☐ Determine whether to object to discovery request on grounds of burden and/or expense of

production. *See §§ 6.17, 6.18 below*.

☐ Negotiate stipulated protective order to protect against disclosure and use of confidential or privileged information. *See § 6.25 below*.

☐ If requesting party refuses to stipulate, seek protective order to protect confidential disclosure. *See § 6.19 below*.

☐ Determine whether production entails significant or special costs. If so, move for order shifting costs. *See § 6.20 below*.

☐ If responding to a Rule 45 subpoena:

- ○ Produce information in form specified in subpoena. If no form is specified, then produce the information in the form it is normally maintained, or in a form that is reasonably usable. *See § 6.21 below*.
- ○ Identify records withheld on grounds of privilege. *See § 6.21 below*.
- ○ If necessary, seek protective order. *See § 6.21 below*.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Electronic Discovery



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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.14

§ 6.14 Understanding Duties of Responding Party

A Rule 34 request for production (*see* Ch. 5 *above*) encompasses production of electronically stored information. *See Fed. R. Civ. P. 34(a)*; *see also § 6.15 below*.

The party or party's attorney must sign responses to discovery requests. The signature certifies that after a reasonable inquiry, to the best of the signer's knowledge, information and belief, the response is consistent with the Federal Rules of Civil Procedure. *See Fed. R. Civ. P. 26(g)*.

Failure to produce relevant, non-privileged material in response to a discovery request may be sanctionable conduct, unless the failure was substantially justified. *See Fed. R. Civ. P. 37(a)(5)*.

Once a responding party is on notice of litigation, and the duty to preserve evidence is triggered, the party must suspend any of its routine procedures, such as deleting old files, that could alter or destroy potentially relevant records. *See, e.g., William T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)* (sanctions are available against a litigant who is on notice of litigation, knows that it possesses relevant files, and subsequently destroys the files); *see also § 6.10 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37A.11*.
- *Fed. R. Civ. P. 26(g)* (signature on discovery responses signifies good faith inquiry).
- *Fed. R. Civ. P. 34(a)* (request for production includes electronically stored information).
- *Fed. R. Civ. P. 37(a)(5)* (failure to respond to discovery requests may be sanctionable).
- *Fed. R. Civ. P. 37(e)* (limit on sanctions for failure to provide electronically stored information).



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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.15

§ 6.15 Responding to Request for Electronically Stored Information

[1] Forms of Production

The responding party has a duty to produce electronically stored information, including data or data compilations stored in any medium from which information can be obtained. The responding party must translate this data into usable form if necessary. *See Fed. R. Civ. P. 34(a)(1)(A).*

The request for production may specify the form that the requested information is to be produced. *See Fed. R. Civ. P. 34(b)(1)*; *see also § 6.08[4] above*. If the responding party objects to the form of production that is specified in the request, or if no form is specified, the response must set forth the form the responding party intends to use. *See Fed. R. Civ. P. 34(b)(2)(D)*; *see also § 6.15[3] below*.

Warning:

The responding party may later be compelled to produce in the form requested if the response does not include an objection to the form requested. *See Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co., 259 F.R.D. 568, 587 (M.D. Fla. 2009)* (responding party was required to produce metadata because requesting party specifically asked for information in "native format" with metadata included and responding party never objected to form of production, but simply produced TIFF images).

Unless the parties agree otherwise, or the court orders another form of production, the information must be produced in the form that it is ordinarily maintained, or in a form that is reasonably usable. Electronically stored information need only be produced in one form. *See Fed. R. Civ. P. 34(b)(2)(E)*; *see also United States v. O'Keefe, 2008 U.S. Dist. LEXIS 12220, at *10, *22 (D.D.C. 2008)* (if no specification in request, production must be in form ordinarily maintained, or in a reasonably usable form).

Warning:

A district court in the Tenth Circuit held that a party did not fulfill its duty to produce documents in a "reasonably usable form" when it converted e-mails to PDF files and produced the PDF documents in paper format. Although a party generally is not required to produce documents in more than one format,

the court noted that a party's option to produce in a reasonably usable form does not mean it is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult to use the information efficiently in the litigation. *See White v. Graceland College Ctr. for Professional Dev. & Lifelong Learning, Inc., 586 F. Supp. 2d 1250, 1264 (D. Kan. 2008)* (although plaintiff failed to specify form for producing electronically stored information in original request, court ordered re-production of e-mails in native format with metadata intact).

Case law also suggests that producing electronically stored information in paper format does not meet the requirement that information be produced in a form in which it is ordinarily maintained, because it is unlikely that businesses routinely print out every e-mail or other electronic document. *See Covad Communications Co. v. Revonet, Inc., 254 F.R.D. 147, 150 (D.D.C. 2008)* ("no one is pretending that Revonet prints all of its e-mails or converts them to TIFF files on a daily basis," so "no reasonable person can honestly believe that hard copy" is a form in which electronically stored information is ordinarily maintained).

[2] Answering Interrogatories by Making Records Available

Interrogatories may be answered by making business records, including electronically stored information, available for inspection and copying. This includes compilations when the burden of ascertaining the answer is substantially the same for the party propounding the interrogatory as for the party responding. *See Fed. R. Civ. P 33(d)*; *see also § 6.15[1] above*.

If the responding party opts to produce business records electronically, as with a production of paper business records, the response must specify the location sufficiently to permit the requesting party to locate and identify the sought-after records. *See Graske v. Auto-Owners Ins. Co., 647 F. Supp. 2d 1105, 1108 (D. Neb. 2009)* (defendant's production of 7000 pages of documents, divided into seven files and scanned onto CD-ROM, did not provide plaintiffs sufficient guidance as to how to locate responsive documents); *Bayview Loan Servicing, LLC v. Boland, 259 F.R.D. 516, 519 (D. Colo. 2009)* (responses to interrogatories by use of compact disc must be in sufficient detail to permit interrogating party to locate and identify responsive documents).

[3] Making Timely Response or Objection

The response must identify the specific item or category that is objected to, and state the reason for the objection. *See Fed. R. Civ. P. 26(b)(5)(A), 34(b)(2)(B).*

The responding party must set forth the form it intends to use for producing electronically stored information if the request did not specify a form, or if the requesting party has objected to the form specified in the request. *See Fed. R. Civ. P. 34(b)(2)(D).*

A failure to object to a discovery request within the time required constitutes a waiver of any objections. *See, e.g., Krewson v. City of Quincy, 120 F.R.D. 6, 7 (D. Mass. 1988)* (all objections waived because objections to document requests were served six weeks after they were due).

However, a court may determine a brief delay in objecting does not amount to a waiver if the request exceeds the bounds of fair discovery, by seeking information that is clearly privileged. *See United States v. ex. Rel. Burroughs v. DeNardi Corp., 167 F.R.D. 680, 687 (S.D. Cal. 1996)* (documents sought were protected from disclosure therefore short period of tardiness in objecting was excused).

Warning--Responding Party:

Failure to object or respond within the time allowed can subject the nonresponsive party to Rule 37

sanctions. *See Fed. R. Civ. P. 37(a)(5)*; *see also* Ch. 18 *below*.



Strategic Point:

Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the work of the production occurs. If the parties disagree on the form of production, they must meet and confer under *Fed. R. Civ. P. 37(a)(1)* to try to resolve the matter before the requesting party can file a motion to compel. *See Fed. R. Civ. P. 34(b)*, Committee Note of 2006.

[4] Determining Best Method to Prevent Manipulation of Data

If the responding party decides to allow the requesting party access to its electronic storage devices, it should have its own personnel participate in the inspection so that no manipulation of data occurs.

Alternatively, the parties can agree on a neutral third party to be custodian of the electronic data to ensure that there is no manipulation of data. In such a procedure, the third party conducts the search or inspection of the storage device, ensuring that the information is not altered by the responding party, and retrieves only non-privileged, nonconfidential, responsive information. *See § 6.11[2][b] above*.



Strategic Point:

If the responding party allows its hard drives to be copied by the requesting party, it should keep a copy for itself so that it has a record of the data originally provided to the requesting party.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37A.43*, *37A.44*.
- *Bender's Federal Practice Forms* Form Nos. 34:80, 34:81.
- *Fed. R. Civ. P. 33(b)(4)* (failure to object to interrogatories within time required constitutes waiver of objections).
- *Fed. R. Civ. P. 34(a)(1)(A)* (electronic data must be translated to usable form).
- *Fed. R. Civ. P. 34(b)(1)(C)* (request may specify form of production).
- *Fed. R. Civ. P. 34(b)(2)(E)* (response must set forth the form of production intended if none specified).



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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.16

§ 6.16 Applying General Discovery Rules to Electronically Stored Information

[1] Requested Matter Must Be Relevant to Claim or Defense

The information requested in discovery must be relevant to a pleaded claim or defense of a party. The information requested need not be admissible at trial, as long as it is relevant to a claim or defense. *See Fed. R. Civ. P. 26(b)(1)*; *see also* Ch. 2 *above*.

A responding party resisting discovery has the initial burden of showing lack of relevance. *See Quinby v. West LC AG, 2006 U.S. Dist. LEXIS 1178, at *4 (S.D.N.Y. 2006)* (discovery request for "all emails" did not meet requirement that discovery be limited to relevant materials).

Warning:

"Fishing expeditions," or overly broad, irrelevant requests, are not allowed. *See United States v. Nixon, 418 U.S. 683, 700, 94 S. Ct. 3090, 41 L. Ed 2d 1039 (1974)* (to require production the requests must be made in good faith and not as a general "fishing expedition").

[2] Requested Matter Must Not Be Privileged

In addition, the information requested in discovery must not be privileged. *See Fed. R. Civ. P. 26(b)(1)*. If information is withheld on the grounds of privilege, the allegedly privileged matter must be specifically described in a manner that will enable the requesting party to assess the applicability of the privilege. *See Fed. R. Civ. P. 26(b)(5)(A)*; *see also* Ch. 3 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37A.31, 37A.32.*
- *Fed. R. Civ. P. 26(b)(1)* (requested matter must not be privileged).

- Fed. R. 26(b)(5)(A) (privilege must be specifically described).

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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.17

§ 6.17 Evaluating Burden and Expense

[1] Relevant Evidence Must Be Produced Unless Production Is Unduly Burdensome or Expensive

A party has a duty to produce relevant evidence unless the burden or expense of production outweighs its likely benefit. *See Fed. R. Civ. P. 26(b)(2)(C)(iii).*



Strategic Point:

Prior to responding, evaluate whether the discovery request is overbroad. The requesting party is not entitled to discovery that is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient. *See Fed. R. Civ. P. 26(b)(2)(C).*

[2] Weighing Burden and Expense of Production

The burden and cost associated with searching for all electronically stored information responsive to a Rule 34 request for production can be substantial, especially because "deleted" computer records may be discoverable (*see § 6.08[2] above*). Searching for deleted records can be time consuming and expensive due to the number of storage locations that may have to be checked, and the possible need to use special search methods to located deleted files.

Due to the potential burden and expense, cost-benefit balancing factors are employed to determine the extent that discovery of electronically stored information is appropriate and which party should bear the cost of production. *See Fed R. Civ. P. 26(b)(2)*; *see also § 6.20 below*.

The cost-benefit balancing factors include the following:

1. Whether the discovery sought is unreasonably cumulative or duplicative;

2. Whether the information sought is obtainable from some other more convenient, less burdensome or inexpensive source;

3. Whether the party seeking the information already has had adequate opportunity to obtain the information;

4. Whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into consideration the following:

a. The needs of the case;

b. The amount in controversy;

c. The resources of the parties;

d. The importance of the issues at stake in the litigation, and of the discovery sought to the resolution of the issues.

See Fed. R. Civ. P. 26(b)(2).

[3] Evaluating Necessity of Protective Order

Absent an overriding claim of privilege, the "likely benefit" of the production of electronically stored information that is the sole source of evidence will almost always outweigh the burden and expense of production. *See Daewoo Elecs. Co. v. United States, 650 F. Supp 1003, 1006 (Ct. Int'l Trade 1986)* (raw data was destroyed so electronic files had to be produced as there was no other source for the information).

Although e-mails may exist only in computerized form, the cost of production may still be unduly burdensome due to the volume of messages that must be reviewed, particularly if the back-up system must be searched.



Strategic Point:

Requested electronic information can be used to challenge the authenticity of a document, because computer software can show when changes were made to a document and by whom. *See, e.g., Turner v. Resort Condominiums Int'l, LLC, 2006 U.S. Dist. LEXIS 48561, at *11-*12 (S.D. Ind. 2006)* (metadata suggesting that document was modified after lawsuit was filed was insufficient to offset substantial evidence confirming content and authenticity of document).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37A.30, 37A.33, 37A.34.*
- *Fed. R. Civ. P. 26(b)(2)(C)* (limits on frequency or extent of discovery).
- *Fed. R. Civ. P. 26(c)* (protective orders).



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§ 6.18 Responding to Request for Search of Back-Up System or Archive

[1] Search of Back-Up System or Archive May Be Difficult or Costly

Back-up systems and archives are intended to protect files in case of disaster, and are not designed for search purposes. Because these systems are not designed to be used in the typical everyday computer environment, they may not be organized or searchable in the same manner as the computer system used in daily business operations, and thus are more costly to search. *See Fed. R. Civ. P. 26(b)(2)(B)*; *see also § 6.17[3] above*; *see also Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed LLC, 2007 U.S. Dist. LEXIS 15277, at *49-*50 (D. Colo. 2007)* (back-up tapes not reasonably accessible due to the cost and burden of locating evidence).

[2] Search of Back-Up System or Archive Must Be Reasonable

The responding party does not have to provide electronically stored information from sources that it identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the responding party bears the burden of showing undue burden. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the general limitations on discovery imposed by Rule 26(b)(2)(C). The court may specify conditions for the discovery. *See Fed. R. Civ. P. 26(b)(2)(C)*.

The scope of a search of the responding party's back-up system or archive must be reasonable. *See Fed. R. Civ. P. 26(b)(2)(C)*; *see also § 6.17[2] above*. The requesting party must show more than speculation that relevant matters will be turned up by a search of the back-up system or archive and must minimize the production of irrelevant items. *See* American Bar Association Civil Discovery Standards 29(a)(iii); *see also Alexander v. FBI, 194 F.R.D. 316, 330 (D.D.C. 2000)* (search of back-up system for e-mails of 57 persons using 37 search terms required 10 weeks of time and cost over $1 million).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37A.35*.
- *Fed. R. Civ. P. 26(b)(2)* (limitations on frequency and extent of discovery).

- American Bar Association Civil Discovery Standards 29(a)(iii).



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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.19

§ 6.19 Seeking Protective Order if Dispute Cannot Be Resolved Between Parties

If the burden of production is too great, and the dispute cannot be resolved between the parties without court action, the party responding to the discovery request may bring a motion for protective order. The court has broad discretion to fashion an appropriate protective order that can include provisions such as the following:

1. That the discovery not be had;

2. That the discovery be had only on specified terms and conditions, including a designation of time and place;

3. That the discovery be had only by a method other than that selected by the requesting party;

4. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

5. That discovery be conducted with only designated persons present;

6. That confidential information not be revealed, or revealed only in a designated way.

See Fed. R. Civ. P. 26(c), *see also* § 6.27 *below*. For further discussion of protective orders, *see* Ch. 16 *below*.



Strategic Point:

Be prepared with a less burdensome alternative means of locating relevant evidence, such as an initial sampling of documents. *See Zubulake v. UBS Warburg LLC., 217 F.R.D. 309, 324 (S.D.N.Y. 2003)* (sample restoration of computer back-up tapes provided tangible evidence of costs).

The responding party must attempt informally to resolve any discovery dispute with the requesting party before seeing a protective order. *See Fed. R. Civ. P. 26(c)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37A.35[1][d].*
- *Bender's Federal Practice Forms* Form Nos. 26:100-26:200.
- *Fed. R. Civ. P. 26(c)* (protective order).
- *Fed. R. Civ. P. 37(a)* (motion to compel).



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Chapter 6 MANAGEMENT AND DISCOVERY OF ELECTRONICALLY STORED INFORMATION
PART D: RESPONDING TO REQUESTS FOR ELECTRONICALLY STORED INFORMATION

1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.20

§ 6.20 Applying for Cost-Shifting Order if Production Requires Significant or Special Costs

[1] Courts Have Inherent Authority to Allocate Costs

The court's power to limit discovery also includes the power to allocate costs. *See Fed. R. Civ. P. 26(b)(2)*; *see also Manual for Complex Litigation (4th ed.)* § 11.446.

Usually the responding party bears the cost of responding to discovery requests, but an order shifting costs may be available when production requires significant or special costs. *See Semsroth v. City of Wichita 239 F.R.D. 630, 634-640 (D. Kan. 2006)* (detailed analysis of cost-shifting); *see also Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 316 (S.D.N.Y. 2003)* (orders protecting from undue burden and expense can include orders conditioning discovery on the requesting party's payment of costs of discovery).

The court also has the authority to order an apportionment of costs. *See OpenTV v. Liberate Techs., 219 F.R.D. 474, 479 (N.D. Cal. 2003)* (cost of extraction of source code to be split equally); *see also Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 432-433 (S.D.N.Y. 2002)* (court reviewed eight factors in apportioning costs).

[2] Cost Shifting Is Appropriate for Inaccessible Data

When deciding whether to shift the cost of electronic production, the court may consider the accessibility of the data, and order cost-shifting only when the data is relatively inaccessible and costly to restore and/or retrieve, such as data on back-up tapes and data that has been deleted or damaged. *See Fed. R. Civ. P. 26(b)(2)(B)*; *see also Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318 (S.D.N.Y 2003)* (whether production is unduly burdensome or expensive depends primarily on whether the documents are stored on accessible or inaccessible sources).

Whether or not electronic data is relatively inaccessible depends on the type of media that the data is stored on. Under the influential *Zubulake* formulation, three types of data are generally presumed to be accessible:

1. Active, online data (e.g., hard drives);

2. Near-line data (e.g., optical disks and other robotic or removable storage devices); and

3. Offline storage/archives (e.g., removable optical disks or magnetic tape media that can be labeled or stored on a shelf or rack).

See Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318-319 (S.D.N.Y 2003) .

Two types of data are generally presumed to be inaccessible:

1. Back-up tapes that are sequential access devices requiring one to read all of the preceding blocks to retrieve a particular block of data; and

2. Erased, fragmented or damaged data (data that has been "deleted" and can be converted and used again as free space.

See Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318-319 (S.D.N.Y 2003) .

In determining whether to shift costs for producing relatively inaccessible data, the court may consider the following:

1. The extent that the request is specifically tailored to discover relevant information;

2. The availability of the information from other sources;

3. The total cost of production, compared to the amount in controversy;

4. The total cost of production, compared to the resources available to each party;

5. The relative ability of each party to control costs and its incentive to do so;

6. The importance of the issues at stake in the litigation; and

7. The relative benefits to the parties of obtaining the information.

See Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 284 (S.D.N.Y 2003) .

Warning:

Following conversion to accessible form, the responding party is still responsible for the costs associated with reviewing and producing the data, such as making copies, despite the fact that cost-shifting is appropriate. *See OpenTV v. Liberate Techs., 219 F.R.D. 474, 479 (N.D. Cal. 2003)* (responding party always bears the cost of review and production once the information has been converted, citing to *Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y 2003))* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37A.35[3], 37A.36[1], [3].*
- *Manual for Complex Litigation (4th ed.)* § 11.446.



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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.21

§ 6.21 Responding to Third-Party Subpoena Issued Under Rule 45

A subpoena may specify the form of production of electronically stored information. *See Fed. R. Civ. P. 45(a)(1)(C).* If the form specified is unobjectionable, then production should be made in that form. *See Fed. R. Civ. P. 45(c)(2)(B).*

If a subpoena does not specify the form for producing the electronically stored information, the responding party must produce the information in the form that the information is ordinarily maintained, or in a form that is reasonably usable. *See Fed. R. Civ. P. 45(d)(1)(B).*

When electronically stored information subject to a subpoena is withheld on the basis of privilege, the claim of privilege must be made expressly and must be supported by a description of the nature of the documents, communications, or things not produced sufficient to enable the requesting party to contest the claim. *See Fed. R. Civ. P. 45(d)(2)(A).*

Warning:

Under the Electronic Communications Privacy Act of 1986, a pretrial discovery subpoena under Rule 45 cannot be used to compel a provider of electronic communication service, such as an ISP, to disclose private consumer information to a government entity. *See 18 U.S.C. § 2701 et seq.*; *see e.g., In re Subpoena Duces Tecum to AOL, LLC, 2008 U.S. Dist. LEXIS 39349, at *6 (E.D. Va. 2008)* ("issuance of a civil discovery subpoena is not an exception to the provisions of the Privacy Act ...").

A requesting party must take reasonable steps to ensure that a Rule 45 pretrial discovery subpoena does not impose undue burden or expense on the third party subject to the subpoena. Sanctions are authorized for breach of this duty. *See Fed. R. Civ. P. 45(c)(1).*

A motion to quash is available to protect the third party from undue burden or disclosure of privileged or other protected matters. *See Fed. R. Civ. P. 45(c)(3).*

For further discussion of Rule 45 subpoenas, *see* Ch. 14 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37A.32[1], [5][d][iii], 37A.41, 37A.43.*
- *Fed. R. Civ. P. 45(a)(1)(C)* (subpoena can specify form of production).
- *Fed. R. Civ. P. 45(c)* (protection of person subject to subpoena).
- *Fed. R. Civ. P. 45(d)* (duties in responding to subpoena).



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PART E: PROTECTING CONFIDENTIALITY AND PRIVILEGE

1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.22

§ 6.22 Checklist for Protecting Confidentiality and Privilege

☐ Determine whether reasonable expectation of confidentiality exists in electronically stored information. *See § 6.23 below*.

☐ Conduct review for privileged and confidential information before disclosure. *See §§ 6.23*, *6.24 below*.

☐ Seek stipulation to protect disclosure and use of privileged or confidential information. *See § 6.25 below*.

☐ If requesting party will not stipulate, move for protective order if production of computer hardware, software, or electronically stored information will reveal confidential or privileged information. *See § 6.26 below*.

☐ **Search by Topic:** Civil Procedure > Discovery > Privileged Matters



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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.23

§ 6.23 Assessing Privilege

[1] Assertion of Privilege

Privileged communications are not subject to discovery and may generally be withheld. *See Fed. R. Civ. P. 26(b).*

The party asserting the privilege must specifically designate the privileged matters, and has the burden of proving the withheld matter is privileged. *See Fed. R. Civ. P. 26(b)(5)(A).*

For discussion of privilege, *see* Ch. 3 *above*.

[2] Electronically Stored Information May Contain Privileged or Confidential Information

Electronically stored information may contain privileged or confidential information. Privacy may be waived by consent or by a failure to object to discovery.

Circuit Split:

There are several lines of authority in federal court jurisdictions on whether inadvertent disclosure waives the attorney client privilege. *See § 3.18[3] above*.

Warning:

Facts or data provided to a testifying expert is subject to disclosure under Rule 26(a)(2). *See Fed. R. Civ. P. 26(a)(2).* To avoid the inadvertent waiver of privilege, all data to be provided to a testifying expert should be screened for privilege. Former versions of Rule 26 created uncertainty as to whether the work product privilege is waived when an attorney provides work product materials to an expert witness. The uncertainty was based on an apparent conflict in the language of Rule 26. A former version of Rule 26(a)(2)(B) required that an expert report contain a complete statement of all of the "data or other information" considered by the expert in forming the opinions, without express limitation. Based on this language, many courts held that work product protection was waived for any document or information provided to a testifying expert, whether or not the expert relied on the information in preparing the expert report. *See, e.g., In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001)* ; *see also*

*United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co., 2002 U.S. Dist. LEXIS 111, at *23 (S.D.N.Y. 2002)* (privilege waived for vast quantity of electronic information because date was provided to testifying expert). In 2010, Rule 26(a)(2)(B) was amended to replace the term "data or other information" with the term "facts or data." This amendment was intended to disapprove of cases that relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports.

[3] No Reasonable Expectation of Privacy for E-mails Sent Over Employer's Computer System

An employee normally does not have a reasonable expectation of privacy in e-mails sent over the employer's computer system sufficient to protect that e-mail from discovery, and will generally be found to have consented to employer access. No decisions have recognized a privacy right in employee e-mails. *See Smyth v. Pillsbury Co.*, F. Supp. 97, 101 (E.D. Pa. 1996) (no reasonable expectations of privacy in e-mails sent voluntarily by an employee to supervisor); *see also Strauss v. Microsoft Corp., 1995 U.S. Dist. LEXIS 7433, at *11-*12 (S.D.N.Y 1995)* (e-mails are admissible).

Express consent can occur when, for example, the employee signs an employment contract waiving any expectation of privacy in e-mail on the employer's computer system. The consent may also be implied from the employee's knowledge that the employer has access to the computer system that the e-mail was sent on. *See Bohach v. City of Reno, 932 F. Supp. 1232, 1236-1237 (D. Nev. 1996)* (consent implied when employee was aware that e-mails are stored in computer).

Employers are generally exempt from federal law protecting the privacy of e-mails. Federal law prohibits unauthorized interception of e-mails, but there is no privacy violation if there has been consent to the interception or access. *See 18 U.S.C. § 2511(2)(d).*

Employers can monitor an employee's use of a computer furnished by the employer in the ordinary course of business to the extent necessary to protect the rights and property of the employer. *See 18 U.S.C. § 2701(c).*

Although federal law prohibits unauthorized access to stored electronic communications, conduct authorized by the entity that provides the electronic communications service, i.e., the employer, is exempt. *See 18 U.S.C. § 2701.*



Strategic Point:

If appropriate, counsel should consider moving for a protective order to protect an employee from annoyance, embarrassment, undue burden or expense. *See Fed. R. Civ. P. 26(c).*

[4] E-Mail Communications Protected by Attorney-Client Privilege

The attorney-client privilege applies to communications by e-mail, provided the client has maintained the confidentiality. *See United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1078 (N.D. Cal. 2002)* (e-mails sent by defendant's in-house counsel were protected by attorney-client privilege except to extent that defendant did not maintain confidentiality, and discussed matters in e-mails with third parties).

If an e-mail string with otherwise privileged attachments is sent to a third party, the privilege is lost with respect to that e-mail and all of the attached e-mails. Whether text repeated in an e-mail string remains privileged is determined by analyzing the most recent e-mail. That is, if the last e-mail is privileged, everything in the string is privileged. Conversely, if the last e-mail is not protected by privilege, earlier e-mails in the string may lose their protection. *See Cont'l Cas. Co. v. St. Paul Surplus Lines Ins. Co., 265 F.R.D. 510, 517 n.9 (E.D. Cal. 2010)* (even though one e-mail is not privileged, second e-mail that forwards prior e-mail to counsel "might be privileged in its entirety").

In line with the general rule that a client cannot push a document under the umbrella of privilege merely by turning it over to an attorney, courts have ruled that copying e-mails to counsel does not provide a basis for attaching

attorney-client privilege to those e-mails. *See Zelaya v. UNICCO Serv. Co., 682 F. Supp. 2d 28, 39 (D.D.C. 2010)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.47, 37A.32, 37A.33.*
- *Fed. R. Civ. P. 26(b)* (discovery scope and limits).



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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.24

§ 6.24 Assessing Applicability of Work Product Protection

[1] Work Prepared in Anticipation of Litigation Protected by Work Product Doctrine

[a] Opinion Work Product Absolutely Protected

The work product doctrine protects an attorney's work prepared for, or in anticipation of, litigation. The court may not order disclosure of an attorney's mental impressions, conclusions, or legal theories concerning the litigation. This form of work product is referred to as "opinion work product," and the protection is practically absolute. *See Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed 2d 584 (1981)* (attorney's mental process protected from disclosure); *see also § 3.44 above*.

[b] Ordinary Work Product May Be Disclosed

On a showing that the party seeking discovery has a substantial need for the materials in the preparation of the party's case, and that the party is not able to obtain the substantial equivalent of the materials without undue hardship, the court may order disclosure of "ordinary work product." *See Fed. R. Civ. P. 26(b)(3)*; *see also § 3.44 above*.

[2] Computerized Litigation Support System Protected by Work Product Doctrine

Information contained on a computerized litigation support system is work product. If such information is targeted for discovery, the issue then becomes whether it is entitled to the protection of "ordinary" work product or "opinion" work product.

The attorney's personal involvement in the development of the support system is the key to determining the level of protection afforded. *See Shipes v. BIC Corp., 154 F.R.D. 301, 309 (M.D. Ga. 1994)* (computer database maintained by in-house counsel in on-going litigation was protected by the work product doctrine).



Strategic Point:

The level of involvement in an index support program that is based on key terms and summaries of

individual documents is more likely to merit "opinion" protection, than a support program that merely uses a character search.



Strategic Point:

The fact that discoverable information has been put into a computerized support system does not by itself prevent discovery. The original source of the information should be retained so that any response to discovery targeting that information can provide the information from the original source rather than from the support system. This will eliminate the risk of incidentally revealing attorney strategy.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37A.32[3], [4].*
- *Fed. R. Civ. P. 26(b)(3)* (ordinary work product may be disclosed).
- *Gerber v. Down E. Cmty. Hosp., 266 F.R.D. 29, 32-33 (D. Me. 2010)* (work-product protection may extend to e-mail correspondence between party's attorney and potential witnesses even though witness necessarily obtains copy of e-mail and may play role in its creation because witness statements prepared in anticipation of litigation or for trial are work product by nature).



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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.25

§ 6.25 Using Stipulated Protective Order to Protect Confidential and Privileged Information

The parties may enter into a stipulated protective order to protect confidential and privileged information. *See, e.g., Hydraflow Inc. v. Enidine Inc., 145 F.R.D. 626, 638 (W.D.N.Y 1993)* (protective order that inadvertent disclosure would not waive attorney client privilege); *see also § 6.11 above*.



Strategic Point:

Stipulating to a "non-waiver" agreement, which can be adopted as a case management order, can avoid the onerous burden of pre-production screening of vast quantities of unorganized electronically stored information for privilege to avoid inadvertent waiver. This stipulation protects the responding party by allowing "take back" of inadvertently produced privileged materials if discovered within a reasonable period.

Some data may be maintained in compilations that are entitled to trade-secret protection, or that reflect attorney work product for use at trial or as a basis for expert opinion. *See Manual for Complex Litigation (4th ed.)* § 11.446. A stipulated "non-waiver" agreement may be especially appropriate when the only way to review a huge volume of electronic files, e-mails and databases is by conducting electronic word searches. The word searches may not screen out every privileged or protected document, but may be the only way to conduct such a search without spending an inordinate amount of time and money.



Strategic Point:

Parties may stipulate that disclosure to a forensic expert does not constitute a waiver of privilege or confidentiality.

For further discussion of discovery stipulations, *see* Ch. 15 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37A.32[5][d].*
- *Manual for Complex Litigation (4th ed.)* § 11.446.



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1-6 Moore's AnswerGuide: Federal Discovery Practice § 6.26

§ 6.26 Moving for Protective Order if Requesting Party Will Not Stipulate

The responding party must attempt informally to resolve any discovery dispute with the requesting party before seeking a protective order. *See Fed. R. Civ. P. 26(c)(1)*; *see also § 6.19[1] above*.

Once a protective order is sought, the court has broad discretion to fashion an appropriate order that may include provisions such as the following:

1. That certain matters not be inquired into;

2. That discovery be conducted with no one present except the designated persons;

3. That confidential information not be revealed, or revealed only in a designated way.

See Fed. R. Civ. P. 26(c), *see also § 6.19[2] above*.

For further discussion of protective orders, *see* Ch. 16 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37A.35[1][d]*.
- *Bender's Federal Practice Forms* Form Nos. 26:70, 26:71.
- *Fed. R. Civ. P. 26(c)* (protective orders).



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Chapter 7 INTERROGATORIES

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§ 7.syn Synopsis to Chapter 7: INTERROGATORIES

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§ 7.02 Checklist for Propounding Interrogatories

§ 7.03 Considering Options and Strategies

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§ 7.06 Determining Allowable Number of Interrogatories

§ 7.07 Drafting Interrogatories

[1] Interrogatories Must Inform Responding Party of Information Requested

[2] Instructions and Definitions Permissible

[3] Pattern or Form Interrogatories Generally Permissible

[4] Cross-Referencing Other Discovery May Be Permissible

[5] Attorney's Signature Is Required

§ 7.08 Determining Time for Serving Interrogatories

[1] Interrogatories May Be Served Only After Rule 26(f) Conference

[2] Court May Postpone Answers to Contention Interrogatories

[3] Interrogatories Must Be Served 30 Days Before Discovery Cut-Off

[4] Interrogatories Seeking Information Subject To Mandatory Disclosure May Be Premature If Served Before Disclosure Date

§ 7.09 Serving All Parties

§ 7.10 Moving to Compel When Party Fails to Respond

§ 7.11 Checklist for Responding to Interrogatories

§ 7.12 Considering Options and Strategies

§ 7.13 Determining Who May Respond

[1] Interrogatories Directed to Individual Must Be Answered, Signed, and Verified by That Person

[2] Interrogatories Directed to Organization Must Be Answered, Signed, and Verified by Officer or Agent

[3] Interrogatories Directed to Government Agency Must Be Answered, Signed, and Verified by Officer or Agent

[4] Attorney for Party Must Certify Responses

§ 7.14 Determining Duties of Responding Party

[1] Responding Party Must Answer or Object

[2] Answer to Extent Possible

[3] Information Under Responding Party's Control

[4] Business Entity Must Provide Information Known to Officers and Employees

§ 7.15 Business Records May Be Provided in Lieu of Answer

[1] Specify Records and Provide Opportunity for Inspection

[2] Make Specification Detailed; Voluminous Records May Require Index

[3] Burden Of Deriving Answer Must Be Same For Both Parties

[4] Court May Require That Interrogating Party Reimburse Respondent's Expenses

[5] Courts Divided On Asserting Privilege

§ 7.16 Serving Timely Response

[1] Thirty-Day Period for Response Plus Extra Three Days for Service by Mail or Other Delivery

[2] Obtain Agreement of Parties or Court Order to Alter Timing

[3] Several Methods of Serving Response Are Available

[4] Timing of Response for Removed Actions

[5] Failure to Make Timely Response Sanctionable

§ 7.17 Formatting Responses

[1] Draft Full and Separate Responses for Each Interrogatory

[2] Respondent and Attorney Must Sign

§ 7.18 Objecting to Interrogatories

[1] Grounds for Objections

[2] State Precise Grounds for Objection

[3] Respondent May Object in Part

[4] Objector Has Burden of Proof

[5] Objecting in Proper Format

[6] Making Timely Objection

[7] Avoiding Waiver of Objection

[a] General Rule: Failure to Timely Object Waives Objection

[b] Boilerplate or General Objections May Result In Waiver Of Any Objections

[8] Attorney Must Sign Objections

§ 7.19 Obtaining Protective Order

§ 7.20 Understanding Effect of Answers

[1] Use at Trial

[2] Objections To Introduction Of Answers

§ 7.21 Supplementing and Amending Answers



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Chapter 7 INTERROGATORIES
PART A: PROCEDURAL CONTEXT

1-7 Moore's AnswerGuide: Federal Discovery Practice § 7.01

§ 7.01 Procedural Context--Interrogatories

Interrogatories are written questions propounded by one party to another and may cover any matter, not privileged, relevant to any party's claims or defenses.

Like other forms of discovery, interrogatories can develop facts and theories of the case and narrow the issues. Interrogatories may refer to other forms of discovery and may expand on information already obtained.

Interrogatories may also inquire into a party's contentions and opinions.

Advantages of using interrogatories compared to other discovery methods include:

1. Interrogatories are more convenient and less expensive than depositions;

2. Interrogatories may be carefully crafted and can anticipate objections;

3. Interrogatories require a party to provide all information available to that party; and

4. The responding party has an obligation to supplement interrogatory answers if it learns that the initial answers were incomplete or incorrect.

Disadvantages of using interrogatories compared to other discovery methods include the following:

1. Interrogatories are limited to parties only;

2. Interrogatories often prompt boilerplate objections;

3. Interrogatories do not provide subjective information, such as the party's demeanor;

4. Interrogatory responses are often by written by opposing counsel, normally carefully crafted to minimize usefulness; and

5. Interrogatories do not allow for follow up questions.

Interrogatory answers can be used as permitted by the rules of evidence. Moreover, if an answering party did not provide certain responsive information, the propounding party may be able to use the interrogatory and response to exclude that information at trial.



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Chapter 7 INTERROGATORIES
PART B: PROPOUNDING INTERROGATORIES

1-7 Moore's AnswerGuide: Federal Discovery Practice § 7.02

§ 7.02 Checklist for Propounding Interrogatories

☐ Determine when to serve interrogatories. *See § 7.08 below*.

- ○ Serve interrogatories any time after parties have conferred for discovery purposes, as required by Rule 26(f).
- ○ If interrogatories need to be served before Rule 26(f) conference, either obtain written stipulation from other parties or obtain court order.
- ○ In all cases, serve interrogatories early enough before discovery cut-off date set by court to allow responding party 30-day response period.

☐ Evaluate interrogatories as part of discovery plan. *See § 7.03 below*.

☐ Weigh impact of mandatory disclosures under Rule 26(a). *See § 7.04 below*.

☐ Consider when drafting interrogatories:

- ○ Usefulness: Will interrogatory elicit useful information? *See § 7.03 below*.
- ○ Clarity: Is the interrogatory written in clear and precise language? *See § 7.07[1] below*.
- ○ Definitions: Should there be definitions at beginning of the set of interrogatories? *See § 7.07[2] below*.

- Instructions: Should there be separate instructions at beginning of the set of interrogatories? *See § 7.07[2] below*.
- Breadth: Is the interrogatory appropriate in its scope? *See § 7.07 below*.
- Burden to respond: Is the interrogatory defensible as to its scope and burden? *See § 7.07 below; see also § 7.18 below*.
- Avoiding objections: Frame interrogatories to minimize potential for objections. *See § 7.18 below*.

☐ Consider use of both types of interrogatories.

- Use identification interrogatories to obtain factual information. *See § 7.03[1] below*.
- Use contention interrogatories to obtain opinions and contentions that relate to fact or the application of law to fact, to determine opposing party's theories. *See § 7.03[2] below*.

☐ Consider permissible subject matter of interrogatories.

- Parties may seek matters relevant to claims and defenses. *See § 7.05 below*.
- For good cause, court may order discovery of any matter relevant to the subject matter of action. Any matter reasonably calculated to lead to discovery of admissible evidence is relevant. *See § 7.05 below*.
- Interrogatory may relate to party's contention. *See §§ 7.03[2], 7.05[3] below*.
- Interrogatory may not seek legal conclusions or statements of law. *See § 7.18*.
- Interrogatory may not seek privileged matter. *See § 7.18 below*.

☐ Entities: If responding party is a corporation, partnership or governmental agency, do not direct interrogatories to particular person. *See § 7.13[2], [3] below*.

☐ Number of interrogatories: Do not exceed 25-interrogatory limit, counting discrete subparts, without court order or stipulation. *See § 7.06 below*.

☐ Draft interrogatories clearly and narrowly. *See § 7.07 below*.

- Make sure subparts relate directly to subject matter of main interrogatory.

- Follow local rules on format (e.g., rules on numbering interrogatories sequentially, leaving space for answer after interrogatory, cross referencing other discovery).

☐ Sign interrogatories before serving on responding party. *See § 7.07[5] below*.

- Interrogatories must be signed by attorney for propounding party if propounding party is represented by counsel.

- Interrogatories must be signed by propounding party if proceeding pro se.

☐ Serve interrogatories. *See §§ 7.08*, *7.09 below*.

- On responding party.

- On all other parties to action.

- If responding party is business or other entity, serve on business or entity generally, and not on particular officer or employee.

☐ Do not file interrogatories or responses until they are to be used in proceeding or until the court orders filing. Check local rules for any additional requirements regarding filing. *See § 7.09 below*.

☐ Calendar response date.

☐ If respondent fails to serve timely answers, or answers are incomplete, consider motion to compel. *See § 7.10 below*.

- Check local rules for meet and confer requirements.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Interrogatories



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§ 7.03 Considering Options and Strategies

[1] Using Identification Interrogatories Early in Case

Identification interrogatories, asking for factual information, are used early in the case to:

1. Obtain identifying and general background information about the responding party that is not publicly available or contained in documents;

2. Identify and locate witnesses for deposition and to develop deposition questions;

3. Obtain facts pertaining to an opposing party's allegations and defenses;

4. Identify relevant documents for document requests; and

5. Identify conversations or other communications about specified subjects, especially if these communications were not memorialized.



Strategic Point:

By requesting the identification of all documents pertaining to a specific subject matter, the propounding party may later prevent the responding party from using responsive documents that were not identified. Similarly, requesting the identity of people with knowledge on a subject can also be a means of barring witnesses at trial, if they were not previously identified in the responses.



Timing:

Identification interrogatories may be particularly useful at the outset of the case to obtain basic factual information regarding claims and defenses. A number of interrogatories should be kept in reserve to propound for follow-up information arising out of depositions and document production.

[2] Using Contention Interrogatories to Obtain Opinion or Contention

Contention interrogatories are used to inquire into an opinion or contention that relates to fact or the application of law to fact, including asking a party to:

1. State what it contends.

2. State the facts underlying a contention.

3. State the legal or theoretical reason for a contention.

Fed. R. Civ. P. 33(a)(2).

Contention interrogatories can help to pin the opposing party to certain positions, narrow the issues, and obtain admissions. *See § 7.20[1] below.*



Timing:

Contention interrogatories generally should be propounded at or near the close of discovery, when the responding party better understands the disputed issues and has less reason to object. Nevertheless, contention interrogatories may be useful early in the case to understand what evidence the opposing party has and what theories it is pursuing.



Strategic Point:

Parties might include a reservation in answers to early contention interrogatories that their factual investigation and discovery are incomplete. There is a duty to supplement the answers later (*Fed. R. Civ. P. 26(e)*), and changes in a party's answers can appear inconsistent.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 33.03, 33.05, 33.78.*
- *Federal Litigation Guide PP 12.04 -12.09.*
- *Bender's Federal Practice Forms* Form No. 33:12.
- *Fed. R. Civ. P. 33(a)(2)* (scope of interrogatories).



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§ 7.04 Reviewing Mandatory Disclosure Requirements

Except in categories of exempt cases, or to the extent otherwise stipulated or directed by court order, parties must share certain specific types of information at specific pretrial stages *without* a discovery request:

1. Preliminary disclosures: Parties must disclose basic information regarding individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses; documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses; claims and calculations of damages; and insurance coverage.

2. Expert witness disclosures: Information about and from retained expert witnesses is to be shared later into the pretrial period.

3. Pretrial disclosures: Information about evidence that the parties contemplate using at trial is to be shared near the end of the pretrial period.

Fed. R. Civ. P. 26(a)(1)-(3); *see also* Ch. 4 *above*.

Parties may use traditional discovery methods, including interrogatories, to obtain further information regarding any matters subject to mandatory disclosure. *Fed. R. Civ. P. 26*, Committee Note of 2007.



Strategic Point:

Because mandatory disclosures have lessened the need for identification interrogatories regarding basic information on claims and defenses, interrogatories may be more useful to follow up on more specific factual information and to lock in on adversary's contentions near the conclusion of the discovery period.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 33.41.*
- *Federal Litigation Guide P 12.10.*
- *Fed. R. Civ. P. 26(a)* (mandatory disclosure requirements).



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§ 7.05 Considering Subject Matter of Interrogatories

[1] Interrogatories May Inquire Only About Relevant Matters

Interrogatories may inquire about any matters, not privileged, relating to any claim or defense, including any documents or tangible things and persons having knowledge of any discoverable matter. *Fed. R. Civ. P. 26(b)(1), 33(a)(2)*; *see also* Ch. 2 *above*.

[2] Interrogatories Must Be Reasonably Calculated to Lead to Discovery of Admissible Evidence

Interrogatories must be reasonably calculated to lead to the discovery of admissible evidence. *Fed. R. Civ. P. 26(b)(1)*; *see also* Ch. 2 *above*.

[3] Contention Interrogatories Are Not Automatically Objectionable

An interrogatory is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact. *Fed. R. Civ. P. 33(a)(2)*. Contention interrogatories are generally viewed as a permissible form of discovery. *See, e.g., American Nurses' Ass'n v. Illinois, 783 F.2d 716, 723 (7th Cir. 1986)* (contention interrogatories proper to learn theory behind claim); *see also § 7.03[2] above*.

Timing:

If a party serves contention interrogatories early in the case, the court may order that responses be deferred until other discovery is completed.

Warning:

Contention interrogatories that ask for all facts supporting the party's contentions in each paragraph of its pleadings have been found in some jurisdictions to be abusive because they can impose great burdens on the opposing party, and are often counterproductive. *See, e.g., IBP, Inc. v. Mercantile Bank of Topeka, 179 F.R.D. 316, 321 (D. Kan. 1998)* (interrogatories tracking each paragraph and requesting supportive facts and theories disallowed as overly burdensome).

Interrogatories may not pose questions when the answers would extend to "pure law"--i.e., legal issues unrelated to the facts of the case. *Cundiff v. Postel, 2008 U.S. Dist. LEXIS 13863, at *6-*7 (E.D. Tenn. 2008)* (sustaining objections to interrogatories on ground that they would delve into areas of pure law, resulting in the impermissible disclosure of the plaintiff's counsel's mental impressions).

- *Moore's Federal Practice (3d ed.) §§ 33.60 -33.79.*
- *Federal Litigation Guide P 12.04.*
- *Fed. R. Civ. P. 26(b)* (discovery scope and limits).
- *Fed. R. Civ. P. 33(a)(2)* (scope of interrogatories).



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§ 7.06 Determining Allowable Number of Interrogatories

Rule 33 generally limits the number of interrogatories that may be served by one party on another to 25, including all discrete subparts. *Fed. R. Civ. P. 33(a)(1).*

Unless otherwise ordered for good cause shown, every interrogatory served that causes the responding party to undertake the burden of preparing and serving objections is counted against the 25-interrogatory limit. For example, interrogatories objected to, but not answered, count against the limit. *Walker v. Lakewood Condo. Owners Ass'n, 186 F.R.D. 584, 587 (C.D. Cal. 1999)* .



Strategic Point:

Given the numeric limit, interrogatories should be carefully drafted to request only information not readily available from other sources or not subject to mandatory disclosures. *See § 7.04 above.*

Circuit Split:

Jurisdictions diverge on whether subparts should be counted as separate interrogatories. *See, e.g., Smith v. Cafe Asia, 256 F.R.D. 247, 254 (D.D.C. 2009)* (to determine whether interrogatory is composed of discrete subparts, court looks to see if interrogatories were drafted using an approach that "threatens the purpose of the rule by putting together in a single question distinct areas of inquiry"). In addition, some courts have ruled that an interrogatory seeking information on a topic and asking for all related documents is actually two interrogatories. *See Smith v. Cafe Asia, 256 F.R.D. 247, 254 (D.D.C. 2009)* (each interrogatory seeking identification of documents in addition to information about a topic was counted as two interrogatories). Counsel should check case law and local district rules.

A party must secure a court order or a written stipulation from the responding party to exceed the 25-interrogatory limit. *Fed. R. Civ. P. 29, 33(a).*



Warning:

Counsel should check the court's local rules to ensure that a stipulation to additional interrogatories is

permissible. If allowed, counsel should first seek a stipulation before seeking a court order.

Additionally, the court may grant leave to serve additional interrogatories in its scheduling order or at the pretrial conference. *See Fed. R. Civ. P. 16(b)(3), (c)(2)(F)*; *see also* Ch. 4 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* §§ 22.11, *33.30*.
- *Federal Litigation Guide P 12.24*.
- *Bender's Federal Practice Forms* Form No. 33:110.
- *Fed. R. Civ. P. 26(b)(2)(A)* (court may alter limit on number of interrogatories).
- *Fed. R. Civ. P. 33(a)(1)* (limit on number of interrogatories).

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§ 7.07 Drafting Interrogatories

[1] Interrogatories Must Inform Responding Party of Information Requested

The Federal Rules of Civil Procedure do not prescribe any specific form for interrogatories. However, courts hold that they must be definite, clear, narrowly tailored, and adequately advise the interrogated party what information is sought. *See, e.g., Cappachionie v. Charlotte-Mecklenburg Sch., 182 F.R.D. 486, 491 (W.D.N.C. 1998)* ("interrogatories must be sufficiently definite, clear, and concise, and they must adequately advise the interrogated party of the information requested").

Strategic Point:

Poorly drafted questions are unlikely to produce any useful information, and may be subject to objection as overly broad and ambiguous. Counsel should consider all objections and revise accordingly.

Warning:

Counsel should check local rules for additional procedural and substantive requirements for drafting interrogatories.

[2] Instructions and Definitions Permissible

Rule 33 does not preclude interrogatories from having instructions and definitions at the beginning if not unduly burdensome or unreasonable.

[3] Pattern or Form Interrogatories Generally Permissible

Pattern interrogatories are not prohibited and may efficiently cover all aspects of a case.

Warning:

While not prohibited, district courts have disparate attitudes toward pattern or "canned" interrogatories.

Counsel should check local rules.

[4] Cross-Referencing Other Discovery May Be Permissible

Rule 33 does not preclude interrogatories that reference other discovery, but the practice might be disfavored by a particular judge. Counsel should check local rules and any standing orders.

[5] Attorney's Signature Is Required

Interrogatories must be signed by the propounding party's attorney, or, if proceeding pro se, by the propounding party. *Fed. R. Civ. P. 26(g)(1).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 33.31.*
- *Federal Litigation Guide PP 12.20 -12.23.*
- *Bender's Federal Practice Forms* Form Nos. 33:2, 33:10-33:12.
- *Fed. R. Civ. P. 26(g)(1)* (signing discovery requests).
- *Fed. R. Civ. P. 33* (interrogatories).



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§ 7.08 Determining Time for Serving Interrogatories

[1] Interrogatories May Be Served Only After Rule 26(f) Conference

Except in categories of cases exempted from initial disclosure, or when authorized by court order or stipulation, a party may not seek discovery from any source before the Rule 26(f) conference. *See Fed. R. Civ. P. 26(d), (f).*

Unless, on motion, the court orders otherwise, methods of discovery may be used in any sequence and discovery by one party does not require any other party to delay its discovery. *Fed. R. Civ. P. 26(d)(2).*

[2] Court May Postpone Answers to Contention Interrogatories

The court may order that a contention interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time. *Fed. R. Civ. P. 33(a)(2)*; *see § 7.05[3] above.*

A party wishing to defer answering contention interrogatories should first meet and confer with opposing counsel. If the propounding party's counsel continues to insist on early answers, the responding party may then object or move for a protective order. *See Fed. R. Civ. P. 26(c)*; *see also* Ch. 16 *below.*

[3] Interrogatories Must Be Served 30 Days Before Discovery Cut-Off

Rule 33 contains no deadline for serving interrogatories. However, when the court sets a discovery cut-off, a propounding party must give sufficient time to permit the responding party the 30-day response time under Rule 33. See *Smith v. Principal Casualty Ins. Co., 131 F.R.D. 104, 105 (S.D. Miss. 1990)* ("in order to meet the discovery deadline, Plaintiff should have filed his interrogatories at least 30 days before the discovery cutoff").

Warning:

Serving discovery close to the discovery cut-off means that there will be no time to serve follow-up discovery or to resolve discovery disputes.

[4] Interrogatories Seeking Information Subject To Mandatory Disclosure May Be Premature If Served

Before Disclosure Date

Interrogatories seeking information subject to mandatory disclosures prior to the disclosure deadline may be stricken as untimely. *See, e.g., Basque Station, Inc. v. United States, 1995 U.S. Dist. LEXIS 7085, at *6 n.3 (D. Idaho 1995)* (plaintiff not entitled to expert information in response to interrogatory until it is due under federal and local rule, nor is plaintiff entitled to defendant's witness list until it is due).



Strategic Point:

The parties may stipulate to conduct some discovery after the formal cut-off date. Whether it is necessary to obtain court approval of such stipulations depends on a judge's practice and the pretrial order.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 33.41, 33.78, 33.79.*
- *Federal Litigation Guide PP 12.27, 12.40.*
- *Bender's Federal Practice Forms* Form No. 33:100.
- *Fed. R. Civ. P. 26(a)* (required disclosures)
- *Fed. R. Civ. P. 26(d)* (timing and sequence of discovery).
- *Fed. R. Civ. P. 33(a)(2)* (answering contention interrogatory).
- *Fed. R. Civ. P. 33(b)(2)* (30-day time to respond to interrogatory).



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§ 7.09 Serving All Parties

A party who propounds interrogatories to one party must serve copies of the interrogatories on all other parties. *Fed. R. Civ. P. 5(a)(1)(C).*

Interrogatory requests and responses must not be filed until they are used in the proceeding or the court orders filing. *Fed. R. Civ. P. 5(d)(1).*

Warning:

Counsel should check local district court rules as to custodial and filing requirements. For example, local rules may require the propounding party to retain the original requests and responses.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 33.42, 33.43.*
- *Federal Litigation Guide P 12.27.*
- *Fed R. Civ. P. 5(a)* (when service of papers required).
- *Fed. R. Civ. P. 5(d)(1)* (restrictions on filing discovery requests and responses).



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§ 7.10 Moving to Compel When Party Fails to Respond

If opposing counsel fails to respond to an interrogatory, or provides evasive or incomplete responses, the propounding party may move for an order to compel discovery. *Fed. R. Civ. P. 37(a)*; *see* Ch. 17 *below*.

Warning:

Check local rules for meet and confer requirements for discovery disputes.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.02* -37.07.
- *Bender's Federal Practice Forms* Form Nos. 37:20-37:24.
- *Fed. R. Civ. P. 37(a)* (motion to compel).



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§ 7.11 Checklist for Responding to Interrogatories

☐ On receipt of interrogatories:

- ○ Calendar deadline for responding (30 days). *See § 7.16 below*.
- ○ Determine whether more time is needed to respond. If so, seek stipulation or court order. *See § 7.16[2] below*.
- ○ Send copy of interrogatories to client asking client to review them and contact counsel to discuss how to proceed. *See § 7.13 below*.

☐ Determine information sought and possible objections. *See § 7.18 below*.

☐ Consider how responses to interrogatories can be used to help client's theory of case and other objectives. *See § 7.20 below*.

☐ If client is business or other entity, consider appointing a liaison to assist in gathering responsive information. *See § 7.14 below*.

☐ After client has reviewed interrogatories, discuss:

- ○ Possible objections. *See § 7.18 below*.
- ○ What information must be gathered. *See § 7.14[3] below*.

- ○ Minimizing burden while still complying with discovery rules. *See §§ 7.14*, *7.15 below*.

☐ Prepare preliminary draft of answers and review with client. *See § 7.17 below*.

☐ Have client collect additional information if answers are incomplete. *See § 7.14 below*.

☐ Consider specifying business records in lieu of answering questions. *See § 7.15 below*.

☐ Consider options for responding to interrogatories:

- ○ Answer interrogatories. *See § 7.14 below*.
- ○ Object to some or all interrogatories. *See § 7.18 below*.
- ○ Move for protective order. *See § 7.19 below*.

☐ Consider grounds for objection. *See § 7.18 below*.

☐ Evaluate need for protective order, including extension of time to respond. *See § 7.18 below*. If sought, decide what relief to request:

- ○ Not answering interrogatories. *See § 7.14 below*.
- ○ Limiting number of interrogatories. *See §§ 7.06*, *7.18 below*.
- ○ Extending time to respond. *See § 7.16[2] below*.
- ○ Protecting trade secrets and other confidential information. *See § 7.19 below*.
- ○ Sealing some or all responses.

☐ Before objecting or requesting relief, contact opposing counsel in attempt to clarify or limit requests. *See § 7.12 below*.

☐ Calendar supplementing and/or amending answers. *See § 7.21 below*.

☐ If answering, prepare answers to interrogatories:

- ○ Precede each response with interrogatory, and number each response with same

number as interrogatory. *See § 7.17 below*.

○ Answer each interrogatory not objected to separately, fully, in writing, and under oath. *See § 7.14[1] below*.

○ State any objections; if terms are defined separately, consider objecting to definitions. *See §§ 7.07[2], 7.18 below*.

☐ Specify business records in lieu of answering certain interrogatories if answer to interrogatory can be derived from business records and burden of deriving answer from records is substantially same for propounding party as for responding party:

○ Responding party must specify records in sufficient detail to permit propounding party to locate and identify records.

○ Responding party must afford requesting party reasonable opportunity to inspect records. *See § 7.15 below*.

☐ Obtain appropriate signatures:

○ Answers must be signed under oath by person making them. *See § 7.13[1] below*.

○ Objections must be signed by attorney making them. *See § 7.18[8] below*.

☐ Attach appropriate certification.

☐ Timely serve interrogatory responses on propounding party's attorney or unrepresented party (30 days). *See § 7.16 below*.

☐ Timely serve copies of responses on all attorneys of parties or unrepresented parties. *See § 7.16 below*.

☐ Do not file interrogatory responses until they are to be used in proceeding or court orders filing. *See § 7.09[2] above*.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Interrogatories



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§ 7.12 Considering Options and Strategies

When a party receives a set of interrogatories, the party's options are:

1. Answer the interrogatories in writing and under oath. *See § 7.13 below*.

2. Object to some or all of the interrogatories in writing and under oath. *See § 7.18 below*.

3. Move for a protective order. *See § 7.19 below*.

See Fed. R. Civ. P. 26(c), 33(b).

A party may not ignore interrogatories. The party submitting the interrogatories may move to compel under Rule 37(a) regarding any objection to or other failure to answer interrogatories. *See Fed. R. Civ. P. 37(a)*; *see also* Ch. 17 *below*.



Strategic Point:

Before objecting, counsel should contact opposing counsel to attempt to reach a written agreement to clarify or limit the request. If the overture is rejected, the responding party should note that in the interrogatory response.



Warning:

Only applicable objections should be invoked and they should be tailored to specific interrogatories. The "boilerplate" approach to objections can negatively impact the party's credibility with the court and undermine reasonable objections.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 33.43*.

- *Federal Litigation Guide P 12.27*.
- *Bender's Federal Practice Forms* Form No. 33:201.
- *Fed. R. Civ. P. 26(c)* (protective orders).
- *Fed. R. Civ. P. 33(b)* (answers and objections to interrogatories).
- *Fed. R. Civ. P. 37(a)* (motions to compel).



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§ 7.13 Determining Who May Respond

[1] Interrogatories Directed to Individual Must Be Answered, Signed, and Verified by That Person

Interrogatories directed to an individual party must be answered in writing under oath and signed by that party. *Fed. R. Civ. P. 33(b)(1), (5).*

[2] Interrogatories Directed to Organization Must Be Answered, Signed, and Verified by Officer or Agent

Interrogatories directed to a corporation, partnership, or association, must be signed by an officer or agent of the business. The entity must designate its own officer or agent to answer interrogatories. *Fed. R. Civ. P. 33(b)(1)(B), (5)*; *see also United States v. Kordel, 397 U.S.1, 8, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1970)* (service of interrogatories obliged corporation to appoint agent to provide requested information).

The officer or agent who may sign includes an attorney for the business, including an outside counsel. *Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 508 (4th Cir. 1977)* (counsel for automobile manufacturer could sign and verify answers to interrogatories); *Shire Labs., Inc. v. Barr Labs., Inc., 236 F.R.D. 225, 227 (S.D.N.Y. 2006)* (agent can be outside counsel or in-house counsel).

The officer or agent has a duty to provide all information available to the corporation, but may sign and verify the interrogatories on the basis of knowledge, information, and belief, without firsthand knowledge of the information in the responses. *Law v. NCAA, 167 F.R.D. 464, 476 (D. Kan. 1996) , vacated on other grounds, 96 F.3d 1337 (10th Cir. 1996)* (answers must speak of "composite knowledge" of party, whether or not officer or agent has personal knowledge of facts).

[3] Interrogatories Directed to Government Agency Must Be Answered, Signed, and Verified by Officer or Agent

Interrogatories addressed to governmental agencies must be answered by an officer or agent of the government. *Fed. R. Civ. P. 33(b)(1)(B).* Governments and governmental agencies generally are subject to the same rules as corporate entities in designating agents to answer interrogatories. *See Trane Co. v. Klutznick, 87 F.R.D. 473, 476-477 (W.D. Wis. 1980)* (in case involving interrogatories directed to President of the United States, court deemed as relevant "analogous"

cases where courts have compelled corporate parties to gather information from its subsidiaries to answer interrogatories).

[4] Attorney for Party Must Certify Responses

In addition to being signed and verified by the party making them, responses to interrogatories must be signed by at least one attorney of record; the attorney must include his or her address. *Fed. R. Civ. P. 26(g)(1).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 33.104.*
- *Federal Litigation Guide P 12.43.*
- *Fed. R. Civ. P. 26(g)(1)* (signing discovery responses).
- *Fed. R. Civ. P. 33(b)* (answers and objections to interrogatories).



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§ 7.14 Determining Duties of Responding Party

[1] Responding Party Must Answer or Object

Each interrogatory must be answered separately and fully in writing, under oath, unless an objection is interposed. *Fed. R. Civ. P. 33(b)(3).*

[2] Answer to Extent Possible

Interrogatories must be answered to the extent that the interrogatories are not objectionable. *Fed. R. Civ. P. 33(b)(3).*

Warning:

Failure to respond to interrogatories may result in a sanctions order. *See Fed. R. Civ. P. 37(d)(1)(A)(ii), (2)*; *see also* Ch. 18 below.

[3] Information Under Responding Party's Control

A party answering interrogatories has an affirmative duty to furnish any and all information available to and controlled by the party. *See, e.g., Trane Co. v. Klutznick, 87 F.R.D. 473, 476 (W.D. Wis. 1980)* (information controlled by a party is available to the party).

[4] Business Entity Must Provide Information Known to Officers and Employees

A business organization has the duty to provide any information imputed to the organizational party itself, including information possessed by the party's officers, employees, former employees, and counsel. *General Dynamics Corp. v. Selb Mfg., 481 F.2d 1204, 1210* (imposing sanctions when corporation's secretary failed to answer interrogatory due to "insufficient personal knowledge," because, as agent of corporation, he was obliged to furnish all information available to corporation).

While a corporation need not uncover facts not within its control, especially when those facts are equally accessible to other parties, it may have a duty to discover information available from its employees. *See Directory Dividends, Inc. v.*

*SBC Communications, Inc., 2003 U.S. Dist. LEXIS 24296, at *12-*14 (E.D. Pa. 2003)* ("a corporation need not disclose information not in its possession or the possession of those it controls"); *Weddington v. Consolidated Rail Corp., 101 F.R.D. 71, 74 (N.D. Ind. 1984)* (corporation had duty to discover information available from its employees).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 33.100 -33.107.*
- *Federal Litigation Guide P 12.41.*
- *Bender's Federal Practice Forms* Form No. 33:300.
- *Fed. R. Civ. P. 33(b)(3)* (answering each interrogatory).



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Chapter 7 INTERROGATORIES
PART C: RESPONDING TO INTERROGATORIES

1-7 Moore's AnswerGuide: Federal Discovery Practice § 7.15

§ 7.15 Business Records May Be Provided in Lieu of Answer

[1] Specify Records and Provide Opportunity for Inspection

When the answer to an interrogatory can be derived or ascertained from business records, including electronically stored information, the responding party may, in lieu of answering:

1. Specify the records from which the answer may be derived or ascertained; and

2. Afford the propounding party a reasonable opportunity to inspect the records.

Fed. R. Civ. P. 33(d).



Warning:

While this procedure can save significant time in responding if there are preexisting documents that contain all of the requested information, counsel should ensure that there are no documents otherwise harmful or privileged. Courts diverge as to whether any privileges are waived upon opting to permit inspection. *See § 7.15[5] below.*

[2] Make Specification Detailed; Voluminous Records May Require Index

A specification must be in sufficient detail to permit the propounding party to locate and identify, as readily as can the responding party, the records from which the answer may be ascertained. *Fed. R. Civ. P. 33(d)(1).*

A responding party must specify, by category and location, the records from which answers to interrogatories can be derived. "Location" means where in the records an answer may be found. *See Rainbow Pioneer #44-18-04A v. Hawaii-Nevada Inv. Corp., 711 F.2d 902, 906 (9th Cir. 1983)* (general recitation that answers may be found in company books of accounts, ledgers, and other records was not specific enough because it did not specify where in records answer could be found).

When voluminous documents are produced under Rule 33(d) some courts require indices or other methods to guide the

propounding party to the documents responsive to the interrogatories. *See SEC v. Elfindepan, S.A., 206 F.R.D. 574, 576-577 (M.D.N.C. 2002)* (if large number of documents produced, indices may be required); *O'Connor v. Boeing N. Am., Inc., 185 F.R.D. 272, 278 (C.D. Cal. 1999)* (index required for voluminous responsive records).

If records have already been produced, the easiest way to identify the records is by Bates number. If records have not been produced, the easiest way to satisfy this requirement might be by producing the records with the interrogatory response.

[3] Burden Of Deriving Answer Must Be Same For Both Parties

The option of specifying business records is limited to situations in which the burden of deriving the answer from the records is substantially the same for the propounding party as for the responding party. *Fed. R. Civ. P. 33(d)*.

[4] Court May Require That Interrogating Party Reimburse Respondent's Expenses

To the extent the expense of compliance is considered unduly burdensome, Rule 33(d) provides the responding party with the option of shifting the burden and expense by producing the business records in which the requested information can be found. The Court may in its discretion order reimbursement for expense of assembling business records and making them intelligible. *Multitechnology Servs., L.P. v. Verizon Southwest, 2004 U.S. Dist. LEXIS 3744, at *3-*4 (N.D. Tex. 2004)* (court has discretion to order interrogator to reimburse responding party for expense of assembling business records and making them intelligible).

[5] Courts Divided On Asserting Privilege

Courts are divided as to whether a party may opt to produce business records under Rule 33(d) and then claim that some or all of the documents are privileged. *See, e.g., O'Connor v. Boeing N. Am., Inc., 185 F.R.D. 272, 279 (C.D. Cal. 1999)* (responsive documents may be withheld based on privilege, provided the propounding party can get complete answers to the interrogatories and the withheld documents are listed in a privilege log); *Blake Assocs., Inc. v. Omni Spectra, Inc., 118 F.R.D. 283, 288-290 (D. Mass. 1988)* (party cannot use option to produce business records if party "is going to claim a privilege with respect to documents"; rather the party "must answer the interrogatory in the traditional manner").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 33.105*.
- *Federal Litigation Guide P 12.44*.
- *Bender's Federal Practice Forms* Form No. 33:300.
- *Fed. R. Civ. P. 33(d)* (option to produce business records).



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Chapter 7 INTERROGATORIES
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1-7 Moore's AnswerGuide: Federal Discovery Practice § 7.16

§ 7.16 Serving Timely Response

[1] Thirty-Day Period for Response Plus Extra Three Days for Service by Mail or Other Delivery

A party on whom interrogatories have been served must serve the answers and objections, if any, on the propounding party within 30 days after service of the interrogatories. *Fed. R. Civ. P. 33(b)(2)*. Copies must be served on all other parties. *Fed. R. Civ. P. 5(a)(1)(C)*.

An additional three days are allowed if interrogatories were served by mail or by electronic or alternative means of delivery. *Fed. R. Civ. P. 6(d)*.

[2] Obtain Agreement of Parties or Court Order to Alter Timing

The time for responding may be shortened or lengthened by stipulation or court order. *Fed. R. Civ. P. 29*, *33(b)(2)*.

An agreement extending the time for responses requires court approval if it would interfere with any dates set by the court for completion of discovery, for the hearing of a motion, or for trial. *Fed. R. Civ. P. 29(b)*; *see also* Ch. 15, *below*.



Strategic Point:

Generally, parties should grant first requests for extensions, unless a party has abused such requests or deadlines are pressing. Denying the request might cause the other party to deny your future requests for accommodations.

[3] Several Methods of Serving Response Are Available

Service of interrogatory responses is complete when the responses are hand-delivered to the party or the attorney for the party, or when they are placed in the mail. *See Fed. R. Civ. P. 5(b)* (if party is represented by attorney, service must be made on attorney unless court orders service on party).

Alternative methods of delivery, including by electronic means, may be used if the person being served has provided

written consent to such service. *Fed. R. Civ. P. 5(b)(2)(E)*.

Service by electronic means is complete on transmission. However, service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served. *Fed. R. Civ. P. 5(b)(2)(E)*.

Service by other consented means is complete when the person making service delivers the copy to the agency designated to receive delivery. *Fed. R. Civ. P. 5(b)(2)(F)*.

[4] Timing of Response for Removed Actions

In cases removed to federal court that have outstanding interrogatories at the time of removal, the time limit for responses to interrogatories is measured from the date of the parties' meeting under the federal meet and confer requirements. *Fed. R. Civ. P. 33*, Committee Note of 1993; *see Fed. R. Civ. P. 26(d)*.

[5] Failure to Make Timely Response Sanctionable

Sanctions may be levied against a party who fails to comply with discovery deadlines. *Fed. R. Civ. P. 16(f)*, *37(d)*; *see also* Ch. 18 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 33.120 -33.124*, *33.141*.
- *Federal Litigation Guide P 12.40*.
- *Bender's Federal Practice Forms*, Form Nos. 33:100, 33:201, 33:310.
- *Fed. R. Civ. P. 5* (service of papers).
- *Fed. R. Civ. P. 29* (stipulations).
- *Fed. R. Civ. P. 33(b)* (answers and objections to interrogatories).



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Chapter 7 INTERROGATORIES
PART C: RESPONDING TO INTERROGATORIES

1-7 Moore's AnswerGuide: Federal Discovery Practice § 7.17

§ 7.17 Formatting Responses

[1] Draft Full and Separate Responses for Each Interrogatory

Each interrogatory must be answered separately and fully in writing under oath, unless it is objected to. Objections must state the reason for the objection and the responding party must answer any portions of the interrogatory that are not objectionable. *Fed. R. Civ. P. 33(b)(1).*

Warning:

Counsel should check the court's local rules for particular formatting and substantive requirements when preparing responses to interrogatories.

[2] Respondent and Attorney Must Sign

Answers to interrogatories must be signed by the person making them or by a representative of a corporate or entity party. *Fed. R. Civ. P. 33(b)(5).* Such a representative does not need to have personal knowledge of the answers. *See § 7.13[2] above.*

In addition, all interrogatory responses must be signed, and thereby certified, by the attorney for the responding party. *See Fed. R. Civ. P. 26(g)(1).*

Objections must be signed by the attorney making them. *Fed. R. Civ. P. 33(b)(5).*

The verification requirement applies to supplemental responses as well as original responses. *See Knights Armament Co. v. Optical Sys. Tech., Inc., 254 F.R.D. 463, 466 (M.D. Fla. 2008) .*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 33.101, 33.104.*

- *Federal Litigation Guide PP 12.41[2], 12.43.*

- *Fed. R. Civ. P. 26(g)(1)* (signing discovery responses generally).

- *Fed. R. Civ. P. 33(b)(5)* (signing interrogatory answers and objections).

- *Villareal v. El Chile, Inc., 266 F.R.D. 207, 211 (N.D. Ill. 2010)* (because interrogatories must be answered by party to whom they are directed, verified, and signed by person answering them, emails from party's attorney allegedly containing information sought in interrogatories were insufficient to fulfill party's duty to answer interrogatories).



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§ 7.18 Objecting to Interrogatories

[1] Grounds for Objections

Among the common objections to interrogatories are:

1. **Argumentative or speculative:** Interrogatories are subject to objection if they call for argumentative or speculative answers. *See In re Erie Lackawanna Ry. Co., 496 F.2d 1189, 1190 (6th Cir. 1974)* .

2. **Available from another source:** Interrogatories may not seek information that is obtainable from some other source that is more convenient, less burdensome, or less expensive. *Fed. R. Civ. P. 26(b)(2)(C)(i)*; *see also* Ch. 2 *above*.

3. **Irrelevant information:** Information that is irrelevant to the claims or defenses of the parties is beyond the scope of permissible discovery. *Fed. R. Civ. P. 26(b)(1)*; *see also* Ch. 2 *above*.

4. **Unrelated to discovery of admissible evidence:** Information that is not reasonably calculated to lead to the discovery of admissible evidence is beyond the scope of discovery. *See Fed. R. Civ. P. 26(b)(1)*; *see also* Ch. 2 *above*.

5. **Legal conclusions:** Interrogatories may not seek legal conclusions on questions of pure law. *Fed. R. Civ. P. 33(c)*, Committee Note of 1970; *see § 7.05[1] above*.

6. **Facts known and opinions held by nonwitness experts:** Facts known and opinions held by nonwitness experts are beyond the scope of discovery. *Fed. R. Civ. P. 26(b)(4)(D)*; *see also* Ch. 12 *below*.

7. **Number exceeded:** Interrogatories served on a specific party must not exceed the 25-interrogatory limit without stipulation or order. *Fed. R. Civ. P. 33(a)*; *see 7.06 above* .

8. **Other opportunity to obtain same information:** Interrogatories may not seek information that the

propounding party has had ample other opportunities to obtain. *Fed. R. Civ. P. 26(b)(2)(C)(ii)*; *see also* Ch. 2 *above*.

9. **Overbreadth:** Overbroad interrogatories are subject to objection. *See Cahela v. Bernard, 155 F.R.D. 221, 227-228 (N.D. Ga. 1994)* .

10. **Premature contention interrogatories:** Premature contention interrogatories may be objectionable, and the responding party may be able to obtain a court order that the interrogatories need not be answered until later. *See Fed. R. Civ. P. 33(a)(2)*; *see also § 7.05[3] above*.

11. **Privilege:** Privileged information is beyond the scope of discovery. *See Fed. R. Civ. P. 26(b)(1)*; *see also* Ch. 3, *above*.

12. **Work product protection:** Protected work product is beyond the scope of discovery. *See Fed. R. Civ. P. 26(b)(3)*; *see also* Ch. 3 *above*.

12. **Trade secrets:** Trade secrets and confidential business information are generally subject to restrictions on discovery. A party may protect trade secrets or confidential business information from disclosure by seeking an order limiting discovery or a protective order. *Fed. R. Civ. P. 26(c)(1)(G)*; *see also* Ch. 3 *above* and Ch. 16 *below* .

13. **Vagueness:** Interrogatories are objectionable if they are so vague or ambiguous as to be burdensome or oppressive. *See, e.g., Frost v. Perry, 161 F.R.D. 434, 435-436 (D. Nev. 1995)* ; *see also § 7.07[1] above*.

[2] State Precise Grounds for Objection

All grounds for objection to an interrogatory must be stated with specificity and particularized as to the basis for the objection. *Fed. R. Civ. P. 33(b)(4)*.



Strategic Point:

Counsel may decide to answer objectionable requests to lessen the possibility of a motion to compel. The objection may be preserved by prefacing the response with a statement such as "subject to and without waiving the objection that the interrogatory is cumulative and duplicative, the responding party responds ..."



Warning:

Boilerplate or general objections may be found to be insufficient, resulting in a waiver of any objections. *See § 7.18[7][b] below*.

[3] Respondent May Object in Part

If an interrogatory is only partly objectionable, the responding party must answer to the extent that the interrogatories are not objectionable. *See Fed. R. Civ. P. 33(b)(3)*.

[4] Objector Has Burden of Proof

The burden is on the responding party to justify its objections or its failure to provide complete answers to

interrogatories. *Fed. R. Civ. P. 33(a)*, Committee Note of 1970.

[5] Objecting in Proper Format

Counsel should review local rules for specific formatting requirements when preparing discovery responses, as requirements vary from district to district.

[6] Making Timely Objection

Responses and objections to an interrogatory must be made in writing within 30 days after service of the interrogatories unless a shorter or longer time is ordered by the court or stipulated to. *Fed. R. Civ. P. 33(b)(2)*.

[7] Avoiding Waiver of Objection

[a] General Rule: Failure to Timely Object Waives Objection

Objections to an interrogatory, including those based on privilege, that are not timely raised are waived, unless:

- Responding party seeks an extension to answer or object; or
- The failure to object is excused by the court for good cause shown.

Fed. R. Civ. P. 33(b)(2), (b)(4); *see Davis v. Fendler, 650 F.2d 1154, 1160 (9th Cir. 1981)* (objection on grounds of *Fifth Amendment* privilege waived when untimely).



Strategic Point:

When drafting responses, consider how each objection could be supported if the propounding party moved to compel further responses. Making objections that cannot be supported can lead to a lack of credibility in court.



Warning:

It is especially important to object if an interrogatory calls for privileged information. Failure to object will cause the privilege to be waived. Once the privilege is waived as to a particular topic, the opposing party may be able to obtain other communications on that topic. For discussion of privilege, *see* Ch. 3, *above*.

[b] Boilerplate or General Objections May Result In Waiver Of Any Objections

Objections must state which interrogatory is being challenged, and must include the precise reason for the objection. Unstated grounds for objections normally are waived.



Strategic Point:

General boilerplate objections in an introductory paragraph preceding responses should be discouraged. Some courts find boilerplate objections to be unacceptable, especially if they suggest that the responding party withheld information based on the objections.

However, general objections stating clear, case-specific objections may be acceptable to avoid pointless repetition of the

objections for each response.

[8] Attorney Must Sign Objections

Objections must be signed by the attorney making them. *Fed. R. Civ. P. 33(b)(5).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* §§ 27.47 *-27.52*, 27.70, *33.104*, *33.170 -33.175*.
- *Federal Litigation Guide PP 12.60 -12.69*.
- *Bender's Federal Practice Forms* Form No. 33:201.
- *Fed. R. Civ. P. 26(b)(1)* (scope of discovery in general).
- *Fed. R. Civ. P. 26(b)(2)* (limitations on frequency and extent of discovery).
- *Fed. R. Civ. P. 26(b)(3)* (work product protection).
- *Fed. R. Civ. P. 26(b)(4)* (expert evidence and testimony).
- *Fed. R. Civ. P. 26(g)(1)* (signing discovery objections).
- *Fed. R. Civ. P. 33(b)(4)* (objections to interrogatories).
- *Fed. R. Civ. P. 33(b)(5)* (signature interrogatory objections)



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§ 7.19 Obtaining Protective Order

A protective order protects any person or party from whom discovery is sought from annoyance, embarrassment, oppression, or undue burden and expense. The moving party must show good cause for the order. *Fed. R. Civ. P. 26(c)*; *see also* Ch. 16 *below*.

District courts have broad discretion in determining whether to issue a protective order, but courts nevertheless apply a balancing test in making that determination. *See, e.g., Doe v. Provident Life & Accid. Ins. Co., 247 F.R.D. 218, 221 (D.D.C. 2008)* .

A protective order may include, but is not limited to, one or more of the following orders:

1. A party need not answer all or part of the interrogatories.

2. Discovery not be had.

3. The number of interrogatories is improper.

4. The time to respond be extended.

5. Certain matters not be inquired into, or that the scope of the disclosures be limited to certain matters.

6. A trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.

7. Some or all of the answers be sealed and thereafter subject to opening only by court order.

Fed. R. Civ. P. 26(c).



Strategic Point:

Moving for a protective order can be expensive and puts the burden on the moving party. It may be more efficient simply to object (assuming good grounds exist for objections), which places the burden on the propounding party to move to compel further responses under Rule 37(a). The propounding party may decide that information sought is not worth the expense and effort of moving to compel. However, if the propounding party does move to compel, it will have the first and last words to the court in the opening and reply papers, and thus be able to frame the disputed issue.



Warning:

Check local rules for meet-and-confer requirements for discovery disputes.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* §§ 22.35 -22.66, *33.175*.
- *Federal Litigation Guide P 12.68*.
- *Fed. R. Civ. P. 26(c)* (protective orders).
- *Fed. R. Civ. P. 33(b)(4)* (objections to interrogatories).



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1-7 Moore's AnswerGuide: Federal Discovery Practice § 7.20

§ 7.20 Understanding Effect of Answers

[1] Use at Trial

Answers to interrogatories may be used at trial to the extent permitted by the Federal Rules of Evidence, including:

1. As admissions by a party opponent. *See Fed. R. Evid. 801(d)(2).*

2. To impeach. *See Fed. R. Evid. 613(a).*

3. In support of motions, such as for summary judgment. *See Fed. R. Civ. P. 56(c)(1)(A).*

[2] Objections To Introduction Of Answers

On proper objection, the court has the same power to exclude answers to interrogatories as it does any other offered evidence. *Fed. R. Civ. P. 33(c).* Because the scope of discovery is very broad and not limited to admissible evidence, objections to the introduction of answers to interrogatories are often made based on irrelevance, unfair prejudice, and confusion of the issues. See *Fed. R. Evid. 403* (exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 33.160, 33.173.*
- *Weinstein's Federal Evidence (2d ed.)* Chs. 403, 613, 801.
- *Fed. R. Civ. P. 26(c)* (protective orders).
- *Fed. R. Civ. P. 33(c)* (use of interrogatories under Federal Rules of Evidence).
- *Fed. R. Evid. 403* (exclusion of relevant evidence).

- *Fed. R. Evid. 613(a)* (prior statements of witnesses).
- *Fed. R. Evid. 801(d)(2)* (admission by party-opponent).



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§ 7.21 Supplementing and Amending Answers

If a party acquires material additional information or learns that information submitted was materially incorrect after submitting answers, and that additional information is not otherwise known to the propounding party, the responding party has a duty to supplement or amend its responses. *Fed. R. Civ. P. 26(e)*; *Fortino v. Quasar Co., 950 F.2d 389, 398 (7th Cir. 1991)* (party must supplement interrogatory answer when it is no longer true, and failure to amend is in substance a knowing concealment).

The court may impose sanctions for failure to supplement interrogatory responses. *Fed. R. Civ. P. 37(c)(1)*; *see* §§ *18.08-18.12 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 33.107.*
- *Fed. R. Civ. P. 26(e)* (supplementing disclosures and responses)
- *Fed. R. Civ. P. 37(c)(1)* (sanctions for failure to supplement earlier discovery response).



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Chapter 8 ORAL DEPOSITIONS

1-8 Moore's AnswerGuide: Federal Discovery Practice 8.syn

§ 8.syn Synopsis to Chapter 8: ORAL DEPOSITIONS

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§ 8.02 Checklist for Planning Oral Depositions

§ 8.03 Making Preliminary Assessments

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§ 8.04 Considering Numeric and Timing Restrictions

[1] Stipulation or Leave of Court Is Required to Take Deposition Before Parties' Initial Discovery Plan Meeting

[2] Stipulation or Leave of Court Is Required to Take More Than 10 Depositions

[3] Duration of Each Deposition Is Limited

[a] Duration Is One Day of Seven Hours Unless Otherwise Stipulated or Ordered

[b] Court Must Allow Additional Time for Fair Examination

[c] Circumstances That Might Require Additional Time

[d] Persons Responsible for Impediment or Delay May Be Subject to Sanctions

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§ 8.05 Determining Who May Be Deposed

[1] Generally Any Person, Including Any Party, May Be Deposed

[2] Deposition Notice May Specify Certain Individuals to Testify on Behalf of Corporation

[a] Deposition Notice May Specify Officers, Directors, or Managing Agents to Appear on Behalf of Corporation

[b] Determining Whether Individual Is "Managing Agent"

[3] Depositions of Counsel Are Allowed in Limited Circumstances

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§ 8.06 Determining Whether Leave of Court Is Required

[1] Leave of Court Generally Not Required

[2] When Leave of Court Required

[a] Leave Required When Deponent Is Incarcerated

[b] Leave Required for More Than 10 Depositions

[c] Leave Required if Person Already Deposed

[d] Leave May Be Required for Deposition Before Parties Agree to Discovery Plan

[e] Leave Required Before Action Commenced

§ 8.07 Considering Limit on Excessive or Unreasonable Discovery

§ 8.08 Checklist for Giving Notice of Oral Deposition

§ 8.09 Noticing Deposition in Writing

[1] Give Reasonable Notice in Writing to All Parties

[2] Specify Time and Place of Deposition

[3] State Name and Address of Deponent, if Known

[4] Designate Materials to Be Produced Pursuant to Subpoena Duces Tecum

[5] State Method for Recording Testimony

§ 8.10 Naming Business Entity or Agency as Deponent

[1] Notice Must Describe Matters on Which Examination Is Requested

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§ 8.11 Including Request for Production With Notice

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§ 8.19 Ensuring That Deposition Officer Is Qualified Under Rule 28

[1] Deposition Officer Must Be Authorized to Administer Oaths or Be Appointed by Court

[2] Deposition Officer Cannot Have Relationship to Parties or Counsel or Financial Interest in Action

§ 8.20 Conducting Deposition in Compliance With Rule 30

[1] Officer Must Make Statement on Record to Begin

[2] Officer Must Administer Oath and Record Testimony

[3] Requirements for Nonstenographic Recording

[a] Officer Must Identify Deposition at Beginning of Each Unit of Tape or Other Recording Medium

[b] Recording Techniques Cannot Distort Appearance or Demeanor of Participants

[4] Examination and Cross-Examination Proceed As at Trial

[a] Federal Rules of Evidence Apply, With Two Exceptions

[b] Adverse Party May Access Materials Used to Refresh Deponent's Memory

[c] Deponent and Deponent's Counsel May Not Confer During Questioning

[5] Other Parties May Transmit Written Questions

[6] Examination Proceeds Subject to Objections Noted in Record

[7] Officer Must Indicate End of Deposition on Record and Set Forth Stipulations Made by Counsel

[8] Any Party May Arrange for Transcription or Additional Method of Recording

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§ 8.23 Making Timely Objections

[1] Objecting to Qualifications of Deposition Officer

[2] Objecting to Competence of Witness or Testimony

[3] Objecting to Errors or Irregularities During Deposition

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[2] Reviewing and Making Changes

§ 8.29 Certifying and Delivering Deposition

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[2] Annexing Documents and Things

[3] Indicating Review Was Requested and Appending Changes

[4] Delivering Deposition to Attorney Who Arranged for Transcript or Recording

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§ 8.30 Retaining Stenographic Notes or Copy of Recording

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Chapter 8 ORAL DEPOSITIONS
PART A: PROCEDURAL CONTEXT

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§ 8.01 Procedural Context--Oral Depositions

Oral depositions are an effective and significant tool to obtain important information and to assess the strength, credibility, and effectiveness of a witness. They are critical to obtain the testimony of witnesses who live beyond the subpoena range of the court or who otherwise cannot be compelled to testify at trial, as well as to preserve testimony if the witness becomes unavailable for any reason. Deposition testimony can provide a basis for a later summary judgment motion or be used at trial for impeachment purposes.

Advantages of oral depositions include:

1. They can be set on reasonable notice;

2. They can be videotaped or audiotaped;

3. They permit the questioner to learn what the witness may say at trial;

4. They provide an opportunity to evaluate the credibility of key witnesses;

5. They allow a broad range of questions and are much more likely to uncover useful information than are interrogatories;

6. They may provide inconsistent statements that can be used to impeach trial testimony;

7. They may be used to require the witness to bring documents;

8. They preserve testimony, if the witness is later unavailable;

9. They afford an opportunity to observe opposing counsel;

10. They may provide a basis for a motion for summary judgment;

11. The deposition process may encourage the opponent to pursue settlement, either to avoid the deposition entirely or in relation to a witness's poor deposition performance;

12. They may lead to discovery of other important witnesses or documents;

13. They may uncover potential weaknesses in your own case early enough to modify your strategy;

14. They may provide an opportunity for opposing counsel to observe your effectiveness; and

15. They may provide a means of controlling the course of the litigation.

Disadvantages of oral depositions include:

1. They can be expensive, compared to other forms of discovery;

2. They are time consuming; and

3. They may provide an opportunity for opposing counsel to understand your strategy and identify weaknesses in your case or your effectiveness.

Planning is important to maximize the value of a deposition. Because depositions may be extensively relied on in showing the existence of a disputed fact on a summary judgment motion, and potentially at trial, the deposition must show the deponent's personal knowledge of the matter about which the deponent is testifying. Similarly, counsel must ensure that documents on which a claim or defense relies are properly authenticated by the appropriate witness.



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Chapter 8 ORAL DEPOSITIONS
PART B: PLANNING ORAL DEPOSITIONS

1-8 Moore's AnswerGuide: Federal Discovery Practice § 8.02

§ 8.02 Checklist for Planning Oral Depositions

☐ Review Rule 30.

☐ Consider whether oral deposition is appropriate discovery method for information sought. *See § 8.01 above*.

☐ Consider whether deposition should be videotaped. *See § 8.03[2] below*.

☐ Consider restrictions on number and timing of depositions. *See § 8.04 below*.

☐ Determine who will be deposed. *See § 8.05 below*.

- ○ Party or nonparty. *See § 8.05[1] below*.
- ○ Individuals. *See § 8.05[1] below*.
- ○ Named individual(s) to testify on behalf of corporation or other entity. *See § 8.05[2] below*.
- ○ Entity that will designate individual(s) to testify. *See §§ 8.05[1], 8.10 below*.

☐ If seeking deposition testimony from corporation through individual named employees, determine whether deponent(s) can testify on behalf of corporation, because of status as any of the following. *See § 8.05[2] below*.

- ○ Officer(s).
- ○ Director(s).
- ○ Managing agent(s).

☐ If proposed deponent is opposing counsel, determine whether circumstances meet requirements for taking deposition. *See § 8.05[3] below*.

- ○ No other means exist to obtain the information than to depose opposing counsel;
- ○ The information sought is relevant and nonprivileged; and
- ○ The information is crucial to the preparation of the case.

☐ Determine whether leave of court is required to take any deposition because deponent is incarcerated. *See § 8.06[2][a] below*.

☐ Determine if opposing counsel will stipulate to allowing deposition when circumstances exist, that otherwise require leave of court. *See § 8.06 below*.

- ○ Proposed deposition would result in more than 10 depositions by party seeking discovery. *See § 8.06[2][b] below*.
- ○ Person to be examined has already been deposed in the case. *See § 8.06[2][c] below*.
- ○ Party seeking discovery wants to take deposition before parties have agreed to a discovery plan. *See § 8.06[2][d] below*.

☐ If action has not yet been commenced, determine whether to seek leave of court to allow deposition to perpetuate testimony. *See § 8.06[2][e] below*.

☐ If leave of court is required, draft motion for leave, indicating for which of the following reasons the discovery sought is not excessive or unreasonable. *See § 8.07 below*.

- ○ The discovery sought is not unreasonably cumulative or duplicative, or is not obtainable from some other source that is more convenient, less burdensome, or less expensive;
- ○ The party seeking discovery has not had ample opportunity by discovery in the action to obtain the information sought; or

○ The burden or expense of the proposed discovery does not outweigh its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Oral Depositions



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Chapter 8 ORAL DEPOSITIONS
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1-8 Moore's AnswerGuide: Federal Discovery Practice § 8.03

§ 8.03 Making Preliminary Assessments

[1] Evaluating Most Important Depositions for Case

Because the number of depositions is limited, each party must determine the most important depositions for its case. *See Fed. R. Civ. P. 30(a)(2)(A)(i)* (10 deposition limit); *see also § 8.04 below*. Each party should also use other forms of discovery, such as interrogatories (*see* Ch. 7 *above*), to elicit the information sought or to identify specific individuals to be deposed.

The party seeking discovery from a corporation or other entity should consider whether to require the entity to designate individuals to testify on its behalf, or to notice the depositions of specific individuals within the entity. *See Fed. R. Civ. P. 30(b)(6)* (notice directed to an entity); *see also §§ 8.05[1], 8.10 below*. If the party names a corporation or other entity as deponent, so that the entity must designate the person or persons to testify on its behalf, the examination is considered to be one deposition for purposes of the deposition limit. *See Fed. R. Civ. P. 30(b)(6)*. Although the selection of the individuals to testify is then in the entity's control, rather than in the control of the party seeking discovery, remedies are available if the entity fails to designate and produce for deposition "the most knowledgeable person" on the subjects identified. *See § 8.10 below; see also* Ch. 17 *below*.



Strategic Point--Preparation Is Key:

Prior to starting a deposition, counsel should always consider the goal of the deposition and the information and/or trial testimony to be obtained from the deponent. Counsel should develop a strategy for every deposition that will be taken. Preparation is important because of the limit of 10 depositions and because subsequent depositions of the same person require leave of court. *See Fed. R. Civ. P. 30(a)(2)(A)* (circumstances when leave required); *see also §§ 8.04[2], 8.06 below*. Also, the seven-hour duration limit of Rule 30(d)(1) requires that counsel be organized. *See Fed. R. Civ. P. 30(d)(1)*; *see also § 8.04[3] below*. If the potential deponent is a party to the action, the deposing party should consider using other discovery methods prior to the deposition to gather information that will enable counsel to define clearly the issues to be emphasized at the oral examination.

[2] Determining Whether Deposition Should Be Videotaped

A videotaped deposition can be a very powerful tool for preserving not just the testimony, but also the appearance and credibility of the deponent. A videotape can also keep opposing counsel on his or her best behavior; failing that, it demonstrates the behavior for the judge if the behavior is extreme enough to lead to a motion for a protective order. A videotape is useful in assessing potential juror reactions to the other side's witnesses (e.g., in mock trials or focus-group exercises).

A videotape is also more powerful at trial than reading from a deposition transcript, especially when used for impeachment purposes. A cold stenographic transcript reports only words spoken at the deposition. It misses all the nonverbal communication inherent in facial expressions, the inflection and intonation of the voice, gestures, body language, and long pauses between questions and answers. Nonverbal communication may express a message to those present at the deposition that does not appear on the written transcript.

Counsel should always include a statement in a deposition notice reserving the right to take the deposition by videotaping it, to keep that option available. *See Fed. R. Civ. P. 30(b)(3)(A)* (method of recording must be stated in notice); *see also § 8.09[5]* below. Videotaping depositions is a common occurrence, particularly in large commercial litigation.

Although there are many benefits to videotaping depositions, the cost of making and copying the videotape may be a consideration in a particular case. Counsel should also consider potential difficulties in laying the foundation for the videotape at trial. *See Roberts v. Homelite Div. of Textron, Inc., 109 F.R.D. 664, 668 (N.D. Ind. 1986)* (videotaped depositions not automatically admissible at trial).

Another potential drawback is that videotaping can make the deposition more formal and less conversational, constraining the questioner and causing the deponent to be less talkative.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 30.02, 30.23[1][b].*
- *Federal Litigation Guide PP 16.01, 16.02, 17.01, 17.04[1]*[1.-1].
- *Fed. R. Civ. P. 30(a)* (when deposition may be taken).
- *Fed. R. Civ. P. 30(b)(3)* (method of recording deposition).
- *Fed. R. Civ. P. 30(d)(1)* (duration of deposition).



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1-8 Moore's AnswerGuide: Federal Discovery Practice § 8.04

§ 8.04 Considering Numeric and Timing Restrictions

[1] Stipulation or Leave of Court Is Required to Take Deposition Before Parties' Initial Discovery Plan Meeting

A stipulation or leave of court is required to take a deposition before the parties' initial meeting to develop a discovery plan. *Fed. R. Civ. P. 30(a)(2)(A)(iii)*; *see Fed. R. Civ. P. 26(d), (f), 29(a)*; *see also §§ 8.06[2][d], 15.05[4] below*.

Exception:

Leave of court is not required if the notice of deposition contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time. *Fed. R. Civ. P. 30(a)(2)(A)(iii)*.



Strategic Point--No Party Has Priority in Setting Depositions:

Although discovery by all parties ordinarily proceeds concurrently (the rules do not give priority to any party or side), sometimes one or more parties should be allowed to proceed first. For example, if a party needs discovery to respond to an early summary judgment motion, that party may be given priority. Some judges establish periods in which particular parties have exclusive or preferential rights to take depositions, and, in multiple litigation, those judges direct that discovery be conducted in some cases before others. Sometimes judges order "common" discovery to proceed in a specified sequence, without similarly limiting "individual" discovery in the various cases.

One purpose of a discovery plan (*see § 4.09 above*) is to establish an orderly procedure and to avoid indiscriminate noticing of depositions, which may result in inconvenience, harassment, and inefficiency. Depositions should be scheduled to accomplish the objectives of the discovery plan while minimizing travel and other expense, and reasonably accommodating parties, counsel, and witnesses. A plan might set specific dates for specific witnesses or set aside specified time periods during which designated parties are given either exclusive or preferential rights to schedule depositions, subject to exceptions for emergencies.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 30.04, 30.05[1][d].*
- *Federal Litigation Guide P 16.02[6].*
- *Bender's Federal Practice Forms* Form Nos. 30:1-30:3, 30:7, 30:8.
- *Fed. R. Civ. P. 30(a)(2)(A)(iii)* (leave required to take deposition before initial discovery plan meeting).

[2] Stipulation or Leave of Court Is Required to Take More Than 10 Depositions

Unless the court grants leave to take additional depositions, only 10 depositions, whether oral or written, may be taken by the plaintiffs, or by the defendants, or by third-party defendants. *Fed. R. Civ. P. 30(a)(2)(A)(i)*; *see § 8.06[2][b] below*. In considering a request for leave to take more than 10 depositions, the court must examine the request and consider the asserted need for additional discovery in light of the stated principles of Rule 26(b)(2). *Andamiro U.S.A. v. Konami Amusement of Am., Inc., 2001 U.S. Dist. LEXIS 11168, at *5 (C.D. Cal. 2001)* (leave granted, after 10-deposition limit was exhausted, to take four additional depositions of experts); *see Fed. R. Civ. P. 26(b)(2)* (limitations on frequency and extent of discovery); *see also § 2.08 above*.

Leave of court is not required to take more than 10 depositions, if the parties stipulate in writing to additional depositions. *Fed. R. Civ. P. 30(a)(2)(A)*; *see also Fed. R. Civ. P. 29(b)* (stipulations may modify limitations placed on discovery); *§ 15.05[2] below*.

If the party seeking discovery notices the deposition of an entity, the deposition counts as only one deposition against the 10-per-side limit, even though the entity may designate several witnesses to testify on its behalf. *See Fed. R. Civ. P. 30(b)(6)*. However, each designee may be examined for seven hours. *Fed. R. Civ. P. 30(d)*, Committee Note of 2000.

Although Rule 30 generally permits 10 depositions without leave of court, the court does have the power to limit the number of depositions to less than 10 per side, either by court order, *see Fed. R. Civ. P. 26(b)(2)*, or through a scheduling order. *See Fed. R. Civ. P. 16(b)(3)(B)(ii)*; *see also Donohoe v. Bonneville Int'l Corp., 602 F. Supp. 2d 1, 4 n.2 (D.D.C. 2009)* (court rejected plaintiff's claim that federal rules grant right of minimum of 10 depositions "as a matter of law").



Strategic Point--Avoiding Need to Apply to Court:

Parties should consider and, if possible stipulate to, the need for additions to the 10-per-side limitation at the discovery planning conference to avoid having to later apply to the court for leave to take additional depositions. *See Fed. R. Civ. P. 26(f)(3)(E)* (proposed changes to limitations on discovery should be included in discovery plan); *see also § 4.09[2] above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.05[1][b].*
- *Federal Litigation Guide P 16.03[1].*

- *Bender's Federal Practice Forms* Form Nos. 30:5, 30:7, 30:8.

- *Fed. R. Civ. P. 30(a)(2)(A)(i)* (leave required for more than 10 depositions).

[3] Duration of Each Deposition Is Limited

[a] Duration Is One Day of Seven Hours Unless Otherwise Stipulated or Ordered

Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. *Fed. R. Civ. P. 30(d)(1)*. It is expected that in most instances the parties and the witness will make reasonable accommodations to avoid the need for resort to the court. *Fed. R. Civ. P. 30(d)*, Committee Note of 2000.

The limitation is phrased in terms of a single day, on the assumption that ordinarily a single day would be preferable to a deposition extending over multiple days; if alternative arrangements would better suit the parties, they may agree to them in most cases, or a party may seek modification by the court. *Fed. R. Civ. P. 30(d)*, Committee Note of 2000.

This limitation contemplates that there will be reasonable breaks during the day for lunch and other reasons, and that the only time to be counted is the time occupied by the actual deposition. *Fed. R. Civ. P. 30(d)*, Committee Note of 2000.

[b] Court Must Allow Additional Time for Fair Examination

The court must allow additional time, consistent with the principles stated in Rule 26(b)(2), if:

1. Additional time is needed for a fair examination of the deponent; or

2. The deponent or another person, or other circumstance, impedes or delays the examination.

Fed. R. Civ. P. 30(d)(1); *see Fed. R. Civ. P. 26(b)(2)* (limitation on excessive or unreasonable discovery).



Strategic Point:

A party generally should not seek additional time for a deposition from the court, beyond the allotted seven hours, before the deposition is taken. The better practice is for counsel to go forward with the deposition, to determine more accurately how many additional hours, if any, are needed, and then attempt to obtain a stipulation for the additional time (*see § 15.05[11] below*). The parties should seek a court order only if a stipulation cannot be reached. *See Malec v. Trustees of Boston College, 208 F.R.D. 23, 24 (D. Mass. 2002)* (motion for leave to extend, filed before deposition commenced, denied).

[c] Circumstances That Might Require Additional Time

Various circumstances, such as the following, may justify extending the time for a deposition:

1. An interpreter is needed to communicate with the witness;

2. The examination covers events occurring over a long period of time;

3. The witness failed to review and become familiar with numerous or lengthy documents made available to the witness in advance, prior to the deposition;

4. The examination reveals that documents were requested but not produced;

5. Each party in a multiparty case needs to examine the witness;

6. The lawyer for the witness wants to examine the witness;

7. Additional time is needed to explore the theories on which an expert witness relies;

8. The deponent or opposing counsel has delayed the examination by improper, lengthy, or inappropriate objections; or

9. The witness has been very slow in responding to questions or has delayed proceedings by consultations with counsel.

Fed. R. Civ. P. 30(d), Committee Note of 2000.

[d] Persons Responsible for Impediment or Delay May Be Subject to Sanctions

If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose on the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result of the impediment, delay, or conduct. *Fed. R. Civ. P. 30(d)(2)*.

The "persons responsible" may include the deponent, any party, or any other person involved in the deposition. *Fed. R. Civ. P. 30(d)*, Committee Note of 2000.

[e] Court May Order Shorter Duration in Particular Case

The court may limit the length of a deposition to less than one day of seven hours under its general power to limit discovery, either on its own initiative or pursuant to a motion for a protective order. *See Fed. R. Civ. P. 26(b)(2)(A)* (limit on length of deposition permitted).

The court may order:

1. Shorter depositions for all depositions in a particular case;

2. A shorter deposition for a specific witness in a particular case; or

3. A particular deposition to be taken for limited periods on several days.

Fed. R. Civ. P. 30(d), Committee Note of 2000.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.45*.
- *Federal Litigation Guide P 17.01[3]*.
- *Fed. R. Civ. P. 30(d)(1)* (duration of deposition).



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§ 8.05 Determining Who May Be Deposed

[1] Generally Any Person, Including Any Party, May Be Deposed

A party may take the testimony of any person, including a party, by deposition on oral examination. *Fed. R. Civ. P. 30(a)(1)*. Leave of court, or a stipulation between the parties, is required, however, if the person has already been deposed in the action. *Fed. R. Civ. P. 30(a)(2)(A)(ii)*; *see §§ 8.06[2][c], 15.05[3] below*.

The person to be deposed can be a natural person or an entity. A public official is subject to deposition, when warranted by the circumstances of the case, unless a state privilege precludes the examination. *See, e.g., Virgo Corp. v. Paiewonsky, 39 F.R.D. 9, 10 (D.V.I. 1966)* (territorial governor subject to deposition); *Phelan v. Thompson, 161 F.R.D. 7, 7-8 (D.N.H. 1994)* (judicial immunity privilege precluded deposition).

Exceptions:

Absent extraordinary circumstances, high-ranking government officials generally cannot be deposed if other persons can provide the information sought. *See Kyle Eng'g Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979)* (district court's order vacating notice of deposition of administrator of SBA not an abuse of discretion). One rationale for limiting depositions of high-ranking government officials is to protect the decision-making process of such officials. Based on this rationale, courts have extended the rule shielding high-ranking government officials from depositions to *former* government officials. *See United States v. Sensient Colors, Inc., 649 F. Supp. 2d 309, 316-317 (D.N.J. 2009)* (although Third Circuit has not yet ruled on issue, magistrate judge did not abuse his discretion in extending to former government official, rule that high-ranking government officials should not be subject to deposition absent extraordinary circumstances). Similarly, a high-ranking corporate officer may obtain a protective order to preclude being deposed about matters of which he or she has no personal knowledge, even if the corporation has such knowledge. *See, e.g., Thomas v. IBM, 48 F.3d 478, 483 (10th Cir. 1995)* (upholding protective order concerning deposition of chairman of IBM in age discrimination case brought by regional clerical employee); *Lewelling v. Farmers Ins. of Columbus, Inc., 879 F.2d 212, 218 (6th Cir. 1989)* (upholding protective order to bar plaintiffs from deposing their employer's chief executive officer, who lacked knowledge about any pertinent facts).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.03[1], [3].*
- *Federal Litigation Guide P 16.03[1].*
- *Fed. R. Civ. P. 30(a)(1)* (deposition of any person).

[2] Deposition Notice May Specify Certain Individuals to Testify on Behalf of Corporation

[a] Deposition Notice May Specify Officers, Directors, or Managing Agents to Appear on Behalf of Corporation

A party may notice the deposition of a specific named person within an organization that is a party to the action. *See Fed. R. Civ. P. 30(a)(1)* (any person may be deposed). However, if the named person is not being deposed as a representative of the organization, a Rule 45 subpoena (*see* Ch. 14 *below*) is required. *See United States v. Afram Lines, Ltd., 159 F.R.D. 408, 413 (S.D.N.Y. 1994)* (individuals not managing agents could not be compelled to attend by simple notice of deposition).

Only an officer, director, or managing agent may be noticed to appear for deposition on behalf of a corporation. *See Contardo v. Merrill Lynch, Pierce, Fenner & Smith, 119 F.R.D. 622, 623 (D. Mass. 1988)* (witness who was not officer, director, or managing agent of defendant corporation could not be compelled to attend deposition by notice of deposition and could not be compelled to produce documents in custody and control of corporation).

A party may name the entity as deponent and describe the matters for examination, without specifying an individual; the entity is then obligated to designate the officers, directors, or managing agents who will testify on its behalf. *Fed. R. Civ. P. 30(b)(6)*; *see § 8.10 below*.

[b] Determining Whether Individual Is "Managing Agent"

Whether an individual will be deemed a managing agent of a corporate party depends on the following factors:

1. Whether the individual is invested with general powers allowing him or her to exercise judgment and discretion in corporate matters;

2. Whether the individual can be expected to identify or represent the interests of the corporation; and

3. Whether the individual can be relied on to give testimony, at the employer's request, in response to the demands of the examining party.

See In re Honda Am. Motor Co., Inc., 168 F.R.D. 535, 540 (D. Md. 1996) (courts generally agree on controlling factors used to determine managing agent); *Reed Paper Co. v. Proctor & Gamble Distrib. Co., 144 F.R.D. 2, 4 (D. Me. 1992)* (commonly accepted and definitive test to determine employee's status as managing agent).

Some courts consider two additional factors:

1. Whether any person or persons are employed by the corporate employer in positions of higher authority than the individual designated in the area concerning the information sought; and

2. The general responsibilities of the individual respecting the matters involved in the litigation.

See, e.g., Sugarhill Records, Ltd. v. Motown Record Corp., 105 F.R.D. 166, 170 (S.D.N.Y. 1985) (citing all five factors).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.03[2].*
- *Federal Litigation Guide P 17.06.*
- *Fed. R. Civ. P. 30(a)(1)* (deposition of any person).
- *Fed. R. Civ. P. 30(b)(6)* (notice of deposition directed to entity).

[3] Depositions of Counsel Are Allowed in Limited Circumstances

Depositions of opposing counsel, although not prohibited, are generally disfavored because of the potential for abuse and issues of work product and privilege. *See Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986)* (opposing counsel's deposition should occur only in limited circumstances).

Depositions of opposing counsel should be limited to those circumstances when the party seeking to take the deposition has shown that:

1. No other means exist to obtain the information than to depose opposing counsel;
2. The information sought is relevant and nonprivileged; and
3. The information is crucial to the preparation of the case.

See Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986) ; *see also Nguyen v. Excel Corp., 197 F.3d 200, 208-209 (5th Cir. 1999)* (adopting *Shelton's* statement that depositions of opposing counsel are generally disfavored and should only be permitted in limited circumstances, but upholding lower court's decision to permit plaintiff to depose opposing trial and in-house counsel); *but see Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Del., Inc. v. Friedman (In re Friedman), 350 F.3d 65, 71 (2d Cir. 2003)* (noting that Second Circuit has never adopted the *Shelton* rule).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.03[5].*
- *Fed. R. Civ. P. 30(a)(1)* (deposition of any person).

[4] Expert Whose Opinions May Be Presented at Trial May Be Deposed

A party may depose any person who has been identified as an expert to present testimony at trial. *Fed. R. Civ. P. 26(b)(4)(A)*; *see §§ 12.16-12.25 below*. A report from the expert is required. *Fed. R. Civ. P. 26(a)(2)(B)*. The deposition cannot be conducted until after the report is provided. *Fed. R. Civ. P. 26(b)(4)(A)*.

Unless manifest injustice would result, the court will require the party seeking discovery to pay the expert a reasonable

fee for time spent in responding to the discovery. *Fed. R. Civ. P. 26(b)(4)(E)*. The manifest injustice exception may apply if the court finds that the party seeking to depose the expert is either indigent or that requiring payment of the deposition fee would create an undue hardship. *See Harris v. San Jose Mercury News, Inc., 235 F.R.D. 471, 473 (N.D. Cal. 2006)* (defendant newspaper required to pay for plaintiff photographer's deposition of two of defendant's experts when plaintiff, although not insolvent, could not pay normal expert fees); *Edin v. Paul Revere Life Ins. Co., 188 F.R.D. 543, 547 (D. Ariz. 1999)* (no undue hardship in requiring plaintiff dentist, who voluntarily initiated litigation, to pay reasonable expert fee to depose defendant's expert).



Strategic Point--Determining Whether to Depose:

Counsel may prefer not to depose the opponent's experts, on the theory that all pertinent information is in the Rule 26 expert report, and a deposition simply gives the expert time to correct any weaknesses in the presentation. The opposing view is that failing to depose might lead to a new theory or opinion that comes as a surprise at trial. Although the rules call for exclusion of any expert opinion not included in the Rule 26 report, not all judges strictly adhere to that provision of Rule 26. Unless you know the judge's practice in this regard, failing to depose can be risky.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.80*.
- *Fed. R. Civ. P. 26(b)(4)(A)* (deposition of experts who may testify).



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§ 8.06 Determining Whether Leave of Court Is Required

[1] Leave of Court Generally Not Required

Leave of court generally is not required to take a deposition on oral examination. *Fed. R. Civ. P. 30(a)(1)*. If leave is required, the court must grant leave consistent with Rule 26(b)(2), which limits excessive or unreasonable discovery. *Fed. R. Civ. P. 30(a)(2)*; *see Fed. R. Civ. P. 26(b)(2)*; *see also § 8.07 below*.

[2] When Leave of Court Required

[a] Leave Required When Deponent Is Incarcerated

A party must obtain leave of court when the person to be deposed is confined in prison. *Fed. R. Civ. P. 30(a)(2)(B)*. Unlike other circumstances, in which the parties can agree to the deposition, there is no provision for the parties to stipulate, without obtaining leave of court, to the deposition of a prisoner. *See Ashby v. McKenna, 331 F.3d 1148, 1150 (10th Cir. 2003)* (leave of court required, even if prisoner is plaintiff and prison administrators do not object).

The court may deny leave to take the deposition of a prisoner if the objecting party shows the following:

1. The deposition would be unreasonably cumulative or duplicative;

2. The party seeking the deposition has had ample opportunity to obtain the information sought; or

3. The burden or expense of the deposition outweighs its likely benefit.

See Williams v. Greenlee, 210 F.R.D. 577, 578-579 (N.D. Tex. 2002) (deposition of inmate at juvenile facility before inmate's release would result in undue psychological harm).

[b] Leave Required for More Than 10 Depositions

A party must obtain leave of court if, without the written stipulation of all parties, a proposed deposition would result in more than 10 depositions being taken by either side. *Fed. R. Civ. P. 30(a)(2)(A)(i)*. Both oral depositions and

depositions on written questions under Rule 31 (*see* Ch. 9 *below*) are included in determining the number of depositions taken. *Fed. R. Civ. P. 30(a)(2)(A)(i).*

[c] Leave Required if Person Already Deposed

A party must obtain leave of court if, without the written stipulation of the parties, the person to be examined has already been deposed in the case. *Fed. R. Civ. P. 30(a)(2)(A)(ii).*

The decision to grant or deny leave to re-depose a witness is guided by Rule 26(b)(2)(C), which limits excessive or unreasonable discovery. *Judicial Watch, Inc. v. United States Dept. of Commerce, 34 F. Supp. 2d 47, 54 (D.D.C. 1998)* (leave granted for additional depositions, but scope of examination limited); *see Fed. R. Civ. P. 26(b)(2)(C)*; *see also § 8.07 below.*

[d] Leave May Be Required for Deposition Before Parties Agree to Discovery Plan

A party must obtain leave of court if, without the written stipulation of the parties, the party seeks to take a deposition before the parties have agreed to a discovery plan, unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time. *Fed. R. Civ. P. 30(a)(2)(A)(iii)*; *see Fed. R. Civ. P. 26(d)* (timing of discovery), 26(f) (planning for discovery).

[e] Leave Required Before Action Commenced

Leave is required to take a deposition to perpetuate testimony before the formal commencement of a civil action. *Fed. R. Civ. P. 27(a)(3).* For discussion of depositions to perpetuate testimony, *see* Ch. 10 *below.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.05.*
- *Bender's Federal Practice Forms* Form Nos. 30:1-30:8.
- *Fed. R. Civ. P. 30(a)(1)* (depositions without leave).
- *Fed. R. Civ. P. 30(a)(2)* (depositions requiring leave).



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Chapter 8 ORAL DEPOSITIONS
PART B: PLANNING ORAL DEPOSITIONS

1-8 Moore's AnswerGuide: Federal Discovery Practice § 8.07

§ 8.07 Considering Limit on Excessive or Unreasonable Discovery

The court may limit discovery if it determines that:

1. The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

2. The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

3. The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C); *see also* Ch. 2 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.05[2].*
- *Fed. R. Civ. P. 26(b)(2)(C)* (limitation on excessive or unreasonable discovery).



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Chapter 8 ORAL DEPOSITIONS
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1-8 Moore's AnswerGuide: Federal Discovery Practice § 8.08

§ 8.08 Checklist for Giving Notice of Oral Deposition

☐ Determine time and place for deposition. *See § 8.09[1], [2] below.*

- ○ Reasonable notice is required.
- ○ Thirty days' notice is required if notice of deposition to party is accompanied by request for production.
- ○ Deposition of nonparty must be within 100 miles of place where deponent resides, is employed, or regularly transacts business.

☐ Fulfill requirements for taking deposition by telephone or other remote electronic means, if appropriate. *See § 8.13 below.*

- ○ Obtain stipulation of opposing counsel; or
- ○ If unable to obtain stipulation, move for court order.

☐ Prepare notice of taking oral deposition. *See § 8.09 below.*

- ○ Specify time and place of deposition. *See § 8.09[2] below.*
- ○ State name and address of deponent, if known, or state general description sufficient to identify person or particular class or group to which person belongs. *See § 8.09[3] below.*

- ○ Designate materials to be produced pursuant to subpoena duces tecum, if any. *See § 8.09[4] below*.

- ○ State method for recording testimony. *See § 8.09[5] below*.

- ○ If entity is named as deponent, describe with reasonable particularity the matters on which examination is requested. *See § 8.10[1] below*.

☐ Serve notice on all parties. *See § 8.12 below*.

☐ If documents are requested of party deponent, serve party with accompanying request for production of documents and things at the taking of the deposition. *See § 8.11 below*.

☐ If documents are requested of nonparty deponent, serve nonparty with subpoena to compel attendance, testimony, and production of documents. *See § 8.11 below*.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Oral Depositions



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1-8 Moore's AnswerGuide: Federal Discovery Practice § 8.09

§ 8.09 Noticing Deposition in Writing

[1] Give Reasonable Notice in Writing to All Parties

A party desiring to take the deposition of any person on oral examination must give reasonable notice in writing to every other party to the action. *Fed. R. Civ. P. 30(b)(1).*



Warning--Notice of Deposition Accompanied by Request for Production:

Although only "reasonable" notice of an oral deposition is required, if the notice to a party is accompanied by a request for production of documents at the deposition, 30 days' notice is required. *See Fed. R. Civ. P. 34(b)(2)(A).*



Strategic Point:

Although only "reasonable notice" is required for a deposition, the party seeking discovery should consult with opposing counsel about scheduling prior to giving notice, if possible, to avoid objections to the time and place that may cause unnecessary delay. *See Fed. R. Civ. P. 30(b)(1)* (reasonable notice requirement). The party giving notice should also take care to comply with the specific requirements for the written notice and for any request for production or subpoena served with the notice. *See Fed. R. Civ. P. 34* (request for production), 45 (subpoena).

[2] Specify Time and Place of Deposition

A notice of oral deposition must state the time and place for taking the deposition. *Fed. R. Civ. P. 30(b)(1).*

The party noticing the deposition usually has the right to choose the location. *See Riley v. Murdock, 156 F.R.D. 130, 132 (E.D.N.C. 1994)* (disagreement over location settled in favor of choice of party noticing deposition); *Payton v. Sears, Roebuck & Co., 148 F.R.D. 667, 669 (N.D. Ga. 1993)* (deposing party ordinarily may set place for deposition, subject to court's power to grant protective order designating different place).

Warning--Location of Deposition of Nonparty:

The attendance of a nonparty deponent at a deposition must be compelled by subpoena. *Fed. R. Civ. P. 30(a)(1)*. The location of the deposition is limited by the court's subpoena power. The deposition must take place within 100 miles of the place where the nonparty deponent resides, is employed, or regularly transacts business in person. *See Fed. R. Civ. P. 45(c)(3)(A)(ii)*; *see also* Ch. 14, *below*.

[3] State Name and Address of Deponent, if Known

A notice of deposition must state the name and address of each person to be examined, if known. *Fed. R. Civ. P. 30(b)(1)*. If the name of the person to be deposed is not known, the notice must state a general description sufficient to identify the person or the particular class or group to which the person belongs. *Fed. R. Civ. P. 30(b)(1)*.

[4] Designate Materials to Be Produced Pursuant to Subpoena Duces Tecum

If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena must be attached to, or included in, the notice of deposition. *Fed. R. Civ. P. 30(b)(2)*.

[5] State Method for Recording Testimony

The party taking the deposition must state in the notice the method by which the testimony will be recorded. *Fed. R. Civ. P. 30(b)(3)(A)*. Unless the court orders otherwise, the testimony may be recorded by sound, sound-and-visual (*e.g.*, videotape), or stenographic means. *Fed. R. Civ. P. 30(b)(3)(A)*.

With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. *Fed. R. Civ. P. 30(b)(3)(B)*; *see § 8.20[8] below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.20[1].*
- *Federal Litigation Guide P 17.03.*
- *Bender's Federal Practice Forms* Form Nos. 30:20-30:45.
- *Fed. R. Civ. P. 30(b)* (requirements for notice of deposition).



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1-8 Moore's AnswerGuide: Federal Discovery Practice § 8.10

§ 8.10 Naming Business Entity or Agency as Deponent

[1] Notice Must Describe Matters on Which Examination Is Requested

A party may, in the notice of deposition or in a subpoena, name as the deponent a public or private corporation, partnership, association, governmental agency, or other entity. *Fed. R. Civ. P. 30(b)(6)*. The notice or subpoena must describe with reasonable particularity the matters on which examination is requested. *Fed. R. Civ. P. 30(b)(6)*.

A subpoena to a nonparty organization must advise the organization of its duty to make a designation of the individual or individuals who will testify on its behalf. *Fed. R. Civ. P. 30(b)(6)*; *see § 8.10[2] below*.

Circuit Split:

At least one court has ruled that the individual designated by a deponent entity may only be questioned regarding issues described in the notice because of the "reasonable particularity" requirement in Rule 30(b)(6). *See Paparelli v. Prudential Ins. Co., 108 F.R.D. 727, 730 (D. Mass. 1985)* ("reasonable particularity" requirement implicitly restricts the scope of examination). Other courts have concluded that the "reasonable particularity" requirement does not limit the scope of the questioning to the matters described in the notice, but simply informs the entity of the information the designated deponent must be able to supply. *See, e.g., Cabot Corp. v. Yamulla Enters., Inc., 194 F.R.D. 499, 500 (M.D. Pa. 2000)* (specifically rejecting *Paparelli*); *Detoy v. City & County of San Francisco, 196 F.R.D. 362, 366-367 (N.D. Cal. 2000)* (scope of examination is determined solely by relevance standard of Rule 26); *King v. Pratt & Whitney, 161 F.R.D. 475, 476 (S.D. Fla. 1995)* (declining to follow *Paparelli*; entity not entitled to protective order barring examination outside scope of matters described in notice).

[2] Entity Must Designate Individual(s) Who Will Testify on Its Behalf

An entity named as a deponent must designate one or more officers, directors, or managing agents, or other persons most knowledgeable to testify on its behalf on the subjects identified in the notice. *Fed. R. Civ. P. 30(b)(6)*. For each person so designated, the organization may set forth the matters on which the person will testify. *Fed. R. Civ. P. 30(b)(6)*.

The persons designated by an entity must testify as to matters known or reasonably available to the organization. *Fed.*

R. Civ. P. 30(b)(6).

Warning:

The entity should seek a protective order under Rule 26(c) (*see* Ch. 16 *below*) if it is unable to designate one or more individuals to testify on its behalf with respect to the matters described in the notice of deposition. *See § 8.17 below*. Failure to make a designation or seek a protective order may result in the imposition of sanctions. *See Commodity Futures Trading Comm'n v. Noble Metals Int'l, Inc., 67 F.3d 766, 770-771 (9th Cir. 1995)* (because of defendants' willful failure to make designation and comply with court orders, court imposed sanction ordering allegations of complaint be taken as established for purposes of action).

[3] Deposition of Specific Individual May Be Noticed

The rules on organization depositions do not preclude a party from noticing the deposition of a specific named officer, director, or managing agent within an organization. *See Fed. R. Civ. P. 30(b)(6)* (subdivision (b)(6) does not preclude taking deposition by other procedures authorized in rules); *see also Operative Plasterers' & Cement Masons' Int'l Ass'n v. Benjamin, 144 F.R.D. 87, 90 (N.D. Ind. 1992)* (specific designation of person as corporate deponent is viable alternative for party aware of particular individual with authority to testify on behalf of organization on desired subject).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.25.*
- *Federal Litigation Guide PP 16.04[4], 17.06.*
- *Bender's Federal Practice Forms* Form Nos. 30:40-30:45.
- *Fed. R. Civ. P. 30(b)(6)* (notice or subpoena directed to organization).
- *Cooley v. Lincoln Elec. Co., 693 F. Supp. 2d 767, 791 (N.D. Ohio 2010)* ("fact that a witness is a 30(b)(6) designee does not create a hearsay exception allowing him to simply repeat statements made by corporate officers and employees, if those statements are offered for their truth").



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§ 8.11 Including Request for Production With Notice

The notice to a party deponent may be accompanied by a request for the production of documents, electronically stored information, and tangible things at the taking of the deposition. *Fed. R. Civ. P. 30(b)(2)*; *see Fed. R. Civ. P. 34(a)*, Committee Note of 2006.

The request for the production must be made in accordance with the procedure specified in Rule 34. *Fed. R. Civ. P. 30(b)(2)*; *see Fed. R. Civ. P. 34*; *see also* Ch. 5 *above*.



Warning--30 Days' Notice Required:

Although only "reasonable" notice of an oral deposition is required, if the deponent is a party and the notice is accompanied by a request for production at the deposition, 30 days' notice is required. *See Fed. R. Civ. P. 34(b)(2)(A)*.

If the deponent is not a party, the deposing party must serve a subpoena duces tecum on the deponent. *See Fed. R. Civ. P. 30(b)(2)*; *see also § 8.09[4] above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.22*.
- *Bender's Federal Practice Forms* Form Nos. 30:30-30:35.
- *Fed. R. Civ. P. 30(b)(2)* (requesting documents to be produced at deposition).



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§ 8.12 Serving Notice on All Parties

"Reasonable" notice of a deposition must be served on all parties. *Fed. R. Civ. P. 30(b)(1)*; *see Fed. R. Civ. P. 5* (service of papers).

Timing:

Rule 30 requires only "reasonable" notice of a deposition. *See Fed. R. Civ. P. 30(b)(1)*. However, if a party receives less than 14 days' notice and promptly files a motion for a protective order requesting that the deposition not be held or be held at a different time or place, and the deposition is taken while the motion is pending, the deposition cannot be used against that party. *Fed. R. Civ. P. 32(a)(5)(A)*.

Warning:

Local rules may establish a required number of days' notice. Consult local rules to determine whether a particular numeric limit is required.

The notice of deposition is sufficient to compel the attendance and testimony of a party deponent. *See Fed. R. Civ. P. 37(d)(1)(A)(i)*. A subpoena is required to compel attendance and testimony or production of documents by a nonparty deponent. *Fed. R. Civ. P. 30(a)(1)*; *see Fed. R. Civ. P. 45(a)*; *see also* Ch. 14 *below*.

Warning:

An employee of a corporation who is not an officer, director, or managing agent of the corporation is a nonparty witness, even if the corporation is a party to the proceeding. *See, e.g., Contardo v. Merrill Lynch, Pierce, Fenner & Smith, 119 F.R.D. 622, 623 (D. Mass. 1988)* (plaintiff's counsel properly arranged to have deposition of employee who was not officer, director, or managing agent of defendant corporation taken at witness's place of employment in compliance with *Fed. R. Civ. P. 45*).

The notice of deposition is not filed with the court. *See Fed. R. Civ. P. 5(d)(1)* (discovery requests not filed until used or filing ordered by court).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 30.20[2], 30.21.*
- *Bender's Federal Practice Forms* Form No. 30:50.
- *Fed. R. Civ. P. 30(b)(1)* (notice of deposition).



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1-8 Moore's AnswerGuide: Federal Discovery Practice § 8.13

§ 8.13 Requesting Telephonic or Video Deposition

The parties may stipulate in writing or the court may, on motion, order that a deposition be taken by telephone or other remote electronic means. *Fed. R. Civ. P. 30(b)(4)*; *see also § 15.05[7] below*. Telephone and video depositions are commonly used in cases involving multiple parties, with counsel and witnesses located in disparate locations, often relating to the authentication of documents and other formal, noncontentious matters.

A deposition taken by telephone or other remote electronic means is deemed to be taken in the district and at the place where the deponent is to answer questions. *Fed. R. Civ. P. 30(b)(4)*.

Some courts have stated that telephone depositions should be liberally permitted. *See Brown v. Carr, 253 F.R.D. 410, 413 (S.D. Tex. 2008)* (prisoner established legitimate basis for taking deposition by videoconferencing because he "obviously cannot leave his prison facility for any depositions," but prisoner is responsible for paying costs of depositions and, if he cannot afford videoconferencing, must proceed by deposition upon written questions); *Jahr v. IU International Corp., 109 F.R.D. 429, 431 (W.D.N.C. 1986)* (telephone deposition allowed when plaintiff alleged financial hardship in traveling to another state to take deposition of nonparty); *Rehau, Inc. v. Colortech, Inc., 145 F.R.D. 444, 446 (W.D. Mich. 1993)* (telephone depositions of two European residents allowed because of expense of bringing them to United States). However, other courts appear reluctant to order telephone depositions. *See, e.g., United States v. $160,066.98 from Bank of Am., 202 F.R.D. 624, 629 (S.D. Cal. 2001)* (in refusing to order a deposition by telephone from Pakistan to San Diego, court emphasized that circumstances of case required in-person depositions).



Strategic Point:

Counsel defending a deposition will usually be comfortable stipulating to a telephone or other electronic deposition. However, counsel taking a deposition should take into account that (1) it is difficult to monitor discussions between the witness and the witness's counsel, and (2) it is difficult to develop a conversational rhythm in telephonic or electronic depositions.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.24*.
- *Fed. R. Civ. P. 30(b)(4)* (deposition by remote means).



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§ 8.14 Checklist for Responding to Notice of Deposition

☐ Review notice of deposition and accompanying documents to determine basis for objections, if any. *See § 8.15 below*.

- ○ Errors or irregularities in notice.
- ○ Lack of qualifications of deposition officer.
- ○ Grounds for motion to quash or motion for protective order based on discovery sought or manner in which deposition will be conducted.

☐ Serve written objections promptly on party giving notice of deposition. *See § 8.15 below*.

☐ Prepare and file motion to quash notice of deposition or subpoena, if appropriate, in accordance with standard motion procedure. *See § 8.16 below*.

☐ Attempt to confer with other parties to resolve dispute before seeking protective order. *See § 8.17[2] below*.

☐ Prepare and file motion for protective order, if appropriate, in accordance with standard motion procedure, specifying the grounds for order. *See § 8.17 below*.

☐ If notice names an entity as deponent, provide party giving notice with designation of one or more individuals who will testify on entity's behalf and the matters on which each person will testify. *See § 8.10[2] above*.

☐ Determine whether to have the deponent's testimony recorded by a method other than the method specified by the party taking the deposition and give notice to the deponent and other parties of the additional method of recording, if any. *See § 8.20[8] below*.

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§ 8.15 Objecting to Deposition

A party or deponent served with a notice of deposition may oppose the deposition on any of the following grounds:

1. The noticing party failed to comply with the requirements for noticing a deposition. *Fed. R. Civ. P. 32(d)(1)*; *see § 8.09 above*.

2. The deposition officer identified in the notice is unqualified. *Fed. R. Civ. P. 32(d)(2)*; *see § 8.19 below*.

3. The discovery sought or the manner in which the deposition will be conducted fails to comply with procedural requirements. *See § 8.20 below*.

Timing:

All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served on the party giving notice. *Fed. R. Civ. P. 32(d)(1)*.

Timing:

Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made (1) before the taking of the deposition begins, or (2) as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence. *Fed. R. Civ. P. 32(d)(2)*.

Serving the noticing party with objections will preserve objections that would otherwise be waived, but will not prevent the deposition from going forward. The party or deponent opposing discovery must therefore determine whether his or her objections to the proposed deposition give rise to grounds for a motion to quash the notice or a motion for a protective order to prevent or limit the deposition. *See §§ 8.16, 8.17 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 30.50, 32.40.*
- *Fed. R. Civ. P. 32(d)* (waiver of objections).



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§ 8.16 Moving to Quash Deposition

The court may quash a deposition notice or subpoena under its general power to limit discovery. *See Fed. R. Civ. P. 26(b)(2), (c).* However, courts will generally grant a motion to quash, or a motion for a protective order to prohibit a deposition, only in extraordinary circumstances. *Thomas v. IBM, 48 F.3d 478, 483 (10th Cir. 1995)* (deposition of corporate officer in age discrimination action quashed after he testified by affidavit that he lacked personal knowledge of plaintiff and her work performance).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.50.*
- *Fed. R. Civ. P. 26(b)(2)* (limitations on frequency and extent of discovery).
- *Fed. R. Civ. P. 26(c)* (protective orders).



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§ 8.17 Moving for Protective Order

On motion by a party or by the deponent, the court in which the action is pending or, alternatively, the court in the district where the deposition is to be taken, may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. *Fed. R. Civ. P. 26(c)(1)*. The moving party must show good cause for the order. *Fed. R. Civ. P. 26(c)(1)*.

A motion for a protective order must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. *Fed. R. Civ. P. 26(c)(1)*.

The protective order limiting a deposition may include one or more of the following orders:

1. That the deposition not be taken;

2. That the deposition may be taken only on specified terms and conditions, including a designation of the time or place;

3. That the discovery may be had only by another method of discovery;

4. That certain matters not be inquired into, or that the scope of questioning be limited to certain matters;

5. That the deposition be taken with no one present except persons designated by the court;

6. That the deposition transcript be sealed and thereafter be opened only by order of the court;

7. That a trade secret or other confidential research, development, or commercial information may not be revealed or may be revealed only in a designated way; and

8. That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Fed. R. Civ. P. 26(c)(1).

If the court denies the motion for a protective order in whole or in part, it may order that any party or deponent identified in the notice provide or permit discovery on such terms and conditions as are just. *Fed. R. Civ. P. 26(c)(2).*

The court may award expenses to the prevailing party for costs incurred in relation to the motion for a protective order. *Fed. R. Civ. P. 26(c)(3)*; *see Fed. R. Civ. P. 37(a)(5)*; *see also § 17.10 below.*

For discussion of protective orders, *see* Ch. 16 *below.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.50.*
- *Federal Litigation Guide P 18.01[8].*
- *Bender's Federal Practice Forms* Form Nos. 30:50-30:53.
- *Fed. R. Civ. P. 26(c)* (protective orders).



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1-8 Moore's AnswerGuide: Federal Discovery Practice § 8.18

§ 8.18 Checklist for Conducting an Oral Deposition

☐ Make appropriate arrangements for taking deposition:

○ Place and manner of recording arranged for time specified in notice. *See § 8.09[2] above*.

○ Stipulation or court order obtained to allow deposition to be taken by telephone or other remote electronic means. *See § 8.13 above*.

○ Qualified deposition officer engaged. *See § 8.19 below*.

☐ Conduct deposition in accordance with Rule 30. *See § 8.20 below*.

○ Deposition officer must make statement on record. *See § 8.20[1] below*.

○ Officer must administer oath and record the questions, objections, comments, and testimony. *See § 8.20[2] below*.

○ If deposition is recorded by non-stenographic means, such as videotape, officer must, in addition to other requirements, identify deposition at beginning of each unit of tape or other recording medium. *See § 8.20[3] below*.

○ Any party may arrange for transcription or additional method of recording examination. *See § 8.20[8] below*.

☐ Proceed with examination and cross-examination of deponent as at trial. *See §§ 8.20[4], [5], 8.21 below* .

☐ Continue with examination to conclusion, subject to objections noted in the record. *See § 8.20[6] below*.

☐ Suspend the taking of testimony and adjourn deposition if one of the following occurs:

- ○ Deponent fails to answer any question or produce materials, and noticing party wishes to file motion to compel before proceeding.
- ○ Party or deponent demands suspension to seek protective order. *See § 8.25 below*.

☐ Conclude deposition. *See § 8.20[7] below*.

- ○ Officer states on record that deposition is complete.
- ○ Officer sets forth stipulations of parties.

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§ 8.19 Ensuring That Deposition Officer Is Qualified Under Rule 28

[1] Deposition Officer Must Be Authorized to Administer Oaths or Be Appointed by Court

Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions must be taken before:

1. An officer authorized to administer oaths by the laws of the United States or of the place where the examination is held; or

2. A person appointed by the court in which the action is pending to administer oaths and take testimony.

Fed. R. Civ. P. 28(a)(1).

The term "officer," as used in Rules 30, 31 and 32, governing depositions, includes a person appointed by the court or designated by the parties. *Fed. R. Civ. P. 28(a)(2).*

[2] Deposition Officer Cannot Have Relationship to Parties or Counsel or Financial Interest in Action

No deposition can be taken before a person who is:

1. A relative, employee, attorney, or counsel of any of the parties;

2. A relative or employee of any attorney or counsel of any of the parties; or

3. Financially interested in the action.

Fed. R. Civ. P. 28(c).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 28.02, 28.30.*
- *Fed. R. Civ. P. 28* (persons before whom depositions may be taken).



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1-8 Moore's AnswerGuide: Federal Discovery Practice § 8.20

§ 8.20 Conducting Deposition in Compliance With Rule 30

[1] Officer Must Make Statement on Record to Begin

Unless otherwise agreed by the parties, a deposition must be conducted before a qualified deposition officer and must begin with a statement on the record by the officer that includes the following:

1. The officer's name and business address;

2. The date, time, and place of the deposition;

3. The name of the deponent;

4. The administration of the oath or affirmation to the deponent; and

5. An identification of all persons present.

Fed. R. Civ. P. 30(b)(5)(A).



Warning--Presence of Additional Persons May Be Grounds for Protective Order:

If a party or counsel has brought numerous people to the deposition, such as several officers of a corporate party, nonparty family members of an individual, or staff, a party or the deponent may be able to move for a protective order to limit the persons present. An objection ordinarily should be made only if the additional parties are disruptive, or themselves are witnesses. *See Fed. R. Civ. P. 26(c)(1)(E), 30(d)(3)*; *see also § 16.27 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.40[2].*

- *Fed. R. Civ. P. 30(b)(5)(A)* (officer's duties before deposition).

[2] Officer Must Administer Oath and Record Testimony

The officer before whom the deposition is to be taken must put the witness on oath or affirmation. *Fed. R. Civ. P. 30(c)(1).*

The officer must personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. *Fed. R. Civ. P. 30(c)(1).*

The testimony must be recorded by the method stated in the notice of deposition. *Fed. R. Civ. P. 30(c)(1)*; *see Fed. R. Civ. P. 30(b)(3)(A)* (method stated in notice).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 30.40[1], [3].*
- *Fed. R. Civ. P. 30(b)(5)(A)* (officer's duties before deposition).

[3] Requirements for Nonstenographic Recording

[a] Officer Must Identify Deposition at Beginning of Each Unit of Tape or Other Recording Medium

If the deposition is recorded other than stenographically, the officer must repeat his or her name and business address, the date, time, and place of the deposition, and the name of the deponent at the beginning of each unit of recorded tape or other recording medium. *Fed. R. Civ. P. 30(b)(5)(B).*

[b] Recording Techniques Cannot Distort Appearance or Demeanor of Participants

The appearance or demeanor of deponents or attorneys cannot be distorted through camera or sound-recording techniques. *Fed. R. Civ. P. 30(b)(5)(B).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.40[2].*
- *Fed. R. Civ. P. 30(b)(5)(A)* (officer's duties before deposition).

[4] Examination and Cross-Examination Proceed As at Trial

[a] Federal Rules of Evidence Apply, With Two Exceptions

Examination and cross-examination may proceed as permitted at trial under the provisions of the Federal Rules of Evidence, except Rule 103 (rulings on evidence) and Rule 615 (exclusion of witnesses on request of party). *Fed. R. Civ. P. 30(c)(1).*



Strategic Point--Deponent's Counsel:

You may learn a great deal about the case from the opposing party's deposition of your client. The

opposing party's questioning may take the client in some directions you had not anticipated and uncover facts the client did not provide to you and for which you had not probed. For the first time, you are hearing your client address pieces of the story under oath, and issues and facts may surface that did not appear when the client was telling the story to you in your office. The line of questioning may also offer some clues as to opposing counsel's theory of the case and information opposing counsel has, sometimes matters that you have yet to discover.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.42[1][a].*
- *Fed. R. Civ. P. 30(c)(1)* (examination and cross-examination).

[b] Adverse Party May Access Materials Used to Refresh Deponent's Memory

Because the Federal Rules of Evidence generally apply to depositions, Rule 612 allows an adverse party access to materials used to refresh a deponent's memory. *United States ex rel. Bagley v. TRW, Inc., 212 F.R.D. 554, 565 (C.D. Cal. 2003)* (motion to compel production of document used to refresh deponent's memory granted).

Under Rule 612, if a witness uses a writing to refresh his or her memory either while testifying or before testifying, if the court in its discretion determines it necessary, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce into evidence those portions of the writing that relate to the testimony of the witness. *Fed. R. Evid. 612.*

Warning:

Rule 612 entitles the adverse party to discovery of any document used to refresh the deponent's memory, even one otherwise subject to privilege. *Coryn Group II, LLC v. O.C. Seacrets, Inc., 265 F.R.D. 235, 240 (D. Md. 2010)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.42[1][b].*
- *Weinstein's Federal Evidence (2d ed.) § 612.02.*
- *Fed. R. Civ. P. 30(c)(1)* (examination and cross-examination).
- *Fed. R. Evid. 612* (writing used to refresh memory).

[c] Deponent and Deponent's Counsel May Not Confer During Questioning

Examination and cross-examination in a deposition proceed as at trial. *Fed. R. Civ. P. 30(c)(1).* Consequently, a questioning attorney is entitled to have the witness, and the witness alone, answer questions. When a question is pending, the deponent arguably may not confer with his or her attorney, except to assert a privilege. *Hall v. Clifton Precision, 150 F.R.D. 525, 528-529 (E.D. Pa. 1993)* (witness's own lawyer not entitled to act as intermediary, interpreting questions, deciding which questions witness should answer, and helping witness to formulate answers).

Circuit Split:

Courts differ as to whether the deponent and counsel may confer during recesses. Some courts prohibit private conferences during recesses. *Honeywell Int'l, Inc. v. Universal Avionics Sys. Corp., 289 F. Supp. 2d 493, 499 n. 30 (D. Del. 2003)* (counsel for witness may not consult with witness regarding testimony while witness remains under examination by opposing party); *Hall v. Clifton Precision, 150 F.R.D. 525, 528-529 (E.D. Pa. 1993)* (private conferences prohibited during deposition and recesses). Other courts reason that such conferences are allowed, as they are during recesses at trial, as long as the attorney for the deponent does not demand a break in the questions or demand a conference between questions and answers. *See In re Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 621-622 (D. Nev. 1998)* (refusing to adopt the strict prohibitions of *Hall*).

The extent to which a court may limit communications during deposition requires a balancing of several factors, including:

1. The deponent's right to counsel;

2. The importance of ensuring that depositions are free from impermissible coaching and reflect true and accurate testimony; and

3. The practical necessity of permitting the free flow of communications between clients and their counsel.

See United States v. Philip Morris, Inc., 212 F.R.D. 418, 420 (D.D.C. 2002) (court refused to adopt categorical prohibition on communications during depositions while acknowledging that, as a general rule, parties have no right to confer with counsel).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.42[2].*
- *Fed. R. Civ. P. 30(c)(1)* (examination and cross-examination).

[5] Other Parties May Transmit Written Questions

In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition. *Fed. R. Civ. P. 30(c)(3)*. The party taking the deposition must transmit the written questions to the officer, who must propound them to the witness and record the answers verbatim. *Fed. R. Civ. P. 30(c)(3)*. This procedure is not commonly used, but may be useful if the expense of traveling to a distant deposition is prohibitive, and the questions are non-controversial and relatively unimportant.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.44.*
- *Fed. R. Civ. P. 30(c)(3)* (participating through written questions).

[6] Examination Proceeds Subject to Objections Noted in Record

The officer must note on the record of the deposition all objections made at the time of the examination to any of the following issues:

1. The qualifications of the officer taking the deposition;

2. The manner of taking the deposition;

3. The evidence presented;

4. The conduct of any party; or

5. Any other aspect of the proceedings.

Fed. R. Civ. P. 30(c)(2).

The examination must proceed, with the testimony being taken subject to the objections. *Fed. R. Civ. P. 30(c)(2)*; *see § 8.23 below*.

Exception:
The taking of a deposition must be suspended, on demand of the objecting party or the deponent, for the time necessary to make a motion for a protective order. *Fed. R. Civ. P. 30(d)(3)(A)*; *see § 8.25 below*.

Exception:
A deponent may decline to answer a question in order to preserve a privilege. *See Fed. R. Civ. P. 30(c)(2)*; *see § 8.24 below* .

If objections are anticipated, counsel should determine, prior to the deposition, whether the court will consider objections via telephone. Many courts will now take telephone calls in order to rule on such issues without the need to suspend the deposition.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.43[1].*
- *Fed. R. Civ. P. 30(c)(2)* (objections).

[7] Officer Must Indicate End of Deposition on Record and Set Forth Stipulations Made by Counsel

At the end of the deposition, the officer must state on the record that the deposition is complete and must set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters. *Fed. R. Civ. P. 30(b)(5)(C)*; *see also* Ch. 15 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.40[4].*
- *Fed. R. Civ. P. 30(b)(5)(C)* (officer's duties after deposition).

[8] Any Party May Arrange for Transcription or Additional Method of Recording

Any party may arrange for a transcription to be made from the recording of a deposition. *Fed. R. Civ. P. 30(b)(3)(A).*

With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript must be made at that party's expense unless the court otherwise orders. *Fed. R. Civ. P. 30(b)(3)(B).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 30.23[3], 30.23[4].*
- *Federal Litigation Guide P 17.04[1].*
- *Bender's Federal Practice Forms* Form No. 30:23.
- *Fed. R. Civ. P. 30(b)(3)* (method of recording deposition).
- *Meacham v. Church, 2010 U.S. Dist. LEXIS 38393, at *11-*12 (D. Utah Apr. 19, 2010)* (party may not be appointed "officer of the court" for purposes of recording video deposition).



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§ 8.21 Preparing Deponent

The deponent should be prepared for the deposition in the same way he or she would be prepared for trial. The deponent should be warned not to assume the informal setting of the deposition means the situation is less serious than examination at trial.

Counsel should cover at least the following issues with the deponent before the deposition:

1. An overview of the topics to be covered.

2. The strategies the questioner will use, and strategies for defending the deposition.

3. That the deponent should not volunteer nonresponsive information in response to questions, and should confine testimony to what the deponent actually knows and recalls. The deponent should not guess or speculate.

4. The concept of refreshing recollection. If after being refreshed with a document the deponent has no independent recollections, the deponent should say so, and clarify that his or her recollection is not refreshed. The deponent should not unthinkingly adopt, as the deponent's own recollection, language contained in documents shown to the deponent, unless the deponent's memory is actually refreshed.

5. That the deponent should avoid making conversational banter with the questioner.

6. The purposes of objections, and how the deponent should respond to them.

7. The manner for responding to questions calling for privileged information (*e.g.,* attorney-client communications, and attorney work product).

PRACTICE RESOURCES:

- *Federal Litigation Guide PP 18.01, 18.04.*



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§ 8.22 Checklist for Objecting to Conduct of Oral Deposition

☐ Attend deposition as noticed. *See § 8.09 above*.

☐ If party giving notice fails to attend and proceed with the deposition, file and serve motion for award of expenses, in accordance with standard motion procedure. *See § 8.26 below*.

☐ If deponent fails to attend because of noticing party's failure to serve the deponent with a subpoena, file and serve motion for award of expenses, in accordance with standard motion procedure. *See § 8.26 below*.

☐ Make objections during deposition to any of the following:

- ○ Qualifications of deposition officer. *See § 8.23[1] below*.
- ○ Competency of witness or testimony. *See § 8.23[2] below*.
- ○ Errors or irregularities during the deposition. *See § 8.23[3] below*.

☐ State objections concisely and in non-argumentative and non-suggestive manner. *See § 8.23[4] below*.

☐ Instruct witness not to answer only when necessary. *See § 8.24 below*.

- ○ To preserve a privilege;

- ○ To enforce a limitation directed by the court; or
- ○ To present a motion to terminate or limit examination.

☐ Determine if deposition is being conducted in manner that would justify protective order. If so, demand that deposition be suspended for time necessary to move for order. *See § 8.25 below*.

☐ If deponent wants to review transcript before it is final, make request for review before deposition is concluded. *See § 8.28 below*.

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§ 8.23 Making Timely Objections

[1] Objecting to Qualifications of Deposition Officer

Objections based on the qualifications of the deposition officer are waived unless made:

1. Before the deposition begins; or

2. Promptly after the basis for disqualification becomes known, or with reasonable diligence could have been known.

Fed. R. Civ. P. 32(d)(2).

[2] Objecting to Competence of Witness or Testimony

Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the deposition, unless the ground of the objection is one that might have been corrected at that time. *Fed. R. Civ. P. 32(d)(3)(A)*. These types of objections should be made as early as possible, if the witness is suffering from a temporary incapacity, such as a speech or memory problem caused by medication.

[3] Objecting to Errors or Irregularities During Deposition

Errors and irregularities occurring at the oral examination in the following matters are waived unless objection to them is timely made during the deposition:

1. The manner of taking the deposition;

2. The form of the questions or answers;

3. The oath or affirmation;

4. A party's conduct; or

5. Other matters that might have been corrected at that time.

Fed. R. Civ. P. 32(d)(3)(B).

[4] Making Objections Concise and Non-Argumentative

Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. *Fed. R. Civ. P. 30(c)(2).*

If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose on the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result of the impediment, delay, or conduct. *Fed. R. Civ. P. 30(d)(2).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.43.*
- *Federal Litigation Guide PP 18.03, 18.04.*
- *Fed. R. Civ. P. 30(c)(2)* (objections).
- *Fed. R. Civ. P. 30(d)(2)* (sanction).
- *Fed. R. Civ. P. 32(d)(3)* (waiver of objections).



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§ 8.24 Instructing Witness Not to Answer

A person may instruct a deponent not to answer only when necessary to:

1. Preserve a privilege;

2. Enforce a limitation directed by the court; or

3. Present a motion to terminate or limit the examination.

Fed. R. Civ. P. 30(c)(2); *see Fed. R. Civ. P. 30(d)(3)* (motion to terminate or limit deposition).



Warning:

Instructing a witness not to answer without justification can result in a motion to compel and sanctions awarded against the party objecting to the questioning. *See Fed. R. Civ. P. 37(a)(5)(A)*; *see also § 17.10 below*.

When an entity has designated an individual to testify on its behalf pursuant to Rule 30(b)(6), generally the scope of the questioning is not limited to the matters described in the notice. *See Fed. R. Civ. P. 30(b)(6)*; *see also § 8.10[1] above*. Under the majority view, counsel for the entity cannot instruct the individual testifying on behalf of the entity not to answer merely because a question is beyond that scope. *See Dravo v. Liberty Mut. Ins. Co., 164 F.R.D. 70, 75 (D. Neb. 1995)* (counsel improperly instructed witness not to answer questions allegedly outside scope of Rule 30(b)(6) subpoena); *but see Paparelli v. Prudential Ins. Co., 108 F.R.D. 727, 730 (D. Mass. 1985)* (minority view: "if a party opts to employ the procedures of Rule 30(b)(6) ... to depose the representative of a corporation, that party must confine the examination to the matters stated 'with reasonable particularity' which are contained in the Notice of Deposition").



Strategic Point--Party Objecting to Question Beyond Scope of Notice:

If desired, counsel may object and note on the record that the answers to questions beyond the scope of the designation are not intended as the answers of the entity and do not bind the entity. *Detoy v. City &*

County of San Francisco, 196 F.R.D. 362, 367 (N.D. Cal. 2000) (suggesting that, prior to trial, counsel may request jury instructions from trial judge that such answers were merely answers or opinions of individual fact witnesses, not admissions of party). Counsel may also seek a protective order if the questioner pursues topics outside the scope of the notice. *Paparelli v. Prudential Ins. Co., 108 F.R.D. 727, 730 (D. Mass. 1985)* (even if counsel properly instructs witness not to answer, party instructing witness not to answer should immediately seek protective order); *see also § 8.10[1] above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.43[2].*
- *Federal Litigation Guide P 18.03.*
- *Fed. R. Civ. P. 30(c)(2)* (instructing witness not to answer).



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§ 8.25 Moving for Protective Order During Deposition

At any time during a deposition, a party or the deponent may move for a protective order in the court in which the action is pending or the court in the district where the deposition is being taken. *Fed. R. Civ. P. 30(d)(3)(A)*; *see also Fed. R. Civ. P. 26(c)*.

On demand of the objecting party or deponent, the deposition must be suspended for the time necessary to obtain an order. *Fed. R. Civ. P. 30(d)(3)(A)*.

The party seeking a protective order must show that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party. *Fed. R. Civ. P. 30(d)(3)(A)*.

A party seeking to limit discovery must make a strong showing for limitation and a particular and specific need for the protective order. *Methode Elecs., Inc. v. Finisar Corp., 205 F.R.D. 552, 554 (N.D. Cal. 2001)* (motion for protective order denied when no showing that questions at issue were unduly burdensome to answer, implicated privileged information, or could improperly be used to the detriment of defendant's legal position in action).

On consideration of the motion for protective order, the court may order that the deposition be terminated or may limit the scope and manner of the taking of the deposition. *Fed. R. Civ. P. 30(d)(3)(B)*; *see Fed. R. Civ. P. 26(c)* (protective orders).

If terminated, the deposition may be resumed only on the order of the court in which the action is pending. *Fed. R. Civ. P. 30(d)(3)(B)*.

The court may make an award of expenses to the prevailing party incurred in relation to the motion for a protective order. *Fed. R. Civ. P. 30(d)(3)(C)*; *see Fed. R. Civ. P. 37(a)(5)* (order regarding payment of expenses); *see also § 17.10 below*.

For further discussion of protective orders, *see* Ch. 16 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.51.*
- *Bender's Federal Practice Forms* Form Nos. 30:60-30:65.
- *Fed. R. Civ. P. 26(c)* (protective orders).
- *Fed. R. Civ. P. 30(d)(3)* (motion to terminate or limit deposition).



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§ 8.26 Moving for Award of Expenses

If the noticing party fails to attend and proceed with the deposition, the other parties and attorneys attending pursuant to the notice may, on motion, recover the reasonable expenses incurred in attending, including reasonable attorney's fees. *Fed. R. Civ. P. 30(g)(1).*

If a party noticing the deposition of a nonparty deponent fails to serve a subpoena on the deponent, and the deponent consequently does not attend, the other parties and attorneys attending pursuant to the notice may, on motion, recover the reasonable expenses incurred in attending, including reasonable attorney's fees. *Fed. R. Civ. P. 30(g)(2).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 30.72[2], 30.73.*
- *Bender's Federal Practice Forms* Form Nos. 30:90, 30:91.
- *Fed. R. Civ. P. 30(g)* (failure to attend deposition or serve subpoena).



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§ 8.27 Checklist for Obtaining Copies of and Reviewing Transcript

☐ Deponent or party requesting review:

○ Review transcript, if review was requested, after being notified by deposition officer that it is available. *See § 8.28[1] below*.

○ Make changes within 30 days after receiving notification of availability of transcript. *See § 8.28[2] below*.

○ Sign statement reciting changes and giving reasons for changes. *See § 8.28[2] below*.

☐ Noticing party:

○ Store deposition received from deposition officer to protect it against loss, destruction, tampering, or deterioration. *See §§ 8.29*, *8.30 below*.

○ Do not file deposition with court or clerk until used in proceeding or court orders filing. *See § 8.32 below*.

○ If deposition is to be used in proceeding or court orders filing, give notice of filing to all other parties. *See § 8.32 below*.

☐ Opposing party:

- Obtain copy of transcript or other recording of deposition from deposition officer. *See § 8.31 below*.
- File motion to suppress portions subject to errors or irregularities. *See § 8.33 below*.

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§ 8.28 Requesting Review of Transcript

[1] Meeting Prerequisite for Review

The deponent may review and make changes to the transcript of a deposition only if the deponent or a party has requested that review before completion of the deposition. *Fed. R. Civ. P. 30(e)(1).*

[2] Reviewing and Making Changes

If requested by the deponent or a party before completion of the deposition, the deponent has 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording. *Fed. R. Civ. P. 30(e)(1)(A).* The 30-day correction period begins on notification of availability, not possession of the transcript of the recording by the deponent. *See Hambleton Bros. Lumber Co. v. Balkin Enters., 397 F.3d 1217, 1224 (9th Cir. 2005)* (transcript available on December 31; corrections made on February 1 untimely).

The deponent must sign a statement reciting any changes in form or substance and giving the reasons for making the changes. *Fed. R. Civ. P. 30(e)(1)(B).* While corrections may be made in form or substance, changes must be corrective and not contradictory. *Hambleton Bros. Lumber Co. v. Balkin Enters., 397 F.3d 1217, 1225-1226 (9th Cir. 2005)* (changes, not corrections but rewrites intended to manufacture issue of material fact to avoid summary judgment, excluded).

Warning:

Only the deponent himself or herself, not deponent's counsel, can change the deponent's testimony. *See Adams v. Allied Sec. Holdings, 236 F.R.D. 651, 652 (C.D. Cal. 2006)* (changes to plaintiff's testimony not personally signed by plaintiff excluded). If the procedural dictates of Rule 30(e) are not followed, the district court may exercise its discretion to strike any changes. *See, e.g., Hambleton Bros. Lumber Co. v. Balkin Enters., 397 F.3d 1217, 1226 (9th Cir. 2005)* (no abuse of discretion in striking deposition errata when Rule 30(e) procedure was not followed).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.60*.
- *Federal Litigation Guide P 18.03[8]*[8.-2].
- *Bender's Federal Practice Forms* Form Nos. 30:70, 30:71.
- *Fed. R. Civ. P. 30(e)(1)* (review of transcript; statement of changes).



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§ 8.29 Certifying and Delivering Deposition

[1] Preparing Certificate

The deposition officer must certify that:

1. The witness was duly sworn by the officer; and

2. The deposition is a true record of the testimony given by the witness.

Fed. R. Civ. P. 30(f)(1).

The certificate must be in writing and accompany the record of the deposition. *Fed. R. Civ. P. 30(f)(1).*

[2] Annexing Documents and Things

Documents and things produced for inspection during the examination of a witness must, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party. *Fed. R. Civ. P. 30(f)(2)(A).*

Exception:
If the person producing the materials desires to retain them, the person may do either of the following:

1. Offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals; or

2. Offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition.

Fed. R. Civ. P. 30(f)(2)(A).

Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case. *Fed. R. Civ. P. 30(f)(2)(B).*

[3] Indicating Review Was Requested and Appending Changes

The deposition officer must indicate in the certificate accompanying the deposition whether any review was requested. *Fed. R. Civ. P. 30(e)(2).* If review was requested, the officer must append any changes made by the deponent during the 30-day review period. *Fed. R. Civ. P. 30(e)(2).*

[4] Delivering Deposition to Attorney Who Arranged for Transcript or Recording

Unless otherwise ordered by the court, the officer must:

1. Securely seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]"; and

2. Promptly send the deposition to the attorney who arranged for the transcript or recording.

Fed. R. Civ. P. 30(f)(1).

[5] Storing Deposition

The attorney to whom the deposition is sent must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. *Fed. R. Civ. P. 30(f)(1).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 30.61, 30.63.*
- *Bender's Federal Practice Forms* Form Nos. 30:80-30:82, 30:85.
- *Fed. R. Civ. P. 30(e)(2)* (indicating review and changes).
- *Fed. R. Civ. P. 30(f)* (certification and delivery).



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1-8 Moore's AnswerGuide: Federal Discovery Practice § 8.30

§ 8.30 Retaining Stenographic Notes or Copy of Recording

Unless otherwise ordered by the court or agreed by the parties, the deposition officer must retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. *Fed. R. Civ. P. 30(f)(3).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.64.*
- *Fed. R. Civ. P. 30(f)(3)* (copies of transcript or recording).



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Chapter 8 ORAL DEPOSITIONS
PART G: OBTAINING COPIES OF AND REVIEWING TRANSCRIPT

1-8 Moore's AnswerGuide: Federal Discovery Practice § 8.31

§ 8.31 Obtaining Copy of Transcript or Recording

The deposition officer must furnish a copy of the transcript or other recording of the deposition to any party or to the deponent, on payment of reasonable charges by the person requesting the copy. *Fed. R. Civ. P. 30(f)(3).*

If a deposition is filed with the court, a nonparty may obtain a copy unless the deposition was filed subject to a protective order preventing public disclosure. *See Fed. R. Civ. P. 26(c)(1)(F)* (order for sealing deposition); *see also § 16.28 below.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.64.*
- *Fed. R. Civ. P. 30(f)(3)* (copies of transcript or recording).



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1-8 Moore's AnswerGuide: Federal Discovery Practice § 8.32

§ 8.32 Filing Deposition When Used in Proceeding or Court Orders Filing

Discovery requests and responses, including depositions, generally are not filed with the court until they are used in the proceeding or the court orders filing. *Fed. R. Civ. P. 5(d)(1).*

When a deposition is filed with the court, the party taking the deposition must give prompt notice of its filing to all other parties. *Fed. R. Civ. P. 30(f)(4).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.62.*
- *Bender's Federal Practice Forms* Form Nos. 30:83, 30:84.
- *Fed. R. Civ. P. 30(f)(4)* (notice of filing).



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1-8 Moore's AnswerGuide: Federal Discovery Practice § 8.33

§ 8.33 Moving to Suppress Deposition for Irregularities or Errors in Preparation

Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rule 30 are waived unless a motion to suppress the deposition or some part of it is made with reasonable promptness after the defect is, or with due diligence might have been, ascertained. *Fed. R. Civ. P. 32(d)(4)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 32.47*.
- *Bender's Federal Practice Forms* Form No. 32:60.
- *Fed. R. Civ. P. 32(d)(4)* (waiver of objections to completing and returning depositions).



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Chapter 9 WRITTEN DEPOSITIONS

1-9 Moore's AnswerGuide: Federal Discovery Practice 9.syn

§ 9.syn Synopsis to Chapter 9: WRITTEN DEPOSITIONS

§ 9.01 Procedural Context--Depositions by Written Questions

§ 9.02 Checklist for Planning Depositions by Written Questions

§ 9.03 Evaluating Benefits and Alternatives

[1] Considering Other Discovery Devices

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§ 9.17 Propounding Cross, Redirect, and Recross Questions

[1] Parties May Serve Cross Questions Within 14 Days of Notice

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§ 9.18 Checklist for Taking Depositions by Written Questions

§ 9.19 Taking Depositions by Written Questions

[1] Noticing Party Must Deliver Notice and Questions Served to Deposition Officer

[2] Deposition Officer Must Take Testimony of Deponent

[3] Deponent May Request Review of Completed Deposition

[4] Officer Must Certify and Deliver Deposition

[5] Deposition Is Not Filed With the Court

[6] Noticing Attorney Must Safely Store Deposition Transcript

[7] Motion to Suppress Must Be Made Promptly or Errors Are Waived



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Chapter 9 WRITTEN DEPOSITIONS
PART A: PROCEDURAL CONTEXT

1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.01

§ 9.01 Procedural Context--Depositions by Written Questions

A deposition by written questions is a discovery tool that can be used to obtain testimony from either a party or nonparty witness, without incurring the expense of an oral deposition. In depositions by written questions, all questions, including cross, redirect and recross questions, are prepared in advance and served on all parties. The questions are also delivered to a deposition officer who propounds the questions on the deponent, and records the deponent's responses.

The procedures that apply to oral depositions (*see* Ch. 8, *above*), such as compelling the attendance of a non-party with a subpoena, also generally apply to depositions by written questions.

Depositions by written questions can be efficient and cost-effective, but are not as commonly used as oral depositions, due to their inherent limitations, such as the lack of spontaneity, the inability to observe the witness' demeanor, and the possibility that the witness will be coached before testifying.

Depositions by written questions may be an appropriate discovery method when the deponent is a witness whose credibility is not at issue such as a custodian of records, or a nonparty whose testimony is predictable or not controversial in light of the record.



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Chapter 9 WRITTEN DEPOSITIONS
PART B: PLANNING DEPOSITIONS BY WRITTEN QUESTIONS

1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.02

§ 9.02 Checklist for Planning Depositions by Written Questions

☐ Determine if a deposition by written questions is necessary or advantageous under the circumstances of the case. *See § 9.03[2] -[4] below.*

- ○ Written depositions would be less expensive and/or less burdensome.
- ○ Written depositions will be required for discovery in a foreign country.
- ○ Identity of the deponent must be kept confidential.

☐ Looking at the circumstances of the case, determine if the advantages of a deposition by written questions are outweighed by the inherent limitations of this type of discovery method. *See § 9.03[5] below.*

- ○ Lack of extensive or probing follow-up questions.
- ○ Inability to observe the demeanor of a witness.
- ○ Potential coaching of the witness by counsel before deposition.

☐ Determine who will be deposed by written questions. *See § 9.05 below.*

- ○ Individuals.
- ○ Entity that will designate individuals to testify.

☐ If the proposed deponent is opposing counsel, determine whether circumstances exist for the deposition. *See § 9.05 below*.

- ○ No other means exist to obtain the information than to depose opposing counsel;
- ○ The information sought is relevant and non-privileged; and
- ○ The information is crucial to case preparation.

☐ Determine whether leave of court is required to take the deposition because the deponent is incarcerated. *See § 9.06[2] below*.

☐ Determine if opposing counsel will stipulate to allow the deposition if any of the following circumstances exist, and for which leave of court is normally required: *See also § 9.06[2] below*.

- ○ Proposed deposition would result in more than 10 depositions by the party seeking discovery;
- ○ The individual to be examined has already been deposed in the case; or
- ○ The party seeking discovery wants to take the deposition before the parties have agreed to a discovery plan.

☐ If leave of court is required, draft a motion for leave, in accordance with standard motion procedure and local rule requirements, indicating that: *See § 9.07 below*.

- ○ The discovery sought is not unreasonably cumulative or duplicative, or is not obtainable from another source that is more convenient, less burdensome, or less expensive;
- ○ The party seeking discovery has not had sufficient opportunity through discovery to obtain the sought information; or
- ○ The burden or expense of the proposed discovery does not outweigh its likely benefit, taking into consideration the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

☐ Consider videotaping or using another nonstenographic method of recording the deposition. *See § 9.03[1] below*.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Written Depositions



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1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.03

§ 9.03 Evaluating Benefits and Alternatives

[1] Considering Other Discovery Devices

A party seeking discovery should consider whether the information sought through a written deposition can be more effectively obtained through a different discovery device. For example, interrogatories may be a more efficient way of obtaining the information, but interrogatories can only be propounded on other parties, and the number of questions is limited. *See Fed. R. Civ. P. 33(a)(1).*

The cost-saving or other benefits of a written deposition should also be weighed against the inherent limitations of the discovery device. If it is important to the case to evaluate the witness' demeanor and credibility, an oral deposition may be more appropriate, especially if the opposing party is likely to seek a protective order to require that discovery be taken by oral examination. *See Fed. R. Civ. P. 26(c)(3).*

If counsel decides to proceed with a deposition by written questions, counsel should also consider having the questions and answers recorded by videotape or other nonstenographic method of recording.

[2] Written Depositions May Be Cost-Effective

Written depositions are less expensive and less burdensome than oral depositions because they only require that the deposition officer and the deponent be present, and the questions are submitted in advance.

Written depositions may be particularly useful to:

1. Obtain the testimony of nonparty witnesses without incurring travel expenses;

2. Obtain the testimony of witnesses in a foreign country that does not permit oral depositions;

3. Complete the examination of a witness whose oral deposition has been adjourned or ordered resumed;

4. Obtain the testimony of a nonparty whose testimony is not controversial, and/or is predictable, in light of the documentary record;

5. Obtain the testimony of a custodian of records whose credibility is not at issue;

6. Obtain specific information from a large number of people, such as the members of a class; or

7. Determine if the subsequent oral deposition of a witness is necessary.



Warning:

Counsel taking the written deposition of a witness may be precluded from taking an oral deposition of that witness. *See Fed. R. Civ. P. 30(a)(2)(A)(i), 31(a)(2)(A)(i)* (limits on the number of oral and written depositions that may be taken).

[3] Written Depositions May Be Used for Discovery in Other Countries

If discovery is sought in another country, the court has discretion to order the deposition to be taken by written questions instead of oral questions. This discretion must be exercised in a way that is fair to both sides, depending on the circumstances of the individual case. *See SEC v. Tanner, 2005 U.S. Dist. LEXIS 18753, at *9 (D. Kan. 2005)* (court has discretion to order either an oral or written deposition, but this discretion must ensure justice to both sides); *see also DBMS Consultants v. Computer Assocs. Int'l, 131 F.R.D. 367, 370 (D. Mass. 1990)* (written deposition to be taken in Australia due to the extensive expense of travel); *but see United States v. $160,066.98 from Bank of Am., 202 F.R.D. 624, 629-631 (S.D. Cal. 2001)* (court rejected request for written deposition in Pakistan, as costs of travel were foreseeable at start of litigation).

Before drafting a request for discovery, counsel should verify that the actual discovery and manner of discovery sought will be allowed under the laws of the foreign nation.

[4] Written Depositions May Allow Identity of Opponent to Be Kept Confidential

The identity of the individual from whom discovery is sought is not generally kept confidential. For example, interrogatories are signed by the party responding, and the parties are entitled to be present and participate in the examination of the deponent in an oral deposition. *See Fed. R. Civ. P. 30(c), 33(b)(5).*

By contrast, a written deposition can be used to obtain discovery from a deponent whose identity must be kept confidential. *See Borzillieri v. American Nat'l Red Cross, 139 F.R.D. 284, 288-289 (W.D.N.Y. 1991)* (blood donor whose identity was to be kept confidential in a case involving the transmission of AIDS by a blood transfusion, could be deposed anonymously by written deposition).

[5] Written Depositions Have Inherent Limitations

Written depositions may be an appropriate form of discovery in certain situations, but they are used less frequently than oral depositions because of their inherent limitations. Particular disadvantages of written depositions include:

1. The written question format does not permit extensive or probing follow-up questioning;

2. The demeanor of the witness cannot be observed; and

3. All questions are served in advance, so the witness' answers may be coached by counsel before the deposition.

See Mill Run Tours, Inc. v. Khashoggi, 124 F.R.D. 547, 549 (S.D.N.Y 1989) (written depositions should not routinely

replace oral depositions).

The specific circumstances of the case must be reviewed to evaluate the adequacy of a written deposition. *See United States v. $160,066.98 from Bank of Am., 202 F.R.D. 624, 629-631 (S.D. Cal. 2001)* (plaintiff demonstrated that a written deposition in Pakistan would be inadequate when (1) the existence of the deponent was in question; (2) the demeanor of the witness could not be observed; (3) the court needed to evaluate the deponent's demeanor; (4) the testimony to be elicited did not lend itself to advance preparation of follow-up).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 31.02*.
- *Fed. R. Civ. P. 26(c)* (protective orders).
- *Fed. R. Civ. P. 30(a)(2)(A)(i)*, *31(a)(2)(A)(i)* (limits on the number of oral and written depositions that may be taken).
- *Fed. R. Civ. P. 30(c)* (parties entitled to be present and examine deponent at oral depositions).
- *Fed. R. Civ. P. 33(a)(1)* (limitations of interrogatories).
- *Fed. R. Civ. P. 33(b)(5)* (interrogatories signed by the responding party or its attorney).



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1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.04

§ 9.04 Considering Numeric Limitations

There is a limit of 10 depositions per side in an action, unless there is an agreement or order to the contrary. In other words, only 10 depositions, either oral or written, can be taken by the plaintiffs, by defendants or by third party defendants, unless the parties stipulate to the contrary, or the court grants leave to take additional depositions. *See Fed. R. Civ. P. 31(a)(2)(A)(i)*; *see also Fed. R. Civ. P. 29(a)* (stipulations); Ch. 15 *below*.

If the party seeking discovery notices the deposition of an entity, the deposition counts as only one deposition for the 10-per-side limit, even though the entity may designate several witnesses to testify on its behalf. *See Fed. R. Civ. P. 30(b)(6)*; *see also § 9.09[2] below*.

PRACTICE RESOURCES:

- *Bender's Federal Practice Forms* Form No. 31:4.
- *Fed. R. Civ. P. 26(d), (f)* (stipulation or leave of court required to take depositions before development of discovery plan).
- *Fed. R. Civ. P. 30(b)(6)* (deposition of entity counts as one deposition).
- *Fed. R. Civ. P. 31(a)(2)(A)(i)* (10-per-side limit for depositions by written questions).



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1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.05

§ 9.05 Determining Who May Be Deposed

A party may take the written deposition of the following persons or entities:

1. Any person or party to the action. *See Fed. R. Civ. P. 31(a)(1).*

2. Public or private corporations in accordance with Rule 30(b)(6). *See Fed. R. Civ. P. 31(a)(4)*; *see also § 8.10 above*.

3. An association or a governmental agency in accordance with Rule 30(b)(6). *See Fed. R. Civ. P. 31(a)(4)*; *see also § 8.10 above*.

4. Opposing party's attorney. *See § 8.05[3] above*.

The rules do not prohibit a party from taking the deposition of an opposing party's attorney, but it is extremely rare, and allowed only under limited circumstances, where propriety and need are shown. *See American Casualty Co. v. Krieger, 160 F.R.D. 582, 585 (S.D. Cal. 1995)* (written deposition of opposing counsel not prohibited by rules); *see also Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986)* (deposition of opposing party's attorney allowed under limited circumstances, where there following is shown: (1) there is no other way to obtain the information; (2) the information sought is relevant and nonprivileged; (3) information sought is crucial to the preparation of the case); *§ 8.05[3] above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 31.03*.
- *Fed. R. Civ. P. 31(a)* (when depositions by written questions may be taken).



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1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.06

§ 9.06 Determining Whether Leave of Court Is Required

[1] Leave of Court Generally Is Not Required

Leave of court is generally not required to take a written deposition. *See Fed. R. Civ. P. 31(a)(1).*

[2] Circumstances When Leave of Court Is Required

Leave of court is required to take a written deposition when the person to be deposed is incarcerated. *See Fed. R. Civ. P. 31(a)(2)(B).*

Without the written stipulation of the parties (*see* Ch. 15 *below*), leave of court is required to take a written deposition when: *See § 9.06[2] below.*

1. A proposed deposition would result in more than 10 depositions being taken by either side. *See Fed. R. Civ. P. 31(a)(2)(A)(i).*

2. The person to be examined has already been deposed in the case. *See Fed. R. Civ. P. 31(a)(2)(B).*

3. The party seeks to take a deposition before the parties have agreed to a discovery plan. *See Fed. R. Civ. P. 31(a)(2)(A)(iii)*; *see also Fed. R. Civ. P. 26(d), (f).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 31.04.*
- *Bender's Federal Practice Forms* Form Nos. 31:5, 31:6.
- *Fed. R. Civ. P. 31(a)* (when deposition may be taken).



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1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.07

§ 9.07 Applying Limitations on Excessive or Unreasonable Discovery

Discovery by written depositions will be limited if the court determines that:

1. The discovery sought is unreasonably cumulative or duplicative, or can be obtained from another source that is more convenient, less expensive, or less burdensome;

2. The party seeking discovery has already had ample opportunity by discovery in the action to obtain the information sought; or

3. The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

See Fed. R. Civ. P. 26(b)(2); *see also* Ch. 2 *above*.

PRACTICE RESOURCES:

- *Fed. R. Civ. P. 26(b)(2)* (limitations on frequency and extent of discovery).



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Chapter 9 WRITTEN DEPOSITIONS
PART C: GIVING NOTICE OF DEPOSITIONS BY WRITTEN QUESTIONS

1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.08

§ 9.08 Checklist for Giving Notice of Depositions by Written Questions

☐ Determine the time and place for the deposition:

○ Time of deposition must be at least 28 days after the service of notice (extended to take into account time computation under Rule 6) unless stipulation of the parties or order of the court provides otherwise. This ensures adequate time for service of cross, redirect, and recross questions. *See § 9.10 below*.

○ Deposition of nonparty must be within 100 miles of place where deponent resides, is employed, or regularly transacts business. *See § 9.09[4] below*.

☐ Prepare notice of taking deposition by written questions:

○ Set forth name and address of deponent, if known, or set forth general description sufficient to identify person or particular class of group to which person belongs. *See § 9.09[2] below*

○ State name of descriptive title and address of deposition officer.*See § 9.09[3] below*

○ Specify time and place of deposition. *See § 9.09[4] below*

○ If entity is named as deponent, describe with reasonable particularity the matters on which examination is requested.

☐ Prepare questions to be propounded to deponent. *See § 9.10 below*.

☐ Serve notice and questions on all parties. *See § 9.10 below*.

☐ Serve party deponent with accompanying request for production of documents, electronically stored information, and things at the taking of the deposition, if appropriate. *See § 9.10 below*.

☐ Serve nonparty deponent with subpoena to compel attendance and testimony and, if desired, production. *See § 9.10 below*.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Written Depositions



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1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.09

§ 9.09 Preparing Notice

[1] Preliminary Considerations

A notice for written deposition must take into account the time required for the exchange of cross, redirect and recross questions. If there is a need to get the discovery on an expedited basis, the party noticing the deposition should consider bring a motion requesting the court to shorten the time for serving questions. *See Fed. R. Civ. P. 31(a)(5).*

If a request for production or subpoena will be served with the notice of written deposition, the party giving notice should comply with the requirements for the request or subpoena to avoid any delay in the deposition. *See Fed. R. Civ. P. 34, 45.*

[2] Identifying Deponent

In a notice for a deposition by written questions, the deponent must be identified in one of the following ways:

1. If known, the notice must state the name and address of the person who is to answer the questions. *See Fed. R. Civ. P. 31(a)(3).*

2. If the name of the person who is to answer the questions is not known, the notice must contain a general description sufficient to identify the person or particular class or group that the person belongs to. *See Fed. R. Civ. P. 31(a)(3).*

3. A public or private corporation, association or governmental agency can be named as a deponent in accordance with the provisions of *Fed. R. Civ. P. 30(b)(6). See Fed. R. Civ. P. 31(a)(4).* The entity must then designate one or more individuals on its behalf. *See Fed. R. Civ. P. 30(b)(6)*; *see also § 8.10 above.*

[3] Identifying Deposition Officer

A notice of deposition by written questions must state the name or descriptive title and address of the officer before whom the deposition is to be taken. *See Fed. R. Civ. P. 31(a)(3).*

[4] Stating Time and Place of Deposition

A notice of deposition by written questions should set forth the time and place of the deposition, although this is not explicitly required by *Fed. R. Civ. P. 31*. In the alternative, the notice may set forth that the time and place will be determined by the deposition officer.



Warning--Location of Nonparty Deposition:

The attendance of a nonparty deponent at a written deposition may be compelled by subpoena (*see Fed. R. Civ. P. 31(a)(1)*), in which case, the location of the deposition is limited by the court's subpoena power. The deposition must take place within 100 miles of where the nonparty deponent resides, is employed, or regularly transacts business in person. *See Fed. R. Civ. P. 45(c)(3)(A)(iii)*; *see also* Ch. 14 *below*.

PRACTICE RESOURCES:

- *Bender's Federal Practice Forms* Form Nos. 31:1, 31:2, 31:3.
- *Fed. R. Civ. P. 31(a)* (when written deposition may be taken).
- *Fed. R. Civ. P. 45(c)(3)(A)(iii)* (proper locations for nonparty deponent deposition).



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1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.10

§ 9.10 Serving Notice on All Parties

The party noticing a deposition on written questions must serve the questions along with the notice of deposition. *See Fed. R. Civ. P. 31(a)(3).*

The notice of deposition and written questions must also be served on all parties to the action. *See Fed. R. Civ. P. 31(a)(3).* The notice of deposition is not filed with the court. *See Fed. R. Civ. P. 5(d)(1).*



Timing:

At least 28 days must be allowed in the notice (absent stipulation or court order) to permit all parties to formulate and serve their questions for the witness. For purposes of drafting the notice, that time period should be extended to take into account time computation pursuant to Rule 6(a) and (d). *See Fed. R. Civ. P. 6(a), (d).*



Strategic Point--Compelling Attendance:

A notice of deposition is sufficient to compel the attendance and testimony of a party deponent. *See Fed. R. Civ. P. 37(d)(1)(A)* (party's failure to appear as sanctionable conduct). To compel a nonparty deponent's appearance and testimony, a subpoena is required. *See Fed. R. Civ. P. 31(a)(1)*; *see also Fed. R. Civ. P. 45(a).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 31.10, 31.17.*
- *Fed. R. Civ. P. 31(a)(5)* (no specific time for service of deposition notice).
- *Fed. R. Civ. P. 5(d)(1)* (discovery responses not filed until used or ordered filed by the court).

- *Fed. R. Civ. P. 31(a)(1)* (compelling nonparty deponent's attendance by Rule 45 subpoena).
- *Fed. R. Civ. P. 37(d)(1)(A)* (party's failure to attend its own deposition as sanctionable conduct).



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Chapter 9 WRITTEN DEPOSITIONS
PART D: RESPONDING TO NOTICE OF DEPOSITIONS BY WRITTEN QUESTIONS

1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.11

§ 9.11 Checklist for Responding to Notice of Deposition

☐ Review notice of written deposition and accompanying documents to determine basis, if any, for opposing discovery or method of discovery.

- ○ Objections to errors or irregularities in notices. *See § 9.14 below*.
- ○ Objections to qualifications of deposition officer, if known. *See § 9.14 below*.
- ○ Objection to form of written question(s). *See § 9.14 below*.
- ○ Grounds for motion for protective order based on discovery sought or manner in which deposition will be conducted. *See § 9.15 below*.

☐ Serve written objections on party giving notice of deposition. *See § 9.14 below*.

☐ Prepare and file motion for protective order, if appropriate, in accordance with standard motion procedure, to preclude or limit discovery or to require that discovery be taken by method other than by written questions. *See § 9.15 below*.

☐ If notice names an entity as a deponent, provide party giving notice with designation of one or more individuals who will testify on entity's behalf, and the matters on which each person will testify. *See § 9.13 below*.

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Chapter 9 WRITTEN DEPOSITIONS
PART D: RESPONDING TO NOTICE OF DEPOSITIONS BY WRITTEN QUESTIONS

1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.12

§ 9.12 Considering Options and Strategy

A party or deponent served with a notice of deposition by written questions may object on the following grounds:

1. The noticing party's failure to comply with notice requirements. *See Fed. R. Civ. P. 32(d)(1)*; *see also § 9.14 below*.

2. The qualifications of a deposition officer identified in the notice. *See Fed. R. Civ. P. 32(d)(2)*; *see also § 9.14 below*.

3. The form of written questions. *See Fed. R. Civ. P. 32(d)(3)(C)*; *see also § 9.14 below*.

4. The substance of the discovery sought or the way in which discovery will be conducted. *See Fed. R. Civ. P. 26(c)*; *see also § 9.15 below*.



Strategic Point:

Serving the noticing party with objections will preserve objections that would otherwise be waived, but will not stop the deposition from going forward. The objecting party should consider whether a motion for protective order should be brought in order to prevent or limit the deposition, or to require that the discovery be taken by other means. *See Fed. R. Civ. P. 26(c)*, *see also § 9.15 below*.

If the party served with a notice of written deposition has no objections, the party should consider whether to serve cross questions to be propounded on the deponent. *See Fed. R. Civ. P. 31(a)(5)*; *see also § 9.17[1] below*.

If the deponent served with a notice of written deposition is an entity, it should designate an individual to testify on its behalf. *See Fed. R. Civ. P. 30(b)(6)*, *31(a)(3)*; *see also § 9.13 below*.

PRACTICE RESOURCES:

- Fed. R. Civ. 26(c) (protective orders).
- *Fed. R Civ. P. 30(b)(6), 31(a)(3)* (entity must designate an individual to testify on its behalf).
- *Fed. R. Civ. P. 32(d)* (waiver of objections).



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§ 9.13 Designating Individual to Testify

If the deposition notice names a public or private corporation, partnership, association, or governmental agency as a deponent, the entity must designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf. *See Fed. R. Civ. P. 30(b)(6), 31(a)(4).*

PRACTICE RESOURCES:

- *Fed. R. Civ. P. 30(b)(6), 31(a)(4)* (entity must designate an individual to testify on its behalf).



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1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.14

§ 9.14 Making Objections

All errors or irregularities in the notice of deposition are waived unless a written objection is served on the party giving notice. *See Fed. R. Civ. P. 32(d)(1).*

Objections to taking the deposition because of disqualification of the deposition officer are waived unless made:

1. Before the deposition begins; or

2. As soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

See Fed. R. Civ. P. 32(d)(2).

Objections to the form of the questions are waived unless served in writing on the propounding party. *Fed. R. Civ. P. 32(d)(3)(C).*



Timing:

Objections to the form of the question are waived if not served within the time for serving responsive questions or, if the question is a recross-question, within seven days after being served with it. *Fed. R. Civ. P. 32(d)(3)(C).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* §§ 31.15, 32.40-32.47.
- *Bender's Federal Practice Forms* Form No. 31:50.
- *Fed. R. Civ. P. 32(d)(1),(d)(2)* (objections to depositions).



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1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.15

§ 9.15 Seeking Protective Order

On motion by a party or a deponent, the court where the action is pending, or alternatively the court in the district where the deposition is to be taken, may make any order that justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. The moving party must show good cause for the order. *See Fed. R. Civ. P. 26(c).*

If the deponent or a party opposes the taking of a written deposition instead of by another method, the deponent or party may move for a protective order requiring that discovery be taken by oral examination or by another method. *See Fed. R. Civ. P. 26(c)(3).*

A motion for protective order must be accompanied by a certification that the moving party has conducted a good faith meet and confer effort with the other affected parties in order to resolve the dispute without court intervention. *See Fed. R. Civ. P. 26(c).*

For discussion of protective orders, *see* Ch. 16 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 31.16.*
- *Fed. R. Civ. P. 26(c)* (protective orders).



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Chapter 9 WRITTEN DEPOSITIONS
PART E: PROPOUNDING CROSS, REDIRECT, AND RECROSS QUESTIONS

1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.16

§ 9.16 Checklist for Propounding Cross, Redirect, and Recross Questions

☐ If served with notice of deposition and written questions:

- ○ Draft cross questions. *See § 9.17[1], [4] below.*
- ○ Serve cross questions on all other parties within 14-day period. *See § 9.17[1], [4] below.*

☐ If served with cross questions to be propounded to deponent:

- ○ Draft redirect questions, if any, to be propounded to deponent. *See § 9.17[2], [4] below.*
- ○ Serve redirect questions on all other parties within 7-day period. *See § 9.17[2], [4] below.*

☐ If served with redirect questions to be propounded to deponent:

- ○ Draft recross questions, if any, to be propounded to deponent. *See § 9.17[3], [4] below.*
- ○ Serve recross questions on all other parties. *See § 9.17[3], [4] below.*

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PART E: PROPOUNDING CROSS, REDIRECT, AND RECROSS QUESTIONS

1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.17

§ 9.17 Propounding Cross, Redirect, and Recross Questions

[1] Parties May Serve Cross Questions Within 14 Days of Notice

A party may serve cross questions on all other parties, 14 days after the notice and written questions are served. *See Fed. R. Civ. P. 31(a)(5).*

[2] Noticing Party May Serve Redirect Questions Within Seven Days of Cross Questions

A party may serve redirect questions on all other parties, seven days after being served with cross questions. *See Fed. R. Civ. P. 31(a)(5).*

[3] Party May Serve Recross Questions Within Seven Days of Redirect Questions

A party may serve recross questions on all other parties, seven days after being served with redirect questions. *See Fed. R. Civ. P. 31(a)(5).*

[4] Court May Enlarge or Shorten Time for Serving Questions

If good cause is shown, the court may lengthen or shorten the time for serving cross, redirect, and recross questions. *See Fed. R. Civ. P. 31(a)(5).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 31.11.*
- *Bender's Federal Practice Forms* Form Nos. 31:20, 31:21, 31:30.
- *Fed. R. Civ. P. 31(a)(5)* (propounding cross, redirect and recross questions).



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Chapter 9 WRITTEN DEPOSITIONS
PART F: TAKING DEPOSITIONS BY WRITTEN QUESTIONS

1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.18

§ 9.18 Checklist for Taking Depositions by Written Questions

☐ Procedure to be followed by noticing party:

○ Deliver notice of deposition and all questions to deposition officer. *See § 9.19[4] below*.

○ Store deposition received from deposition officer to protect it from loss, destruction, tampering, or deterioration, in accordance with local requirements, if any.

○ Do not file deposition with court or clerk until used in proceeding or court orders filing. *See § 9.19[5] below*.

○ If deposition is to be used in proceedings or court orders filing, give notice of filing to all other parties.

☐ Procedure to be followed by deponent:

○ Review transcript when notified by deposition officer that it is available. *See § 9.19[6] below*.

○ Sign statement, making any changes in form and substance, and giving the reasons for changes.

☐ Procedure to be followed by opposing party:

○ Obtain copy of transcript or other recording of deposition from deposition officer on payment or charge.

○ File motion to suppress all or part of deposition if objecting to errors or irregularities in the manner in which testimony is transcribed or deposition is dealt with by the deposition officer. *See § 9.19[7] below*.

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Chapter 9 WRITTEN DEPOSITIONS
PART F: TAKING DEPOSITIONS BY WRITTEN QUESTIONS

1-9 Moore's AnswerGuide: Federal Discovery Practice § 9.19

§ 9.19 Taking Depositions by Written Questions

[1] Noticing Party Must Deliver Notice and Questions Served to Deposition Officer

The party taking the written deposition must deliver a copy of the notice and copies of all questions served to the deposition officer designated in the notice. *See Fed. R. Civ. P. 31(b).*

[2] Deposition Officer Must Take Testimony of Deponent

The deposition officer must promptly take the testimony of the witness in response to the questions, in the manner provided for oral depositions. *See Fed. R. Civ. P. 30(c), 31(b).*

[3] Deponent May Request Review of Completed Deposition

The deponent may review and make changes to the transcript of a written deposition, if the deponent or a party has requested that review before completion of the deposition. *See Fed. R. Civ. P. 30(e), 31(b).*

[4] Officer Must Certify and Deliver Deposition

In the manner provided for oral depositions, the deposition officer must promptly prepare, certify and file or mail the deposition, attaching it to the copy of the notice and the questions received by the officer. *See Fed. R. Civ. P. 30(e), (f), 31(b); see also § 8.29[4] above.*

[5] Deposition Is Not Filed With the Court

Discovery requests and responses, including deposition transcripts, are generally not filed with the court until they are used in the proceeding, or the court orders that they be filed. *See Fed. R. Civ. P. 5(d)(1).*

[6] Noticing Attorney Must Safely Store Deposition Transcript

The attorney who noticed the deposition must store the deposition transcript to protect it from loss, destruction, tampering, or deterioration. *See Fed. R. Civ. P. 30(f)(1), 31(b).*

[7] Motion to Suppress Must Be Made Promptly or Errors Are Waived

Errors or irregularities in the manner that the testimony is transcribed or in the way the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the deposition officer under *Fed. R. Civ. P. 30* and *31* are waived, unless a motion to suppress the deposition or a portion of it, is made promptly after the defect is known, or with reasonable diligence should have been known. *See Fed. R. Civ. P. 32(d)(4).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 31.12*, *31.13*, *31.14*, *31.15*, 32.47.
- *Bender's Federal Practice Forms* Form Nos. 31:60, 31:70.
- *Fed. R. Civ. P. 5(d)(1)* (deposition transcripts are not filed with the court).
- *Fed. R. Civ. P. 31(b)* (delivery of questions to officer and officer's duties).



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Chapter 10 PERPETUATION OF TESTIMONY

1-10 Moore's AnswerGuide: Federal Discovery Practice 10.syn

§ 10.syn Synopsis to Chapter 10: PERPETUATION OF TESTIMONY

§ 10.01 Procedural Context--Perpetuation of Testimony

§ 10.02 Checklist for Petitioning for Perpetuation of Testimony

§ 10.03 Making Initial Determination

[1] Determining Whether Pre-Action Perpetuation of Testimony Is Necessary to Prevent Loss of Evidence

[2] Determining What Information Will Be Sought

[3] Considering Independent Action to Perpetuate Testimony

[4] Considering Stipulations or Declaratory Relief

[a] Stipulations

[b] Declaratory Relief

[5] Using Perpetuated Evidence

§ 10.04 Understanding Requirements for Pre-Action Perpetuation of Testimony Under Rule 27

[1] Establishing Action Is Anticipated

[2] Establishing Anticipated Action Is Cognizable in Federal Court

[3] Establishing Federal Jurisdiction Over Anticipated Action

[4] Establishing Perpetuation of Testimony May Prevent Failure or Delay of Justice

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§ 10.05 Preparing Petition for Perpetuation

[1] Including Required Contents of Petition

[2] Stating Three Required Elements

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[2] Providing Required Notice

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[b] Content Requirements

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[2] Taking Deposition According to Federal Rules of Civil Procedure

§ 10.08 Checklist for Opposing Petition to Perpetuate Testimony

§ 10.09 Opposing Petition to Perpetuate Testimony

[1] Considering Options and Strategy for Opposing Petition

[2] Alleging Grounds for Objecting to Petition

[3] Filing Opposition Papers

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Chapter 10 PERPETUATION OF TESTIMONY
PART A: PROCEDURAL CONTEXT

1-10 Moore's AnswerGuide: Federal Discovery Practice § 10.01

§ 10.01 Procedural Context--Perpetuation of Testimony

In rare circumstances, a person who is a potential party in a federal action may be concerned about vital evidence being lost or destroyed before the action is filed. Examples of such evidence include elderly or ailing witnesses who may die, ships that may sail to foreign ports, and property that may be repaired or demolished before the action is commenced. *Fed. R. Civ. P. 27* provides a possible avenue of relief in these situations, for both potential plaintiffs and defendants.

Rule 27 is designed to preserve specific testimony that could be lost before a civil action begins. Pre-action acquisition and preservation of testimony is called "perpetuation of testimony."

Rule 27 has stringent requirements that are not liberally construed. For this reason, counsel should carefully review its provisions and consider the following issues:

- Whether persons who can be deposed can be identified and located.
- Whether the testimony or physical evidence will be otherwise lost or destroyed.
- Whether the content of the testimony to be perpetuated can be specified.
- Whether the anticipated action will be filed in federal court.
- Whether other potentially adverse parties can be identified.

Although testimony is perpetuated through depositions, a discovery method, perpetuation is not a discovery tool itself. Rule 27 is not intended to find new evidence. Thus, when petitioning for perpetuation under Rule 27, counsel must know what information is being sought.



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Chapter 10 PERPETUATION OF TESTIMONY
PART B: PETITIONING FOR PERPETUATION OF TESTIMONY

1-10 Moore's AnswerGuide: Federal Discovery Practice § 10.02

§ 10.02 Checklist for Petitioning for Perpetuation of Testimony

☐ Determine whether action is anticipated in federal court but cannot be brought now. *See §§ 10.04[1], 10.05[2] below.*

☐ Determine whether vital evidence in anticipated action may be lost or destroyed. *See §§ 10.03[1], 10.05[2] below.*

☐ Identify potential adverse parties in anticipated action. *See § 10.05[1] below.*

☐ Identify particular testimony, documents, or things to be sought. *See §§ 10.03[2], 10.05[2], [3] below.*

☐ Identify persons whose depositions will be sought. *See § 10.05[1] below.*

☐ Ascertain basis of federal jurisdiction over anticipated action. *See § 10.04[3] below.*

☐ Consider alternative procedures. *See § 10.03[1], [3], [4] below.*

☐ Draft petition entitled "IN THE MATTER OF _____ [*name of petitioner*], PETITION FOR PERPETUATION OF TESTIMONY." Include following:

- ○ Statement that civil action is anticipated in federal court to which petitioner is potential party. *See § 10.05[1], [2] below.*
- ○ Reason why action cannot be brought at this time. *See § 10.05[1], [2] below.*

- ○ Names and addresses of potential adverse parties. *See § 10.05[1] below*.
- ○ Description of subject matter of anticipated action and petitioner's interest in action. *See § 10.05[1] below*.
- ○ Names and addresses of persons to be examined. *See § 10.05[1] below*.
- ○ Content of expected testimony, or documents, or investigation. *See § 10.05[1], [2] below*.
- ○ Allegation that testimony will be lost or destroyed if not perpetuated at this time. *See § 10.05[1], [2] below*.
- ○ Request for order authorizing petitioner to take depositions of persons named in petition. *See § 10.05[1] below*.
- ○ Provide verification. *See § 10.05[1] below*.

☐ Draft notice to be served on all adverse parties. *See § 10.06[2] below*. Include:

- ○ Statement that petitioner will apply to court for order requested in petition.
- ○ Time and place of hearing.

☐ File petition in federal district court. *See § 10.06[1] below*.

- ○ File in district court in district of any expected adverse party's residence.
- ○ File in any district if all expected adverse parties are aliens.

☐ Schedule hearing. *See § 10.06[2][c] below*.

☐ Serve notice at least 21 days before hearing date. *See § 10.06[2][c] below*.

- ○ Serve notice on all expected adverse parties named in petition. *See § 10.06[2][a] below*.
- ○ Include copy of petition. *See § 10.06[2][a] below*.

☐ Draft proposed order. *See § 10.07[1] below*.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Perpetuation of Testimony



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Chapter 10 PERPETUATION OF TESTIMONY
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1-10 Moore's AnswerGuide: Federal Discovery Practice § 10.03

§ 10.03 Making Initial Determination

[1] Determining Whether Pre-Action Perpetuation of Testimony Is Necessary to Prevent Loss of Evidence

Assuming the client is a potential party in an anticipated action in federal court, counsel must identify what particular testimony or physical evidence may be lost or destroyed before filing an action to invoke the provisions of Rule 27.

Warning:

Note that Rule 27 only applies when needed to prevent testimony from being lost. *See Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra, 198 F.3d 473, 484 (4th Cir. 1999)* (*Fed. R. Civ. P. 27* properly applies only in that special category of cases where it is necessary to prevent testimony from being lost); *see also Ash v. Cort, 512 F.2d 909, 911 (3d Cir. 1975)* (*Fed. R. Civ. P. 27* properly applies only in that special category of cases where it is necessary to prevent testimony from being lost).

[2] Determining What Information Will Be Sought

Counsel must identify the particular evidence to be perpetuated and who can provide this evidence. *See Fed. R. Civ. P. 27(a)(1)(C), (a)(1)(E).*

Warning:

Fed. R. Civ. P. 27 is not intended to be a substitute for broad discovery, nor is it intended to be used to ascertain facts for drafting a complaint. *See Penn Mutual Life Insurance Co. v. United States, 68 F.3d 1371, 1376 (D.C. Cir. 1995)* (a Rule 27(a) deposition "may not be used as a substitute for discovery"); *Nevada v. O'Leary, 63 F.3d 932, 933 (9th Cir. 1995)* (Rule 27 is not appropriate where the petitioner seeks discovery of unknown information hoping it will assist in the future when the petitioner applies for judicial relief); *see also In re Application of Eisenberg, 654 F.2d 1107, 1112 (5th Cir. 1981)* (person contemplating litigation has no absolute entitlement to early discovery under Rule 27). A petitioner must know the substance of the evidence it seeks before invoking Rule 27 perpetuation. *See Nevada v. O'Leary, 63 F.3d 932, 936 (9th Cir. 1995)* (petitioner could not satisfy Rule 27 because it could not "set forth the substance of the testimony").

Material sought under Rule 27 must be material and admissible. *See Nevada v. O'Leary, 63 F.3d 932, 936 (9th Cir. 1995)* (petition to perpetuate testimony for use in anticipated action does not permit inquiry as broad as that allowed under discovery rules); *see also Nissei Sangyo America, Ltd. v. United States, 31 F.3d 435, 440 (7th Cir. 1994)* (records are properly discoverable under Rule 27 if they are competent records, material to the matter in controversy, that cannot be obtained in ordinary discovery because the plaintiff is not yet in a position to initiate such an action, but that might be lost if the plaintiff cannot now obtain them).

[3] Considering Independent Action to Perpetuate Testimony

Counsel may bring an independent action for the sole purpose of perpetuating testimony, rather than filing a petition. *See Fed. R. Civ. P. 27(c)*; *see Shore v. Acands, Inc., 644 F.2d 386, 389 (5th Cir. 1981)* (Rule 27(c) recognizes the power of a federal district court to entertain an action that is in substance the former bill in equity to perpetuate testimony). The action must meet the venue and service of process requirements of the expected action in which perpetuated testimony will be used. *See Shore v. Acands, Inc., 644 F.2d 386, 389 (5th Cir. 1981)* (citing **Moore's**).

Plaintiff must make a similar showing to that required by petitioning under Rule 27(a), including the following:

1. The records or testimony sought are competent and material to the matter in controversy;

2. The information sought cannot be obtained in ordinary discovery because the plaintiff is not yet able to initiate such an action; and

3. The testimony or records may be lost if the plaintiff cannot obtain them presently.

See Nissei Sangyo America Ltd. v. United States, 31 F.3d 435, 440 (7th Cir. 1994) (records are properly discoverable under Rule 27 if they are competent records, material to the matter in controversy, that cannot be obtained in ordinary discovery because the plaintiff is not yet in a position to initiate such an action, but that might be lost if the plaintiff cannot now obtain them).

[4] Considering Stipulations or Declaratory Relief

[a] Stipulations

Instead of preserving testimony under *Fed. R. Civ. P. 27(a)*, potential parties to the litigation can stipulate to discovery before the action is filed. Thus, the parties can avoid the stringent requirements of Rule 27 by stipulating to a variety of discovery methods without having to show that the testimony will be lost. *See In re Sinclair Oil Corp., 881 F. Supp. 535, 536 (D. Wyo. 1995)* (upholding a stipulation to perpetuate testimony).

Warning:

Counsel must not appear to be circumventing Rule 27. *See Collins v. Polk, 115 F.R.D. 326, 329 (M.D. La. 1987)* (court impounded depositions that it believed were taken in circumvention of Rule 27 and ordered that they not be used by any party in case). Further, there is a strong argument that the parties cannot expand Rule 27 by stipulation, because a Rule 27 petition's relationship to an anticipated federal case provides the district court with jurisdiction over the matter and subject matter jurisdiction cannot be conferred by agreement. However, an unopposed petition to perpetuate may still be able to proceed, if the elements are properly asserted. Also, even if it is ultimately determined that Rule 27 has been circumvented or improperly expanded by stipulation, testimony taken under oath per such a stipulation may still qualify for admission at trial under an exception or exemption to the hearsay rule.

For discussion of stipulations, see Ch. 15 *below*.

[b] Declaratory Relief

A party can bring an action for declaratory relief in anticipation of being sued or when it would not otherwise be possible to file suit. *See Fed. R. Civ. P. 57*; *see Manuel v. Convergys Corp., 430 F.3d 1132, 1135 (11th Cir. 2005)* (a finding that a filing is anticipatory is one equitable factor among many that a district court can consider in determining whether to hear a declaratory judgment action); *see also Amerada Petroleum Corp. v. Marshall, 381 F.2d 661, 663 (5th Cir. 1967)* (that a petition for declaratory judgment was apparently filed in anticipation of a lawsuit is an equitable consideration that the district court was entitled to take into account when dismissing it); *but see Mission Insurance Co. v. Puritan Fashions Corp., 706 F.2d 599, 602 n.3 (5th Cir. 1983)* (anticipatory suits are disfavored because they are an aspect of forum-shopping).



Strategic Point:

A potential defendant to a claim that can meet the standards for declaratory relief can seek such relief to facilitate discovery without waiting for the potential plaintiff to file a claim and without filing a *Fed. R. Civ. P. 27* petition. However, in many cases, a Rule 27 petition may be the better alternative to a declaratory relief action if the petitioner's only purpose is to preserve testimony, because the requirements of a Rule 27 petition are easier to meet.

[5] Using Perpetuated Evidence

If a deposition to perpetuate testimony is taken under Rule 27, it may be used in any action involving the same subject matter later brought in a federal district court, in accordance with *Fed. R. Civ. P. 32(a)*; *see Fed. R. Civ. P. 27(a)(4)*.

The deposition may be filed, if the court so orders or if the deposition is being used in a proceeding. *See Fed. R. Civ. P. 5(d)(1)*; *In re Amenia, 200 F.R.D. 200, 204 (S.D.N.Y. 2001)* (directing Rule 27 deposition to be filed).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 27.02, 27.03, 27.04, 27.17, 27.52.*
- *Federal Litigation Guide PP 11.07[2], 17.04[1].*
- *Bender's Federal Practice Forms* Form Nos. 27:1, 27:200, 29:1.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.10.*
- *Fed. R. Civ. P. 5(d)(1)* (required filings).
- *Fed. R. Civ. P. 27(a)* (perpetuation before action filed).
- *Fed. R. Civ. P. 27(c)* (perpetuation by action).
- *Fed. R. Civ. P. 32(a)* (using depositions).
- *Fed. R. Civ. P. 57* (declaratory judgments).



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Chapter 10 PERPETUATION OF TESTIMONY
PART B: PETITIONING FOR PERPETUATION OF TESTIMONY

1-10 Moore's AnswerGuide: Federal Discovery Practice § 10.04

§ 10.04 Understanding Requirements for Pre-Action Perpetuation of Testimony Under Rule 27

[1] Establishing Action Is Anticipated

The petitioner must show that he or she expects to be a party in an anticipated action in federal court. *See Fed. R. Civ. P. 27(a)(1)(A)*; *see, e.g., Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra, 198 F.3d 473, 484 (4th Cir. 1999)* (*Fed. R. Civ. P. 27* petitioner must show, among other things, that it expects to be party to action that may be cognizable in any court of the United States but is presently unable to bring it or cause it to be brought); *In re Petition of Price, 723 F.2d 1193, 1194, n.1 (5th Cir. 1984)* (petition to perpetuate testimony must show that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought).

The petitioner also must establish that he or she is presently unable to bring the action or cause it to be brought. See *Fed. R. Civ. P. 27(a)(1)(A)*; *see also Jackson v. Good Shepherd Servs., 683 F. Supp. 2d 290, 293 (S.D.N.Y. 2009)* (court denied Rule 27 petition because, among other things, petitioner failed to establish she was not yet able to file action).

[2] Establishing Anticipated Action Is Cognizable in Federal Court

To perpetuate testimony regarding any matter cognizable in any United States court, a petitioner may file a verified petition in a federal district court. *See Fed. R. Civ. P. 27(a)(1)*. The petitioner does not have to show a cognizable action with absolute certainty. *See Penn Mutual Life Insurance Co. v. United States, 68 F.3d 1371, 1374 (D.C. Cir. 1995)* (party need not demonstrate that litigation is an absolute certainty in order to perpetuate testimony); *In re Bay City Middlegrounds Landfill Site, 171 F.3d 1044, 1046 (6th Cir. 1999)* (Rule 27 does not require that litigation be an absolute certainty). Even anticipated actions that are contingent and uncertain can be cognizable for the purposes of Rule 27 jurisdiction. *See Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra, 198 F.3d 473, 484-485 (4th Cir. 1999)* .

[3] Establishing Federal Jurisdiction Over Anticipated Action

There need not be an independent basis in federal jurisdiction in a proceeding to perpetuate under *Fed. R. Civ. P. 27*, but it must be shown that in the contemplated action, for which the testimony is being perpetuated, federal jurisdiction would exist and thus is a matter that may be cognizable in the federal courts. *See Deiulemar Compagnia di*

Navigazione S.P.A. v. M/V Allegra, 198 F.3d 473, 484 (4th Cir. 1999) .

[4] Establishing Perpetuation of Testimony May Prevent Failure or Delay of Justice

As a precondition for perpetuation of testimony before an action is filed, the court must be satisfied that the perpetuation "may prevent a failure or delay of justice." *See Fed. R. Civ. P. 27(a)(3)*; *see also Calderon v. United States District Court, 144 F.3d 618, 621-622 (9th Cir. 1998)* . To satisfy this requirement, a petitioner must show a need for the testimony or evidence that cannot easily be accommodated by other potential witnesses. *See Penn Mutual Life Ins. Co. v. United States, 68 F.3d 1371, 1375 (D.C. Cir. 1995)* .

[5] Establishing Anticipated Action Is Civil

Pre-action perpetuation of testimony is limited to civil cases. *See In re Eisenberg, 654 F.2d 1107, 1113 n.9 (5th Cir. 1981)* (there is no rule in criminal procedure analogous to Rule 27 by which a deposition can be taken by a potential defendant before a prosecution begins).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 27.10, 27.13[2].*
- *Federal Litigation Guide P 11.07[2].*
- *Bender's Federal Practice Forms* Form Nos. 27:1.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.10.*
- *Fed. R. Civ. P. 27(a)* (deposition to perpetuate testimony before action is filed).



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Chapter 10 PERPETUATION OF TESTIMONY
PART B: PETITIONING FOR PERPETUATION OF TESTIMONY

1-10 Moore's AnswerGuide: Federal Discovery Practice § 10.05

§ 10.05 Preparing Petition for Perpetuation

[1] Including Required Contents of Petition

The petition must meet the following requirements:

1. Be titled in the name of the petitioner. *See Fed. R. Civ. P. 27(a)(1)*;

2. State that the petitioner expects to be a party to an action cognizable in a federal court but is presently unable to bring the action or cause it to be brought. *See Fed. R. Civ. P. 27(a)(1)(A)*;

3. Describe the subject matter of the expected action and the petitioner's interest in that subject matter. *See Fed. R. Civ. P. 27(a)(1)(B)*;

4. State the facts the petitioner wants to establish by the proposed testimony. *See Fed. R. Civ. P. 27(a)(1)(C)*;

5. State the petitioner's reasons for wanting to perpetuate the testimony. *See Fed. R. Civ. P. 27(a)(1)(C)*;

6. State the names of the adverse parties or describe the persons the petitioner expects will be adverse parties and give their known addresses. *See Fed. R. Civ. P. 27(a)(1)(D)*;

7. State the names and addresses of the persons to be examined and the substance of the testimony the petitioner expects to elicit from each. *See Fed. R. Civ. P. 27(a)(1)(E)*;

8. Request an order allowing the petitioner to take the depositions of the persons to be examined as named in the petition, for the purpose of perpetuating their testimony. *See Fed. R. Civ. P. 27(a)(1)*; and

9. Contain a verification. *See Fed. R. Civ. P. 27(a)(1)*.

[2] Stating Three Required Elements

The petition must meet the following requirements:

1. Show the petitioner is acting in anticipation of litigation in federal court that cannot presently be brought;

2. Explain the substance of the testimony the petitioner seeks; and

3. Show that there is a significant risk the evidence described in the petition will be lost if it is not perpetuated.

See Calderon v. United States District Court, 144 F.3d 618, 621-622 (9th Cir. 1998) (requirements for petition met).

Although the passage of time may under some circumstances be enough to show the need to perpetuate testimony, courts are most likely to permit perpetuation under *Fed. R. Civ. P. 27(a)* when some special consideration makes that need particularly urgent. *See Tennison v. Henry, 203 F.R.D. 435, 440-41 (N.D. Cal. 2001)*

Among the factors courts have found persuasive in justifying the need to perpetuate testimony are the following:

1. Witness' advanced age or infirmity. *See, e.g., Penn Mutual Life Insurance Co. v. United States, 68 F.3d 1371, 1375 (D.C. Cir. 1995)* (permitting deposition under Rule 27(a) on basis that witness was 80 years old and, therefore, that there was significant risk that testimony would be lost);

2. Possibility that the witness will not be willing to testify if discovery is delayed. *See, e.g., Calderon v. United States District Court, 144 F.3d 618, 622 (9th Cir. 1998)* (permitting perpetuation on unexhausted claim when facts showed that witness might not be willing to cooperate in future); and

3. Uniqueness of the information at issue. *See In re Bay City Middlegrounds Landfill Site, 171 F.3d 1044, 1047 (6th Cir. 1999)* (material sought under Rule 27(a) need only be "distinctly useful" to finder of fact, but if material were absolutely unique and relevant to potential suit, it would clearly meet standard of Rule 27(a)).

4. Possibility that witness plans to leave the country for a long period of time. *See In re Deiulemar di Navigazione, S.p.A., 153 F.R.D. 592, 593 (E.D. La. 1994)* (when vessel with crew members possessing particular knowledge of dispute is about to leave port, necessity exists). But the fact that deponent resides in another country is an insufficient reason to grant a petition to perpetuate testimony. *See Norex Petroleum Ltd. v. Access Industries, Inc., 620 F. Supp. 2d 587, 591 (S.D.N.Y. 2009)* (court denied petition to perpetuate testimony of resident of United Kingdom while he was in judicial district for sentencing in unrelated criminal action because "difficulty" petitioner would face in securing nonresident's testimony under Hague Convention, if necessary, did not establish that testimony would "be lost" if immediate deposition was not permitted).

Warning:

Although age may be a relevant factor in showing that testimony must be perpetuated to avoid loss, conclusory remarks in the petitioner's brief may be inadequate to show evidence is likely to be lost. *See Ash v. Cort, 512 F.2d 909, 913 (3d Cir. 1975)* (court upheld denial of petition to perpetuate testimony pending appeal, finding petitioner's conclusory remarks failed to show evidence was likely to be lost during that time). Therefore, affidavits or declarations supporting statements of risk of loss should be attached to the petition: for example with respect to a very ill deponent, an affidavit from the person's doctor.

[3] Including Rule 34 or Rule 35 Requests

As part of its authority to grant a petition to perpetuate testimony before an action is initiated, a district court may make orders as provided for by Rules 34 and 35. *See Fed. R. Civ. P. 27(a)(3). Fed. R. Civ. P. 34* (*see* Ch. 5 *above*) governs production of documents, electronically stored information, and things and entry on land as part of discovery in a civil action. *Fed. R. Civ. P. 35* (*see* Ch. 11 *below*) governs physical and mental examinations of persons as part of discovery in a civil action. A party may request an order under *Fed. R. Civ. P. 27* for production of documents, electronically stored information, and things or entry onto land under *Fed. R. Civ. P. 34* without taking a deposition. *See Martin v. Reynolds Metals Corp., 297 F.2d 49, 55 (9th Cir. 1961)* (party may, in proper case, proceed under Rule 27 for an order under Rule 34 without taking a deposition at all).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 27.11[1], 27.12, 27.13[1].*
- *Federal Litigation Guide PP 11.07, 13.01, 21.02*
- *Bender's Federal Practice Forms* Form Nos. 27:1, 27:2.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.10.*
- *Fed. R. Civ. P. 27(a)(1)* (filing petition to perpetuate testimony about any matter cognizable in federal court).
- *Fed. R. Civ. P. 27(a)(3)* (court may issue orders like those authorized by Rules 34 and 35).
- *Fed. R. Civ. P. 34* (producing documents, electronically stored information and tangible things, or entering onto land for inspection and other purposes).
- *Fed. R. Civ. P. 35* (physical and mental examinations).



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Chapter 10 PERPETUATION OF TESTIMONY
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1-10 Moore's AnswerGuide: Federal Discovery Practice § 10.06

§ 10.06 Filing Petition and Providing Required Notice

[1] Filing Petition

The petitioner must file the petition in the federal district court in the district of the residence of any expected adverse party. *See Fed. R. Civ. P. 27(a)(1).* If all the expected adverse parties in the anticipated litigation are aliens, the petitioner may file the petition in any district under the federal venue statute. *See 28 U.S.C. § 1391(d).*

[2] Providing Required Notice

[a] Parties Required to Be Served

After filing the petition, the petitioner must serve a notice on each person named in the petition as an expected adverse party, together with a copy of the petition. *See Fed. R. Civ. P. 27(a)(2).*

Warning:

The petitioner must provide notice to the anticipated adverse party in accordance with Rule 27(a)(2). This notice is a condition precedent; when the petitioner fails to comply, the petition will be denied. *See Okubo v. Reynolds, 16 F.3d 1016, 1020 (9th Cir. 1994)* (Rule 27 requires notice of the deposition to be served upon all expected adverse parties); *see also In re Solorio, 192 F.R.D. 709, 709 (D. Utah 2000)* (because petitioner did not show that notice was given to the anticipated adverse party in accordance with Rule 27(a)(2) and such notice is a condition precedent, the petition was denied).

[b] Content Requirements

The notice must state that the petitioner will apply to the court, at a time and place named in the notice, for the order described in the petition. *See Fed. R. Civ. P. 27(a)(2).*

[c] Timing Requirements

The petitioner must serve the notice at least 21 days before the date of the hearing, within or without the district or state. *See Fed. R. Civ. P. 27(a)(2).*

Warning:

Fed. R. Civ. P. 27(a)(2) does not authorize dispensation of the notice requirement, even if the potential deponent might die during that period, before the deposition can be ordered and taken. *See In re Petition of Jacobs, 110 F.R.D. 422, 424 (N.D. Ind. 1986)* (concern that potential deponent may die does not empower the court to dispense with the requirement that the movant attempt to afford the adverse parties with twenty days' (now 21 days') notice).

[d] Rule 4 Service Requirements

The notice must be served in the manner provided in *Fed. R. Civ. P. 4*. *See Fed. R. Civ. P. 27(a)(2)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 27.11*.
- *Bender's Federal Practice Forms* Form No. 27:10.
- *Federal Litigation Guide P 11.07[2]*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.10*.
- *28 U.S.C. § 1391(d)* (venue in actions against aliens).
- *Fed. R. Civ. P. 4* (summons).
- *Fed. R. Civ. P. 27(a)(1)* (person who seeks to perpetuate testimony may file verified petition in federal court).
- *Fed. R. Civ. P. 27(a)(2)* (notice and service).



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1-10 Moore's AnswerGuide: Federal Discovery Practice § 10.07

§ 10.07 Proceeding After Hearing on Perpetuation Petition

[1] Including Specific Findings Required by Rule 27(a) in Court Order

If after the hearing the court is satisfied that the perpetuation of testimony may prevent a failure or delay of justice, the court must issue an order as follows:

1. Designating or describing the persons whose depositions may be taken;

2. Specifying the subject matter of the examination. *See Martin v. Reynolds Metals Corp., 297 F.2d 49, 55 (9th Cir. 1961)* (court may not delegate obligation to specify subject matter of deposition);

3. Specifying whether the depositions will be taken on oral examination or written questions; and

4. Specify any orders for production of documents or things, or entry on land; or orders for physical or mental examination.

See Fed. R. Civ. P. 27(a)(3).

[2] Taking Deposition According to Federal Rules of Civil Procedure

Depositions for perpetuating testimony will be taken according to the Federal Rules of Civil Procedure. *See Fed. R. Civ. P. 27(a)(3).* Rules 30 and 31 set out the general procedures for oral and written depositions, respectively. *See* Chs. 8, 9 *above.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 27.14, 27.36.*
- *Bender's Federal Practice Forms* Form Nos 27:20, 27:30.

- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.10*.
- *Fed. R. Civ. P. 27(a)(3)* (order and examination).



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1-10 Moore's AnswerGuide: Federal Discovery Practice § 10.08

§ 10.08 Checklist for Opposing Petition to Perpetuate Testimony

☐ Consider objections based on petitioner's failure to include required elements in petition. *See § 10.09[1], [2] below.*

- ○ Failure to show petitioner is presently unable to bring an action or to cause an action to be brought. *See § 10.09[2] below.*
- ○ Lack of federal jurisdiction in anticipated action. *See § 10.09[2] below.*
- ○ Failure to set forth substance of testimony sought. *See § 10.09[2] below.*

☐ Consider objections based on petitioner's failure to show that unique evidence will be lost or destroyed. *See § 10.09[2] below.*

☐ Consider objections based on petitioner's lack of specificity as to evidence sought (a "fishing expedition"). *See § 10.09[2] below.*

☐ Consider objections based on petitioner's failure to serve and file the petition as required. *See § 10.09[2] below.*

☐ Draft opposing papers. *See § 10.09[2] below.*

☐ Serve opposing papers on petitioner and all named potential adverse parties; file with the court. *See § 10.09[3] below.*

☐ Consider requesting sanctions. *See § 10.09[4] below*.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Perpetuation of Testimony



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Chapter 10 PERPETUATION OF TESTIMONY
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1-10 Moore's AnswerGuide: Federal Discovery Practice § 10.09

§ 10.09 Opposing Petition to Perpetuate Testimony

[1] Considering Options and Strategy for Opposing Petition

Because Rule 27 provides strict requirements, counsel who receives notice of a petition to perpetuate testimony should review the notice and petition carefully to make sure that they meet those requirements, taking into account the checklist. *See § 10.08 above*. If possible, point out alternative sources of the information requested to show that it is not unique.

[2] Alleging Grounds for Objecting to Petition

Among the most common objections to Rule 27 petitions are the following:

1. Petitioner has not shown that he or she is presently unable to bring an action or to cause an action to be brought;

2. Petitioner has not shown that a risk of loss of testimony exists;

3. Petitioner seeks to engage in a fishing expedition. *See 19th St. Baptist Church v. St. Peters Episcopal Church, 190 F.R.D. 345, 347 (E.D. Pa. 2000)* (Rule 27 does not license a prospective plaintiff to engage in a wholesale fishing expedition);

4. No basis for federal jurisdiction exists in anticipated action;

5. Petitioner has not set forth the substance of the testimony sought;

6. Notice was not served on all potentially adverse parties; and

7. Notice was served less than 21 days before the hearing date.

See Fed. R. Civ. P. 27(a)(1), (a)(2).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 27.11[1], 27.11[3], 27.13[1].*
- *Federal Litigation Guide PP 11.07[2], 17.03[2].*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.10.*
- *Fed. R. Civ. P. 27(a)(1)* (petition to perpetuate testimony before action is filed).
- *Fed. R. Civ. P. 27(a)(2)* (notice and service of petition to perpetuate testimony).

[3] Filing Opposition Papers

Counsel must file the opposition papers and serve the response on the petitioner and all named potential adverse parties. *See In re Amenia, 200 F.R.D. 200, 201 (S.D.N.Y. 2001)* (opposition to petition filed in case and petitioners filed reply). Any potential adverse party may file a response in support of or opposition to the petition. *See In re Amenia, 200 F.R.D. 200, 201 (S.D.N.Y. 2001)* (various potential adverse parties filed responses supporting and opposing petition).

Timing:

Fed. R. Civ. P. 27 does not discuss when the opposition papers must be filed. Therefore, unless a local rule applies, there does not appear to be any firm deadline for oppositions. If the petition is considered a "motion," local rules regarding the deadlines for filing motions apply. *Fed. R. Civ. P. 12* also governs defenses and objections that can be raised by motion. However, there is also an equally reasonable argument that a Rule 27 petition is not a "motion," in which case such rules would not apply.

[4] Considering Whether to Seek Sanctions

Sanctions under *Fed. R. Civ. P. 26(g)*, generally available for improper certification in connection with discovery requests (*see §§ 18.35-18.40 below*), are not available in a *Fed. R. Civ. P. 27(a)* proceeding. *See In re Chester County Electric, Inc., 208 F.R.D. 545, 548-549 (E.D. Pa. 2002)* (unlike other discovery, information preservation under Rule 27(a) explicitly requires court pre-approval; therefore, it does not fall under Rule 26(g)). However, truly frivolous or offending motions under Rule 27(a) can be sanctioned under other rules, or under the court's inherent authority. *See, e.g., 18 U.S.C. § 401*; *28 U.S.C. § 1927*; *see generally Chambers v. NASCO, Inc., 501 U.S. 32, 44-45, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* (courts have the inherent power to fashion an appropriate sanction for conduct that abuses the judicial process); *In re Amenia, 200 F.R.D. 200, 203 (S.D.N.Y. 2001)* (*Fed. R. Civ. P. 11* prevents a Rule 27 petitioner from bringing suit immediately when petitioner is unable to identify with certainty parties to proceed against).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 12.12, 26.154[1], 27.13[1]*
- *Federal Litigation Guide P 22.22[7].*
- *Bender's Federal Practice Forms* Form Nos. 11:100 et seq.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.10.*

- *18 U.S.C. § 401* (contempt power).
- *28 U.S.C. § 1927* (punishing attorneys who vexatiously multiply proceedings).
- *Fed. R. Civ. P. 12* (defenses and objections--when presented).
- *Fed. R. Civ. P. 26(g)* (signing of disclosures, discovery requests, responses, and objections).
- *Fed. R. Civ. P. 27(a)* (filing petition to perpetuate testimony before action is started).



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Chapter 11 PHYSICAL AND MENTAL EXAMINATIONS

1-11 Moore's AnswerGuide: Federal Discovery Practice 11.syn

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Chapter 11 PHYSICAL AND MENTAL EXAMINATIONS
PART A: PROCEDURAL CONTEXT

1-11 Moore's AnswerGuide: Federal Discovery Practice § 11.01

§ 11.01 Procedural Context--Physical and Mental Examinations

A medical examination is a powerful discovery tool that presents an unbiased view of a party's alleged physical and/or mental condition. Rule 35 outlines procedures for examination of a person whose medical or physical condition is "in controversy."

A court where an action is pending may order, subject to a showing of good cause, a medical examination of a party whose medical or physical condition--including blood group--is at issue. Persons in the custody of or under legal control of the party are also subject to physical and medical examination. Rule 35 sets forth requirements on who may conduct a Rule 35 examination, who may be present at the examination, as well as the preparation and use of the resulting report.

Prior to utilizing Rule 35 discovery methods, issues for counsel to carefully consider in determining whether to seek this type of evidence include:

- Necessity for the particular evidence the examination is likely produce.
- Scope of the examination and the procedures to be performed.
- Timing of the examination.
- Choice of medical professional to conduct the examination.
- Other available means to obtain the information.
- Objections that opposing counsel will likely raise.

Under Rule 35, when a party moves for an examination and it is ordered, the examined party has the right to demand the examiner's report and reserves entitlement to all medical reports obtained with respect to the same condition. Thus, a decision to move for a physical or mental examination requires careful thought. Similarly, the examined party's decision also requires careful consideration and the reciprocal obligation to supply all such reports in kind.



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Chapter 11 PHYSICAL AND MENTAL EXAMINATIONS
PART B: DETERMINING WHETHER TO CONDUCT EXAMINATION OF PARTY

1-11 Moore's AnswerGuide: Federal Discovery Practice § 11.02

§ 11.02 Checklist for Determining Whether to Conduct Examination of Party

☐ Consider importance of party's physical or mental condition to claims or defenses. *See § 11.03 below*.

☐ Determine whether discovery of an individual's physical or mental condition would be available under Rule 35. *See §§ 11.03*, *11.15 below*.

- ○ Mental or physical condition (including blood group) must be "in controversy" with regard to party or person in custody or under legal control of a party.

☐ Ascertain whether other available means of discovery for information regarding party's mental or physical condition are available. *See §§ 11.05*, *11.08*, *11.16 below*.

- ○ Interrogatories.
- ○ Requests for production.
- ○ Witness depositions.

☐ Evaluate likely outcome of examination.

- ○ Consider potential of harm if report is made available to examinee's counsel. *See §§ 11.20 -11.23 below*.

☐ Select examiner. *See § 11.06 below*.

- ○ Consider prospective examiner's fees, qualifications, experience, and availability.
- ○ Examiner must be individual who is suitably licensed or certified.

☐ Ascertain whether other parties will agree to examination. *See §§ 11.09 -11.10, 11.13 -11.14 below.*

- ○ Discuss potential use of Rule 35 examination at Rule 26(f) discovery planning conference.
- ○ Prepare agreement for examination as part of the Rule 26(f) discovery plan, if parties agree to examination.
- ○ Prepare for notice of motion for court-ordered examination if agreement is not possible.

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Chapter 11 PHYSICAL AND MENTAL EXAMINATIONS
PART B: DETERMINING WHETHER TO CONDUCT EXAMINATION OF PARTY

1-11 Moore's AnswerGuide: Federal Discovery Practice § 11.03

§ 11.03 Determining Availability of Rule 35 Examination Procedure

Federal district courts permit the use of physical and mental examinations as a discovery method under Rule 35. Such examinations are available only if: 1) the mental or physical condition of a party or a person in a party's custody or legal control is "in controversy" (*see § 11.15 below*) and 2) there is good cause for the examination (*see § 11.16 below*). *See Fed. R. Civ. P. 35*; *Schlagenhauf v. Holder, 379 U.S. 104, 115-116, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* .

Attempts to use Rule 35 discovery must be preceded by analysis of the facts of the case in light of these two requirements. Even though the moving party shows the two requirements are met, the decision to grant or deny a Rule 35 examination lies within the court's discretion. *See Fed. R. Civ. P. 35(a)(1)*.

Rule 35 examinations are often sought in personal injury actions. However, they are available in any civil action in which the mental or physical condition of a party is at issue. *See, e.g., In re Letter Rogatory from the Nedenes Dist. Court, Norway, 216 F.R.D. 277, 279 (S.D.N.Y. 2003)* (paternity suit); *In re Dillon, 194 B.R. 533, 535-536 (Bankr. S.D. Fla. 1996)* (bankruptcy action); *Jansen v. Packaging Corp., 158 F.R.D. 409, 410 (N.D. Ill. 1994)* (sexual harassment claim); *Usher v. Lakewood Eng'g & Mfg. Co., 158 F.R.D. 411, 412 (N.D. Ill. 1994)* (employment discrimination action); *Hodges v. Keane, 145 F.R.D. 332, 335 (S.D.N.Y. 1993)* (civil rights action); *Sloane v. Thompson, 128 F.R.D. 13, 15 (D. Mass. 1989)* (ERISA case);

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.02[1].*
- *Federal Litigation Guide P 21.01.*
- *Fed. R. Civ. P. 35(a)(1)* (order for a physical or mental examination).



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Chapter 11 PHYSICAL AND MENTAL EXAMINATIONS
PART B: DETERMINING WHETHER TO CONDUCT EXAMINATION OF PARTY

1-11 Moore's AnswerGuide: Federal Discovery Practice § 11.04

§ 11.04 Determining Who May Seek Rule 35 Examination

If the physical or mental condition of a party, or a person in the custody or legal control of a party, is in controversy, a motion to examine that condition may be sought by any party to the action. *See Schlagenhauf v. Holder, 379 U.S. 104, 115-116, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* .

The examination need not be sought by an opposing party. For example, defendants may move to compel examination of a co-defendant, if the physical or mental condition of the co-defendant is in controversy. *See Schlagenhauf v. Holder, 379 U.S. 104, 115-116, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.02.*
- *Federal Litigation Guide P 21.01.*



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1-11 Moore's AnswerGuide: Federal Discovery Practice § 11.05

§ 11.05 Understanding Who May Be Examined

[1] Any Party Is Subject to Examination

Any party may be subject to a physical or mental examination when the physical or mental condition of the party is in controversy. Rule 35 also permits a court to order a party to submit to an examination, or to produce a person in the party's control for an examination. *See Fed. R. Civ. P. 35(a).*

Usually plaintiffs are examined under Rule 35. However, a defendant may be subject to examination in appropriate circumstances. *See Schlagenhauf v. Holder, 379 U.S. 104, 112-114, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* .

[2] Person in Custody or Control of Party Is Subject to Examination

A person in the custody or under the legal control of a party may be subject to a physical or mental examination when the physical or mental condition of that person is in controversy. *Fed. R. Civ. P. 35(a)(1).*

A court may compel a parent or guardian to produce a minor child for a physical or mental examination in personal injuries cases brought on behalf of that minor child. *See Schempp v. Reniker, 809 F.2d 541, 542-543 (8th Cir. 1987)* .

Similarly, a child or incompetent who is not technically a party to an action may be compelled to submit to a physical or mental examination when suit is brought by a parent or guardian and the condition of the child or incompetent is "in controversy." *See Scharf v. United States Attorney Gen. 597 F.2d 1240, 1244 (9th Cir. 1979)* .

For purposes of an autopsy ordered under Rule 35, courts have determined that a decedent is a "person in the custody and control of a party." *In re Certain Asbestos Cases, 112 F.R.D. 427, 433 (N.D. Tex. 1986)* (court rejected plaintiffs' arguments that decedent's body was not a "person" under Rule 35); *see also Belkow v. Celotex Corp., 1989 U.S. Dist. LEXIS 5917, at *4 (N.D. Ill. 1989)* ("upon proper showing Rule 35(a) permits the court to order an autopsy").

[3] Nonparty Is Not Subject to Examination

Physical or mental examinations may not be used against nonparties. Even if intimately connected to a party in action, a person who is not a party to the action may not be ordered to submit to an examination under Rule 35. *See Dulles v.*

Quan Yoke Fong, 237 F.2d 496, 498-499 (9th Cir. 1956) .

Unless named as a party, a mere agent of a party may not be compelled to submit to an examination. *See Schlagenhauf v. Holder, 379 U.S. 104, 112-114, 85 S. Ct. 234, 13 L. Ed. 2d 152. (1964)* . An employee of a party may not be compelled to submit to a Rule 35 examination. *See Lewis v. Herrman's Excavating, Inc., 200 F.R.D. 657, 660-661, (D. Kan. 2001)* . A guardian or parent of a minor who is suing only in a representative capacity is not considered to be a "party" to the action, and may not be ordered to undergo an examination under Rule 35. *See Scharf v. United States Attorney Gen., 597 F.2d 1240, 1243-1244 (9th Cir. 1979)* ; *Caban ex rel. Crespo v. 600 E. 21st St Co., 200 F.R.D. 176, 180-181 (E.D.N.Y. 2001)* .



Strategic Point:

Nonnparty discovery is generally limited to three methods: oral depositions, written depositions, and subpoenas. *See Fed. R. Civ. P. 30(a)(1), 31(a)(1), 34(c), 45.* It may be possible to examine a nonparty by stipulation, however, if the examinee agrees to the examination. *Fed. R. Civ. P. 29*; *see §§ 11.07 -11.09 below; see also* Ch. 15 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.06*.
- *Federal Litigation Guide P 21.03*.
- *Bender's Federal Practice Forms* Form No. 35:4.
- *Fed. R. Civ. P. 35(a)* (order for physical and mental examination).



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1-11 Moore's AnswerGuide: Federal Discovery Practice § 11.06

§ 11.06 Understanding Who May Conduct Rule 35 Examination

[1] Examination Must Be Conducted by Qualified Examiner

The court may order a physical or mental examination only if the proposed examiner is "suitably licensed or certified." *See Fed. R. Civ. P. 35(a)(1).*

Suitably licensed or certified examiners include physicians, psychologists, vocational rehabilitation experts and other certified or licensed professionals. The "suitably licensed" requirement provides a court with recourse to examine the qualifications of a proposed examiner. Often a certified or licensed professional may be deemed unsuitable if the professional lacks expertise for a particular examination. If the proposed examiner is not a licensed professional, disqualification is contingent on whether the individual's qualifications are appropriate for the condition to be examined. *See Fed. R. Civ. P. 35*, Committee Note of 1991.

In 1991, Rule 35 was amended to include other certified and licensed professionals and to expand the scope of suitable examiners beyond physicians for physical examinations and psychologists for mental examinations only. *See Hill ex rel. Hill v. McNairy County Bd. of Educ., 229 F.R.D. 563, 568 (W.D. Tenn. 2004)* (board-certified behavioral analyst as suitably licensed examiner); *Jefferys v. LRP Publications, Inc. 184 F.R.D. 262, 262-263 (E.D. Pa. 1999)* (good cause shown for examination by certified rehabilitation counselor).

[2] Designation of Examiner by Moving Party Generally Honored

Courts generally honor the examining party's choice of examiner. *See Great West Life Assurance Co. v. Levithan, 153 F.R.D. 74, 76 (E.D. Pa. 1994)* (defendant had choice of physician to conduct examination in disability insurance dispute); *Olcott v. Lafiandra, 793 F. Supp. 487, 492 (D. Vt. 1992)* (court noted that defendants would be prejudiced by not having their own expert examine plaintiff).

[3] Considerations for Party Objections to Examiner

If a party objects to the choice of examiner based on the regular payment or funding source for the proposed examiner, courts have determined that such possible bias merely addresses the examiner's credibility as a witness and not his or her qualification to conduct an examination. *See Duncan v. Upjohn Co., 155 F.R.D. 23, 26 (D. Conn. 1994)*

Possible justification for rejection of a party's choice of examiner may arise when the nature of the examination raises privacy concerns for the examinee (i.e., gynecological or urological examinations for sexual assault cases). The court has discretion to determine whether an examinee is entitled to an examination by an individual of her own sex; however little case authority addresses this point. *See Gale v. National Transp. Co., 7 F.R.D. 237, 238 (S.D.N.Y. 1946)* (court considered fact that examinee had been treated by physician of opposite sex before).

[4] Court May Designate Examiner if Parties Object

Although the court will generally honor a party's designation of a proposed examiner (*see § 11.06[2] above*), the court may appoint a different examiner if the party to be examined raises some valid objection to the ability of the proposed examiner to conduct the examination. *See Ragge v. MCA/Universal Studios, 165 F.R.D. 605, 609 (C.D. Cal. 1995)* .

A court may also appoint an examiner if the parties do not agree on an examiner. A court-selected examiner serves the purpose of ensuring independent and impartial insight on the examinee's condition. *Jansen v. Packaging Corp., 158 F.R.D. 409, 410-411 (N.D. Ill. 1994)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.07[2].*
- *Federal Litigation Guide P 21.10.*



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1-11 Moore's AnswerGuide: Federal Discovery Practice § 11.07

§ 11.07 Checklist for Agreeing or Stipulating to Physical or Mental Examination

- ☐ Consider examination type and choice of examiner to achieve discovery goals.
- ☐ Review requirements for agreement or stipulation. *See §§ 11.08 -11.10 below*.
- ☐ Draft written agreement to include:
  - ○ Time and place of examination.
  - ○ Identity and specialty of the examiner.
  - ○ Examination procedures to be used.
  - ○ Examination attendees.
  - ○ Recording method of examination.
  - ○ Scope of the examination.
- ☐ Sign agreement and obtain signatures of other parties.
  - ○ For examination of an individual not ordinarily subject to examination under Rule 35, also obtain that examinee's signature.

○ Agreement may be included as a part of parties' Rule 26(f) discovery plan.

○ Examinations not already agreed to at Rule 26(f) discovery conference may be arranged by a separate stipulation.

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1-11 Moore's AnswerGuide: Federal Discovery Practice § 11.08

§ 11.08 Considering Options and Strategy for Examination by Agreement

Generally, a need for mental and physical examinations will be apparent. When a party's physical or mental condition is clearly relevant to the claims or defenses presented in the case, parties may agree in writing to have an examination rather than seek Rule 35 court order.

Rule 35 expressly recognizes the possibility and validity of a stipulated examination and sets forth conditions for discovery stipulations. *See Fed. R. Civ. P. 29, 35(b)(6).*

Examination by agreement or stipulation may prove preferable to a Rule 35 court order and may provide wider berth of advantage to parties seeking examination. Discovery strategies to consider in drafting an agreement or stipulation for examination include:

- Examining a key witness or other person not a party to the action.
- Scheduling for flexibility of examinations.
- Limiting scope of examination.
- Permitting counsel or some other third party to attend the examination.
- Limiting partial or whole disclosure of the report, including waivers of rights to obtain the report.

If parties cannot agree on the terms of an examination, the party seeking the examination may proceed by motion under the standard noticed motion procedure. *See Fed. R. Civ. P. 35(a)(2)*; *see also §§ 11.11-11.17 below.*

PRACTICE RESOURCES:

- *Federal Litigation Guide PP 21.04-21.07.*

- *Fed. R. Civ. P. 29* (stipulations for discovery procedure).
- *Fed. R. Civ. P. 35(a)(2)* (motion and order for physical and mental examination).
- *Fed. R. Civ. P. 35(b)(6)* (scope of examiner's report).



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§ 11.09 Agreeing to Physical or Mental Examination

[1] Parties May Agree to Mental or Physical Examination

Parties to an action may stipulate to discovery by means of a physical or mental examination. The stipulation must be in writing. *See Fed. R. Civ. P. 29*; *see also* Ch. 15 *below*.

The contents of the stipulation are not prescribed by rule. As a practical matter, the points referenced in Rule 35(a) (time, place, manner, conditions, scope of examination, and examiner(s) will need to be specified as clearly as possible.

[2] If Parties Do Not Agree, Court May Order Examination

If a party agrees to an examination and subsequently changes his or her mind, the opposing party may still obtain a traditional Rule 35 motion or seek enforcement through a Rule 37 motion to compel discovery. *Herrera v. Lufkin Indus. Inc., 474 F.3d 675, 689 (10th Cir. 2007)* (magistrate judge did not abuse discretion in granting Rule 37(a) motion to compel discovery of plaintiff's mental condition); *see also* Ch. 17 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.02[5].*
- *Fed. R. Civ. P. 29* (stipulations for discovery procedure).
- *Fed. R. Civ. P. 35(b)(6)* (scope of examiner's report).
- *Fed. R. Civ. P. 37* (sanctions for failure to make disclosures).



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§ 11.10 Examination Pursuant to Agreement Is Subject to Rule 35 Restrictions

Unless the stipulation for a Rule 35 examination expressly provides otherwise, the stipulation is deemed to incorporate the protocol in Rule 35(b) for exchange of examination reports and waiver of privilege *See Fed. R. Civ. P. 35(b)(6).*

Unless contrary provisions are expressly stipulated, the examining party will be required to disclose the results of the stipulated examination at the examinee's request. *See Fed. R. Civ. P. 35(b)(1).* Also, unless expressly stipulated, the examining party will have a reciprocal right to receive future examination reports concerning the examinee's same physical or mental condition. *See Fed. R. Civ. P. 35(b)(3).*

Warning:

With regard to future examinations of the same condition, the examinee will waive any testimonial privileges regarding the condition that would otherwise be available in that action or other action arising from the same controversy. *See Fed. R. Civ. P. 35(b)(4).* Privileges that have been waived by obtaining a copy of the examination report may not be reasserted under state law. *See Bethel v. Thornbrough, 311 F.2d 201, 203-204 (10th Cir. 1962) .*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.12[2], [5].*
- *Federal Litigation Guide P 21.15.*
- *Bender's Federal Practice Forms* Form Nos. 35:100-35:101.
- *Fed. R. Civ. P. 35(b)(1)* (request by party or person examined).
- *Fed. R. Civ. P. 35(b)(3)* (request by moving party).
- *Fed. R. Civ. P. 35(b)(6)* (scope of examiner's report).



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1-11 Moore's AnswerGuide: Federal Discovery Practice § 11.11

§ 11.11 Checklist for Moving for Physical or Mental Examination of a Party

☐ Review Rule 35 requirements. *See §§ 11.03 -11.05*, *11.15*, *11.16 above*.

☐ Review local rules and individual judge's rules to ascertain preconditions for filing discovery motion.

☐ Determine whether timing of the discovery is proper. *See § 11.13 below*.

☐ Meet and confer with opposing counsel to determine conditions and terms for stipulations. *See § 11.17 below*.

☐ Draft motion, serve and file motion papers. *See § 11.14 below*.

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1-11 Moore's AnswerGuide: Federal Discovery Practice § 11.12

§ 11.12 Considering Alternatives to Motion Procedure

The motion procedure for Rule 35 examinations should be used only as a last resort, if the parties cannot reach an agreement or stipulation concerning the terms of the examination. *See §§ 11.07-11.10 above*. Consideration of other investigative techniques may provide more useful results and may be less intrusive and invasive for parties to be examined.

PRACTICE RESOURCES:

- *Federal Litigation Guide P 21.05*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.05*.



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§ 11.13 Properly Timing Request and Examination

[1] Examinations Must Await Preliminary Discovery Conference

A party generally may not seek discovery, including Rule 35 examinations, before the parties have held the mandatory preliminary discovery conference. *See Fed. R. Civ. P. 26(f)*; *see also § 4.04 above*.

Discovery before the mandatory preliminary discovery conference is permitted for categories of cases exempted from initial disclosure requirements (*see Fed. R. Civ. P. 26(a)(1)(B)*) and cases where the court has authorized, or the parties have agreed to, early discovery.

[2] Examinations Must Be Sought Before Close of Discovery

A Rule 35 examination must be sought and completed within the discovery cut-off established by the court for the action. *See Fed. R. Civ. P. 16(b)(3)*.

Even if an examination request is technically made within the discovery period, it may be denied if made so late that the examination and report cannot reasonably be produced within the discovery period. *See Shumaker v. West, 196 F.R.D. 454, 456-457 (S.D. W. Va. 2000)* (district court denied defendant's request to examine plaintiff when request was made a few days before defendant's expert disclosures were due).

[3] Examination May Be Available Prior to Commencement of Action to Preserve Evidence

In some circumstances, Rule 27 provides a mechanism to perpetuate testimony before any court action has been filed or while an appeal from a judgment is pending. In such cases, Rule 27 is utilized to preserve evidence that may be lost if not immediately preserved. *See Fed. R. Civ. P. 27*.

Parties may be able to use the perpetuation mechanisms of Rule 27 to conduct a physical or mental examination under Rule 35 prior to an action or pending appeal. *Fed. R. Civ. P. 27(a), (b)*.

Such examinations are available on a restricted basis, subject to court approval. *See Martin v. Reynolds Metals Corp. 297 F.2d. 49, 56 (9th Cir. 1961)* (authorizing use of Rule 34 and Rule 35 discovery in pre-litigation perpetuation).

For discussion of perpetuation, *see* Ch. 10 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.02*.
- *Federal Litigation Guide P 21.02*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.05*.
- *Fed. R. Civ. P. 16(b)(3)* (scheduling order to complete discovery).
- *Fed. R. Civ. P. 26(a)(1)(B)* (proceedings exempt from initial disclosure)
- *Fed. R. Civ. P. 26(f)* (conference of the parties, planning for discovery).
- *Fed. R. Civ. P. 27(a)* (deposition to perpetuate testimony before action is filed).
- *Fed. R. Civ. P. 27(b)* (deposition to perpetuate testimony pending appeal).



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§ 11.14 Following Requirements of Motion Practice

A party who wishes to obtain a physical or mental examination of a party under Rule 35 through a court order must proceed by motion under the standard noticed motion procedure. The moving party must:

1. Show that the physical or mental condition of the party to be examined is "in controversy." *See Fed. R. Civ. P. 35(a)*; *Schlagenhauf v. Holder, 379 U.S. 104, 112-114, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* ; *see also § 11.15 below*;

2. Show "good cause" for the conduct of the examination. *See Fed. R. Civ. P. 35(a)*, *Schlagenhauf v. Holder, 379 U.S. 104, 112-114, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* ; *see also § 11.16 below*; and

3. Provide specific facts about the proposed examination, including time, place, manner, and name of examiner, to put the other parties on notice. *See Fed. R. Civ. P. 35(a)(2)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.03*.
- *Federal Litigation Guide P 21.06*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.05*.
- *Fed. R. Civ. P. 35(a)(2)* (content of order for physical and mental examinations).



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§ 11.15 Showing Physical or Mental Condition Is in Controversy

[1] Burden Is on Moving Party

The party moving to compel a physical or mental examination under Rule 35 has the burden of showing that the prospective examinee's mental or physical condition is genuinely "in controversy." *See Fed. R. Civ. P. 35(a)*; *Schlagenhauf v. Holder, 379 U.S. 104, 112-114, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* .

In addition, the movant must show more than mere relevance to the claims or defenses in the action. The movant must make an affirmative showing that each condition as to which the examination is sought is genuinely in controversy. *See Felmly v. Hills, 222 F.R.D. 257, 259 (D.V.I. 2004)* (party requesting physical or mental examination has burden of showing that condition is in issue).

If a plaintiff alleges only past mental or emotional suffering and does not allege a separate claim for relief for emotional distress, a Rule 35 examination is generally not appropriate. *See Curtis v. Express, Inc., 868 F. Supp. 467, 469 (N.D.N.Y. 1994)* (district court denied employer's request to conduct mental examination of employee who claimed only past emotional distress due to employer's conduct and did not place separate tort claim for ongoing psychological injuries).

[2] Party to Be Examined Must Have Placed Condition in Controversy

For a physical or mental examination to be ordered under Rule 35, the party to be examined must be the party that placed the physical or mental condition "in controversy." *See Gattegno v. Pricewaterhousecoopers, LLP, 204 F.R.D. 228, 231-232 (D. Conn. 2001)* (plaintiff placed her mental condition in controversy, alleging ongoing mental injury as component in claims of gender discrimination and asserting separate claim of emotional distress); *see also Houghton v. M & F Fishing, Inc., 198 F.R.D. 666, 669 (S.D. Cal. 2001)* (plaintiff could not be subjected to psychiatric examination in suit for personal injury because plaintiff alleged no mental injury or damages).

Often, plaintiffs suing to recover tort damages will assert the alleged actions of the defendants caused some emotional distress or mental anguish. By itself, a claim of routine or "garden-variety" mental distress or anguish does not place the plaintiff's mental condition "in controversy" for purposes of Rule 35, and cannot serve as the basis for a compelled mental examination. Such claims can be placed "in controversy" for purposes of Rule 35 when asserted in conjunction

with one or more of the following:

1. A separate tort claim for emotional distress. *See Lahr v. Fulbright & Jaworski, 164 F.R.D. 204, 209-210 (N.D. Tex. 1996)* (claim for relief for emotional distress placed plaintiff's mental condition "in controversy)";

2. An allegation of a specific mental or psychiatric injury or disorder. *See Cauley v. Ingram Micro, Inc. 216 F.R.D. 245, 247 (W.D.N.Y. 2003)* ; or

3. Plaintiff's offer of expert testimony to support a claim of emotional distress. *See Tomlin v. Holecek, 150 F.R.D. 628, 630 (D. Minn. 1993)* .

Allegations that defendant's actions caused the plaintiff some mental injury that is either ongoing or persists beyond that normally associated with the actions at issue places the plaintiff's mental condition "in controversy" for purposes of Rule 35. *See Ragge v. MCA/Universal Studios, 165 F.R.D. 605, 608-609 (C.D. Cal. 1995)* (in employment discrimination/sexual harassment case, plaintiff's allegation of ongoing humiliation and emotional distress placed plaintiff's mental condition "in controversy").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.03*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.05*.
- *Federal Litigation Practice* P 21.08.



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§ 11.16 Establishing Good Cause for Examination

[1] Burden Is on Moving Party

The party moving to compel a physical or mental examination under Rule 35 has the burden of showing that there is "good cause" to conduct the examination. *See Fed. R. Civ. P. 35(a)(2)(A).*

[2] Good Cause Requires Demonstration of Necessity to Discover Specific Relevant Facts Through Examination

To demonstrate "good cause" to conduct a physical or mental examination of a party under Rule 35, the movant must show that the examination could lead to discovery of specific facts relevant to the claims or defenses in the action, and that the discovery of those facts is necessary to the movant's case. *See Peters v. Nelson, 153 F.R.D. 635, 638-639 (N.D. Iowa 1994)* (complexity of mental injuries and possible causes in case of alleged sexual abuse of minor established necessity for psychiatric examination of plaintiff); *Sacramona v. Bridgestone/Firestone Inc., 152 F.R.D. 428, 431 (D. Mass. 1993)* (party must establish good cause for particular examination requested).

[3] Information From Other Source or Prior Examination May Obviate Need for Examination

The moving party's ability to obtain information from another source may preclude a finding of good cause. For example, if a prior examination of the party would suffice to provide the desired information, discovery of the results of that examination may be an appropriate substitute for ordering a subsequent examination. *See DeCrescenzo v. Maersk Container Serv. Co., 741 F.2d 17, 21 (2d Cir. 1984)* (personal injury case remanded to trial court for determination whether prior physical examination of plaintiff already on record was sufficient for defendant's purposes without ordering another examination); *Stanislawski v. Upper River Servs., 134 F.R.D. 260, 262 (D. Minn. 1991)* (plaintiff not required to submit to defendant's requests for vocational rehabilitation examinations when defendant had been provided with plaintiff's medical records, had deposed plaintiff, and had been provided information concerning plaintiff's education, experiences and medical disability).

Sometimes, a second examination will be necessary, e.g., when there is a need to determine a change in the plaintiff's physical condition since the first examination. *See Ziemann v. Burlington County Bridge Comm'n, 155 F.R.D. 497, 501-502 (D.N.J. 1994)* (good cause established for psychiatric examination because plaintiff's mental condition had

changed significantly since plaintiff's prior examination); *Galieti v. State Farm Mut. Auto Ins. Co., 154 F.R.D. 262, 263 (D. Colo. 1994)* (defendant already underwent mental evaluation for severe emotional distress, but new examination was ordered because more than two years passed since prior examination).

[4] Court May Balance Privacy Interest of Party Against Need for Examination

Because compelling a party to submit to a physical or mental examination is a significant intrusion on the party's privacy interests, Rule 35 requires a demonstration of both the "in controversy" and "good cause" elements. Even if good cause is shown, an examination order is not mandatory. It is within the court's discretion to balance the privacy interests of the party to be examined against the need of the movant for the information. *See Curtis v. Express, Inc., 868 F. Supp. 467, 468 (N.D.N.Y. 1994)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 35.04, 35.05.*
- *Bender's Federal Practice Forms* Form Nos. 35:1-35:3.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.05.*



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§ 11.17 Setting and Limiting Conditions of Examination

[1] Conditions Should Be Specified in Motion

A Rule 35 motion seeking to compel the examination should specify the intended conditions of the examination. The motion should address matters such as the time, place, and manner of examination, and the person or persons by whom the examination is to be made. *See Fed. R. Civ. P. 35(a).*

[2] Attendance of Third Parties, Including Counsel, Generally Disfavored

Because the presence of persons other than the party and the examiner may interfere with the conduct of the examination, third parties, including counsel for any party in the action, can be prohibited from attending the examination. *See Cabana v. Forcier, 200 F.R.D. 9, 12 (D. Mass. 2001)* (plaintiff not entitled to have his attorney present at psychiatric examination).

Courts do, however, have the discretion to permit the examined party's attorney to be present. *See Vreeland v. Ethan Allen, Inc., 151 F.R.D. 551, 551 (S.D.N.Y. 1993)* (permitting plaintiff's attorney to attend psychological examinations in age discrimination case where plaintiff claimed psychological damage).

[3] Examination Generally Not Recorded

To avert undue intrusion on the examination process and to ensure fairness, courts generally do not permit the party to be examined to have the examination transcribed electronically or by court stenographer. *See Tirado v. Erosa, 158 F.R.D. 294, 299 (S.D.N.Y 1994)* ; *see also Hertenstein v. Kimberly Home Health Care, Inc., 189 F.R.D. 620, 630-631 (D. Kan. 1999)* (plaintiff has no right to presence of mechanical recording device at psychiatric examination when plaintiff did not demonstrate need). Videotaping of a psychiatric examination is inappropriate. *See Abdulwali v. Washington Metro Area Transit Auth., 193 F.R.D. 10, 13 (D.D.C. 2000)* .

[4] Examined Party Generally Pays Own Travel Expenses

The general rule is that the party being examined must pay his or her own travel expenses to an examination in the forum state. *McCloskey v. UPS Gen. Servs. Co., 171 F.R.D. 268, 270 (D. Or. 1997)* . The party moving for the

examination must bear the expense of the examination itself. *Eckmyre v. Lambert*, 1988 U.S. Dist. LEXIS 10849, at *3 (D. Kan. 1988) .

If the party being examined will suffer undue financial hardship by fronting the travel expenses, or if the travel expenses could have been avoided by better planning, the court may require the party requesting the examination to advance the travel expenses, to be paid back once the litigation is finished. *See, e.g.*, *Chaparro v. IBP, Inc.*, 1994 U.S. Dist. LEXIS 18438, at *10-*12 (D. Kan. 1994) .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 35.02[4]*, *35.08[2]*, *35.10*.
- *Federal Litigation Guide P 21.07*, *21.12*.
- *Bender's Federal Practice Forms* Form No. 35:56.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.05*.



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Chapter 11 PHYSICAL AND MENTAL EXAMINATIONS
PART E. OPPOSING REQUEST FOR MOTION FOR EXAMINATION

1-11 Moore's AnswerGuide: Federal Discovery Practice § 11.18

§ 11.18 Checklist for Opposing Request or Motion for Examination

☐ Consider alternatives to opposition:

- ○ Entering into stipulation with opposing party as to terms and conditions of examination.
- ○ Preparing client for the examination.

☐ Focus efforts on ensuring that scope of examination is limited to precise condition in controversy.

☐ Consider moving for protective order under Rule 26(c) if proposed examination involves invasive or painful procedures or delves into highly personal matters.

☐ If examination is held, interview client immediately after examination to root out possible discrepancies in examiner's report.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Mental and Physical Examinations



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Chapter 11 PHYSICAL AND MENTAL EXAMINATIONS
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§ 11.19 Considering Options and Strategies for Opposition

Before opposing a request or motion for a physical or mental examination, counsel for the party to be examined should determine if anything can be gained by such resistance. Entering into a stipulation as to the terms and conditions of an agreed examination, as well as simple preparation of the client for the examination, might yield more fruitful results than simple opposition.

Options and strategies to consider include:

1. Attempting negotiation toward a stipulated examination (*see* §§ *11.07-11.10 above*).

2. Focusing on the scope of the examination.

3. Considering a protective order if the examination involves invasive or painful procedures (*see* Ch. 16 *below*).

4. Preparing the client for the examination.

5. Interviewing the client immediately after the examination.

6. Considering options for obtaining the examination report (*see* §§ *11.20-11.24 below*).

See Fed. R. Civ. P. 35(b).

PRACTICE RESOURCES:

- *Fed. R. Civ. P. 35* (physical and mental examinations).
- *Moore's Federal Practice (3d ed.)* §§ 35.02-35.12.

- *Federal Litigation Guide P 21.14*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.05*.



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Chapter 11 PHYSICAL AND MENTAL EXAMINATIONS
PART F: OBTAINING EXAMINATION REPORTS

1-11 Moore's AnswerGuide: Federal Discovery Practice § 11.20

§ 11.20 Checklist for Obtaining Examination Reports

☐ Draft demand for examination reports. *See § 11.21 below*.

- ○ Request detailed written report setting out the examiner's findings, including results of all tests made, diagnoses, and conclusions.
- ○ Request copy of like reports of all earlier examinations of the same condition.

☐ If reports are not received, move to compel production. *See § 11.22 below*.

- ○ Accompany motion with declaration stating failure of attempts at informal resolution.
- ○ Include request for sanctions.

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§ 11.21 Obtaining Report on Request of Examined Party

When an examination is ordered following a noticed motion under Rule 35(a), the party subject to the order of examination may request a copy of the report of the examiner and copies of all earlier examinations of the same condition. *See Fed. R. Civ. P. 35(b)(1).*

The right of the examined party to receive the examiner's report applies to an examination performed under a stipulation of the parties, unless the stipulation expressly provides otherwise. *See Fed. R. Civ. P. 35(b)(6).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.12[2].*
- *Federal Litigation Guide P 21.15.*
- *Fed. R. Civ. P. 35(b)(1)* (request of examiner's report by party or person examined).
- *Fed. R. Civ. P. 35(b)(6)* (agreement by stipulation).



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Chapter 11 PHYSICAL AND MENTAL EXAMINATIONS
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1-11 Moore's AnswerGuide: Federal Discovery Practice § 11.22

§ 11.22 Compelling Production of Report

If the party subject to an order for examination requests the examiner's report, but the party conducting the examination does not produce the report, the party requesting the report may compel delivery by moving for a court order under the standard noticed motion procedure. *See Fed. R. Civ. P. 35(b)(5).*

If the examined party makes a request for the examiner's report and moves the court for an order to compel production of the report, but the examiner fails or refuses to make the report, the court may exclude the examiner's testimony if offered at trial. *See Fed. R. Civ. P. 35(b)(5).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.12[4].*
- *Federal Litigation Guide P 21.15[3], [5].*
- *Bender's Federal Practice Forms* Form Nos. 35:100, 35:101, 35:120.
- *Fed. R. Civ. P. 35(b)(5)* (failure to deliver report).



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Chapter 11 PHYSICAL AND MENTAL EXAMINATIONS
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§ 11.23 Determining Effect of Request for and Delivery of Report

[1] Request of Examined Party Includes All Results of Earlier Examinations of Same Condition

If the party subject to an order for examination makes a request for the examiner's report, the examining party's duty of disclosure includes not only the results of the particular examination, but also "like reports of all earlier examinations of the same condition." *See Fed. R. Civ. P. 35(b)(1).*

This duty also applies to an examination under a stipulation of the parties, unless the stipulation expressly provides otherwise. *See Fed. R. Civ. P. 35(b)(6).*

[2] Delivery of Report by Examining Party Entitles Party to Results of Any Other Examination of Same Condition

Once the examining party furnishes the examiner's report after a request from the examined party, the examining party may request from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. *See Fed. R. Civ. P. 35(b)(3).*

Requesting and receiving the examiner's report carries the reciprocal obligation to provide the opposing party with any reports of any examination of the same condition. This reciprocal obligation applies to an examination under a stipulation of the parties, unless the stipulation expressly provides otherwise. *See Fed. R. Civ. P. 35(b)(6).*

[3] Request of Examined Party Waives Any Privilege of Party As to Other Examinations of Same Condition

By requesting and obtaining a report of the examination or by taking the deposition of the examiner, the examined party waives any privilege regarding the testimony of any other person who examined or may examine the party with respect to the same condition. *See Fed. R. Civ. P. 35(b)(4).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.12[3], [5].*

- *Federal Litigation Guide P 21.15[4], [6].*
- *Fed. R. Civ. P. 35(b)(1)* (request of examiner's report by party or person examined).
- *Fed. R. Civ. P. 35(b)(3)* (request of examiner's report by moving party).
- *Fed. R. Civ. P. 35(b)(4)* (waiver of privilege).
- *Fed. R. Civ. P. 35(b)(6)* (agreement by stipulation).



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§ 11.24 Obtaining Report Under Other Discovery Provisions Not Precluded

Rule 35 does not bar discovery of an examiner's report or deposing an examiner under other discovery rules. *See Fed. R. Civ. P. 35(b)(6).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.12[6].*
- *Federal Litigation Guide P 21.15[7].*
- *Fed. R. Civ. P. 35(b)(6)* (other discovery provisions not precluded).



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Chapter 12 DISCOVERY OF EXPERTS

1-12 Moore's AnswerGuide: Federal Discovery Practice 12.syn

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Chapter 12 DISCOVERY OF EXPERTS
PART A: PROCEDURAL CONTEXT

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§ 12.01 Procedural Context--Discovery of Experts

Expert witnesses are widely employed in federal litigation. Because experts can testify on the "ultimate issue," they may be the most helpful witnesses for the party presenting the expert testimony and the most damaging witnesses for the opposing party. Proper selection and pretrial preparation of expert witnesses and effective discovery of opposing expert opinion is fundamental to a successful result in federal court litigation.

The increase in the use of expert evidence has not been without its critics. Courts have seen cases bogged down by overuse of expert opinion; costs of litigation have soared as a result of the parties' heavy reliance on expert witnesses; and many litigators and judges have commented that experts have taken on too large a role in civil litigation.

Expert testimony has become a critical component of federal trials, in part, because the Federal Rules of Evidence have been expanded to allow for the flexible use of experts.

For example:

1. Rule 701 has been relaxed to allow lay witnesses to offer opinions based on their perceptions if such opinions are helpful to the fact-finder;

2. Under Rule 702, the class of witnesses characterized as experts has been expanded beyond those with formal education or degrees to include persons qualified through skill or experience;

3. Rule 703 now allows experts to base their opinions on inadmissible evidence if it is the type normally and reasonably used by experts in their field; and

4. Rule 705 permits the expert to state an opinion without expressing the basis for it.

The Civil Rules governing mandatory disclosure and discovery require parties to lay the groundwork for their use of experts during the pretrial phase. Parties must pay particular attention to the rules governing mandatory disclosure of expert testimony and use of experts in trial preparation. Maintaining protection for attorney work product is another critical consideration.



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Chapter 12 DISCOVERY OF EXPERTS
PART B: UNDERSTANDING ROLE OF EXPERT WITNESSES IN LITIGATION

1-12 Moore's AnswerGuide: Federal Discovery Practice § 12.02

§ 12.02 Checklist for Understanding Role of Expert Witnesses

☐ Consider retaining an expert early, at pre-filing stage. *See § 12.03[1] below.*

- ○ Pre-filing retention avoids possibility of losing the expert to other side.
- ○ Early retention gives expert a chance to learn about case up-front, and to help in framing discovery.
- ○ Determine if retention of expert will increase or decrease cost of litigation in the long run, and if careful management will minimize additional expenses.

☐ Consider retaining "consulting expert," who will help formulate theories of case and assist with understanding theories of opposing counsel, but will not testify at trial. *See § 12.03[2] below.*

☐ Evaluate potential testifying experts, who must be both knowledgeable about technical issues and capable of communicating with jurors in the courtroom. See *§ 12.03[3] below.*

- ○ Consider whether the case requires use of an expert to prepare demonstrative evidence for the trial.

☐ Locate appropriate expert witness[es] for case by reviewing reported cases, word of mouth from other attorneys, bar associations, technical literature, and other means. *See § 12.03[4] below.*

- ○ Perform independent check on expert's experience, qualifications, and references.

☐ Compel testimony from appropriate non-retained experts, such as treating physician, by subpoena. *See § 12.04 below*.

☐ Enter into contract[s] with experts that explicitly address expert's responsibilities to the client. *See § 12.05 below*.

☐ Prepare expert to withstand cross-examination. *See § 12.06[1] below*.

☐ Provide expert with access to all of the facts. *See § 12.06[2] below*.

☐ Counsel experts to refrain from expressing their preliminary opinion in writing until facts are in. *See § 12.06[3] below*.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Expert Witness Discovery



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Chapter 12 DISCOVERY OF EXPERTS
PART B: UNDERSTANDING ROLE OF EXPERT WITNESSES IN LITIGATION

1-12 Moore's AnswerGuide: Federal Discovery Practice § 12.03

§ 12.03 Selecting Expert Witnesses

[1] Timing of Expert Selection

Experts can be useful at all stages of a case, including the pre-filing stage. In some cases, early consultation with a person knowledgeable in the specific technical, medical, or business area involved in the controversy will help with the development of legal claims. Because not all experts selected will be used at trial, consulting with an expert early may at first seem unduly expensive. Retaining that expert as early as possible, however, can provide significant advantages when a suit is filed and an expert is needed. For example, pre-filing retention avoids the possibility of losing the expert to the other side. Early retention also gives the expert a chance to learn about the case up-front, and to help in framing discovery.

Yet, retaining an expert early need not add unduly to the cost of litigation. Careful management of the expert's duties will minimize additional expenses. At most, early use of experts will simply move the costs up in time. Unless the case is likely to settle in the very early stages, this is money well spent. Moreover, it could actually reduce costs later on, because the expert will not be forced to do extra work to create theories in short order.

[2] Selecting a "Consulting Expert"

The expert hired at an early stage need not be the perfect trial witness. Some experts who may not want to testify at trial (or who may not be good at it) nevertheless have useful contributions to make to the evaluation of a case. Because the opinions of such "consulting experts" usually are not discoverable, using them early can shield the testifying expert as well. Under *Fed. R. Civ. P. 26(a)(2)(A)*, a party is only entitled to disclosure of persons whose expert testimony "it may use at trial." Moreover, *Fed. R. Civ. P. 26(b)(4)(B)* allows depositions of consulting experts only on a showing of "exceptional circumstances." Thus, the rules do not support, but also do not completely prohibit, consulting expert discovery.

A consulting expert can help formulate theories of the case using principles of science, medicine, or business. Consulting experts, as well as trial experts, can also help counsel understand and assess likely theories of opposing counsel. Each case will require an independent evaluation of the need for early expert participation.

[3] Selecting a "Testifying Expert"

A different set of considerations applies to the selection of testifying experts. Unlike consulting experts, testifying experts must be both knowledgeable on the technical issues presented, and capable of communicating with jurors in the courtroom. Testifying experts must be persuasive, confident, and capable. Experienced testifying experts often charge higher hourly or daily rates. However, inexperienced experts may not be familiar with the stress of cross-examination in a deposition or in the courtroom.

In addition to substantive testifying experts, a case may also require the use of experts who do nothing but prepare demonstrative evidence for the trial: models, experiments, videos, or animations. Such demonstrative evidence experts must be prepared to testify, at least on deposition, to authenticate their work for admission into evidence.

Some experts have developed expertise solely in areas of litigation controversy: damages experts, accident reconstructionists, handwriting experts, model makers, and recreation safety analysts, to name just a few. These experts are unique in that their expertise relates specifically to litigation issues, and exists only partially, if at all, outside that context. Virtually all complex cases will require at least one of these experts.

[4] Locating Expert Witnesses

The appropriate expert may be found in any number of ways: from reported cases; by word of mouth from other attorneys; from bar associations; from technical literature in the field; or from colleges or universities. There are many expert clearinghouses whose business it is to direct attorneys to qualified experts, as well as societies that attempt to screen and qualify experts for public reference.



Warning:

An independent check on the expert's experience, qualifications, and references is always imperative. Only by interviewing an expert can counsel determine if the expert's knowledge is right for the particular case.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.80.*
- *Fed. R. Civ. P. 26(a)(2)(A)* (disclosure of expert testimony expected to be used at trial).
- *Fed. R. Civ. P. 26(b)(4)(B)* (expert employed only for trial preparation).



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§ 12.04 Compelling Testimony From Non-Retained Experts

An expert who has not been retained by another party in a case enjoys no immunity or privilege from testifying and may be compelled to testify by subpoena. *Anker v. G.D. Searle & Co., 126 F.R.D. 515, 519 (M.D.N.C. 1989)* (researcher in field of medical devices has no special privilege); *see also Fed. R. Civ. P. 45* (rule on subpoenas).

An expert can be compelled to testify to opinions that he or she has previously formed and that require no study of the facts or further preparation. *See, e.g., Wright v. Jeep Corp., 547 F. Supp. 871, 875-877 (E.D. Mich. 1982)* (expert was subpoenaed involuntarily to discuss his studies regarding the disproportionately high roll over rate in accidents regarding utility vehicles). However, courts have also exercised their discretion to limit unwilling expert testimony. *See, e.g., Buchanan v. American Motors Corp., 697 F.2d 151, 152 (6th Cir. 1983)* (expert who had published a lengthy adverse research study about safety of appellant's product was not compelled to travel a long distance to testify, when he had no direct contact with appellant).

For discussion of Rule 45 subpoenas, see Ch. 14 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.80[1].*
- *Federal Litigation Guide P 23.03.*



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§ 12.05 Contracting With Experts

The relationship between an attorney and an expert witness is voluntary and contractual. An expert with no pre-existing relationship with the party, the case, or the attorney, has no duty to render services as an expert witness merely on request. Once a relationship is established, however, the expert witness must fulfill the contract and perform the services with reasonable care. *Honeywell, Inc. v. American Standards Testing Bureau, 851 F.2d 652 (3d Cir. 1988)* ($300,000 judgment entered against expert witness company for "gross negligence" when expert who signed report did not participate in its preparation and could not testify as to his own opinion, resulting in an adverse verdict).

Even though there is a contractual relationship, there is no contractual duty on the part of the expert to testify in a certain way or express certain opinions; such a contract would violate public policy. Nor does an expert owe a duty to the opposing party. The expert owes a duty only to the court and is immune from liability for claims arising out of an expert report or testimony *Kahn v. Burman, 673 F. Supp. 210, 212-213 (E.D. Mich. 1987)* (witness deposition and reports as protected by absolute immunity afforded to statements relevant to a judicial proceeding).

Because of these "independent" responsibilities, a contract with an expert should explicitly address what the expert's responsibilities will be to the client. The agreement should also state what the expert's services will cost. Practices vary widely among experts. For example, they may charge by the hour, the day, or the job. Charges for research assistants and other technical assistants should be expressly covered.

PRACTICE RESOURCES:

- *Federal Litigation Guide P 23.04.*



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Chapter 12 DISCOVERY OF EXPERTS
PART B: UNDERSTANDING ROLE OF EXPERT WITNESSES IN LITIGATION

1-12 Moore's AnswerGuide: Federal Discovery Practice § 12.06

§ 12.06 Preparing Experts for Litigation

[1] Withstanding Cross-Examination

The expert's role is to analyze the problem in sufficient detail to withstand cross-examination, *and* to reiterate that detail in a manner understandable to the lay juror or judge. If an expert will not defer to direction of counsel, or cannot because of differing opinions concerning the case theory, a new expert must be located. Of course, as a highly skilled specialist, the expert must feel free to voice contrary opinions. Vigorous discussion will narrow the issues and will facilitate explanation of the most troublesome aspects of the case to the jury. Moreover, discussions with an expert will aid in avoiding a trial theory that is destined to fail.

[2] Providing Expert With Access to Facts

Fundamentally, the expert's opinion is based on the facts of the case. Accordingly, the expert must have access to *all* of the facts, good and bad. Such access is crucial in maintaining the expert's credibility; if important facts are withheld from an expert, cross-examination can be devastating.

Generally, the facts should not be gathered by the expert. Rather, counsel should gather the facts before requesting that the expert analyze them. One of the best ways to get an expert into a case quickly is to transmit the case documents to the expert as soon as possible after the expert is retained and a fee schedule is agreed upon.

Warning:

While some materials provided to an expert may be protectable, it is safer to operate under the assumption that all material supplied to the expert is discoverable as a basis of opinion.

[3] Avoiding Preliminary Expert Opinions

Most experts refrain from solidifying their opinions until they know all the facts, but counsel may need to caution an inexperienced expert against expressing opinions in writing until the facts are in. Under no circumstances should preliminary opinions be written. If they are contrary to the final opinion, they will be hard to explain at a deposition or on cross-examination. Some experts believe these opinions can be explained, but there is no guarantee a jury will

believe a paid expert's explanation.

Periodic telephone conferences with the expert will keep the work focused on the issues that are pivotal to the case and help frame continuing discovery requests to assist the expert's work. The expert should prepare a written report only when counsel asks; unsolicited written reports often do not address key issues and cannot be "unwritten." When it is time to submit the mandatory expert report, counsel can work with the expert to create the best possible product.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.80[1].*
- *Federal Litigation Guide P 23.05.*



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Chapter 12 DISCOVERY OF EXPERTS
PART C: MAKING EXPERT WITNESS DISCLOSURES

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§ 12.07 Checklist for Making Expert Witness Disclosures

☐ Unless otherwise stipulated or ordered by the court, the parties must prepare and provide expert witness disclosures as required under *Fed. R. Civ. P. 26(a)(2). See §§ 12.08, 12.09 below.*

☐ Determine which witnesses must be included in the disclosures as experts. *See § 12.10 below*:

- ○ Those retained or specially employed to provide expert testimony in the case.
- ○ Those whose duties as an employee of the party regularly involve giving expert testimony.
- ○ Testifying experts.
- ○ Treating physicians.
- ○ Direct witnesses.
- ○ Cross examination witnesses.
- ○ Rebuttal witnesses (30 days after other parties' disclosures).

☐ Provide to other parties the identity of any expert witness who may testify at trial as required under *Fed. R. Civ. P. 26(a)(2)(A). See § 12.10 below.*

☐ Have each expert witness subject to the disclosure requirements prepare a written report. Counsel

may provide assistance, but cannot prepare report. The report must contain the following information, pursuant to *Fed. R. Civ. P. 26(a)(2)(B)*: *See § 12.11[2] below*.

- ○ A complete statement of all opinions that the expert will express and their basis and reasons.
- ○ The facts or data considered by the expert in forming opinions.
- ○ Any exhibits to be used as a summary of or in support of the witness's opinions.
- ○ The witness's qualifications, including a list of all publications written by the witness within the preceding 10 years.
- ○ The compensation to be paid for the study and testimony.
- ○ A list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

☐ Report need not include rebuttal evidence. *See § 12.10[5] below*.

☐ Review report to assure it is complete. Experts may not testify about matters not included in report. *See § 12.11 below*.

☐ Prepare expert witness disclosures in writing as required by *Fed. R. Civ. P. 26(a)(4)*. *See § 12.14[1] below*.

☐ Have expert sign written report, pursuant to *Fed. R. Civ. P. 26(a)(2)(B)*. *See § 12.14[1] below*.

☐ Prepare expert witness disclosures for experts who are not required to provide a written report, including the following information, pursuant to *Fed. R. Civ. P. 26(a)(2)(C)*; *See § 12.12 below*.

- ○ The subject matter on which the witness is expected to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*.
- ○ A summary of the facts and opinions to which the witness is expected to testify.

☐ Serve expert witness disclosures on the other parties as required under *Fed. R. Civ. P. 26(a)(4)*. *See § 12.14[1] below*.

☐ Supplement expert witness disclosures with any changes or additions by the time pretrial disclosures under *Fed. R. Civ. P. 26(a)(3)* are due. *See § 12.13 below*.

☐ **Search by Topic:** Civil Procedure > Discovery > Disclosures > Mandatory Disclosures



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Chapter 12 DISCOVERY OF EXPERTS
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1-12 Moore's AnswerGuide: Federal Discovery Practice § 12.08

§ 12.08 Understanding Scope of Expert Witness Disclosures

[1] Including Requisite Information in Disclosure

Unless otherwise stipulated or ordered by the court, the parties must provide to other parties at least 90 days before the trial date or the date the case is to be ready for trial:

1. The identity of any expert witnesses who may testify at trial under *Rule 702*, *703*, or *705 of the Federal Rules of Evidence*. *Fed. R. Civ. P. 26(a)(2)(A)*.

2. A written report prepared and signed by each witness who may testify. *Fed. R. Civ. P. 26(a)(2)(B)*.

3. For experts who are not required to provide a written report, the subject matter on which the witness is expected to present evidence and a summary of the facts and opinions to which the witness is expected to testify. *Fed. R. Civ. P. 26(a)(2)(C)*.

This rule provides parties the opportunity to prepare an effective cross-examination of the opposing parties' expert witnesses and, if necessary, arrange for testimony from other experts. *Fed. R. Civ. P. 26(a)*, Committee Note of 1993.

[2] Rebutting Expert Witness Information Disclosed Under Rule 26(a)(2)

After receiving the other parties' disclosures under Rule 26(a)(2)(B) or (C), a party may determine that additional expert testimony, not yet disclosed, may be necessary to contradict or rebut the other parties' disclosed witnesses. In that event, the party must disclose rebuttal expert witness identities and reports within 30 days after the other parties' disclosures. *Fed. R. Civ. P. 26(a)(2)(D)(ii)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.80[1].*
- *Federal Litigation Guide P 23.100* (sample form of expert witness disclosures).

- *Weinstein's Federal Evidence (2d ed.)* Chs. 702 (testimony by experts), 703 (bases of opinion testimony by experts), 705 (disclosure of facts or data underlying expert opinions).

- *Fed. R. Civ. P. 26(a)(2)(A)* (disclosure of expert testimony, required disclosures).

- *Fed. R. Civ. P. 26(a)(2)(B)* (disclosure of expert testimony, written reports).

- *Fed. R. Civ. P. 26(a)(2)(C)* (disclosures about experts who are not required to provide written reports).

- *Fed. R. Civ. P. 26(a)(2)(D)* (time to disclose expert testimony).



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1-12 Moore's AnswerGuide: Federal Discovery Practice § 12.09

§ 12.09 Understanding Consequences of Not Disclosing Expert Information

[1] Excluding Testimony at Trial

Failure to comply with the expert disclosure requirements of Rule 26(a)(2) may be countered by a motion to compel by any other party. *Fed. R. Civ. P. 37(a)(3)(A)*. The failure to make disclosure without substantial justification is sanctionable and sanctions may include disqualification of the witness or the exclusion of undisclosed evidence. *Fed. R. Civ. P. 26(a)(2)(B)*.

When exclusion would be tantamount to dismissal of the case (based on the party's inability to prove its case without the expert), the trial judge should not impose the exclusion sanction unless it finds that the party's failure to comply with the disclosure requirements was both unjustified and harmful. *See Sherrod v. Lingle, 223 F.3d 605, 612 (7th Cir. 2000)* (sanction of excluding plaintiff's experts was an abuse of discretion, considering harmless nature of plaintiff's failure to comply with discovery order).

One party's failure to comply with the expert disclosure requirements does not excuse noncompliance by another party. *Smith v. State Farm Fire and Cas. Co., 164 F.R.D. 49, 54 (S.D. W. Va. 1995)* (plaintiff argued that his experts' conclusory reports should be satisfactory because the reports of defendants' experts were also conclusory; court did not excuse noncompliance with Rule 26 on that basis).

If an expert discusses the omitted opinion in the course of the expert's deposition, that will often operate to satisfy Rule 26(e)(1), which permits supplementation of disclosures, and prevent exclusion under *Fed. R. Civ. P. 37(c)(1)*, unless the court determines that the omission was intentional and without substantial justification, and the opponent was unduly prejudiced as a result. However, the mere fact that an expert's deposition is taken and the opposing party has the opportunity to inquire into opinions omitted from the expert's report--but does not in fact do so--will not cure the omission in the report. The omitted opinion will, in these circumstances, usually be excluded under Rule 37(c)(1) unless the proponent can show substantial justification or harmless error. *See LaMarca v. United States, 31 F. Supp. 2d 110, 123 (E.D.N.Y. 1998)* (proponent failed to submit any part of deposition transcript to support his argument of substantial justification or harmless error).

For discussion of motions to compel, see Ch. 17 *below*. For discussion of Rule 37(c)(1) sanctions, see §§ *18.08-18.12*

below.

[2] Imposing Lesser Sanctions

In addition to the strong sanction of exclusion, the court has broad discretion in fashioning additional sanctions for failure to disclose experts or to provide proper expert reports under Rule 26(a)(2). The court may as an additional sanction, or in lieu of exclusion:

1. Require payment of reasonable expenses caused by the failure to disclose (including attorney's fees);

2. Designate certain facts be taken as established for the purposes of the action;

3. Refuse to allow the non-disclosing party to support or oppose certain claims or defenses;

4. Strike parts of the pleadings;

5. Stay further proceedings until disclosure is made;

6. Dismiss any part of the action; or

7. Inform the jury of the failure to disclose.

Fed. R. Civ. P. 37(c)(1).

For discussion of Rule 37(c)(1) sanctions, see §§ *18.08-18.12 below*.

PRACTICE RESOURCES:

- *Federal Litigation Guide P 23.100*.
- *Fed. R. Civ. P. 26(a)(2)* (disclosure of expert testimony).
- *Fed. R. Civ. P. 37(a)(3)(A)* (failure to make required disclosures or to cooperate in discovery; sanctions, specific motions).
- *Fed. R. Civ. P. 37(c)(1)* (failure to disclose or supplement, sanctions).



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1-12 Moore's AnswerGuide: Federal Discovery Practice § 12.10

§ 12.10 Identifying Expert Witnesses Who May Testify

[1] Testifying Experts Must Be Disclosed

Parties must disclose the identity of experts who may be used at trial to present evidence under *Rules 702*, *703*, or *705 of the Federal Rules of Evidence*. *Fed. R. Civ. P. 26(a)(2)(A)*.

Note that:

1. Rule 702 allows experts to offer opinion evidence if it will assist the trier of fact to determine a factual issue. *Fed. R. Evid. 702*.

2. Rule 703 allows an expert to base an opinion on material provided before or during trial and that may not be admissible. *Fed. R. Evid. 703*.

3. Rule 705 allows an expert to state the reason for an offered opinion without first disclosing the facts or data relied on to form the opinion. *Fed. R. Evid. 705*

A party is not exempt from the disclosure and report requirement for a witness who will give expert testimony simply because the witness is not monetarily compensated. It is the nature of the testimony rather than the compensation that determines whether a witness is exempt from the disclosure and report requirements. *See Innogenetics, N.V. v. Abbott Laboratories, 578 F. Supp. 2d 1079, 1089 (W.D. Wis. 2007)* (purpose of Rule 26(a)(2)(B) would be thwarted if witness who will be giving scientific testimony is exempt from report requirement simply because witness is willing to testify without charge).

[2] "Lay" Experts Need Not Be Disclosed

A party is not required to disclose--as an expert--the identity of a lay witness who will provide opinion testimony under *Rule 701 of the Federal Rules of Evidence*. *MCI Telecommunications Corp. v. Wanzer, 897 F.2d 703, 706 (4th Cir. 1990)* (appellant not required to identify witness as expert before trial because witness would have testified about records she personally kept, and her projection of profits was based on her personal knowledge and perception).

Evidence Rule 701 permits a lay witness to testify in the form of opinions or inferences when the testimony is rationally based on the perception of the witness and the testimony will be helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. *Fed. R. Evid. 701*. It is sometimes difficult to distinguish between a lay witness providing Rule 701 testimony and an expert providing testimony under Rule 702, particularly if the witness might otherwise qualify as an expert in his or her field, especially in courts that have adopted a liberal view toward the admissibility of Rule 701 testimony. *Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190 (3d Cir. 1995)* (admission of lay opinion witness' testimony improper because there was no evidence in record that witness possessed sufficient knowledge or experience that qualified him to offer technical opinion concerning malfunction in aerial lift that caused plaintiff's death).

An essential difference is that Rule 701 requires direct personal knowledge of a factual matter at issue. Only then does it allow introduction of a limited degree of opinion testimony to help convey that information and only if the court finds that it would be helpful to the jury. *Wilburn v. Maritrans GP, Inc., 139 F.3d 350, 355-356 (3d Cir. 1998)* (reversible error when district court excluded testimony of two percipient witnesses to events that occurred before defendant was tossed from the deck of a ship by a gigantic wave; court failed to inquire whether witnesses possessed requisite knowledge or experience to provide opinion testimony).

However, "lay experts" must be disclosed if they are serving as fact witnesses. *See Fed. R. Civ. P. 26(a)(1), (a)(3)*.

[3] Consultants Need Not Be Disclosed

Rule 26(a)(2) requires the disclosure only of experts who may testify at trial. Consultants who have provided expert opinions, but who the party does not intend to call as witnesses, generally need not be disclosed. *Fed. R. Civ. P. 26(a)(2)*.

Note, however, that facts known or opinions held by such a consulting expert may be discoverable on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. *Fed. R. Civ. P. 26(b)(4)(D)*.

In addition, reports of physical or mental examinations ordered by the court or agreed to by the parties must be provided if requested by the examined party. *Fed. R. Civ. P. 26(b)(4)(D)*; *see also Fed. R. Civ. P. 35(b)*; Ch. 11 *above*.

[4] Determining Whether to Disclose Treating Physician as Expert

A physician who has treated a party is generally considered to be an ordinary witness, who need not be disclosed, even though a treating physician may be called on to testify based on his or her personal knowledge of the patient's examination, diagnosis, and treatment. In some cases, a treating physician may be permitted to offer an opinion as to what caused the medical condition at issue. *Brundidge v. City of Buffalo, 79 F. Supp. 2d 219, 224 (W.D.N.Y. 1999)* (treating physician can offer opinion as to what caused plaintiff's mental problems as long as physician's opinion is based solely on physician's treatment of plaintiff).

In contrast, a physician who is specially retained or employed to render a medical opinion based on factors that were not learned in the course of treatment of the patient, is considered to be an expert witness, and is subject to expert witness disclosure requirements. *Hall v. Sykes, 164 F.R.D. 46, 48-49 (E.D. Va. 1995)* (noting that routine payment of fees to attend deposition or testify in court does not constitute such special employment).

Although a treating physician need not be disclosed if his or her testimony will be limited to what was observed during treatment, a treating physician's testimony is rarely limited to such factual observation. It is more likely that the treating physician's testimony will include some expert testimony as defined under *Fed. R. Civ. P. 26(a)(2)(A)*. *See § 12.10[1], above*. Rule 26 requires the disclosure of any witness a party may use to present evidence under *Federal Rule of*

Evidence 702, *703*, *705*. *Fed*. *R*. *Civ*. *P*. *26(a)(2)(A)*. Thus, the safer practice is to disclose a treating physician as an expert witness. In addition, a party must provide summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B). *See Fed*. *R*. *Civ*. *P*. *26(a)(2)(C)*; *see also § 12.12*, *below*. Although Rule 26 does not specifically mention treating physicians, the advisory committee note cites as examples of fact witnesses who may also provide expert testimony, "physicians or other health care professionals and employees of a party who do not regularly provide expert testimony." Parties must identify these witnesses under Rule 26(a)(2)(A) and provide the summary disclosures required under Rule 26(a)(2)(C), but do not need to furnish a formal written report. *See Fed*. *R*. *Civ*. *P*. *26(a)(2)(C)*, Committee Note of 2010.

[5] Including Direct, Cross, or Rebuttal Witnesses in Disclosures

Expert witness disclosures must include the identity, testimony, and other required information from all expert witnesses expected to testify at trial, including those that will be used to impeach or rebut evidence offered by the other parties' experts. Experts who will be offered solely as rebuttal witnesses, however, need not be identified until 30 days after the other parties' disclosures. *Fed*. *R*. *Civ*. *P*. *26(a)(2)(D)(ii)*; *see also ABB Air Preheater, Inc*. *v*. *Regenerative Envtl*. *Equip*. *Co*., *167 F*.*R*.*D*. *668, 672-673 (D*.*N*.*J*. *1996)* (rebuttal evidence need not appear in first report submitted by patentee's experts).

Warning:

Although the rule allows the admission of expert testimony that is "intended solely to contradict or rebut evidence on the same subject matter identified by another party," the court has authority to exclude rebuttal testimony that goes beyond the scope of the other party's expert testimony and introduces new opinions not previously disclosed. *See New York v*. *Solvent Chem*. *Co*., *685 F*. *Supp*. *2d 357, 414 (W*.*D*.*N*.*Y*. *2010)* (typical "rebuttal testimony" identifies flawed premise in another's expert report that casts doubt on expert's conclusions and expertise).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed*.*) § 26*.*23*.
- *Federal Litigation Guide P 23*.*100*.
- *Weinstein's Federal Evidence (2d ed*.*)* Chs. 701, 702, 703, 705.
- *Fed*. *R*. *Civ*. *P*. *26(a)(1)* (initial disclosures).
- *Fed*. *R*. *Civ*. *P*. *26(a)(2)* (disclosure of expert testimony).
- *Fed*. *R*. *Civ*. *P*. *26(b)(4)(B)* (expert employed only for trial preparation).
- *Fed*. *R*. *Civ*. *P*. *35(b)* (examiner's report in connection with physical or mental examination).
- *Fed*. *R*. *Evid*. *701* (opinion testimony by lay witnesses).
- *Fed*. *R*. *Evid*. *702* (testimony by experts).
- *Fed*. *R*. *Evid*. *703* (bases of expert opinion testimony).
- *Fed*. *R*. *Evid*. *705* (disclosure of facts or data underlying expert opinion).



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Chapter 12 DISCOVERY OF EXPERTS
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§ 12.11 Preparing Expert Witness Reports

[1] Determining Whether Witnesses Must Prepare Report

Unless otherwise stipulated or ordered by the court, two types of witnesses must prepare written reports:

1. Those retained or specially employed to provide expert testimony in the case.

2. Those whose duties as an employee of the party regularly involve giving expert testimony.

Fed. R. Civ. P. 26(a)(2)(B).

Courts often consider whether the witness has been paid a fee in determining whether the witness was retained or specially employed, but that fact alone does not make a witness an expert subject to the report requirements. *Hall v. Sykes, 164 F.R.D. 46, 48 (E.D. Va. 1995)* (merely paying fee to treating physician to attend deposition or to testify in court does not make treating physician specially retained or employed expert so as to require preparation of expert written report).

[2] Including Opinions and Other Information in Expert Report

The expert's report must contain each of the following:

1. A complete statement of all opinions the expert will express and their basis and reasons;

2. The facts or data considered by the expert in forming opinions;

3. Any exhibits to be used as a summary of or in support of the witness's opinions;

4. The witness's qualifications, including a list of all publications written by the witness within the preceding 10 years. *See Rivera Pomales v. Bridgestone Firestone, Inc., 217 F.R.D. 290, 293 (D.P.R. 2003)* (district court excluded defendant's expert witness for failure to include a copy of the expert's curriculum vitae with the expert witness report).

5. A list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years;

6. The compensation to be paid for the study and testimony. *See Cary Oil Co. v. MG Ref. & Mktg., Inc., 257 F. Supp. 2d 751, 756 (S.D.N.Y. 2003)* (disclosure of hourly rate on its own is insufficient).

Fed. R. Civ. P. 26(a)(2)(B).

A party is not excused from producing a detailed and complete list of cases in which that party's expert has testified simply because the expert does not maintain such a list, or because such a list would be costly and difficult to compile because of the number of cases in which the expert has testified. *Palmer v. Rhodes Machinery, 187 F.R.D. 653, 655-656 (N.D. Okla. 1999)* (court found that cost or difficulty of compiling list is insufficient for purpose of meeting "substantial justification" requirement).

Information in the nature of rebuttal evidence need not be included in an expert witness's first report. It is sufficient for this information to appear in the second report filed by a party's expert in response to the other party's expert's report. *ABB Air Preheater, Inc. v. Regenerative Envtl. Equip. Co., Inc., 167 F.R.D. 668, 672-673 (D.N.J. 1996)* .

With respect to the required list of cases in which the witness has testified, one district court has held that the identification of cases at a minimum should include the courts or administrative agencies, the names of the parties, the case number, and whether the testimony was by deposition or at trial. *Nguyen v. IBP, Inc., 162 F.R.D. 675, 682 (D. Kan. 1995)* .

[3] Providing Detailed and Complete Report

An expert witness's report must include all testimony the witness is expected to present during direct examination, and the expert may not testify on a matter not disclosed in the preliminary report. An expert's testimony may be entirely precluded if the expert's report is not made available to opposing counsel within disclosure deadlines. *Walsh v. McCain Foods Ltd., 81 F.3d. 722 (7th Cir. 1996)* .

The written report requirement was designed to counter the common practice of providing information so sketchy and vague that it rarely dispensed with the need to depose the expert or was of little help in preparing for a deposition of the witness. *Fed. R. Civ. P. 26(a)*, Committee Note of 1993.

Rule 26(a)(2) effectively does away with the need for interrogatories to determine the substance of an expert's testimony because the expert report must contain a complete statement of all opinions to be expressed and the basis and reasons for the opinions, as well as the data or other information considered by the witness in forming the opinions. *Fed. R. Civ. P. 26(a)(2)*. Because the report must be served before an expert may be deposed, the report may reduce the length of the expert's deposition (*see § 12.20 below*) or may eliminate the need for one entirely. *Fed. R. Civ. P. 26(a)*, Committee Note of 1993.

[4] Disclosing Information Considered by Witness in Forming Opinions

Rule 26(a)(2)(B) mandates disclosure, in the expert's written report, of the facts or data considered by the expert in forming expert opinions. *See Fed. R. Civ. P. 26(a)(2)(B)(ii)*. Former versions of Rule 26 created uncertainty as to whether the work product privilege is waived when an attorney provides work product materials to an expert witness. The uncertainty was based on an apparent conflict in the language of Rule 26. A former version of Rule 26(a)(2)(B) required that an expert report contain a complete statement of all of the "data or other information" considered by the expert in forming the opinions. Based on this language, many courts held that work product protection was waived for

any document or information provided to a testifying expert, whether or not the expert relied on the information in preparing the expert report. *See, e.g., In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001)* . In 2010, Rule 26(a)(2)(B) was amended to replace the term "data or other information" with the term "facts or data." This amendment was intended to disapprove of cases that relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. In addition, Rule 26(b)(4) was amended at the same time to provide work-product protection for draft reports and communications between a party's attorney and expert witnesses. *Fed. R. Civ. P. 26(a)(2)(B)*, Committee Note of 2010. The amendments to Rule 26(b)(4) were designed to protect work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to discovery. *Fed. R. Civ. P. 26(b)(4)(C)*, Committee Note of 2010.

Although most communications between a party's attorney and expert witnesses are entitled to work product protection, when assisting expert witnesses, keep in mind that facts or data provided to an expert and considered in forming the opinions to be expressed are not protected. In addition, work product protection does not extend to assumptions that the attorney provided and that the expert relied on in forming the opinions to be expressed. *See Fed. R. Civ. P. 26(b)(4)(C).*

[5] Determining Whether Report Requirement Applies to Treating Physician

Application of the written report requirement to treating physicians has generated some uncertainty. When the written report requirement was enacted, the advisory committee stated that a treating physician "can be deposed or called to testify at trial without any requirement for a written report." *See Fed. R. Civ. P. 26(a)*, Committee Note of 1993. Nevertheless, some courts drew a distinction between treating physicians who were solely fact witnesses and those who crossed the line, by virtue of the substance of their proposed testimony, into specially retained experts who were required to provide an expert witness report. These courts reasoned that when the testimony of a treating physician goes beyond the scope of treatment, observation, and diagnosis, and includes opinions on causation, prognosis, or the future impact of the injury, the treating physician must provide an expert report. *See, e.g., Krischel v. Hennessy, 533 F. Supp. 2d 790, 795 (N.D. Ill. 2008)* (when treating physician's testimony goes beyond what physician saw and did and why he or she did it, treating physician must provide expert report).

2010 amendments to Rule 26(a)(2)(C) were intended to resolve this "tension that sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement." *See Fed. R. Civ. P. 26(a)(2)(C)*, Committee Note of 2010. The amended rule requires summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B). *See Fed. R. Civ. P. 26(a)(2)(C)*; *see also § 12.12*, *below*. Although the Rule still does not specifically mention treating physicians, the advisory committee note cites as examples of fact witnesses who may also provide expert testimony, "physicians or other health care professionals and employees of a party who do not regularly provide expert testimony." Parties must identify these witnesses under Rule 26(a)(2)(A) and provide the summary disclosures required under Rule 26(a)(2)(C), but do not need to furnish a formal written report. *See Fed. R. Civ. P. 26(a)(2)(C)*, Committee Note of 2010.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.23*
- *Federal Litigation Guide P 23.100* (sample form of expert witness disclosures).
- *Fed. R. Civ. P. 26(a)(2)(B)* (disclosure of expert testimony, written report).



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§ 12.12 Disclosures Required For Experts Who Do Not Provide Written Reports

Unless otherwise stipulated or ordered by the court, if an expert witness is not required to provide a written report, the party employing that witness must make certain summary disclosures. These disclosures must state the subject matter on which the witness is expected to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*. *Fed. R. Civ. P. 26(a)(2)(C)(i)*. The disclosing party also must provide a summary of the facts and opinions to which the witness is expected to testify. *Fed. R. Civ. P. 26(a)(2)(C)(ii)*.

These disclosures are considerably less extensive than the written report required from retained experts under Rule 26(a)(2)(B), and the advisory committee has cautioned the courts against requiring "undue detail." *See Fed. R. Civ. P. 26(a)(2)(C)*, Committee Note of 2010.

This summary disclosure requirement is intended to include fact witnesses who also provide expert testimony, such as treating physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. *See Fed. R. Civ. P. 26(a)(2)(C)*, Committee Note of 2010.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.23*
- *Fed. R. Civ. P. 26(a)(2)(C)* (disclosures from experts who do not provide written reports).



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§ 12.13 Supplementing Expert Disclosures

The duty to supplement expert testimony disclosures extends not only to the report prepared and provided under Rule 26(a)(2)(B), but also to any deposition of the expert and to disclosures about experts who do not provide written reports. *Fed. R. Civ. P. 26(a)(2)(E), (e)(1).* Any additions or changes to an expert's reports or depositions must be disclosed by the time a party's pretrial disclosures are due. *Fed. R. Civ. P. 26(e)(1).*

Supplemental material generally must change or add to only those subjects raised in the initial report or deposition. Courts may strike "supplemental" material that relates to a subject matter not raised initially. *See Procter & Gamble Co. v. McNeil-PPC, Inc., 615 F. Supp. 2d 832, 838-839 (W.D. Wis. 2009)* (court struck those portions of "supplemental" expert report that raised entirely new matters not raised in expert's initial reports).

Failure to supplement the expert disclosures when required can lead to the exclusion of the expert's testimony. *Walsh v. McCain Foods Ltd., 81 F.3d 722, 727 (7th Cir. 1996)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.131.*
- *Federal Litigation Guide P 23.100* (sample form of expert witness disclosures).
- *Fed. R. Civ. P. 26(a)(2)(B)* (disclosure of expert testimony, written report).
- *Fed. R. Civ. P. 26(a)(2)(C)* (disclosures from experts who do not provide written reports).
- *Fed. R. Civ. P. 26(a)(2)(E)* (supplementing expert witness disclosures).
- *Fed. R. Civ. P. 26(e)(1)* (supplementation of disclosures and responses in general).



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§ 12.14 Preparing and Certifying Expert Witness Information

[1] Making Disclosures

Unless otherwise directed by the court, expert witness disclosures made under Rule 26(a)(2) must be:

1. Made in writing;

2. Signed; and

3. Served on the other parties.

Fed. R. Civ. P. 26(a)(2)(B), (a)(4).

Expert witness disclosures are generally not to be filed unless ordered by the court, or unless they will be used in connection with a motion, the trial, or an appeal. *See Fed. R. Civ. P. 5(d)(1).*

[2] Preparing Expert Witness Report

The report accompanying the expert witness disclosures must be made in writing and be prepared and signed by the witness. *Fed. R. Civ. P. 26(a)(2)(B).*

Counsel may assist experts in preparing the reports, but the report, which is intended to set forth the substance of the direct examination, should accurately reflect the witness' future testimony. *Fed. R. Civ. P. 26(a)*, Committee Note of 1993.

The fact that counsel helps with preparation of an expert report goes to the weight to be accorded to the opinions, rather than admissibility. *See Sunbeam Prods. v. Homedics, Inc., 670 F. Supp. 2d 873, 883-884 (W.D. Wis. 2009)* (court refused to strike expert report allegedly "ghost written by defense counsel" because counsel may assist in preparation of reports and expert averred that all opinions were his and he reviewed report before signing it).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.23*.
- *Federal Litigation Guide P 23.100* (sample form of expert witness disclosures).
- *Fed. R. Civ. P. 26(a)(2)(B)* (disclosure of expert testimony, written report).
- *Fed. R. Civ. P. 26(a)(4)* (form of disclosures).



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Chapter 12 DISCOVERY OF EXPERTS
PART C: MAKING EXPERT WITNESS DISCLOSURES

1-12 Moore's AnswerGuide: Federal Discovery Practice § 12.15

§ 12.15 Considering Impact of Witness Report on Privileged Matter

In 2010, Rule 26(b)(4) was amended to provide work product protection for drafts of expert reports or disclosures, and for most communications between an attorney and a retained expert. *Fed. R. Civ. P. 26(b)(4)*, Committee Note of 2010. Specifically, the rule provides that Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded. *Fed. R. Civ. P. 26(b)(4)(B)*. The rule is also intended to protect drafts of any supplementation under Rule 26(e). *Fed. R. Civ. P. 26(b)(4)*, Committee Note of 2010.

With specified exceptions, communications between a party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, are granted work product protection. The exceptions provide that such communications are not protected to the extent they (1) relate to compensation for the expert's study or testimony; (2) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (3) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed. *Fed. R. Civ. P. 26(b)(4)(C)*.

Work product protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying. Although the rule does not protect communications between counsel and other types of expert witnesses, it also does not preclude protection under other doctrines such as privilege or independent development of the work product doctrine. *Fed. R. Civ. P. 26(b)(4)*, Committee Note of 2010.

Discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii); that is, that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. A party rarely will be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. *Fed. R. Civ. P. 26(b)(4)*, Committee Note of 2010.

For discussion of privileges, see Ch. 3 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.80[1].*
- *Federal Litigation Guide P 23.100* (sample form of expert witness disclosures).
- *Fed. R. Civ. P. 26(b)(4)(B)* (trial preparation protection for draft reports).
- *Fed. R. Civ. P. 26(b)(4)(C)* (trial preparation protection for communications between attorney and expert witnesses).



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PART D: DEPOSING EXPERT WITNESSES

1-12 Moore's AnswerGuide: Federal Discovery Practice § 12.16

§ 12.16 Checklist for Deposing Expert Witnesses

☐ Determine whether expert may be deposed. *See § 12.17 below*.

☐ Avoid ex parte communications with retained experts. *See § 12.19 below*.

☐ Depose experts expected to testify. *See § 12.20 below*.

☐ Depose experts specially retained in preparation of trial, but not expected to testify, if applicable. *See § 12.21 below*.

☐ Consider stipulating to the discovery of experts at the pre-trial discovery conference. *See § 12.22 below*.

☐ Prepare expert. *See § 12.23 below*.

☐ Prepare to take expert deposition. *See § 12.24 below*.

☐ Pay expert fees in the context of discovery. *See § 12.25 below*.

☐ **Search by Topic**: Civil Procedure > Discovery > Methods > Oral Depositions



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§ 12.17 Determining Whether Expert May Be Deposed

Once the parties have made all pre-trial disclosures regarding experts who may testify at trial, Rule 26(b)(4) allows the parties to depose any person who has been identified as an expert who may testify at trial. *Fed. R. Civ. P. 26(b)(4).*

A party may, through interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or preparation for trial who is not expected to be called as a witness at trial only under either of the following circumstances:

> 1. The expert has conducted a court ordered mental or physical examination under Rule 35. *See Fed. R. Civ. P. 35(b).*
>
> 2. Upon a showing a exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

See Fed. R. Civ. P. 26(b)(4)(D).

Discovery can never be had concerning experts who were "informally consulted." *Fed. R. Civ. P. 26(b)(4)*, Committee Note of 1993; *see also U.S.M. Corp. v. American Aerosols, Inc., 631 F.2d 420 (6th Cir. 1980)* (expert's letter not discoverable because expert expressed his unwillingness to become involved in dispute and expert received no compensation for his services). Such experts include those consulted at social occasions or those briefly consulted by telephone to whom only general information was provided and no follow-up consultation occurred. An expert may be categorized as an informal expert if she was not of assistance to the attorney, had insufficient credentials, or was otherwise inappropriate to the case.

An expert who acquired information and formed an opinion as to the disputed matter, not in preparation for litigation, but as an actor or observer, is subject to the same broad discovery under Rule 26(b)(1) as any other occurrence witness. *Sipes v. United States, 111 F.R.D. 59 (S.D. Cal. 1986)* (improper to name treating physicians as expert witnesses when the information and opinions they possessed were obtained by virtue of their roles as actors or viewers of the transactions or occurrences giving rise to the litigation; such witnesses were percipient fact witnesses whose opinions and information should be freely accessible to both parties); *Quarantillo v. Consolidated Rail Corp, 106 F.R.D. 435*

(W.D.N.Y. 1985) (mere designation of physician as "expert" did not thereby transmute experience that physician acquired as actor into experience that he acquired in anticipation of litigation or trial).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.80[1], 30.03.*
- *Federal Litigation Guide P 23.30.*
- *Fed. R. Civ. P. 26(b)(1)* (discovery scope and limits).
- *Fed. R. Civ. P. 26(b)(4)(D)* (expert employed only for trial preparation).
- *Fed. R. Civ. P. 35(b)* (physical and mental examinations, examiner's report).



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§ 12.18 Conducting Informal Investigation of Expert Before Deposition

Although information exchanged pursuant to Rule 26(a)(2) will generally serve as the foundation for expert depositions, informal investigation of experts may provide additional insight into the background and credentials of the expert. One approach to informal investigation is to ask your own expert to conduct an investigation of an opposing expert's reputation and credentials. An expert knowledgeable about the field may have sufficient friendly contacts with other professionals to facilitate a few discreet inquiries. Newspapers, magazines, and internet sites often rely on experts for quotable material and may also be useful. Websites for professional associations often list members and include background information. Researching prior testimony may also be helpful. Any inconsistencies between an expert's prior trial or deposition testimony and current proposed testimony may be exploited.

Finally, a client can participate in the investigation of the opposing expert if the client is engaged in a business in the expert's field of expertise. The client or one of its employees may be familiar with the expert or may have attended a seminar at which the expert participated. Industry contacts may produce information regarding other companies that have had experience with the expert, either in litigated matters or in a consulting capacity.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.80[1], 30.03.*
- *Federal Litigation Guide P 23.31.*
- *Fed. Rule Civ. P. 26(a)(2)* (disclosure of expert testimony).



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§ 12.19 Avoiding Ex Parte Communications With Retained Experts

Some courts have held that an ex parte contact by one party of another party's expert while the expert is still employed is a violation of Rule 26(b)(4)(D). Because this rule allows a party to discover the opinions of testifying and consulting experts, by implication, it prohibits ex parte contacts with expert witnesses. *See Olson v. Snap Prods., Inc., 183 F.R.D. 539, 542 (D. Minn. 1998)* (formal rules permit depositions and interrogatories directed at experts; by implication, *ex parte* contacts with expert witnesses are prohibited).Thus, the prohibition against ex parte communications is not based on the language of the rule, but rather on the concept of fairness. *See Procter & Gamble Co. v. Haugen, 184 F.R.D. 410, 412 (D. Utah 1999)* (court found no basis to conclude that any critical litigation strategy of party's counsel was discussed with expert, nor was there any express agreement that would restrict expert's future arrangements with anyone or impose an obligation of confidentiality on him).

It has been argued that ex parte communications with an opposing party's experts should not be prohibited when those experts also played a role in the underlying transactions or occurrences that gave rise to the lawsuit. At least one court has rejected this argument. While acknowledging that an expert witness might possess two subsets of information (one involving historic fact, and the other accumulated in preparation for expert testimony), the district court concluded that ex parte communications should be prohibited as to both types of information. In practical terms, the court felt it would be too difficult to separate the two categories of information, and ex parte communications would only invite controversy, overreaching, and professional misconduct. *See Olson v. Snap Prods., Inc., 183 F.R.D. 539, 542 (D. Minn. 1998)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.80[1], 30.01* et.seq.
- *Federal Litigation Guide P 23.32*.
- *Fed. R. Civ. P. 26(b)(4)(D)* (expert employed only for trial preparation).



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§ 12.20 Deposing Experts Expected to Testify

[1] Conducting Deposition After Receipt of Expert Witness Report

Rule 26(b)(4)(A) provides for the pretrial deposition of expert witnesses who are expected to testify at trial. *Fed. R. Civ. P. 26(b)(4)(A)*. If, however, a report is required from the expert witness under Rule 26(a)(2)(B), the deposition may not be conducted until after the report is provided. *Fed. R. Civ. P. 26(b)(4)(A)*; *Smith v. State Farm Fire & Cas. Co., 164 F.R.D. 49, 53 (S.D. W. Va. 1995)* . The purpose of this restriction is to reduce or eliminate the need for depositions.

Circuit Split:

The majority of courts have ruled that when a party identifies an expert as testifying under Rule 26(b)(4)(A), but subsequently redesignates the expert as non-testifying, the opposing party may depose that expert only upon a showing of exceptional circumstances, in the same manner as if that expert had never been designated as testifying. *See R.C. Olmstead, Inc. v. CU Interface, LLC, 657 F. Supp. 2d 899, 904 (N.D. Ohio 2009)* (court adopted majority rule in applying "exceptional circumstances" rule to redesignated expert witness). However, some courts have held that once a party has designated an expert witness as someone who will testify at trial, the later withdrawal of that designation may neither prevent the deposition of that witness by the opposing party nor the expert's testimony at trial. *See House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 245-247 (N.D. Iowa 1996)* (designation of an expert as expected to be called at trial, pursuant to *Fed. R. Civ. P. 26(b)(4)(A)*, even if subsequently withdrawn, takes opposing party's demand to depose and use expert at trial out of "exceptional circumstances" category of *Fed. R. Civ. P. 26(b)(4)(D)*).

[2] Considering Applicability of Work Product Doctrine in Expert Depositions

Rule 26(b)(4) provides work product protection for drafts of expert reports or disclosures, and for most communications between an attorney and a retained expert. *Fed. R. Civ. P. 26(b)(4)*, Committee Note of 2010. With specified exceptions, communications between a party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, are granted work product protection. The exceptions provide that such communications are not protected to the extent they (1) relate to compensation for the expert's study or testimony; (2) identify facts or data that the party's attorney provided and that the expert considered in forming the

opinions to be expressed; or (3) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed. *Fed. R. Civ. P. 26(b)(4)(C)*.

[3] Deposing Court-Appointed Experts

Experts appointed by the court (*see Fed. R. Evid. 706*) also may be deposed. The court will generally determine the type and extent of discovery permitted, and set this out in the order appointing the expert. *See Manual for Complex Litigation (4th ed.)* §§ 21.48, 21.51.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.80, 30.01 et seq.*
- *Federal Litigation Guide P 23.100* (sample form of expert witness disclosures).
- *Weinstein's Federal Evidence (2d ed.)* Ch. 706.
- *Fed. R. Civ. P. 26(a)(2)(B)* (disclosure of expert testimony, written report).
- *Fed. R. Civ. P. 26(b)(4)(A)* (deposition of expert who may testify).
- *Fed. R. Civ. P. 26(b)(4)(B)* (trial preparation protection for draft reports or disclosures).
- *Fed. R. Civ. P. 26(b)(4)(C)* (trial preparation protection for communications between attorney and expert witnesses).
- *Fed. R. Evid. 706* (court appointed experts).



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§ 12.21 Deposing Experts Specially Retained in Preparation of Trial, but Not Expected to Testify

[1] Showing of Exceptional Circumstances Required

A party may use interrogatories or a deposition to discover facts known or opinions held by an expert specially retained by a party in anticipation of litigation or preparation for trial, but not expected to be called as a witness, only under the following circumstances.

1. The expert has conducted a court ordered mental or physical examination under Rule 35. *Fed. R. Civ. P. 35(b)*; *see also* Ch. 11 *above*.

2. Upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Fed. R. Civ. P. 26(b)(4)(D).

In determining whether a witness is an ordinary fact witness or an expert protected by Rule 26(b)(4)(D), the court examines the total factual situation to determine whether the witness obtained the information in the normal course of business or was hired to make an evaluation in connection with expected litigation. For an expert to be hired "in anticipation of litigation," a lawsuit need not have been filed, but there must have existed "more than a remote possibility of litigation." *Bank Brussels Lambert v. Chase Manhattan Bank, N.A., 175 F.R.D. 34, 43 (S.D.N.Y. 1997)* .

The purpose of this Rule is to prevent a party from replacing the work of its own experts with that of its opponent. *See Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. Partnership, 154 F.R.D. 202, 207 (N.D. Ind. 1993)* . The party seeking discovery has a heavy burden of proving that the required exceptional circumstances exist. *See Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. Partnership, 154 F.R.D. 202, 208-209 (N.D. Ind. 1993)* (defining exceptional circumstances). Exceptional circumstances may be established by demonstrating that the party seeking discovery is unable to obtain equivalent information that is essential to the preparation of the case from other sources. *In re Shell Oil Refinery, 132 F.R.D. 437, 442* , *clarified by 134 F.R.D. 148 (E.D. La. 1990)* (total cost to duplicate the investigation and testing performed would be prohibitive); *see also Bank Brussels Lambert v. Chase Manhattan Bank, N.A., 175 F.R.D. 34, 44-45 (S.D.N.Y. 1997)* .

[2] Evaluating Policy Factors

Once a court finds that the party seeking discovery has met its initial burden of showing exceptional circumstances, the court, before ordering discovery, still must analyze the policy considerations underlying Rule 26(b)(4)(D) to determine if they outweigh the exceptional circumstances. Four commonly articulated policy considerations are:

1. The interest in allowing counsel to obtain the expert advice they need to properly evaluate and present their clients' positions without fear that every consultation with an expert may yield grist for the discovery mill.

2. The view that each side should prepare its own case at its own expense.

3. The concern that it would be unfair to the expert to compel its testimony and that experts might become unwilling to serve as consultants if they suspected their testimony would be compelled.

4. The risk of prejudice to the party who retained the expert as a result of the mere fact of retention.

See Bank Brussels Lambert v. Chase Manhattan Bank, N.A., 175 F.R.D. 34, 45 (S.D.N.Y. 1997) (concluding that none of the factors changed court's finding of exceptional circumstances under facts of case).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.80[2], 30.01 et seq.*
- *Fed. R. Civ. P. 26(b)(4)(D)* (discovery scope and limits, expert employed only for trial preparation).
- *Fed. R. Civ. P. 35(b)* (physical and mental examinations, examiner's report).



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§ 12.22 Stipulating to Discovery of Experts

In cases where both parties clearly will retain experts to testify at trial, counsel should consider the possibility of entering into a Rule 29 stipulation regarding discovery of expert witnesses. Rule 26(a)(2)(D) provides the flexibility to tailor expert discovery to the needs of a particular case by stipulation.

Rules 16 and 26(f) provide for a discovery conference, which serves as a convenient mechanism to establish ground rules for expert discovery under the supervision of the court. Because Rule 26(a)(2) sets certain requirements for expert discovery, court approval of any alteration is required. However, often the timing of expert discovery is a big issue, as well as whether depositions will occur. Parties can reduce subsequent controversy by entering into a stipulation about these basic issues. For general discussion of stipulations, see Ch. 15 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.80, 30.01 et seq.*
- *Fed. R. Civ. P. 16* (pretrial conferences; scheduling; management).
- *Fed. R. Civ. P. 26(a)(2)(D)* (time to disclose expert testimony).
- *Fed. R. Civ. P. 29* (discovery stipulations).



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§ 12.23 Preparing Expert for Deposition

[1] Reviewing Opinion Testimony

Counsel should not assume that an expert is prepared to testify at a deposition. It is counsel's responsibility to ensure that the expert is prepared on the issues that are critical to the case. No matter how experienced the expert, a meeting several days in advance of the deposition is essential. Make sure the expert understands the fundamental problems that are to be resolved by his or her testimony. Since many experts do not speak in public frequently, insist that the expert articulate opinions in advance of the deposition, as well as the basis for the opinions.

Prepare practice questions to ask the expert on aspects of the expert opinion that may be troublesome and also help the expert to prepare some suggested responses that are consistent with the expert's opinion.

[2] Reviewing Expert's Report Before Deposition

The expert report exchanged pursuant to Rule 26(a)(2) will often serve as a chief basis of inquiry by the adversary. It is critical to review the report and prepare testimony regarding:

1. Opinions to be offered and the basis for the opinions;

2. The data considered in forming the opinions;

3. The exhibits used to support or summarize opinions;

4. Qualifications as an expert;

5. All publications, even those written more than ten years ago;

6. Participation in other litigation, even more than four years ago; and

7. Compensation for testimony offered

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.80, 30.01 et seq.*
- *Fed. R. Civ. P. 26(a)(2)* (disclosure of expert testimony).



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§ 12.24 Preparing To Take Expert Deposition

[1] Learning Expert's Field of Expertise

The first step in preparing for the expert's deposition is to learn the field of expertise thoroughly. A complete command of all facts of the case is essential in order to place the expert's opinions in context. Prior to an expert deposition, thoroughly review the expert's report and any information gathered through informal investigation.

Counsel should always use their own expert to help prepare for an expert deposition. Moreover, unless costs prohibit it, counsel's expert should attend a deposition of the opposing expert. It also helps to review physical evidence with an expert as part of the preparation. If the case involves the scene of an accident, a construction site, or other physical location where the operative facts occurred, visiting the scene with an expert will give a feel for the events that transpired and will assist greatly in questioning the opponent's expert by providing a basis of personal knowledge from which to create questions.

[2] Inquiring About Expert's Qualifications

It is important to determine just how expert the opposing expert is. Detailed inquiry about the expert's qualifications will assist in evaluating the expertise of the witness and assist on the determination of whether to attack the expert's qualifications. Thoroughly develop the witness' educational and employment background and determine the extent of the witness' involvement in the industry involved in the litigation. Many experts appear qualified on paper, but have no direct knowledge of an area peculiar to a contested issue or no direct experience in that area. Thorough inquiry also may bring forth incomplete, inaccurate, or questionable disclosures under Rule 26(a)(2).

[3] Inquiring About Expert's Retention

Generally it is helpful to determine when the expert was retained. If an expert is retained shortly before deposition and trial, you may later be able to create the impression that his or her testimony was bought or that the expert hastily rushed into forming opinions. Determine whether the expert was given an "assignment" to reach a certain opinion requested by the attorney. Ascertain exactly when the expert first formed the opinion rendered at the deposition. Sometimes experts will give an opinion during their first contact with an attorney. That opinion obviously will be based upon information provided by the attorney and will be offered before the expert has formally reviewed the documents or other materials in

the case.

Also find out precisely how the expert was retained and whether or not the expert has been retained by opposing counsel or the opposing party in the past or is a friend of the opponent. If the expert has been retained in the past, it can be useful to delve into the specific circumstances of that retainer. If the expert is a close friend of the party retaining him or her, or of that party's counsel, the expert's credibility and objectivity will be in doubt.

Finally, while the Rule 26(a)(2) report will provide information regarding "compensation to be paid for the study and testimony," it does not require more. Thus, it is necessary to discover the expert's rate of compensation and the number of hours spent on the project. An expert who charges $10,000 a day or one who has charged $5,000 for one hour of work generally will not be well received by the jury. Also determine whether the expert has been paid anything to date or whether it is understood that he will be paid at the conclusion of the case.

[4] Inquiring About Testimony in Other Cases

Rule 26(a)(2) requires the disclosure all prior deposition or trial testimony going back four years. Many cases, however, have longer histories; and many experts have longer histories as well. Since many experts keep a record of the cases in which they have offered testimony and sometimes include prior litigation experience in their curriculum vitae, this is still an essential area of inquiry during an expert deposition.

[5] Inquiring About Publications

Rule 26(a)(2) limits publications disclosed to the preceding ten years. Thus, this area should also be explored both before and at an expert deposition. The problem with questioning an expert about publications during a deposition is essentially the same problem of faulty recall that plagues deposition questions regarding testimony in other cases. The best approach is to handle this area of inquiry by a prior internal investigation of the expert. It is better practice to review the publications in advance of the deposition and in light of the anticipated testimony as set forth in the expert's report to see if there are inconsistencies between the anticipated testimony and the content of the publications.

[6] Inquiring About Facts and Materials Given to Expert

Rule 26(b)(4) establishes counsel's right to facts known by the expert. Obtain all of the facts given to, and considered by, the expert in rendering his or her opinion. Obviously, an understanding of the factual predicate of the opinion is necessary to formulate an attack on the opinion. As a part of gathering these facts, ask the expert to identify all documents that were relied upon to form the opinion being offered.

Also ask the expert for the names of each and every person that the expert has talked to regarding the facts of the case. Many times experts will personally interview witnesses and will not reduce their statements to writing. Elicit from the expert the factual data obtained from each person interviewed and the expert's assumptions based on that data. After the deposition, contact or, if possible, depose those persons and determine whether or not the expert has accurately ascertained their knowledge of the facts. Also determine whether such persons know of a fact that the expert failed to discover or disclosed facts that the expert chose to ignore.

[7] Inquiring About Exhibits in Support of Opinions

As part of the effort to determine the factual basis of the expert's opinion, interrogate the expert regarding all exhibits attached to the expert's report and establish a record of the expert's reliance on any documents used in preparation of the report.

[8] Inquiring About Reliance on Legal Standards

Find out whether the expert considered or relied upon any codes, statutes, rules or regulations in forming the offered opinion. Keep in mind that out-of-state experts are probably not familiar with all state or local regulations that govern a given industry or discipline. Such regulations can provide fertile ground for impeachment if the out-of-state expert has rendered opinions without considering them.

[9] Inquiring About Field of Expertise

Test the general competence and knowledge of the expert by inquiring into generally accepted principles in the art or science which will be the subject of the expert's trial testimony. It may be possible to develop favorable admissions or grounds for impeachment. Certainly, a jury will be suspicious of an expert who was unable to explain a general principle at deposition but later at trial provides an erudite explanation.

[10] Inquiring About Expert's Opinions

Explore fully each opinion of the expert. It is often useful strategy to ask the expert to list all his or her opinions in the case at the very beginning of the deposition. This may take the expert off guard and commit the expert to candid opinions before the expert has the opportunity to sense possible points of criticism. Also, understanding the complete spectrum of the expert's opinions at the outset of the deposition will provide context for other areas of inquiry. At the end of the deposition, counsel should have a complete list of all opinions and the factual basis for each opinion. If, at trial, the expert attempts to offer new or additional opinions, a basis either to exclude the new opinions or to impeach the witness will have been established. *See Raymond v. Raymond Corp., 938 F.2d 1518, 1525-1526 (1st Cir. 1991)* (expert was not allowed to testify as to opinion that was never expressed either in his deposition or official report); *see also § 12.09 above*.

Moreover, in developing the expert's opinions, ask for definitions whenever the expert uses a technical term, even if the term or concept appears understandable. Impeachment at trial loses its effect if the expert's meaning and use of the term differed from counsel's or his or her expert's understanding of the term.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.80, 30.01 et seq.*
- *Fed. R. Civ. P. 26(b)(4)* (trial preparation, experts).



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§ 12.25 Paying Expert Fees in Context of Discovery

[1] Compensating Expert to Obtain Discovery

No compensation must be paid for preparation of the mandatory expert report under Rule 26(a)(2). However, to accommodate a party's need to have discovery of experts in advance of trial and to rectify any unfairness to the party retaining the expert, Rule 26(b)(4)(E) empowers the court to require the party seeking expert discovery to pay a fair portion of the fees and expenses of the expert. *Griffith v. Mt. Carmel Medical Center, 157 F.R.D. 499, 504 (D. Kan. 1994)* . (although expert discovery beyond mandatory disclosure is permissible under Rule 26(b) without motion, Rule 26(b)(4)(E) still requires compensation).

When an expert witness's deposition is noticed, counsel can request that his or her adversary pay all fees that the expert will charge as a result of the deposition. This includes payments for travel time, travel expenses, and time the expert expended in preparing for, giving, and reviewing the deposition. *See Fisher-Price, Inc. v. Safety 1st, Inc., 217 F.R.D. 329, 331 (D. Del. 2003)* .

Although not all of the expenses are automatically recoverable, parties usually reach reciprocal agreement about the payments made to experts. For example, some courts have held preparation time recoverable. *Hose v. Chicago & Northern Western Transp. Co., 154 F.R.D. 222 (S.D. Iowa 1994)* ; *E.E.O.C. v. Sears, Roebuck & Co., 138 F.R.D. 523, 526 (N.D. Ill. 1991)* . Others have held the opposite, *Cotton v. Consolidation Coal Co., 457 F.2d 641, 646-647 (6th Cir. 1972)* ; *Rhee v. Witco Chem. Corp., 126 F.R.D. 45, 47-48 (N.D. Ill. 1989)* .

Even if a deposition is limited solely to an expert's qualifications, and does not seek the expert's opinions in the case, a fee must be paid. *Keith v. Van Dorn Plastic Mach. Co., 86 F.R.D. 458, 459-460 (E.D. Pa. 1980)* . The rule requiring the party seeking discovery to pay the expert a reasonable fee does not require that the expert's fee be paid in advance of the deposition. One court found that the plaintiff's attorney was wrong in unilaterally terminating the deposition of plaintiff's expert because defendants' counsel did not tender witness fees at the start of the deposition. *See Harris v. Costco Wholesale Corp., 226 F.R.D. 675, 676 (S.D. Cal. 2005)* .

[2] Evaluating Experts' Fees

In determining the reasonableness of a requested fee to compensate an expert for the time spent responding to discovery

demands, the court considers factors such as:

1. The expert's area of expertise;

2. The education and training required to provide the expertise that is sought;

3. The prevailing rates for other comparably respected experts;

4. The nature, quality and complexity of the information provided by the expert;

5. The cost of living in the applicable geographic area; and

6. Any other factor that may assist the court in achieving the proper balance of interests implicated by Rule 26.

See Mathis v. NYNEX, 165 F.R.D. 23, 24-25 (E.D.N.Y. 1996) .

Courts also consider the fee actually charged to the party who retained the expert, and the fees traditionally charged by the expert on related matters. *See Bowen v. Monahan, 163 F.R.D. 571, 573-574 (D. Neb. 1995)* . An agreement among counsel as to the appropriate fee is not controlling, unless that fee is approved by the court. *See U.S. Energy Corp. v. Nukem, Inc., 163 F.R.D. 344, 347 (D. Colo. 1995)* . A flat fee as compensation for an expert witness deposition is generally considered to be improper because there should be some reasonable relationship between the services rendered and the remuneration to which an expert is entitled. *Massasoit v. Carter, 227 F.R.D. 264, 265 (M.D.N.C. 2005)* ; *Mannarino v. United States, 218 F.R.D. 372, 375 (E.D.N.Y. 2003)* .

[3] Seeking Fees Within Reasonable Time

The Civil Rules do not contain a time limit within which the court order for the expert's fees must be sought. The courts, however, have held that if the fee application is not brought within a reasonable time, the court does not abuse its discretion in rejecting the application. *See Ellis v. United Airlines, Inc., 73 F.3d 999, 1011 (10th Cir. 1996)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.80, 30.01* et seq.
- *Fed. R. Civ. P. 26(a)(2)* (disclosure of expert testimony).
- *Fed. R. Civ. P. 26(b)(4)(E)* (payment of experts).



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Chapter 13 REQUESTS FOR ADMISSION

1-13 Moore's AnswerGuide: Federal Discovery Practice 13.syn

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Chapter 13 REQUESTS FOR ADMISSION
PART A: PROCEDURAL CONTEXT

1-13 Moore's AnswerGuide: Federal Discovery Practice § 13.01

§ 13.01 Procedural Context--Requests for Admission

Requests for admission are used to establish statements or opinions of fact or the application of law to fact, including the genuineness of documents, about which there is no real dispute. Admissions also facilitate proof with respect to issues that cannot be eliminated from the case. By eliminating some issues and facilitating proof on other issues, requests for admission can expedite the trial and save litigants time and money.

Matters admitted in accordance with *Fed. R. Civ. P. 36*, whether expressly admitted or admitted by default, are conclusively established for purposes of the pending action unless the court, on motion, permits the withdrawal or amendment of the admission. Matters that are deemed admitted do not require further proof.

One reason to propound requests for admission is that if the responding party fails to admit what is requested under *Fed. R. Civ. P. 36*, the propounding party may move for an order requiring the responding party to pay the reasonable expenses, including reasonable attorney's fees, for proving the genuineness of the document or the truth of the matter at trial.

Requests for admission are not designed to elicit or discover facts but rather to eliminate issues not in dispute. Consider, therefore, whether you are trying to elicit facts, discover the existence of facts, or obtain documents. Other discovery tools such as interrogatories, depositions, and requests for production may be more useful than requests for admission.



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Chapter 13 REQUESTS FOR ADMISSION
PART B: REQUESTING ADMISSIONS

1-13 Moore's AnswerGuide: Federal Discovery Practice § 13.02

§ 13.02 Checklist for Requesting Admissions

☐ Determine whether matter under consideration may be subject of request for admission. *See § 13.03 below*.

- ○ Requests for admission may cover matters of fact, such as statement of fact, opinion on matter of fact, application of law to fact, or genuineness of a document.

- ○ Requests for admission may not cover any matter that is irrelevant, privileged, or a pure legal conclusion unrelated to facts of case.

☐ Consider whether alternative discovery devices may provide more direct and efficient means for obtaining desired information.

☐ Determine party or parties to whom requests for admission should be addressed. *See § 13.04 below*.

☐ Determine whether propounding requests for admission would violate time constraints. *See § 13.05 below*.

- ○ Consider that requests for admission ordinarily may not be propounded prior to discovery conference, though earlier requests may be allowed by court order or by parties' stipulation.

- ○ Review any scheduling orders and other pretrial orders to determine applicable cut-off date for discovery, including requests for admission.

- ○ Review parties' proposed discovery plan and any scheduling orders and other

pretrial orders to ascertain whether time constraints on propounding requests for admission have been modified.

☐ If requests for admission would violate time constraints, consider options. *See § 13.05 below*.

○ Entering into stipulation with other party to allow early or late requests for admission.

○ Seeking leave of court to propound early or late requests for admission.

☐ Decide how many requests to propound. *See § 13.06 below*.

○ Ascertain whether local rules limit number of requests for admission.

○ Ascertain whether standing order of court limits number of requests for admission.

○ Ascertain whether court in present case has issued scheduling order or other pretrial order that limits number of requests for admission.

○ Consider whether contemplated requests would be so voluminous as to be deemed unduly burdensome and subject to protective order.

☐ Prepare requests for admission, observing formalities. *See § 13.06 below*.

○ Include heading and caption.

○ State and number each request separately.

○ Frame each request as statement, rather than question.

☐ Phrase each request clearly and specifically. *See § 13.06[1][a] below*.

☐ Comply with applicable limits on number of requests. *See § 13.06[1][b] below*.

☐ If any request concerns genuineness of document that has not already been provided to responding party, attach copy of document to request. *See § 13.06[1][d] below*.

☐ Sign requests for admission. *See § 13.06[2] below*.

○ If propounding party is represented by counsel, attorney must sign.

- If propounding party is not represented by counsel, propounding party must sign.
- Signature must be accompanied by signer's address, e-mail address, and telephone number.

☐ Serve requests for admission. *See § 13.06[2] below.*

- Serve signed requests for admission on responding party, sending copy of signed requests and retaining original if required to do so by local rules.
- Serve copy of requests for admission on each other party that has appeared in case.
- Execute and retain proof of service.
- Do not file requests for admission until they are used in case or court orders filing.

☐ Calendar date for service of responses.

- Note that responses to requests for admission ordinarily must be served within 30 days after service of requests.
- Determine whether any court order, such as scheduling order or other pretrial order, has modified time for serving response to requests for admission.
- Review any written agreement of parties that might have modified time for serving response to requests for admission.

☐ Maintain record of requests for admission for use at trial or post-trial proceedings or as ordered by court. *See § 13.06 below.*

- Retain copy or, if required by local rules, original of requests for admission.
- Retain original proof of service of requests for admission.
- Retain original responses to requests.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Admissions > Content & Form



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1-13 Moore's AnswerGuide: Federal Discovery Practice § 13.03

§ 13.03 Determining Whether Matter Is Subject to Requests for Admission

[1] Requests Must Concern Matters Relating to Facts

Requests for admission may call for the admission of any of the following:

1. A statement of fact.

2. An opinion on a matter of fact.

3. The application of law to fact.

4. The genuineness of a document.

Fed. R. Civ. P. 36(a)(1).



Strategic Point:

Trial courts will presumably look with favor on requests for admission directed to undisputed matters, such as the genuineness of documents, that streamline trial proceedings. In appropriate cases, counsel should consider stipulations (*see* Ch. 15 *below*) with opposing counsel on matters such as document authenticity as an alternative to the more cumbersome request for admission mechanism.

[2] Requests May Relate to Ultimate Facts

Requests for admission and the resulting admissions may relate to the ultimate facts of a case, i.e., facts that prove dispositive of the entire case. *See Marchand v. Mercy Med. Ctr., 22 F.3d 933, 936-939 (9th Cir. 1994)* ; *Cereghino v. Boeing Co., 873 F. Supp. 398, 403 (D. Or. 1994)* . That a matter on which an admission has been requested presents a genuine issue for trial is not an appropriate basis to object to the request. *Fed. R. Civ. P. 36(a)(1)*; *see Chemical Eng'g Corp. v. Essef Indus., Inc., 795 F.2d 1565, 1575 (Fed. Cir. 1986)* .

Because a request for admission may relate to opinions of fact, it may concern a matter that would otherwise be the subject of expert opinion. *See Fed. R. Civ. P. 36(a)(1)(A).*

[3] Requests May Relate to Application of Law to Facts

Requests for admission may relate to the application of law to fact. *Fed. R. Civ. P. 36(a)(1)(A).* Thus, for example, a party may be requested to admit what its contractual obligations are as a matter of law. *Langer v. Monarch Life Ins., 966 F.2d 786, 802 (3d Cir. 1992)* .

[4] Requests May Relate to Genuineness of Documents

Requests for admission may seek to establish the genuineness of documents. *Fed. R. Civ. P. 36(a)(1)(B).* Requests for admission relating to genuineness of documents can be particularly useful in helping parties determine which documents that are to be introduced at trial will present foundational problems and which will not. *Berry v. Federated Mut. Ins. Co., 110 F.R.D. 441, 443 (N.D. Ind. 1986)* .

Because the text of a document is a matter of fact, a request may require the responding party to admit or deny the accuracy of quoted text from a particular document. *See Fed. R. Civ. P. 36(a)(1)(B)*; *Miller v. Holzmann, 240 F.R.D. 1, 4 (D.D.C. 2006)* (response that document "speaks for itself" is improper).

[5] Requested Matter Must Be Relevant and Not Privileged

Requests for admission may concern any matter on which discovery may be had, that is, any nonprivileged matter that is relevant to the claims and defenses in the pending case. *Fed. R. Civ. P. 36(a)(1)*; *see Fed. R. Civ. P. 26(b)(1).*

For discussion of relevance, see Ch. 2 *above*. For discussion of privileges, see Ch. 3 *above*.

[6] Requested Matter Must Not Be Pure Legal Conclusion Unrelated to Facts of Case

Requests seeking legal conclusions or legal theories unrelated to the facts of the case are not authorized. *Fed. R. Civ. P. 36*, Committee Note of 1970; *United States v. Petroff-Kline, 557 F.3d 285, 293 (6th Cir. 2009)* (court noted that many of defendant's requests for admission improperly targeted "ultimate legal issue in the case"); *Tulip Computers Int'l B.V. v. Dell Computer Corp., 210 F.R.D. 100, 108 (D. Del. 2002)* . In addition, requests may not be directed at an opponent's litigation strategy. *Howell v. Maytag, 168 F.R.D. 502, 504 (M.D. Pa. 1996)* .

Note that requests for admission under *Fed. R. Civ. P. 36* are not intended principally as a discovery device, but rather presuppose that the propounding party knows the facts set forth or possesses the documents about which the party seeks concession of genuineness. *Safeco Ins. Co. of Am. v. Rawstron, 181 F.R.D. 441, 445 (C.D. Cal. 1998)*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 36.02*, *36.10*.
- *Bender's Federal Practice Forms* Form Nos. 36:1, 36:2.
- *Federal Litigation Guide PP 19.01*, *19.02*.
- *Fed. R. Civ. P. 26(b)* (trial preparation).
- *Fed. R. Civ. P. 36(a)* (scope and procedure of requests for admission).



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Chapter 13 REQUESTS FOR ADMISSION
PART B: REQUESTING ADMISSIONS

1-13 Moore's AnswerGuide: Federal Discovery Practice § 13.04

§ 13.04 Determining Who Should Be Served With Requests

Requests for admission may be directed to any party to the action, including co-parties and adverse parties. *Fed. R. Civ. P. 36(a)(1).*



Strategic Point--Propounding Party:

An admission binds only the party to whom the request was propounded. *See Fed. R. Civ. P. 36*; *Riberglass, Inc. v. Techni-Glass Indus., Inc., 811 F.2d 565, 566-567 (11th Cir. 1987)* . The propounding party therefore should carefully review all parties' claims and defenses to determine which might be affected by a particular matter on which an admission might be sought. A separate request to admit that matter should be propounded to each party whose claim or defense might be affected by that matter.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 36.02, 36.10.*
- *Bender's Federal Practice Forms* Form Nos. 36:1, 36:2.
- *Federal Litigation Guide PP 19.01, 19.02.*
- *Fed. R. Civ. P. 26(b)* (trial preparation).
- *Fed. R. Civ. P. 36(a)* (scope and procedure of requests for admission).

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Chapter 13 REQUESTS FOR ADMISSION
PART B: REQUESTING ADMISSIONS

1-13 Moore's AnswerGuide: Federal Discovery Practice § 13.05

§ 13.05 Determining Timing of Requests

[1] Service of Requests Generally Must Await Discovery Conference

Without leave of court or written stipulation, requests for admission may not be served before the parties' discovery conference under *Fed. R. Civ. P. 26(f)*. *See Fed. R. Civ. P. 26(d)(1)*; *see also § 4.04[1] above*.

Strategic Point:

Parties commonly serve several requests for admission at the beginning of a case to limit the scope of discovery needed. After most of discovery is completed, other requests can then be served to further limit issues for trial.

Warning:

Propounding requests for admission early in the litigation may prompt the objection that the request is premature. Such an objection is particularly likely when the requests seek opinions on a matter of fact.

[2] Earlier Service of Requests May Be Based on Parties' Stipulation or Leave of Court

Requests for admission may be served prior to the parties' Rule 26(f) discovery conference if permitted by the court or by the parties' written stipulation. *Fed. R. Civ. P. 26(d)(1)*.

Warning:

Counsel should review the parties' proposed discovery plan and any scheduling orders and other pretrial orders entered in the case to determine whether the standard time constraints on propounding requests for admission have been modified. *See Fed. R. Civ. P. 16(b), (e), 26(f)*.

For discussion of stipulations, see Ch. 15 *below*.

[3] Discovery Cut-Off Date Applies to Requests for Admission

Requests for admission are subject to the deadlines applicable to discovery in general. *See Marchand v. Mercy Med. Ctr., 22 F.3d 933, 936-937 (9th Cir. 1994)* ; *see, e.g., Fed. R. Civ. P. 26(b)(2), 29(b), 37(c)(2)*; Fed. R. Civ. P. Appendix of Forms, Form 51. Accordingly, the discovery cut-off date specified in the scheduling order and any pretrial orders in the case apply to the use of requests for admission. *See Fed. R. Civ. P. 16(b), (e).*



Strategic Point:

The requests, if extensive, should be made sufficiently in advance of trial so that a burdensomeness objection will have less prospect of being sustained.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.10[2], [4].*
- *Bender's Federal Practice Forms* Form No. 36:1.
- *Federal Litigation Guide P 19.28.*
- *Fed. R. Civ. P. 16(b)* (scheduling).
- *Fed. R. Civ. P. 16(e)* (final pretrial conference and orders).
- *Fed. R. Civ. P. 26(d)(1)* (timing and sequence).
- *Fed. R. Civ. P. 26(f)* (conference of parties; planning for discovery).
- *Fed. R. Civ. P. 36(a)* (scope and procedure of requests for admission).



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Chapter 13 REQUESTS FOR ADMISSION
PART B: REQUESTING ADMISSIONS

1-13 Moore's AnswerGuide: Federal Discovery Practice § 13.06

§ 13.06 Drafting and Serving Requests

[1] Drafting Requests Carefully

[a] Requests Must Be Clear and Precise

Statements posed by a party seeking their admission should be capable of a yes or no answer. *Henry v. Champlain Enters., 212 F.R.D. 73, 77 (N.D.N.Y. 2003)* ; *Honeycutt v. First Fed. Bank, 2003 U.S. Dist. LEXIS 3629, at *3-*4 (W.D. Tenn. 2003)* (statements that are vague, or susceptible of more than one interpretation, are properly objectionable). Counsel should draft each request simply and concisely, so that the responding party can easily admit or deny the request without explanation. *Tulip Computers Int'l B.V. v. Dell Computer Corp., 210 F.R.D. 100, 107-108 (D. Del. 2002)* ; *see Fed. R. Civ. P. 36(a)*.



Strategic Point--Propounding Party:

Consider preceding the first request with a preamble setting forth the time for responding, along with a brief explanation that a failure to respond will be deemed an admission. Although such a preamble is not required by *Fed. R. Civ. P. 36*, it will minimize the chances that the court might later grant a motion to withdraw a deemed admission based on the responding party's ignorance of the consequences of a failure to respond. A preamble is particularly advisable when propounding requests for admission to a pro se litigant. *See Diggs v. Keller, 181 F.R.D. 468, 469 (D. Nev. 1998)* .



Warning:

It is improper for a plaintiff to "re-serve the complaint in the form of a request for admissions" in order to require a defendant to admit or deny nearly every paragraph of a complaint a defendant has already answered. *Perez v. Miami-Dade County, 297 F.3d 1255, 1269 (11th Cir. 2002)* .

[b] State Each Request Separately

Each matter for which an admission is requested must be separately stated. *Fed. R. Civ. P. 36(a)(2)*.



Strategic Point--Propounding Party:

Draft each request with the expectation that it will ultimately be read to the jury. Avoid argumentative, subjective, pejorative, legalistic, and conclusory terminology. To help keep the requests simple and direct, consider defining key terms separately at the beginning of the set of requests.



Warning:

Check local rules for standing orders and review scheduling orders and other pretrial orders in the case to determine whether the number of requests is limited. *Fed. R. Civ. P. 16(b), (e).* A voluminous set of requests for admission may justify the issuance of a protective order under *Fed. R. Civ. P. 26(c)* if the court finds the requests to be unduly burdensome.

[c] Frame Requests As Statements Not Questions

Counsel should draft each request for admission in the form of a declarative statement. *See Fed. R. Civ. P. 36(a).*



Strategic Point:

Draft requests to be simple and direct, not vague or ambiguous, so that they can be answered with a simple "admit" or "deny," without explanation. *Henry v. Champlain Enters., 212 F.R.D. 73, 77 (N.D.N.Y. 2003)* .



Warning:

To minimize the possibility that a request may be found objectionable, or that a response may be found ambiguous (and therefore not effective as an admission), make sure that each request is directed to a single fact or issue. A compound request that requires the admission of two or more facts will only invite an evasive or unclear response.

[d] Attach Relevant Documents

If a request pertains to the genuineness of a document, it must be accompanied by a copy of the document, unless the document is, or has been, otherwise furnished or made available for inspection and copying. *Fed. R. Civ. P. 36(a)(2).*

[e] Request Must Be Signed on Behalf of Propounding Party

The request for admission must be signed by the attorney for the propounding party or, if that party is not represented by counsel, by the party. *See Fed. R. Civ. P. 26(g)(1).* The person signing a request for admission must state his or her address, e-mail address, and phone number. *See Fed. R. Civ. P. 26(g)(1).*



Warning:

The signature of the attorney or party certifies that to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the request complies with applicable rules, is not made for an improper purpose, and is not unreasonable or unduly burdensome or expensive, *Fed. R. Civ. P. 26(g)(1)(B).* Sanctions may be imposed for a certification that violates these requirements. *Fed. R. Civ. P. 26(g)(3); see also § 18.35-18.40 below.*

[2] Serving Requests

[a] Signed Request Must Be Served on Responding Party

The signed requests for admission must be served on the party from whom the admission is requested. *Fed. R. Civ. P. 5(a)(1), 36(a)(1).*



Strategic Point:

Having proper proof of service of the requests for admission will be essential if it later becomes necessary to establish that the responding party has made a deemed admission by failing to respond to a properly served request to admit. *See Fed. R. Civ. P. 36(a)(3).*

[b] Serve Copies of Requests on All Other Parties

Copies of the requests for admission must be served on all other parties that have appeared in the case. *Fed. R. Civ. P. 5(a)(1)(C).*

[3] Requests For Admission Not Filed Until Used in Case

Requests for admission generally must not be filed until they are used in the case or the court orders filing. *Fed. R. Civ. P. 5(d)(1).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.10[3] -[6], [9].*
- *Bender's Federal Practice Forms* Form No. 36:1.
- *Federal Litigation Guide PP 19.20 -19.23, 19.26 -19.28.*
- *Fed. R. Civ. P. 5(a)(1)* (when service required).
- *Fed. R. Civ. P. 5(d)(1)* (filing; certificate of service).
- *Fed. R. Civ. P. 16(b)* (scheduling).
- *Fed. R. Civ. P. 16(e)* (final pretrial conference and orders).
- *Fed. R. Civ. P. 26(c)* (protective orders).
- *Fed. R. Civ. P. 26(g)* (signature required for discovery requests).
- *Fed. R. Civ. P. 36(a)* (scope and procedure for requests for admission).



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Chapter 13 REQUESTS FOR ADMISSION
PART C: RESPONDING TO REQUESTS FOR ADMISSION

1-13 Moore's AnswerGuide: Federal Discovery Practice § 13.07

§ 13.07 Checklist for Responding to Requests for Admission

☐ When requests for admission are received, calendar date for service of responses. *See § 13.12 below*.

- ○ Responses to requests for admission ordinarily must be served within 30 days after service of requests.
- ○ Failing to make timely response will ordinarily result in requested matters being deemed admitted.
- ○ Determine whether any court order, such as scheduling order or other pretrial order, has modified time for serving response to requests for admission.
- ○ Review any written agreement of parties that might have modified time for serving response to requests for admission.

☐ If date for service of responses does not allow sufficient time to prepare responses, do either or both of following: *See § 13.12 below*.

- ○ Negotiate with propounding party to obtain written agreement extending time for responses.
- ○ Move for court order extending time for responses, following standard noticed motion procedure.

☐ Review grounds for objecting. *See § 13.09 below*.

☐ Before answering or objecting, conduct reasonable inquiry. *See § 13.08 below*.

☐ Determine how to respond to each request, considering the following possible responses, which may be used in combination: *See §§ 13.09, 13.10 below*.

- ○ Make admission, either unqualified or qualified.
- ○ Make complete or partial denial.
- ○ State inability to admit or deny, that the responding party has made reasonable inquiry and that readily obtainable information is insufficient to enable responding party to admit or deny.
- ○ Assert objection, based on undue burden, improper scope of request, or irrelevance.
- ○ Assert privilege.
- ○ Assert propounding party's failure to provide necessary document.
- ○ Assert format of request is improper.
- ○ Assert request is untimely.
- ○ Assert number of requests is excessive.

☐ Prepare written responses to requests for admission, observing following formalities:

- ○ Include heading and caption.
- ○ Set forth each request in full before each response.

☐ Sign responses to requests for admission. *See § 13.17 below*.

- ○ If responding party is represented by counsel, attorney must sign.
- ○ If responding party is not represented by counsel, responding party must sign.
- ○ Signature must be accompanied by signer's address, e-mail address, and phone number.

- ○ Verification is not required.

☐ Serve responses to requests for admission. *See § 13.18 below*.

- ○ Serve signed original responses on propounding party.
- ○ Serve copy of responses on each other party that has appeared in case.
- ○ Execute and retain original proof of service.
- ○ Do not file responses until they are used in case or court orders filing.

☐ After serving responses, prepare and serve supplemental responses to requests for admission if and when both of the following occurs: *See § 13.19 below*.

- ○ Responding party learns that original response is in some material respect incomplete or incorrect.
- ○ Additional or corrective information has not otherwise been made known to other parties during discovery process or in writing.

☐ **Search by Topic:**

- ○ Civil Procedure > Discovery > Methods > Admissions > Responses
- ○ Civil Procedure > Discovery > Methods > Admissions > Objections



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§ 13.08 Meeting Duty of Inquiry

The answering party may not give lack of information or knowledge as a reason for failure to admit or deny, unless the party states that it has made a reasonable inquiry and insufficient information exists on which to base an admission or denial. *Fed. R. Civ. P. 36(a)(4)*; *see also § 13.15 below*. The answering party must make a reasonable inquiry and secure such knowledge and information as are readily obtainable. *Concerned Citizens v. Belle Haven Club, 223 F.R.D. 39, 44 (D. Conn. 2004)* ; *In re Sweeten, 56 B.R. 675, 678 (Bankr. E.D. Pa. 1986)* ; *A. Farber & Partners, Inc. v. Garber, 237 F.R.D. 250, 256 (C.D. Cal. 2006)* .

Generally, a reasonable inquiry is limited to review and inquiry of those persons and documents that are within the responding party's control. *See T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co., 174 F.R.D. 38, 46 (S.D.N.Y. 1997)* . However, depending on the facts of the case, it might be reasonable for the responding party to inquire of a third party with whom the responding party has some relationship. *See, e.g., Concerned Citizens v. Belle Haven Club, 223 F.R.D. 39, 44 (D. Conn. 2004)* ; *Brown v. Arlen Mgmt. Corp., 663 F.2d 575, 580 (5th Cir. 1981)* (former employee of the responding party); *A. Farber & Partners, Inc. v. Garber, 237 F.R.D. 250, 256 (C.D. Cal 2006)* (co-defendant with whom the defendant has a close business and personal relationship).

Warning:

If the responding party has failed to make a reasonable inquiry and the propounding party makes a motion to determine the sufficiency of the response, the court may require an amended response, or order that the matter be deemed admitted. *Fed. R. Civ. P. 36(a)(4)*; *see, e.g., A. Farber & Partners, Inc. v. Garber, 237 F.R.D. 250, 256-257 (C.D. Cal. 2006)* .

For discussion of motions to determine the sufficiency of a response, *see §§ 13.20*, *13.21 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.11[4], [5].*
- *Bender's Federal Practice Forms* Form Nos. 36:10, 36:11.

- *Federal Litigation Guide P 19.45[2].*
- *Fed. R. Civ. P. 36(a)(4)* (answer to request for admission).



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§ 13.09 Considering Potential Grounds for Objection

[1] Improper Format of Request

An objection may be based on the request's noncompliance with format requirements, such as the requirement that each matter on which an admission is requested be set forth separately. *Fed. R. Civ. P. 36(a)(2)*. A request that is set forth as a compound or complex statement may be objectionable. *See Fed. R. Civ. P. 36(a)(2)*.

[2] Untimely Request

An objection may be based on the propounding party's service of the requests in violation of the applicable time constraints. *See Fed. R. Civ. P. 36(a)(3)*; *see also § 13.05 above*.

[3] Excessive Number of Requests

An objection may be made to requests that exceed any applicable limit on the number of requests for admission. *See Fed. R. Civ. P. 26(b)(2)(A)*; *see also § 13.06[1][b] above*.

[4] Undue Burden

Undue burden may provide a ground for objection. Requests that are repetitive, voluminous, convoluted, vague, or ambiguous, or that otherwise require extensive analysis or explanation, may be objectionable. *See Fed. R. Civ. P. 36(a)*, Committee Note of 1970; *see also Nelson v. Capital One Bank, 206 F.R.D. 499, 500-501 (N.D. Cal. 2001)* .



Strategic Point:

In appropriate cases, in lieu of objecting to an unduly burdensome set of requests for admission, the responding party may move for a protective order under *Fed. R. Civ. P. 26(c)*; *see Fed. R. Civ. P. 36*, Committee Note of 1970. Filing a motion for a protective order may be more efficient than merely stating objections and waiting for the propounding party to make a motion to determine the sufficiency of the responses, although motion practice can in some cases be expensive and time-consuming, and in

other cases unnecessary. *See Nelson v. Capital One Bank, 206 F.R.D. 499, 500 (N.D. Cal. 2001)* . Note that after meeting and conferring with the responding party, the propounding party may decide to serve alternative requests. For discussion of protective orders, *see* Ch. 16 *below*.

[5] Improper Scope of Request

Requests for admission are limited to statements or opinions of fact or the application of law to fact, including the genuineness of documents. *Fed. R. Civ. P 36(a)(1)*. A request that seeks an admission on other matters, for example, interpretations of law or the opponent's litigation strategy, is objectionable. *See Fed. R. Civ. P. 36*, Committee Note of 1970; *Howell v. Maytag, 168 F.R.D. 502, 504 (M.D. Pa. 1996)* .

[6] Irrelevance

Because requests for admission are limited to matters within the scope of discovery, the responding party may validly object to a request to admit a matter that is irrelevant to the claims and defenses asserted in the case. *Fed. R. Civ. P. 26(b)(1)*, *36(a)*. For discussion of relevance, see Ch. 2 *above*.

[7] Privilege

Because requests for admission are limited to matters within the scope of discovery, the responding party may properly object to a request pertaining to a matter that is privileged, such as matters within the attorney-client privilege or the privilege against self-incrimination. *Fed. R. Civ. P. 36(a)(1)*; *see United States v. 266 Tonawanda Trail, 95 F.3d 422, 428 n.10 (6th Cir. 1996)* . For discussion of privileges, see Ch. 3 *above*.



Strategic Point--Responding Party:

The responding party may object to a request for admission on the basis that responding to the request would infringe the responding party's right against self-incrimination. Although *Fed. R. Civ. P. 36* provides that an admission is to be used only in the pending action and may not be used against the responding party in any other proceeding, the rule does not provide immunity from criminal prosecution. *See Federal Deposit Ins. Corp. v. Logsdon 18 F.R.D. 57, 58 (W.D. Ky. 1955)* .

[8] Failure to Provide Document

An objection may be based on the propounding party's failure to serve a document whose genuineness is the subject of the request, if the document is not otherwise available to the responding party. *Fed. R. Civ. P. 36(a)(1)(B)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.11[5][c].*
- *Bender's Federal Practice Forms* Form Nos. 36:10, 36:11.
- *Federal Litigation Guide P 19.46.*
- *Fed. R. Civ. P. 26(b)* (discovery scope and limits).
- *Fed. R. Civ. P. 36(a)* (scope and procedure for requests for admission).



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§ 13.10 Understanding Options for Response

[1] Answer

When served with requests for admission, the responding party may respond with an answer, which may be either an express admission, a denial, or an explanation of why the responding party cannot admit or deny. *Fed. R. Civ. P. 36(a)(4).*

Warning:

Admissions made in response to Rule 36 requests for admission are binding on that party. *See Praetorian Ins. Co. v. Site Inspection, LLC, 604 F.3d 509, 514 (8th Cir. 2010)* . If facts admitted under Rule 36 are dispositive of the case, a court may properly grant summary judgment on the basis of those admitted facts. *Quasius v. Schwan Food Co., 596 F.3d 947, 950-951 (8th Cir. 2010)* .

[2] Objections

When served with requests for admission, the responding party may respond with an objection. *Fed. R. Civ. P. 36(a)(5).*

Warning:

Hypertechnical objections to the meaning of straightforward requests for admission, especially those seeking easily discernable facts such as the genuineness of documents, are highly disfavored. If the court concludes that an objection to a request is unfounded, it can deem the request admitted. *See Fed. R. Civ. P. 36(a)(6)*; *see also § 13.21[2]*, *[3]*. Moreover, unfounded objections have the potential of opening the objecting party to sanctions under *Fed. R. Civ. P. 37*, *26*, or *36*. *See* Ch. 18 *below*.

[3] Extension of Time

The responding party may ask the propounding party to agree to an extension of the time to respond. Further, the responding party may file a motion for an order extending the time to respond. *See Fed. R. Civ. P. 36(a)(3)*; *see also § 13.12 above*.

[4] Protective Order

If a request for admission is oppressive or would cause the responding party annoyance, embarrassment, oppression, or undue burden or expense, the court may issue a protective order sua sponte or on motion by the responding party. *See Fed. R. Civ. P. 26(c)(1); Nelson v. Capital One Bank, 206 F.R.D. 499, 500-501 (N.D. Cal. 2001)* .

The court's power to issue protective orders includes the power to limit the frequency or extent of requests for admission that the court determines are unreasonably cumulative, duplicative, unduly burdensome, or expensive. *See Fed. R. Civ. P. 26(b)(2)(C), 26(c)(1).*

For discussion of protective orders, see Ch. 16 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.11[1], [4], [5].*
- *Bender's Federal Practice Forms* Form Nos. 36:10, 36:11, 36:20.
- *Federal Litigation Guide PP 19.42 -19.47.*
- *Fed. R. Civ. P 26(b)(2)(C)* (limitations on frequency and extent of discovery).
- *Fed. R. Civ. P. 26(c)(1)* (protective orders).
- *Fed. R. Civ. P. 36(a)* (scope and procedure for requests for admission).
- *Fed. R. Civ. P. 37(a)(5)* (payment of expenses; protective orders).



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§ 13.11 Understanding Effect of Failure to Respond

If the party to whom a request for admission has been directed does not serve a timely response, the requested matter is admitted. *Fed. R. Civ. P. 36(a)(3)*; *see, e.g., Kalis v. Colgate-Palmolive Co., 231 F.3d 1049, 1059 (7th Cir. 2000)* ; *Vigra v. Big Apple Construction & Restoration Inc., 590 F. Supp. 2d 467, 471-472 (S.D.N.Y. 2008)* (requests for admissions were deemed admitted after defendants failed to respond within 30 days, and these admissions were binding on defendants in summary judgment motion because defendants never filed motion to have admissions withdrawn or amended); *In re Heritage Bond Litig., 220 F.R.D. 624, 626-627 (C.D. Cal. 2004)* (requested matter deemed admitted when response served 12 days late after two extensions of time were granted). Failure to respond results in automatic admission with no motion necessary. *Switchmusic.com, Inc. v. U.S. Music Corp., 416 F. Supp. 2d 812, 817 (C.D. Cal. 2006)* (Rule 36(a) is self-executing).



Strategic Point--Propounding Party:

Although unanswered requests for admission are automatically deemed judicially admitted, the propounding party will still need to lay a foundation for the use of the deemed admission at trial. *See Fed. R. Civ. P. 36(a)(3)*; *Cook v. Allstate Ins. Co., 337 F. Supp. 2d 1206, 1210 (C.D. Cal. 2004)* . The propounding party should prepare to present the request for admission and proof of service at trial, along with testimony that no response was ever received, to establish that the requirements for a deemed admission have been met. The propounding party may also rely on default admissions on summary judgment. *See, e.g., Switchmusic.com, Inc. v. U.S. Music Corp., 416 F. Supp. 2d 812, 817 (C.D. Cal. 2006)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 36.03[1], 36.11[1].*
- *Bender's Federal Practice Forms* Form No. 36:30.
- *Federal Litigation Guide PP 19.08, 19.40.*

- *Fed. R. Civ. P. 36(a)(3)* (time to respond).

- *Praetorian Ins. Co. v. Site Inspection, LLC, 604 F.3d 509, 514 (8th Cir. 2010)* (admissions made in response to Rule 36 requests for admissions are binding on that party and may be used to support entry of summary judgment).



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§ 13.12 Serving Timely Response

[1] Response Must Be Served Within 30 Days

The party to whom a request for admission has been directed must serve a written response on the party requesting the admission within 30 days of service of the requests for admission, unless another time is set by court order or by the parties' written agreement. *Fed. R. Civ. P. 36(a)(3).*

If service is by a method other than hand delivery, three days are added to the time for responding to the requests. *Fed. R. Civ. P. 6(d)*; *see Fed. R. Civ. P. 5(b)(2)(C)*((F).

[2] Exceptions to 30-Day Period to Respond

[a] Court Order

The time for responding to requests for admission may be extended by court order. *Fed. R. Civ. P. 36(a)(3)*; *see Diggs v. Keller, 181 F.R.D. 468, 469 (D. Nev. 1998)* ; *Upchurch v. USTNET, Inc., 160 F.R.D. 131, 132 (D. Or. 1995)* (defendant was allowed to file a late response in one of plaintiff's requests for admission when failure to respond was inadvertent, decision on the merits of the case would be advanced by allowing response, and plaintiff would not be prejudiced by the late response).

Warning:

Counsel should review the parties' proposed discovery plan. *See Fed. R. Civ. P. 26(f)(3)*, *(f)(4)*; *see also* Fed. R. Civ. P. Appendix of Forms, Form 52 and any scheduling orders and other pretrial orders under *Fed. R. Civ. P. 16(b)*, *(e)* to determine whether the court has modified the 30-day period for responding to requests for admission.

[b] Parties' Written Stipulation

The time for responding to requests for admission may be shortened or extended by the parties' written agreement. *Fed. R. Civ. P. 36(a)(3).* However, an agreement extending the time for responses requires court approval if it would

interfere with any time set for completion of discovery, for hearing of a motion, or for trial. *Fed. R. Civ. P. 29(b)*. For discussion of discovery stipulations, see Ch. 15 *below*.

[3] Responding Party May Move for Relief From Failure to Make Timely Response

The court may under certain circumstances allow the withdrawal of a deemed admission, effectively permitting the filing of a late response and relieving the responding party of the effect of the failure to respond timely. *Fed. R. Civ. P. 36(b)*; *see Diggs v. Keller, 181 F.R.D. 468, 469 (D. Nev. 1998)* ; *Upchurch v. USTNET, Inc., 160 F.R.D. 131, 132-133 (D. Or. 1995)* . However, this discretion will be exercised only under compelling circumstances. *See In re Heritage Bond Litig., 220 F.R.D. 624, 626 (C.D. Cal. 2004)* ("the Court's discretion to permit a late response to requests for admissions should be exercised only when necessary to relieve a party from default by the use of the admissions to obtain a summary or default judgment").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.11[1], [2].*
- *Bender's Federal Practice Forms* Form Nos. 36:10, 36:11, 36:21.
- *Federal Litigation Guide P 19.49.*
- *Fed. R. Civ. P. 5(b)(2)* (methods of service).
- *Fed. R. Civ. P. 6(d)* (additional time after certain kinds of service).
- *Fed. R. Civ. P. 16(b)* (scheduling).
- *Fed. R. Civ. P. 16(e)* (final pretrial conference and orders).
- *Fed. R. Civ. P. 26(f)* (conference of parties; planning for discovery).
- *Fed. R. Civ. P. 29(b)* (stipulations about discovery procedure).
- *Fed. R. Civ. P. 36(a)(3)* (time to respond).

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§ 13.13 Stating Admissions

[1] Unqualified Admission

If the responding party chooses to admit a requested matter without qualification, a simple admission is all that is necessary. No explanation is needed, and no evidence or authority need be cited. *See Fed. R. Civ. P. 36(a).*

Strategic Point:

If the responding party has admitted a matter and the propounding party attempts to conduct additional discovery on that matter, the responding party may seek a protective order under *Fed. R. Civ. P. 26(c)*; *see also* Ch. 16 *below*. Although a request for admission is not objectionable merely because it may duplicate information obtained through discovery, once a matter is admitted, it is no longer an issue and is generally outside the scope of permissible discovery. *See Fed. R. Civ. P. 26(b)(1).*

[2] Admission With Qualification

When the responding party qualifies a response or denies only a part of a requested matter, the responding party must specify which part of the requested matter is true and qualify or deny the rest. *Fed. R. Civ. P. 36(a)(4)*; *Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 77 (N.D.N.Y. 2003)* ; *Poole v. Textron, Inc., 192 F.R.D. 494, 499 (D. Md. 2000)* .

Warning--Responding Party:

The court may award the propounding party the expenses incurred in proving a matter that the responding party failed to admit, unless the court finds that the request was objectionable, the admission sought was of no substantial importance, the party failing to admit had reasonable ground to believe that it might prevail on the matter, or there was other good reason for failure to admit. *Fed. R. Civ. P. 37(c)(2)*; *see Fed. R. Civ. P. 26(g)(3), 36(a).*

For discussion of motions to recover expenses of proof after an unreasonable failure to admit, *see §§ 18.13-18.17 below.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.11[5][a].*
- *Federal Litigation Guide PP 19.42, 19.43.*
- *Fed. R. Civ. P. 26(c)* (protective orders).
- *Fed. R. Civ. P. 26(g)(3)* (sanctions for improper certification).
- *Fed. R. Civ. P. 36(a)* (scope and procedure for requests for admission).
- *Fed. R. Civ. P. 37(c)(2)* (failure to admit).



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§ 13.14 Stating Denials

[1] Complete Denial

A complete denial of a request for admission must specifically deny the requested matter and fairly respond to the substance of the matter. No explanation is needed, and no evidence or authority need be cited. *See Fed. R. Civ. P. 36(a)(4).*

[2] Partial Denial

When good faith requires that the responding party deny only a part of a requested matter, the responding party must specify the part admitted and deny the rest. *Fed. R. Civ. P. 36(a)(4)*; *Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 77 (N.D.N.Y. 2003)* ; *Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 579-580 (9th Cir. 1992)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d. ed.) § 36.11[5][b].*
- *Federal Litigation Guide PP 19.43, 19.44.*
- *Fed. R. Civ. P. 36(a)(4)* (answer).



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§ 13.15 Asserting Lack of Information

If the responding party cannot truthfully admit or deny a request for admission, the response must state in detail why the responding party cannot truthfully admit or deny it. *Fed. R. Civ. P. 36(a)(4)*. The response may assert a lack of information or knowledge as a reason for failing to admit or deny only if the response states both of the following:

1. The responding party has made a reasonable inquiry. *See § 13.08 above*.

2. The information known to or readily obtainable by the responding party is insufficient to enable the party to admit or deny.

Fed. R. Civ. P. 36(a)(4).

Warning:

A response asserting that the responding party made a reasonable inquiry (and that the inquiry did not uncover sufficient information to enable the party to admit or deny) will be deemed inadequate if the evidence does not show that the party did, in fact make a reasonable inquiry. *In re Sweeten, 56 B.R. 675, 678 (Bankr. E.D. Pa. 1986)* .

Warning:

Though a party may respond to an interrogatory by stating that its answer is to be found in specified business records under *Fed. R. Civ. P. 33(d)*, this is not a proper response to a request for admission. *In re Heritage Bond Litig., 220 F.R.D. 624, 626 (C.D. Cal. 2004)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.11[5][d].*
- *Federal Litigation Guide P 19.45.*

- *Fed. R. Civ. P. 36(a)(4)* (answer).



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§ 13.16 Asserting Objections

[1] Stating Objections to Avoid Waiver

If the responding party responds to a request without objecting to it, any objection is waived. *See Fed. R. Civ. P. 36(a)(3)*; *Wagner v. St. Paul Fire & Marine Ins. Co., 238 F.R.D. 418, 423 (N.D. W. Va. 2006)* (though Rule 36 does not contain waiver provision, strong indications that it should be implied).

The responding party may seek relief from a waiver of objection by moving to withdraw or amend the resulting admission. *See Fed. R. Civ. P. 36(b)*; *see §§ 13.22*, *13.23 below*.



Warning:

An objection to a part of a request does not excuse the responding party from properly responding to the other parts of the request to which the responding party has raised no specific objection. *See Fed. R. Civ. P. 36(a)(4)*.

[2] Stating Reasons for Objection

The grounds for any objection must be stated in the response. *Fed. R. Civ. P. 36(a)(5)*. The objection must be specific to overcome the waiver rule. *Wagner v. St. Paul Fire & Marine Ins. Co., 238 F.R.D. 418, 424 (N.D. W. Va. 2006)* .

[3] Avoiding Improper Objections

The following objections are not allowable:

1. That a matter on which an admission has been requested presents an ultimate issue in the case. *Fed. R. Civ. P. 36(a)(5)*; *Marchand v. Mercy Med. Ctr., 22 F.3d 933, 936-939 (9th Cir. 1994)* .

2. That a requested opinion is a matter for expert opinion. *See Fed. R. Civ. P. 36(a)(5)*.

3. That the propounding party has the burden of proof on the matter requested, because the purpose of

requests for admission is to eliminate the need to make discovery of uncontested facts. *See Fed. R. Civ. P. 36(a)(5)*; *House v. Giant of Maryland LLC, 232 F.R.D. 257, 260 (E.D. Va. 2005)* .

4. That the responding party lacks personal knowledge, or that the requested matter consists of facts within the knowledge of the propounding party, if the information is obtainable on reasonable inquiry by the responding party. *Fed. R. Civ. P. 36*, Committee Note of 1970; *Diederich v. Department of Army, 132 F.R.D. 614, 616-617 (S.D.N.Y. 1990)* ; *see also* §§ *13.08, 13.15 above*.

5. That the requests cover many of the issues in the case, or the entire case. *See Fed. R. Civ. P. 36*, Committee Note of 1970.

6. That the requested matter constitutes a genuine issue for trial or that the request goes to a disputed matter presenting a genuine issue for trial. *Fed. R. Civ. P. 36*, Committee Note of 1970; *Jobin v. Kloepfer (In re M & L Business Mach. Co.), 184 B.R. 366, 368 (D. Colo. 1995)* .

7. That the request relates to facts, the application of law to fact, or opinions about either. *Fed. R. Civ. P. 36(a)(1)(A)*; *see also § 13.03 above*.

8. That the request has been or will be duplicated by upcoming discovery, since the purpose of requests for admission is to eliminate the need to make discovery of uncontested facts. *See Fed. R. Civ. P. 36(a)(5)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.11[5][c]*.
- *Bender's Federal Practice Forms* Form Nos. 36:10, 36:11.
- *Federal Litigation Guide PP 19.46*, *19.47*.
- *Fed. R. Civ. P. 36(a)* (scope and procedure for requests for admission).
- *Fed. R. Civ. P. 36(b)* (withdrawing or amending admission).



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§ 13.17 Signing on Behalf of Responding Party

[1] Response Must Be Signed

The response to requests for admission must be signed by the attorney for the responding party or, if that party is not represented by counsel, by the party. The person signing must also state his or her address, e-mail address, and phone number. *Fed. R. Civ. P. 26(g)(1), 36(a)(3).*

Warning--Responding Party:

The signature of the attorney or party certifies that to the best of the person's knowledge, information, and belief, formed after a reasonable inquiry, the response complies with applicable rules, is not made for an improper purpose, and is not unreasonable *Fed. R. Civ. P. 26(g)(1).* Sanctions may be imposed for a certification that violates these requirements. *Fed. R. Civ. P. 26(g)(3); see § § 18.35-18.40 below.*

[2] Verification Is Not Required

The response to requests for admission need not be verified. *See Fed. R. Civ. P. 26(g)(1), 36(a); see also Fed. R. Civ. P. 36,* Committee Note of 1970.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.11[5].*
- *Federal Litigation Guide P 19.48.*
- *Fed. R. Civ. P. 26(g)* (signing disclosures and discovery requests, responses and objections).
- *Fed. R. Civ. P. 36(a)(3)* (time to respond).



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Chapter 13 REQUESTS FOR ADMISSION
PART C: RESPONDING TO REQUESTS FOR ADMISSION

1-13 Moore's AnswerGuide: Federal Discovery Practice § 13.18

§ 13.18 Serving Responses

[1] Serving Original Response on Propounding Party

The signed response to the requests for admission must be served on the propounding party before the deadline, which is usually 30 days after service of the requests. *Fed. R. Civ. P. 5(a)(1)(C), 36(a)(3).*



Warning:

Having proper proof of service of the responses will be essential if it is later contended that the responding party has made a deemed admission by failing to serve a timely response. *See Fed. R. Civ. P. 36(a).*

[2] Serving Copies of Response on All Other Parties

Copies of the response to the requests for admission must be served on all other parties that have appeared in the case. *Fed. R. Civ. P. 5(a)(1).*

[3] Propounding Party Should Not File Response

[a] Responses Are Not Filed Until Used in Case

Responses to requests for admission generally must not be filed until they are used in the case or the court orders filing. *Fed. R. Civ. P. 5(d)(1).*

[b] Retain Original Response

Because responses ordinarily must not be filed until they are used at trial, the propounding party should retain the original responses received from the responding party and ensure that they are available at trial and for any other proceedings for which they may be needed. *Fed. R. Civ. P. 5(d)(1).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d. ed.) § 36.11[1] -[3].*
- *Federal Litigation Guide P 19.49.*
- *Fed. R. Civ. P. 5(a)(1)* (when service required).
- *Fed. R. Civ. P. 5(d)(1)* (filing papers and certificate of service).
- *Fed. R. Civ. P. 36(a)(3)* (time to respond).

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Chapter 13 REQUESTS FOR ADMISSION
PART C: RESPONDING TO REQUESTS FOR ADMISSION

1-13 Moore's AnswerGuide: Federal Discovery Practice § 13.19

§ 13.19 Supplementing Responses

The responding party who has responded to a request for admission must supplement or correct its disclosure or response:

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

2. As ordered by the court.

Fed. R. Civ. P. 26(e)(1); *see also Fed. R. Civ. P. 37(c)(1)* (sanctions for failure to amend).

Timing:

Generally, any amended response may simply be served on the other parties to the action. However, if the original response is an admission, the responding party must first obtain a court order allowing the amendment. *Fed. R. Civ. P. 36(b)*.

For discussion of motions to withdraw or amend admissions, *see §§ 13.22*, *13.23 below*. For discussion of sanctions for failure to supplement discovery responses, see §§ *18.08-18.12 below*.

Warning:

If the response is considered inadequate, untimely, or incomplete, or if the responding party failed to supplement a response under *Fed. R. Civ. P. 26(e)(2)*, the requesting party can request sanctions under *Fed. R. Civ. P. 36(a)*, *Fed. R. Civ. P. 26(g)(2)*, or *Fed. R. Civ. P. 37(c)(2)*. *See Hadley v. United States, 45 F.3d 1345, 1350 (9th Cir. 1995)* (district court should have considered lesser sanction for taxpayer's failure to respond timely to request for admission, rather than deeming it admitted).

For discussion of recovering expenses for proving matters not admitted, see §§ *18.13-18.17 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.13.*
- *Federal Litigation Guide PP 19.60, 19.61.*
- *Fed. R. Civ. P. 26(e)(1)* (supplementing disclosures and responses).
- *Fed. R. Civ. P. 36(b)* (withdrawing or amending admission).
- *Fed. R. Civ. P. 37(c)(1)* (sanctions for failure to amend).



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Chapter 13 REQUESTS FOR ADMISSION
PART D: MOVING TO DETERMINE SUFFICIENCY OF RESPONSES

1-13 Moore's AnswerGuide: Federal Discovery Practice § 13.20

§ 13.20 Checklist for Moving to Determine Sufficiency of Responses

☐ Propounding party:

- ○ Review sufficiency of responses to requests for admission. *See § 13.21 below*.
- ○ If any response appears to be insufficient, move for order determining sufficiency of response. *See § 13.21 below*.
- ○ Seek order that matter is deemed admitted. *See § 13.21[3] below*.
- ○ Request award of reasonable expenses, including attorney's fees, incurred in relation to motion. *See § 13.21[5] below*.
- ○ If court finds that response is insufficient and orders that matter is deemed admitted, adjust trial preparation accordingly.
- ○ If court finds that response is insufficient and orders responding party to serve amended response, calendar date for service of amended response; when amended response is received, review it for sufficiency, and if amended response appears to be insufficient, make further motion for order determining sufficiency of response.
- ○ If court defers disposition of motion until pretrial conference or other designated time, calendar that date and prepare to renew motion at that time.

☐ Responding party:

○ If propounding party moves for order determining sufficiency of response, calendar dates for filing and serving opposition to motion and for hearing, prepare opposition, including request for leave to file amended response if court finds original response to be insufficient, and follow standard noticed motion procedure. *See § 13.21 below*.

○ If court finds that response is insufficient and orders that matter is deemed admitted, consider making motion to withdraw or amend that admission. *See § 13.23 below*.

○ If court finds that response is insufficient and orders responding party to serve amended response, prepare amended response and serve it within time specified by court. *See § 13.23 below*.

○ If court defers disposition of motion until pretrial conference or other designated time, calendar that date and prepare to reassert opposition to motion at that time. *See § 13.21 below*.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Admissions > Responses

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Chapter 13 REQUESTS FOR ADMISSION
PART D: MOVING TO DETERMINE SUFFICIENCY OF RESPONSES

1-13 Moore's AnswerGuide: Federal Discovery Practice § 13.21

§ 13.21 Moving to Determine Sufficiency of Responses

[1] Requesting Party May Move to Determine Sufficiency of Responses

A party that has requested admissions may file a motion asking the court to determine the sufficiency of the responses. *Fed. R. Civ. P. 36(a)(6)*; *see Collins v. JC Penney Life Ins. Co., 2003 U.S. Dist. LEXIS 8455, at *9 (S.D. Cal. 2003)* .

Strategic Point--Propounding Party:

If the propounding party's trial strategy or presentation will be affected by the response to a request for admission, use of this motion could reduce the propounding party's time and expense. Moreover, the propounding party may not want to wait until trial to prove the insufficiency of the answer. Establishing the sufficiency of an admission before trial can allow a party to focus trial preparation on other issues.

Strategic Point--Propounding Party:

A motion to determine the sufficiency of responses is an infrequently used device most likely because the expense and burden of bringing the motion is seldom commensurate with the results. In the event that the denial is in proper form, the court will often be disinclined to delve into the question further at the motion stage and will prefer to address the matter at trial. An exception to that general approach is when nailing down an admission is critical for use in a motion for summary judgment. In that instance, a party may find it necessary to pursue a sufficiency motion and should alert the court that the need to confront the accuracy of the denial is owing to the party's expectation of making a dispositive motion implicating the issue addressed in the request for admission.

Warning:

A motion to determine the sufficiency of a response should not be used to test the accuracy of a denial that fairly meets the substance of the requested admission. *See Fed. R. Civ. P. 36(a)(6)*. In the case of such a denial, the propounding party's proper course is to prove the inaccuracy of the denial at trial, and then move to recover the expenses and fees incurred in making that proof.

[2] Unless Objection Is Justified, Court Will Order Answer

If an objection has been asserted, unless the court determines that the objection is justified, the court will order that an answer be served. *Fed. R. Civ. P. 36(a)(6)*. The order may specify that if the answer is not served within a certain time, the matter will be deemed admitted. *Fed. R. Civ. P. 36(a)(6)*.

[3] If Answer Is Insufficient, Court May Order Matter Admitted or Answer Amended

If the court determines that a denial or an explanation of a failure to admit or deny does not comply with the requirements of *Fed. R. Civ. P. 36*, the court may order either that the matter is admitted or that an amended or supplemental response be served. *Fed. R. Civ. P. 36(a)(6)*.

[4] Court May Order Parties to Confer

The court may defer the final disposition of a request for admission until a pretrial conference or a designated time prior to trial. *Fed. R. Civ. P. 36(a)(6)*; *see Fed. R. Civ. P. 16* (pretrial conferences).

[5] Expenses May Be Awarded

The court may make an award of expenses, including attorney's fees, incurred in relation to the motion. *Fed. R. Civ. P. 36(a)*; *see Fed. R. Civ. P. 37(a)(5)*; *see also § 17.10 below*.

Warning:

If the response to the requests for admission was signed in violation of the requirements of *Fed. R. Civ. P. 26(g)(1)*, the court may award sanctions, which may include attorney's fees incurred on the motion. *See Fed. R. Civ. P. 26(g)(3)*; *see also §§ 18.35-18.40 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d. ed.) §§ 36.12, 37.70 -37.76*.
- *Federal Litigation Guide, P 19.10*.
- *Bender's Federal Practice Forms* Form Nos. 36:20, 36:30.
- *Fed. R. Civ. P. 16* (pretrial conferences).
- *Fed. R. Civ. P. 26(g)* (signing disclosures and discovery requests, responses, and objections).
- *Fed. R. Civ. P. 36(a)(6)* (motion regarding the sufficiency of an answer or objection).
- *Fed. R. Civ. P. 37(a)(5)* (payment of expenses when motion to compel granted).
- *Fed. R. Civ. P. 37(c)(2)* (failure to admit request under Rule 36).



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Chapter 13 REQUESTS FOR ADMISSION
PART E: WITHDRAWING OR AMENDING ADMISSIONS

1-13 Moore's AnswerGuide: Federal Discovery Practice § 13.22

§ 13.22 Checklist for Withdrawing or Amending Admissions

☐ Determining whether withdrawal or amendment is desirable, by reviewing: *See § 13.23 below*.

- ○ Review express admissions, including any partial admission made in response to request for admission.
- ○ Review deemed admissions resulting from failure to serve timely response to requests for admission.
- ○ Review any statement of inability to admit or deny that might be deemed admission because of failure to comply with duty to make reasonable inquiry or failure to comply with other requirements for responses to requests for admission.
- ○ Review any objection that might be deemed admission because of invalidity of objection.

☐ If withdrawal or amendment of any admission is desirable, determine whether all of the following grounds for withdrawal or amendment are present: *See § 13.23 below*.

- ○ Presentation of merits of action will be served by allowing withdrawal or amendment.
- ○ Withdrawal or amendment will not prejudice propounding party in maintaining action or defense on merits.
- ○ If trial has already begun, or if admission has been incorporated in court's order

following final pretrial conference, withdrawal or amendment is necessary to prevent manifest injustice.

☐ If seeking withdrawal or amendment: *See § 13.23 below*.

○ Comply with any applicable local requirement to confer with opposing counsel before making motion.

○ Draft notice of motion and motion to withdraw or amend admission, including statement of grounds for motion and request for order allowing withdrawal or amendment of admission.

○ Prepare affidavit or declaration for filing with moving papers, to authenticate text of request and existing admission, and to propose new or amended response to request for admission.

○ Follow standard noticed motion procedure.

☐ If opposing motion for leave to withdraw or amend an admission: *See § 13.23 below*.

○ Calendar dates for filing and serving opposition to motion and for hearing.

○ Prepare opposition showing that grounds for withdrawal or amendment are not present.

○ If appropriate, include in opposition argument that proposed new or amended response would itself be insufficient.

○ Include with opposition papers original request for admission and response, authenticated by supporting affidavit or declaration.

○ Follow standard noticed motion procedure.

○ If motion for leave to withdraw or amend is granted, review new or amended response to determine whether further requests for admission should be propounded.

○ If matter on which admission was withdrawn or amended is later proven at trial, move for award of expenses of making that proof.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Admissions > Withdrawals



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Chapter 13 REQUESTS FOR ADMISSION
PART E: WITHDRAWING OR AMENDING ADMISSIONS

1-13 Moore's AnswerGuide: Federal Discovery Practice § 13.23

§ 13.23 Moving for Admission to be Withdrawn or Amended

[1] Withdrawal or Amendment Must Advance Decision on Merits and Not Prejudice Requesting Party

A party that made an admission may move for the admission to be withdrawn or amended. *Fed. R. Civ. P. 36(b)*. In general, a formal written motion to withdraw is not necessary. *Chancellor v. City of Detroit, 454 F. Supp. 2d 645, 666 (E.D. Mich. 2006)* ("a formal, written motion to withdraw is not necessary, and a withdrawal or request to withdraw may be made orally or may be imputed from a party's actions"). The court ordinarily has discretion to permit the withdrawal or amendment of an admission, including a deemed admission, only if the following circumstances exist:

1. The presentation of the merits of the action will be served by allowing the withdrawal or amendment. *See Pritchard v. Dow Agro Sciences, 255 F.R.D. 164, 172 (W.D. Pa. 2009)* (first prong of test was satisfied because subject matter of deemed admissions reached merits of plaintiffs' case, effectively admitting that exposure to defendant's product did not cause their injuries).

2. The party that propounded the request for admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

Fed. R. Civ. P. 36(b); *Conlon v. United States, 474 F.3d 616, 622 (9th Cir. 2007)* ; *Raiser v. Utah County, 409 F.3d 1243, 1246-1247 (10th Cir. 2005)* .

The prejudice contemplated by Rule 36(b) relates to the difficulty a party may face in proving its case, including problems caused by the unavailability of key witnesses, or the sudden need to obtain evidence with respect to the questions previously deemed admitted. *Gallegos v. City of Los Angeles, 308 F.3d 987, 993 (9th Cir. 2002)* ; *see Pritchard v. Dow Agro Sciences, 255 F.R.D. 164, 172 (W.D. Pa. 2009)* (court found no prejudice because case was in early stages of discovery, granting motion would not be detrimental to any dispositive motion, and time between date when responses were due and when responses were served was only five days). The court has broad discretion in deciding whether to withdraw or amend admissions. *Carlson v. Freightliner LLC, 226 F.R.D. 343, 361 (D. Neb. 2004)* ; *see also Banos v. City of Chicago, 398 F.3d 889, 892 (7th Cir. 2005)* ; *Perez v. Miami-Dade County, 297 F.3d 1255, 1265 (11th Cir. 2002)* .

Fed. R. Civ. P. 36(b) contemplates the withdrawal or amendment of admissions only (including deemed admissions resulting from a failure to respond). Thus, there is no procedure for the responding party to obtain a court order to withdraw or amend other kinds of responses such as a denial, a statement of inability to admit or deny, or an objection. However, these responses will not be deemed admissions unless the propounding party brings the matter before the court, usually on a motion to determine the sufficiency of the responses. *See Asea, Inc. v. Southern Pac. Transp. Co., 669 F.2d 1242, 1245 (9th Cir. 1981)* . In that event, the responding party will have an opportunity to argue for withdrawal or amendment of the response before the court decides whether to deem the matter as admitted. *See Fed. R. Civ. P. 36(a)(6).*



Timing:

The primary consideration in motions to withdraw or amend is avoiding delay. Because prejudice to the propounding party is a key part of the analysis, delay in bringing the motion to withdraw or amend increases the prospect that prejudice will be successfully demonstrated. Moreover, from a practical standpoint, the longer the period from admission to the motion to withdraw, the more the court will expect an explanation for why a motion was not forthcoming earlier.

[2] Stricter Standard for Withdrawal Applies After Entry of Final Pretrial Order

If the admission has been incorporated in the court's order following the final pretrial conference, or if the trial has already begun, withdrawal or amendment may be permitted only if necessary to prevent manifest injustice. *Fed. R. Civ. P. 16(e), 36(b)*; *AAA v. AAA Legal Clinic, 930 F.2d 1117, 1120 (5th Cir. 1991)* ; *see Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995)* .

[3] Moving Party's Burden on Motion

The party moving to withdraw or amend an admission (the responding party to the requests for admission) has the burden of convincing the court that allowing the amendment or withdrawal will serve the presentation of the merits of the case. *Fed. R. Civ. P. 36(b)*; *see Weeks Stevedoring Co. v. Raymond Int'l Bldrs., Inc., 1995 U.S. Dist. LEXIS 19266, at *8-*9 (S.D.N.Y. 1995)* ; *Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995)* . That withdrawal of an admission will serve the presentation of the merits may be established by showing that the admission goes to the heart of the case, such that leaving the admission in place would effectively eliminate a determination on the merits. *See Sonoda v. Cabrera, 255 F.3d 1035, 1040 (9th Cir. 2001)* .



Strategic Point:

The responding party should emphasize that the admission sought to be withdrawn or amended is factually inaccurate. *Fed. R. Civ. P. 36(b)* does not mention the factual inaccuracy of the admission as a factor the court should consider in deciding a motion for withdrawal or amendment. Nevertheless, a strong showing that the admission is inaccurate may help convince the court that withdrawal or amendment would subserve the presentation of the true merits of the case.

[4] Propounding Party's Burden on Motion

The party that propounded the request for admission has the burden of convincing the court that it will be prejudiced if the amendment or withdrawal is allowed. *Hadley v. United States, 45 F.3d 1345, 1348-1349 (9th Cir. 1995)* . Prejudice in this context is not simply that the propounding party will have to convince the factfinder of the truth; rather, it relates to the difficulty the party may face in proving its case. *Sonoda v. Cabrera, 255 F.3d 1035, 1039 (9th Cir. 2001)* . For example, a demonstration of prejudice in this context may consist of a showing that key witnesses have become unavailable between the time that the admission was made and the time of the motion to withdraw the

admission. *See Sonoda v. Cabrera, 255 F.3d 1035, 1039 (9th Cir. 2001)* .



Strategic Point:

The court has discretion to combine an order granting a motion to withdraw a deemed admission with an order requiring the responding party to pay the propounding party's costs incurred in opposing the motion. Such an order may be particularly appropriate if denying withdrawal of the admission would significantly impair the responding party's ability to present the case on the merits, while the only substantial prejudice the propounding party would suffer from the withdrawal of the admission is the expense of opposing the motion. *See Mid Valley Bank v. North Valley Bank, 764 F. Supp. 1377, 1391 (E.D. Cal. 1991)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d. ed.) § 36.13.*
- *Federal Litigation Guide* PP 19.160 *-19.63.*
- *Bender's Federal Practice Forms* Form No. 36:22.
- *Fed. R. Civ. P. 16(e)* (final pretrial conferences).
- *Fed. R. Civ. P. 36(a)(4)* (answer).
- *Fed. R. Civ. P. 36(a)(6)* (motion regarding sufficiency of answer or objection).
- *Fed. R. Civ. P. 36(b)* (effect of admission; withdrawing or amending admission).
- *Quasius v. Schwan Food Co., 596 F.3d 947, 952 (8th Cir. 2010)* (without some filing aimed at withdrawing deemed admissions, even after court directed plaintiff to file such motion and granted additional time for that purpose, district court did not abuse its discretion by considering deemed admissions in resolving summary judgment motion).



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Chapter 14 NONPARTY DISCOVERY: SUBPOENA

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§ 14.syn Synopsis to Chapter 14: NONPARTY DISCOVERY: SUBPOENA

§ 14.01 Procedural Context--Nonparty Discovery

§ 14.02 Checklist for Determining Whether Use of Subpoena Is Appropriate

§ 14.03 Considering Options and Strategy

[1] Informal Discovery Available from Nonparties

[2] Party May Not Issue Subpoena Absent Pending Litigation

[3] Party Must Issue Subpoena Before Discovery Cut-Off

[4] Prior to Drafting, Verify That Subpoena May Be Served

[5] Command for Production in Subpoena for Testimony

[6] Consult Local Rules When Issuing Subpoena

§ 14.04 Checklist for Drafting Subpoenas

§ 14.05 Preparing Subpoena to Compel Testimony

[1] Subpoena Must Issue From Proper Court and Identify Issuing Court

[2] State Title of Action, Name of Court in Which Action is Pending, and Civil Action Number

[3] Command Witness to Attend and Give Testimony

[4] Advise Corporate Witnesses of Duty to Designate and Subject Matter

[5] State Time and Place for Deposition

[6] Provide Reasonable Time to Comply

[7] State Method of Recording Deposition Testimony

[8] Include Text of Federal Rule of Civil Procedure 45(c) and (d)

[9] Include Proper Signature

[10] Include Appropriate Witness and Mileage Fees

[11] Subpoena Must Not Be Unduly Burdensome

§ 14.06 Preparing Subpoena to Compel Production

[1] Subpoena Must Issue From Proper Court and Identify Issuing Court

[2] State Title of Action, Name of Court in Which Action Is Pending, and Civil Action Number

[3] Command Witness to Produce

[4] Describe Items to Be Produced With Specificity

[5] Subpoena May State Form for Producing Electronically Stored Information

[6] State Time and Place for Production

[7] Provide Reasonable Time to Comply

[8] Include Text of Federal Rule of Civil Procedure 45(c) and (d)

[9] Include Proper Signature

[10] Subpoena Seeking Production Must Not Be Unduly Burdensome

[11] Subpoena to Compel Production of Electronically Stored Information Requires Special Care to Avoid Imposing Undue Burden; May Raise First Amendment Issues

§ 14.07 Preparing Subpoena to Compel Permission to Inspect Premises

[1] Subpoena Must Issue From Proper Court and Identify Issuing Court

[2] State Title of Action, Name of Court in Which Action is Pending, and Civil Action Number

[3] Command Permission to Inspect Premises

[4] State Time and Place for Inspection

[5] Provide Reasonable Time to Comply

[6] Include Text of Federal Rule of Civil Procedure 45(c) and (d)

[7] Include Proper Signature

[8] Subpoena Commanding Permission to Inspect Must Not Be Unduly Burdensome

§ 14.08 Checklist for Serving Subpoenas

§ 14.09 Following Requirements for Service

[1] Provide Notice to Parties Before Issuing Subpoena

[2] Verify That Subpoena Will Be Served Before Discovery Cut-Off

[3] Verify That Person Serving Subpoena Is at Least 18 and Not a Party

[4] Ensure That Proper Method of Service Is Used

[5] Verify That Service Is Within Prescribed Territorial Limits

[6] Enclose Correct Amount of Witness and Mileage Fees

[7] If Required, Certificate of Service Must Be Filed With Issuing Court

§ 14.10 Checklist for Responding to Subpoenas

§ 14.11 Reviewing Options and Strategy for Responding

[1] Appropriate Response Depends on Subpoena

[2] Remedies for Avoiding or Limiting Compliance With Subpoena

[3] Make Good-Faith Effort to Resolve Disputes

§ 14.12 Analyzing Validity of Subpoena

[1] Verify That Subpoena Was Served Within Discovery Period

[2] Verify That Subpoena Was Properly Served

[3] Verify That Subpoena Was Issued From Proper Court

[4] Verify That Subpoena Affords Reasonable Time for Compliance

[5] Verify That Subpoena Does Not Exceed 100-Mile Limit on Travel

[6] Determine Whether Subpoena Seeks Privileged or Protected Materials

[7] Determine Whether Subpoena Imposes Undue Burden

[8] Determine Whether Subpoena Seeks Trade Secrets or Other Confidential Research or Development Information, or

Commercial Information

[9] Determine Whether Subpoena Is Directed Against Unretained Expert

[10] Determine Whether to Object to Form Specified for Production of Electronically Stored Information

[11] Verify That All Parties to the Action Received Prior Notice of the Subpoena

[12] Check Local Rules

§ 14.13 Choosing Method for Resisting Subpoena

[1] Resisting Subpoena Seeking Production or Inspection

[2] Resisting Subpoena Seeking Testimony

§ 14.14 Making Written Objections to Subpoena

[1] Written Objections Must Be Timely Made and Served

[2] Clearly State Objection and Include Privilege Log If Making Claim of Privilege

[3] Because Objection Excuses Compliance, Do Not Permit Production to Proceed Without a Court Order

[4] Person Making Objections Must Have Standing to Object to Subpoena

§ 14.15 Moving to Modify or Quash Subpoena

[1] When Subpoena Must Be Modified or Quashed

[2] When Subpoena May Be Modified or Quashed

[3] Burden on Movant; Court Has Discretion to Modify or Quash Subpoena

[4] Motion Must Be Timely Made

[5] Motion Must Be Made in Proper Court

[6] Consult Local Rules to Determine If Meet-and-Confer Is Required Before Filing Motion

[7] Standing to Modify or Quash Subpoena

§ 14.16 Moving for a Protective Order

§ 14.17 Producing Documents and Electronically Stored Information in Response to Subpoena

[1] Materials in Nonparty's "Control" Must Be Produced

[2] How to Produce Documents

[3] How to Produce Electronically Stored Information

[4] Nonparty May Be Entitled to Reimbursement for Costs Incurred in Complying With Subpoena

§ 14.18 Checklist for Enforcing Subpoenas

§ 14.19 Attempt to Resolve Contested Issues Through Meet-and-Confer With Counsel

§ 14.20 Moving to Compel

§ 14.21 Seeking Contempt Sanctions for Failure or Refusal to Respond to Subpoena



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Chapter 14 NONPARTY DISCOVERY: SUBPOENA
PART A: PROCEDURAL CONTEXT

1-14 Moore's AnswerGuide: Federal Discovery Practice § 14.01

§ 14.01 Procedural Context--Nonparty Discovery

Discovery against nonparties is obtained by issuing a subpoena. Subpoenas are required for all discovery devices employed against nonparties, whether discovery is sought through an oral deposition, a production of documents, electronically stored information, and things, or permission to inspect premises. A subpoena also is required to compel a witness to testify at a trial or hearing. A subpoena to compel testimony is also referred to as a "subpoena ad testificandum," and a subpoena to compel production or to inspect premises is also referred to as a "subpoena duces tecum."

Informal discovery from nonparties, including witness interviews and documents, may be obtained without a subpoena but may not be admissible at trial or may be difficult to obtain from hostile nonparties.

Federal Rule of Civil Procedure 45 governs the form, issuance, service, response to, and enforcement of a subpoena in a federal civil action. Rule 45 essentially serves to make the discovery available against parties under *Fed. R. Civ. P. 26*, *30*, and *34* available from nonparties as well. Therefore, it is important to review Rules 26, 30, and 34 along with Rule 45 when seeking or responding to a subpoena.

Not all discovery devices available against parties are available against nonparties. Interrogatories and requests for admission may not be used against nonparties. Further, physical and mental examinations are available against nonparties only when the nonparty's physical or mental condition is at issue, and the nonparty is in the custody or under the legal control of a party.

Proper drafting and service of subpoenas are crucial to ensuring the acquisition of information in the possession, custody, or control of a nonparty. The form and contents of a subpoena must comply with Rule 45(a) and service must comply with Rule 45(b). Failure to comply with these requirements may render a subpoena unenforceable.

Nonparties must timely respond to subpoenas and must carefully follow the applicable rules. Failure to do so may result in a waiver of any objection or privilege claim regarding the subpoena. If a nonparty does not comply with a subpoena, it may be necessary to move a court to compel the nonparty to comply, or to seek sanctions.



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Chapter 14 NONPARTY DISCOVERY: SUBPOENA
PART B: DETERMINING WHETHER TO USE A SUBPOENA

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§ 14.02 Checklist for Determining Whether Use of Subpoena Is Appropriate

☐ Determine whether discovery is sought from a nonparty.

☐ Determine whether information from the nonparty is better sought through use of a Rule 45 subpoena or through informal discovery. *See § 14.03[1] below*.

☐ Determine whether there is a pending action. *See § 14.03[2] below*.

☐ Determine whether the discovery cut-off deadline has passed. *See § 14.03[3] below*.

☐ Verify that subpoena may properly be served. *See § 14.03[4] below*.

☐ Consider whether testimony, production of documents, electronically stored information, things, permission to inspect premises, or all of these are needed from the nonparty. *See § 14.03[5] below*.

☐ Consult local rules for any special requirements. *See § 14.03[6] below*.

☐ **Search by Topic:** Civil Procedure > Pretrial Matters > Subpoenas



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Chapter 14 NONPARTY DISCOVERY: SUBPOENA
PART B: DETERMINING WHETHER TO USE A SUBPOENA

1-14 Moore's AnswerGuide: Federal Discovery Practice § 14.03

§ 14.03 Considering Options and Strategy

[1] Informal Discovery Available from Nonparties

While a subpoena issued pursuant to *Federal Rule of Civil Procedure 45* must be served to compel a nonparty to provide discovery, parties may obtain informal discovery from cooperating nonparties without the use of the formal requirements of Rule 45. Informal discovery against nonparties may help to control litigation costs and save time.

Informal discovery may be particularly appropriate at the early stages of the case to develop facts and to provide insight into what formal discovery needs to be obtained. For example, when a nonparty is willing to provide an off-the-record interview, the party seeking such discovery will be in a better position to determine if a deposition is needed and, if so, what questions to ask. Of course, such informal contact will be discoverable once formal discovery commences.

Informal discovery also has the benefit of being initiated and conducted without the requirement of notice to adverse parties.

Some informal discovery methods are as follows:

1. Interviews of nonparty witnesses.

2. Review of documents and other evidence obtained from nonparty witnesses.

3. Review of publicly available information.

Warning:

Informal discovery obtained from a nonparty witness may not be admissible at trial unless the witness is called to testify at the trial. Further, nonparties might not voluntarily comply with informal discovery requests, in which case, a subpoena will be necessary.

[2] Party May Not Issue Subpoena Absent Pending Litigation

Rule 45 subpoenas may not be issued absent a pending action. *See Sullivan v. Dickson, 283 F.2d 725, 727 (9th Cir. 1960)* . Rule 27 governs depositions taken or sought before an action has been filed or pending appeal. *See Fed. R. Civ. P. 27*. For discussion of discovery under Rule 27, *see* Ch. 10 *above*.

[3] Party Must Issue Subpoena Before Discovery Cut-Off

Rule 45 subpoenas issued for deposition testimony, production of documents, electronically stored information, or things, or for permission to inspect premises are "discovery subpoenas," and therefore must be issued within the time period permitted for discovery in the case. A majority of courts hold that, after the discovery deadline established by a scheduling order has passed, a party may not issue a nonparty subpoena to obtain materials that could have been procured during discovery. *See, e.g., Alper v. United States, 190 F.R.D. 281, 283-284 (D. Mass. 2000)* (Rule 45 subpoena constitutes discovery, and so could not be enforced when production was sought after close of discovery period); *but see O'Boyle v. Jensen, 150 F.R.D. 519, 520 (M.D. Pa. 1993)* (parties' discovery deadline did not preclude parties from making requests for information not directed to the other side).

Timing:

A subpoena also must be issued at a time that gives nonparties a reasonable period to comply with the subpoena before the discovery deadline. *See §§ 14.05[6], 14.06[7]* and *14.07[5] below*.

[4] Prior to Drafting, Verify That Subpoena May Be Served

In the interest of efficiency, a party should verify--prior to drafting--that the subpoena may be properly served. *See § 14.09 below*.

[5] Command for Production in Subpoena for Testimony

When drafting a deposition subpoena, consider including a request for production. Rule 45 permits a party to include a command to produce documents, electronically stored information, or things, or to permit inspection of premises in a subpoena commanding attendance at a deposition, hearing or trial. *Fed. R. Civ. P. 45(a)(1)(C)*. Alternatively, a party may set out the command for production or inspection in a separate subpoena. When combining a command for production with a command for testimony, the subpoena should issue from the court for the district where the deposition is to be taken. *Fed. R. Civ. P. 45(a)(2)*.

[6] Consult Local Rules When Issuing Subpoena

The party issuing a subpoena should consult the local rules of the appropriate district court for any special requirements that may exist for issuing subpoenas. For example, the district may require the use of an official form subpoena.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 45.03[3], 45.10[3][d].*
- *Federal Litigation Guide P 13.07[5].*
- *Fed. R. Civ. P. 27* (deposition before an action is filed or pending appeal).
- *Fed. R. Civ. P. 45* (subpoena).



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Chapter 14 NONPARTY DISCOVERY: SUBPOENA
PART C: DRAFTING SUBPOENAS

1-14 Moore's AnswerGuide: Federal Discovery Practice § 14.04

§ 14.04 Checklist for Drafting Subpoenas

☐ State name of court from which subpoena is issued, either:

- ○ Court of district where the deposition will be held. *See § 14.05[1] below*.
- ○ Court of district where production or inspection of premises will be made. *See §§ 14.06[1], 14.07[1] below*.

☐ State title of the action, name of court in which action is pending, and civil action number. *See §§ 14.05[2], 14.06[2], 14.07[2] below*.

☐ Command witness to:

- ○ Attend and testify. *See § 14.05[3] below*.
- ○ Produce designated documents, designated electronically stored information, designated things. *See § 14.06[3] below*.
- ○ Permit inspection of documents. *See § 14.07[3] below*.

☐ If commanding testimony of nonparty organization, advise of duty to designate witness(es) and describe subject of testimony "with reasonable particularity." *See § 14.05[4] below*.

☐ If commanding production, specify the documents or things sought. *See § 14.06[4] below*.

☐ State time and place for deposition, production, or inspection of premises, providing a reasonable time for compliance. *See §§ 14.05[5]*, *[6]*, 14.06[6], [7], 14.07[4], [5] *below*.

☐ If commanding deposition, state method for recording testimony. *See § 14.05[7] below*.

☐ Include text of *Fed. R. Civ. P. 45(c)*, *(d)*. *See §§ 14.05[8]*, *14.06[8]*, *14.07[6] below*.

☐ Include proper signature. *See §§ 14.05[9]*, *14.06[9]*, *14.07[7] below*.

☐ Include appropriate witness fees with a subpoena to compel testimony. *See* § 14[10] *below*.

☐ Provide notice to parties before serving subpoena on nonparty. *See § 14.09[1] below*.

☐ **Search by Topic:** Civil Procedure > Pretrial Matters > Subpoenas



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Chapter 14 NONPARTY DISCOVERY: SUBPOENA
PART C: DRAFTING SUBPOENAS

1-14 Moore's AnswerGuide: Federal Discovery Practice § 14.05

§ 14.05 Preparing Subpoena to Compel Testimony

[1] Subpoena Must Issue From Proper Court and Identify Issuing Court

A subpoena must state the name of the issuing court. *Fed. R. Civ. P. 45(a)(1)(A)(i)*. A subpoena for attendance at a deposition properly issues from the court for the district where the deposition is to be taken. *Fed. R. Civ. P. 45(a)(2)(B)*. If a deposition is to be taken outside of the district in which the action is pending, the subpoena must issue from the district court where the deposition will be taken; a subpoena issuing from the court where the action is pending is insufficient on its face and invalid. *See Kupritz v. Savannah College of Art & Design, 155 F.R.D. 84, 87-88 (E.D. Pa. 1994)* (deposition subpoena issued from Southern District of Georgia where action was pending, rather than Eastern District of Pennsylvania where deposition was to be taken, was invalid on its face); *see also Avance v. Kerr-McGee Chem. LLC, 2005 U.S. Dist. LEXIS 44872, at *9-*15 (E.D. Tex. 2005)* (motion to quash subpoena denied because motion was filed in court of underlying action rather than in issuing court, but noting a minority view exists that issuing court may transfer subpoena motions to district court of underlying action).

The issuing court is responsible for enforcing the subpoena. *See In re Sealed Case, 141 F.3d 337, 341-343 (D.C. Cir. 1998)* (district court that issued deposition subpoena had no authority to transfer motions to enforce and quash to district court when underlying action was pending; only issuing court can enforce, modify, or quash subpoena).

When determining the court from which to issue a deposition subpoena, keep in mind that the nonparty must not be required to travel more than 100 miles from where that person lives, works, or regularly conducts business to attend the deposition. *Fed. R. Civ. P. 45(c)(3)(A)(ii)*. *See § 14.05[5] below*. The location of the deposition within that 100-mile range will determine the proper court.

A subpoena for attendance at a hearing or trial properly issues from the court for the district where the hearing or trial will be held. *Fed. R. Civ. P. 45(a)(2)(A)*.

To determine who should sign and issue the subpoena on behalf of the court, *see § 14.05[9] below*.

[2] State Title of Action, Name of Court in Which Action is Pending, and Civil Action Number

A subpoena must state the title of the action, the name of the court in which the action is pending, and the civil action

number. *Fed. R. Civ. P. 45(a)(1)(A)(ii)*. Include this information in the caption, or, if using the official form, as indicated by the form.

[3] Command Witness to Attend and Give Testimony

A subpoena to compel testimony must "command each person to whom it is directed to ... attend and testify." *Fed. R. Civ. P. 45(a)(1)(A)(iii)*.

[4] Advise Corporate Witnesses of Duty to Designate and Subject Matter

A subpoena issued to compel testimony from a nonparty corporation, partnership, or organization must advise the nonparty of its duty to designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf. *Fed. R. Civ. P. 30(b)(6)*; *see also § 8.10 above*.

Additionally, the subpoena for a nonparty organization must describe "with reasonable particularity" the matters about which the testimony is being sought. *Fed. R. Civ. P. 30(b)(6) see also § 8.10 above*.

[5] State Time and Place for Deposition

A subpoena must specify the time and place at which the nonparty is to give testimony. *Fed. R. Civ. P. 45(a)(1)(A)(iii)*. This "return date" of the subpoena must provide the nonparty with a reasonable period of time from the date of service to comply with the subpoena. *See § 14.05[6] below*. The return date must allow a reasonable time for compliance before the discovery cut-off in the action, or the subpoenaing party should seek an extension of discovery from the court that issued the scheduling order for the action before serving a subpoena with a return date after the end of discovery. *See Washington v. Thurgood Marshall Acad., 230 F.R.D. 18, 19 (D.D.C. 2005)* (subpoenas served 27 days before discovery cut-off and demanding depositions two days after discovery cut-off improperly extended discovery without court's approval; extending discovery for sole purpose of depositions, rather than quashing subpoena).

Warning:

A deposition subpoena must not require a witness to travel more than 100 miles from where the witness lives, works, or regularly conducts business. *Fed. R. Civ. P. 45(c)(3)(A)(ii)*.

The 100 miles generally is measured "as the crow flies" meaning by a straight line on a map, not by the course of travel. *See State Farm Fire & Cas. Co. v. Hood, 2007 U.S. Dist. LEXIS 84865, at *4 (S.D. Miss. 2007)* (proper measure is the "straight line" or "as the crow flies" method of measuring distance of a straight line connecting two points on map, as opposed to distance over highways, as provided by Google map).

[6] Provide Reasonable Time to Comply

Failure to allow a reasonable time for a nonparty to prepare for or arrange to attend a deposition constitutes grounds to modify or quash a subpoena. *Fed. R. Civ. P. 45(c)(3)(A)(i)*. Generally, what is "reasonable" will be determined on a case-by-case basis, given the specific circumstances. Local rules also may provide a minimum time for compliance.

[7] State Method of Recording Deposition Testimony

A subpoena for attendance at a deposition must state the method for recording the testimony, such as stenography or video recording. *Fed. R. Civ. P. 45(a)(1)(B)*.

[8] Include Text of Federal Rule of Civil Procedure 45(c) and (d)

The entire text of both subsection (c), "Protecting a Person Subject to a Subpoena," and subsection (d), "Duties in

Responding to a Subpoena," must be set forth verbatim in the subpoena. *Fed. R. Civ. P. 45(a)(1)(A)(iv)*. The text of Rule 45 is set out in the Appendix to this AnswerGuide, "Selected Federal Rules of Civil Procedure."

[9] Include Proper Signature

A subpoena must be signed by the clerk of the court (not the judge) from which the subpoena is properly issued, or by an attorney, as an officer of the court. *See Fed. R. Civ. P. 26(g)(1)* (signing of discovery requests generally), *45(a)(3)* (signing of subpoena).

The clerk of the court may issue the subpoena on the court's behalf by signing a blank subpoena at a party's request. The party must then complete and serve the subpoena. *Fed. R. Civ. P. 45(a)(3)*.

An attorney may issue the subpoena on behalf of:

1. A court in which the attorney is authorized to practice; or

2. A court for a district where a deposition is to be taken, if the attorney is authorized to practice in the court where the action is pending.

Fed. R. Civ. P. 45(a)(3); *see, e.g., Donahoo v. Ohio Dep't of Youth Servs., 211 F.R.D. 303, 306 (N.D. Ohio 2002)* (attorney admitted in Northern District of Ohio, where action was pending, could issue subpoena on behalf of Southern District for deposition to take place in Southern District); *see also § 14.05[1] above*.

[10] Include Appropriate Witness and Mileage Fees

Service of a subpoena to compel testimony requires counsel to tender fees to the witness for one day's attendance and the mileage allowed by law. *Fed. R. Civ. P. 45(b)(1)*; *see § 14.09[6] below*.

[11] Subpoena Must Not Be Unduly Burdensome

A party or attorney issuing a subpoena "must take reasonable steps" to avoid imposing an undue burden or expense on a nonparty. *Fed. R. Civ. P. 45(c)*((1); *see, e.g., Alexander v. Jesuits of Missouri Province, 175 F.R.D. 556, 559-560 (D. Kan. 1997)* (quashing subpoena issued on three days' notice commanding pregnant non-party witness to appear 60 miles from home at 8:00 a.m.); *see also § 14.06[10] below*.

A court will modify or quash a subpoena that "subjects a person to undue burden." *Fed. R. Civ. P. 45(c)(3)(A)(iv)*; *see §§ 14.12[7], 14.15, below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 45.03[4], 45.10, 45.11, 45.21, 45.31, 45.51.*
- *Bender's Federal Practice Forms* Form Nos. 45:2, 45:3.
- *Federal Litigation Guide P 13.07[4].*
- *Fed. R. Civ. P. 30(b)(6)* (notice or subpoena directed to an organization).
- *Fed. R. Civ. P. 45(a)* (form, contents, and issuance of subpoena).

- *Fed. R. Civ. P. 45(b)* (service of subpoena).
- *Fed. R. Civ. P. 45(c)* (protection of person subject to subpoena).



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Chapter 14 NONPARTY DISCOVERY: SUBPOENA
PART C: DRAFTING SUBPOENAS

1-14 Moore's AnswerGuide: Federal Discovery Practice § 14.06

§ 14.06 Preparing Subpoena to Compel Production

[1] Subpoena Must Issue From Proper Court and Identify Issuing Court

A command for production may be joined in a subpoena with a command for testimony or may be issued in a separate subpoena. *Fed. R. Civ. P. 45(a)(1)(C)*. If separate from a subpoena commanding the attendance of a person, a subpoena for production, inspection, copying, testing, or sampling must issue from the court for the district in which the production or inspection is to be made. The subpoena may be issued from a different district than where the action is pending if the place of production is outside the district of the pending action. *Fed. R. Civ. P. 45(a)(2)(C)*.

If a command to produce is combined in a subpoena to compel testimony, the issuing court must be the court for the district in which the deposition will take place. *Fed. R. Civ. P. 45(a)(2)(B), (a)(2)(C)*.

The issuing court is responsible for enforcing the subpoena. So long as the subpoena issues from the court in which production will be made (e.g., the place where documents will be delivered or inspected), the court may enforce the subpoena even if the documents or things originate from outside its district. *See Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 412-413 (3d Cir. 2004)* (requirement that subpoena issue from court where production is to be made refers to delivery of documents, not their location before production); *see also James v. Booz-Allen & Hamilton, Inc., 206 F.R.D. 15, 19 (D.D.C. 2002)* (subpoena commanding production in Maryland invalid and unenforceable because subpoena issued from D.C. district court instead of Maryland district court).

The subpoena must state the name of the issuing court. *Fed. R. Civ. P. 45(a)(1)(A)(i)*. To determine who should sign and issue the subpoena on behalf of the court, *see § 14.05[9] above*.

[2] State Title of Action, Name of Court in Which Action Is Pending, and Civil Action Number

A subpoena must state the title of the action, the name of the court in which the action is pending, and the civil action number. *Fed. R. Civ. P. 45(a)(1)(A)(ii)*. Include this information in the caption, or, if using the official form, as indicated by the form.

[3] Command Witness to Produce

A subpoena to compel a production must "command each person to whom it is directed to ... produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control." *Fed. R. Civ. P. 45(a)(1)(A)(iii)*.

[4] Describe Items to Be Produced With Specificity

A subpoena commanding a nonparty to produce documents, electronically stored information, or tangible things must specify the documents or things sought. Broad or blanket demands are to be avoided as they may impose an "undue burden" on the nonparty and be unenforceable. *See United States v. Int'l Bus. Mach. Corp., 83 F.R.D. 97, 106-107 (S.D.N.Y. 1979)* ("To the extent a subpoena sweepingly pursues material with little apparent or likely relevance to the subject matter it runs the greater risk of being found overbroad and unreasonable."); *see also §§ 14.06[10], 14.15 below*.

[5] Subpoena May State Form for Producing Electronically Stored Information

A subpoena may specify the form or forms for producing electronically stored information. *Fed. R. Civ. P. 45(a)(1)(C)*. If it does not contain such a specification, the nonparty must produce the information in the form in which it is ordinarily maintained or in a reasonably usable form. *Fed. R. Civ. P. 45(d)(1)(B)*. Demands for electronically stored information may give rise to concerns about the burden on nonparties in producing such material. *See § 14.06[11] below*. For general discussion of discovery of electronically stored information, *see* Ch. 6 *above*.

[6] State Time and Place for Production

A subpoena must specify the time and place at which the nonparty is to produce designated documents, electronically stored information, or tangible things. *Fed. R. Civ. P. 45(a)(1)(A)(iii)*. A command to produce requires the responding party to permit inspection, copying, testing, or sampling of the materials. *Fed. R. Civ. P. 45(a)(1)(D)*. The subpoena may not require the nonparty to travel more 100 miles from where that person resides, is employed, or regularly transacts business. *Fed. R. Civ. P. 45(c)(3)(A)(ii) see § 14.05[5] above*. Further, the date for compliance, or "return date," of the subpoena must provide the nonparty with a reasonable period of time from the date of service to comply with the subpoena. *See § 14.06[7] below*.

[7] Provide Reasonable Time to Comply

Failure to allow a reasonable time for a nonparty to prepare for or make a production is grounds for a court to quash or modify the subpoena. *Fed. R. Civ. P. 45(c)(3)(A)(i)*; *see also § 14.15 below*. Generally, what is "reasonable" will be determined on a case-by-case basis, given the specific circumstances. *See, e.g., Donoghue v. County of Orange, 848 F.2d 926, 931 (9th Cir. 1987)* (subpoena served one week before trial, seeking 20 years of employment records and various data compilations, was properly quashed because compliance was not possible "at such a late date"); *Vaughan Furniture Co. v. Featureline Mfg., 156 F.R.D. 123, 126 (M.D.N.C. 1994)* (subpoena served with only two days for compliance modified to allow 20 days). Local rules also may provide a minimum time for compliance.

Timing:

There is no general rule as to what constitutes "reasonable time." However, *Fed. R. Civ. P. 45(c)(2)(B)* uses 14 days as a starting point in the sense that it requires objections to a subpoena for production or inspection to be served before the earlier of the time specified for compliance or within 14 days of service of the subpoena. While that does not create a rule requiring counsel to give a nonparty at least 14 days to comply, it does underscore that counsel who seeks to obtain discovery in less than 14 days from service of the subpoena should be prepared to demonstrate the need for an accelerated production and explain why the requesting party did not serve its subpoena earlier. Courts are often sensitive to the burden and inconvenience of responding to a subpoena for third parties who have no direct stake in the litigation.

[8] Include Text of Federal Rule of Civil Procedure 45(c) and (d)

The entire text of both subsection (c), "Protecting a Person Subject to a Subpoena," and subsection (d),"Duties in Responding to a Subpoena," must be set forth verbatim in the subpoena. *Fed. R. Civ. P. 45(a)(1)(A)(iv)*. The text of Rule 45 is set out in the Appendix to this AnswerGuide, "Selected Federal Rules of Civil Procedure."

[9] Include Proper Signature

A subpoena must be signed by the clerk of the court (not the judge) from which the subpoena is properly issued, or by an attorney, as an officer of the court. *Fed. R. Civ. P. 45(a)(3)*. To determine when an attorney may issue a subpoena on behalf of the court, *see § 14.05[9] above*.

[10] Subpoena Seeking Production Must Not Be Unduly Burdensome

A party or attorney issuing a subpoena "must take reasonable steps to avoid imposing [an] undue burden or expense" on a nonparty. *Fed. R. Civ. P. 45(c)*((1). Thus, care must be taken in drafting the subpoena to avoid an overbroad or burdensome request. A court must modify or quash a subpoena that "subjects a person to undue burden." *Fed. R. Civ. P. 45(c)(3)(A)(iv)*.

The question of whether a subpoena creates an undue burden or expense on a nonparty most often arises in connection with a subpoena for production of documents, electronically stored information, or tangible things. To determine whether a production subpoena presents an "undue" burden or expense, courts generally balance the need of the party for the production against the interests of the subpoenaed nonparty resisting compliance. In this balancing test, courts may consider several factors, including the relevance of the information requested, the breadth of the request for production, the time period covered by the subpoena, and the party's need for the information. *See Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 49 (S.D.N.Y. 1996)* (subpoena encompassing documents relating to every transaction undertaken by banking firm for its client during the last ten years was overbroad and unreasonable); *see also Guy Chem. Co. v. Romaco AG, 243 F.R.D. 310, 313 (N.D. Ind. 2007)* ("nonparty status is a significant factor to be considered in determining whether the burden imposed by a subpoena is undue"); *see also § 14.12[7] below*.

Warning:

The party who issues the subpoena, or the party's attorney, is responsible for taking reasonable steps to avoid imposing an undue burden or expense on a subpoenaed nonparty. Rule 45 empowers a court to sanction parties or attorneys who violate the duty to avoid imposing an undue burden or expense. *Fed. R. Civ. P. 45(c)(1)*. Sanctions may include lost earnings and reasonable attorney's fees. *Fed. R. Civ. P. 45(c)(1)*; *see also Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 814 (9th Cir. 2003)* (affirming award of attorney's fees incurred in obtaining quashing of subpoena); *but see Tiberi v. Cigna Ins. Co., 40 F.3d 110, 112 (5th Cir. 1994)* (district court erred in awarding sanctions when party made good faith effort to agree on terms of overbroad subpoena for production). A court also may shift all or part of the reasonable costs of production to the party seeking the information. *See United States v. CBS, Inc., 666 F.2d 364, 367-369 (9th Cir. 1982)* (court may order sharing or shifting of costs of compliance).

[11] Subpoena to Compel Production of Electronically Stored Information Requires Special Care to Avoid Imposing Undue Burden; May Raise First Amendment Issues

Subpoenas commanding a nonparty to produce electronically stored information, in particular, raise concerns about imposing an undue burden or expense on the nonparty. When drafting a subpoena seeking electronically stored information, keep in mind that the nonparty need not provide information from sources that the nonparty identifies as not "reasonably accessible because of undue burden or cost." *Fed. R. Civ. P. 45(d)(1)(D)*; *see § 14.12[10] below*.

Further, a subpoena seeking the identity of an anonymous nonparty Internet user may raise *First Amendment* issues. *See Sony Music Entm't Inc. v. Does 1-40, 326 F. Supp. 2d 556, 564-565 (S.D.N.Y. 2004)* (discussing cases on this issue and providing five factors to determine whether to enforce subpoena on internet service provider seeking the identity of an anonymous Internet user).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 45.10; 45.11[1][c], 45.31 -45.33, 45.51[1].*
- *Bender's Federal Practice Forms* Form Nos. 45:3, 45:4.
- *Federal Litigation Guide P 13.07[1], [4].*
- *Fed. R. Civ. P. 45(a)* (form, contents, and issuance of subpoena).
- *Fed. R. Civ. P. 45(c)* (protection of person subject to subpoena).
- *Fed. R. Civ. P. 45(d)* (duties in responding to subpoena).



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Chapter 14 NONPARTY DISCOVERY: SUBPOENA
PART C: DRAFTING SUBPOENAS

1-14 Moore's AnswerGuide: Federal Discovery Practice § 14.07

§ 14.07 Preparing Subpoena to Compel Permission to Inspect Premises

[1] Subpoena Must Issue From Proper Court and Identify Issuing Court

If separate from a subpoena commanding the attendance of a person, a subpoena for inspection of premises must issue from the court for the district in which the production or inspection is to be made. *Fed. R. Civ. P. 45(a)(2)(C)*. The issuing court is responsible for enforcing the subpoena.

If a command to inspect premises is combined in a subpoena to compel testimony, the issuing court must be the court for the district in which the deposition will take place. *Fed. R. Civ. P. 45(a)(2)(C)*.

The subpoena must state the name of the issuing court. *Fed. R. Civ. P. 45(a)(1)(A)(i)*. To determine who should sign and issue the subpoena on behalf of the court, *see § 14.05[9] above*.

[2] State Title of Action, Name of Court in Which Action is Pending, and Civil Action Number

A subpoena must state the title of the action, the name of the court in which the action is pending, and the civil action number. *Fed. R. Civ. P. 45(a)(1)(A)(ii)*. Include this information in the caption, or, if using the official form, as indicated by the form.

[3] Command Permission to Inspect Premises

A subpoena to compel permission to inspect premises must "command each person to whom it is directed to ... permit the inspection of premises ... ." *Fed. R. Civ. P. 45(a)(1)(A)(iii)*.

[4] State Time and Place for Inspection

A subpoena must command a nonparty to permit inspection of premises "at a specified time and place." *Fed. R. Civ. P. 45(a)(1)(A)(iii)*. This "return date" of the subpoena must provide the nonparty with a reasonable period of time from the date of service to comply with the subpoena. *See § 14.07[5] below*.

[5] Provide Reasonable Time to Comply

Failure to allow a reasonable time for a nonparty to prepare for or to permit inspection of premises is grounds for a court to quash or modify the subpoena. *Fed. R. Civ. P. 45(c)(3)(A)(i)*. Generally, what is "reasonable" will be determined on a case-by-case basis, depending on the specific circumstances. Local rules also may provide a minimum time for compliance. *See § 14.06[7] above*.

[6] Include Text of Federal Rule of Civil Procedure 45(c) and (d)

The entire text of both subsection (c), "Protecting a Person Subject to a Subpoena," and subsection (d), "Duties in Responding to a Subpoena," must be set forth verbatim in the subpoena. *Fed. R. Civ. P. 45(a)(1)(A)(iv)*. The text of Rule 45 is set out in the Appendix to this AnswerGuide, "Selected Federal Rules of Civil Procedure."

[7] Include Proper Signature

A subpoena must be signed by the clerk of the court (not the judge) from which the subpoena is properly issued, or by an attorney, as an officer of the court. *Fed. R. Civ. P. 45(a)(3)*. To determine when an attorney may issue a subpoena on behalf of the court, *see § 14.05[9] above*.

[8] Subpoena Commanding Permission to Inspect Must Not Be Unduly Burdensome

A party or attorney issuing a subpoena "must take reasonable steps to avoid imposing [an] undue burden or expense" on a nonparty. *Fed. R. Civ. P. 45(c)*((1). Thus, care must be taken in drafting the subpoena to avoid an overbroad or burdensome request. A court must modify or quash a subpoena that "subjects a person to undue burden." *Fed. R. Civ. P. 45(c)(3)(A)(iv)*; *see § 14.06[10] above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 45.10, 45.11[1][c], [2], [3], 45.31 -45.33, 45.51[1].*
- *Federal Litigation Guide P 13.07[4].*
- *Bender's Federal Practice Forms* Form Nos. 45:3, 45:4.
- *Fed. R. Civ. P. 45(a)* (form, contents, and issuance of subpoena).
- *Fed. R. Civ. P. 45(c)* (protection of person subject to subpoena).



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Chapter 14 NONPARTY DISCOVERY: SUBPOENA
PART D: SERVING SUBPOENAS

1-14 Moore's AnswerGuide: Federal Discovery Practice § 14.08

§ 14.08 Checklist for Serving Subpoenas

☐ Provide notice to parties before serving subpoena on a nonparty. *See § 14.09[1] below*.

☐ Verify that subpoena is being served before discovery cut-off date. *See § 14.09[2] below*.

☐ Verify that person serving subpoena is at least 18 and is not a party to the action. *See § 14.09[3] below*.

☐ Verify that manner of service is proper. *See § 14.09[4] below*.

☐ Verify that service is within prescribed territorial limits. *See § 14.09[5] below*.

☐ Include appropriate witness fees with subpoena to compel testimony. *See § 14.09[6] below*.

☐ **Search by Topic:** Civil Procedure > Pretrial Matters > Subpoenas



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Chapter 14 NONPARTY DISCOVERY: SUBPOENA
PART D: SERVING SUBPOENAS

1-14 Moore's AnswerGuide: Federal Discovery Practice § 14.09

§ 14.09 Following Requirements for Service

[1] Provide Notice to Parties Before Issuing Subpoena

Before serving a Rule 45 subpoena to compel production or inspect premises, serve notice of the subpoena to every party in the action. *Fed. R. Civ. P. 45(b)(1)*. Notice should comply with the requirements of *Fed. R. Civ. P. 5(b)*, which governs service on parties. Notice must be served prior to the date of service of the subpoena on the nonparty, not prior to the date of production or inspection. *Fed. R. Civ. P. 45(b)(1)*.

Rule 45 does not require notice to the parties before serving a subpoena to compel a nonparty deposition. Rather, Rule 30 requires a party to give "reasonable written notice" of a deposition to all parties to the action. *Fed. R. Civ. P. 30(b)*. When a subpoena seeking production or inspection of premises is issued jointly in a subpoena to compel testimony at a deposition, the Rule 30 notice requirements govern. For discussion of notice requirements for depositions, *see* §§ *8.08-8.13 above*.

Warning:

Failure to serve prior notice of the issuing party's demand for production may serve as grounds for sanctions or for quashing the subpoena. *See Murphy v. Board of Educ., 196 F.R.D. 220, 222-223 (W.D.N.Y. 2000)* (sanctions of attorneys fees and costs imposed on counsel for issuing 12 subpoenas without notice to opposing counsel); *see also § 14.12[11] below*.

Timing:

There is no prescribed time period for providing notice to the parties except that notice must be served before serving the subpoena. However, prior notice should be sufficient to allow the receiving party to have input, for example, to object to the subpoena. *See Zinter Handling, Inc. v. General Elec. Co., 2006 U.S. Dist. LEXIS 83389, at *5 (N.D.N.Y. 2006)* (declining to quash subpoenas when notice to party was given one day after service because party was not prejudiced by the delay).

[2] Verify That Subpoena Will Be Served Before Discovery Cut-Off

Rule 45 subpoenas are discovery and must be used within the time period permitted for discovery in the case. *See §*

14.03[3] above. Thus, subpoenas should not be served before the parties have met and conferred and made a discovery plan pursuant to *Federal Rule of Civil Procedure 26(d)* and *(f)*, unless the parties have made an agreement otherwise or the court has ordered otherwise.



Timing:

The time period permitted for discovery, including the cut-off date, is usually set in the Rule 16(b) Scheduling Order. The subpoena must be served at a time that gives nonparties a reasonable period to comply with the subpoena *before* the discovery cut-off.

[3] Verify That Person Serving Subpoena Is at Least 18 and Not a Party

The subpoena must be served by someone who is at least 18 years-old and is not a party to the action. *Fed. R. Civ. P. 45(b)(1)*.

[4] Ensure That Proper Method of Service Is Used

Service of a subpoena is made by "delivering a copy to the named person." *Fed. R. Civ. P. 45(b)(1)*.

Circuit Split:

A majority of courts have held that that personal service on the nonparty is required. *See, e.g., Agran v. City of New York, 1997 U.S. Dist. LEXIS 2577, at *3 (S.D.N.Y. 1997)* (personal service of subpoena was required). However, some courts have rejected this position and have permitted service of a Rule 45 subpoena by certified mail or by some alternative method that is reasonably calculated to ensure receipt. *See, e.g., King v. Crown Plastering Corp., 170 F.R.D. 355, 356 (E.D.N.Y. 1997)* (in-hand delivery not required if method of service reasonably ensures receipt); *see also Bank of Okla. v. Arnold, 2008 U.S. Dist. LEXIS 12677, at *7-*8 (N.D. Okla. 2008)* (surveying majority and minority opinions on issue; concluding that Rule 45 service is not restricted to personal delivery but does not allow service by e-mail or facsimile).

Service of a subpoena on a corporation, association, governmental body, or other entity, may be made by using the method of service of process on such an entity under Rule 4(h). *See Fed. R. Civ. P. 4(h)* (serving a corporation or partnership).

[5] Verify That Service Is Within Prescribed Territorial Limits

A subpoena may be served at any place:

1. Within the district of the issuing court;

2. Outside the district of the issuing court but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

3. Within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

4. That the court authorizes on motion and for good cause, if a federal statute so provides.

Fed. R. Civ. P. 45(b)(2).

This rule generally allows service on any nonparty individual present within the district of the issuing court, unless the person has immunity from service on the basis that he or she is in the district solely to attend legal proceedings. *Fed. R. Civ. P. 45(b)(2)(A)*; *see Celanese Corp. v. Duplan Corp., 502 F.2d 188, 189-190 (4th Cir. 1974)* (French citizen present in South Carolina district for a deposition was immune to subpoena service by a party in an unrelated Florida action). A nonparty corporation is amenable to service in any district within which it has minimum contacts. *See In re Jee, 104 B.R. 289, 293 (Bankr. C.D. Cal. 1989)* (nonparty corporation subject to service of subpoena in any forum in which it has minimum contacts).

Outside the territorial boundaries of the district of the issuing court, a nonparty may be served within 100 miles of the place specified by the subpoena for the trial, hearing, deposition, production, or inspection. *Fed. R. Civ. P. 45(b)(2)(B)*.

In states that contain multiple federal districts, a subpoena issued from any one of those districts may be served anywhere in the state, provided that state law permits statewide service of a subpoena issued by a state court of general jurisdiction sitting in the place of the trial, hearing, deposition, production, or inspection. *Fed. R. Civ. P. 45(b)(2)(C)*.

Service of a subpoena on a U.S. national or resident who is in a foreign country is governed by *28 U.S.C. § 1783*. *Fed. R. Civ. P. 45(b)(3)*.

[6] Enclose Correct Amount of Witness and Mileage Fees

Proper service of a subpoena to compel testimony requires that the subpoena be accompanied by payment to the witness of "the fees for 1 day's attendance and the mileage allowed by law." *Fed. R. Civ. P. 45(b)(1)*. This rule does not apply to subpoenas issued on behalf of the United States or any of its officers or agencies.

The amount of the witness fee is determined by statute. *See 28 U.S.C. § 1821*. Currently, the fee for a day of attendance is $40.00. The amount of the mileage fee is based on the witness's distance and mode of travel. *See 28 U.S.C. § 1821(b), (c)*.

Warning:

Failure to tender appropriate witness fees simultaneously with a subpoena to compel testimony may lead a court to quash the subpoena or cause the witness not to attend. *See, e.g., Judicial Watch, Inc. v. United States DOC, 212 F.R.D. 429, 431 (D.D.C. 2003)* (rule requires payment of witness fees or subpoena is procedurally invalid).

[7] If Required, Certificate of Service Must Be Filed With Issuing Court

If proof of service of a subpoena is required, a certified statement of the server must be filed with the issuing court, showing the date and manner of service and the names of persons served. *Fed. R. Civ. P. 45(b)(4)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 45.03[2], 45.20, 45.21, 45.22, 45.51[1].*
- *Federal Litigation Guide P 13.07[1], [2].*
- *Bender's Federal Practice Forms* Form Nos. 45:10, 45:11.
- *28 U.S.C. § 1783* (subpoena of person in foreign country).

- *28 U.S.C. § 1821* (per diem and mileage).
- *Fed. R. Civ. P. 4(h)* (serving a corporation, partnership, or association).
- *Fed. R. Civ. P. 5* (serving and filing pleadings and other papers).
- *Fed. R. Civ. P. 16(b)* (scheduling orders).
- *Fed. R. Civ. P. 26(d)* (timing and sequence of discovery).
- *Fed. R. Civ. P. 26(f)* (conferences and discovery plan).
- *Fed. R. Civ. P. 30* (deposition by oral examination).
- *Fed. R. Civ. P. 45(b)* (service of subpoena).



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§ 14.10 Checklist for Responding to Subpoenas

☐ Verify that subpoena is served within discovery period. *See § 14.12[1] below*.

☐ Verify that subpoena was properly served. *See § 14.12[2] below*.

☐ Verify that subpoena was issued from proper court. *See § 14.12[3] below*.

☐ Verify that subpoena affords reasonable time for compliance. *See § 14.12[4] below*.

☐ Verify that subpoena does not exceed 100-mile limit on travel. *See § 14.12[5] below*.

☐ Determine whether subpoena seeks privileged or protected materials. *See § 14.12[6] below*.

☐ Determine whether subpoena imposes an undue burden. *See § 14.12[7] below*.

☐ Determine whether subpoena seeks trade secrets, confidential research or development information, or commercial information. *See § 14.12[8] below*.

☐ Determine whether subpoena is directed at a retained or unretained expert. *See § 14.12[9] below*.

☐ Determine whether to object to form specified for producing electronically stored information. *See § 14.12[10] below*.

☐ Verify that all parties to the action received prior notice of the subpoena. *See § 14.12[11] below*.

☐ Check local rules for any requirements in responding to subpoenas. *See § 14.12[12] below*.

☐ Attempt an informal resolution, when appropriate. *See § 14.11[3] below*.

☐ Determine whether to serve written objections or move to quash or modify subpoena. *See § 14.13 below*.

☐ Draft written objections, if applicable. *See § 14.14 below*.

- ○ Ensure objections will be timely made and served. *See § 14.14[1] below*.
- ○ Clearly state objections and basis for them. *See § 14.14[2] below*.
- ○ If claiming that subpoena seeks privileged information, draft a privilege log to include with objection(s). *See § 14.14[2] below*.

☐ Draft motion to modify or quash, if applicable, clearly stating grounds. *See § 14.15 below*.

☐ Determine whether to move for a protective order. *See § 14.16 below*.

☐ If producing documents, produce them as they are kept in ordinary course of business or organize and label them to correspond to categories in demand. *See § 14.17[1], [2] below*.

☐ If producing electronically stored information, where subpoena does not specify form for production, produce it as it is ordinarily maintained or in a reasonably usable form. *See § 14.17[3] below*.

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§ 14.11 Reviewing Options and Strategy for Responding

[1] Appropriate Response Depends on Subpoena

The appropriate response to a subpoena depends on how the subpoena is drafted and the discovery that is sought. It is important to determine quickly the appropriate response to ensure the timeliness of the response. *See §§ 14.14[1], 14.15[4] below*.

[2] Remedies for Avoiding or Limiting Compliance With Subpoena

The following remedies may be appropriate to avoid or limit compliance with the subpoena:

1. Serve written objections to the subpoena (available for subpoena for production or inspection only). *See § 14.14 below*;

2. Move to quash or modify the subpoena. *See § 14.15 below*; or

3. Move for a protective order under *Federal Rule of Civil Procedure 26(c). See § 14.16 below*.

Choosing the best method for responding to the subpoena may depend on an analysis of the potential problems with the subpoena and the nonparty's goals in resisting the subpoena. *See §§ 14.12, 14.13 below*.

[3] Make Good-Faith Effort to Resolve Disputes

The subpoenaed party should make a good-faith effort to resolve any issues with the party who issued the subpoena. This is a prerequisite to filing a motion for a protective order. *Fed. R. Civ. P. 26(c). See § 14.16 below*.

The requirement that counsel meet and confer prior to moving for a protective order does not apply to motions to modify or quash a subpoena under Rule 45(c)(3). However, before moving to modify or quash, an attempt should be made to resolve a dispute, particularly when the dispute is based on a scheduling conflict with the return date of the subpoena. Further, it may be wise to confer before moving to modify or quash in case a protective order becomes necessary.

Judge's rules and standing orders should be consulted, as some judges require a meet-and-confer prior to moving to modify or quash a subpoena.

PRACTICE RESOURCES:

- *Fed. R. Civ. P. 26(c)* (protective order).
- *Fed. R. Civ. P. 45* (subpoena).



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§ 14.12 Analyzing Validity of Subpoena

[1] Verify That Subpoena Was Served Within Discovery Period

Subpoenas issued under Rule 45 are discovery and must be served within the time period permitted for discovery in the case. Failure to serve a subpoena within the permitted discovery period may be grounds for a motion to quash. *See, e.g., Alper v. United States, 190 F.R.D. 281, 283-284 (D. Mass. 2000)* (Rule 45 subpoena constitutes discovery, and so could not be enforced when production was sought after close of discovery period); *see also § 14.03[3] above*.

[2] Verify That Subpoena Was Properly Served

Service of a subpoena is made by "delivering" a copy of the subpoena to the person named in the subpoena, and, in the case of a subpoena to compel testimony, including fees for one day's attendance and mileage as allowed by law. *Fed. R. Civ. P. 45(b)(1)*. For discussion of what constitutes proper service, *see § 14.09[4] above*.

Although not expressly stated in Rule 45, failure to serve a subpoena properly has been found to constitute grounds to modify or quash a subpoena. *See, e.g., Rotter v. Cambex Corp., 1995 U.S. Dist. LEXIS 8561, at *4 (N.D. Ill. 1995)* . Additionally, failure to provide the requisite attendance and mileage fees may be grounds to modify or quash a subpoena. *See, e.g., CF&I Steel Corp. v. Mitsui & Co., 713 F.2d 494, 496 (9th Cir. 1983)* (affirming quashing of subpoenas for failure to simultaneously tender fees and serve subpoena).

Moreover, the nonparty recipient is not obligated to file a motion to quash if service of a subpoena is defective. *See, e.g., Martin v. Howard Univ., 209 F.R.D. 20, 20-21 (D.D.C. 2002)* (upholding witness's refusal to appear based on defective service).



Strategic Point:

If the subpoena was not properly served, or if the subpoena to compel testimony was not accompanied by the appropriate fees, attempt an informal resolution with the subpoenaing party. Through this process, the subpoenaed nonparty may arrange a more convenient time for response or limit the scope of the subpoena, using to its advantage the prospect that, if the party disagrees, motion practice will be

necessary. Ignoring the subpoena poses a risk because if a court ultimately concludes service was proper the subpoenaed nonparty may have more difficulty persuading the court to ameliorate any burden imposed.

[3] Verify That Subpoena Was Issued From Proper Court

To be enforceable, a subpoena must be issued from the proper court. *Fed. R. Civ. P. 45(a)(2)*; *see also Fed. R. Civ. P. 45*, Committee Note of 1991; *see also § 14.05[1] above*. If the subpoena is not issued from the proper court, and if informal resolution is unsuccessful, counsel may move to modify or quash the subpoena. *See § 14.15 below*.

[4] Verify That Subpoena Affords Reasonable Time for Compliance

A subpoena must provide a reasonable time for a nonparty to comply. *Fed. R. Civ. P. 45(c)(3)(A)(i)*. On a timely motion, a court *must* modify or quash a subpoena that fails to afford a reasonable time for compliance. *Fed. R. Civ. P. 45(c)(3)(A)(i)*; *see also § 14.06[7] above*. A court will consider all the circumstances when deciding whether the time for compliance is reasonable. *See, e.g., Mann v. University of Cincinnati, 824 F. Supp. 1190, 1202 (S.D. Ohio 1993)* (one week's notice seeking medical file was unreasonable when no urgency justified such short notice). Local rules also may provide a minimum time for compliance. Consider attempting to resolve the issue with the subpoenaing party before moving to modify or quash.

[5] Verify That Subpoena Does Not Exceed 100-Mile Limit on Travel

A subpoena to compel deposition testimony may not require a nonparty to travel to a place that is more than 100 miles from where that person resides, is employed, or regularly transacts business. *Fed. R. Civ. P. 45(c)(3)(A)(ii)*; *see also § 14.05[5] above*. A court *must* quash or modify a subpoena that requires a nonparty to travel more than 100 miles from where that person lives, works, or regularly does business. *Fed. R. Civ. P. 45(c)(3)(A)(i)*; *see also § 14.15[1] below*. Consider attempting to resolve the issue with the subpoenaing party before moving to modify or quash.

In addition to providing grounds for a motion to modify or quash, a subpoena "that purports to require the nonparty to attend or produce at a place outside the [100-mile] limits of Rule 45(c)(3)(A)(ii)" provides an "adequate excuse" for the nonparty's failure to obey the subpoena. *Fed. R. Civ. P. 45(e)*.



Strategic Point:

If the subpoena appears to require the nonparty to travel more than 100 miles from where the nonparty resides, is employed, or regularly transacts business, attempt an informal resolution with the subpoenaing party. It is appropriate for nonparties to insist on the 100-mile limit during informal resolution. However, ignoring the subpoena posing a risk because of the ambiguity involved in measuring the 100-mile distance. If the subpoenaing party moves to compel, a court could conclude that the distance was not improper.

[6] Determine Whether Subpoena Seeks Privileged or Protected Materials

A subpoenaed nonparty should determine whether the subpoena calls for privileged materials or other protected matter. *See* Ch. 3 *above*, for discussion of privileges and work product protection. The nonparty may make written objections in response to a subpoena seeking privileged or other protected matter, or may move to modify or quash the subpoena. *Fed. R. Civ. P. 45(c)(2)(B), (c)(3)(A)(iii)*.

On timely motion, a court *must* modify or quash a subpoena that seeks disclosure of privileged or other protected matter as to which no exception or waiver applies. *Fed. R. Civ. P. 45(c)(3)(A)(iii)*.

Written objections must expressly make the claim for privilege and must describe the documents or things not produced in a manner that is sufficient to enable the requesting party to contest the claims made in the objections. *Fed. R. Civ. P. 45(d)(2).*

A nonparty may claim work-product protection when the nonparty "is in substance equally concerned with the outcome of the litigation," and the documents sought were created "with an eye toward litigation." *AT&T Corp. v. Microsoft Corp., 2003 U.S. Dist. LEXIS 8710, at *16 (N.D. Cal. 2003)* ; *see also* §§ *3.41-3.45 above.*

[7] Determine Whether Subpoena Imposes Undue Burden

On a nonparty's timely motion, a court *must* modify or quash a subpoena that "subjects a person to undue burden." *Fed. R. Civ. P. 45(c)(3)(A)(iv)*; *see also §§ 14.06[10] above*, *14.15[1] below*. If the subpoena imposes an undue burden, attempt to resolve the issue with the attorney who issued the subpoena. If informal resolution is unsuccessful, move to quash or modify the subpoena.

A nonparty subject to a subpoena need not provide discovery of electronically stored information from sources that the nonparty identifies as not reasonably accessible because of undue burden or cost. *Fed. R. Civ. P. 45(d)(1)(D).* On a motion to compel discovery or to quash, the nonparty bears the burden of making that showing. If that showing is made, the court may still order discovery from those sources if the requesting party shows good cause, considering the limits imposed under *Fed. R. Civ. P. 26(b)(2)(C).* The court also may specify conditions for the discovery. *Fed. R. Civ. P. 45(d)(1)(D).* For discussion of discovery of electronically stored information, see Ch. 6 *above.*

Whether a subpoena imposes an undue burden is a "case specific inquiry," and may depend on the following factors:

1. Relevance.

2. The subpoenaing party's need for the documents.

3. The breadth of the request.

4. The time period covered by the request.

5. The particularity of the document descriptions.

See, e.g., Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 49 (S.D.N.Y. 1996) .

It is the responsibility of the party issuing the subpoena to avoid imposing an undue burden or expense on the nonparty. Failure to do so may result in sanctions on the issuing party. *Fed. R. Civ. P. 45(c)(1)*; *see also § 14.06[10] above.*

[8] Determine Whether Subpoena Seeks Trade Secrets or Other Confidential Research or Development Information, or Commercial Information

On a timely motion, a court *may* modify or quash a subpoena that seeks disclosure of trade secrets or other confidential research, development, or commercial information. *Fed. R. Civ. P. 45(c)(3)(B)(i)*; *see also* § *14.15[2] below*. The court also may issue a protective order. *Fed. R. Civ. P. 26(c)*; *see* § *14.16 below*. As an alternative to modifying or quashing the subpoena, the court may order a nonparty to testify at a deposition or to produce confidential information if the serving party shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship *and* ensures that the subpoenaed nonparty will be reasonably compensated. *Fed. R. Civ. P. 45(c)(3)(C).*

The nonparty resisting the subpoena has the burden of showing that the information sought is a trade secret or confidential information and demonstrating that disclosure would be harmful. *See, e.g., Fadalla v. Life Auto. Prods., 2007 U.S. Dist. LEXIS 88890, at *14-*20 (M.D. Fla. 2007)* (modifying subpoena where nonparty demonstrated harm in disclosing confidential information and subpoenaing party failed to demonstrate substantial need for the information).



Strategic Point:

Protective orders are routinely issued in cases involving trade secrets and other confidential information. *See § 14.16 below*. If a stipulated general protective order governing discovery has already been issued in the case, the court will often extend its terms to cover subpoenaed material from third parties.

For discussion of protection of trade secrets, *see §§ 3.39, 3.40 above*.

[9] Determine Whether Subpoena Is Directed Against Unretained Expert

On timely motion, a court *may* modify or quash a subpoena that seeks disclosure of an unretained expert's opinion or information that does not describe events or specific occurrences in dispute and results from the expert's study that was not requested by a party to the action. *Fed. R. Civ. P. 45(c)(3)(B)(ii), see, e.g., Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 813-815 (9th Cir. 2003)* (subpoena requesting art museum to provide person to testify about market for defendant's product appeared to be an improper attempt to obtain expert testimony by subpoena); *see also § 14.15[2] below*.

A nonparty may also seek a protective order to prevent such disclosures. *See In re Bextra & Celebrex Mktg. Sales Practices & Product Liability Litigation, 2008 U.S. Dist. LEXIS 26108, at *13 (D. Mass. 2008)* (granting protective order for nonparty New England Journal of Medicine in part because Pfizer's subpoena to obtain comments by the journal's peer reviewers was an effort to "coopt" the reviewers' expertise instead of using its own retained experts); *see also § 14.16 below*.

As an alternative to modifying or quashing the subpoena, the court may order a nonparty to testify at a deposition or to produce information if the serving party shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship *and* ensures that the subpoenaed nonparty will be reasonably compensated. *Fed. R. Civ. P. 45(c)(3)(C)*.

A subpoena may not be modified or quashed on the basis that it seeks such information from a retained expert, although the subpoena may be objectionable on other grounds.

For discussion of discovery of experts, *see* Ch. 12 *above*.

[10] Determine Whether to Object to Form Specified for Production of Electronically Stored Information

A subpoena to produce electronically stored information may specify the form or forms in which the information is to be produced. *Fed. R. Civ. P. 45(a)(1)(C)*. An objection may be made to the form specified. *Fed. R. Civ. P. 45(c)(2)(B)*. For discussion of discovery of electronically stored information, *see* Ch. 6 *above*.

[11] Verify That All Parties to the Action Received Prior Notice of the Subpoena

Prior notice to all parties to an action is required before serving a subpoena. *See § 14.09[1] above*. A subpoenaing party's failure to provide notice to all parties may be a basis for quashing the subpoena. *See Firefighters' Inst. for Racial Equal. v. City of St. Louis, 220 F.3d 898, 903 (8th Cir. 2000)* .

[12] Check Local Rules

Local district court rules may provide specific requirements for responding to subpoenas. Counsel should review the local rules before serving a response.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 45.03[2], 45.11, 45.21, 45.31 -45.33, 45.50 -45.52, 45.61, 45.63.*
- *Bender's Federal Practice Forms* Form Nos. 45:20, 45:21, 45:22, 45:40, 45:41, 45:42, 45:43, 45:45, 45:51.
- *Federal Litigation Guide P 13.07.*
- *Fed. R. Civ. P. 30(b)* (requiring parties to give "reasonable written notice" of a deposition).
- *Fed. R. Civ. P. 45(a)* (form, contents, and issuance of subpoena).
- *Fed. R. Civ. P. 45(b)* (service of subpoena).
- *Fed. R. Civ. P. 45(c)* (protection of person subject to subpoena).
- *Fed. R. Civ. P. 45(d)* (duties in responding to subpoena).



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§ 14.13 Choosing Method for Resisting Subpoena

[1] Resisting Subpoena Seeking Production or Inspection

When a subpoena seeks a production of documents, electronically stored information, tangible things, or permission to inspect premises, the nonparty recipient may do one or more of the following:

1. Serve on the requesting party written objections. *See § 14.14 below*.

2. Move to modify or quash the subpoena. *See § 14.15 below*.

3. Move for a protective order under Rule 26(c). *See § 14.16 below*.

At any time after the filing of objections, on notice to the subpoena recipient and all other parties, the serving party may move the issuing court for an order to compel production or inspection. *Fed. R. Civ. P. 45(c)(2)(B)(i)*. Therefore, written objections may be preferable when it appears likely that the party serving the subpoena will not proceed with the burden and expense of bringing a motion to compel.

Alternatively, when it appears likely that the serving party will move to compel, the nonparty may elect to bring a motion to modify or quash the subpoena instead of serving written objections. Moving to modify or quash allows the subpoena recipient to be in control of the timing of the motion and to frame the questions presented by initiating the briefing process.



Strategic Point:

A subpoenaed nonparty generally should move for a protective order when the nonparty seeks constraints and limits on the dissemination and treatment of materials to be produced. It may be most appropriate to move for a protective order if a subpoena seeks trade secrets or other confidential research, development, or commercial information. If the nonparty seeks to avoid producing such materials altogether, a motion to quash is more appropriate. The nonparty may then seek a protective order as a fallback request to the court.

[2] Resisting Subpoena Seeking Testimony

When a subpoena seeks deposition testimony, a nonparty may do one of the following:

1. Move to modify or quash the subpoena.

2. Move for a protective order under Rule 26(c).

A subpoenaed nonparty generally should move for a protective order when the nonparty seeks constraints and limits on the dissemination and treatment of testimony. It may be most appropriate to move for a protective order if a subpoena seeks testimony about trade secrets or other confidential research, development, or commercial information. If the nonparty seeks to avoid testifying about such materials altogether, a motion to quash is more appropriate. The nonparty may then seek a protective order as a fallback request to the court.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 45.30, 45.41, 45.50 -45.52.*
- *Fed. R. Civ. P. 45(c)* (protection of person subject to subpoena).



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1-14 Moore's AnswerGuide: Federal Discovery Practice § 14.14

§ 14.14 Making Written Objections to Subpoena

[1] Written Objections Must Be Timely Made and Served

A person who is commanded to produce or permit inspection, copying, testing, or sampling may serve written objections to producing the materials or permitting the inspection. *Fed. R. Civ. P. 45(c)(2)(B)*. The objections must be served on the issuing party within 14 days after service of the subpoena, or before the time specified for compliance in the subpoena if the time for compliance is less than 14 days. *Fed. R. Civ. P. 45(c)(2)(B)*. Objections may be made on any available legal grounds, including privilege, undue burden, and relevance. *See Fed. R. Civ. P. 26(b)*; *see also* Chs. 3, 4 *above*.

Warning:

Failure to serve written objections to a subpoena within the time specified by Rule 45 may constitute a waiver of the objections and any privileges that may have been claimed. *See, e.g., United States v. IBM Corp., 70 F.R.D. 700, 701-702 (S.D.N.Y. 1976)* (objections waived when not made before time for compliance). In unusual circumstances and for good cause, untimely objections may be considered. Courts have found unusual circumstances when: (1) the subpoena is overbroad on its face; (2) the subpoenaed person is a nonparty acting in good faith; and (3) counsel for the nonparty and the subpoenaing party were negotiating compliance before the nonparty objected. *See, e.g., Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 52 (S.D.N.Y. 1996)* .

[2] Clearly State Objection and Include Privilege Log If Making Claim of Privilege

If material is withheld on the ground that it is privileged or subject to protection as trial preparation material, the claim must be expressly made and supported by a description of the nature of the material not produced that is sufficient to enable the demanding party to contest the claim *Fed. R. Civ. P. 45(d)(2)(A)*; *see also § 14.12[6] above*. The privilege log need not be served with the objections, but should be served within a reasonable time. For discussion of privilege and work product protection, *see* Ch. 3 *above*.

[3] Because Objection Excuses Compliance, Do Not Permit Production to Proceed Without a Court Order

The serving of timely written objections to a subpoena automatically excuses compliance unless a court order is obtained enforcing the subpoena. *Fed. R. Civ. P. 45(c)(2)(B)*. Once a timely written objection is made, the nonparty or counsel for the nonparty should not proceed with production without a court order. *Fed. R. Civ. P. 45(c)(2)(B)*.

[4] Person Making Objections Must Have Standing to Object to Subpoena

Only the person or entity subject to a subpoena has standing to object to it. *See McCoy v. Southwest Airlines Co., 211 F.R.D. 381, 384-385 (C.D. Cal. 2002)* (party's objections to subpoena on nonparty were invalid because party lacked standing to object). However, a party may, in limited circumstances, move to quash a subpoena directed at a nonparty or for a protective order. *See §§ 14.15[7], 14.16 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 45.41, 45.61*.
- *Bender's Federal Practice Forms* Form Nos. 45:20-45:22, 45:30, 45:31.



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§ 14.15 Moving to Modify or Quash Subpoena

[1] When Subpoena *Must* Be Modified or Quashed

On timely motion, a court must modify or quash a subpoena that:

1. Fails to allow a reasonable time for compliance. *See § 14.12[4] above*.

2. Requires a person who is not a party or an officer of a party to travel more than 100 miles from where that person lives, works, or regularly transacts business. *See § 14.12[5] above*.

3. Requires disclosure of privileged or other protected materials. *See § 14.12[6] above*.

4. Subjects a person to an undue burden. *See § 14.12[7] above*.

Fed. R. Civ. P. 45(c)(3)(A).

[2] When Subpoena *May* Be Modified or Quashed

On timely motion, a court may modify or quash a subpoena that:

1. Requires disclosure of a trade secret or other confidential research, development, or commercial information. *See also § 14.12[8] above*.

2. Requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made without the request of any party. *See also § 14.12[9] above*.

3. Requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial.

Fed. R. Civ. P. 45(c)(3)(B).

[3] Burden on Movant; Court Has Discretion to Modify or Quash Subpoena

The moving nonparty has the burden to show grounds for modifying or quashing the subpoena. *See Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 402, 407 (D.C. Cir. 1984)* (movant has a "heavy burden" to show that subpoena is oppressive). The court has discretion to modify the subpoena on a motion to quash, and some court have expressed a preference for modifying when possible rather than quashing a subpoena outright. *See, e.g., Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 818 (5th Cir. 2004)* .

[4] Motion Must Be Timely Made

A court must modify or quash a subpoena "on timely motion" for good cause. *Fed. R. Civ. P. 45(c)(3)(A)*. Although the rule does not define "timely," courts have held that a motion to modify or quash is timely if it is made before the date of compliance specified in the subpoena. *See, e.g., Nova Biomedical Corp. v. i-Stat Corp., 182 F.R.D. 419, 424 (S.D.N.Y. 1998)* (motion to quash served two days before return date was timely); *Anderson v. Abercrombie & Fitch Stores, Inc., 2007 U.S. Dist. LEXIS 47795, at *25-*26 (S.D. Cal. 2007)* (motion to quash made seven days after production date was untimely).

Warning:

If it appears that the court may not hear and decide the motion to quash before the production or deposition date demanded in the subpoena, the safest course after filing the motion is to seek an order adjourning or extending the time for compliance until after the court decides the motion. *See King v. Fidelity Nat'l Bank of Baton Rouge, 712 F.2d 188, 191 (5th Cir.1983)* ("a motion to quash must be not only made but *granted* before the scheduled deposition to excuse compliance").

[5] Motion Must Be Made in Proper Court

A motion to modify or quash a subpoena should be made in the court that issued the subpoena. Only the court from which the subpoena was issued may quash or modify the subpoena.*Fed. R. Civ. P. 45(c)(3)(A)*.

[6] Consult Local Rules to Determine If Meet-and-Confer Is Required Before Filing Motion

The requirement that counsel meet and confer prior to moving for a protective order or to compel production generally does not apply to motions to modify or quash a subpoena. However, local rules or judge's standing orders may require counsel to make an effort to resolve the issue prior to the filing of any motion. The safest and best course, even absent a specific requirement, is to establish a record that informal resolution was attempted through the meet-and-confer process in case a motion for protective order becomes necessary.

[7] Standing to Modify or Quash Subpoena

Generally, only the nonparty served with a subpoena has standing to quash or modify the subpoena. A party to the action has no standing to assert any rights of the nonparty in a motion to modify or quash. *See, e.g., Thomas v. Marina Assocs., 202 F.R.D. 433, 434-435 (E.D. Pa. 2001)* (party does not have standing to move to quash subpoena based on asserted confidentiality interest of nonparty). However, if a party claims a personal right or privilege with respect to the information sought from the subpoenaed nonparty, the party has standing to move to modify or quash. *See, e.g., Minnesota Sch. Bds. Ass'n Ins. Trust v. Employers Ins. Co., 183 F.R.D. 627, 629 (N.D. Ill. 1999)* (defendant had standing to move to quash subpoena based on claim that materials subpoenaed were defendant's work product).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 45.50, 45.51, 45.52.*
- *Bender's Federal Practice Forms* Form Nos. 45:40-45:45.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.09.*
- *Fed. R. Civ. P. 45(c)* (protection of person subject to subpoena).



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§ 14.16 Moving for a Protective Order

A nonparty objecting to a subpoena should consider making a motion for a protective order under *Federal Rule of Civil Procedure 26(c). Fed. R. Civ. P. 26(c)*; *see also* Ch. 16 *below*. Consider moving for a protective order simultaneously to (1) moving to modify or quash a subpoena, or (2) serving written objections to a subpoena. A motion for a protective order may be particularly appropriate when a subpoena seeks trade secrets or other confidential information. For discussion of protective orders, *see* Ch. 16 *below*.

A nonparty deponent may seek a protective order either in the court where the action is pending or in the court for the district where the deposition will be taken. The district where the deposition will be taken has discretion to remit the decision to the district where the action is pending, but remission usually occurs only if the decision involves complicated factual issues with which the court where the action is pending has greater knowledge. *See Convertino v. United States DOJ, 260 F.R.D. 678, 679 (E.D. Mich. 2008)* (typical purpose of remission for protective order ruling is to place complicated factual disputes before single court that is most familiar with case).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.100 -26.108.*
- *Fed. R. Civ. P. 26(c)* (specifying circumstances in which court may issue a protective order).



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§ 14.17 Producing Documents and Electronically Stored Information in Response to Subpoena

[1] Materials in Nonparty's "Control" Must Be Produced

The nonparty subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served. *See Fed. R. Civ. P. 45*, Committee Note of 1991. "Control" is defined as "the legal right to obtain documents on demand." *United States v. Stein, 488 F. Supp. 2d 350, 361 (S.D.N.Y. 2007)* .

[2] How to Produce Documents

Documents must be produced as they are kept in the usual course of business, or must be organized and labeled to correspond with the categories in the demand. *Fed. R. Civ. P. 45(d)(1)(A)*.

[3] How to Produce Electronically Stored Information

A subpoena may specify the form or forms in which electronically stored information is to be produced. *Fed. R. Civ. P. 45(a)(1)(C)*. If the form specified is unobjectionable, production should be made in that form. If the form specified is objectionable, an objection should be made. *See Fed. R. Civ. P. 45(c)(2)(B)*. If a subpoena does not specify the form or forms for producing electronically stored information, the nonparty must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable, *see Fed. R. Civ. P. 45(d)(1)(B)*, provided that electronically stored information need not be produced in more than one form. *See Fed. R. Civ. P. 45(d)(1)(C)*. For discussion of discovery of electronically stored information, *see* Ch. 6 *above*.

[4] Nonparty May Be Entitled to Reimbursement for Costs Incurred in Complying With Subpoena

A nonparty may be entitled to reimbursement for the costs incurred in complying with a subpoena. *See Fed. R. Civ. P. 45(c)(1)* (persons subject to subpeona are protected from undue burden and expense); *See, e.g., United States v. Columbia Broad. Sys., Inc., 666 F.2d 364, 372 (9th Cir. 1982)* ("[a]lthough party witnesses generally must bear the burden of discovery costs, the rationale for the general rule is inapplicable where the discovery demands are made on nonparties"); *Johnson v. Bryco Arms, 222 F.R.D. 48, 51 (E.D.N.Y. 2004)* ("[t]his court has the power to require that the parties to a civil action reimburse a third party for its expenses in producing subpoenaed data").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 45.33[2], 45.60, 45.63.*
- *Fed. R. Civ. P. 45(d)(1)* (producing documents or electronically stored information).



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§ 14.18 Checklist for Enforcing Subpoenas

☐ Attempt to resolve issues informally. *See § 14.19 below.*

☐ If no resolution is achieved, move to compel compliance with subpoena. *See § 14.20 below.*

- ○ Move to compel at any time after recipient files written objections.
- ○ If recipient moves to quash subpoena, file counter motion to compel.
- ○ File motion to compel in court that issued subpoena.
- ○ Consult *Fed. R. Civ. P. 37(a)* for additional requirements.
- ○ Consult local rules.

☐ **Search by Topic:** Civil Procedure > Pretrial Matters > Subpoenas



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§ 14.19 Attempt to Resolve Contested Issues Through Meet-and-Confer With Counsel

A motion to compel compliance with discovery requires a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the subpoenaed information or material without court action. *Fed. R. Civ. P. 37(a)(1)*.

PRACTICE RESOURCES:

- *Fed. R. Civ. P. 37(a)* (motion to compel).

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§ 14.20 Moving to Compel

If, after serving a subpoena, a party is served with written objections to the subpoena, the party may move at any time for an order to compel production after giving notice to the subpoenaed person. A court's order to compel production must protect a nonparty from significant expense resulting from the copying and inspection demanded. *Fed. R. Civ. P. 45(c)(2)(B).*

In addition, Rule 37(a) generally provides that a party may move for an order to compel discovery against a nonparty under *Federal Rule of Civil Procedure 37(a)(1)*. The motion must be made to the court in the district where the discovery is being, or is to be, taken. *Fed. R. Civ. P. 37(a)(2)*. The motion must include a certification that the party has conferred or has attempted to confer in good faith with the nonparty failing to make the discovery. *Fed. R. Civ. P. 37(a)(1)*. For discussion of Rule 37(a) motions to compel, *see* Ch. 17 *below*.



Strategic Point:

Consider making a motion to compel when, after serving a subpoena, the recipient of the subpoena moves to quash the subpoena. At least one court has suggested that denial of the motion to quash may not, alone, compel compliance. *See Pennwalt Corp. v. Durand-Wayland, Inc., 708 F.2d 492, 494 (9th Cir. 1983)* .



Strategic Point:

The party seeking to compel discovery may also request contempt sanctions. *See 14.21 below* .

The court in whose name the subpoena is issued is responsible for its enforcement. *See § 14.05[1] above*.

Parties should consult the local district rules as well as individual judge's rules and standing orders to determine whether there are local requirements for motions to compel. For example, some judges' rules require that a certification of the parties' good-faith efforts to resolve the dispute be attached to the motion. Some judges, however, do not permit resolution of discovery disputes by motion and instead require that disputes be resolved in a conference with the judge.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.01 -37.06*, *37.20 -37.23*; *45.41[2][a]*, *45.50[6]*.
- *Bender's Federal Practice Forms* Form Nos. 45:60, 45:61.
- *Fed. R. Civ. P. 37(a)* (motion to compel).
- *Fed. R. Civ. P. 45(c)(2)(B)* (serving party may move issuing court for order compelling production or inspection)



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§ 14.21 Seeking Contempt Sanctions for Failure or Refusal to Respond to Subpoena

A person who fails to obey a subpoena without an adequate excuse may be deemed in contempt of the court from which the subpoena issued. *See Fed. R. Civ. P. 45(e)*; *see also Smith v. Pefanis, 652 F. Supp. 2d 1308, 1338 (N.D. Ga. 2009)* (subpoena "should be treated as a court order" and the basis for contempt sanctions for failure to comply with subpoena). The court must excuse a nonparty's failure to obey if the subpoena purports to require the nonparty to attend or produce at a place that is more than 100 miles from where the person resides, is employed, or regularly transacts business. *See Fed. R. Civ. P. 45(e).*

A witness who fails to comply with a subpoena generally is afforded an opportunity to demonstrate an adequate excuse for the noncompliance. *See, e.g., Fremont Energy Corp. v. Seattle Post Intelligencer, 688 F.2d 1285, 1287 (9th Cir. 1982)* (vacating contempt order when district denied deponent an opportunity to show "adequate excuse" for failure to produce documents).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 45.62.*
- *Bender's Federal Practice Forms* Form Nos. 45:80-45:84.
- *Fed. R. Civ. P. 45(e)* (contempt).



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Chapter 15 MODIFYING DISCOVERY PROCEDURES BY STIPULATION

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[11] Parties May Stipulate to Modify Duration of Deposition

[12] Parties May Stipulate to Waive Formalities

[13] Parties May Stipulate to Alter Requirements for Retention of Deposition Notes

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[c] Reserving All Objections

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[16] Parties May Stipulate to Matters Pertaining to Taking Depositions Abroad



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PART A: PROCEDURAL CONTEXT

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§ 15.01 Procedural Context--Discovery Stipulations

Depending on the specific needs of the case, parties often find it useful, or even necessary, to alter the limitations set forth by the Federal Rules of Civil Procedure, the local district court rules, or judges' standing orders.

Counsel should consider how stipulations modifying discovery can benefit the involved parties. For example, a propounding party may seek to expedite the deposition of a third-party witness if it knows that the witness will be unavailable later. Deposing the witness prior to the Rule 26(f) planning meeting may benefit all of the involved parties and encourage opposing counsel to stipulate to the modification. Alternatively, a responding party may seek to extend certain deadlines related to the production of discovery.

Counsel should contact opposing counsel and discuss the advantages of any proposed stipulations. For example, counsel may opt to discuss with opposing counsel how the parties would benefit from entering into a blanket protective order because doing so would ensure the confidentiality of proprietary and private information that might be disclosed during the course of discovery.

If opposing counsel proposes a stipulation for something as mundane as perhaps, accommodating a scheduling conflict, keep in mind that the extension of a professional courtesy may benefit you and your client if similar conflicts later arise for you.

Generally, courts expect the parties to act cooperatively with one another and in that spirit, a stipulation modifying discovery is viewed favorably unless the proposed stipulation affects certain deadlines set by the court.



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PART B: USING STIPULATIONS TO MODIFY DISCOVERY PROCEDURES

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§ 15.02 Checklist for Discovery Stipulations

☐ Consider whether the timing of certain discovery should be altered, including:

- ○ Whether any discovery should be made prior to Rule 26(f) planning meeting. *See 15.04[1] below* .
- ○ Whether time for discovery responses should be extended. *See 15.04[2] below* .
- ○ Whether time for discovery responses should be expedited. *See* 15.04[2], [7] *below*.
- ○ Whether to take an early deposition. *See 15.05[4] below* .

☐ Consider whether limits on amount or scope of discovery should be altered, such as:

- ○ Whether more than 25 interrogatories for each side are necessary. *See § 15.04[3] below*.
- ○ Whether more than 10 depositions for each side are necessary. *See § 15.05[2] below*.
- ○ Whether to conduct deposition of previously deposed witness. *See § 15.05[3] below*.
- ○ Whether to modify time period allowed for taking deposition. *See § 15.05[11] below*.

- ○ Whether to limit scope of deposition to particular issue(s). *See § 15.05[10] below*.

☐ Consider whether matters regarding custody of discovery documents should be altered, such as:

- ○ Who should maintain custody of original interrogatories, requests for production of documents and requests for admissions.
- ○ Who should retain stenographic notes or transcripts of depositions.

☐ Consider stipulating to terms regarding physical or mental examination, and ensuing report. *See § 15.04[4] below*.

☐ Consider stipulating to procedural aspects of discovery, such as:

- ○ Varying subpoena procedures, such as methods of depositions and reimbursement of costs. *See § 15.04[5] below*.
- ○ Location for taking deposition. *See § 15.05[1] below*.
- ○ Using a commission to require the production of documents or to conduct a deposition in a foreign country. *See § 15.04[9] below*.
- ○ Waiving or modifying notice and/or signature requirements for a deposition. *See § 15.05[5], [12] below*.
- ○ Taking a deposition before person other than an officer. *See § 15.05[6] below*.
- ○ Recording and taking deposition by other than stenographic means. *See § 15.05[7] below*.
- ○ Shifting cost of deposition. *See § 15.05[8] below*.
- ○ Staging discovery such that threshold issues are explored at the outset before embarking on more expensive discovery.

☐ Determine whether to stipulate to limit use of discovery, such as:

- ○ Whether discovery in one case may be used in a subsequent case.
- ○ Whether discovery should be kept confidential. *See § 15.04[8] below*.

- ○ Whether to allow use of unsigned deposition transcript. *See § 15.05[14] below*.

☐ Consider stipulating to issues regarding documents: *See § 15.05[9] below*.

- ○ Authenticity of a document.
- ○ Who prepared, or directed preparation, of a document.
- ○ That a document was kept in the regular course of business.
- ○ That a document will be retained by a certain party.
- ○ That a document will be kept available for future inspection.

☐ Consider whether it is desirable to modify rules regarding objections during depositions: *See § 15.05[15] below*.

- ○ Whether reserving objections will benefit the client at trial.
- ○ Whether each matter stipulated to is clear and recorded in the record.

☐ Consult with opposing party to determine:

- ○ Who should draft the stipulation.
- ○ The issues and the terms agreed on.
- ○ If stipulation is made during deposition, have stipulation placed on record.

☐ Use precise language:

- ○ Avoid ambiguous terms.
- ○ Include all terms agreed by the parties.

☐ Evaluate need for court order:

- ○ If extension of time interferes with discovery cut-off.

- ○ If extension of time interferes with hearing or trial.

☐ Review local rules to determine whether prior court order is required. *See § 15.03[5] below*.

☐ Review local rules to determine whether the stipulation should be filed. *See § 15.03[4] below*.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Stipulations



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PART B: USING STIPULATIONS TO MODIFY DISCOVERY PROCEDURES

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§ 15.03 Understanding Requirements for Use of Discovery Stipulations

[1] When to Use Discovery Stipulations

Unless the court directs otherwise, parties may stipulate that:

1. A deposition may be taken before any person, at any time or place, on any notice, and in the manner specified; and

2. Other procedures governing or limiting discovery be modified.

See Fed. R. Civ. P. 29.

[2] Discovery Stipulations Distinct From Disclosure Stipulations

Rule 29 governs only stipulations relating to discovery, and not stipulations relating to mandatory disclosure under *Fed. R. Civ. P. 26(a). See Fed. R. Civ. P. 29.*

[3] Stipulations Generally Should Be in Writing

To modify discovery by agreement of the parties, the stipulation generally should be in writing and signed by all the parties. *See Fed. R. Civ. P. 29*; *Tropix, Inc. v. Lyon & Lyon, 169 F.R.D. 3, 3-4 (D. Mass. 1996)* .

Warning:

Prior to the 2007 restyling of Rule 29, a stipulation regarding discovery procedure generally had to be in writing. As part of the restyling of the Federal Rules of Civil Procedure, effective December 1, 2007, the word "written" was removed from Rule 29. The rule now states that "parties may stipulate" to modify discovery procedure. The prior version of the rule used the term "written stipulation." While the Committee Note to the restyled rule states that all "changes are intended to be stylistic only," it can be argued that this textual amendment is more than stylistic: i.e., no written stipulation is required--an oral stipulation will suffice. This issue was called to the attention of the rulemakers in the public comment

period, and they consciously decided to eliminate the requirement of a written stipulation. This was not inadvertent. As a matter of good practice, however, counsel are advised to reduce all stipulations to writing to avoid later disputes as to precisely what, if anything, was the subject of the stipulation.

Examples of informal writings not enforced by the courts prior to the 2007 restyling include:

1. **Confirming letter:** A letter to opposing counsel that confirmed an oral agreement to limit the length of time to take depositions was not enforced by the court because the agreement was not in the form of a stipulation. *Pescia v. Auburn Ford-Lincoln Mercury, 177 F.R.D. 509, 510 (M.D. Ala. 1977)* .

2. **Oral agreement:** An oral agreement between opposing counsel was not sufficient to extend time to respond to discovery. *Tropix, Inc. v. Lyon & Lyon, 169 F.R.D. 3, 3-4 (D. Mass. 1996)* .

3. **Unilateral understanding:** A unilateral understanding was insufficient to create an enforceable stipulation. For example, a party who mistakenly believed that discovery was suspended pending response to a settlement offer was not justified in ignoring discovery deadlines or unilaterally granting extensions of time, even if the intention was to save time and expense. *Rogerson v. Xidex Corp., 110 F.R.D. 412, 413 (D. Mass. 1986)* .

Examples of situations where a writing has not been required include:

1. **Oral representation in open court:** Courts may enforce oral stipulations made in open court. *Rice v. Glad Hands, Inc., 750 F.2d 434, 437-438 (5th Cir. 1985)* .

2. **Stipulations on record during deposition.** An oral agreement made on the record at a deposition constitutes an enforceable stipulation. *Racine Educ. Ass'n v. Racine Unified Sch. Dist., 82 F.R.D. 461, 462-463 (E.D. Wis. 1979)* ; *see also Fed. R. Civ. P. 30(b)(5)(C)* (requiring deposition officer to "set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters").

3. **Estoppel doctrine may prevent unfair advantage**. Courts may enforce an oral discovery agreement, just as with certain other contracts that otherwise must be in writing, if the failure to do so allows one party to take unfair advantage of another. *Oliver v. City of Shattuck, 157 F.2d 150, 153 (10th Cir. 1946)* .

[4] Filing Stipulations Not Required by Federal Rules

The Federal Rules do not require that stipulations be filed with the court. *See Fed. R. Civ. P. 5(d)(1), 29*. Nevertheless, local district rules may require that stipulations be filed. Filing a stipulation can alert the court to a change in scheduling, and the stipulation becomes part of the court record.

[5] Prior Judicial Approval May Be Required for Some Stipulations

Always refer to local rules and the judge's standing order to determine whether prior approval of the stipulation may be necessary.

The Federal Rules generally do not require court approval for discovery stipulations. However, prior court approval is required for stipulations that extend time for responses to interrogatories, requests for production of documents, and requests for admission when the stipulated response date would interfere with dates for discovery cut-off, hearing of a motion, or trial. *Fed. R. Civ. P. 29(b)*.

Timing:

Try to obtain a stipulation from opposing counsel as soon as possible after you determine that you need an extension. Requests for court-approved extensions brought on the date a response is due may be disfavored.

Those stipulations that seek an order shortening time must be approved by the judge or magistrate judge on whose calendar the matter is to be heard before such stipulations will be given effect. Any proposed order shortening time must include blanks for the court to designate a time and date for the hearing.

With the written stipulation, counsel may have to submit a proposed order to the court. Counsel need not, however, submit a separate document to contain the proposed order. The proposed order may consist of an endorsement on the stipulation with the words, "IT IS SO ORDERED," with spaces designated for the date and signature of the judge or magistrate judge.

[6] Stipulations Govern Only Litigation at Hand

If opposing parties are involved in more than one lawsuit against each other, a discovery stipulation applies only to the litigation for which the stipulation is prepared, unless the parties express an intent to be bound in other suits. *Melton v. McCormick, 94 F.R.D. 344, 346 (W.D.N.Y. 1982)* .

[7] Stipulations Bind Parties to Included Terms

A stipulation binds parties only to the terms expressly included in the stipulation *See Angell v. Shawmut Bank Conn. Nat'l Ass'n, 153 F.R.D. 585, 590-591 (M.D.N.C. 1994)* .

Warning:

Courts fully enforce the unambiguous terms expressed in the stipulation. When terms are ambiguous, the court examines the surrounding circumstances to determine the intent of the parties in entering the stipulation. *See Rice v. Glad Hands, Inc., 750 F.2d 434, 438 (5th Cir. 1985)* . Inclusion of ambiguous terms can lead to additional time and expense for the court to resolve the intended meaning of the stipulation.

[8] Judicial Rejection of Stipulations

Courts have the authority to reject stipulations, and parties may not enter stipulations if "the court orders otherwise". *Fed. R. Civ. P. 29.*

The court may relieve a party from an improvident stipulation if enforcement of the stipulation would contravene the policy favoring full disclosure and interfere with the ability to dispose of a case on the merits. For example, a stipulation that precluded additional questioning of a deponent was not enforced when important documents were produced after the parties' agreement and enforcement of the stipulation would have closed the door to the development of potentially critical facts. *In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 570 F.2d 899, 902-903 (10th Cir. 1978)* .

A court may relieve a party from an improvident stipulation to prevent injustice, such as when the stipulation was entered into under a mistake of law. *Marshall v. Emersons Ltd., 593 F.2d 565, 568-569 (4th Cir. 1979)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 29.02 -29.03, 29.05 -29.07.*
- *Fed. R. Civ. P. 29* (stipulations).



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Chapter 15 MODIFYING DISCOVERY PROCEDURES BY STIPULATION
PART B: USING STIPULATIONS TO MODIFY DISCOVERY PROCEDURES

1-15 Moore's AnswerGuide: Federal Discovery Practice § 15.04

§ 15.04 Using Stipulations for General Discovery Matters

[1] Parties May Stipulate to Permit Discovery Before Rule 26(f) Planning Meeting

As a general rule, parties may not seek discovery until after they have conferred as required under Rule 26(f). *Fed. R. Civ. P. 26(d)*, *(f)*; *see § 4.04 above*. However, parties may agree by written stipulation to permit discovery prior to the *Fed. R. Civ. P. 26(f)* discovery planning meeting. *Fed. R. Civ. P. 26(d)*.

[2] Parties May Stipulate to Alter Time for Response to Discovery Request

The parties may stipulate to increase or decrease the time required to respond to discovery requests, including the 30-day period normally required to respond to requests for production, interrogatories, and requests for admission *Fed. R. Civ. P. 29(b)*, *33(b)(2)*, *34(b)(2)(A)*, *36(a)(3)*. Courts recognize that discovery responses are rarely completed within the 30-day period and expect that this type of modification be accommodated by stipulation. *See Jayne H. Lee, Inc. v. Flagstaff Indus. Corp., 173 F.R.D. 651, 653-654 (D. Md. 1997)* .

[3] Parties May Stipulate to Exceed Permitted Number of Interrogatories

Parties may stipulate to allow more than 25 interrogatories for each party, the maximum number allowed under the Federal Rules. *Fed. R. Civ. P. 29(b)*, *33(a)(1)*; *see also § 7.06 above*.

[4] Stipulation Concerning Conduct of Physical or Mental Examinations

Parties may stipulate to alter the requirements for taking a physical or mental examination otherwise required by *Fed. R. Civ. P. 35*. *Fed. R. Civ. P. 29(b)*, *35(a)*; *see §§ 11.07-11.10 above*.

If the stipulation pertains only to the taking of the exam itself, Rule 35(b)'s requirements regarding the examiner's report will still apply. *Fed. R. Civ. P. 35(b)*. Parties wishing to alter these requirements must include terms expressly addressing the examiner's report. See *Fed. R. Civ. P. 35(b)*.

[5] Parties May Stipulate to Vary Subpoena Procedures

Parties may stipulate to alter the terms of a subpoena for discovery of a nonparty witness. *Fed. R. Civ. P. 29, 45.* Stipulations may modify, for example, methods of taking a deposition and reimbursement of costs. *See Westmoreland v. CBS, Inc., 770 F.2d 1168, 1175 (D.C. Cir. 1985)* ; *Angell v. Shawmut Bank Conn. Nat'l Ass'n, 153 F.R.D. 585, 589-590 (M.D.N.C. 1994)* .

[6] Parties May Stipulate to Limit Discovery in Future Litigation

At least one court has enforced stipulations limiting discovery in future litigation. *See Elliott-McGowan Prods. v. Republic Prods., Inc., 145 F. Supp 48, 50 (S.D.N.Y. 1956)* . Because of the potential impact on the client in future litigation, be sure the client understands and consents to such terms.

[7] Parties May Stipulate to Expedite Discovery

When both parties recognize a need to expedite discovery, they should draft a stipulation setting forth the scope, method, and timing of discovery. The stipulation should be designed to maximize the efficiency of the discovery process, minimize discovery disputes, and facilitate preparation for the hearing or trial.

If the parties agree to expedited discovery, the stipulation should be incorporated into the written report required by Rule 26(f). *See Fed. R. Civ. P. 26(f).*

[8] Parties May Stipulate to Preserve Confidentiality

Parties may enter stipulations to limit the dissemination of sensitive, proprietary, or confidential information. For example, parties may stipulate that discovery be limited to certain matters, that discovery be conducted with no one present except persons designated by the court, that a deposition be sealed and opened only by court order, and that secret or confidential matters not be revealed, or be revealed only in certain designated ways. *Fed. R. Civ. P. 26(c)(1)(D)-(G), 29*; *see also §§ 16.26-16.29, 16.34[1] below.*

[9] Parties May Stipulate to Obtain Discovery Abroad

Parties may stipulate to the terms of obtaining discovery abroad, as long as those terms do not violate the law of the country in which the discovery is sought. For example, parties have stipulated to use commissions to require the production of documents located in foreign countries as provided in the Hague Evidence Convention. See *Compagnie Francaise d' Assurance v. Phillips Petroleum Co., 105 F.R.D. 16, 22-23 (S.D.N.Y. 1984)* .

[10] Stipulations Regarding Discovery for Use in Foreign Courts

Parties may stipulate to matters relating to obtaining and using domestic discovery for use in foreign proceedings. For example, parties have stipulated to stay discovery pending appeal of a subpoena issued under *28 U.S.C. § 1782*, the statute that permits discovery of individuals in the United States for use in a foreign or international tribunal. *In re Application of Gianoli Aldunate, 3 F.3d 54, 57 (2d Cir. 1993)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* §§ 28.15, 29.04.
- *Bender's Federal Practice Forms* Form Nos. 28:32, 29:2, 34:60, 34:251, 35:10.
- *Fed. R. Civ. P. 29* (stipulations).



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Chapter 15 MODIFYING DISCOVERY PROCEDURES BY STIPULATION
PART B: USING STIPULATIONS TO MODIFY DISCOVERY PROCEDURES

1-15 Moore's AnswerGuide: Federal Discovery Practice § 15.05

§ 15.05 Parties May Stipulate to Modify Deposition Procedures

[1] Parties May Stipulate to Modify Procedural Aspects of Depositions

Parties may stipulate to modify procedural aspects of both oral and written depositions. Unless otherwise directed by the court, parties may stipulate that depositions be taken:

1. Before any person.

2. At any time or place.

3. On any notice.

4. In any manner.

Fed. R. Civ. P. 29(a).

[2] Parties May Stipulate to Exceed Limit on Number of Depositions

Parties may stipulate to take more than ten depositions, the maximum number of depositions permitted for both oral and written depositions under the Federal Rules. *Fed. R. Civ. P. 29(a)*, *30(a)(2)(A)(i)*, *31(a)(2)(A)(i)*. Absent a stipulation, parties must seek leave of court to take additional depositions. *Fed. R. Civ. P. 30(a)(2)(A)*, *31(a)(2)(A)*; *see also § 8.04[2] above*.

[3] Parties May Stipulate to Take Deposition of Previously Deposed Witness

If a party determines it is necessary to depose a witness whose deposition has already been taken, the party must obtain a written stipulation with the other parties to avoid the need to obtain leave of court. *Fed. R. Civ. P. 30(a)(2)(A)(ii)*, *31(a)(2)(A)(ii)*; *see also § 8.06[2][c] above*.

[4] Parties May Stipulate to Take Early Deposition

Absent a stipulation or court order, depositions may not be taken prior to the time the parties have met and conferred as required by *Fed. R. Civ. P. 26(f)*. *Fed. R. Civ. P. 26(d)*.

Parties may stipulate to take a deposition before the *Fed. R. Civ. P. 26(f)* meeting. *Fed. R. Civ. P. 26(d)(1)*, *30(a)(2)(A)(iii)*, *31(a)(2)(A)(iii)*; *see also § 8.04[1] above*.

[5] Parties May Stipulate to Waive or Modify Notice Requirements

Parties may stipulate to alter or waive notice requirements for oral or written depositions. *Fed. R. Civ. P. 29(a)*, *30(b)(1)*, *31(a)(3)*; *see also § 8.09[1] above*.

[6] Stipulations May Allow Deposition Before Person Other Than Officer

A deposition taken in the United States ordinarily must be taken before an officer authorized to administer oaths or appointed by the court. *Fed. R. Civ. P. 28*, *30(b)(5)*, *31(b)*. The parties may stipulate to have the deposition taken "before any person." *Fed. R. Civ. P. 29(a)*; *see also § 8.20[1] above*.

[7] Parties May Stipulate to Record and Take Deposition by Other Than Stenographic Means

Unless otherwise ordered by the court, depositions may be recorded by sound, sound-and-visual, or by stenographic means, in addition to other methods designated by any party. *Fed. R. Civ. P. 30(b)(3)*. The parties, however, may stipulate that a deposition be taken by telephone or other remote electronic means. *Fed. R. Civ. P. 29(a)*, *30(b)(4)*; *see also § 8.13 above*.



Strategic Point:

For cases in which the dollar value of the case is low, or where it would be burdensome for a witness to appear at a deposition for reasons such as distance or physical disabilities, parties may decide that telephonic or other electronic methods, such as instant messaging, would be appropriate. A stipulation would be required under these circumstances. *Fed. R. Civ. P. 30(b)(4)*. When the demeanor of the witness is important, sound-and-visual recording would be valuable. No stipulation is required for this type of recording, as it is provided for in the rules. *Fed. R. Civ. P. 30(b)(3)*.

[8] Parties May Stipulate to Shift Cost of Deposition

Normally, the party taking the deposition pays for the cost of the recording of the deposition. *See Fed. R. Civ. P. 30(b)(3)(B)*. The parties may, however, stipulate to shift or share those costs. *Fed. R. Civ. P. 29(a)*; *see also § 8.20[8] above*.

[9] Parties May Stipulate to Matters Regarding Documents

If documents are used as exhibits or produced for identification, the parties may stipulate to foundational issues, such as:

1. That a document is authentic.

2. That a document was prepared by or under the direction of a witness.

3. That a document was kept in the regular course of business of a witness.

4. That, following the deposition, a document will be retained by a certain party.

5. That a document will be kept available for future inspection.

See Fed. R. Civ. P. 30(f); *Fed. R. Evid. 803(6)*, *901*, *1003*.

[10] Parties May Stipulate to Limit Scope of Examination

Parties may stipulate to limit the scope of the examination. *See Fed. R. Civ. P. 29(a)* (parties may stipulate to take deposition "in any manner"); *see also Fed. R. Civ. P. 26(c)(1)(D)* (party may seek protective order to limit scope of examination). For example, when personal jurisdiction is at issue, the parties may stipulate to limit the scope of a deposition to matters relating to personal jurisdiction without prejudice to the taking of another deposition of the defendant on the merits of the case. *See Fed. R. Civ. P. 29(a)*.

[11] Parties May Stipulate to Modify Duration of Deposition

While the rules limit the duration of a deposition to one day of seven hours, parties may stipulate to extend this time. *Fed. R. Civ. P. 30(d)(1)*. In addition, parties may stipulate to divide the seven-hour period over more than one day. See *Fed. R. Civ. P. 30(d)(1) see also § 8.04[3] above*.

[12] Parties May Stipulate to Waive Formalities

Parties may stipulate to waive formalities regarding a deposition, such as notice and signature. *See Fed. R. Civ. P. 29(a)*, *30*, *31*.

[13] Parties May Stipulate to Alter Requirements for Retention of Deposition Notes

Under the Federal Rules, the deposition officer retains the stenographic notes or the copy of the recording of a deposition. The parties may, however, stipulate otherwise. *See Fed. R. Civ. P. 30(f)(3) see also § 8.30 above*.

[14] Parties May Stipulate to Use of Unsigned Transcript

Prior to completion of a deposition, a deponent or party may request to review the transcript or recording within 30 days of being notified that the transcript or recording is available. If the deponent wishes to change any testimony, the deponent must sign a statement reciting the changes and the reasons for making them. *Fed. R. Civ. P. 30(e)*. The parties may stipulate to allow the use of the unsigned transcript without prejudice to the deponent's right to correct and sign the statement regarding changes at a later time. *See Fed. R. Civ. P. 29(a)*. For example, if the deposition testimony contains information relevant to a fact material to a pending hearing, the parties may stipulate to allow use of the deposition testimony at the hearing rather than file a motion to continue the hearing until after the 30 days has lapsed. *See Fed. R. Civ. P. 29(a)*.

[15] Parties May Stipulate to Modify Rules on Waiving and Reserving Objections

[a] General Rules

A party present at a deposition need not object to the competency of a witness or to the competency, relevancy or materiality of testimony, unless the ground of the objection could be obviated or removed if raised at the deposition. *Fed. R. Civ. P. 32(d)(3)(A)*. In the latter case, however, a party who fails to raise the objection at the deposition waives the objection completely. In particular, objections pertaining to the manner of taking the deposition, the form of the questions or answers, the oath or affirmation, the conduct of parties, and other errors that might be obviated, removed, or cured, are waived unless raised at the deposition. *Fed. R. Civ. P. 32(d)(3)(B)*.

The parties may, however, stipulate to alter these rules. *See Fed. R. Civ. P. 29(a)*. These stipulations are typically done on the record just prior to the questioning of the witness.

[b] Reserving Objections Except As to Form

Frequently, counsel who participate in a deposition stipulate that all objections are reserved, except those "as to form."

Warning:

Though a stipulation reserving objections except as to form resembles *Fed. R. Civ. P. 32(d)(3)*, it is not the same. A question that might be correct as to form may nonetheless be objectionable for being asserted without a proper foundation. If this stipulation is in place, opposing counsel may refrain from objecting to the question at the deposition, but later raise the objection of lack of foundation at trial. The response to the deposition question may thereby be excluded at trial. Under Rule 32(d)(3), this objection would have been waived if not raised at the deposition, because counsel taking the deposition could have cured the defect by laying the proper foundation at the deposition. Absent the stipulation, the response would therefore be admissible at trial. Counsel taking the deposition should consider the risks of entering this type of stipulation before agreeing to it.

[c] Reserving All Objections

Counsel may stipulate to reserve all objections, including those as to form. *Los Angeles Trust & Deed Mortg. Exch. v. SEC, 264 F.2d 199, 212, 213 (9th Cir.1959)* .

Warning:

Consider the potential for substantial parts of the deposition to be excluded at trial pursuant to a stipulation reserving all objections. In addition, objections are an important tool for ensuring that your client understands the questions he or she is answering and for controlling an opposing party's improper questions.

[d] Agreeing to Blanket Stipulations

In some areas local practitioners develop a set of stipulations (usually concerning how long the court reporter will have to complete the transcript, how long the deponent will have to review the transcript, and who will maintain the original transcript) to which they commonly stipulate. These sets of stipulations may be commonly referred to as the "usual stipulations." Nevertheless, to avoid disputes, counsel should always insist that the exact stipulations be articulated on the record to avoid any uncertainty and to ensure against stipulating to undesirable terms.

[16] Parties May Stipulate to Matters Pertaining to Taking Depositions Abroad

As parties may stipulate to take the deposition "at any place," parties may stipulate to take a deposition in a foreign country. *Fed. R. Civ. P. 29(a)*; *In re Anschuetz & Co., 754 F.2d 602, 609 (5th Cir. 1987)* , *vacated on other grounds sub nom. Anschuetz & Co. v. Mississippi River Bridge Auth., 483 U.S. 1002 (1987)* . However, the terms of the stipulation should not contravene any laws of the country in which the deposition is taken. *Popular Imps., Inc. v. Wong's Int'l Trading, Inc., 166 F.R.D. 276, 280 n.5 (E.D.N.Y. 1996)* . Some countries, such as Japan and Switzerland, have strict laws severely limiting or precluding depositions.

If the deposition is of a nonparty witness, parties otherwise inclined to stipulate to the terms of the deposition must consider the provisions of the Hague Convention if the deponent resides within the jurisdiction of one of the signatory countries. *See Graco v. Kremlin, Inc., 101 F.R.D. 503, 519-520 (N.D. Ill. 1984)* .

Stipulations have been used for the following procedures:

1. To invoke a foreign commission to take depositions abroad. *In re Bankers Trust Co., 752 F.2d 874, 878 (3d Cir.1984)* ; *but see In re Bankers Trust Co., 775 F.2d 545, 547-549 (3d Cir.1985)* (rejecting terms of stipulation to allow use of previous deposition where lower court had ordered second deposition must be taken by commission).

2. To agree on procedures for taking depositions in foreign countries, including procedures that circumvent the requirements of *Fed. R. Civ. P. 28(b)* regarding who may take the deposition. *Popular Imps., Inc. v. Wong's Int'l Trading, Inc., 166 F.R.D. 276, 280 (E.D.N.Y. 1996)* .

3. To decide where deposition will be taken. *Pillar Corp. v. Enercon Indus. Corp., 694 F. Supp. 1353, 1363 (E.D. Wis. 1988)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 29.04.*
- *Bender's Federal Practice Forms* Form Nos. 29:1, 31:4.
- *Fed. R. Civ. P. 29(a)* (stipulations).
- *Fed. R. Civ. P. 30* (depositions by oral examination).
- *Fed. R. Civ. P. 31* (depositions on written questions).
- *Fed. R. Civ. P. 32* (use of depositions).



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Chapter 16 RESTRICTING AND MODIFYING DISCOVERY PROCEDURES BY MOTION; PROTECTIVE ORDERS

1-16 Moore's AnswerGuide: Federal Discovery Practice 16.syn

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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.01

§ 16.01 Procedural Context--Restricting and Modifying Discovery Procedures by Motion

In addition the wide and detailed array of discovery procedures set out in the Federal Rules of Civil Procedure, the Rules provide two general avenues to alter the regulation of discovery to accommodate the needs and circumstances of specific cases: stipulations (*see* Ch. 15 *above*) and motions.

A party may bring a motion to obtain relief from certain discovery rules after first attempting to obtain a stipulation from opposing counsel, even when leave of court is required to modify the rule. A discovery motion may be an appropriate means to, among other things, lengthen the amount of time a responding party has to prepare a response to a discovery request, extend the discovery cut-off when parties have not yet completed discovery, protect against the disclosure of privileged or confidential information, or compel a response from the opposing party.

Before filing a discovery motion, counsel should first attempt to reach an agreement regarding the sought modification with opposing counsel and obtain a stipulation to that effect, as courts generally look more favorably on the desired modification when counsel have cooperated. Many courts have local meet-and-confer requirements that must be met before a party may bring a discovery motion.



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.02

§ 16.02 Checklist for Motion to Modify Discovery Procedures

☐ Determining whether joint motion or stipulation is appropriate.

- ○ Consult with the opposing party to attempt to resolve differences by stipulation. *See § 16.03 below*.
- ○ Determine whether court approval is required or desirable.
- ○ Consider whether a joint motion is appropriate. *See § 16.04[5] below*.

☐ Bringing noticed motion to modify discovery procedures.

- ○ Determine whether the proposed modification would interfere with court-imposed deadlines.
- ○ Carefully review district court rules and standing orders issued by the assigned judge for local prerequisites to bringing a discovery motion (e.g., meet-and-confer requirements). *See § 16.04[4] below*.
- ○ Consider availability of motion expenses and attorney's fees. *See § 16.04[7] below*.
- ○ Prepare notice of motion and supporting documents.

☐ Opposing noticed motion to modify discovery procedures:

- Review local rules to determine whether joint stipulation must be prepared and whether supplemental briefing is allowed.

- Determine extent of issues to raise in opposition in order to preserve them on appeal.

- Determine whether to request a protective order if the motion seeks to compel discovery. *See* §§ *16.20-16.30 below*.

- Determine whether to seek an order assessing the cost of discovery motion on moving party.

- Prepare opposition and supporting documents.

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- Civil Procedure > Pleading & Practice > Motion Practice



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§ 16.03 Considering Options and Strategy for Discovery Motion Practice

A party should generally resort to motion practice to modify or regulate discovery only when opposing counsel refuses to stipulate to the sought modification or when required by the rules. If a party cannot obtain a modification to the discovery rules by stipulation (*see* Ch. 15 *above*), then a party may move the court to order such modification. Counsel should determine at the outset whether informal procedures are available and appropriate.

Before filing a motion to modify discovery, counsel should make sure that the requested modification is reasonable under the circumstances. Courts are empowered to impose attorney's fees on the moving party when the request is unjustified. Similarly, opposing a reasonable request could result in the imposition of attorney's fees for the cost of bringing the motion on the party opposing the motion.

Consider whether the modification is sufficiently important and necessary to warrant the time and expense of litigating the issue. Every discovery motion involves delay in the discovery process and expenses to the parties to some extent, and in this respect runs counter to two of the purposes of the federal rules. The party opposing the motion should raise these issues in its opposition. The nonmoving party should also consider whether the time and expense of opposing the motion is worth the cost to the client. Both parties should consider whether the court will see the dispute as trivial and if so, whether it is nevertheless necessary to seek judicial resolution of the issue.

PRACTICE RESOURCES:

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 1 (filing and serving motions).
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6 (discovery motions).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.04

§ 16.04 Understanding General Requirements for Discovery Motions

[1] When to Use Motions to Regulate Discovery

Motions to modify discovery procedures may be brought in the following circumstances:

1. To limit the frequency or extent of the discovery methods set forth in the federal or local rules.

2. To expand the scope of discovery to encompass "the subject matter involved in the action" rather than the parties' claims or defenses (*see § 2.05*, *above*).

3. To determine whether the sought material is privileged or should otherwise be protected from disclosure (*see* Ch. 3 *above*).

4. To obtain discovery from a recalcitrant party or witness.

5. When the Federal Rules or local rules require a party to obtain a court order before proceeding with discovery.

[2] Governing Law

The Federal Rules of Civil Procedure specifically addressing discovery (Rules 26-37) impose procedural requirements for certain types of discovery motions in addition to the requirements under *Fed. R. Civ. P. 7(b)*, which governs motion practice generally.

Warning:

In addition, local rules and individual judges' standing orders may impose additional or different requirements for discovery motions that those found in the Federal Rules.

[3] Motion Must Be Filed in Appropriate Court

Discovery motions are typically brought in the court where the action is pending. *See Fed. R. Civ. P. 26(c), 37(a)(1).*

Exception:

A motion to compel discovery from a nonparty must be brought in the court in the district where the discovery would be taken. *See Fed. R. Civ. P. 37(a)(2).*

Exception:

A motion for a protective order relating to a deposition brought under *Fed. R. Civ. P. 26(c)* must be brought in the court for the district where the deposition would be taken. *See Fed. R. Civ. P. 26(c); but see Fed. R. Civ. P. 30(d)(3)(A)* (when examination is being conducted in bad faith, court where action is pending or court where deposition is taken may order examination terminated).

[4] Certification Regarding Good-Faith Attempt to Meet and Confer Is Mandatory

The Federal Rules require that discovery motions for protective orders, motions to compel and motions for sanctions be accompanied by a certification that the moving party has in good faith conferred (or attempted to confer) with the opposing party. *See Fed. R. Civ. P. 26(c), 37(a)(1), (d)(1)(B).*

Warning:

Local rules and individual judges' standing orders may also impose additional or different meet-and-confer requirements that those found in the Federal Rules.

[5] Joint Motion Is Possible

Adverse parties may join together to bring a discovery motion, or may stipulate regarding discovery. *See e.g., Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co., 288 F. Supp. 2d 1033, 1040 (D. Ariz. 2003)* (joint motion to vacate discovery deadlines); *see also* Ch. 15 *above*.

[6] Opposing Discovery Motions

The procedure for preparing and filing an opposition to a discovery motion generally follows the procedure for opposing other motions. *See Fed. R. Civ. P. 7(b), 37(a).* Local rules may vary these procedures.

[7] Court May Order Payment of Motion Expenses

As part of the ruling on a discovery motion, the court will assess attorney's fees against the party bringing or opposing the motion unless it finds that the unsuccessful party was substantially justified in bringing the motion or that circumstances make such an award unjust.

Examples of motions for which attorney's fees may be assessed against the unsuccessful opposing party include:

1. Motions to compel disclosure or discovery. *See Fed. R. Civ. P. 37(a)(5), (d)(3).*

2. Motions for protective orders. *See Fed. R. Civ. P. 26(c).*

3. Motions to terminate or limit depositions. *See Fed. R. Civ. P. 30(d)(3).*

4. Motions for expenses due to a party's failure to appear at its own noticed deposition. *See Fed. R. Civ. P. 30(g).*

5. Motions to determine the sufficiency of responses or objections to requests for admissions. *See Fed. R. Civ. P. 36(a)(6), 37(c)(2).*

6. Motions to establish that discovery certifications were signed in violation of the rules. *See Fed. R. Civ. P. 26(g).*

7. Motions to establish an opposing party's failure to participate in the framing of discovery plan. *See Fed. R. Civ. P. 37(f).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 7.03.*



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§ 16.05 Limiting Frequency, Extent, or Use of Discovery

[1] Availability of Motion

The recipient of a discovery demand may bring a motion to limit the frequency or extent of propounded discovery. *See Fed. R. Civ. P. 26(b)(2).*

Warning:

In addition, the court may act on its own motion, with proper notice, to limit the extent of discovery. *See Fed. R. Civ. P. 26(b)(2)(C)(ii).*

[2] Limiting Unreasonably Cumulative, Duplicative or Inconvenient Discovery

The responding party may move the court to be relieved of the obligation to respond to discovery requests that are unreasonably cumulative, duplicative or inconvenient. *See Fed. R. Civ. P. 26(b)(2)(C)(i).*

The responding party may also seek to shift the costs of responding to unreasonably cumulative, duplicative or inconvenient discovery requests, particularly when the information sought is not readily accessible. *See e.g., OpenTV v. Liberate Techs., 219 F.R.D. 474, 475-476 (N.D. Cal. 2003)* .

The propounding party may defeat a motion for a protective order by establishing the reasonableness of its discovery request. A court will generally not limit discovery on the ground that it is cumulative, duplicative, or inconvenient unless the court finds the request to be unreasonable. *See Fed. R. Civ. P. 26(b)(1)*; *see also* Ch. 2 *above*.

Once the court determines that the discovery request is unreasonably cumulative, duplicative or inconvenient, the court will order relief. *See Fed. R. Civ. P. 26(b)(2)(C).*

[3] Limiting Extent or Use of Electronic Discovery When Sought Information Is Not Reasonably Accessible

If proposed discovery requests seek electronically stored information, the responding party may seek to be relieved of

its obligation to respond if the information is not reasonably accessible due to undue burden or cost. The party from whom the discovery is sought bears the burden of making the showing of undue burden or cost. *See Fed. R. Civ. P. 26(b)(2)(B)*; *see, e.g., Petcou v. C.H. Robinson Worldwide, Inc., 2008 U.S. Dist. LEXIS 13723, at *3 (N.D. Ga. 2008)* (defendant met burden of showing that deleted e-mails were not reasonably accessible); *see also* Ch. 6 *above*.

The propounding party may defeat such a motion by making a showing of good cause, considering the proportionality limitations of *Fed. R. Civ. P. 26(b)(2)(C)*. *See Fed. R. Civ. P. 26(b)(2)(B)*.

In ruling on the motion to limit discovery, the court may specify conditions for the discovery of electronically stored information. *Fed. R. Civ. P. 26(b)(2)(B)*.

For discussion of discovery of electronically stored information, *see* Ch. 6 *above*.

[4] Limiting Discovery When Information Is Available From Another More Convenient, Less Burdensome, or Less Expensive Source

If the material sought can be obtained from another more convenient, less burdensome or less expensive source, the party or person from whom the discovery is sought may bring a motion to require the propounding party to obtain the information from the alternative source. *See Fed. R. Civ. P. 26(b)(2)(C)(i)*.

[5] Limiting Extent or Use of Discovery if Propounding Party Has Had Ample Opportunity to Obtain Information Sought

A court may limit the extent or use of the discovery sought if the propounding party has had ample opportunity in the action to obtain the information sought. The court may act on noticed motion of the responding party or on its own motion after reasonable notice. *See Fed. R. Civ. P. 26(b)(2)(C)(ii)*; *see, e.g., Green Constr. Co. v. Kansas Power & Light Co., 732 F. Supp. 1550, 1554 (D. Kan. 1990)* (when owner of construction performance bonds had prior opportunity to discovery histories of other bond claims, discovery of these histories was denied).

[6] Limiting Extent or Use of Discovery When Burden or Expense of Proposed Discovery Outweighs Its Likely Benefit

The responding party may move to limit the extent or use of discovery when the burden or expense of responding to proposed discovery outweighs its likely benefit, considering the following:

1. The needs of the case;

2. The amount in controversy;

3. The parties' resources;

4. The importance of the issues; and

5. The importance of the proposed discovery in resolving the issues.

See Fed. R. Civ. P. 26(b)(2)(C)(iii).

In deciding a motion to limit discovery, the court may not base its decision solely on the financial resources of the respective parties. The focus must be on whether the cost of the proposed discovery outweighs its benefit. *See e.g., Munoz-Santana v. United States Immigration & Naturalization Service, 742 F.2d 561, 563-564 (9th Cir. 1984)* ;

Marker v. Union Fidelity Life Ins. Co., 125 F.R.D. 121, 125 (M.D.N.C. 1989) . The moving party may, however, include a discussion of the parties' respective resources in the briefing on this motion. *See Fed. R. Civ. P. 26(b)(2)(C)(iii)* (parties' resources as factor in weighing burden or expense).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.53[2], 26.60.*
- *Fed. R. Civ. P. 26(b)(2)* (limitations on frequency and extent of discovery).



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§ 16.06 Widening Scope of Discovery

In general, parties may obtain discovery of unprivileged matters that are relevant to any party's claims or defenses. *See Fed. R. Civ. P. 26(b)(1).*

A party may make a motion to expand the scope of discovery to any unprivileged matters relevant to the subject matter of the action. *See Fed. R. Civ. P. 26(b)(1).* The party must show good cause in order to prevail. *Fed. R. Civ. P. 26(b)(1)*; *see, e.g., Apsley v. Boeing Co., 2007 U.S. Dist. LEXIS 5144, at *30-*31 (D. Kan. 2007)* (good cause not shown); *see also Thompson v. HUD, 199 F.R.D. 168, 171-172 (D. Md. 2001)* (explaining distinction between relevance standards).

For discussion of the scope of discovery, *see* Ch. 2 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.41.*
- *Fed. R. Civ. P. 26(b)(1)* (discovery scope in general).



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§ 16.07 Increasing Numeric Limits on Discovery

The Federal Rules of Civil Procedure generally allow each side, including plaintiffs, defendants and third-party defendants, to take 10 depositions. A party may, however, seek a court order to increase the number of allowable depositions. *See Fed. R. Civ. P. 30(a)(2)(A)(i), 31(a)(2)(A)(i).* Parties may also stipulate to a different limit. *See Fed. R. Civ. P. 29, 30(a)(2)(A), 31(a)(2)(A); see also 15.05[2] above .*

Under the Federal Rules, each party may propound up to 25 interrogatories. A party, however, may move the court to allow additional interrogatories. *See Fed. R. Civ. P. 33(a)(1).* Parties may also stipulate to a different limit. *See Fed. R. Civ. P. 29, 33(a)(1); see also § 15.04[3] above.*

A party opposing an increase in the number of allowable depositions and interrogatories should focus on the purpose of the limits imposed by the rules: to control costs and delays associated with discovery. *See Fed. R. Civ. P. 1, 26(b).*

PRACTICE RESOURCES:

- *Bender's Federal Practice Forms* Form Nos. 30:5, 33:110.



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§ 16.08 Requiring Discovery Papers to Be Filed

Depositions, interrogatories, requests for admission, and requests for documents or to permit entry on land are not filed with the court unless ordered by the court. A party may bring a motion requiring that these documents be filed. *See Fed. R. Civ. P. 5(d)(1).*

PRACTICE RESOURCES:

- *Bender's Federal Practice Forms* Form No. 5:70.
- *Fed. R. Civ. P. 5(d)(1)* (discovery papers generally not filed).



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§ 16.09 Authorizing Discovery Prior to Rule 26(f) Planned Meeting

Discovery may be initiated prior to the *Fed. R. Civ. P. 26(f)* planning meeting if all parties stipulate to the expedited discovery. *See Fed. R. Civ. P. 26(d)*, *29*; *see also § 15.04[1] above*. Otherwise, a party may make a motion to seek expedited discovery prior to the meeting. *See Fed. R. Civ. P. 26(d)*; *see also § 4.04[1]*, *above*.

Circuit Split:

Courts have applied different standards for the motion to seek expedited discovery, *e.g.*:

1. Requiring the movant to show "good cause" for expedited discovery. *See, e.g., Yokohama Tire Corp. v. Dealers Tire Supply, Inc., 202 F.R.D. 612, 614 (D. Ariz. 2001)* (adopting "good cause" standard);

2. Applying a more stringent standard that resembles the test for granting a preliminary injunction. *Notaro v. Koch, 95 F.R.D. 403, 405 (S.D.N.Y 1982)* (movant must show (1) irreparable injury, (2) some probability of success on the merits, (3) some connection between the expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted); and

3. A combination of approaches 1 and 2. *See, e.g., Entm't Tech. Corp. v. Walt Disney Imagineering, Inc., 2003 U.S. Dist. LEXIS 19832, at *12 (E.D. Pa. 2003)* (applying good cause standard of #1 unless circumstances are such that the *Notaro* factors of #2 apply).

A showing, by an opposing party, that expediting discovery will not appreciably benefit the administration of the case and may cause harm to a party may convince the court that there is no good cause for expediting discovery. *See Semitool, Inc. v. Tokyo Electron Am., 208 F.R.D. 273, 277-278 (N.D. Cal. 2002)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.121.*
- *Bender's Federal Practice Forms* Form No. 26:300.
- *Fed. R. Civ. P. 26(d)* (timing and sequence of discovery).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.10

§ 16.10 Setting Timing or Sequence of Discovery

Normally, a party may employ any method of discovery in any desired sequence, and the fact that one party is conducting discovey does not serve to delay another party's discovery. *See Fed. R. Civ. P. 26(d)(2).* A party may make a motion, however, to restrict the sequence or timing of discovery "for the parties' and witnesses' convenience and in the interests of justice." *See Fed. R. Civ. P. 26(d)(2); Shoen v. Shoen, 5 F.3d 1289, 1301-1302 (9th Cir. 1993)* (Kleinfield, J. concurring).

A court may determine whether to grant a motion to restrict the timing or sequence of discovery based on a balancing of hardships. *See Rebel Oil Co. v. Atlantic Richfield Co., 133 F.R.D. 41, 45 (D. Nev. 1990)* . A party bringing or opposing such a motion should explain in the motion papers the hardship it may endure if the motion is not decided in its favor.



Strategic Point--Defendant:

Restricting the sequence of discovery can be particularly desirable for a defendant when the plaintiff's liability case is likely to be defeated on summary judgment and the discovery into damages would be burdensome. In some cases, preventing damages discovery until after summary judgment is decided can save a significant amount of time and money for all parties.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.122.*
- *Fed. R. Civ. P. 26(d)* (timing and sequence of discovery).



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§ 16.11 Altering Time to Respond to Written Discovery Demands

A party may move the court to modify the 30-day deadline for responding to discovery if that party first sought an extension of time via stipulation and was refused. *See Fed. R. Civ. P. 33(b)(2), 34(b)(2)(A), 36(a)(3)*; *see also § 15.04[2] above* .

When considering whether to seek an order shortening time for a discovery response, be sure to have propounded the discovery demand as soon as practicable after learning of the need for the information. A court may be disinclined to shorten time for discovery responses when the demand was not propounded in a timely manner. *See, e.g., Worldwide Forest Prods., Inc. v. Winston Holding Co., 1997 U.S. Dist. LEXIS 23368, at *4 (N.D. Miss. 1997)*

If the moving party seeks to shorten time for a discovery response, the opposing party may oppose the motion by establishing that the moving party had ample time and opportunity to propound the discovery earlier.

If the moving party seeks to extend time to respond, the opposing party may oppose the motion by showing that the moving party had ample opportunity to respond, either by showing previously allowed extensions, or by showing the limited amount of discovery sought. *See DePew v. Hanover Ins. Co., 76 F.R.D. 8, 9 (E.D. Tenn. 1976)* . A court also will consider the resources available to the moving party to prepare the responses prior to the existing or proposed deadline. *See Fed. R. Civ. P. 26(b)(2)(C).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 33.120, 34.13[1], 36.11[1].*
- *Bender's Federal Practice Forms* Form Nos. 33:101, 33:310, 33:312, 36:21.



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.12

§ 16.12 Extending Discovery Cut-Off On Showing of Good Cause

If discovery needs to be taken after the discovery cut-off date, and a stipulation to that effect is refused, the party seeking additional discovery must file a motion to extend the cut-off date. The motion must establish good cause. *See Fed. R. Civ. P. 16(b)(4)*. Good cause can be established by showing diligence in seeking the discovery. *See, e.g., AMS Staff Leasing v. Starving Students, 2004 U.S. Dist. LEXIS 26201, at *2 (N.D. Tex. 2004)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 16.14*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.03*.
- *Fed. R. Civ. P. 16(b)(4)* (modifying schedule).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.13

§ 16.13 Requiring Physical or Mental Examination, and Preparation of Resulting Report

A party may move the court for an order directing the physical or mental examination of an opposing party when the physical or mental condition of the opposing party is in controversy. *See Fed. R. Civ. P. 35(a).*

The examined party may request a report prepared by the examiner. If this report is not forthcoming, the examined party may move for an order for such relief as is just, including an order that the examiner's testimony be excluded at trial. *See Fed. R. Civ. P. 35(b)(5).*

For discussion of requests for physical or mental examinations, see Ch. 11 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 35.02 -35.12.*
- *Bender's Federal Practice Forms* Form Nos. 35:1-35:6.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.05.*
- *Fed. R. Civ. P. 35* (request for physical or mental examination).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.14

§ 16.14 Withdrawing or Amending Admission

If a responding party believes that a previous admission made pursuant to a request for admission is incorrect or incomplete, the party may move to withdraw or amend it. *See Fed. R. Civ. P. 36(b).*

For discussion of requests for admission, *see* Ch. 13 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.13.*
- *Bender's Federal Practice Forms* Form No. 36:22.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.08.*
- *Fed. R. Civ. P. 36* (requests for admission).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.15

§ 16.15 Ordering Deposition of Person Confined in Prison

If a witness is confined in prison, a party may take the deposition of that witness only after the party obtains leave of court to do so. *See Fed. R. Civ. P. 30(a)(2)(B).*

For discussion of oral depositions, *see* Ch. 8 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.05[1][a].*
- *Bender's Federal Practice Forms* Form No. 30:6.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04.*
- *Fed. R. Civ. P. 30(a)(2)(B)* (deposition of prisoner).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.16

§ 16.16 Ordering That Deposition Be Taken Before Action or Pending Appeal

If it is necessary to take a deposition of a witness before an action has been filed, the person seeking to take the deposition may file a verified petition in the district of the residence of the expected adverse party seeking to perpetuate the testimony. *See Fed. R. Civ. P. 27(a).*

Similarly, if the case is on appeal, a party may petition the district court in which the judgment was rendered to order the perpetuation of testimony to use in the event of further proceedings in the district court. *See Fed. R. Civ. P. 27(b).*

For discussion of perpetuation under Rule 27, *see* Ch. 10 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 27.11, 27.30.*
- *Bender's Federal Practice Forms* Form Nos. 27:1, 27:2, 27:100.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.10.*
- *Fed. R. Civ. P. 27* (deposition to perpetuate testimony).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.17

§ 16.17 Compelling Discovery on Party's Motion

A party that has propounded discovery may file a motion to compel responses when the recipient of the discovery requests fails to respond. *See Fed. R. Civ. P. 37(a)(3)(B)*. A motion to compel also may be filed by the propounding party if responses to discovery are evasive or incomplete. *See Fed. R. Civ. P. 37(a)(4)*.

If a court denies a motion to compel, the court may enter a protective order under Rule 26(c) limiting the allowable discovery. *See Fed. R. Civ. P. 37(a)(5)(B)*; *see also § 16.22 below* (discussing types of relief available through protective order).



Strategic Point:

In opposing a motion to compel, consider including an argument supporting the need for a protective order. *See § 16.34[2] below*. Review the possible types of relief available through a protective order, to determine if one or more would be helpful. For example, if the propounding party has sought to compel responses to a set of interrogatories, and answering the interrogatories would reveal a trade secret, the responding party may seek a protective order requiring that the trade secret not be revealed, or be revealed only in a specified way. *See Fed. R. Civ. P. 26(c)(1)(G)*.

For discussion of motions to compel, *see* Ch. 17 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.01 -37.23*.
- *Bender's Federal Practice Forms* Form Nos. 37:1-37:81.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11*.

- *Fed. R. Civ. P. 37(a)* (motion for order compelling disclosure or discovery).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.18

§ 16.18 Limiting Discovery Through Protective Order

A recipient of a discovery request may move for a protective order to bar or place limits or restrictions on the discovery sought. *See Fed. R. Civ. P. 26(c)*; *see §§ 16.23 -16.30 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.100 -26.108*.
- *Bender's Federal Practice Forms* Form Nos. 26:100-26:200.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04*.
- *Fed. R. Civ. P. 26(c)* (protective orders).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.19

§ 16.19 Seeking Sanctions Against Another Party

In addition to seeking attorney's fees, a party may move for additional sanctions against another party. Additional sanctions include fact, issue and claim preclusion. *See Fed. R. Civ. P. 37(d)(3).*

A court may award sanctions for various types of misconduct, including the following:

1. Failure to comply with an order that a party provide or permit discovery, including answering written or oral depositions, answering interrogatories, or responding to a request for inspection. *See Fed. R. Civ. P. 37(a), (b).*

2. Failure to comply with an order that a party submit to a mental or physical examination. *See Fed. R. Civ. P. 35(a), 37(b).*

3. Failure to comply with pre-trial orders and protective orders. *See Fed. R. Civ. P. 16(b), (c), 26(c), (f), 37(b)(2).*

4. Failure to supplement disclosure or amend prior discovery responses. *See Fed. R. Civ. P. 26(e), 37(c).*

5. Failure to appear at a deposition after proper notice. *See Fed. R. Civ. P. 37(d).*

6. Failure to serve answers or objections to interrogatories after proper service, or failure to serve a written response after proper service of the request. *See Fed. R. Civ. P. 37(d).*

For discussion of sanctions, *see* Ch. 18 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* Ch. 37.

- *Bender's Federal Practice Forms* Rule 37.
- *Moore's AnswerGuide: Federal Civil Motion Practice §§ 6.12-6.19.*
- *Fed. R. Civ. P. 37* (failure to make disclosures or to cooperate in discovery; sanctions).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.20

§ 16.20 Checklist for Evaluating Grounds for a Protective Order

☐ On receipt of discovery requests, determine whether grounds for a protective order exist, including whether the request results in unnecessary annoyance, embarrassment, oppression, or undue burden or expense. *See § 16.21 below*.

☐ If grounds for a protective order exist, determine the type of relief to be sought, including, but not limited to the following:

- ○ Order forbidding disclosure or discovery. *See § 16.23 below*.
- ○ Imposition of specified terms and conditions of discovery. *See § 16.24 below*.
- ○ Stay of discovery. *See § 16.24[4] below*.
- ○ Prescribing particular method for discovery. *See § 16.25 below*.
- ○ Limitation on scope of discovery. *See § 16.26 below*.
- ○ Excluding a particular person from attending a deposition. *See § 16.27 below*.
- ○ Sealing discovery materials. *See § 16.28 below*.
- ○ Limiting discovery of trade secrets or other confidential information. *See § 16.29 below*.

- Ordering parties to simultaneously file information under seal. *See § 16.30 below*.

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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.21

§ 16.21 Considering Options and Strategy for Protective Orders

On receipt of discovery requests, a party should determine whether good cause exists to relieve it from complying with the requests, or some part of them, because of "annoyance, embarrassment, oppression, or undue burden or expense." *See Fed. R. Civ. P 26(c)(1)*. When such good cause exists, the responding party should consider seeking a protective order.

If a discovery request seeks information that is beyond the scope of discovery, is privileged, or constitutes a trade secret or other confidential information, the responding party may seek a protective order barring or limiting the requested discovery in some manner. *See Fed. R. Civ. P. 26(c)(1)*.

Also, it is appropriate to seek a protective order providing that a particular method of discovery be used in place of the method selected by the propounding party. *See Fed. R. Civ. P. 26(c)(1)(C)*.

Protective orders also may be obtained to specify the location, time or sequence that discovery may be had. *See Fed. R. Civ. P. 26(c)(1)(B)*.



Strategic Point:

Parties often serve objections first and then attempt to agree on limitations to discovery requests through the meet-and-confer process that precedes a motion to compel. The decision whether to preempt the motion to compel by a motion for a protective order is a strategic one. Filing a motion for a protective order means that the party does not have to wait for a motion to compel. This will move the case along and may help to dictate the schedule. The party seeking a protective order will also have the opportunity to frame the issues and to have the last word in the reply brief. On the other hand, objecting to discovery and going through the meet-and-confer process may lead to a negotiation of an advantageous agreement with the propounding party without the need for motion practice and the associated expense.



Warning:

Filing a motion for a protective order does not substitute for filing a written response to a discovery demand. In the absence of a written response, the missing objections may be deemed waived. *See Flaherty v. Seroussi, 209 F.R.D. 300, 304 (N.D.N.Y. 2002)* .

PRACTICE RESOURCES:

- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04.*
- *Fed. R. Civ. P. 26(c)* (protective orders).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.22

§ 16.22 Understanding Relief Available Through Protective Orders

A party seeking a protective order may request that discovery be restricted in any of the following ways:

1. To preclude certain discovery entirely.

2. To provide that disclosure or discovery be provided only on specified terms and conditions.

3. To exclude certain matters from being inquired into.

4. To limit the scope of the disclosure or discovery to certain matters.

5. To designate the person who may be present at a deposition.

6. To seal discovery, and provide the terms regarding who may view it and when it may be viewed.

7. To preclude entirely, or prescribe the terms for, discovery of trade secrets or other confidential research, development or commercial information.

8. To require parties to simultaneously file specified documents or information enclosed in sealed envelopes.

See Fed. R. Civ. P. 26(c)(1).

It is important to note that this list of available relief is not exclusive. A court may issue *any* order to protect against annoyance, embarrassment, oppression or undue burden or expense. *See Fed. R. Civ. P. 26(c)(1).*

Warning:

Even if a motion for protective order is denied in part or in whole, the court may order that a party or other person provide or permit discovery "on just terms." *See Fed R. Civ. P. 26(c)(2).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.101, 26.105.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04.*
- *Fed. R. Civ. P. 26(c)* (protective orders).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.23

§ 16.23 Blocking Discovery

[1] Court May Order That No Disclosure or Discovery Be Had

The district court is specifically authorized to issue an order that disclosure or discovery not be had. *See Fed. R. Civ. P. 26(c)(1)(A)*. In considering whether to forbid discovery, the court may consider:

1. Whether the particular discovery sought is irrelevant and not likely to lead to the discovery of admissible evidence;

2. Whether the sought discovery is privileged; and

3. Whether the sought discovery would interfere with constitutional or statutory rights.

See Phillips v. G.M.C., 307 F.3d 1206, 1211-1212 (9th Cir. 2002) ; *Killion v. Franklin Reg'l Sch. Dist., 2000 U.S. Dist. LEXIS 12687, at *3-*4 (W.D. Pa. 2000)* .

Rule 26(c)(1)(A) typically applies to the specific discovery request at issue in a motion. Courts seldom order that discovery not be taken at all. Instead, discovery normally is expected to go forward, with the parties asserting their objections to particular matters during the course of discovery. *See United States EEOC v. Caesars Entm't, Inc., 237 F.R.D. 428, 432 (D. Nev. 2006)* ; *Kaiser v. Mutual Life Ins. Co. of New York, 161 F.R.D. 378, 380 (S.D. Ind. 1994)* .

[2] Court May Forbid Depositions of Corporate Officers and Employees

Corporate deponents can utilize Rule 26(c)(1)(A) when a deposition is directed to the wrong individual in the corporation. For example, courts may grant a protective order denying a deposition when the noticed deposition is of a high-level or "apex" corporate officer who can establish a lack of any relevant knowledge. *See Kyle Eng'g Co. v. Kleppe, 600 F.2d 226, 231-232 (9th Cir. 1979)* ; *Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979)* ; *but see Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975)* (if defendant has personal knowledge of relevant events, "apex" status will not preclude the deposition). Also, by way of example, courts may grant a protective order denying a deposition of a subordinate employee when it is more appropriate to seek discovery from the employee's

supervisor who had direct responsibility for the matter in question. *See Kidd v. Taos Ski Valley, Inc., 88 F.3d 848, 853-854 (10th Cir. 1996)* .

[3] Court May Forbid Depositions of Adverse Counsel

[a] Party Seeking Deposition of Adverse Counsel Bears Burden of Showing Good Cause

Ordinarily, the burden of establishing good cause for a protective order is on the party seeking the protective order. However, when a party seeks to take a deposition of opposing counsel, most courts hold that the burden shifts to the party seeking the deposition to establish that counsel has information that is:

1. Not otherwise attainable;

2. Non-privileged;

3. Relevant; and

4. Crucial to the preparation of the case.

See Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986) (leading case); *see also § 8.05[3] above* (rules on deposition of adverse counsel)

When the party seeking deposition of opposing counsel cannot satisfy this burden, opposing counsel may seek a protective order to block the deposition. *See Caterpillar Inc. v. Friedmann, 164 F.R.D. 76, 78 (D. Or. 1995)* .

Warning:

Even if the party seeking to depose opposing counsel does satisfy this burden, the court may issue a limited protective order limiting the duration and scope of the questioning. *See American Cas. Co. v. Krieger, 160 F.R.D. 582, 591 (S.D. Cal. 1995)* .

[b] No Block When Exception to Privilege Applies

A confidential communication between an attorney and an actual or prospective client is privileged when the communication is made for the purpose of securing an opinion of law, legal services, or assistance in some legal proceeding. *See § 3.37 above* (discusing of scope of attorney-client privilege). If, however, an exception to the attorney-client privilege applies, such as when an attorney was retained in furtherance of a crime or fraud, the privilege does not apply and discovery may be obtained from the attorney. *See United States v. Hodge & Zweig, 548 F.2d 1347, 1355 (9th Cir. 1977)* .

[c] No Block When Privilege Is Waived

If the client waives the privilege, expressly or impliedly, such as by asserting ineffective assistance of counsel in a habeas proceeding, the court will not issue a protective order to prevent disclosure of those matters relevant to the matter for which the client has waived privilege. *See, e.g., Bittaker v. Woodford, 331 F.3d 715, 716 (9th Cir. 2003)* .

Warning:

Despite a waiver of privilege, the court may, and in some cases must, limit the use of the otherwise privileged communications for any purpose other than the litigated matter before the court. *See Bittaker v. Woodford, 331 F.3d 715, 717, 728 (9th Cir. 2003)* .

For discussion of waiver of privileges, *see* Ch. 3 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.105[2].*
- *Bender's Federal Practice Forms* Form Nos. 26:100-26:113.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04.*
- *Fed. R. Civ. P. 26(c)(1)(A)* (protective orders forbidding disclosure or discovery).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.24

§ 16.24 Specifying Terms and Conditions for Discovery

[1] Court May Limit Duration of Deposition

The Federal Rules generally provide that a deposition is limited to one day of seven hours. *See Fed. R. Civ. P. 30(d)(1).* A party may obtain a protective order, however, to limit the number of hours a deposition may last. *See Fed. R. Civ. P. 26(c)(1)(B).*

[2] Court May Set Sequence of Discovery

A party may obtain a protective order to designate the timing and sequence of discovery. *See Fed. R. Civ. P. 26(c)(1)(B).*

[3] Court May Order Accelerated Completion of Discovery

A court may set deadlines for the completion of discovery and order accelerated completion of discovery. *See Fed. R. Civ. P. 26(c)(1)(B).*

[4] Court May Order Stay of Discovery Pending Dispositive Motion

A court may stay discovery pending the outcome of a dispositive motion or other determination or when discovery on one issue would obviate the need for discovery on other issues. Dispositive motions that would obviate the need for discovery may include:

1. Motions to dismiss. *See, e.g., B.R.S. Land Investors, 596 F.2d 353, 356 (9th Cir. 1979)* ;

2. Motions for summary judgment. *See, e.g., Landry v. Air Line Pilots Ass'n Int'l AFL-CIO, 901 F.2d 404, 436 (5th Cir. 1990)* ; and

3. Motions to determine governmental immunity. *See, e.g., Anderson v. Creighton, 483 U.S. 635, 646 n.6, 107 S. Ct. 3034, 97 L. Ed. 2d 523* .

The factors a court considers in determining whether to stay discovery pending the outcome of a motion include:

1. The type of motion and whether it is a challenge as a matter of law or to the sufficiency of the allegations;

2. The nature and complexity of the action;

3. Whether counterclaims or crossclaims have been interposed;

4. Whether some or all defendants have joined in the request to stay discovery;

5. The expected extent of discovery in light of the number of parties; and

6. Any other relevant circumstances.

See Skellup Indus. Ltd. v. City of Los Angeles, 163 F.R.D. 598, 601 (C.D. Cal. 1995) .

[5] Court May Order Stay of Discovery Pending Outcome of Parallel Criminal or Civil Proceeding

A court may stay discovery pending outcome of a parallel criminal or civil proceeding if the discovery is likely to interfere with the parallel criminal or civil investigation. *See United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1144 (9th Cir. 1998)* .

In making the determination, the court balances the harm from stay of discovery against the need for discovery, based on the following considerations:

1. The extent to which the defendant's *Fifth Amendment* rights are implicated;

2. The interests of the plaintiff in proceeding expeditiously with the litigation or any particular aspect of it;

3. The potential prejudice of delay;

4. The burden that any particular aspect of the proceeding may impose on the defendant;

5. The convenience of the court in management of its cases and the efficient use of judicial resources;

6. The interests of persons not party to the litigation; and

7. The interest of the public in the pending civil and criminal litigation.

See Federal Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902-903 (9th Cir. 1989) .

[6] Court Order Required to Conduct Discovery Following Automatic Stay of Discovery Pending Ruling on Motion to Dismiss in Securities Fraud Class Actions

In securities fraud class action lawsuits brought pursuant to the Securities Act of 1933 (*see 15 U.S.C. § 77z-1*) or the Securities Exchange Act of 1934 (*see 15 U.S.C. § 78u-4*), all discovery and other proceedings are stayed pending the disposition of any motion to dismiss, unless the court finds, on the motion of any party, that particularized discovery is

necessary to preserve evidence or to prevent undue prejudice to that party. *See 15 U.S.C. §§ 77z-1(b)(1), 78u-4(b)(3)(B).*

[7] Court May Designate Place for Deposition

The party noticing a deposition designates the location of the deposition in the deposition notice, subject to the court's power to grant a protective order. *See Fed. R. Civ. P. 26(c)(1)(B), 30(b)(1); Payton v. Sears, Roebuck & Co., 148 F.R.D. 667, 669 (N.D. Ga. 1993)* (deposing party ordinarily may set place for deposition, subject to court's power to grant protective order designating different place); *see also* § *8.09[2] above* .

If the deponent seeks a protective order seeking to change the location selected by the deposing party, the court will generally recognize the presumption that the deposition should take place at the deponent's residence or place of business or employment, absent special circumstances, and order that the deposition be taken at or near the place of the deponent's residence or business. *See Berry v. Baca, 2002 U.S. Dist. LEXIS 15698, at *10 (C.D. Cal. 2002)* .

[8] Court May Order Payment of Expenses of Discovery

As a condition of obtaining discovery under *Fed. R. Civ. P. 26(c)(1)(B)*, the court may order that the party seeking discovery pay the expenses of obtaining the discovery. *See Penk v. Oregon State Bd. of Higher Educ., 816 F.2d 458, 468 (9th Cir. 1987)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.105[3].*
- *Bender's Federal Practice Forms* Form Nos. 26:120-26:126.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04.*
- *Fed. R. Civ. P. 26(c)(1)(B)* (protective orders specifying terms for disclosure or discovery).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.25

§ 16.25 Prescribing Discovery Method

[1] Court May Order That Certain Method of Discovery Be Used

Although the party seeking discovery typically selects the method of obtaining it, the court, on motion of the responding party, may order discovery by a "method other than the one selected by the party seeking discovery." *See Fed. R. Civ. P. 26(c)(1)(C).*

[2] Court May Order That Discovery Questions Be Propounded By Interrogatories, Not Deposition

In a complicated case, the court may issue a protective order prescribing that a party's questions seeking the bases of the opposing party's contentions may only be answered in response to properly prepared interrogatories, rather than in a deposition. *See McCormick-Morgan, Inc. v. Teledyne Indus., 134 F.R.D. 275, 288 (N.D. Cal. 1991) , rev'd on other grounds, 765 F. Supp. 611 (1991) .*

[3] Court May Order That Deposition Proceed on Written Questions

A party may move to convert a noticed oral deposition to a written deposition. *See Fed. R. Civ. P. 26(c)(1)(C), 31(a).* In determining such a motion, the court must exercise its discretion in a manner that does justice to both parties. *See Wheeler v. West Indies S.S. Co., 11 F.R.D. 396, 397 (S.D.N.Y. 1951) .*

The written deposition format is generally disfavored due to:

1. The lack of cross-examination;

2. The inability to evaluate deponent's credibility; and

3. The ability of counsel to assist with providing carefully-tailored answers.

See United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 753 F. Supp. 1158, 1163-1164 (S.D.N.Y. 1990) ; *see also* Ch. 9 *above.*



Strategic Point:

The court is more likely to order a written deposition when the issues to be discussed are narrow and straightforward and the hardships of taking an oral deposition are substantial. *See Mill-Run Tours, Inc. v. Khashoggi, 124 F.R.D. 547, 550 (S.D.N.Y. 1989)* .

[4] Court May Order That Deposition Be Taken Telephonically or Videotaped

On a showing of legitimate hardship, the court may consider ordering a deposition to be taken telephonically. *See Rehau, Inc. v. Colortech, Inc., 145 F.R.D. 444, 446-447 (W.D. Mich. 1993)* ; *but see United States v. $160,066.98 from Bank of Am., 202 F.R.D. 624, 629-630 (S.D. Cal. 2001)* (when authentication of documents is required, court will likely deny telephonic deposition); *see also § 8.13 above*.

When follow-up questions or the deponent's demeanor are critical, the court may order that the deposition be videotaped. *See Fed. R. Civ. P. 26(c)(1)(C), 30(b)(3)(A)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.105[4].*
- *Bender's Federal Practice Forms* Form Nos. 26:130-26:133.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04.*
- *Fed. R. Civ. P. 26(c)(1)(C)* (protective orders prescribing discovery method other than one selected by party seeking discovery).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.26

§ 16.26 Limiting Scope of Discovery

A party may seek an order that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters. *See Fed. R. Civ. P. 26(c)(1)(D).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.105[5].*
- *Bender's Federal Practice Forms* Form Nos. 26:140-26:142.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04.*
- *Fed. R. Civ. P. 26(c)(1)(D)* (protective orders forbidding inquiry into certain matters or limiting scope of disclosure or discovery).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.27

§ 16.27 Restricting Attendance at Deposition

[1] Protective Order Required to Exclude Persons From Deposition

Deposition witnesses are not subject to sequestration at a party's request. To exclude someone from a deposition, the party seeking exclusion must obtain a protective order on a showing of good cause. *See Fed. R. Civ. P. 26(c)(1)(E)*; *In re Terra Int'l, Inc., 134 F.3d 302, 306-307 (5th Cir. 1998)* .

[2] Order May Be Supported By Particular and Specific Showing of Facts

A party cannot establish the good cause showing required to obtain a protective order to exclude attendance at a deposition based on "stereotyped or conclusory statements." The motion must be supported by a "particular and specific showing of facts to establish the need to exclude the presence of the subject person." *See In re Terra Int'l, Inc., 134 F.3d 302, 306-307 (5th Cir. 1998)* .

[3] Examples of Orders Granted

Protective orders have been issued excluding persons, including parties, from attending depositions in order to:

1. Avoid intimidating the deponent in the case involving an alleged child abuse victim. *See, e.g., Bucher v. Richardson Hosp. Auth., 160 F.R.D. 88, 95 (N.D. Tex. 1994)* .

2. Avoid harassment at the deposition. *See, e.g., Galella v. Onassis, 487 F.2d 986, 997 (2d Cir. 1973)* .

3. Protect privacy interests, particularly involving allegations of sexual abuse. *See, e.g., Gottlieb v. County of Orange, 151 F.R.D. 258, 260 (S.D.N.Y. 1993)*

4. Protect prison safety when a prisoner's attendance at the deposition poses a security risk. *See, e.g., James v. Roberts, 163 F.R.D. 260, 262 (S.D. Ohio 1995)* .

5. Protect trade secrets. *See, e.g., Metal Foil Prods. Mfg. Co. v. Reynolds Metals Co., 55 F.R.D. 491,*

493-494 (E.D. Va. 1970) .

6. Avoid extreme anxiety to the deponent in an employment discrimination action. *See Tolbert-Smith v. Bodman, 253 F.R.D. 2, 4 (D.D.C. 2008)* (plaintiff's former supervisors were not permitted to attend plaintiff's deposition after plaintiff's psychiatrist testified their presence would cause plaintiff severe depressive stress possibly resulting in suicide, even though independent examiner testified that plaintiff did not have rational reason to fear supervisors).

Alternatively, a court may devise ways for the excluded parties to participate in the deposition outside the presence of the deponent if exclusion is based on the deponent's fear or anxiety about testifying in the presence of those persons. *See Tolbert-Smith v. Bodman, 253 F.R.D. 2, 4 (D.D.C. 2008)* (defendant's counsel was permitted to take 10 minute recess after every hour of deposition to consult with defendant's excluded representatives, as long as there was no physical contact or other interaction between plaintiff and representatives).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.105[6].*
- *Bender's Federal Practice Forms* Form Nos. 26:150-26:156.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04.*
- *Fed. R. Civ. P. 26(c)(1)(E)* (protective orders designating who may be present when discovery is conducted).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.28

§ 16.28 Ordering Discovery Records to Be Sealed

[1] Party May Move to Seal Depositions and Other Discovery Materials

A court may order that a deposition be sealed and opened only on court order. *See Fed. R. Civ. P. 26(c)(1)(F).*

Although the Federal Rules expressly mention sealing only with respect to depositions, a party may also seek a protective order sealing other types of discovery. *See, e.g., Empire Blue Cross & Blue Shield v. Janet Greeson's A Place for Us, Inc., 62 F.3d 1217, 1218 (9th Cir. 1995)* (noting that documents produced in discovery were sealed pursuant to protective orders).

[2] Party Must Establish Specific Harm or Prejudice to Overcome Presumption of Public Access to Discovery

Absent a court order to the contrary, the products of pretrial discovery are presumed public. *See San Jose Mercury News, Inc. v. United States Dist. Court, 187 F.3d 1096, 1103 (9th Cir. 1999)* . To overcome this presumption, the party seeking a protective order bears the burden of showing specific harm or prejudice that will result if discovery material is made public. *See Verizon Cal., Inc. v. Ronald A. Katz Tech. Licensing, L.P., 214 F.R.D. 583, 585 n.9 (C.D. Cal. 2003)* .

A particularized showing of "good cause" is required to keep documents attached to non-dispositive motion under seal; a party seeking to maintain the secrecy of documents attached to dispositive motions must show that "compelling reasons" support secrecy. *See Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1180 (9th Cir. 2006)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.105[7].*
- *Bender's Federal Practice Forms* Form Nos. 26:160-26:163.

- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04*.

- *Fed. R. Civ. P. 26(c)(1)(F)* (protective orders requiring that deposition be sealed and opened only on court order).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.29

§ 16.29 Limiting Disclosure of Trade Secrets or Other Information

[1] Court May Order Confidential Information Not Be Revealed or Revealed Only in Designated Way

A court may issue a protective order when a party seeks information constituting a trade secret, or other confidential research, development, or commercial information. *See Fed. R. Civ. P. 26(c)(1)(G)*. The court may order that the information not to be revealed or be revealed only in a designated way. *See Fed. R. Civ. P. 26(c)(1)(G)*.

[2] Moving Party Must Show Good Cause for Protection of Confidential Information

[a] Showing That Information Is Confidential

To establish that confidential information merits protection, the party seeking protection must show:

1. That the information is not known outside the business;

2. That the secret or other confidential information has not been disclosed to someone without obligation to maintain confidentiality; and

3. That the information is not publicly available.

See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002 (1984), 104 S. Ct. 2862, 81 L. Ed. 2d 815 .

The court may also consider:

1. The extent to which the information is known to employees and others involved in the business;

2. Measures taken to safeguard the information's secrecy;

3. The value of the information to the business and its competitors;

4. The amount of time, money and effort expended in development of the information; and

5. The ease or difficulty of duplicating or properly acquiring the information.

See Andrew Corp. v. Rossi, 180 F.R.D. 338, 341 (N.D. Ill. 1998) .

For further discussion of trade secret protection, *see* §§ *3.39*, *3.40 above*.

[b] Showing That Specific Prejudice or Harm Will Result in Absence of Protective Order

For each particular document a party seeks to protect, that party must show not only that the material contains confidential information, but also that revealing that information will cause specific prejudice or harm if no protective order is granted. *See Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003)* .

The allegations of harm must be substantiated with specific demonstrations of fact, preferably by affidavits and concrete examples. *See Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003)* .

[c] Mere Harm to Reputation Not Sufficient Basis to Provide Protection From Discovery

Although a party may consider information secret because its release may be embarrassing to, or may harm the reputation of that party, a court may decline to issue a protective order on this basis alone, particularly when a matter of public interest is involved. *See, e.g., Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179-1180 (6th Cir. 1983)* ("[s]imply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records").

[3] If Good Cause Is Established, Burden Shifts to Party Seeking Discovery

If the party seeking a protective order establishes good cause (e.g., the material is confidential and disclosure would harm the party), the party seeking discovery must establish that disclosure is relevant and necessary. Relevance and necessity must be supported by specifics, not conclusory allegations. *See Directv, Inc. v. Trone, 209 F.R.D. 455, 459-460 (C.D. Cal. 2002)* .

[4] Methods for Limiting Disclosure of Trade Secrets and Confidential Information

When determining the type of protection to afford a party's confidential information, the court will balance the risk of inadvertent disclosure of trade secrets and the risk of impairing the litigation process by denying discovery. *See Chan v. Intuit, Inc., 218 F.R.D. 659, 661 (N.D. Cal. 2003)* .

Types of protection the court may grant include:

1. Limiting access to counsel only. *See, e.g., Davidson Pipe Co. v. Laventhol & Horwath, 120 F.R.D. 455, 465 (S.D.N.Y. 1988)* .

2. Limiting access to counsel and party's expert witnesses. *See, e.g., Dynamic Microprocessor Assocs. v. E.K.D. Comp. Sales, 919 F. Supp. 101, 106 (E.D.N.Y. 1996)* .

3. Limiting access to counsel and restricting counsel's ability to represent the same type of entity for a specified period of time. *See, e.g., Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1345-1346 (7th Cir. 1986)* .

4. Limiting access to opposing party's expert witnesses and requiring opposing party to return

confidential documents at the close of litigation. *See, e.g., Miles v. Boeing Co., 154 F.R.D. 112, 115 (E.D. Pa. 1994)* .

5. Limiting access to an independent consultant. *See, e.g., Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1471 (9th Cir. 1992)* .

6. Limiting access only to outside counsel. *See, e.g., Chan v. Intuit, Inc., 218 F.R.D. 659, 661-662 (N.D. Cal. 2003)* .

7. Limiting use of confidential information to the particular lawsuit. *See, e.g., Dove v. Atlantic Capital Corp., 963 F.2d 15, 19 (2d Cir. 1992)* .

8. Prohibiting copying of confidential documents. *See, e.g., Citicorp v. Interbank Card Ass'n, 87 F.R.D. 43, 48 (S.D.N.Y. 1980)* .

9. Requiring a bond to protect against the risk of disclosure. *See, e.g., In re Remington Arms Co., 952 F.2d 1029, 1033 (8th Cir. 1991)* .

10. Maintaining a log of all persons who examine the confidential records, and the times and dates of their inspections. *See, e.g., Dynamic Microprocessor Assocs. v. E.K.D. Comp. Sales, 919 F. Supp. 101, 106 (E.D.N.Y. 1996)* .

11. Designating an attorney as custodian of all confidential records. *See, e.g., In re Remington Arms Co., 952 F.2d 1029, 1033 (8th Cir. 1991)* .

12. Requiring everyone who sees the confidential information to sign a confidentiality agreement. *See, e.g., In re Remington Arms Co., 952 F.2d 1029, 1033 (8th Cir. 1991)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.105[8].*
- *Bender's Federal Practice Forms* Form Nos. 26:170-26:183.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04.*
- *Fed. R. Civ. P. 26(c)(1)(G)* (protective orders regarding trade secret or other confidential information).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.30

§ 16.30 Ordering Parties to Simultaneously File Information Under Seal

A protective order may require that parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. *See Fed. R. Civ. P. 26(c)(1)(H).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.105[9].*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04.*
- *Fed. R. Civ. P. 26(c)(1)(H)* (protective orders regarding simultaneous filing of specified information or documents in sealed envelopes).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.31

§ 16.31 Checklist for Preparing Motion for Protective Order

☐ Follow general noticed motion procedure. *See § 16.35[1] below*.

☐ Make motion in a timely manner. *See § 16.35[2] below*.

☐ Determine proper court in which to bring motion. *See § 16.35[3] below*.

☐ Confer or attempt to confer with opposing counsel. *See § 16.34[1] below*.

☐ State grounds for protective order. *See § 16.35[5] below*.

- ○ Establish good cause by identifying specific harm or prejudice that would result in the absence of protective order.
- ○ Show that danger of harm or prejudice outweighs need for discovery.
- ○ Identify type of protection needed.

☐ Prepare affidavits by knowledgeable persons in order to establish good cause. *See § 16.35[5] below*.

☐ Attach certification that movant conferred or attempted to meet and confer in order to resolve dispute.

☐ Serve and file motion in accordance with federal motion practice, local rules and individual judge's rules.

☐ Include proposed order with motion. *See § 16.35[4] below*.

☐ **Search by Topic:** Civil Procedure > Discovery > Protective Orders



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.32

§ 16.32 Determining Whether to Object or Whether to Seek Protective Order

While it normally makes sense for the party responding to objectionable discovery to make objections in response to written discovery requests and wait until the propounding party brings a motion to compel responses, there are instances where the responding party would benefit from bringing a motion for protective order first.

Bringing a motion for protective order is an aggressive step, and signals that the responding party takes the objections seriously and has confidence in the legal support for the objections. Also, the responding party has the last word on the issue in its reply, in the absence of a court order permitting a surreply.

If the objectionable discovery is voluminous, it may be less time-consuming to prepare a motion for a blanket protective order than to prepare a written response containing numerous and repetitive objections.

In the case of a deposition, the party opposing the deposition does not have the opportunity to raise a written objection and should seek a protective order, either through stipulation or court order, prior to the deposition date, if the party believes that the deposition should not go forward or should be limited in some respect.

After the commencement of a deposition, a protective order may be issued only on a showing that the deposition is being taken in bad faith or in a manner that "unreasonably" annoys, embarrasses, or oppresses the deponent or party. *See Fed. R. Civ. P. 30(d)(3)(A).*

PRACTICE RESOURCES:

- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04.*
- *Fed. R. Civ. P. 26(c)* (protective orders).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.33

§ 16.33 Determining Who May Seek Protective Order

[1] Parties May Move for Protective Order Pertaining to Discovery or Disclosure

Parties may obtain protective orders for:

1. Mandatory disclosure required under *Fed. R. Civ. P. 26(a)(1)* (*see § 4.07 above*).

2. Any type of d iscovery request, including oral or written depositions, interrogatories, requests for admissions, requests for production or inspection, and requests for physical or mental examinations. *See Fed. R. Civ. P. 26(c), 30(d)(3).*

[2] Subpoenaed Nonparties May Seek Protective Order

Subpoenaed nonparties may obtain protection from subpoena under *Fed. R. Civ. P. 26(c)* and *Fed. R. Civ. P. 45*, regarding subpoenas. *See § 14.16 above.*

[3] Third Parties Must Intervene To Assert Rights Under Protective Order

A protective order generally binds nonparties as well as parties, even when the nonparty is not named in the protective order. *See Quinter v. Volkswagen of Am., 676 F.2d 969, 972 (3d Cir. 1982)* .

A party seeking a protective order may assert its own rights, but generally may not assert the rights of third parties to protect the third parties' proprietary or confidential business information. *See Burton Mech. Contractors, Inc. v. Foreman, 148 F.R.D. 230, 234 (N.D. Ind. 1992)* . The affected third party must intervene in the lawsuit to protect the information that is in the possession of the litigant. *See Blum v. Schlegel, 150 F.R.D. 38, 38-39 (W.D.N.Y. 1993)* ; *see also Fed. R. Civ. P. 24* (intervention).

Exception:
In private securities actions subject to the Private Securities Litigation Reform Act (PSLRA), all discovery is stayed during the pendency of a motion to dismiss, unless the court finds, on the motion of

any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party. *15 U.S.C. § 78u-4(b)(3)(B)*. In such actions, a party may seek to block third-party subpoenas until motions to dismiss have been denied. *See Powers v. Eichen, 961 F. Supp. 233, 236 (S.D. Cal. 1997)* ("[b]y its language, the Reform Act addresses "all discovery" with no distinction between that sought from nonparties as opposed to parties").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.102[1].*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04.*
- *Fed. R. Civ. P. 24* (intervention).
- *Fed. R. Civ. P. 26(c)* (protective orders).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.34

§ 16.34 Evaluating Methods for Obtaining Protective Order

[1] Stipulating to Protective Order

In many cases, the parties may be able to stipulate to a protective order, particularly when the party seeking discovery wishes to avoid delays, uncertainties and costs associated with pursuing a motion to compel or opposing a motion for protective order. *See San Jose Mercury News, Inc. v. United States Dist. Court, 187 F.3d 1096, 1098 n1 (9th Cir. 1999)* .

Even if attempts to stipulate to a protective order are unsuccessful, the process of attempting to secure one satisfies the meet-and-confer requirements requisite to filing a motion for protective order. *See Fed. R. Civ. P. 26(c).*



Strategic Point:

Stipulating to a protective order has the advantage of allowing the parties to draft the order themselves and therefore insure that provisions important to them are included.



Warning:

Some courts have ruled that even if the parties agree that a protective order be entered, they still have the burden of showing that good cause exists for issuance of that order. Furthermore, in deciding whether to issue a stipulated protective order, some courts insist that the district court must independently determine if good cause exists, because the parties are generally in a non-adversarial situation. *See, e.g., Jepson, Inc. v. Makita Elec. Works, Ltd., 30 F.3d 854, 858-859 (7th Cir. 1994)* (good cause did not exist for parties' stipulated confidentiality order); *Cumberland Packing Corp. v. Monsanto Co., 184 F.R.D. 504, 506 (E.D.N.Y. 1999)* (district court refused to approve proposed stipulated protective order, which stated that it would be applicable to all discovery material as well as testimony adduced at trial, matters in evidence, and other information either party designated as confidential material).

[2] Requesting Protective Order in Opposition to Motion to Compel

A party faced with a Rule 37(a) motion to compel discovery or mandatory disclosure who objects to the motion on the ground that it would cause annoyance, embarrassment, oppression, or undue burden or expense, may file a cross-motion for a protective order. *See, e.g., Johnson v. Wayne Manor Apartments, 152 F.R.D. 56, 57 (E.D. Pa. 1993)* (defendants combined cross-motion for protective order with response to plaintiff's motion to compel). For discussion of motions to compel, *see* Ch. 17 *below*.

[3] Bringing Motion for Protective Order

If the parties refuse to stipulate to a protective order, the party from whom discovery is sought may bring a motion for protective order. *See Fed. R. Civ. P. 26(c)(1)*; *see also § 16.35 below* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.103, 26.104.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04.*
- *Fed. R. Civ. P. 26(c)* (protective orders).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.35

§ 16.35 Moving for Protective Order

[1] Motion for Protective Order Must Follow Noticed Motion Procedure

A party filing a motion for protective order must follow the notice procedures set out in the Federal Rules of Civil Procedure, local rules, and judge's standing orders, if any. *See Fed. R. Civ. P. 6(c), 7(b)(1), 26(c).*



Warning:

District courts often have additional local requirements, as do individual judges, as reflected in their standing orders.

[2] Motion for Protective Order Must Be Timely

Although *Fed. R. Civ. P. 26(c)* does not specifiy a time limit for filing a motion for protective order, courts require that the motion be timely or reasonable. *Nestle Foods Corp. v. Aetna Cas. and Sur. Co., 129 F.R.D. 483, 487 (D.N.J. 1990)* (defendant's motion filed two months after discovery was due was not timely).



Timing:

A motion for protective order is timely if it is made prior to the date set for production. *See Berry v. Baca, 2002 U.S. Dist. LEXIS 15698, at *9 (C.D. Cal. 2002)* . A motion to block or narrow the scope of an oral deposition is timely when it is filed and protective order obtained prior to the commencement of the deposition. *See Pioche Mines Consol., Inc. v. Dolman, 333 F.2d 257, 269 (9th Cir. 1964)* (construing former Civil Rule regarding protective orders for depositions).



Warning:

The mere filing of a motion is insufficient to relieve the deponent from the obligation to appear at the deposition. *See B.C.I. Communication Sys., Inc. v. Bell Atlanticom Sys., Inc., 112 F.R.D. 154, 159 (N.D. Ala. 1986)* .

Exception:

A court may excuse an untimely-filed motion for protective order for good cause. *See Berry v. Baca, 2002 U.S. Dist. LEXIS 15698, at *9 (C.D. Cal. 2002)* . For example, good cause has been found when:

1. There was no opportunity to move for a protective order. *See, e.g., Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 414 (M.D.N.C. 1991)* .

2. The party sought in good faith to negotiate a stipulated protective order. *See, e.g., Nestle Foods Corp. v. Aetna Cas. & Sur. Co. 129 F.R.D. 483, 487 (D.N.J. 1990)* .

[3] Motion Must Be Filed in Proper District

A motion for protective order may be filed in either:

1. The court in which the action is pending; or

2. On matters relating to a deposition, in the district where the deposition is to be taken.

See Fed. R. Civ. P. 26(c)(1).

[4] Proposed Order Should Be Submitted

Along with the motion, the moving party should submit a proposed order. Otherwise, the court may enter an order that does not contain provisions that may be important to the moving party.

[5] Requirements for Burden of Proof Must Be Satisfied by Party Seeking Protective Order

The court may only grant a protective order on a showing of good cause. *See Fed. R. Civ. P. 26(c)(1).* The limitation on discovery must be supported by a "strong showing" for limitation and a "particular and specific need for the protective order." *See Methode Elecs., Inc. v. Finisar Corp., 205 F.R.D. 552, 554 (N.D. Cal. 2001)* .

The party seeking the protective order bears the burden of demonstrating good cause for each particular document or matter for which protection is sought. *See Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003)* .

A party must make a showing of specific prejudice or harm that would result if no protective order is granted. *See McCoy v. Southwest Airlines, 211 F.R.D. 381, 386 (C.D. Cal. 2002)* .

Broad allegations of prejudice or harm are insufficient; the motion must be supported by specific examples or articulated reasoning. *See Beckman Indus., Inc. v. International Ins. Co., 966 F.2d 470, 476 (9th Cir. 1992)* .



Strategic Point:

The moving party should use affidavits from knowledgeable people to show good cause. *See Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 412-413 (M.D.N.C. 1991)* . If the specific facts alleged in the affidavit contain confidential information or trade secrets, the court may review the affidavit *in camera*. *See Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 412-413 (M.D.N.C. 1991)* .

[6] After Good Cause Is Shown, Court Must Balance Hardship Against Need for Discovery

Once the party seeking a protective order establishes good cause, the court must balance hardship to the party seeking the protective order against public and private interests to decide whether a protective order is necessary. *See Phillips v. G.M.C., 307 F.3d 1206, 1211 (9th Cir. 2002)* .

In addition, the court must balance the public interest in obtaining access to the discovery materials against the litigant's interest in withholding the materials from discovery. *See, e.g., In re Eli Lilly & Co., Prozd Prods. Liab. Litig. 142 F.R.D. 454, 458 (S.D. Ind. 1992)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.101 -26.104.*
- *Bender's Federal Practice Forms* Form Nos. 26:100-26:200.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04.*
- *Fed. R. Civ. P. 26(c)* (protective orders).

[7] Appellate Review of Protective Orders

Like other types of discovery orders, protective orders are not appealable as final decisions. *See, e.g., Truckstop.net, LLC v. Sprint Corp., 547 F.3d 1065, 1067 (9th Cir. 2008)* (general rule is that discovery orders are interlocutory and nonappealable under *28 U.S.C. § 1291*); *Glenmede Trust Co. v. Thompson, 56 F.3d 476, 482 (3d Cir. 1995)* (appellate court exercised mandamus jurisdiction). Nor is a grant or denial of a protective order usually appealable under the collateral order doctrine. *See, e.g., Coleman v. American Red Cross, 979 F.2d 1135, 1138 (6th Cir. 1992)* (plaintiffs could not have appealed protective order at time it was issued, so appellate court could properly consider assigned errors on appeal on the merits).

On final review, the decision of a trial judge to enter or deny a protective order under Rule 26(c) is reviewed for abuse of discretion. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 28 F.3d 1388, 1394 (5th Cir. 1994)* (protective order is reviewed only for an abuse of discretion).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 202.11[2], 204.06[1], 206.05.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04.*
- *Fed. R. Civ. P. 26(c)* (protective orders).



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§ 16.36 Checklist for Opposing Motion for Protective Order

☐ Follow procedures for opposing a noticed motion. *See § 16.38[1] below*.

☐ Refute showing of good cause. *See § 16.38[2] below*.

☐ Show that relevance and need for discovery outweigh potential harm to party seeking protection. *See § 16.38[3] below*.

☐ Serve and file opposition to motion in accordance with federal motion practice, local rules and individual judge's rules.

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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.37

§ 16.37 Considering Options and Strategies for Opposing Motion

When opposing a motion for protective order, the propounding party should emphasize to the court the nature of the moving party's requested limitations and the difficulties that those limitations will impose on the propounding party's ability to successfully litigate its case. The propounding party should establish that the sought discovery is relevant and necessary to the issues in the case and that the moving party's bases for "good cause" are insufficient.

To the extent that the moving party has legitimate bases for establishing good cause, the propounding party must establish that the need for full discovery outweighs the purported harm by showing that the purported harm is minimal or that the risk of harm is slight.

The propounding party may further its argument by describing any voluntary restrictions it offered to the moving party during meet-and-confer efforts, the manner in which the offered restrictions would have alleviated the asserted harm and that the moving party rejected them.

The propounding party may consider submitting an alternative proposed protective order containing provisions that are more acceptable than those proposed by the moving party.

PRACTICE RESOURCES:

- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04*.
- *Fed. R. Civ. P. 26(c)* (protective orders).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.38

§ 16.38 Opposing Motion for Protective Order

[1] Party Opposing Motion Must Use Noticed Motion Procedure

Parties opposing a motion for a protective order must generally follow the notice procedures set out in the Federal Rules of Civil Procedure, local rules, and judge's standing orders, if any, for opposing a noticed motion. *See Fed. R. Civ. P. 6(c), 7(b)(1), 26(c).*

Warning:

Pay particular attention to local rules and individual judge's standing orders for additional requirements.

[2] Party Opposing Protective Order Should Refute Good Cause

The party opposing a request for protective order may refute good cause for the order by:

1. Establishing minimal risk of harm to the moving party if requested discovery is allowed. *See Nazomi Communications, Inc. v. Arm Holdings P.L.C., 2002 U.S. Dist. LEXIS 21400, at *8, *11 (N.D. Cal. 2002)* ;

2. Establishing minimal harm to the moving party if requested discovery is allowed. *See Pacific Lumber Co. v. National Union Fire Ins. Co., 220 F.R.D. 349, 351-352 (N.D. Cal. 2003)* ; or

3. Establishing lack of cognizable prejudice to the moving party if requested discovery is allowed. *See Pacific Lumber Co. v. National Union Fire Ins. Co., 220 F.R.D. 349, 353-354 (N.D. Cal. 2003)* .

[3] Party Opposing Protective Order May Defeat Motion on Showing of Relevance and Necessity of Requested Information

The party seeking discovery may defeat, or at least limit the reach of, a protective order by showing that the information is sufficiently relevant and necessary to the case to outweigh the harm disclosure would cause to the person from whom

the party is seeking the information. *Four Star Capital Corp. v. Nynex Corp., 183 F.R.D. 91, 110 (S.D.N.Y. 1997)* (after party seeking protective order has established good cause, burden shifts to party requesting discovery to demonstrate relevance and need).

[4] Nonparty May Oppose Protective Order on Public Interest Grounds

Because the products of pretrial discovery are presumptively public in the absence of a court order to the contrary, a nonparty may intervene in an action to refute a showing of good cause when the case involves a matter of public interest. *See San Jose Mercury News, Inc. v. United States Dist. Court, 187 F.3d 1096, 1100 (9th Cir. 1999)* .

[5] Prevailing Party May Recover Motion Expenses

When the court denies a motion for protective order, it may award to the prevailing party any expenses incurred in relation to opposing the motion, including attorney's fees. However, the court will not award expenses if it finds that filing the motion was substantially justified or that the circumstances make an award of expenses unjust. *See Fed. R. Civ. P. 37(a)(5)*; *see also § 17.10 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.101 -26.105*.
- *Bender's Federal Practice Forms* Form Nos. 26:106, 26:111, 26:112.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04*.
- *Fed. R. Civ. P. 26(c)* (protective orders).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.39

§ 16.39 Checklist for Modifying or Vacating Protective Order

☐ If you are nonparty to action in which protective order was entered, prepare timely motion to intervene. *See § 16.41[3] below*.

☐ If you are party to protective order, establish: *See § 16.41[4] below* .

- ○ Sufficient need for information.
- ○ Need for discovery outweighs potential harm to party seeking continued protection.

☐ If you are collateral litigant seeking to avoid duplicative discovery, establish to court that issued the protective order that: *See § 16.41[5] below*.

- ○ Protected material was not subjected to good cause analysis.
- ○ Protected material is relevant to collateral litigation.
- ○ Protected material is generally discoverable.
- ○ Relevance of protected discovery outweighs reliance interests of protected party.

☐ If, as collateral litigant, you obtain modification of protective order from issuing court, establish to collateral court that: *See § 16.41[5] below*.

- ○ Specific discovery sought is relevant to specific issues.
- ○ Specific material sought is discoverable.

☐ If you are nonparty seeking access, in matter of public interest, to matters filed under seal in court in a non-dispositive motion, show compelling reasons why material should be released. *See § 16.41[6] below*

☐ If you are party opposing modification of protective order: *See § 16.42 below*.

- ○ Establish good cause for specific materials to remain protected, particularly if case involves a blanket protective order or stipulated protective order.
- ○ Establish reliance on existence of protective order.
- ○ If sought discovery was filed in court under seal, show compelling reasons why sealed matters should not be revealed.

☐ **Search by Topic:** Civil Procedure > Discovery > Protective Orders



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.40

§ 16.40 Considering Circumstances for Modifying Protective Order

Various circumstances may call for modification of a protective order. For example:

1. A party to the litigation in which the protective order was issued may determine that the information previously blocked from discovery has become necessary and relevant to the litigation and that therefore the protective order must be modified to obtain the information.

2. A party to a collateral litigation may need access to material subject to the protective order.

3. A nonparty may seek access to the protected material when that material contains information that bears on a matter of public interest.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.106*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04*.
- *Fed. R. Civ. P. 26(c)* (protective orders).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.41

§ 16.41 Seeking Modification of Protective Order

[1] Court May Modify or Vacate Protective Order

The district court retains the power to modify or vacate a protective order after it has been entered. *See Verizon Cal., Inc. v. Ronald A. Katz Tech. Licensing, L.P., 214 F.R.D. 583, 585-586 (C.D. Cal. 2003)* . Modification may be sought even after the underlying suit has terminated. *See Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1128 (9th Cir. 2003)* .

Note, however, that once the underlying action has terminated, the court may not impose any new, affirmative requirements on the parties relating to discovery. *See Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1128 (9th Cir. 2003)* , *citing Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 781 (1st Cir. 1988)* .

[2] Both Parties and Nonparties May Seek Modification

A party or other person may seek to modify or vacate a protective order by noticed motion. *See Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1128 (9th Cir. 2003)* .

[3] Nonparty Must Intervene to Modify Protective Order

Nonparties have standing to seek modifications to protective orders in an effort to obtain access to information or judicial proceedings. *See, e.g., Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 787 (1st Cir. 1988)* (public interest group had standing to intervene in wrongful death action against tobacco company to obtain documents deemed confidential under protective order); *Pansy v. Borough of Stroudsburg, 23 F.3d 772, 777 (3d Cir. 1984)* (newspapers had standing to intervene in civil rights action by police chief after court sealed terms of settlement agreement). The correct procedure for a nonparty to challenge a protective order is a motion under *Fed. R. Civ. P. 24(c)* to intervene in the action in which the protective order was issued. *See, e.g., Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 896 (7th Cir. 1994)* (trial court properly permitted nonparties to intervene to challenge confidentiality order in pending action).

[4] Showing Required When Party to Protective Order Seeks Modification

When a party to a lawsuit in which a protective order was entered seeks to modify the protective order for private reasons, the court will perform a balancing test, taking into account such factors as:

1. Whether there is good cause for the modification;

2. The nature of the protective order;

3. The foreseeability of the requested modification at the time the order was entered; and;

4. Whether the parties and third parties relied on the protective order in producing information they would not otherwise have produced.

See, e.g., Bayer AG v. Barr Lab., Inc., 162 F.R.D. 456, 459 (S.D.N.Y. 1995) ; *Jochims v. Isuzu Motors, 145 F.R.D. 499, 501-502 (S.D. Iowa 1992)* .

[5] Showing Required When Collateral Litigant Seeks Modification

When a nonparty challenges a protective order to obtain information for use in collateral litigation, there are usually two competing interests: the privacy interests of the parties who, under the assurance of confidentiality provided by the protective order, fully disclosed information they might not otherwise have disclosed; and the interest of the third party and the courts in avoiding duplicative discovery in the collateral case. In striking a balance between these competing interests, most courts tip the balance in favor of avoiding duplicative discovery. *See, e.g., Jepson, Inc. v. Makita Elec. Works, Ltd,. 30 F.3d 854, 861 (7th Cir. 1994)* (district court erred in refusing to modify protective order when requesting party would have been forced to duplicate discovery already made and opposing party made no showing of prejudice). The court has broad discretion in determining whether the benefits of the requested modification outweigh the prejudice. *See, e.g., Grove Fresh Distribs. v. Everfresh Juice Co., 24 F.3d 893, 896 (7th Cir. 1994)* (much material produced in first action would be relevant and eventually discoverable in collateral action, and thus, nonparties were presumptively entitled to access). The Manual for Complex Litigation contains a list of issues the courts should consider in making this determination. *See Manual for Complex Litigation (4th ed.)* § 11.432.

When seeking modification of a protective order to avoid duplicative discovery in collateral litigation, the collateral litigant should demonstrate the relevance of the protected discovery to the collateral proceedings and its general discoverability in the collateral litigation. *Foltz v. State Farm Mut. Auto Ins. Co., 331 F.3d 1122, 1136 (9th Cir. 2003)* (sealed discovery documents attached to summary judgment motion were not entitled to protection).

[6] Showing Required by Nonparty in Matter of Public Interest

A nonparty seeking to modify a protective order to gain access to pretrial discovery or court documents should establish that the protective order was issued without a showing of good cause as to the particular materials sought. *See San Jose Mercury News, Inc. v. United States Dist. Court, 187 F.3d 1096, 1103 (9th Cir. 1999)* .

In determining whether good cause exists to shield discovery from nonparties seeking information in the public interest, courts may consider a variety of factors, including the following:

1. Whether disclosure will violate any public policy interests.

2. Whether the information is being sought for a legitimate purpose or an improper purpose.

3. Whether disclosure of the information will cause a party embarrassment.

4. Whether confidentiality is being sought over information important to public health and safety.

5. Whether the sharing of information among litigants will promote fairness and efficiency.

6. Whether a party benefiting from the order of confidentiality is a public entity or official.

7. Whether the case involves issues important to the public.

*See Kamakana v. City & County of Honolulu, 2002 U.S. Dist. LEXIS 26921, at *9 (D. Haw. 2002)* .

When a third party is seeking access to the discovered information, there is a difference between documents produced during discovery but never admitted into evidence, and documents that have become part of the trial record. Based on the strong presumption that materials introduced into evidence at trial should be made available for public access, references to confidential documents made in open court amount to publication of the material. A party's failure to object to the admission into evidence of materials subject to the non-disclosure provisions of the protective order, absent a court order sealing the record, waives any confidentiality treatment under the protective order. *See, e.g., Littlejohn v. BIC Corp., 851 F.2d 673, 678-680 (3d Cir. 1988)* (trial court properly permitted newspaper to intervene and obtain documents introduced at trial, which had been subject to confidentiality order during discovery). Documents that have been filed with the court on motions that are dispositive of the litigants' substantive rights, as opposed to discovery motions, may similarly be accessible by third parties. *Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1136 (9th Cir. 2003)* (once sealed discovery materials are attached to a dispositive motion, "they lose their status of being raw fruits of discovery," and are no longer entitled to protected status).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.106.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04.*
- *Fed. R. Civ. P. 26(c)* (protective orders).



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1-16 Moore's AnswerGuide: Federal Discovery Practice § 16.42

§ 16.42 Opposing Modification to Protective Order

On receiving a motion to modify a protective order, counsel for the responding party should consider possible grounds for opposing modification, depending on the type of modification sought. *See § 16.41 above*. If good cause was not required to be shown when the protective order was first entered, the party who later seeks to prevent disclosure of the information generally bears the burden of showing good cause for the protective order. *Longman v. Food Lion, Inc., 186 F.R.D. 331, 333 (M.D.N.C. 1999)* . If good cause was shown initially, however, the party seeking to modify the order generally must show good cause. *See Bayer AG v. Barr Lab., 162 F.R.D. 456, 463-464 (S.D.N.Y. 1995)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.106*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.04*.
- *Fed. R. Civ. P. 26(c)* (protective orders).



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Chapter 17 COMPELLING DISCOVERY BY MOTION

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§ 17.syn Synopsis to Chapter 17: COMPELLING DISCOVERY BY MOTION

§ 17.01 Procedural Context--Compelling Discovery by Motion

§ 17.02 Checklist for Moving to Compel Mandatory Disclosure or Discovery

§ 17.03 Attempting to Resolve Discovery Disputes Informally

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§ 17.06 Bringing Motion to Compel

[1] Meeting Good Faith Requirement to Confer or Attempt to Confer

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[9] Courts Use Broad Standard to Determine Relevance of Pretrial Discovery

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§ 17.07 Checklist for Opposing Motion to Compel Mandatory Disclosure or Discovery

§ 17.08 Opposing Motion to Compel

§ 17.09 Checklist for Expense-Shifting Sanctions on Motion to Compel Mandatory Disclosure or Discovery

§ 17.10 Seeking Court Award of Reasonable Expenses

[1] If Motion for Order Compelling Disclosure or Discovery Is Granted

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[3] If Motion for Order Compelling Disclosure or Discovery Is Granted in Part and Denied in Part

[4] Due Process Requires Opportunity to Be Heard

[5] Rebuttable Presumption Favors Party Seeking Expense-Shifting Sanctions

[6] Moving Party May Recover Attorney's Fees Incurred in Requesting Expense-Shifting Sanctions

§ 17.11 Checklist for Opposing Expense-Shifting Sanctions on Motion to Compel

§ 17.12 Opposing Expense-Shifting Sanctions on Motion to Compel

[1] If Moving Party Prevails, Responding Party May Raise Failure to Make Good-Faith Effort at Informal Resolution

[2] If Moving Party Prevails, Responding Party May Raise Substantial Justification

[3] If Responding Party Prevails, Moving Party May Raise Substantial Justification

[4] Unsuccessful Party May Raise Other Circumstances That Render Imposition of Sanctions Unjust

[5] Substantial Justification Is Determined By Objective Standard

[6] Amount of Sanctions Request Must Be Reasonable



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Chapter 17 COMPELLING DISCOVERY BY MOTION
PART A: PROCEDURAL CONTEXT

1-17 Moore's AnswerGuide: Federal Discovery Practice § 17.01

§ 17.01 Procedural Context--Compelling Discovery by Motion

If an opposing party fails to meet its disclosure or discovery obligations (e.g., by failing to answer a discovery request), the motion to compel can be a useful tool. Through Rule 37(a), a party may obtain a court order requiring the noncomplying party to meet its obligations. The motion to compel should only be used after the parties have had an opportunity to informally resolve the dispute.

Prior to filing a motion to compel, counsel should first weigh the importance of the disputed discovery matter against the cost and delay of bringing the motion. Only the party seeking discovery may move to compel compliance with a discovery request.

The more targeted the discovery request is, the more likely the court will side with the requesting party in compelling discovery. Alternatively, if the discovery request is unreasonable or obtainable from another source, the court is more likely to deny the motion.

As a general rule, courts do not like to deal with discovery motions, and strongly prefer attorneys to work through discovery issues on their own. It is best not to bring a motion to compel unless the motion serves a significant function in preparation of the case for settlement or trial.



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Chapter 17 COMPELLING DISCOVERY BY MOTION
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1-17 Moore's AnswerGuide: Federal Discovery Practice § 17.02

§ 17.02 Checklist for Moving to Compel Mandatory Disclosure or Discovery

☐ Determine if grounds for motion to compel mandatory disclosure exist. *See §§ 17.05[1], 17.06[4] below.*

☐ Determine if grounds for motion to compel discovery exist. *See §§ 17.05[2], 17.06[4] -[8]* below.

☐ Consider whether motion is advisable, with respect to potential costs and delay. *See § 17.03 below.*

☐ Follow meet-and-confer requirements. *See §§ 17.03, 17.06[1] below.*

☐ If appropriate, prepare motion and serve papers. *See § 17.06 below.*

☐ Include the following allegations in the moving papers:

- ○ The court has jurisdiction.
- ○ The moving party has the right to bring the motion.
- ○ The moving party made a good-faith effort at a resolution of issues, etc.
- ○ The information sought is discoverable.
- ○ The motion is timely.

- ○ Reasonable notice was given.

☐ Follow local rules regarding motion procedures.

☐ **Search by Topic:**

- ○ Civil Procedure > Discovery > Motions to Compel
- ○ Civil Procedure > Disclosures > Motions to Compel



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1-17 Moore's AnswerGuide: Federal Discovery Practice § 17.03

§ 17.03 Attempting to Resolve Discovery Disputes Informally

[1] Parties Should Attempt to Clarify Discovery Requests Informally

Parties should attempt informally to resolve disputes concerning the scope of discovery requests. Consultation between attorneys often results in punctual delivery of clearly discoverable information pursuant to an appropriately framed discovery request.

A party served with an ambiguous or unclear interrogatory or document request should contact the propounding attorney for clarification, rather than simply objecting. Similarly, a party served with an interrogatory or document request that it considers overly broad, partially irrelevant, or unduly burdensome should contact the propounding attorney in an attempt to reach an agreement reducing the scope of the request.

Any agreement clarifying a discovery request should be reduced to writing. Furthermore, if there is a meaningful chance that the response to an interrogatory might be used at trial, the clarification should be set forth in a revised interrogatory.



Strategic Point:

Counsel should focus on the need for the requested discovery and minimize name-calling and personal attacks on the motives of the opposing side. Courts see an enormous number of motions to compel and are generally not receptive to an argument devoted primarily to the accusation that the other side is hiding and deceiving. If the other side is indeed hiding or deceiving, counsel can place those issues in a separate sanctions motion (*see* Ch. 18 *below*) and concentrate in the motion to compel on why the material or information targeted for discovery is both important and within the scope of discovery. Counsel should make sure that the motion is not susceptible to being read as motivated by the desire to inflict pain and burden on the other side, as opposed to a sincere need to obtain the requested discovery.

[2] Proceeding After Rejection of Informal Request for Clarification

If the propounding party rejects an informal request for clarification, the responding party should note that fact in its responses, set forth in good faith its understanding of the unclear terms, and then, on the basis of that understanding,

provide answers.

Similarly, if an informal request to narrow the scope of a document request is rejected, the responding party should note that fact, identify the scope of a request that it would consider appropriate, and then provide the documents responsive to that narrowed request.



Warning:

Counsel should consult local rules, which may contain specific requirements as to the manner and timing of informal resolution before a motion to compel can be filed. *See § 17.06[1] below*.

[3] Weighing Cost and Delay of Motion

Before filing a motion to compel, counsel should first weigh the importance of the disputed discovery matter against the cost and delay of bringing the motion. Counsel should also consider how the motion would fit into the broader strategic context of the case.



Strategic Point--Moving Party:

A motion to compel would most likely be filed when the information to be disclosed might be helpful to the party seeking the disclosure, but not to the party required to make it. When the information sought is more likely to be helpful to the party with the duty to disclose, the more effective enforcement mechanism is the court's power under *Fed. R. Civ. P. 37(c)(1)* to preclude use of the information that was not disclosed. *See Fed. R. Civ. P. 37(c)(1)*; *see also Fed. R. Civ. P. 37(a)*, Committee Note of 1993.

The more targeted the discovery request is, *i.e.*, with respect to specific individuals or time periods, the more likely the court will side with the requesting party in compelling discovery. The court ruling on the motion to compel has the discretion to narrow the requests rather than sustain the responding party's objections to them completely. In doing so, the court effectively sustains an objection that the requests are vague, ambiguous, or overbroad in part, and overrules it in part. *See Green v. Baca, 219 F.R.D. 485, 490 (C.D. Cal. 2003)* (it is within the court's discretion "to narrow the requests rather than sustain the responding party's objections to them in toto").

PRACTICE RESOURCES:

- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11*.
- *Fed. R. Civ. P. 37(a)* (motion for order compelling disclosure or discovery).



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1-17 Moore's AnswerGuide: Federal Discovery Practice § 17.04

§ 17.04 Distinguishing Mandatory Disclosure Obligations Under Rule 26 From Discovery

In addition to its more customary use to compel a discovery response, the Rule 37(a) motion to compel may be used if a party "fails to make a disclosure required by Rule 26(a)". *Fed. R. Civ. P. 37(a)(3)(A)*; *see § 17.05[1] below*. Since 2000, Rule 26(a) has required parties to make three types of disclosures, without a formal request from other parties, at different stages in the litigation:

1. **Initial disclosures**, including information about individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses; documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses; claims and calculations of damages; and insurance coverage.

2. **Disclosure of expert testimony,** including information regarding the background and qualifications of expert witnesses, and the content of and bases for expert opinions.

3. **Final pretrial disclosures**, including identification of trial witnesses and exhibits, and designation of deposition testimony that will be used at trial.

See Fed. R. Civ. P. 26(a).

Note that the initial disclosure obligation only applies to information the disclosing party may use to support *its own claims or defenses*; it does not apply to information in opposition to the party's claims or defenses. The relevance standard for discovery is broader, generally permitting the discovery of any matter, not privileged, "that is relevant to the claim or defense of any party," and for good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. *Fed. R. Civ. P. 26(b)(1).*

For further discussion of mandatory disclosures, *see* Ch. 4 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.22*.
- *Federal Litigation Guide P 22.02[1]*.
- *Fed. R. Civ. P. 26(a)* (required disclosures).
- *Fed. R. Civ. P. 26(b)* (general scope of discovery).



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1-17 Moore's AnswerGuide: Federal Discovery Practice § 17.05

§ 17.05 Considering Orders Available Under Rule 37(a)

[1] Orders Concerning Mandatory Disclosures

If a party fails to make the mandatory disclosures required by Rule 26(a) (*see § 17.04 above*), any other party may bring a noticed motion to compel disclosure and for appropriate sanctions. *Fed. R. Civ. P. 37(a)(3)(A)*. Note however, that courts do not like to deal with discovery motions, and if a party fails to meet its Rule 26(a) disclosure obligations, an opposing party may still be able to obtain the Rule 26(a) information through discovery (e.g., through a Rule 34 request for documents on which damages computations are based).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.02[1].*
- *Federal Litigation Guide P 22.02[1].*
- *Bender's Federal Practice Forms* Form No. 37:1.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11.*
- *Fed. R. Civ. P. 37(a)* (motion for order compelling disclosure or discovery).

[2] Orders Concerning Discovery Responses

A party may apply for an order compelling discovery under any of the following circumstances:

1. If a deponent fails to answer a question propounded or submitted under *Fed. R. Civ. P. 30* or *31*, or provides an evasive or incomplete answer to such a question.

2. If a corporation or other entity fails to make a designation under *Fed. R. Civ. P. 30(b)(6)* or *31(a)*.

3. If a party fails to answer an interrogatory submitted under *Fed. R. Civ. P. 33*, or provides an evasive or incomplete answer to an interrogatory.

4. If a party, in response to a request for inspection submitted under *Fed. R. Civ. P. 34*, fails to respond that inspection will be permitted as requested, fails to permit inspection as requested, or otherwise provides an evasive or incomplete response to the request.

See Fed. R. Civ. P. 37(a)(3)(B), 37(a)(4).

Complete failure to respond with respect to (1) appearance at a party's own deposition, (2) interrogatories, and (3) requests for inspection is subject to the sanction provisions of *Fed. R. Civ. P. 37(d)*. For discussion of sanctions under Rule 37(d), see §§ *17.06[4], 18.18-18.22 below* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.02, 37.03.*
- *Federal Litigation Guide P 22.02[6].*
- *Bender's Federal Practice Forms* Form Nos. 37:10-37:33.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11.*
- *Fed. R. Civ. P. 37(a)* (motion for order compelling disclosure or discovery).
- *Fed. R. Civ. P. 37(c)(1)* (sanctions for failure to disclose or supplement).
- *Fed. R. Civ. P. 37(d)* (sanctions for party's failure to attend its own deposition, serve answers to interrogatories, or respond to a request for inspection).



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1-17 Moore's AnswerGuide: Federal Discovery Practice § 17.06

§ 17.06 Bringing Motion to Compel

[1] Meeting Good Faith Requirement to Confer or Attempt to Confer

A motion for an order to compel disclosure or discovery must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action. *Fed. R. Civ. P. 37(a)(1).*

Local rules often specify the effort needed to meet the good faith requirement. Some local rules direct the moving party to set up an informal conference with the other party to clarify the scope of discovery request and settle any disagreements regarding discovery. Some jurisdictions require an informal conference to take place in person or over the telephone. Jurisdictions may require more than the sending of a letter, e-mail, or series of facsimiles to satisfy the good faith requirement to "meet and confer". *See, e.g., Marion T, LLC v. Northwest Metals Processors, Inc., 2007 U.S. Dist. LEXIS 79799, at *3 (N.D. Ind. 2007)* (sending two letters to counsel is insufficient and does not satisfy the duty to confer).

A court may find that the party seeking discovery or disclosure did not confer or attempt to confer in good faith if the party did not provide opposing counsel with a reasonable amount of time to respond. *See Naviant Mktg. Solutions, Inc. v. Larry Tucker, Inc., 339 F.3d 180, 186-187 (3d Cir. 2003)* (counsel did not engage in a "good faith" attempt to obtain disclosure from opposing party when counsel denied request for more time to respond to interrogatories and threatened to file motion if deficiencies were not rectified within three days); *see also Use Techno Corportation v. Kenko USA, Inc., 2007 U.S. Dist. LEXIS 80006, at *4-*5 (C.D. Cal. 2007)* (leaving one message for plaintiffs' attorney before filing a motion to compel several hours later does not satisfy good faith requirement to confer or attempt to confer with opposing counsel).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.05[4].*
- *Federal Litigation Guide P 22.02[4].*

- *Bender's Federal Practice Forms* Form No. 37:2.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11.*
- *Fed. R. Civ. P. 37(a)(1)* (motion to compel must include certification re attempt to confer).

[2] Meeting Requirements for Notice and Timeliness

On a motion to compel disclosures or discovery under Rule 37(a), the movant must serve a notice of the hearing at least 14 days prior to the date set for that hearing, absent a contrary local rule. *Fed. R. Civ. P. 6(c)(1)*; *see also Fed. R. Civ. P. 7(b)(1)* (motion requirement). The party applying for an order to compel disclosure or discovery must give notice to the other parties, and to all other persons affected by the order. *Fed. R. Civ. P. 37(a)(1).*

Timing:

Although the Federal Rules of Civil Procedure do not impose time limits governing motions to compel, a local rule, order, or directive may impose such a limitation. Additionally, courts have discretion in deciding whether a motion to compel has been timely filed. *See, e.g., Public Loan Co. v. FDIC, 803 F.2d 82, 86 (3d Cir. 1986)* (denial of plaintiffs' motion to compel discovery when plaintiffs made no effort to begin discovery until nearly 90 days after discovery completion deadline and failed to comply in good faith with opponent's discovery requests was not abuse of discretion).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.05.*
- *Bender's Federal Practice Forms* Form No. 37:12.
- *Federal Litigation Guide P 22.02[2] , [3].*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11.*
- *Fed. R. Civ. P. 6(c)(1)* (notice of hearing on written motion).

[3] Moving Party Must Have Standing and Seek Relief From Proper Court

If a party fails to make a disclosure required by *Fed. R. Civ. P. 26(a)*, any other party may move to compel disclosure and for appropriate sanctions. *Fed. R. Civ. P. 37(a)(3)(A).*

With respect to a discovery request, however, only the party that propounded the request may move to compel compliance when:

1. A deponent fails to answer a question.
2. A corporation or other entity fails to make a required designation.
3. A party fails to answer an interrogatory.
4. A party fails to respond to a request for inspection.

See Fed. R. Civ. P. 37(a)(3)(B).

Absent a contrary local rule, standing order, or case-specific directive from the assigned judge, counsel must apply to the court for an order compelling disclosures or discovery by motion. The application for an order to compel disclosure or discovery to a party must be made to the court in which the action is pending. Similarly, an application for an order directed to a nonparty must be made to the court in the district where the discovery is being, or is to be, taken. *Fed. R. Civ. P. 37(a)(2).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.04.*
- *Federal Litigation Guide P 22.02[2] -[6].*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11.*
- *Fed. R. Civ. P. 37(a)(3)* (types of relief available through motion to compel).

[4] Evasive or Incomplete Disclosure, Answer, or Response Is Equivalent to Failure to Disclose, Answer, or Respond

An evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond. *Fed. R. Civ. P. 37(a)(4).* Nevertheless, counsel face different consequences for a complete failure to respond versus an incomplete response:

1. The party objecting to an incomplete response must move to compel an adequate response (*Fed. R. Civ. P. 37(a)(3), (a)(4)*); without a court order, sanctions are limited to expenses incurred in making the motion.

2. When the party completely fails to respond to discovery, and no motion for protective order is filed, the moving party has a broader array of sanctions available, without the need first to obtain a court order. *See Fed. R. Civ. P. 37(d)*; *see also* §§ *18.18-18.22 below* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.03.*
- *Federal Litigation Guide P 22.02[5] -[8].*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11.*
- *Fed. R. Civ. P. 37(a)(3)* (compelling disclosure and discovery response).
- *Fed. R. Civ. P. 37(a)(4)* (evasive and incomplete disclosures).

[5] Using Motion When Deponent Fails to Answer Oral Deposition Questions

When a deponent refuses to answer a question on an oral deposition (*see* Ch. 8 *above*), the proponent of the question may complete or adjourn the examination before applying for an order to compel discovery. *Fed. R. Civ. P. 37(a)(3)(C).*

Exception:

A court may deny a motion to compel the deponent's answer to a question, if the deponent's failure to answer was necessary to preserve a privilege, enforce a court-ordered limitation, or present a motion for a protective order on the ground that the examination is being conducted in bad faith, or in a manner that unreasonably annoys, embarrasses, or oppresses either the deponent or a party. *Fed. R. Civ. P. 30(d)(1), (d)(3).*

Completing the remainder of the deposition is often advantageous for the following reasons:

1. The deponent has an opportunity to reconsider his or her position, and may later provide the answers.

2. The information later provided may lead the attorney conducting the deposition to conclude that there is no substantial need for answers to those unanswered questions.

3. A court looks more favorably on a motion to compel when it focuses on a few questions, rather than requests an open-ended order to compel questions not yet posed in subject areas not yet reached.

However, if a party or witness during an oral deposition refuses to answer a question, and if counsel for the examining party has made a good faith but unsuccessful attempt to resolve the matter without judicial intervention, then the examining party may:

1. Suspend the examination and move immediately for a court order to compel an answer.

2. Complete the examination regarding other matters, then move for a court order to compel an answer.

See Fed. R. Civ. P. 37(a)(3)(C).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 30.43[2], 37.02[3].*
- *Federal Litigation Guide P 22.01[3].*
- *Bender's Federal Practice Forms* Form Nos. 37:10-37:15.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11.*
- *Fed. R. Civ. P. 30* (oral depositions).
- *Fed. R. Civ. P. 37(a)(3)(C)* (regarding oral depositions).
- *Fed. R. Civ. P. 37(a)(4)* (evasive and incomplete answer is treated as a failure to answer).

[6] Using Motion When Deponent Fails to Answer Written Deposition Questions

A motion to compel may be used, after exhaustion of good-faith efforts to secure responses by conferring with opposing counsel, to require answers to written questions that are posed to a party or to a nonparty witness through a deposition by written questions. *Fed. R. Civ. P. 37(a)(3)(B)(i)*; *see Fed. R. Civ. P. 31*; *see also* Ch. 9 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.02[3].*
- *Federal Litigation Guide P 22.01[3].*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11.*
- *Fed. R. Civ. P. 31* (depositions by written questions).
- *Fed. R. Civ. P. 37(a)(3)(B)* (compelling discovery response).

[7] Using Motion When Party Fails to Designate Deponent

If a business entity or governmental agency served with a deposition fails to designate a deponent in accordance with *Fed. R. Civ. P. 30(b)(6)* or *31(a)(4)*, the discovering party may bring a motion to compel. *Fed. R. Civ. P. 37(a)(3)(B)(ii).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.02[2].*
- *Federal Litigation Guide P 22.01[4].*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11.*
- *Fed. R. Civ. P. 30(b)(6)* (oral deposition notice or subpoena directed to an organization).
- *Fed. R. Civ. P. 31(a)(4)* (written deposition questions directed to an organization).
- *Fed. R. Civ. P. 37(a)(3)(B)(ii)* (compelling discovery response).

[8] Using Motion When Party Fails to Respond to Interrogatories or Request for Production or Inspection

A party seeking discovery may make a motion to compel if:

1. A party fails to answer an interrogatory submitted under Rule 33; or

2. A party fails to respond that inspection will be permitted, or fails to permit inspection, as requested under Rule 34.

See Fed. R. Civ. P. 37(a)(3)(B)(iii), (a)(3)(B)(iv).

For purposes of the motion to compel, an evasive or incomplete answer or response is treated as a failure to answer or respond. *Fed. R. Civ. P. 37(a)(4).*

Note that a party who fails to respond or object within the proper time to interrogatories or a request for production or inspection is also subject to sanctions under Rule 37(d). *Fed. R. Civ. P. 37(d)*; *see §§ 18.18-18.22 below.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 33.140, 34.16[2], 37.02[4].*
- *Federal Litigation Guide P 22.01[5].*
- *Bender's Federal Practice Forms*, Form Nos. 34:10, 37:20-37:24, 37:30-37:33.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11.*
- *Fed. R. Civ. P. 37(d)* (party's failure to serve answers to interrogatories).

[9] Courts Use Broad Standard to Determine Relevance of Pretrial Discovery

In determining whether information is relevant for purposes of pretrial discovery, courts apply a substantially broader standard than that for relevance during trial. *See Fed. R. Civ. P. 26(b)(1)*; *see also § 17.05[2] above.*

Parties may generally obtain discovery regarding any matter relevant to the subject matter of the action. *Fed. R. Civ. P. 26(b)(1)*; *Breon v. Coca-Cola Bottling Co. of New England, 232 F.R.D. 49, 52 (D. Conn. 2005)* (relevance is broadly construed, and request for discovery should be considered relevant if there is any possibility that information sought may be relevant to claim or defense of any party); *Sheldon v. Vermonty, 204 F.R.D. 679, 689 (D. Kan. 2002)* (request for discovery should be allowed unless it is clear that information sought can have no possible bearing on the claim or defense of a party).

For good cause, the court may broaden the scope of discovery in a particular case to include "any matter to the subject matter involved in the action." *Fed. R. Civ. P. 26(b)(1).*

Warning: Consider Impact of Proportionality Requirement, Good-Faith Requirement, Applicable Privileges, and Work Product Protection.

Even if the material sought is within the broad scope of the potential reach of discovery, a request for discovery must also satisfy the separate and often more demanding proportionality requirements that are set forth in *Fed. R. Civ. P. 26(b)(2).*

Pursuant to the proportionality requirements of Rule 26(b)(2), a motion to compel must be denied if the party opposing discovery persuades the court that:

1. The discovery sought is unreasonably cumulative or duplicative;

2. The discovery sought can be obtained from some other source that is more convenient, less burdensome, or less expensive;

3. The party seeking the discovery has had ample opportunity to obtain the information by discovery in the action;

4. The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issues.

See Fed. R. Civ. P. 26(b)(2)(C).

In addition, pursuant to the good-faith requirements of Rule 26(g), a motion to compel must be denied if the party opposing the discovery persuades the court that:

1. The discovery sought is not warranted by existing law or a nonfrivolous argument for extending, modifying, or reversing existing law; or

2. The discovery has been sought for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

See Fed. R. Civ. P. 26(g)(1)(B).

A substantial percentage of motions to compel turn on resolution of disputes over assertions of privilege or work product protection; a motion to compel discovery generally will be denied if the materials sought are privileged or protected by the work product doctrine, irrespective of whether the materials fall within the broad definition of relevance. *See Fed. R. Civ. P. 26(b)(1), (b)(3).*

For further discussion of relevance and proportionality, *see* Ch. 2 *above*. For further discussion of privileges and work product protection, *see* Ch. 3 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.41 -26.53, 37.20 -37.23.*
- *Federal Litigation Guide P 22.04.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11.*
- *Fed. R. Civ. P. 26(b)* (discovery scope and limits).

[10] Discovery Rulings Reviewed Under Abuse of Discretion Standard

Trial courts have very broad discretion in discovery matters, including the determination as to whether the losing party on a motion to compel took a position that was substantially justified. However, a court's judgment must be made on sound legal principles. Appellate courts apply an "abuse of discretion" standard when reviewing ruling on motions to compel. *Petrucelli v. Bohringer and Ratzinger, 46 F.3d 1298, 1310-1311 (3d Cir. 1995)* (finding no abuse of discretion in denying motion to compel); *see also AHP Subsidiary Holding Co. v. Stuart Hale Co., 1 F.3d 611, 620 (7th Cir. 1993)* (conclusory denial of sanctions without explanation was abuse of discretion when record did not enable appellate court to review substance of decision).

Warning:

Note that discovery orders are generally not appealable. *Church of Scientology of Cal. v. United States, 506 U.S. 9, 18 n.11, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992)* ("As a general rule, a district court's order enforcing a discovery request is not a 'final order' subject to appellate review."); *see also 28 U.S.C. § 1291* (appeal of final decisions of district courts). The Supreme Court has expressly held, for example, that disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine. *Mohawk Industries, Inc. v. Carpenter, 175 L. Ed. 2d 458, 464, 2009 U.S. LEXIS 8942 (2009)* ("[p]ostjudgment appeals, together with other review mechanisms, suffice to protect

the rights of litigants and preserve the vitality of the attorney-client privilege").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.23*, 202.11[2].
- *Federal Litigation Guide P 22.07*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11*.



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Chapter 17 COMPELLING DISCOVERY BY MOTION
PART C: OPPOSING MOTION TO COMPEL MANDATORY DISCLOSURE OR DISCOVERY

1-17 Moore's AnswerGuide: Federal Discovery Practice § 17.07

§ 17.07 Checklist for Opposing Motion to Compel Mandatory Disclosure or Discovery

- ☐ Evaluate potential grounds for opposition. *See 17.08 below* .
  - ○ Information sought is not relevant.
  - ○ Proportionality factors favor denial of motion.
  - ○ Good-faith requirements favor denial of motion.
  - ○ Materials sought are privileged or protected by the work product doctrine.
- ☐ Determine whether to seek a protective order. *See § 17.08 below*.
- ☐ Follow local rules regarding motion procedures.
- ☐ **Search by Topic:**
  - ○ Civil Procedure > Discovery > Motions to Compel
  - ○ Civil Procedure > Disclosures > Motions to Compel

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Chapter 17 COMPELLING DISCOVERY BY MOTION
PART C: OPPOSING MOTION TO COMPEL MANDATORY DISCLOSURE OR DISCOVERY

1-17 Moore's AnswerGuide: Federal Discovery Practice § 17.08

§ 17.08 Opposing Motion to Compel

When responding to a Rule 37(a) motion to compel, counsel should follow the general procedures prescribed in local rules and the judge's standing order.

With regard to motions to compel *disclosure*, counsel should be prepared to show in the response papers that the material sought by the moving party is outside the scope of Rule 26(a) (e.g., the material will not be used to support the disclosing party's claims or defenses). *See Fed. R. Civ. P. 26(a)*; *see also § 17.04 above* .



Strategic Point:

Note that it probably won't make sense to oppose a motion for disclosure on the basis the mandatory disclosure wasn't required if the party can obtain the information with a discovery request (e.g., interrogatories or a request for production).

With regard to motions to compel *discovery*, counsel should be prepared to show in the moving papers that the material sought by the moving party is beyond the general scope and limitations on discovery set forth in *Fed. R. Civ. P. 26(b)*.

For example, a party opposing the motion may assert that the discovery sought does not meet the applicable relevance standard for pretrial discovery. Ordinarily, any discovery sought must be relevant to "any party's claim or defense." However, on a showing of good cause by the movant, the court may apply a more lenient relevance standard--that the discovery simply be relevant to "the subject matter involved in the action." *Fed. R. Civ. P. 26(b)(1)*; *see* § *17.06[9] above* ; *see also* Ch. 2 *above*.

Similarly, if privilege or work product protection applies to the material sought, the party opposing the motion should assert in the opposing papers that the materials are privileged or protected by the work product doctrine. *Fed. R. Civ. P. 26(b)(1), (b)(3)*; *see also* Ch. 3 *above*. A party resisting discovery on the ground that the material sought is privileged or constitutes work product bears the burden of proving that the asserted privilege or protection attaches. *See, e.g.*, *Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995)* (party asserting work product protection must prove doctrine's applicability). In some circumstances, courts will conduct in camera inspections of materials in order to rule on motions to compel that are opposed on grounds of privilege or work product. *See, e.g.,* *United States v. Zolin,*

491 U.S. 554, 572, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989) (party seeking in-camera inspection must make threshold showing of appropriateness).

A court will deny a motion to compel if the party opposing the discovery persuades the court that any of the following are true:

1. The discovery sought is unreasonably cumulative or duplicative;

2. The discovery sought is obtainable from a more convenient, less burdensome, or less expensive source;

3. The party seeking the discovery has had ample opportunity by discovery in the action to obtain the information sought; or

4. The burden or expense of the proposed discovery outweighs its likely benefit.

See Fed. R. Civ. P. 26(b)(2); *see also Fed. R. Civ. P. 26(g)(1)(B)(iii)* (also articulating burden and expense element); *see also* Ch. 2 *above*. Cost alone does not determine whether discovery will be limited. *See Standard Chlorine v. Sinibaldi, 821 F. Supp. 232, 262 (D. Del. 1992)* (in civil RICO action, defendants' contention that plaintiff's detailed request for production of docuemnts would entail significant legal and accounting fees was not sufficient to limit request). However the sheer magnitude of the discovery request may be enough to tip the scales in favor or limiting discovery. *See, e.g., Coleman v. American Red Cross, 23 F.3d 1091, 1098 (6th Cir. 1994)* (in action to recover damages resulting from HIV tainted blood transfusion, plaintiffs' request would have required American Red Cross to search every file at their national headquarters).

With regard to requests for electronically stored information, a court will deny a motion to compel if the party opposing the discovery persuades the court that the information is "not reasonably accessible because of undue burden or cost" and the requesting party fails to show good cause. *See Fed. R. Civ. P. 26(b)(2)(B)*; *see also* Ch. 6 *above*.

A court will deny a motion to compel if the party opposing the discovery persuades the court that either of the following is true:

1. The discovery sought is not warranted by existing law or a good-faith argument to change existing law; or

2. The discovery has been sought for an improper purpose, such as to harass or to cause unnecessary delay or needlessly to increase in the cost of litigation.

See Fed. R. Civ. P. 26(g)(1)(B)(iii).

The burden of establishing that the proportionality or good faith requirements have not been met should be placed on the party who opposes the discovery, provided that the movant has satisfied the court that the information sought meets the relevance requriements. *Fisher v. Nat'l R.R. Passenger Corp., 152 F.R.D. 145, 148-149 (S.D. Ind. 1993)* .

When determining motions to compel discovery in which the proportionality or good faith requirements are at issue, courts must often conduct a balancing analysis in which competing interests must be compared and weighed. These analyses must be case-specific; their outcome will be dictated not be simple formulae that apply rigidly in all cases, but by careful examination of the totality of the specific circumstances presented in the particular case. Rulings from other cases, decided in different procedural, factual, and legal settings, offer only limited guidance to attorneys and judges who are involved in motions to compel.



Strategic Point:

The party opposing the motion to compel should explain any concerns of substance based on the sensitive nature of the discovery sought, and propose any palliative measures that would address those concerns. For example, a party opposing a motion to compel may also seek a protective order in the event that the motion to compel is granted. *See, e.g., Molski v. Franklin, 222 F.R.D. 433, 436 (S.D. Cal. 2004)* . For discussion of protective orders, *see* Ch. 16 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.101 -26.108*, *37.21*, *37.22[2][d]*.
- *Federal Litigation Guide PP 22.02[8.-2]*, *22.04*, *22.05[6]*.
- *Bender's Federal Practice Forms* Form Nos. 26:100 et seq., 37:40-37:60.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11*.
- *Fed. R. Civ. P. 26(b)(1)* (general scope of discovery).
- *Fed. R. Civ. P. 26(b)(2)* (limitations on frequency and extent of discovery).
- *Fed. R. Civ. P. 26(b)(3)* (work product doctrine).
- *Fed. R. Civ. P. 26(c)* (protective orders).
- *Fed. R. Civ. P. 37(a)(5)* (payment of expenses; protective orders).



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Chapter 17 COMPELLING DISCOVERY BY MOTION
PART D: SEEKING EXPENSE-SHIFTING SANCTIONS ON MOTION TO COMPEL MANDATORY DISCLOSURE OR DISCOVERY

1-17 Moore's AnswerGuide: Federal Discovery Practice § 17.09

§ 17.09 Checklist for Expense-Shifting Sanctions on Motion to Compel Mandatory Disclosure or Discovery

☐ When motion to compel mandatory disclosure or discovery is granted, request sanctions against party opposing the motion. *See § 17.10[1] below*.

- ○ Prepare documentation for costs incurred in bringing motion. *See § 17.10[1] below*.
- ○ Prepare documentation for attorney's fees being requested. *See § 17.10[6] below*.
- ○ Note that opposing party may rebut presumption in favor of expense shifting sanctions by demonstrating that (1) movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (2) opposing party's nondisclosure, response, or objection was substantially justified, or (3) other circumstances make an award of expenses unjust. *See § 17.10[1] below*.

☐ When motion to compel mandatory disclosure or discovery is denied, request sanctions against party bringing motion. *See § 17.10[2] below*.

- ○ Prepare documentation for costs incurred in bringing motion. *See § 17.10[2] below*.
- ○ Prepare documentation for attorney's fees being requested. *See § 17.10[6] below*.
- ○ Note that party bringing motion may rebut presumption in favor of expense shifting sanctions by demonstrating that (1) motion was substantially justified; or (2) other circumstances make an award of expenses unjust. *See § 17.10[2] below*.

☐ When motion to compel mandatory disclosure or discovery is granted in part and denied in part, request sanctions against party opposing the motion. *See § 17.10[3] below*.

- ○ Prepare documentation for costs incurred in bringing motion. *See § 17.10[3] below*.
- ○ Prepare documentation for attorney's fees being requested. *See § 17.10[6] below*.
- ○ Note that opposing party may rebut presumption in favor of expense shifting sanctions by demonstrating that (1) movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (2) opposing party's nondisclosure, response, or objection was substantially justified, or (3) other circumstances make an award of expenses unjust. *See § 17.10[1] below*.

☐ **Search by Topic:**

- ○ Civil Procedure > Discovery > Motions to Compel
- ○ Civil Procedure > Disclosures > Motions to Compel



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Chapter 17 COMPELLING DISCOVERY BY MOTION
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1-17 Moore's AnswerGuide: Federal Discovery Practice § 17.10

§ 17.10 Seeking Court Award of Reasonable Expenses

[1] If Motion for Order Compelling Disclosure or Discovery Is Granted

If the motion for an order compelling disclosure or discovery is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court must, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising the conduct, or both of them, to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that:

1. The motion was filed without a prior good-faith effort to obtain the disclosure or discovery without court action; or

2. The opposing party's nondisclosure, response, or objection was substantially justified; or

3. Other circumstances make an award of expenses unjust.

See Fed. R. Civ. P. 37(a)(5)(A).

The court may award sanctions even without finding "bad faith." *Green v. Baca, 225 F.R.D. 612, 614 (C.D. Cal. 2005)* . However, the party against whom an award of expenses is sought has the burden of showing the special circumstances that make his or her failure to comply substantially justified. *Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 784 (9th Cir. 1983)* .

Counsel should first contact opposing counsel to see if he or she will voluntarily reimburse you (though this will probably not work). If you elect to file a motion, state that you have attempted to resolve the issue without court intervention and include the number of hours, costs, etc. that were incurred because of opponent's delay. Do not engage in name-calling or hyperbole. Be forthright and concise.

When it grants a motion to compel, the court may also enter any protective order authorized under Rule 26(c). *See Fed.*

R. Civ. P. 26(c)(1) (authorizing court to issue protective order on its own motion); *see also* Ch. 16 *above*.

[2] If Motion for Order Compelling Disclosure or Discovery Is Denied

If the motion for an order compelling disclosure or discovery is denied, the court may enter any protective order authorized under *Fed. R. Civ. P. 26(c)*. The court must, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. *Fed. R. Civ. P. 37(a)(5)(B)*.

[3] If Motion for Order Compelling Disclosure or Discovery Is Granted in Part and Denied in Part

If a motion to compel disclosure or discovery is granted in part and denied in part, the court may enter any protective order authorized under *Fed. R. Civ. P. 26(c)*. The court may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion. *Fed. R. Civ. P. 37(a)(5)(C)*.

[4] Due Process Requires Opportunity to Be Heard

Before imposing expense-shifting sanctions on a party who unsuccessfully made or opposed a motion to compel mandatory disclosures or discovery, a court must afford the persons or parties to be sanctioned an opportunity to be heard. *See Fed. R. Civ. P. 37(a)(5)(A), (a)(5)(B)*.

Courts may comply with the requirement for an opportunity to be heard by either of the following procedures:

1. An oral hearing on adequate notice.

2. Consideration of written submissions from the affected parties.

See Fed. R. Civ. P. 37(a)(4), Committee Note of 1993.

[5] Rebuttable Presumption Favors Party Seeking Expense-Shifting Sanctions

A rebuttable presumption favors imposing expense-shifting sanctions on the party against whom a motion to compel disclosures or discovery is resolved. *See Fed. R. Civ. P. 37(a)(5)(A)*; *see also Fed. R. Civ. P. 37*, Committee Note of 1970.

[6] Moving Party May Recover Attorney's Fees Incurred in Requesting Expense-Shifting Sanctions

Attorney's fees incurred in preparing a request for expense-shifting sanctions are recoverable. An award of attorneys' fees includes the costs and fees for paralegals, and out-of-pocket expenses, such as expenses regarding travel, telephone, mailing, copying and computerized legal research. *Sure Safe Indus. Inc. v. C & R Pier Mfg., 152 F.R.D. 625, 626 (S.D. Cal. 1993)* (attorney's fees incurred in requesting expense-shifting sanctions, such as paralegal fees and costs, and out-of-pocket expenses are recoverable).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.23*.
- *Federal Litigation Guide P 22.05*.

- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11.*
- *Fed. R. Civ. P. 26(c)* (protective orders).
- *Fed. R. Civ. P. 37(a)(5)* (payment of expenses; protective orders).



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Chapter 17 COMPELLING DISCOVERY BY MOTION
PART E: OPPOSING EXPENSE-SHIFTING SANCTIONS ON MOTION TO COMPEL MANDATORY DISCLOSURE OR DISCOVERY

1-17 Moore's AnswerGuide: Federal Discovery Practice § 17.11

§ 17.11 Checklist for Opposing Expense-Shifting Sanctions on Motion to Compel

☐ If position on motion to compel is unsuccessful, oppose imposition of expense-shifting sanctions based on the following grounds:

- ○ The unsuccessful position was substantially justified. *See § 17.12[2], [3], [5] below*.
- ○ Other circumstances make the imposition of sanctions unjust. *See § 17.12[4] below*.
- ○ The prevailing party did not make a good-faith attempt at resolving the issues. *See § 17.12[1] below*.
- ○ The amount requested is excessive. *See § 17.12[6] below*.

☐ **Search by Topic:**

- ○ Civil Procedure > Discovery > Motions to Compel
- ○ Civil Procedure > Disclosures > Motions to Compel



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Chapter 17 COMPELLING DISCOVERY BY MOTION
PART E: OPPOSING EXPENSE-SHIFTING SANCTIONS ON MOTION TO COMPEL MANDATORY DISCLOSURE OR DISCOVERY

1-17 Moore's AnswerGuide: Federal Discovery Practice § 17.12

§ 17.12 Opposing Expense-Shifting Sanctions on Motion to Compel

[1] If Moving Party Prevails, Responding Party May Raise Failure to Make Good-Faith Effort at Informal Resolution

If the moving party prevails, the responding party may rebut the presumption in favor of the imposition of expense-shifting sanctions by demonstrating that the moving party failed to make a good-faith effort to obtain the disclosure or discovery prior to filing the motion. *See Fed. R. Civ. P. 37(a)(5)(A)(i)*; *but see Green v. Baca, 225 F.R.D. 612, 614 (C.D. Cal. 2005)* (no rebuttal of presumption when responding party's conduct was ultimately responsible for extensive court intervention in the discovery process).

[2] If Moving Party Prevails, Responding Party May Raise Substantial Justification

If the moving party prevails, the responding party may rebut the presumption in favor of the imposition of expense-shifting sanctions by demonstrating that its nondisclosure, response, or objection was substantially justified. *See Fed. R. Civ. P. 37(a)(5)(A)(ii)*; *see also Calkins v. Pacel Corp., 2008 U.S. Dist. LEXIS 2258, at *8-*9 (W.D. Va. 2008)* (counterclaim defendants did not provide evidence to show that their failure to comply was substantially justified and thus were subject to imposition of sanctions).

[3] If Responding Party Prevails, Moving Party May Raise Substantial Justification

If the responding party prevails, the moving party may rebut the presumption in favor of imposition of expense-shifting sanctions by demonstrating that the motion was substantially justified. *See Fed. R. Civ. P. 37(a)(5)(B).*

[4] Unsuccessful Party May Raise Other Circumstances That Render Imposition of Sanctions Unjust

Regardless of who prevails, the unsuccessful party on the motion to compel may rebut the presumption in favor of the imposition of expense-shifting sanctions by demonstrating that other circumstances make an award of expenses unjust. *Fed. R. Civ. P. 37(a)(5)(A), (a)(5)(B).*

If the prevailing party also acted unjustifiably, a court might find that imposing sanctions against the unsuccessful party

would be unjust. *See Fed. R. Civ. P. 37*, Committee Note of 1970.

[5] Substantial Justification Is Determined By Objective Standard

A party meets the substantial justification standard by demonstrating that the dispute about the matter was "genuine," that is, reasonable lawyers could disagree about the appropriateness of the disputed position. *See Fed. R. Civ. P. 37*, Committee Note of 1970; *see also Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)* (establishing meaning of substantial justification within context of Equal Access to Justice Act); *see also JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs., 2005 U.S. Dist. LEXIS 16772, at *34 (S.D.N.Y. 2005)* (expenses are usually awarded "unless a court finds that the losing party acted justifiably in carrying his point to court").

[6] Amount of Sanctions Request Must Be Reasonable

The provisions for expense-shifting sanctions require that the recoverable expenses be reasonable. *See Fed. R. Civ. P. 37(a)(5)*. The unsuccessful party to a motion to compel mandatory disclosure or discovery may therefore raise the issue that the amount of expenses sought is unreasonable.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.23*.
- *Federal Litigation Guide P 22.06*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.11*.
- *Fed. R. Civ. P. 37(a)(5)* (payment of expenses).



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Chapter 18 SANCTIONS

1-18 Moore's AnswerGuide: Federal Discovery Practice 18.syn

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Chapter 18 SANCTIONS
PART A: PROCEDURAL CONTEXT

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.01

§ 18.01 Procedural Context--Discovery Sanctions

Fed. R. Civ. P. 37 provides a detailed roadmap for the remedies available when an adversary has not been forthcoming in meeting its disclosure or discovery obligations. Remedies offered by the rule include expenses and sanctions, some of which could be severe, including orders of preclusion and advice to the jury of the default.

Counsel should determine at the outset whether informal procedures are available, through the district or magistrate judge, to deal with discovery disputes without Rule 37 motion practice. Use of the informal procedures is far preferable for anything but the most egregious offenses. In fact, it is generally unrealistic to expect a formal Rule 37 motion will yield a result justifying the cost and time unless the adversary's conduct is inexcusable or a true obstacle to trial preparation.



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Chapter 18 SANCTIONS
PART B: SEEKING SANCTIONS FOR FAILURE TO COMPLY WITH ORDER COMPELLING MANDATORY DISCLOSURE OR DISCOVERY--RULE 37(b)

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.02

§ 18.02 Checklist for Requesting Imposition of Rule 37(b) Sanctions

☐ If court order for discovery disobeyed:

- ○ If disobedient person is nonparty deponent, move for contempt sanction. *See § 18.03[2] below*.
- ○ If disobedient person is party or party designee, determine which sanction to seek under Rule 37(b). *See § 18.03[3] below*.

☐ Follow local rules regarding meet-and-confer requirements.

☐ Follow local rules regarding discovery motions.

☐ Prepare motion and serve motion papers. *See § 18.05 below*.

☐ If monetary sanctions are requested, prepare documentation for the amount of sanctions requested, including:

- ○ Costs incurred due to the party's failure to obey the order. *See § 18.04[5] below*.
- ○ Attorney's fees. *See § 18.04[5] below*.



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Chapter 18 SANCTIONS
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1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.03

§ 18.03 Understanding Conduct Subject to Rule 37(b) Sanctions

[1] Rule 37(b) Sanctions Address Failure to Comply With Court Order

Rule 37 is the main provision in the Federal Rules of Civil Procedure addressing litigation abuse and sanctions in the context of discovery. Rule 37(b) focuses specifically on sanctions for *failure to comply with a court order* and provides for sanctions in connection with the following types of conduct:

1. Failure to obey the court's directives in connection with a deposition (e.g., refusing to be sworn in or refusing to answer questions). *See § 18.03[2] below*.

2. Failure to obey an order to provide or permit discovery. *See § 18.03[3], [4] below*.

3. Failure to comply with an order under Rule 35(a) requiring production of another person for mental or physical examination. *See § 18.03[5] below*.

Fed. R. Civ. P. 37(b)(1), (b)(2).

[2] Person Who Fails to Be Sworn or Deposed May Be in Contempt of Court

If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court. *Fed. R. Civ. P. 37(b)(1)*; *see also § 18.04[4] below*.

[3] Party Who Fails to Obey Discovery Order Is Subject to Sanctions

If a party fails to obey an order to provide or permit discovery or if a party fails to obey an order entered under *Fed. R. Civ. P. 26(f)* (regarding discovery conferences and planning for discovery), the court in which the action is pending may issue "further just orders". *Fed. R. Civ. P. 37(b)(2)*.

Note that a *Fed. R. Civ. P. 37(a)* motion to compel (*see* Ch. 17 *above*) is *not* a prerequisite to bringing a motion for Rule

37(b) sanctions. Sanctions are available if a party "fails to obey an order to provide or permit discovery." The order need not be a Rule 37(a) motion-to-compel order, nor must it be a written order. *Professional Seminar Consultants, Inc. v. Sino Am. Tech. Exch. Council, Inc. 727 F.2d 1470, 1474 (9th Cir. 1984)* (sanctions based on document falsification).

[4] Party's Representative or Designee Who Fails to Obey Discovery Order Is Subject to Sanctions

If an officer, director, or managing agent of a party, or a person designated under *Fed. R. Civ. P. 30(b)(6)* or *31(a)(4)* to testify on behalf of a party (*see* Chs. 8, 9 *above*), fails to obey an order to provide or permit discovery, the court in which the action is pending may make issue "further just orders." *Fed. R. Civ. P. 37(b)(2)*; *see DeVaney v. Continental Am. Ins. Co., 989 F.2d 1154, 1159 (11th Cir. 1993)* (sanctions were appropriately assessed under 37(b)(2) against parties when they deliberately defied court-ordered discovery requirements).

[5] Party Who Fails to Obey Order to Produce Another for Examination Is Subject to Sanctions Absent Showing of Inability

A party who has failed to comply with an order under *Fed. R. Civ. P. 35(a)* requiring that party to produce another for examination (*see* Ch. 11 *above*) is subject to issue preclusion, evidence preclusion, and termination sanctions under *Fed. R. Civ. P. 37(b)(2)(A)* unless the party failing to comply shows that the party is unable to produce the person for examination. *Fed. R. Civ. P. 37(b)(2)(B).*

[6] Pro Se Litigants May Be Sanctioned

Pro se litigants are subject to Rule 37(b) sanctions. However, the determination of appropriate sanctions will necessarily reflect the circumstances surrounding the party's conduct, including absence of counsel and unfamiliarity with procedures, in addition to the party's ability to comply with the order in question. *See Downs v. Westphal, 78 F.3d 1252, 1257 (7th Cir. 1996)* (sanctions proper when pro se litigant's communications with court made clear they understood orders and chose to defy them); *but see Porter v. Martinez, 941 F.2d 732, 733-734 (9th Cir. 1991)* (dismissal order vacated as too severe when homeless, indigent, and severely handicapped pro se plaintiff attempted to comply with massive discovery requests).

[7] Underlying "Order" Is Required

The requirement that there be some form of court order that has been disobeyed is an incontrovertible criterion for imposition of Rule 37(b)(2) sanctions. Rule 37(b)(2) has never been read to authorize sanctions for more general discovery abuse. *See, e.g., Brandt v. Vulcan, Inc., 30 F.3d 752, 756 (7th Cir. 1994)* (sanctions denied for lack of outstanding order); *Daval Steel Products, Div. of Francosteel Corp. v. M/V Fakredine, 951 F.2d 1357, 1364 (2d Cir. 1991)* (sanctions denied for lack of outstanding order).

[8] Court That Issued Order Determines Whether Order Was Violated

The court that issued the discovery order determines whether a party has violated that order. *United States v. National Med. Enters., Inc., 792 F.2d 906, 911 (9th Cir. 1986)* (district court has inherent power to dismiss action if party has willfully deceived the court).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.40 -37.44.*
- *Federal Litigation Guide PP 22.20, 22.22, 22.23.*

- *Bender's Federal Practice Forms* Form No. 37:100.
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 46 -50.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.14.*
- *Fed. R. Civ. P. 37(c)(1)* (sanctions for failure to comply with discovery order).



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Chapter 18 SANCTIONS
PART B: SEEKING SANCTIONS FOR FAILURE TO COMPLY WITH ORDER COMPELLING MANDATORY DISCLOSURE OR DISCOVERY--RULE 37(b)

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.04

§ 18.04 Understanding Sanctions Available Under Rule 37(b)

[1] List of Sanctions

Sanctions that may be imposed under *Fed. R. Civ. P. 37(b)* include:

1. An order that the matters regarding which the order was made or any other designated facts must be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence. *See § 18.04[3] below*.

3. An order striking out pleadings or parts thereof.

4. An order staying further proceedings until the order is obeyed.

5. An order dismissing the action or proceeding or any part thereof. *See § 18.04[2] below*.

6. An order rendering a judgment by default against the disobedient party. *See § 18.04[2] below*.

Fed. R. Civ. P. 37(b)(2)(A).

[2] Dismissal and Default Sanctions Are Severe Penalties Imposed Only After Weighing Certain Factors

[a] Dismissal and Default Sanctions Are Authorized Only in Extreme Circumstances

The severe sanctions of dismissal and default judgment are authorized only in extreme circumstances. *See, e.g., Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 140 (2d Cir. 2007)* (default judgment vacated and case remanded to new judge); *Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1338 (9th Cir. 1985)* (sanctions reversed).

[b] Factors for Determining Dismissal or Default

The standards for imposing the severest Rule 37(b) sanctions can vary from jurisdiction to jurisdiction--this is an area where it's especially critical that counsel review the caselaw of the applicable circuit.

Circuits have identified factors that a district court must weigh in determining whether to impose the dismissal or default sanction. For example, the Ninth Circuit has required the court to consider:

1. The public's interest in expeditious resolution of litigation;

2. The court's need to manage its docket;

3. The risk of prejudice to the defendants;

4. The public policy favoring disposition of cases on their merits; and

5. The availability of less drastic sanctions.

Computer Task Group, Inc. v. Brotby, 364 F.3d 1112, 1115 (9th Cir. 2004) (two lesser sanctions imposed to no avail).

To provide another example, the Second Circuit has requires consideration of:

1. The duration of the party's failure to comply with the court order;

2. Whether the claimant was on notice that failure to comply would result in a dismissal;

3. Whether the other party is likely to be prejudiced by further delays in the proceedings;

4. A balancing of the court's interests and the party's fair chance to be heard; and

5. The effectiveness of less drastic sanctions.

Almonte v. Coca-Cola Bottling Co. of New York, Inc., 169 F.R.D. 246, 248-249 n.4 (D. Conn. 1996) (request to preclude evidence denied).

[c] Determine Whether Court Considered Alternative Sanctions

Dismissal or default judgment sanctions are to be used only as a last resort; district courts therefore are generally required to consider and apply lesser sanctions when possible. *See, e.g., Marfia v. T.C. Ziraat Bankasi, 100 F.3d 243, 249 (2d Cir. 1996)* (default excessive); *Wouters v. Martin County, Fla., 9 F.3d 924, 934 (11th Cir. 1993)* (less drastic sanctions available and defendant suffered no prejudice).

District courts, however, are not required to first apply lesser sanctions when to do so would clearly be ineffective. *See, e.g., Poulos v. Naas Foods, Inc., 959 F.2d 69, 75 (7th Cir. 1992)* ("few other practicable sanctions in this case"); *Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1544 (11th Cir. 1993)* (dismissal upheld when defendant deliberately withheld discoverable information).

[d] Determine Whether Dismissal or Default Sanctions Must Be Preceded by Warning

Several circuits have held that in most circumstances, district courts should give advance warning before resorting to

dismissal or default sanctions for a party's failure to comply with a discovery order. *See, e.g., Simmons v. Abruzzo, 49 F.3d 83, 88 (2d Cir. 1995)* (dismissal reversed for failure to give notice).

Circuit Split:

The Tenth Circuit has explicitly declined to follow the view that, in most instances, dismissal or default sanctions must be preceded by clear warning. *FDIC v. Daily, 973 F.2d 1525, 1532 (10th Cir. 1992)* (default upheld for willful failure to respond to discovery).

Although a warning prior to default or dismissal sanctions is preferred, it may not be necessary in exceptional circumstances. *See, e.g., Commodity Futures Trading Comm'n v. Noble Metals Int'l Inc., 67 F.3d 766, 771-772 (9th Cir. 1995)* (no warning necessary when: (1) sanctioned party could not have been surprised by severity of sanction because opposing party explicitly expressed its intention to seek more severe sanctions and; (2) conduct giving rise to sanctions was egregious and reflected ongoing pattern of dilatory tactics); *Williams v. Chicago Bd. of Educ., 155 F.3d 853, 857 n.4 (7th Cir. 1998)* (exception to "due warning" rule when attorney clearly knows, even without explicit warning, that case faces dismissal).

[e] Appellate Court Review of Dismissal and Default Sanctions

In the circuits that have identified factors to be considered before default or dismissal, the district courts are required to consider all of the factors. The Fifth Circuit, however, has declared that it is necessary that *all* of the factors support the dismissal or default sanction. *See FDIC v. Conner, 20 F.3d 1376, 1380-1381 (5th Cir. 1994)* (default sanction upheld); *see also Yourish v. California Amplifier, 191 F.3d 983, 992 (9th Cir. 1999)* (Ninth Circuit tends to affirm orders of dismissal sanctions if at least four factors support dismissal, or at least three factors strongly support dismissal).

The same "abuse of discretion" standard of review is applied to the imposition of both dismissal and default sanctions. *See Chrysler Corp. v. Carey, 186 F.3d 1016, 1019 (8th Cir. 1999)* (appellate court's review of district court's imposition of sanctions under *Fed. R. Civ. P. 37* is deferential).

[3] Sanction Precluding Party From Defending Claim Is Severe Penalty Authorized Only in Extreme Circumstances

A sanction precluding a defendant from opposing a claim is a severe penalty subject to the same standards applicable to the sanctions of dismissal and default judgment. *Refac Int'l, Ltd. v. Hitachi, Ltd., 921 F.2d 1247, 1254 (Fed. Cir. 1990)* (taking allegations as established used in "extreme circumstances"); *United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co., 857 F.2d 600, 603 (9th Cir. 1988)* (sanction resulted in judgment for plaintiff).

[4] Contempt of Court Is Potential Sanction Under Rule 37(b)

[a] Failure to Obey Order May Be Treated As Contempt of Court

In lieu of or in addition to any of the other orders set forth in *Fed. R. Civ. P. 37(b)(2)*, a sanction may include an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination. *Fed. R. Civ. P. 37(b)(2)(A)(vii)*.

[b] Protective Order May Be Basis for Contempt Citation

A Rule 26(c) protective order (*see* Ch. 16 *above*) is a discovery order subject to *Fed. R. Civ. P. 37(b)*, including the provision for a contempt sanction. *See Westinghouse Elec. v. Newman & Holtzinger, P.C., 992 F.2d 932, 935 (9th Cir. 1993)* (protective order granted); *In re Shalala, 996 F.2d 962, 964 (8th Cir. 1993)* (court required the district court to take the opportunity, before considering contempt, to review petitioner's arguments); *see also Fed. R. Civ. P. 26(c)* (protective orders).

[c] Civil and Criminal Contempt Distinguished by Character and Purpose

To distinguish civil from criminal contempt, the focus of the inquiry is often not on the fact of punishment, but rather its character and purpose. *Shillitani v. United States 384 U.S. 364, 369, 86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966)* (purpose of incarceration was to coerce cooperation and not to punish defendants); *see also Int'l Union v. Bagwell, 512 U.S. 821, 828, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* (stated purposes of a contempt sanction alone cannot be determinative of whether it is civil or criminal in nature).

Several circuits have held that an early determination be made as to the nature of contempt, so that the proceedings can be conducted in accordance with appropriate rules, statutes, and due process requirements. *See Buffington v. Baltimore County, 913 F.2d 113, 133 (4th Cir. 1990)* (sanctions remanded for proper proceedings because they were in effect criminal contempt sanctions); *Falstaff Brewing Corp. v. Miller Brewing Co. 702 F.2d 770, 777 (9th Cir. 1983)* (court reversed district court's order of contempt); *Smith v. Sullivan, 611 F.2d 1050, 1052 (5th Cir. 1980)* (court failed to notify defendants they were being prosecuted for criminal contempt).

Warning:

A contempt sanction could be invalidated if the district court's confusion as to the nature of the contempt proceeding resulted in prejudice to the contemnor. *See Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 777 n1 (9th Cir. 1983)* (court reversed district court's order of contempt).

[d] Nature of Civil Contempt

The purpose of a civil contempt usually is to coerce compliance with a court order, and a coercive civil contempt sanction may be conditioned on continued noncompliance. *Int'l Union v. Bagwell, 512 U.S. 821, 828, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* (fined conduct did not occur in the court's presence and did not implicate its ability to maintain order). A court may impose a civil contempt sanction if:

1. The contemnor violated a court order;

2. The noncompliance was more than technical or de minimis; and

3. The contemnor's conduct was not the product of a good faith or reasonable interpretation of the violated order.

Go-Video, Inc. v. The Motion Picture Ass'n of Am., 10 F.3d 693, 695-696 (9th Cir. 1993) (judgment of contempt vacated because plaintiff substantially complied with order).

Civil contempt sanctions may be imposed in an ordinary civil proceeding on notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required. *Int'l Union v. Bagwell, 512 U.S. 821, 828, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* (nature of fines necessitated criminal trial for contempt).

[e] Nature of Criminal Contempt

The primary purpose of criminal contempt is to punish past defiance of a court's judicial authority, thereby vindicating the court. *Int'l Union v. Bagwell, 512 U.S. 821, 828 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* (nature of fines necessitated criminal trial for contempt). A party's disobedience of a court order must be willful to constitute a basis for criminal contempt sanctions. *See Falstaff Brewing Corp. v. Miller Brewing Co. 702 F.2d 770, 772 (9th Cir. 1983)* (criminal contempt sanction not available because, among other things, evidence failed to show that party was guilty of willful disobedience of district court's order).

Any person who commits criminal contempt may be punished for that contempt after prosecution on notice. *Fed. R. Crim. P. 42(a)*. The court must give the person notice in open court, in an order to show cause, or in an arrest order. *Fed. R. Crim. P. 42(a)(1)*. A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides, and must be released or detained as *Fed. R. Crim. P. 46* provides. *Fed. R. Crim. P. 42(a)(3)*; *Muniz v. Hoffman, 422 U.S. 454, 474-476, 95 S. Ct. 2178, 45 L. Ed. 2d 319 (1975)* (no right to a jury trial in contempt cases arising from the violation of injunctions issued in labor disputes). A jury trial is required only for a "serious offense." *Codispoti v. Pennsylvania 418 U.S. 506, 512-513, 94 S. Ct. 2687, 41 L. Ed. 2d 912 (1974)* (acts of contempt were tried in a single proceeding and the sentence imposed exceeded six months). Criminal contempt must be proved beyond a reasonable doubt. *United States v. Straub, 508 F.3d 1003, 1008 (11th Cir. 2007)* (facts must be proven beyond reasonable doubt).

Notwithstanding any other provision of the Federal Rules of Criminal Procedure, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies. *Fed. R. Crim. P. 42(b)*. A magistrate judge may summarily punish a person as provided in *28 U.S.C. § 636(e)*.

[5] Monetary Sanctions Are Imposed Under Rule 37(b)(2), Absent Substantial Justification or Other Circumstances

Generally, the court must require the party failing to obey an order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. *Fed. R. Civ. P. 37(b)(2)*. The court need not find that an attorney acted in bad faith before imposing these sanctions. *See, e.g., Societe Internationale Pour Participations Industrielles v. Rogers, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958)* (dismissal reversed).

The party against whom an award of expenses is sought has the burden of showing the special circumstances that make his or her failure to comply substantially justified. *Societe Internationale Pour Participations Industrielles v. Rogers, 357 U.S. 197, 212, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958)* (foreign national unable to fully comply with production order despite good faith efforts).

Compensatory monetary sanctions awarded for failure to obey a discovery order may compensate for a broader range of losses than monetary sanctions in connection with a motion to compel discovery, which are limited to the reasonable expenses incurred in making or opposing the motion. *See Fed. R. Civ. P. 37(a)(5)(A)*; *see also § 17.10 above*.

[6] Sanction Must Be Specifically Related to Claim at Issue in Discovery Order

Due process considerations require that the sanction be specifically related to the particular claim that was at issue in the order to provide discovery. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* (respondent was seeking through discovery to respond to petitioners' contention that the district court lacked jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.50*, *37.51*, 642.03.
- *Bender's Federal Practice Forms* Form Nos. 37:60, 37:102, 37:104.
- *Federal Litigation Guide PP 22.22 -22.24*.

- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 46 -50*.

- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.14*.

- *Fed. R. Civ. P. 37(c)(1)* (sanctions for failure to comply with discovery order).

- *Mugavero v. Arms Acres, Inc., 680 F. Supp. 2d 544, 575 (S.D.N.Y. 2010)* ("Given that the relative culpability of Plaintiff and her counsel in perpetrating these discovery abuses is not clear, Plaintiff and Plaintiff's counsel will be held equally liable for the attorneys' fee award ultimately imposed").



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Chapter 18 SANCTIONS
PART B: SEEKING SANCTIONS FOR FAILURE TO COMPLY WITH ORDER COMPELLING MANDATORY DISCLOSURE OR DISCOVERY--RULE 37(b)

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.05

§ 18.05 Moving for Sanctions Under Rule 37(b)

[1] Determining Proper Forum for Motion

A motion seeking sanctions against a party for failure to comply with a discovery order, or an order entered under *Fed. R. Civ. P. 26(f)* regarding a discovery plan, may be brought in the court where the action is pending. *Fed. R. Civ. P. 37(b)(2)*.

The court is not limited to a finding of contempt, but may fashion an appropriate sanctions order, including sanctions that directly affect the parties' substantive rights. *See Fed. R. Civ. P. 37(b)(2)(A)*.

A motion seeking sanctions against a nonparty deponent for failure to comply with a discovery order must be brought pursuant to *Fed. R. Civ. P. 37(b)(1)*, in which case only the court that issued the discovery order has jurisdiction over the motion. *See Fed. R. Civ. P. 37(b)(1)*.

[2] Ascertaining Time for Filing Motion

Fed. R. Civ. P. 37(b) does not establish specific time limits for making a motion for sanctions. In the absence of a specific local rule to the contrary, *Fed. R. Civ. P. 37(b)* motions should be filed within a reasonable time after the alleged violation occurred, was discovered, or should have been discovered through reasonable diligence. The amount of time that is reasonable varies with the circumstances, but long delays will significantly reduce the likelihood that the motion will be granted. *See Brandt v. Vulcan, Inc. 30 F.3d 752, 756-757 (7th Cir. 1994)* (injured worker's motion was untimely).

[3] Content of Motion

A motion for sanctions must describe the alleged violation of the order with enough specificity to enable the accused party to understand the charges, so that he or she is given a fair opportunity to develop a defense. The motion must comport with the requirements of due process, affording some opportunity to be heard. *See Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 41-42 (4th Cir. 1995)* (sanctions against attorney vacated and reversed because attorney did not receive notice or hearing as required by due process).

Warning:

Absent a clear, contrary indication in the moving papers, any motion for sanctions based on an alleged violation of a discovery order places both the party and the party's counsel on notice that the court might assess sanctions against either or both, unless they provide the court with substantial justification for their conduct. *DeVaney v. Continental Am. Ins. Co., 989 F.2d 1154, 1160 (11th Cir. 1993)* (sanctioned party/appellant was told repeatedly to comply with the trial court's orders).

[4] Determination by Court

If a party has failed to comply with a discovery order, the court in which the action is pending may make such orders in regard to the failure as are just. *Fed. R. Civ. P. 37(b)(2).*

Rule 37(b)(2) sanctions are intended to serve the following purposes:

1. Ensure that a party will not benefit from its own failure to comply with discovery requests;

2. Specifically deter sanctioned conduct, and ensure compliance with discovery orders; and

3. Generally deter sanctionable conduct in the instant case and in other cases.

National Hockey League v. Metropolitan Hockey Club, Inc. 427 U.S. 639, 642-643, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976) (bad faith failure to answer interrogatories justified dismissal order).

[5] Review of Rule 37(b) Discovery Rulings

Federal appellate courts review discovery rulings, the imposition of discovery sanctions under *Fed. R. Civ. P. 37*, and dismissal of a case with prejudice for abuse of discretion. *See e.g., Wills v. Amerada Hess Corp., 379 F.3d 32, 41 (2d Cir. 2004)* ("axiomatic that a trial court enjoys wide discretion in its handling of pre-trial discovery"); *Payne v. Exxon Corp., 121 F.3d 503, 507 (9th Cir. 1997)* (noting that district court gave plaintiff every opportunity to avoid the ultimate sanction of dismissal).

An award of monetary sanctions against an attorney is not immediately appealable. An attorney sanctioned for such conduct suffers no inordinate injury from a deferral of appellate consideration. *Cunningham v. Hamilton County, 527 U.S. 198, 208-209, 119 S. Ct. 1915, 144 L. Ed. 2d 184 (1999)* (Court affirmed dismissal of petitioner attorney's appeal of order imposing sanctions for lack of jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.43, 37.44, 37.50, 37.51.*
- *Federal Litigation Guide PP 22.21, 22.24.*
- *Bender's Federal Practice Forms* Form Nos. 37:100-37:104.
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 46 -50.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.14.*
- *Fed. R. Civ. P. 37(c)(1)* (sanctions for failure to comply with discovery order).



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Chapter 18 SANCTIONS
PART C: OPPOSING MOTION FOR RULE 37(b) SANCTIONS

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.06

§ 18.06 Checklist for Opposing Imposition of Rule 37(b) Sanctions

- ☐ If appropriate, seek a protective order under *Fed. R. Civ. P. 26(c). See § 18.07[1] below.*
- ☐ Determine if grounds to oppose motion for sanctions exist. *See § 18.07[3], [4] below.*
- ☐ Prepare and serve response papers. *See § 18.07[1] below.*
- ☐ If monetary sanctions are sought, argue the following:
  - ○ Other circumstances make the imposition of sanctions unjust. *See § 18.07[2] below.*
  - ○ The amount requested is excessive. *See § 18.07[2] below.*



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Chapter 18 SANCTIONS
PART C: OPPOSING MOTION FOR RULE 37(b) SANCTIONS

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.07

§ 18.07 Opposing Imposition of Rule 37(b) Sanctions

[1] Options and Strategies for Party Unable to Comply With Discovery Order

A party who is unable to comply with a discovery order should promptly inform the court and other parties. The party should explain the circumstances to opposing counsel well before the discovery deadline, and request from the court a modification of the original order. If opposing counsel is uncooperative, the party to whom the order is directed should then file a formal motion for reconsideration or modification of the original discovery order, or for a protective order. *See Fed. R. Civ. P. 26(c)*; *see also* Ch. 16 *above*. This practice may protect the responding party from the imposition of sanctions, and obviate the need of other parties to incur expenses in the enforcement of discovery orders.

[2] Opposing Imposition of Monetary Sanctions

Under *Fed. R. Civ. P. 37(b)(2)*, the burden of showing substantial justification and special circumstances is on the party being sanctioned; this is appropriate because the court already will have found that the resisting party has violated the discovery order. *See Fed. R. Civ. P. 37(b)(2)*, Committee Note of 1970. The district court may also elect not to impose compensatory monetary sanctions if "other circumstances make an award of expenses unjust." *Fed. R. Civ. P. 37(b)(2)(C)*.

[3] Opposing Sanctions on Ground that Underlying Order Was Not Issued, or That Party Did Not Disobey Any Order

Application of *Fed. R. Civ. P. 37(b)(2)* sanctions requires that an order has been issued, and that the order was disobeyed. If an underlying order was not issued, sanctions may be opposed on that ground. *See, e.g., Halaco Eng'g Co. v. Costle, 843 F.2d 376, 379 (9th Cir. 1988)* (*Fed. R. Civ. P. 37(b)(2)* was not applicable because no order was specifically issued). Similarly, a party who did not disobey any discovery court order is not subject to sanctions under *Fed. R. Civ. P. 37(b)(2)*. *See, e.g., Hyde & Drath v. Baker, 24 F.3d 1162, 1170 (9th Cir. 1994)* (abuse of discretion of court to order $6,000 in sanctions when party did not violate any discovery order).

[4] Opposing Sanctions on Grounds that Requested Sanction Is Unrelated to Particular Discovery Order That Was Disobeyed

A person may oppose the imposition of sanctions under *Fed. R. Civ. P. 37(b)(2)* on the ground that the sanction sought is unrelated to the particular claim at issue in the discovery that was disobeyed. *See Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 707, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* (defendants were subject to personal jurisdiction under the applicable sanction); *see also Serra Chevrolet, Inc. v. GMC, 446 F.3d 1137, 1152 (11th Cir. 2006)* (unrelated sanctions violated defendant's due process rights). The application of Rule 37 sanctions is foreclosed when a party's alleged discovery-related misconduct is not encompassed by the language of the rule. *Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group, 55 F.3d 463, 467 (9th Cir. 1995)* (trial judge may not impose Rule 37 sanctions for bringing motion for reconsideration).

[5] Opposing Civil Contempt

Substantial compliance with the court order is a defense to civil contempt based on violation of a court order. The defense is not vitiated by a few technical violations when every reasonable effort has been made to comply. *Go-Video v. Motion Picture Ass'n of Am., 10 F.3d 693, 695 (9th Cir. 1993)* (vacating judgment of contempt in light of party's "harmless technical violations" and substantial compliance).

Generally, impossibility is also a complete defense to a charge of contempt. Inability, whether or not self-induced, is a complete defense to a charge of coercive civil contempt. *See Chairs v. Burgess, 143 F.3d 1432, 1436 (11th Cir. 1998)* (inability absolving a party from being held in contempt required only that the party made a good faith and reasonable effort to comply).

Exception:

An exception exists in the criminal context when the impossibility is self-induced. *See, e.g., United States v. Bryan. 339 U.S. 323, 330-331, 70 S. Ct. 724, 94 L. Ed. 884 (1950)* ("A court will not imprison a witness for failure to produce documents which he does not have, unless he is responsible for their unavailability".)

[6] Opposing Severe Sanctions on Ground That Less Severe Sanctions Are Appropriate Under Circumstances

A party who disobeyed a discovery order and is unsuccessful in defeating the imposition of sanctions entirely may argue that, under the circumstances, sanctions less severe than those sought are more appropriate. If severe sanctions such as dismissal are sought, counsel should argue that the court must entertain, among other factors, the feasibility of less drastic sanctions. *See Wouters v. Martin County, Fla., 9 F.3d 924, 934 (11th Cir. 1993)* (reversed sanction of dismissal because lesser sanction, in form of attorney's fees, was available).

If a party's disobedience of a discovery order is due to its inability to comply with it, and the inability was not fostered by its own conduct or by circumstances within its control, severe sanctions, such as dismissal, are not authorized. *Societe Internationale Pour Participations Industrieles et Commerciales v. Rogers, 357 U.S. 197, 210-212, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958)* (reversing dismissal when compliance with order mandating disclosure of bank records would be violation of Swiss laws).

If the motion requests the award of reasonable expenses and attorney's fees caused by the failure to obey a court order to provide or permit discovery, the amount requested may be refuted on the ground that the expenses are unreasonable, or that the expenses were incurred outside of the context of the failure to obey the court order. *See Toth v. Trans World Airlines, Inc., 862 F.2d 1381, 1385-1386 (9th Cir. 1988)* .

Timing:

A party unable to comply with a discovery order should inform the court and affected parties at the earliest possible time, thus avoiding the necessity of later responding to a request for imposition of

sanctions, and arguing for less severe sanctions.



Timing:

A party subject to the imposition of monetary sanctions should refute a disputed itemization of expenses and fees prior to the court's award for those sanctions. *See, e.g., Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 784 (9th Cir. 1983)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.50[1][c], [2][a], 37.51[7][b].*
- *Federal Litigation Guide PP 22.23[6], [7], [9], 22.25[2].*
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 46 -50.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.14.*
- *Fed. R. Civ. P. 37(c)(1)* (sanctions for failure to comply with discovery order).



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Chapter 18 SANCTIONS
PART D: SEEKING SANCTIONS FOR FAILURE TO MAKE MANDATORY DISCLOSURE OR FAILURE TO SUPPLEMENT DISCOVERY RESPONSES--RULE 37(c)(1)

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.08

§ 18.08 Checklist for Requesting Imposition of Rule 37(c)(1) Sanctions

☐ If party has failed to provide information or identify a witness as required by Rule 26(a) with regard to required disclosures or 26(e) with regard to supplementation of disclosures or discovery responses, review Rule 37(c)(1). *See § 18.09 below*.

☐ Raise the party's failure with the court. *See § 18.10[2] below*.

☐ If necessary, prepare a motion for sanctions under Rule 37(c)(1), and serve the papers. *See § 18.10[2] below*.

☐ Prepare documentation for the amount of sanctions requested, including:

- ○ Costs incurred by the party's failure to properly disclose evidence. *See § 18.10[3] below*.
- ○ Attorney's fees. *See § 18.10[3] below*.



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1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.09

§ 18.09 Understanding Conduct Subject to Rule 37(c)(1) Sanctions

Rule 37 is the main provision in the Federal Rules of Civil Procedure addressing litigation abuse and sanctions in the context of discovery. Subdivision (c)(1) in Rule 37 focuses specifically on sanctions for *failure to make mandatory disclosures or to supplement disclosures and discovery responses*.

A party that without substantial justification fails to disclose information required by *Fed. R. Civ. P. 26(a)* (*see § 1.13 above*), or to supplement or amend a prior discovery response as required by *Fed. R. Civ. P. 26(e)* (*see § 1.18 above*), is not, unless the failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. *Fed. R. Civ. P. 37(c)(1)*; *see Mannoia v. Farrow, 476 F.3d 453, 457 (7th Cir. 2007)* (expert witness affidavit and accompanying argument struck for non-compliance with Rule 26(a)).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.60[2].*
- *Federal Litigation Guide P 22.40.*
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 46 -50.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.15.*
- *Fed. R. Civ. P. 37(c)(1)* (sanctions for failure to disclose or supplement).



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Chapter 18 SANCTIONS
PART D: SEEKING SANCTIONS FOR FAILURE TO MAKE MANDATORY DISCLOSURE OR FAILURE TO SUPPLEMENT DISCOVERY RESPONSES--RULE 37(c)(1)

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.10

§ 18.10 Obtaining Sanctions Under Rule 37(c)(1)

[1] Evidence Preclusion Order Is Self-Executing

The drafters described Rule 37(c)(1)'s evidence-preclusion sanction for a party's failure to make mandatory, voluntary disclosures as "self-executing" and "automatic," indicating an intent that evidence-preclusion sanctions are to be imposed without need for a motion. *See Fed. R. Civ. P. 37(c)*, Committee Note of 1993; *see also Happel v. Walmart Stores, Inc., 602 F.3d 820, 825 (7th Cir. 2010)* (sanction for failure to comply with Rule 26(a) disclosure requirements is "automatic and mandatory exclusion from trial of the omitted evidence" unless nondisclosure was justified or harmless).

[2] Making Proper Showing to Obtain Preclusion Order

Before evidence will be precluded, the following must occur:

1. The party seeking to invoke the sanction must first prove that the opposing party violated *Fed. R. Civ. P. 26(a)* or *26(e)* by failing to disclose the evidence in question.

2. The party to be sanctioned must have an opportunity to demonstrate that its failure to disclose was substantially justified or harmless.

See Fed. R. Civ. P. 37(c)(1).

An evidence preclusion sanction may be tantamount to dismissal with prejudice, or entry of a default judgment. Many courts are reluctant to exclude evidence that is important to the merits of the case without a showing of substantial and largely irremediable prejudice, and bad faith, willfulness, or some other substantial fault.



Strategic Point:

Counsel should object if the opposing party attempts to proffer the nondisclosed witness or information

at a hearing or on a motion. Be prepared to prove that this proffer is in violation of *Fed. R. Civ. P. 37(c)(1)*, and request additional time if necessary. If objection is not made at the hearing, be prepared to follow a formal motion procedure.

[3] Additional Sanctions Available

In addition to or in lieu of the evidence-preclusion sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. *Fed. R. Civ. P. 37(c)(1)(C)*; *see § 18.10[1], [2] above* (evidence preclusion). In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the issue-preclusion, evidence-preclusion, and termination sanctions authorized under *Fed. R. Civ. P. 37(b)(2)(A)(i)-(vi)*. *See § 18.04[1] above*. Sanctions for failure to make disclosures may also include informing the jury of the failure to make the disclosure. *Fed. R. Civ. P. 37(c)(1)*.

Discovery sanctions are sometimes imposed under the court's inherent authority. *See, e.g., § 18.31[1], below* (sanctions awarded for spoliation). However, the Federal Circuit has held that a district court should not resort to imposition of sanctions under its inherent power when Rule 37 provides an adequate remedy. The court explained that inherent powers are a limited source, which should be called upon only to make the court function. When there is bad faith conduct in the course of litigation that can be adequately sanctioned under the federal rules, the court should rely on the rules rather than its inherent power. *See ClearValue, Inc. v. Pearl River Polymers, Inc., 560 F.3d 1291, 1309 (Fed. Cir. 2009)* (district court abused its discretion in resorting to its inherent power to sanction failure to make required disclosures because Rule 37 "squarely addresses" appropriate sanctions for this discovery violation).

[4] Review of Rule 37(c)(1) Discovery Rulings

The imposition of discovery sanctions pursuant to *Fed. R. Civ. P. 37* is reviewed for abuse of discretion. *See Wills v. Amerada Hess Corp., 379 F.3d 32, 41 (2d Cir. 2004)* (appellate court will reverse district court's discovery ruling only on clear showing of abuse of discretion); *BankAtlantic v. Blythe Eastman Paine Webber, Inc., 12 F.3d 1045, 1048 (11th Cir. 1994)* (sanctions upheld).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.60, 37.61.*
- *Bender's Federal Practice Forms,* Form Nos. 37:70, 37:75, 37:200, 37:300.
- *Federal Litigation Guide PP 22.40, 22.41.*
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 46 -50.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.15.*
- *Fed. R. Civ. P. 37(c)(1)* (sanctions for failure to disclose or supplement).



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Chapter 18 SANCTIONS
PART E: OPPOSING MOTION FOR RULE 37(c)(1) SANCTIONS

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.11

§ 18.11 Checklist for Opposing Imposition of Rule 37(c)(1) Sanctions

☐ Determine if grounds to oppose Rule 37(c)(1) sanctions exist, such as:

- ○ Failure was substantially justified. *See § 18.12[1] below*.
- ○ Failure was harmless. *See § 18.12[2] below*.
- ○ Factors weigh against sanctions. *See § 18.12[3] below*.
- ○ Sanctions are too severe. *See § 18.12[4] below*.

☐ If appropriate, prepare and serve response papers.



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Chapter 18 SANCTIONS
PART E: OPPOSING MOTION FOR RULE 37(c)(1) SANCTIONS

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.12

§ 18.12 Opposing Imposition of Rule 37(c)(1) Sanctions

[1] Opposing Sanctions on Ground That Failure to Disclose or Supplement Was Substantially Justified

If a party shows that its failure to disclose or supplement information required by *Fed. R. Civ. P. 26(a)* or *26(e)* was substantially justified, then sanctions may not be imposed. *See Fed. R. Civ. P. 37(c)(1)*. A party's predisclosure investigation may be considered by the court in determining whether that party's failure to comply with *Fed. R. Civ. P. 26(a)* or *26(e)* was substantially justified. *See Fed. R. Civ. P. 26(a)(1)*; *see also Fed. R. Civ. P. 26(a)*, Committee Note of 1993. Additionally, a party may be substantially justified in not disclosing evidence if that party could not have been expected to foresee its relevance. *See Fed. R. Civ. P. 26(a)*, Committee Note of 1993.

"Substantially justified" means reasonable people could differ as to the appropriateness of the contested action. *See Neumont v. Florida, 610 F.3d 1249, 1253 (11th Cir. 2010)* .

[2] Opposing Sanctions on Ground That Failure to Disclose or Supplement Was Harmless

A party may oppose sanctions on the ground that the failure to disclose as required by *Fed. R. Civ. P. 26(a)* or *26(e)* was harmless. *See Fed. R. Civ. P. 37(c)(1)*.

[3] Opposing Sanctions on Ground That Factors Weigh Against Sanctions

A party may oppose the imposition of sanctions under *Fed. R. Civ. P. 37(c)(1)* on the ground that the factors considered by the court weigh in its favor. *See, e.g., F.D.S. Marine, LLC v. Brix Maritime Co., 211 F.R.D. 396, 400 (D. Or. 2001)* ("all of the above factors favor leniency").

[4] Opposing Severity of Sanctions

A party subject to sanctions under *Fed. R. Civ. P. 37(c)(1)* may assert that the sanction sought is too severe under the circumstances. *See Synergetics Inc. v. Lumpkin, 2005 U.S. Dist. LEXIS 32273, at *3 (E.D. Mo. 2005)* (court "has obligation to explore the least severe sanction").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.62, 37.63.*
- *Federal Litigation Guide PP 22.43, 22.44.*
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 46 -50.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.15.*
- *Fed. R. Civ. P. 37(c)(1)* (sanctions for failure to disclose or supplement).
- *Bessemer & Lake Erie R.R. Co. v. Seaway Marine Transp., 596 F.3d 357, 370 (6th Cir. 2010)* (test under Rule 37(c) "is very simple: the sanction is mandatory unless there is a reasonable explanation of why Rule 26 was not complied with or the mistake was harmless").



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Chapter 18 SANCTIONS
PART F: SEEKING SANCTIONS FOR UNREASONABLE FAILURE TO ADMIT GENUINENESS OF DOCUMENT OR TRUTH OF MATTER--RULE 37(c)(2)

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.13

§ 18.13 Checklist for Requesting Imposition of Rule 37(c)(2) Sanctions

☐ Determine if party failed to admit the genuineness of any matter that was later proved. *See § 18.14[1] below*.

☐ Review local rule requirements. *See § 18.15[2] below*.

☐ If appropriate, prepare motion and serve papers, including documentation for the amount of sanctions requested:

- ○ Costs incurred in making proof. *See § 18.14[1], [3] below*.
- ○ Attorney's fees. *See § 18.14[1], [3] below*.



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1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.14

§ 18.14 Understanding Conduct Subject to Rule 37(c)(2) Sanctions

[1] Party Failing to Admit Genuineness of Document or Truth of Matter Later Proved Is Subject to Monetary Sanctions

Rule 37 is the main provision in the Federal Rules of Civil Procedure addressing litigation abuse and sanctions in the context of discovery. Subdivision (c)(2) in Rule 37 focuses specifically on sanctions for *failure to admit* in connection with Rule 36 requests for admissions (*see* Ch. 13 *above*).

If a party fails to admit the genuineness of any document or the truth of any matter as requested under *Fed. R. Civ. P. 36*, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, then the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. *Fed. R. Civ. P. 37(c)(2)*.

The court must make the order unless it finds that:

1. The request was held objectionable pursuant to *Fed. R. Civ. P. 36(a)*;

2. The admission sought was of no substantial importance;

3. The party failing to admit had reasonable ground to believe that the party might prevail on the matter; or

4. There was other good reason for the failure to admit.

Fed. R. Civ. P. 37(c)(2).

The test is not whether a party prevailed at trial, but whether the party acted reasonably in believing that he or she might prevail. *Marchand v. Mercy Med. Ctr., 22 F.3d 933, 937 (9th Cir. 1994)* (citing *Fed. R. Civ. P. 37(c)*, Committee Note of 1970).

[2] Party May Object, Admit, or Deny Matter, or State That Matter Cannot Be Admitted or Denied

A party who does nothing in response to a properly framed request for admission is deemed to have admitted the matter. A party who elects to respond to the request for admission may do any of the following:

1. Object to the request and set forth the basis for the objection;

2. Admit the matter;

3. Deny the matter; or

4. State that the matter cannot be admitted or denied, setting forth the reasons in detail.

Fed. R. Civ. P. 36(a).

Fed. R. Civ. P. 36 itself provides no remedy if a party responding to a request for admission provides a straightforward yet unjustified denial, or a statement that is proper in form but ultimately insufficient in asserting that the party cannot either admit or deny the matter. In these situations, *Fed. R. Civ. P. 37(c)* provides post-trial relief requiring the responding party to pay the requesting party's expenses incurred in making the necessary proof at trial. *See Fed. R. Civ. P. 37(c)*, Committee Note of 1970.

[3] Expense-Shifting Sanctions Under Rule 37(c)(2) May Be Imposed Against Party Only

Expense-shifting sanctions for unreasonably denying or unreasonably refusing to admit or deny a legitimate request for admission may be imposed only on parties, and not on counsel. *See Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co., 19 F.3d 431, 438 n.8 (8th Cir. 1994)* (citing **Moore's**).

A court concluding that an attorney played a culpable role in a party's improper response to a request for admission can look to other sources of authority to impose sanctions against the attorney, which may include the following:

1. *Fed. R. Civ. P. 26(g)*, which authorizes sanctions for improper discovery certifications (*see §§ 18.35-18.40*).

2. *Fed. R. Civ. P. 11(c)*, which permits sanctions for violations of the obligation to conduct a reasonable inquiry into the law and facts.

3. *28 U.S.C. § 1927*, which authorizes sanctions against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously."

4. A district court's inherent authority. *See, e.g., Natural Gas Pipeline Co. v. Energy Gathering, Inc., 2 F.3d 1397, 1410-1411 (5th Cir. 1993)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.70 -37.74*
- *Federal Litigation Guide P 22.60.*
- *Bender's Federal Practice Forms* Form No. 37:300.

- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 46 -50*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.16*.
- *Fed. R. Civ. P. 37(c)(2)* (sanctions for failure to admit).



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1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.15

§ 18.15 Moving for Expense-Shifting Sanctions Based on Party's Unreasonable Failure to Admit

[1] Motion Is Filed After Trial Is Completed

The Federal Rules of Civil Procedure do not specify any time frame within which a motion seeking expense-shifting sanctions for a party's unreasonable failure to admit must be filed. However, *Fed. R. Civ. P. 37(c)(2)* is intended to provide post-trial relief. Filing the motion prior to the completion of trial would therefore be inappropriate. As a practical matter, it is necessary to complete a proceeding before a court concludes that the moving party had proved the truth of the matter for which an admission was requested, because a court must consider all rebuttal evidence before it may determine what has been proved.

Circuit Split:

The Seventh Circuit believes that "Rule 37(c) expenses and fees must be timely sought prior to judgment and appeal." *Popeil Bros. Inc. v. Schick Elec., Inc., 516 F.2d 772, 778 (7th Cir. 1975)* (if judgment silent, sanctions deemed waived). The Federal Circuit and the Sixth Circuit, however, have rejected this view, holding instead that because Rule 37(c) clearly provides for post-trial relief, a motion for expense shifting sanctions pursuant to Rule 37c) is not necessarily untimely merely because it is filed after an appeal has been lodged. *Kasuri v. St. Elizabeth Hosp. Med. Ctr., 897 F.2d 845, 856 (6th Cir. 1990)* (citing *Fed. R. Civ. P. 37(c)*, Committee Note of 1970).

[2] Counsel Must Comply With Local Procedural Rules for Motions

Local district court rules typically contain special requirements governing the preparation of papers supporting and opposing discovery motions, and the service of papers.

[3] Review of Rule 37(c)(2) Discovery Rulings

Appellate courts apply an "abuse of discretion" standard when reviewing rulings by district courts on motions for sanctions under *Fed. R. Civ. P. 37(c)(2)*. *Marchand v. Mercy Med. Ctr., 22 F.3d 933, 936 (9th Cir. 1994)* (order upheld).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.70, 37.75, 37.76.*
- *Federal Litigation Guide PP 22.61, 22.63.*
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 46 -50.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.16.*
- *Fed. R. Civ. P. 37(c)(2)* (sanctions for failure to admit).



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Chapter 18 SANCTIONS
PART G: OPPOSING MOTION FOR RULE 37(c)(2) SANCTIONS

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.16

§ 18.16 Checklist for Opposing Imposition of Rule 37(c)(2) Sanctions

☐ Determine if grounds to oppose the motion for sanctions exist, including:

- ○ Unadmitted matter was not proved. *See § 18.17[5] below*.
- ○ Motion is premature.
- ○ Request was objectionable pursuant to *Fed. R. Civ. P. 36(a)*. *See § 18.17[1] below*.
- ○ Admission was of no substantial importance. *See § 18.17[2] below*.
- ○ There was reasonable ground to believe the party would prevail on the matter. *See § 18.17[3] below*.
- ○ There was other good reason for failure to admit. *See § 18.17[4] below*.
- ○ Sanction requested is excessive. *See § 18.17[5] below*.
- ○ Papers and procedures followed did not comply with local rules.

☐ Prepare and serve response papers.



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1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.17

§ 18.17 Opposing Imposition of Rule 37(c)(2) Sanctions

[1] Opposing Sanctions on Ground That Request Was Objectionable Under Rule 36(a)

A party seeking to avoid sanctions under Rule 37(c)(2) may overcome the presumption in favor of the imposition of sanctions by asserting that the request for admission is objectionable under *Fed. R. Civ. P. 36(a). See Fed. R. Civ. P. 37(c)(2)(A)*; *see also § 13.09 above*.

[2] Opposing Sanctions on Ground That Admission Sought Was Not Substantially Important

A party seeking to avoid sanctions under *Fed. R. Civ. P. 37(c)(2)* may overcome the presumption in favor of the imposition of sanctions by asserting that the admission sought was of no substantial importance. *See Fed. R. Civ. P. 37(c)(2)(B)*.

Courts decide whether a particular admission sought was of substantial importance on a case-by-case basis, taking into account all surrounding circumstances. Courts consider whether the propounding party was required to prove the fact that was the subject of the requested admission to prevail on a claim or defense. If the fact was not essential, directly or indirectly, to the party's success, it may not be of substantial importance. *See Read-Rite Corp. v. Burlington Air Express, Inc. 183 F.R.D. 545, 547 (N.D. Cal. 1998)* (no basis for sanctions under *Fed. R. Civ. P. 37(c)(2)(A)* with: (1) requests involving an issue that was found irrelevant in a summary judgment motion; (2) requests involving a theory of liability that had been rejected by the court; and (3) requests "not substantially important to the litigation"); *see also SEC v. Happ, 392 F.3d 12, 34 (1st Cir. 2004)* (an issue is of substantial importance when it is material to the disposition of the case).

[3] Opposing Sanctions on Ground of Reasonable Belief That Party Might Prevail

A party seeking to avoid sanctions under *Fed. R. Civ. P. 37(c)(2)* may overcome the presumption in favor of the imposition of sanctions by asserting that it had reasonable ground to believe that it might prevail on the matter. *See Fed. R. Civ. P. 37(c)(2)(C)*; *Board of Dirs. v. Anden Group, 136 F.R.D. 100, 107 (E.D. Va. 1991)* (reasonable ground to believe party would prevail when case involves substantially conflicting evidence).

The test for determining whether this exception to the presumption applies is not whether a party prevailed at trial, but

whether that party acted reasonably in believing that it might prevail. *See Fed. R. Civ. P. 37(c)*, Committee Note of 1970; *see also Mut. Serv. Ins. Co. v. Frit Indus., 358 F.3d 1312, 1326 (11th Cir. 2004)* (quoting Committee Note).

[4] Opposing Sanctions on Ground of Other Good Reason for Failure to Admit

A party seeking to avoid sanctions under *Fed. R. Civ. P. 37(c)(2)* may overcome the presumption in favor of the imposition of sanctions by asserting that it had other good reason for failing to admit. *Fed. R. Civ. P. 37(c)(2)(D)*.

Although this exception to the presumption is rarely invoked, it may apply when the request for admission addresses complicated technical or statistical matters that would be the subject of expert analysis, about which the responding party could not have developed a reliable position concerning the truth of the matters asserted based on readily available information, but would have had to use extraordinary efforts to gather and analyze that information. *Fed. R. Civ. P. 37(c)*, Committee Note of 1970.

[5] Party May Assert Lack of Proof, Unreasonableness of Amount of Sanctions Requested, or Lack of Connection Between Expenses and Objectionable Response

Even if sanctions might be appropriate under *Fed. R. Civ. P. 37(c)(2)*, an award of expenses is limited by reasonableness. *See Fed. R. Civ. P. 37(c)(2)*; *Marchand v. Mercy Med. Ctr., 22 F.3d 933, 939 (9th Cir. 1994)* (affirming award of sanctions when failure to admit caused plaintiff to incur substantial unnecessary expenses). The moving party must therefore make a sufficient showing of the basis for the amount of sanctions requested, the reasonableness of the expenditures, and the justification for the expense with respect to the specific response in question.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.74*.
- *Federal Litigation Guide P 22.62*.
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 46 -50*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.16*.
- *Fed. R. Civ. P. 37(c)(2)* (sanctions for failure to admit).



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Chapter 18 SANCTIONS
PART H: SEEKING SANCTIONS FOR FAILURE TO APPEAR AT DEPOSITION, SERVE INTERROGATORY ANSWERS, OR RESPOND TO INSPECTION REQUESTS--RULE 37(d)

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.18

§ 18.18 Checklist for Requesting Imposition of Rule 37(d) Sanctions.

☐ Determine if grounds for motion for sanctions exist.

- ○ Person failed to appear at deposition. *See § 18.19 below*.
- ○ Person failed to respond to discovery request. *See § 18.19 below*.

☐ Review local rule requirements for sanction motions. *See § 18.20[4] below*.

☐ If appropriate, prepare motion and serve papers, including following allegations:

- ○ Court has jurisdiction. *See § 18.20[2] below*.
- ○ Moving party made a good-faith effort at a resolution of issues. *See § 18.20[1] below*.
- ○ Motion is timely. *See § 18.20[3] below*.
- ○ Adequate description of failure to comply and sanction sought was given. *See § 18.20[1] below*.
- ○ Papers and procedures followed comply with local rules. *See § 18.20[4] below*.

☐ If monetary sanctions are requested, prepare documentation for the amount of sanctions requested,

including:

- Costs incurred by party's failure to comply with discovery requirements. *See § 18.20[5] below*.

- Attorney's fees. *See § 18.20[5] below*.



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1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.19

§ 18.19 Understanding Conduct Subject to Rule 37(d) Sanctions

Rule 37 is the main provision in the Federal Rules of Civil Procedure addressing litigation abuse and sanctions in the context of discovery. Subdivision (d) in Rule 37 focuses specifically on sanctions for a party's *failure to attend its own deposition, serve answers to interrogatories, or respond to a request for inspection*.

If a party or an officer, director, or managing agent of a party or a person designated under *Fed. R. Civ. P. 30(b)(6)*, *31(a)(4)* to testify on behalf of a party fails to fulfill any of the following discovery obligations, the court in which the action is pending on motion may make such orders in regard to the failure as are just:

1. To appear before the officer who is to take a deposition (*see* Ch. 8 *above*), after being served with a proper notice.

2. To serve answers or objections to interrogatories submitted under *Fed. R. Civ. P. 33* (*see* Ch. 7 *above*), after proper service of the interrogatories.

3. To serve a written response to a request for inspection submitted under *Fed. R. Civ. P. 34* (*see* Ch. 5 *above*), after proper service of the request.

Fed. R. Civ. P. 37(d)(1)(A).

Courts have also imposed sanctions under Rule 37(d) when a party appears for deposition, but fails to answer questions. *See Collins v. Illinois, 554 F.3d 693, 696 (7th Cir. 2009)* (trial court properly imposed Rule 37(d) sanctions on plaintiff who appeared at deposition but refused to answer questions in presence of anyone but lawyers, and then left when attorneys refused to make defendants and court reporter leave).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.90 -37.93, 37.96.*

- *Federal Litigation Guide P 22.80*.
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 46 -50*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.17*.
- *Fed. R. Civ. P. 37(d)* (sanctions for party's failure to attend deposition, serve answers to interrogatories, or respond to request for inspection).



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1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.20

§ 18.20 Moving for Sanctions Under Rule 37(d)

[1] Motion Based on Failure to Respond to Interrogatories or Request for Inspection Must Include Certification of Good-Faith Attempt to Obtain Response

Any Rule 37(d) motion specifying a failure to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain an answer or response without court action. *Fed. R. Civ. P. 37(d)(1)(B).*

[2] Court in Which Action Is Pending Has Jurisdiction Over Motion

A motion for sanctions under *Fed. R. Civ. P. 37(d)* must be brought in the court where the action is pending. *Fed. R. Civ. P. 37(d)(1)(A).*

[3] Motion Should Be Filed Promptly After Discovery Failure, and When Circumstances Dictate

A motion under *Fed. R. Civ. P. 37(d)* should be filed promptly after the discovery failure, and when circumstances dictate. The rule does not establish a specific time limit within which a motion for sanctions must be filed. *See Fed. R. Civ. P. 37(d).*



Timing:

The nature of the sanctions sought may affect the timing of the motion. If the sanctions sought would affect litigation of the merits of the action, the motion must be filed before those merits are reached. If the moving party seeks an order deeming a fact established, prohibiting another party from supporting or denying a claim or defense, or striking pleadings, the motion must be filed before the hearing or trial of those matters.



Strategic Point:

A party should seek relief promptly after the discovery failure and the parties' unsuccessful efforts to

resolve the matter. At that time, the parties' memories will be freshest, documentary evidence is least likely to have been lost or destroyed, and intervention by the court may limit any negative ripple effects of the discovery failure.

[4] Counsel Must Comply With Local Procedural Rules for Motions

Local district court rules typically contain special requirements governing the preparation of papers supporting and opposing discovery motions, and the service of papers.

[5] Court Must Order Expense-Shifting Sanctions Against Party or Attorney or Both for Failure to Act, Absent Substantial Justification or Other Circumstances

In lieu of or in addition to any order, the court must require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. *Fed. R. Civ. P. 37(d)(3)*. Expense-shifting sanctions may be imposed against an attorney even if the attorney did not act in bad faith. *See Hyde & Drath v. Baker, 24 F.3d 1162, 1171 (9th Cir. 1994)* (involving *Fed. R. Civ. P. 37(b)(2)* sanctions, and acknowledging same language as Rule 37(d)).

Courts may look to other sources of authority to impose more severe sanctions against an attorney, including the following:

1. *Fed. R. Civ. P. 26(g)*, which authorizes sanctions for improper discovery certifications.

2. *28 U.S.C. § 1927*, which authorizes sanctions against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously."

3. A district court's inherent authority. *See, e.g., Natural Gas Pipeline Co. v. Energy Gathering, Inc., 2 F.3d 1397, 1410-1411 (5th Cir. 1993)* (discussing nature and history of inherent authority, but declining to create a broad, general inherent power to order a nonparty beyond the district to produce documents).

[6] Review of Rule 37(d) Discovery Rulings

The imposition of discovery sanctions under *Fed. R. Civ. P. 37* is reviewed for abuse of discretion. *See, e.g., IBEW, Local Union No. 545 v. Hope Elec. Corp., 380 F.3d 1084, 1105 (8th Cir. 2004)* (abuse-of-discretion standard applies to the decision to impose a sanction, the nature of the sanction imposed, and the factual basis for the court's decision); *Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group, 55 F.3d 463, 466 (9th Cir. 1995)* (because *Fed. R. Civ. P. 37* did not support a sanction award for a motion for reconsideration, that award was an abuse of discretion).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d. ed.) §§ 37.92, 37.95 -37.99.*
- *Federal Litigation Guide PP 22.81, 22.82, 22.84.*
- *Bender's Federal Practice Forms,* Form Nos. 37:80-37:83, 37:402, 37:403.
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 46 -50.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.17.*

- *Fed. R. Civ. P. 37(d)* (sanctions for party's failure to attend deposition, serve answers to interrogatories, or respond to request for inspection).



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PART I: OPPOSING MOTION FOR RULE 37(d) SANCTIONS

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.21

§ 18.21 Checklist for Opposing Imposition of Rule 37(d) Sanctions

☐ If monetary sanctions are sought, consider the following arguments:

- ○ Failure to comply with the request was substantially justified. *See § 18.22[2] below*.
- ○ Other circumstances make the imposition of sanctions unjust. *See § 18.22[3] below*.
- ○ Moving party did not make a good-faith attempt at a resolution of issues. *See § 18.20[1] above*.
- ○ Amount requested is excessive.

☐ Prepare and serve response papers.



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Chapter 18 SANCTIONS
PART I: OPPOSING MOTION FOR RULE 37(d) SANCTIONS

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.22

§ 18.22 Opposing Imposition of Rule 37(d) Sanctions

[1] Defense Based on Objection to Discovery Should Be Supported by Protective Order Procedure

The failure to act as described in *Fed. R. Civ. P. 37(d)(1)(A)* (*see § 18.19 above*) may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by *Fed. R. Civ. P. 26(c)* (*see* Ch. 16 *above*). *Fed. R. Civ. P. 37(d)(2)*.



Warning:

Disagreement with the court is not an excuse for failing to comply with court orders. *See, e.g., Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1411 (9th Cir. 1990)* (party appealed several of the court's discovery orders without success).



Strategic Point:

No motion for a protective order is necessary if the party from whom discovery is sought files a timely objection to the discovery. A party that neither objects nor seeks a protective order is vulnerable to sanctions. *See Fed. R. Civ. P. 37(d)(2)*, Committee Note of 1970. The only safe course available to a party who intends to do nothing in response to a patently objectionable discovery demand is to file a Rule 26(c) motion for a protective order (*see* Ch. 16 *above*) before the date on which a response to the discovery is due.

[2] Opposing Sanctions on Ground That Failure to Appear or Respond Was Substantially Justified

A litigant may avoid the expense-shifting sanctions of *Fed. R. Civ. P. 37(d)* if the court finds that the failure was substantially justified. *See Fed. R. Civ. P. 37(d)(3)*.

The burden of establishing substantial justification is on the party who failed to respond to discovery pursuant to *Fed. R. Civ. P. 37(d). Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group, 55 F.3d 463, 466 (9th Cir. 1995)* (affirming sanctions for failure to appear at deposition).

The determination of whether there is substantial justification is case-specific. A party may likely meet its burden by showing that its failure to appear or respond was attributable entirely to factors beyond that party's control, at least when the party tried in good faith to warn its opponent that it would not be able to comply within the prescribed time frame. *See, e.g., Speidel v. Bryan, 164 F.R.D. 241, 244 (D. Or. 1996)* (defendants' failure to appear for deposition was substantially justified when they had notified plaintiff in advance that they would be unable to appear because of substantial inconvenience and expense of traveling to deposition site); *but see Harvey v. West Acquisitions & Inv. Group, Inc., 2008 U.S. Dist. LEXIS 6297, at *11-*12 (S.D. Fla. 2008)* (no substantial justification when a pattern of failures to respond and comply existed over several weeks, despite occurrence of four court holidays during that period, or defense counsel's staffing problems).

[3] Opposing Expense-Shifting Sanctions on Ground That Other Circumstances Make Imposition of Sanctions Unjust

The district court may elect not to impose expense-shifting sanctions if "other circumstances make an award of expenses unjust." *See Fed. R. Civ. P. 37(d)(3).*

The burden of demonstrating other circumstances is on the party who failed to respond to the discovery request. *See Hyde & Drath v. Baker, 24 F.3d 1162, 1171 (9th Cir. 1994)* (burden of showing substantial justification also would rest on that party).

[4] Opposing Sanctions on Ground That Rule 37(d) Does Not Encompass Particular Content

A party subject to sanctions under *Fed. R. Civ. P. 37(d)* may oppose the imposition of sanctions if the rule is inapplicable by its terms. The application of Rule 37(d) is limited to its literal scope. *See, e.g., Thomas Consol. Indus. v. Herbst, 456 F.3d 719, 725 (7th Cir. 2006)* (dicta that Rule 37(d) applies to nothing less than a serious or total failure to respond to interrogatories); *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 368 (9th Cir. 1992)* (*Fed. R. Civ. P. 37(d)* not applicable when party's misconduct not encompassed by language of Rule).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.91, 37.94, 37.97.*
- *Federal Litigation Guide P 22.83.*
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 46 -50.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.17.*
- *Fed. R. Civ. P. 37(d)* (sanctions for party's failure to attend deposition, serve answers to interrogatories, or respond to request for inspection).



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Chapter 18 SANCTIONS
PART J: SEEKING SANCTIONS FOR FAILURE TO PARTICIPATE IN FRAMING DISCOVERY PLAN-RULE 37(f)

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.23

§ 18.23 Checklist for Requesting Imposition of Rule 37(f) Sanctions

☐ Determine if grounds for sanctions exist, e.g., if a party fails to participate in the development and submission of a discovery plan. *See § 18.24 below*.

☐ Review local rules regarding meet-and-confer requirements and bringing sanction motions. *See § 18.25[3] below*.

☐ Raise issue of noncompliance with the court. *See § 18.25[1] below*.

☐ If necessary, prepare motion and serve papers, including documentation of:

- ○ Costs incurred by party's failure to comply with discovery requirements. *See § 18.24[1] below*.
- ○ Attorney's fees. *See § 18.24[1] below*.



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Chapter 18 SANCTIONS
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1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.24

§ 18.24 Understanding Conduct Subject to Rule 37(f) Sanctions

[1] Party or Attorney's Failure to Participate in Discovery Plan May Result in Monetary Sanctions

Rule 37 is the main provision in the Federal Rules of Civil Procedure addressing litigation abuse and sanctions in the context of discovery. Subdivision (f) in Rule 37 focuses specifically on sanctions for *failure to participate in framing a discovery plan*.

If a party or a party's attorney fails to participate in the development and submission of a proposed discovery plan as required by *Fed. R. Civ. P. 26(f)* (*see* Ch. 4 *above*), the court may, after opportunity for hearing, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure. *Fed. R. Civ. P. 37(f)*.

Fed. R. Civ. P. 37(f) applies only to the failure to participate in good faith in the framing of a discovery plan. If the pretrial scheduling order was entered before a violation involving the discovery plan is committed, then *Fed. R. Civ. P. 37(b)(2)*, rather than *Fed. R. Civ. P. 37(f)*, applies. In that case, the disobedient party or attorney is exposed to the imposition of more severe sanctions pursuant to *Fed. R. Civ. P. 16(f)*, which governs failure to obey a pretrial or scheduling order, and *Fed. R. Civ. P. 37(b)(2)*, which governs failure to comply with a discovery order. *See United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co., 857 F.2d 600, 602-603, n.3 (9th Cir. 1988)* ; *see also § 18.03 above*.

[2] Parties and Attorneys Have Duty to Participate in Discovery Plan

Except in actions exempted by local rule or court order, parties must develop a proposed discovery plan in every civil action. *See* Ch. 4 *above*. The proposed plan should reflect the parties' views and proposals concerning the following:

1. What changes should be made in the timing, form, or requirement for disclosures under *Fed. R. Civ. P. 26(a)*, including a statement as to when disclosures pursuant to *Fed. R. Civ. P. 26(a)(1)* were made or will be made;

2. The subjects on which discovery may be needed, when discovery should be completed, and whether

discovery should be conducted in phases or be limited to or focused on particular issues;

3. Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

4. Any issues relating to claims of privilege or work product protection, including, if the parties agree on a procedure to assert such claims after production, whether to ask the court to include that agreement in an order;

5. What changes should be made in the limitations on discovery imposed under the Federal Rules of Civil Procedure or by local rule, and what other limitations should be imposed; and

6. Any other orders that should be entered by the court under *Fed. R. Civ. P. 16(b)* and *(c)* or *26(c)*.

Fed. R. Civ. P. 26(f).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.110 -37.111*.
- *Federal Litigation Guide PP 22.100, 22.102*
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 46 -50*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.18*.
- *Fed. R. Civ. P. 26(f)* (conference of the parties; planning for discovery).



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Chapter 18 SANCTIONS
PART J: SEEKING SANCTIONS FOR FAILURE TO PARTICIPATE IN FRAMING DISCOVERY PLAN-RULE 37(f)

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.25

§ 18.25 Moving for Sanctions Under Rule 37(f)

[1] Court or Party May Raise Issue of Sanctions Under Rule 37(f)

Counsel should be prepared to raise the opposing party's failure to participate in good faith under *Fed. R. Civ. P. 37(f)*. Although the court may award sanctions under this rule on its own, nothing precludes a party from raising the issue.



Strategic Point:

Until more opinions are published discussing the criteria to be used in determining whether a party's or attorney's participation in the development of a discovery plan has been in good faith, courts and counsel may seek guidance from the cases that interpret the concept of good faith in the context of Rule 16, which governs pretrial conferences, scheduling, and case management. *See § 4.20 above*.



Strategic Point:

At least one court has held that *Fed. R. Civ. P. 37(a)*, which mandates expense shifting sanctions in connection with a motion to compel discovery, as well as the court's inherent powers, serve as independent sources of authority to impose monetary sanctions if a party breaches a discovery plan obligation. *Nemmers v. United States, 681 F. Supp. 567, 583 (C.D. Ill. 1988) , aff'd, 870 F.2d 426 (7th Cir. 1989)* (court sought to "preserve the integrity of the discovery process and to discourage unnecessary or unwarranted legal expense").

[2] Party Subject to Sanctions Must Be Afforded Opportunity to Be Heard

A judge who is considering imposing an expense-shifting sanction for failing to participate in good faith under *Fed. R. Civ. P. 37(f)* must afford the person subject to sanctions an opportunity to be heard. *Fed. R. Civ. P. 37(f)*.

[3] Counsel Must Comply With Local Procedural Rules for Motions

Local district court rules typically contain special requirements governing the preparation of papers supporting and opposing discovery motions, and the service of papers.

[4] Review of Rule 37(f) Discovery Rulings

The imposition of discovery sanctions pursuant to *Fed. R. Civ. P. 37(f)* is reviewed for abuse of discretion. *See Wills v. Amerada Hess Corp., 379 F.3d 32, 41 (2d Cir. 2004)* (an appellate court will reverse a district court's discovery ruling only upon a clear showing of an abuse of discretion); *BankAtlantic v. Blythe Eastman Paine Webber, Inc., 12 F.3d 1045, 1048 (11th Cir. 1994)* (sanctions upheld).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.111.*
- *Federal Litigation Guide P 22.101.*
- *Bender's Federal Practice Forms* Form No. 37:500.
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 46 -50.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.18.*
- *Fed. R. Civ. P. 37(f)* (sanctions for failure to participate in framing a discovery plan).



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Chapter 18 SANCTIONS
PART K: OPPOSING MOTION FOR RULE 37(f) SANCTIONS

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.26

§ 18.26 Checklist for Opposing Imposition of Rule 37(f) Sanctions

☐ Determine if grounds to oppose the motion for sanctions exist, such as:

- ○ There was no opportunity to be heard. *See § 18.27[1] below*.
- ○ Sanction request is excessive. *See § 18.27[2] below*.
- ○ Papers and procedures followed did not comply with local rules. *See § 18.27[1] below*.

☐ Prepare and serve response papers.



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Chapter 18 SANCTIONS
PART K: OPPOSING MOTION FOR RULE 37(f) SANCTIONS

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.27

§ 18.27 Opposing Imposition of Rule 37(f) Sanctions

[1] Opposing Sanctions on Grounds of Procedural Defects

A party subject to sanctions under *Fed. R. Civ. P. 37(f)* may raise procedural defects, such as the following:

1. Lack of opportunity to be heard.

2. Violation of local court rules.

[2] Opposing Sanctions on Ground That Party's Failure to Participate Was Not in Bad Faith

Because "failure to participate in good faith" is required for Rule 37(f) sanctions, a party may oppose Rule 37(f) sanctions on the ground that it made good faith efforts to cooperate with the party seeking sanctions. *See Kampfer v. Pitcher, 1996 U.S. Dist. LEXIS 12549, at *4-*6 (N.D.N.Y. 1996)* (sanctions motion rejected when plaintiff had not demonstrated (1) that he made specific requests for a Rule 26(f) conference and (2) that defense attorneys, understanding the request, refused to cooperate out of bad faith).

[3] Party May Assert That Amount of Sanctions is Unreasonable or That Expenses Are Unrelated to Failure to Participate in Discovery Plan

The sanctions allowable under *Fed. R. Civ. P. 37(f)* must be reasonable expenses caused by the party's failure to participate in a discovery plan. *Fed. R. Civ. P. 37(f)*. A party opposing sanctions may therefore assert that the amount of sanctions is unreasonable, or that the expenses sought are unrelated to the party's failure to act pursuant to this rule.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.110, 37.111.*
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 46 -50.*

- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.18.*
- *Fed. R. Civ. P. 37(f)* (sanctions for failure to participate in framing a discovery plan).



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Chapter 18 SANCTIONS
PART L: SEEKING SANCTIONS FOR SPOLIATION OF EVIDENCE

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.28

§ 18.28 Checklist for Requesting Imposition of Sanctions for Spoliation of Evidence

☐ Determine if grounds for sanctions exist, e.g., if a party destroyed evidence. *See § 18.29 below*.

☐ If appropriate, prepare motion and serve papers. *See §§ 18.31*, *18.32 below*.



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Chapter 18 SANCTIONS
PART L: SEEKING SANCTIONS FOR SPOLIATION OF EVIDENCE

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.29

§ 18.29 Understanding Duty of Litigants to Preserve Certain Evidence in Their Control

While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request. *See, e.g., Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001)* (spoliation sanction denied where main defendant had opportunity to inspect evidence prior to its destruction); *National Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 556-557 (N.D. Cal. 1987)* (sanctions imposed on Veterans Administration for the destruction of relevant and discoverable documents).

Exception:

Good faith destruction of documents in the normal course of business is not spoliation. A business or government entity is not required to keep records in perpetuity, and if a party without notice of litigation or potential litigation has destroyed records in the normal course of business, such as in conformance with a document retention and storage accommodation policy that accords with any applicable regulations or laws, there is no spoliation of evidence. *See Fed. R. Civ. P. 37(e)*; *State of Idaho Potato Comm'n v. G&T Terminal Packaging, Inc., 425 F.3d 708, 720 (9th Cir. 2005)* .

A party need not have acted in "bad faith" to be held responsible for spoliation of evidence. *See Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993)* ; *Marceau v. International Bhd. of Elec. Workers, 618 F. Supp. 2d 1127, 1174 (D. Ariz. 2009)* (party seeking to introduce evidence of spoliation need not establish bad faith). However, a party must have had notice that documents were relevant or potentially relevant to litigation before the documents were destroyed for spoliation of evidence to have occurred. *Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001)* ; *Marceau v. International Bhd. of Elec. Workers, 618 F. Supp. 2d 1127, 1174 (D. Ariz. 2009)* (party engages in spoliation only if it had some notice that documents were potentially relevant to litigation before they were destroyed, but only a "minimum link of relevance" is required).

In the case of pre-litigation destruction of documents pursuant to a routine document retention policy, there must be some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth. *See, e.g., Stevenson v. Union Pac. R.R., 354 F.3d 739, 747 (8th Cir. 2004)* (pre-litigation destruction of voice tape of radio communications between train crew and dispatchers on date of collision with automobile crossing the tracks, although

pursuant to routine document retention policy, was sanctionable because railroad had general knowledge that tapes would be important in any litigation over the accident, and that litigation is likely when accident involves serious injury or death).



Strategic Point:

Spoliation of evidence is a situation in which monetary sanctions may not be the appropriate remedy. If the evidence was critical or even material to proving your case, consider seeking an equitable remedy such as dismissal, judgment in your favor, or exclusion of the opponent's evidence

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.120.*
- *Federal Litigation Guide P 22.110.*
- *Bender's Federal Practice Forms* Form No. 37:500.
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 52-58.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.19.*
- *Fed. R. Civ. P. 37(e)* (failure to provide electronically stored information).



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Chapter 18 SANCTIONS
PART L: SEEKING SANCTIONS FOR SPOLIATION OF EVIDENCE

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.30

§ 18.30 Moving For Preservation Order to Prevent Spoliation

A party concerned that certain evidence in the possession of an opposing party may be compromised or destroyed may move the court for a preservation order at the earliest opportunity during litigation. *See, e.g., Tracfone Wireless, Inc. v. King Trading, Inc., 2008 U.S. Dist. LEXIS 20036, at *2 (N.D. Tex. 2008)* (granting "emergency" motion for ex parte preservation order); *compare Jacobs v. Scribner, 2007 U.S. Dist. LEXIS 51729, at *2 (E.D. Cal. 2007)* (denying motion as premature when defendants had not yet appeared).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.120.*
- *Federal Litigation Guide P 22.112.*
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 52-58.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.19.*



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Chapter 18 SANCTIONS
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1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.31

§ 18.31 Understanding Grounds for Awarding Spoliation Sanctions

[1] Inherent Powers of Court

[a] Sanctions May Be Awarded for Spoliation of Evidence Under Inherent Powers of Court

Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and who destroys those documents and information. *See, e.g., Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001)* (spoliation sanction denied when main defendant had opportunity to inspect evidence prior to its destruction); *National Ass'n of Radiation Survivors v. Turnage 115 F.R.D. 543, 556-557 (N.D. Cal. 1987)* (sanctions imposed on Veterans Administration for destruction of relevant and discoverable documents).

In exercising its inherent power to impose sanctions for spoliation, some courts require a finding of bad faith. *See Arista Records LLC v. Usenet.com, Inc., 608 F. Supp. 2d 409, 429-430 (S.D.N.Y. 2009)* (due to "potency" of court's inherent power, courts must exercise restraint and discretion when using it, and Second Circuit requires finding of bad faith for imposition of sanctions under inherent powers).

[b] Range of Sanctions, Including Dismissal, Are Available

A range of sanctions is available for spoliation of evidence under the court's inherent powers. *See, e.g., Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 368 (9th Cir. 1992)* (exclusion of evidence). Courts are invested with inherent powers that are governed not by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. *Chambers v. NASCO, Inc., 501 U.S. 32, 43-49, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* .

The following types of sanctions are examples of those imposed under this authority:

1. Exclusion of evidence. *See, e.g., Perez-Velasco v. Suzuki Motor Co., 266 F. Supp. 2d 266, 269 (D.P.R. 2003)* (defendants' inability to inspect the vehicle prejudiced their ability to mount an adequate defense to plaintiffs' manufacturing defect claim).

2. Dismissal. *See, e.g., West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)* (because dismissal is drastic remedy, it should be imposed only in extreme circumstances).

3. An award of attorney's fees against a party or counsel who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *See, e.g., Leon v. IDX Sys. Corp., 464 F.3d 951, 961 (9th Cir. 2006)* (employee despoiled evidence by deleting files from his employer-issued laptop computer during the pendency of litigation).

4. Adverse inference instruction. *See Marceau v. International Bhd. of Elec. Workers, 618 F. Supp. 2d 1127, 1174 (D. Ariz. 2009)* (although party seeking to introduce evidence of spoliation need not establish bad faith, court may reject adverse inference instruction if evidence was lost accidentally or innocently).

[c] Requirements for Imposing Severe Sanctions

In cases in which the drastic sanctions of dismissal or default are ordered, the range of discretion for a district court is narrowed, and the losing party's noncompliance must be due to willfulness, fault, or bad faith. *See, e.g., Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 135 (2d Cir. 2007)* (default judgment vacated). A finding of any of these circumstances may justify the sanction of dismissal. *See, e.g., Halaco Eng'g Co. v. Costle, 843 F.2d 376, 381 (9th Cir. 1988)* (wrongful actions of appellant were not serious enough to warrant the extreme sanction of dismissal). Before imposing a drastic sanction such as dismissal under its inherent powers, the district court should first consider the availability of less drastic sanctions, explicitly discuss the feasibility of those less drastic sanctions, and explain why those less drastic alternatives are inappropriate. *See, e.g., Leon v. IDX Sys. Corp., 464 F.3d 951, 958, 960 (9th Cir. 2006)* (district court did not abuse its discretion in dismissing the employee's claims with prejudice under its inherent authority after determining that the employee despoiled evidence by deleting files from his employer-issued laptop computer during pendency of litigation).

[2] Sanctions May Be Awarded Under Federal or Local Rule if Failure to Produce Evidence Because of Spoliation Violated Rule

A party that fails to preserve evidence in such a manner as to violate a federal or local rule is subject to the sanctions provided in that rule, including the most severe sanctions of default and dismissal. *See, e.g., Wm. T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1456 (C.D. Cal. 1984)* (party as subject to sanctions under Rule 37 for knowingly and purposefully permitting the destruction of key documents and records).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.120, 37.121.*
- *Federal Litigation Guide PP 22.110, 22.111.*
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 52-58.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.19.*



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Chapter 18 SANCTIONS
PART L: SEEKING SANCTIONS FOR SPOLIATION OF EVIDENCE

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.32

§ 18.32 Moving for Spoliation Sanctions

[1] Counsel Must Comply With Local Procedural Rules for Motions

Local district court rules typically contain special requirements governing the preparation of papers supporting and opposing discovery motions, and the service of papers.

[2] Court Order for Sanctions Should Specify Authority

A court order for sanctions, especially for severe sanctions such as dismissal, should specify that it is based on either or both the court's inherent powers or a specified rule. An order imposing sanctions but omitting the grounds for them creates confusion if the sanctions are challenged. *See, e.g., Serra Chevrolet, Inc. v. GMC, 446 F.3d 1137, 1149 (11th Cir. 2006)* (because district court did not explain why it imposed $700,000 fine, it could not be determined if fine violated due process); *Halaco Eng'g Co. v. Costle, 843 F.2d 376, 379 (9th Cir. 1988)* (parties on appeal failed to specify whether dismissal was based on inherent power or Rule 37 caused confusion).

[3] Review of Spoliation Ruling

A district court's ruling on the imposition of spoliation sanctions is reviewed for abuse of discretion. *See Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc., 473 F.3d 450, 456 (2d Cir. 2007)* (an appellate court accepts a district court's factual findings in support of sanctions unless they are clearly erroneous).

Judge Scheindlin of the United States District Court for the Southern District of New York has devised a four-part analytical framework for determining whether to impose sanctions for failure to preserve evidence. First, the court must assess the party's level of culpability. That is, was their conduct of discovery acceptable or was it negligent, grossly negligent, or willful. The second step is the interplay between the duty to preserve evidence and the spoliation of evidence. The third step is to determine which party should bear the burden of proving that evidence has been lost or destroyed and the consequences resulting from that loss. In all cases, the innocent party must prove the following three elements: that the spoliating party (1) had control over the evidence and an obligation to preserve it at the time of destruction or loss; (2) acted with a culpable state of mind upon destroying or losing the evidence; and that (3) the missing evidence is relevant to the innocent party's claim or defense. The fourth step is to determine the appropriate remedy for the harm caused by the spoliation. *See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of*

Am. Sec., LLC, 685 F. Supp. 2d 456, 463 (S.D.N.Y. 2010) .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.122.*
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 52-58.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.19.*



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Chapter 18 SANCTIONS
PART M: OPPOSING MOTION FOR SANCTIONS FOR SPOLIATION OF EVIDENCE

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.33

§ 18.33 Checklist for Opposing Imposition of Sanctions for Spoliation of Evidence

☐ Determine if grounds to oppose the motion for sanctions exist, e.g.:

- ○ Papers and procedures followed did not comply with local rules. *See § 18.32[1] above*.
- ○ No duty to preserve evidence existed. *See § 18.34[1] below*.
- ○ Preserving documents in requested form created undue burden. *See § 18.34[2] below*.
- ○ Electronically stored information was lost as a result of the routine, good-faith operation of an electronic information system. *See § 18.34[3] below*.

☐ Prepare and serve response papers.



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1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.34

§ 18.34 Opposing Imposition of Sanctions

[1] Party May Show No Duty to Preserve Evidence

When appropriate, a party that destroyed potential evidence should show that he or she did not do so in response to the litigation, perhaps by indicating that the evidence was destroyed prior to litigation and before the party could have any reasonable indication that litigation would be brought relative to that evidence. *See, e.g., Akiona v. United States, 938 F.2d 158, 161 (9th Cir. 1991)* . A party should only be penalized for destroying documents if it was wrong to do so, and that requires, at a minimum, some notice that the documents are potentially relevant. *See, e.g., Serra Chevrolet, Inc. v. GMC, 446 F.3d 1137, 1148-1149 (11th Cir. 2006)* (abuse of discretion to impose spoliation sanction when defendant had destroyed records in accordance with retention policy); *Smith v. City of New York, 388 F. Supp. 2d 179, 189 (S.D.N.Y. 2005)* (duty to preserve evidence may arise through discovery request, through information alleged in complaint, or prior to litigation when party is on notice that legal proceedings are likely).

[2] Party May Show Undue Burden in Preserving Documents in Certain Form

A party may refute that it wrongfully destroyed documents in a certain form, by showing that it did preserve the same information in an alternate form, and that retaining the documents in the form requested created an undue burden on that party. *See Wm. T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1446-1447 (C.D. Cal. 1984)* .

Timing:

A party will have a stronger argument that a particular discovery request is burdensome if it seeks relief from the particular request at the earliest possible opportunity. *See, e.g., Allen v. Exxon Corp. (In re Exxon Valdez), 102 F.3d 429, 433 (9th Cir. 1996)* (plaintiff sanctioned with dismissal argued that discovery was unduly burdensome, but "there is no record (and no claim) that they ever sought relief from any of the discovery requests").

[3] Party May Show Electronically Stored Information Was Lost in Routine Operations

Absent exceptional circumstances, a court may not impose sanctions under the federal rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information

system. *Fed. R. Civ. P. 37(e).*

[4] Severe Sanctions Sought Under Court's Inherent Power May Be Opposed on Grounds That Requirements for Imposition of Sanctions Are Not Met

In opposing the imposition of severe sanctions for spoliation of evidence under the court's inherent power, a party may assert any of the following.

1. The absence of willfulness, fault, or bad faith.

2. The lack of nexus among the sanction, misconduct, and matters in controversy.

3. The absence of prejudice to the opposing party.

4. The availability of less severe sanctions.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.120, 37.121A.*
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 52-58.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.19.*
- *Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010)* (severe sanctions, including adverse inference instructions, may not be imposed absent finding of bad faith or willful destruction of evidence).



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Chapter 18 SANCTIONS
PART N: SEEKING SANCTIONS FOR IMPROPER CERTIFICATION OF DISCOVERY REQUEST, OBJECTION, OR DISCLOSURE--RULE 26(g)

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.35

§ 18.35 Checklist for Seeking Imposition of Rule 26(g) Sanctions

☐ Determine whether the certified discovery request, response, objection, or disclosure was made under any of the following conditions:

- ○ Inconsistent with the Federal Rules of Civil Procedure. *See § 18.36 below*.
- ○ Not warranted by existing law. *See § 18.36 below*.
- ○ Not warranted by a good-faith argument for the extension, modification, or reversal of existing law. *See § 18.36 below*.
- ○ Interposed for an improper purpose, such as harassment, unnecessary delay, or needless increase in litigation costs. *See § 18.36 below*.
- ○ Unreasonably or unduly burdensome or expensive in light of the needs of the case, the discovery already completed, the amount in controversy, or the importance of the issues at stake. *See § 18.36 below*.

☐ Determine, if possible, whether the improper certification was made without substantial justification. *See § 18.37 below*.

☐ Follow the applicable informal dispute resolution rules.

☐ If appropriate, prepare and serve the moving papers. *See § 18.38 below*.



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Chapter 18 SANCTIONS
PART N: SEEKING SANCTIONS FOR IMPROPER CERTIFICATION OF DISCOVERY REQUEST, OBJECTION, OR DISCLOSURE--RULE 26(g)

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.36

§ 18.36 Understanding Requirement for Signatures on Disclosures, Requests, Responses, and Objections

Every disclosure under Rule 26(a)(1) or (a)(3), and every request, response, or objection made by a party represented by an attorney must be signed by at least one attorney of record in the attorney's individual name, along with the attorney's address, e-mail address, and telephone number. An unrepresented party must sign the disclosure, request, response, or objection and state the party's address, e-mail address, and telephone number. *Fed. R. Civ. P. 26(g)(1)*. The signature of the attorney or party on a disclosure, request, response, or objection constitutes a certification that, to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

1. Consistent with the Federal Rules of Civil Procedure and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, or for establishing new law. *Fed. R. Civ. P. 26(g)(1)(B)(i)*;

2. Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *Fed. R. Civ. P. 26(g)(1)(B)(ii)*; and

3. 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. *Fed. R. Civ. P. 26(g)(1)(B)(ii)*.

Warning:

If a request, response, or objection is not signed, it will be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection. A party is not obligated to take any action with respect to it until it is signed. *Fed. R. Civ. P. 26(g)(2)*.

The signing attorney must certify that a reasonable inquiry has been made with respect to the factual and legal basis for any discovery disclosure, request or response. *Fed. R. Civ. P. 26(g)*. The reasonableness requirement is measured by an objective standard. There is no required showing of bad faith. *See Fed. R. Civ. P. 26*, Committee Note of 1983.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.150 -26.154*.
- *Federal Litigation Guide PP 22.120 -22.121*.
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 40 -45*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.13*.



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Chapter 18 SANCTIONS
PART N: SEEKING SANCTIONS FOR IMPROPER CERTIFICATION OF DISCOVERY REQUEST, OBJECTION, OR DISCLOSURE--RULE 26(g)

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.37

§ 18.37 Understanding Grounds for Awarding Rule 26(g) Sanctions

If without substantial justification a certification is made in violation of *Fed. R. Civ. P. 26(g)*, the court, on motion or on its own initiative, must impose on the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction. *Fed. R. Civ. P. 26(g)(3)*. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation. *Fed. R. Civ. P. 26(g)(3)*. A simple fine payable to the court, and not tied to actual court costs, also may be imposed under Rule 26(g). *See Travel Sentry, Inc. v. Tropp, 669 F. Supp. 2d 279, 286-287 (E.D.N.Y. 2009)* (magistrate judge properly imposed $10,000 fine on plaintiff's counsel for misleading the court and opposing parties as to existence of documents).

Fed. R. Civ. P. 26(g) contains sanction provisions parallel to those found in *Fed. R. Civ. P. 11*. The primary distinction is that Rule 26 applies exclusively to discovery requests and responses, while Rule 11 applies to any paper, pleading, or motion. Rule 11 is therefore reserved for those papers, pleadings, and motions for which there are no other applicable sanction provisions. *See Fed. R. Civ. P. 26*, Committee Note of 1983. Although Rule 11 may not be used to preempt the application of Rule 26(g) to discovery responses and requests, its interpretation nonetheless guides the application of Rule 26(g). *See Fed. R. Civ. P. 26*, Committee Note of 1983

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.154*.
- *Federal Litigation Guide P 22.123*.
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 40 -45*.
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.13*.
- *Fed. R. Civ. P. 26(g)(3)* (sanctions for improper certification).



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Chapter 18 SANCTIONS
PART N: SEEKING SANCTIONS FOR IMPROPER CERTIFICATION OF DISCOVERY REQUEST, OBJECTION, OR DISCLOSURE--RULE 26(g)

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.38

§ 18.38 Moving for Rule 26(g) Sanctions

[1] Motion Should Be Filed Soon After Violation Occurs

The Federal Rules of Civil Procedure do not specify any time frame within which a motion seeking *Fed. R. Civ. P. 26(g)* sanctions must be filed. The motion should be filed as soon as possible after it becomes clear that a certification was made in violation of *Fed. R. Civ. P. 26(g)* without substantial justification. In some cases, this determination may not be possible until the action has terminated.

[2] Counsel Must Follow Procedures Applicable to Discovery Motions

A motion for sanctions under *Fed. R. Civ. P. 26(g)* must comply with procedures applicable to discovery motions generally.

[3] Person Subject to Sanctions Must Be Afforded Due Process

The sanctioning process must comport with due process requirements. The kind of notice and hearing required depends on the facts of the case and the severity of the sanction being considered. In most cases, the court is aware of the circumstances, and only a brief hearing should be necessary. *See Oregon RSA No. 6 v. Castle Rock Cellular Ltd. P'ship, 76 F.3d 1003, 1007-1008 (9th Cir. 1996)* (notice and opportunity to be heard may be required under both Rule 26 and court's inherent powers); *Fed. R. Civ. P. 26(g)*, Committee Note of 1983.

[4] Motion May Seek Amount of Reasonable Expenses and Attorney's Fees

The sanction for a Rule 26(g) violation may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee. *Fed. R. Civ. P. 26(g)(3)*.

[5] Review of Ruling on Rule 26(g) Motion

All circuits review discovery rulings for abuse of discretion. *See, e.g., Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1545 (11th Cir. 1993)* (court reviews sanctions under Rule 26(a) for abuse of discretion).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.154.*
- *Federal Litigation Guide P 22.123.*
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 40 -45.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.13.*
- *Fed. R. Civ. P. 26(g)(3)* (sanctions for improper certification).



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Chapter 18 SANCTIONS
PART O: OPPOSING MOTION FOR RULE 26(g) SANCTIONS

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.39

§ 18.39 Checklist for Opposing Imposition of Rule 26(g) Sanctions

☐ Determine whether the grounds asserted in the moving papers are justified under *Fed. R. Civ. P. 26(g)(1)(B)(i)*, *(ii)*, or *(iii)*. *See § 18.36 above*.

○ If not, draft objections refuting the facts asserted in the moving papers.

○ If so, draft opposition papers explaining the substantial justification for the request, response, objection, or disclosure.

☐ Determine whether the moving party has complied with local rules concerning dispute-resolution procedures.

☐ Prepare and serve papers in opposition to the motion.



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Chapter 18 SANCTIONS
PART O: OPPOSING MOTION FOR RULE 26(g) SANCTIONS

1-18 Moore's AnswerGuide: Federal Discovery Practice § 18.40

§ 18.40 Opposing Imposition of Rule 26(g) Sanctions

To oppose a motion for *Fed. R. Civ. P. 26(g)* sanctions, a party should attempt to show that the certification was substantially justified, and argue facts showing that the asserted grounds for imposition of sanctions are inapplicable. The showing will depend on the grounds claimed by the moving party, and the specific facts of the case. *See Fed. R. Civ. P. 26(g)(3).*

PRACTICE RESOURCES:

- *Federal Litigation Guide P 22.124[2].*
- *Sanctions: The Federal Law of Litigation Abuse (4th ed.) §§ 40 -45.*
- *Moore's AnswerGuide: Federal Civil Motion Practice § 6.13.*
- *Fed. R. Civ. P. 26(g)(3)* (sanctions for improper certification).



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SELECTED FEDERAL RULES OF CIVIL PROCEDURE

1 Moore's AnswerGuide: Federal Discovery Practice APPENDIX: .syn

§ .syn Synopsis to Appendix : SELECTED FEDERAL RULES OF CIVIL PROCEDURE

Pretrial Conferences; Scheduling; Management

Duty to Disclose; General Provisions Governing Discovery

Depositions to Perpetuate Testimony

Persons Before Whom Depositions May Be Taken

Stipulations About Discovery Procedure

Depositions by Oral Examination

Depositions by Written Questions

Using Depositions in Court Proceedings

Interrogatories to Parties

Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

Physical and Mental Examinations

Requests for Admission

Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

Subpoena



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SELECTED FEDERAL RULES OF CIVIL PROCEDURE
TITLE III. PLEADINGS AND MOTIONS

1 Moore's AnswerGuide: Federal Discovery Practice

Pretrial Conferences; Scheduling; Management

Rule 16 Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

(b) Scheduling.

(1) *Scheduling Order*. Except in categories of actions exempted by local rule, the district judge--or a magistrate judge when authorized by local rule--must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) *Time to Issue*. The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

(3) *Contents of the Order*.

(A) *Required Contents*. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents*. The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;

(v) set dates for pretrial conferences and for trial; and

(vi) include other appropriate matters.

(4) *Modifying a Schedule*. A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) *Attendance*. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) *Matters for Consideration*. At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under *Federal Rule of Evidence 702*;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan,

including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions.

(1) *In General*. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate--or does not participate in good faith--in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) *Imposing Fees and Costs*. Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

[As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.]



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SELECTED FEDERAL RULES OF CIVIL PROCEDURE
TITLE V. DISCLOSURES AND DISCOVERY

1 Moore's AnswerGuide: Federal Discovery Practice

Duty to Disclose; General Provisions Governing Discovery

Rule 26 Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) *Initial Disclosure*.

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

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

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

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected

from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

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

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

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

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

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

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

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

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

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

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

(ix) an action to enforce an arbitration award.

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

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

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

(2) *Disclosure of Expert Testimony*.

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

(B) *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) *Pretrial Disclosures*.

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

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

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

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

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

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

(b) Discovery Scope and Limits.

(1) *Scope in General*. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--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. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) *Limitations on Frequency and Extent*.

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

(B) *Specific Limitations on Electronically Stored Information*. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required*. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) *Trial Preparation: Materials*.

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative

concerning the litigation.

(C) *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts*.

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

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

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

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

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials*.

(A) *Information Withheld*. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced*. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim

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

(c) Protective Orders.

(1) *In General*. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending--or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery*. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

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

(d) Timing and Sequence of Discovery.

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

(2) *Sequence*. Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

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

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

(e) Supplementing Disclosures and Responses.

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

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

(B) as ordered by the court.

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

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

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

(2) *Conference Content; Parties' Responsibilities*. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

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

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

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

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

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

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

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

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

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

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

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

(1) *Signature Required; Effect of Signature*. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign*. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification*. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

[As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 28, 2010, eff. Dec. 1, 2010.]



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Depositions to Perpetuate Testimony

Rule 27 Depositions to Perpetuate Testimony

(a) Before an Action Is Filed.

(1) *Petition*. A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

(A) that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

(2) *Notice and Service*. At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

(3) *Order and Examination*. If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed.

(4) *Using the Deposition*. A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.

(b) Pending Appeal.

(1) *In General*. The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

(2) *Motion*. The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show:

(A) the name, address, and expected substance of the testimony of each deponent; and

(B) the reasons for perpetuating the testimony.

(3) *Court Order*. If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action.

(c) Perpetuation by an Action. This rule does not limit a court's power to entertain an action to perpetuate testimony.

[As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 1, 1971, eff. July 1, 1971; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.]



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Persons Before Whom Depositions May Be Taken

Rule 28 Persons Before Whom Depositions May Be Taken

(a) Within the United States.

(1) *In General*. Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

(A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or

(B) a person appointed by the court where the action is pending to administer oaths and take testimony.

(2) *Definition of* "*Officer*." The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

(b) In a Foreign Country.

(1) *In General*. A deposition may be taken in a foreign country:

(A) under an applicable treaty or convention;

(B) under a letter of request, whether or not captioned a "letter rogatory";

(C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or

(D) before a person commissioned by the court to administer any necessary oath and take testimony.

(2) *Issuing a Letter of Request or a Commission*. A letter of request, a commission, or both may be issued:

(A) on appropriate terms after an application and notice of it; and

(B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) *Form of a Request, Notice, or Commission*. When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(4) *Letter of Request--Admitting Evidence*. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

(c) Disqualification. A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

[As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 1, 2007, eff. Dec. 1, 2007.]



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Stipulations About Discovery Procedure

Rule 29 Stipulations About Discovery Procedure

Unless the court orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified--in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified--but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

[As amended Mar. 30, 1970, eff. July 1, 1970; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007.]



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Depositions by Oral Examination

Rule 30 Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) *Without Leave*. A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave*. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) Notice of the Deposition; Other Formal Requirements.

(1) *Notice in General*. A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) *Producing Documents*. If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(3) *Method of Recording*.

(A) *Method Stated in the Notice*. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) *Additional Method*. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) *By Remote Means*. The parties may stipulate--or the court may on motion order--that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) *Officer's Duties*.

(A) *Before the Deposition*. Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) *Conducting the Deposition; Avoiding Distortion*. If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) *After the Deposition*. At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) *Notice or Subpoena Directed to an Organization*. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) *Examination and Cross-Examination*. The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) *Objections*. An objection at the time of the examination--whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition--must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) *Participating Through Written Questions*. Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) *Duration*. Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Sanction*. The court may impose an appropriate sanction--including the reasonable expenses and attorney's fees incurred by any party--on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to Terminate or Limit*.

(A) *Grounds*. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order*. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses*. Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) *Review; Statement of Changes*. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes Indicated in the Officer's Certificate*. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) *Certification and Delivery*. The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and Tangible Things*.

(A) *Originals and Copies*. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals--after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked--in which event the originals may be used as if attached to the deposition.

(B) *Order Regarding the Originals*. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) *Copies of the Transcript or Recording*. Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) *Notice of Filing*. A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

[As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970; Mar. 1, 1971, eff. July 1, 1971; Nov. 20, 1972, eff. July 1, 1975; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 30, 2007, eff. Dec. 1, 2007.]



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Depositions by Written Questions

Rule 31 Depositions by Written Questions

(a) When a Deposition May Be Taken.

(1) *Without Leave*. A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave*. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take a deposition before the time specified in Rule 26(d); or

(B) if the deponent is confined in prison.

(3) *Service; Required Notice*. A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) *Questions Directed to an Organization*. A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6).

(5) *Questions from Other Parties*. Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

(b) Delivery to the Officer; Officer's Duties. The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to:

(1) take the deponent's testimony in response to the questions;

(2) prepare and certify the deposition; and

(3) send it to the party, attaching a copy of the questions and of the notice.

(c) Notice of Completion or Filing.

(1) *Completion*. The party who noticed the deposition must notify all other parties when it is completed.

(2) *Filing*. A party who files the deposition must promptly notify all other parties of the filing.

[As amended Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007.]



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Using Depositions in Court Proceedings

Rule 32 Using Depositions in Court Proceedings

(a) Using Depositions.

(1) *In General*. At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) *Impeachment and Other Uses*. Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) *Deposition of Party, Agent, or Designee*. An adverse party may use for any purpose the deposition of a party or

anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) *Unavailable Witness*. A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable--in the interest of justice and with due regard to the importance of live testimony in open court--to permit the deposition to be used.

(5) *Limitations on Use*.

(A) *Deposition Taken on Short Notice*. A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place--and this motion was still pending when the deposition was taken.

(B) *Unavailable Deponent; Party Could Not Obtain an Attorney*. A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) *Using Part of a Deposition*. If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) *Substituting a Party*. Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) *Deposition Taken in an Earlier Action*. A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) Objections to Admissibility. Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) Form of Presentation. Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) Waiver of Objections.

(1) *To the Notice*. An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) *To the Officer's Qualification*. An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) *To the Taking of the Deposition*.

(A) *Objection to Competence, Relevance, or Materiality*. An objection to a deponent's competence--or to the competence, relevance, or materiality of testimony--is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an Error or Irregularity*. An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(C) *Objection to a Written Question*. An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

(4) *To Completing and Returning the Deposition*. An objection to how the officer transcribed the testimony--or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition--is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

[As amended Mar. 30, 1970, eff. July 1, 1970; Nov. 20, 1972, eff. July 1, 1975; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.]



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TITLE V. DISCLOSURES AND DISCOVERY

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Interrogatories to Parties

Rule 33 Interrogatories to Parties

(a) In General.

(1) *Number*. Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2).

(2) *Scope*. An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(b) Answers and Objections.

(1) *Responding Party*. The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) *Time to Respond*. The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(3) *Answering Each Interrogatory*. Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) *Objections*. The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) *Signature*. The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) Use. An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

[As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.]



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Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

Rule 34 Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information--including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations--stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) *Contents of the Request*. The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) *Responses and Objections*.

(A) *Time to Respond*. The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item*. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(C) *Objections*. An objection to part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a Request for Production of Electronically Stored Information*. The response may state an objection to a requested form for producing electronically stored information.

If the responding party objects to a requested form--or if no form was specified in the request--the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information*. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

[As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.]



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Physical and Mental Examinations

Rule 35 Physical and Mental Examinations

(a) Order for an Examination.

(1) *In General*. The court where the action is pending may order a party whose mental or physical condition--including blood group--is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) *Motion and Notice; Contents of the Order*. The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report.

(1) *Request by the Party or Person Examined*. The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) *Contents*. The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) *Request by the Moving Party*. After delivering the reports, the party who moved for the examination may request--and is entitled to receive--from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) *Waiver of Privilege*. By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have--in that action or any other action involving the same controversy--concerning testimony about all examinations of the same condition.

(5) *Failure to Deliver a Report*. The court on motion may order--on just terms--that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

(6) *Scope*. This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

[As amended Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; Nov. 18, 1988; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 30, 2007, eff. Dec. 1, 2007.]



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Requests for Admission

Rule 36 Requests for Admission

(a) Scope and Procedure.

(1) *Scope*. A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) *Form; Copy of a Document*. Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) *Time to Respond; Effect of Not Responding*. A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(4) *Answer*. If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) *Objections*. The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial.

(6) *Motion Regarding the Sufficiency of an Answer or Objection*. The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

(b) Effect of an Admission; Withdrawing or Amending It. A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

[As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007.]



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Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

Rule 37 Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) *In General*. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) *Appropriate Court*. A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) *Specific Motions*.

(A) *To Compel Disclosure*. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response*. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to respond that inspection will be permitted--or fails to permit inspection--as requested under Rule 34.

(C) *Related to a Deposition*. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) *Evasive or Incomplete Disclosure, Answer, or Response*. For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) *Payment of Expenses; Protective Orders*.

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing)*. If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied*. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part*. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) *Sanctions in the District Where the Deposition Is Taken*. If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) *Sanctions in the District Where the Action Is Pending*.

(A) *For Not Obeying a Discovery Order*. If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination*. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses*. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) *Failure to Disclose or Supplement*. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) *Failure to Admit*. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the

reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) *In General*.

(A) *Motion; Grounds for Sanctions*. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent--or a person designated under Rule 30(b)(6) or 31(a)(4)--fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification*. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) *Unacceptable Excuse for Failing to Act*. A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) *Types of Sanctions*. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

[As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Oct. 21, 1980, eff. Oct. 1, 1981; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.]



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TITLE VI. TRIALS

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Subpoena

Rule 45 Subpoena

(a) In General.

(1) *Form and Contents*.

(A) *Requirements--In General*. Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action, the court in which it is pending, and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(c) and (d).

(B) *Command to Attend a Deposition--Notice of the Recording Method*. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information*. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce; Included Obligations*. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) *Issued from Which Court*. A subpoena must issue as follows:

(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and

(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) *Issued by Whom*. The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of:

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

(b) Service.

(1) *By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas*. Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

(2) *Service in the United States*. Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(3) *Service in a Foreign Country*. *28 U.S.C. § 1783* governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) *Proof of Service*. Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.

(1) *Avoiding Undue Burden or Expense; Sanctions*. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

The issuing court must enforce this duty and impose an appropriate sanction--which may include lost earnings and reasonable attorney's fees--on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection*.

(A) *Appearance Not Required*. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections*. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises--or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena*.

(A) *When Required*. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person--except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted*. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative*. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information*. These procedures apply to producing documents or electronically stored information:

(A) *Documents*. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified*. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form*. The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information*. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection*.

(A) *Information Withheld*. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced*. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse

to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

[As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.]