This chapter was first published by IICLE®.

8 Discovery

RICHARD L. MILLER II
Siprut PC
Chicago

IICLE® gratefully acknowledges Geoffrey A. Vance, Charles M. Evans, Brian A. Fogerty, and Michael S. Yellin, who provided this chapter for previous editions and updates and on whose material this edition is based.

I. PROCEDURES PRIOR TO BEGINNING FORMAL DISCOVERY

A. [8.1] Initial Disclosures

The Federal Rules of Civil Procedure establish a broad policy that favors full disclosure of facts during discovery. *See Bond v. Utreras,* 585 F.3d 1061, 1067 (7th Cir. 2009) ("The *Federal Rules of Civil Procedure* broadly permit parties in litigation to obtain discovery 'regarding any nonprivileged matter that is relevant to any party's claim or defense.' " [Emphasis in original.]), quoting Fed.R.Civ.P. 26(b)(1). Fed.R.Civ.P. 26(a)(1) requires parties to exchange a great deal of information at the outset of the litigation, without the need for any formal request, including the identity of every 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," copies or descriptions of documents in a party's possession, a computation of damages claimed including documents or other evidentiary material on which the computation is based, and insurance agreements. Fed.R.Civ.P. 26(a)(1)(A). These initial disclosures must be made within 14 days of the parties' Rule 26(f) conference, unless otherwise stipulated by the parties or ordered by the district court. Fed.R.Civ.P. 26(a)(1)(C).

B. [8.2] Rule 26(f) Conference

Fed.R.Civ.P. 26(f) requires a discovery planning conference of counsel for all parties, and Rule 26(d)(1) provides that no discovery shall be sought before the Rule 26(f) conference unless the parties agree or the trial judge orders otherwise. The purpose of the Rule 26(f) conference is to formulate a discovery plan prior to any appearance in court or the initiation of any formal discovery.

The discovery planning meeting is to be held at least 21 days before a scheduling conference is held with the court or a scheduling order is due under Fed.R.Civ.P. 16(b). Fed.R.Civ.P. 26(f)(1). Thus, unless otherwise ordered by the court, the parties normally should hold a meeting to discuss all aspects of the case, including claims and defenses, the possibility of early settlement, and discovery, within 69 days after the first defendant has filed its appearance (*i.e.*, 21 days before a scheduling order is normally due under Rule 16(b)(2)). Fed.R.Civ.P. 16(b). See also §8.25 below for a more comprehensive discussion of the issues that must be raised and discussed in the parties' planning meeting.

C. [8.3] Consultation of Local Rules

Litigants should be cognizant of local rules that might influence their discovery plan. District courts enjoy extremely broad discretion in controlling discovery, and local rules may vary greatly between districts. *See Packman v. Chicago Tribune Co.*, 267 F.3d 628, 646 (7th Cir. 2001) (recognizing that district courts have broad discretion in discovery matters) The Seventh Circuit has recognized that judges are to be "commended rather than criticized for keeping tight reins" on discovery proceedings and are given the power to monitor discovery closely. *Olivieri v. Rodriguez,* 122 F.3d 406, 409 (7th Cir. 1997). Numerous judges in each Illinois district have issued standing orders governing the initial stages of cases on their calendars. These orders

frequently require a written report outlining a discovery plan, among other items, prior to the first court appearance. Therefore, it is imperative for lawyers to know the practices peculiar to the judge assigned to the case. Copies of standing orders are typically available online or from a judge's chambers.

D. [8.4] District Court Websites

All three Illinois districts maintain websites that provide the districts' local rules and, in many cases, individual judges' rules:

Northern District of Illinois	www.ilnd.uscourts.gov
Central District of Illinois	www.ilcd.uscourts.gov
Southern District of Illinois	www.ilsd.uscourts.gov

These sites may provide convenient answers to questions regarding court hours, filing fees, and court papers. Increased access to technology makes it easier for litigants to stay apprised of changes in local rules that may greatly affect the outcome of litigation before a particular judge. The common use of the Internet has also led many judges to expect litigants to check the respective court's website and the judge's webpage periodically over the course of each case.

II. SCOPE OF DISCOVERY

A. [8.5] Standard of Discoverability

Fed.R.Civ.P. 26(b)(1) outlines the general scope of discovery:

> **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*.** **[**Emphasis added.**]**

As stated in the Advisory Committee Notes on the 1946 Amendment to Fed.R.Civ.P. 26, Rule 26(b) is intended to allow a "broad scope of examination [that] may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence." *See also In re Aircrash Disaster near Roselawn, Indiana October 31, 1994*, 172 F.R.D. 295, 303 (N.D.Ill. 1997) ("The test of what is relevant [and thus may be obtained through discovery] is best left to a common sense approach by the court.").

The remaining provisions of Rule 26 enumerate certain limitations and exceptions (*e.g.*, insurance applications, work product, expert opinions) and provide for protective orders, discovery sequencing and timing, supplementation of discovery disclosures and responses, discovery conferences, and signing of disclosures, discovery requests, responses, and objections. As more fully discussed in §§8.6 – 8.21 below, these refinements to and departures from the general philosophy of full discovery are important tools that the attorney responding to a discovery request must exercise, or they may be waived inadvertently.

Under the rules, certain relevant material otherwise discoverable may be protected from discovery altogether, other material may be subject to restrictions, and still other material may be discoverable only on a specified showing.

B. [8.6] Certification That Discovery Is Proper

Fed.R.Civ.P. 26(g)(1) imposes an affirmative duty on lawyers to pursue discovery properly:

> ***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.**

Rule 26(g)(1) prescribes an affirmative obligation on each attorney to certify that he or she has made a reasonable inquiry to determine that the filing is well grounded in fact and warranted by existing law (or a good-faith argument for its change), that it is not interposed for improper purposes such as harassment or delay, and that it is not unduly burdensome in proportion to the case.

Rule 26(g)(3) provides that the court may impose sanctions on a party who "without substantial justification" makes a certification violating the rule. The standard is broader than that of Fed.R.Civ.P. 37 and applies not only to situations in which parties unjustifiably resist discovery but also to situations in which parties use discovery requests as a tool to abuse their opponents. The court may implement Rule 26(g)(3) on its own initiative as well as on the motion of the opposing party. Rule 26(g)(1) also applies signature and certification requirements to Rule 26(a) disclosures.

The duty imposed by Rule 26(g)(1) is identical to that of Fed.R.Civ.P. 11(a), which applies to "[e]very pleading, written motion, and other paper" with one important distinction. Unlike Rule 26, Rule 11 has no requirement that litigation conduct be proportionate to the issues of the case. See Fed.R.Civ.P. 26(g)(1)(B)(iii). Rule 11 does not apply to discovery requests, responses, objections, and motions under Fed.R.Civ.P. 26 – 37. Fed.R.Civ.P. 11(d).

C. Material Protected from Discovery Altogether

1. [8.7] Irrelevant Material

Courts employ a "common sense approach" to determine what constitutes relevant information for purposes of discovery. *In re Aircrash Disaster near Roselawn, Indiana October 31, 1994*, 172 F.R.D. 295, 303 (N.D.Ill. 1997). The Advisory Committee Notes on the 1946 Amendment to Fed.R.Civ.P. 26(b) provide that "matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible." The requested information generally must bear some relevance to the controversy in order to prevent discovery from being used solely as an instrument to obtain information not related to the litigation. *Id.*

2. [8.8] Privileged Material

Certain relevant information is immune from discovery because of overriding policy concerns. Specific privileges are discussed in §§8.9 – 8.11 below. The scope of all privileges during discovery is the same as that during trial and is governed by Federal Rule of Evidence 501:

> **The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:**
>
> - **the United States Constitution;**
> - **a federal statute; or**
> - **rules prescribed by the Supreme Court.**
>
> **But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.**

Fed.R.Civ.P. 26(b)(5)(B) provides a procedure for dealing with the inadvertent production of privileged material:

> ***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.**

This provision was inserted based on a recognition that the risk of inadvertent production is increased when a party must review and ultimately produce a large volume of electronically stored information (ESI). Advisory Committee Notes, 2006 Amendments, Subdivision (b)(5), Fed.R.Civ.P. 26. It is important to note, however, that this provision does not address whether a claim of privilege is waived by inadvertent production. *Id.* Waiver is discussed in §8.12 below.

a. [8.9] Attorney-Client Privilege

The attorney-client privilege is the most well-known and often used privilege. The Seventh Circuit Court of Appeals has adopted the following definition of the attorney-client privilege:

> **(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.** *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991).

Illinois law on the attorney-client privilege is subject to Supreme Court Rule 201(b)(2), which provides: "All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure." S.Ct. Rule 201 does not define the elements of the attorney-client privilege, and, unlike other privileges, there is no statutory definition.

The federal privilege does not apply to every communication between attorney and client. Rather, "it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Roth v. Aon Corp.*, 254 F.R.D. 538, 540 (N.D.Ill. 2009), quoting *Fisher v. United States*, 425 U.S. 391, 48 L.Ed.2d 39, 96 S.Ct. 1569, 1577 (1976). The privilege does not shield routine or administrative details of the attorney-client relationship from inquiry. *See Slamecka v. Empire Kosher Poultry, Inc.*, No. 03 C 4122, 2004 WL 1900817 at *4 (N.D.Ill. Aug. 12, 2004) (recognizing that fact that attorney was consulted, date and time of any work performed, billing rate, and any other expenses are not privileged). *See also Roth, supra*, 254 F.R.D. at 540 (explaining that "the attorney-client privilege protects disclosure of communications, but not the underlying facts by those who communicated with the attorney").

The privilege can be waived in a variety of ways (*e.g.,* if the material is communicated to a non-client third party or, under certain circumstances, by asserting reliance on counsel as an essential element of a defense). *See, e.g., Claffey v. River Oaks Hyundai*, 486 F.Supp.2d 776, 778 (N.D.Ill. 2007) ("The attorney-client privilege may be waived 'when the client asserts claims or defenses that put his attorneys' advice at issue in the litigation.' "), quoting *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175 n.1 (7th Cir. 1995). *But see Ward v. Succession of Freeman*, 854 F.2d 780, 788 (5th Cir. 1988) (privilege not waived when court compelled defendants to disclose privileged communications that then were used by plaintiffs to prove element of their claim). Waiver also may occur when a document is inadvertently produced during discovery. *See Wunderlich-Malec Systems, Inc. v. Eisenmann Corp.*, No. 05 C 04343, 2006 WL 3370700 at *2 (N.D.Ill. Nov. 17, 2006) (explaining approach used by courts in Northern District of Illinois in ruling on motions involving inadvertent production of documents), citing *Sanner v. Board of Trade of City of Chicago*, 181 F.R.D. 374, 376 (N.D.Ill. 1998), and *Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 115 (N.D.Ill. 1996).

The attorney-client privilege is applied narrowly, and the courts will evaluate privilege claims as to each specific document to determine the necessary degree of protection. *See Holifield v. United States*, 909 F.2d 201, 204 (7th Cir. 1990) (holding that blanket assertions of attorney-client privilege do not suffice because they "[do] not address the applicability of the privilege with respect to each individual document [that the party seeks] to exclude [or] set forth any 'specific facts' to support [the] legal conclusions"); *Anderson v. Torrington Co.*, 120 F.R.D. 82, 85 (N.D.Ind. 1987) (rejecting blanket assertion of privilege as to all documents). Courts construe the privilege narrowly "because it is 'in derogation of the search for truth.' " *White, supra*, 950 F.2d at 430, quoting *In re Walsh*, 623 F.2d 489, 493 (7th Cir. 1980); *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*, 152 F.R.D. 132, 135 (N.D.Ill. 1993).

The attorney-client privilege applies whether the client is a natural person or a corporation. In determining whether a communication between a corporate client and the attorney is protected, the Seventh Circuit has used the test in *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491 (7th Cir. 1970). In *Decker*, the Seventh Circuit held that an employee's communications to the corporation's attorney are privileged if made "at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." 423 F.2d at 491 – 492. This test does not seem to be at variance with the Supreme Court's discussion of the privilege in *Upjohn Co. v. United States*, 449 U.S. 383, 66 L.Ed.2d 584, 101 S.Ct. 677 (1981), in which the Supreme Court rejected the "control group test" as being too narrow.

When state law on privilege applies, the control-group test still is applicable. After the United States Supreme Court rejected this test in *Upjohn, supra*, the Illinois Supreme Court reaffirmed its validity under Illinois law in *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill.2d 103, 432 N.E.2d 250, 257 – 258, 59 Ill.Dec. 666 (1982). The Illinois Supreme Court broadened the test to include not only top management but also "an employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority." 432 N.E.2d at 258.

There are limitations on the scope of the attorney-client privilege. For example, courts have held that the privilege does not apply to business advice. *See Wychocki v. Franciscan Sisters of Chicago,* No. 10 C 2954, 2011 WL 2446426 at *5 (N.D.Ill. June 15, 2011) ("[T]he attorney-client privilege is restricted to confidential *legal* advice; financial or business advice is not protected by the privilege." [Emphasis in original.]). Fee arrangements and bills generally are not privileged unless they contain confidential communications. *See Pandick, Inc. v. Rooney,* No. 85 C 6779, 1988 WL 61180 (N.D.Ill. June 3, 1988) (finding time sheets that did not reveal substance of communications or work performed to be discoverable). In addition, the party asserting the privilege must provide a sufficient description of the documents withheld to establish the privilege. *Mold-Masters Ltd. v. Husky Injection Molding Systems Ltd.,* No. 01 C 1576, 2001 WL 1558303 at *2 (N.D.Ill. Dec. 6, 2001) ("If the description . . . fails to provide sufficient information for the court and the party seeking disclosure to assess the applicability of the attorney-client privilege or work-product doctrine, then disclosure of the document is an appropriate sanction."); *In re Stern Walters Partners, Inc.,* No. 94 C 5705, 1996 WL 115290 (N.D.Ill. Mar. 13, 1996) (when court cannot discern from description of documents that privilege applied, documents must be produced).

b. [8.10] Accountant and Taxpayer Privilege

There is no federal accountant-client privilege. *See Couch v. United States,* 409 U.S. 322, 34 L.Ed.2d 548, 93 S.Ct. 611 (1973); *United States v. Frederick,* 182 F.3d 496, 500 (7th Cir. 1999). Nevertheless, under an agency theory, communications involving accountants may be protected work product or subject to the attorney-client privilege. *See Heriot v. Byrne,* 257 F.R.D. 645, 664 – 668 (N.D.Ill. 2009). This immunity goes only as far as the underlying privileges. Therefore, for example, information communicated to accountants or lawyers that is intended to be provided to the government on a tax return is not privileged because it is neither confidential nor related to obtaining legal advice. *See, e.g., United States v. Lawless,* 709 F.2d 485, 487 (7th Cir. 1983).

There is a limited federal privilege between clients and authorized tax practitioners. *See Valero Energy Corp. v. United States,* 569 F.3d 626, 630 (7th Cir. 2009). "This privilege is no broader than the existing attorney-client privilege." *Id.* Thus, this privilege only applies when the advice given was legal advice rather than accounting advice. *Id.* Information that is intended to be put on a tax return is not privileged because the preparation of such returns is an accounting service. *See In re Grand Jury Proceedings,* 220 F.3d 568, 571 (7th Cir. 2000). Communications about legal questions, however, are privileged even if there is no lawyer involved, as long as a valid tax practitioner is a party to the communications. *Id.; Valero Energy Corp., supra,* 569 F.3d at 630.

Unlike the federal common law, the Illinois Public Accounting Act, 225 ILCS 450/0.01, *et seq.,* provides that information communicated from a client to an accountant in a confidential capacity is immune from discovery. 225 ILCS 450/27. The Illinois Supreme Court, in *In re October 1985 Grand Jury No. 746,* 124 Ill.2d 466, 530 N.E.2d 453, 457, 125 Ill.Dec. 295 (1988), stated four conditions necessary before the information is protected:

1. The communication must be made with the expectation that it will not be disclosed.

2. Confidentiality must be necessary to the relationship between the parties.

3. The community must believe that the relationship should be encouraged.

4. The injury resulting from disclosure must be greater than the benefits of obtaining the information.

See also Zepter v. Dragisic, 237 F.R.D. 185, 189 (N.D.Ill. 2006) (recognizing existence of accountant-client privilege under Illinois law). Notwithstanding its recognition of the accountant-client privilege, the Illinois Supreme Court, like the majority of federal courts, has held that the attorney-client privilege does not apply to tax information given to an attorney in connection with the presentation of that information to the government. *October 1985 Grand Jury*, *supra*, 530 N.E.2d at 457.

c. [8.11] Other Privileges

Federal Rule of Evidence 501 provides that privilege shall be governed by "[t]he common law — as interpreted by United States courts in the light of reason and experience." Federal courts recognize a number of common-law privileges, such as the privilege between a psychotherapist and patient, the spousal relationship privilege, votes on elections conducted by secret ballot, and various governmental privileges, such as for reports required by statute to be confidential, state secrets, and the identity of an informer. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1, 135 L.Ed.2d 337, 116 S.Ct. 1923 (1996) (recognizing psychotherapist-patient privilege); *Dole v. Local 1942, International Brotherhood of Electrical Workers, AFL-CIO*, 870 F.2d 368, 372 (7th Cir. 1989) (recognizing informer's privilege).

By contrast, Illinois law (which, under Fed.R.Evid. 501, governs when the privilege relates to "a claim or defense for which state law supplies the rule of decision") provides statutory definitions of various privileges. Under the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.*, Illinois recognizes the physician-patient privilege (735 ILCS 5/8-802); the clergy-advisee privilege (735 ILCS 5/8-803); the "source of information" (or reporter's) privilege (735 ILCS 5/8-901); and the husband-wife privilege (735 ILCS 5/8-801). Illinois also recognizes the psychologist-patient privilege (225 ILCS 15/5) and the social worker-client privilege (225 ILCS 20/16). As noted in §8.10 above, the Illinois Public Accounting Act recognizes the accountant-client privilege (225 ILCS 450/27). The Illinois Supreme Court also has declared that communications between a litigant and the litigant's liability insurance carrier are protected because they fall within the attorney-client privilege. *People v. Ryan*, 30 Ill.2d 456, 197 N.E.2d 15, 17 (1964).

d. [8.12] Asserting and Challenging the Privilege

A party seeking to prevent disclosure of documents has the burden of showing that the attorney-client or other claimed privilege actually applies. *See American National Bank & Trust Company of Chicago v. Axa Client Solutions, LLC*, No. 00 C 6786, 2002 WL 1058776 at *1 (N.D.Ill. Mar. 22, 2002), citing *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983).

Pursuant to Fed.R.Civ.P. 26(b)(5), material that is withheld on the grounds of privilege or work product must be described adequately to ensure that the privilege applies. Fed.R.Civ.P. 26(b)(5)(A) says that when a party claims the privilege, the party must "expressly make the claim" and "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." Further, the Advisory Committee Notes on the 1993 Amendments to Fed.R.Civ.P. 26(b)(5) state: "To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection." Thus, opposing counsel ordinarily is entitled to a privilege log with a description of the privileged material that includes the date, author, and names and identification of parties who received the communication; the subject matter of the communication; and the basis for asserting a privilege but not the substance of the communication. *See Muro v. Target Corp.*, 250 F.R.D. 350, 362 – 365 (N.D.Ill. 2007) (describing information required on privilege log); *Mold-Masters Ltd. v. Husky Injection Molding Systems Ltd.*, No. 01 C 1576, 2001 WL 1558303 (N.D.Ill. Dec. 6, 2001) (same).

Care must be taken that the client does not waive the privilege inadvertently during discovery, as by producing documents or answering questions about a subject for which counsel wants to assert the privilege. However, the risk of waiver because of a party's inadvertent production of privileged material has been addressed and reduced by the amendments to Rule 26(b)(5)(B). See §§8.8 and 8.9 above.

A privilege may also be waived as to any documents that the client testifies have been used to refresh his or her recollection, including documents used to prepare for a deposition. Fed.R.Evid. 612; *Reed v. Advocate Health Care*, No. 06 C 3337, 2008 WL 162760 at *2 (N.D.Ill. Jan. 17, 2008) (explaining that preparation of document binder to prepare witness for deposition constituted work product "but that the use of the binder to refresh the witness's memory prior to testifying constituted a waiver of the protection"); *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11, 13 (N.D.Ill. 1972) (finding attorney-client privilege waived when otherwise privileged document was used to refresh recollection). *But see United States Equal Employment Opportunity Commission v. Continental Airlines, Inc.*, 395 F.Supp.2d 738, 744 (N.D.Ill. 2005) (courts have "considerable discretion in deciding whether a writing must be produced when a witness has reviewed the document prior to testifying"); Advisory Committee Notes, 1974 Enactment, Fed.R.Evid. 612 ("The Committee intends that nothing in the Rule be construed as barring the assertion of a privilege."). Importantly, any voluntary waiver may operate to waive the privilege as to all other communications between the same client and the same attorney on the same subject. *See Neal v. Honeywell, Inc.*, No. 93 C 1143, 1995 WL 591461 at **4 – 6 (N.D.Ill. Oct. 4, 1995).

A party wishing to challenge an assertion of the privilege should file a motion to compel discovery compliance before the court. Fed.R.Civ.P. 37(a)(1). A successful challenge to the assertion of a privilege requires a showing that the privilege does not apply or that it has been waived. A party challenging the privilege will need the fullest description possible of the material being sought to particularize the party's argument. Counsel asserting the privilege will want the description to be sparse to maintain the benefit of the privilege and avoid the risk of being deemed to have waived the privilege. The court may solve this conflict by ordering an in camera

review of the disputed materials to decide whether the privilege applies. *In re JP Morgan Chase & Co. Securities Litigation,* No. 06 C 4674, 2007 WL 2363311 at *3 (N.D.Ill. Aug. 13, 2007) (recognizing that "the Court cannot determine without viewing the documents themselves whether any privilege or protection applies, and the Court must view these documents *in camera*").

A magistrate judge's ruling on the applicability of the privilege or on any other discovery matter will be reviewed by the district judge by filing an objection to the magistrate judge's ruling or a motion to compel discovery compliance. See Fed.R.Civ.P. 72.

e. [8.13] Exception to Privilege Between Insurer and Insured

In *Waste Management, Inc. v. International Surplus Lines Insurance Co.,* 144 Ill.2d 178, 579 N.E.2d 322, 329, 161 Ill.Dec. 774 (1991), the Illinois Supreme Court recognized that insurers and their insureds often have a common interest in defending against a claim and that insureds also have a contractual duty to cooperate with their insurers. The court concluded that communications between the insured and an attorney about a claim for which the insured was seeking insurance coverage from an insurer were properly the subject of discovery. According to the court, the underlying claim information was not privileged as between the insurer and insured because this information was the type of information that the insured was obligated to share with its insurer as part of the insured's duty to cooperate and because the insured and insurer shared an interest in the attorney-client discussions that the insured was trying to shield in discovery. *See also Beloit Liquidating Trust v. Century Indemnity Co.,* No. 02 C 50037, 2003 WL 355743 at **10 – 11 (N.D.Ill. Feb. 13, 2003) (recognizing and applying *Waste Management* holding and reasoning). *But see BASF AG v. Great American Assurance Co.,* No. 04 C 6969, 2006 WL 2859620 (N.D.Ill. Oct. 3, 2006) (declining to apply *Waste Management* reasoning).

D. [8.14] Material Subject to Limited Protection

Fed.R.Civ.P. 26(c)(1) provides in part:

> **A party or any person from whom discovery is sought may move for a protective order . . . [**and**] [**t**]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.**

Rule 26(c) gives each district judge discretion to manage discovery by balancing the broad scope of inquiry permissible under the relevancy standard of Rule 26(b)(1) against potential harmful abuses of the discovery process. The provisions of Rule 26(c) apply to every method of discovery at every step of litigation. The rule can be used by any party to an action as well as by any person, including a nonparty who receives a subpoena or is otherwise being examined. With the exception of protective orders on matters relating to a subpoena, application for a protective order generally must be made to the court in which the action is pending. See Fed.R.Civ.P. 26(c)(1), 45(d)(3).

Protective orders under Rule 26(c) are available for specifying several means of limitation — *i.e.,* designating persons who can be present during discovery (Fed.R.Civ.P. 26(c)(1)(E));

ordering that depositions be sealed and opened only by order of court (Fed.R.Civ.P. 26(c)(1)(F)); ordering that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way (Fed.R.Civ.P. 26(c)(1)(G)); and ordering that the parties simultaneously file specified documents in sealed envelopes to be opened as directed by the court (Fed.R.Civ.P. 26(c)(1)(H)). Additionally, Fed.R.Civ.P. 45(d)(3)(B)(i) provides for court protection of subpoenaed intellectual property. See §§8.56, 8.57, 8.59, and 8.67 below for more on Rule 45. Protective orders are used commonly in commercial litigation, most frequently in patent cases.

Once a party makes a motion for a protective order that the court denies, Rule 26(c)(2) empowers the court to issue an order providing or permitting discovery. As a further guard against frivolous motions, the court also may award expenses pursuant to Fed.R.Civ.P. 37(a)(5). See §§8.114 – 8.119 below for a discussion of Rule 37.

1. [8.15] Sensitive or Confidential Material

Frequently, parties dispute whether requested material must be revealed when the party who has the material contends it constitutes a trade secret or some other form of confidential information. These disputes often are resolved by the parties agreeing to stipulated protective orders that they submit to the district court for approval. *See Bond v. Utreras*, 585 F.3d 1061, 1067 (7th Cir. 2009) ("Protective orders are often entered by stipulation when discovery commences."). Such orders are important because otherwise parties are free to "disseminate materials obtained during discovery as they see fit." *Jepson, Inc. v. Makita Electric Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994).

These protective orders often protect confidential information by limiting its access to counsel only, to counsel and clients only, or to counsel and specified personnel of a corporate party with whom counsel may need to confer. In such a case, the parties may request, and the court may order, a limit to the number of copies of documents, that no one receiving the confidential information copy or reveal the contents of documents for any purpose except that of the pending litigation, and that documents be returned or destroyed when the litigation has ended. 6 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE §26.105[8] (3d ed. 2009) (multivolume set, year varies by volume). Protective orders also may provide for "clawback provisions," when the inadvertent disclosure of a document does not operate to waive privilege.

The Supreme Court has held that a protective order prohibiting parties seeking discovery from publishing, disseminating, or using the information in any way, except when necessary to prepare for trial, does not violate the First Amendment. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 81 L.Ed.2d 17, 104 S.Ct. 2199, 2205 (1984). Nevertheless, parties must show, and the court must find, "good cause" for keeping information confidential. *See Citizens First National Bank of Princeton v. Cincinnati Insurance Co.*, 178 F.3d 943, 946 (7th Cir. 1999) (court must make "determination of good cause before [it] may enter the [protective] order"); Fed.R.Civ.P. 26(c)(1). The issuance of a protective order does not have any preclusive effect as a determination of good cause if, at some point in the future, a party or some other interested member of the public moves for relief from the limitations of the protective order. *See id.*

2. [8.16] Material Difficult or Expensive To Gather

Fed.R.Civ.P. 26(c) generally is used to protect confidentiality, but its scope allows protection for other purposes, including curtailing the difficulty and expense of gathering information. Indeed, under Rule 26(c)(1), the court may reject discovery requests altogether because of the burden the requests impose, as when a party can show that discovery is requested to harass. *See, e.g., Marco Island Partners v. Oak Development Corp.,* 117 F.R.D. 418, 420 (N.D.Ill. 1987). The court also may specify the terms and conditions of discovery, including designating the time and place. Fed.R.Civ.P. 26(c)(1)(B). These orders may be used to coordinate out-of-town depositions or to stay the taking of depositions if a party has persuasive reasons for requesting such an order.

Rule 26(c)(1)(C) allows the court to order that discovery be had by a method other than the one requested. Rule 26(c)(1)(C) is used most frequently to order that depositions be taken only on written questions because oral examination would be unnecessarily expensive (*e.g.,* when a series of straightforward questions are to be asked of an unimportant witness who is available only some distance away). 6 MOORE'S FEDERAL PRACTICE §26.105[4]. Under Fed.R.Civ.P. 30(b)(4), telephone depositions may be used in such a case. See §8.66 below. Rule 26(c)(1)(D) also enables a court to ease the burden or expense of discovery by limiting the scope of examination or by entirely forbidding inquiry into certain matters.

E. [8.17] Materials That May Be Discovered by a Showing of Substantial Need — Work Product

Fed.R.Civ.P. 26(b)(3) protects an attorney's work product, prepared in anticipation of litigation, from disclosure. Rule 26(b)(3) does not use the term "work product," instead referring to documents and tangible things otherwise discoverable "prepared in anticipation of litigation or for trial by or for another party or its representative." Fed.R.Civ.P. 26(b)(3)(A). Rule 26(b)(4) includes a specific provision for discovering material from trial experts. See §§8.18 – 8.20 below.

The imminent approach of litigation does not automatically immunize a company's internal reports. The party claiming the work-product privilege must establish that the "primary motivating purpose behind the creation of a document or investigative report [was] to aid in possible future litigation." *Equal Employment Opportunity Commission v. Commonwealth Edison,* 119 F.R.D. 394, 395 (N.D.Ill. 1988), quoting *Janicker v. George Washington University,* 94 F.R.D. 648, 650 (D.D.C. 1982).

Work-product material is protected from disclosure unless the party seeking it can show that the party has "substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed.R.Civ.P. 26(b)(3)(A)(ii). Even if the attorney's work product has been deemed admissible because this showing has been made, Rule 26(b)(3)(B) protects part of that work product, what is often called "opinion work product," by providing that the court, in ordering discovery, "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."

The work-product doctrine differs from the attorney-client privilege in that it provides limited protection for specific materials and hence is not, strictly speaking, a "privilege." It is designed to protect the preparatory work of lawyers and their agents, not private conduct before litigation such as the relationship between attorney and client. In practice, though, the work-product doctrine and the attorney-client privilege often overlap and are asserted together so that the theoretical distinctions are blurred.

Like the attorney-client privilege, the work-product doctrine must be asserted specifically (*e.g.*, as an objection to a document request or interrogatory). Once asserted, however, the burden shifts to the party seeking discovery to show substantial need and the inability to obtain equivalent material by other means without undue hardship. *See Lawrence E. Jaffe Pension Plan v. Household International, Inc.*, 244 F.R.D. 412, 419 (N.D.Ill. 2006) ("An assertion of work-product privilege may be overcome upon a showing of 'substantial need' and 'undue hardship' ").

Generally, a party will not be able to meet the burden merely by showing that it will be expensive or time-consuming to gather the material sought through other readily available discovery procedures. Rather, a party must show that alternative means of obtaining the information are not available, such as when a witness has died or is hostile and refuses to disclose protected information. *See Eagle Compressors, Inc. v. HEC Liquidating Corp.*, 206 F.R.D. 474, 478 (N.D.Ill. 2002) (recognizing that "burden is difficult to meet and is satisfied only in 'rare situations, such as those involving witness unavailability' "), quoting *Trustmark Insurance Co. v. General & Cologne Life Re of America*, No. 00 C 1926, 2000 WL 1898518 at *3. Opinion work product is protected even when undue hardship exists. *Id.*

F. [8.18] Work-Product Exceptions: Statements and Materials of Experts

While statements and materials of experts may constitute "work product" in a general sense, the discovery of these materials is not governed by Fed.R.Civ.P. 26(b)(3) but by Rule 26(b)(4), which sets out different guidelines for obtaining material from experts. Certain facts about experts a party has retained and expects to call as witnesses can be had automatically (see Fed.R.Civ.P. 26(b)(4)(A)), but discovery about experts who are not expected to be called as witnesses can be had only if the party meets a heavier burden than that enunciated in Rule 26(b)(3) for work product (see Fed.R.Civ.P. 26(b)(4)(D)).

1. [8.19] Experts Who Will Testify at Trial

Fed.R.Civ.P. 26(a)(2) and 26(b)(4)(A) govern discovery of expert witnesses who will give opinions at trial under Fed.R.Evid. 702, 703, or 705. These three rules of evidence cover testimony by experts, bases of opinion testimony by experts, and disclosure of facts or data underlying expert opinion. Rules 26(a)(2) and 26(b)(4)(A) do not cover occurrence witnesses, such as treating physicians, who can be deposed or called to testify at trial about what they saw and heard without any requirement for a written report.

As in many state courts, litigants in federal courts must disclose their testifying experts. However, the federal disclosure is much more onerous a task than in most state courts. A federal litigant has a mandatory requirement to provide all other parties with a written report before an

expert witness is deposed. Fed.R.Civ.P. 26(b)(4)(A), 26(a)(2)(B). The content of an expert report depends on whether 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." Fed.R.Civ.P. 26(a)(2)(B). If he or she is, then the written report must be prepared and signed by the expert and include

> **(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.** *Id.*

If the witness is not "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," then the disclosure need only state

> **(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and**
>
> **(ii) a summary of the facts and opinions to which the witness is expected to testify.** Fed.R.Civ.P. 26(a)(2)(C).

These disclosures must be made as directed by the district court. In the absence of other directions by the court, disclosure of experts must be made at least 90 days before the case is to be ready for trial or within 30 days of another party's disclosure on the same subject matter when intended only to contradict or rebut that disclosure. Fed.R.Civ.P. 26(a)(2)(D).

A failure to make the required disclosures may result in a prohibition of the expert's testimony at trial. *See Fidelity National Title Insurance Company of New York v. Intercounty National Title Insurance Co.*, 412 F.3d 745, 750 (7th Cir. 2005) ("A litigant is required to disclose to his opponent any information 'considered' by the litigant's testifying expert, . . . and the sanction for violating this rule can include barring the expert from testifying." [Citations omitted.]). A party that fails to disclose all of the information considered by his or her expert risks an order barring this expert from testifying.

Disclosures and responses generally must be supplemented or corrected if the party learns that the information is "in some material respect" incomplete or incorrect. Fed.R.Civ.P. 26(e)(1)(A).

Rule 26(b)(4)(E) sets forth the rule for compensating an expert witness for time spent in a deposition: "Unless manifest injustice would result, the court must require that the party seeking discovery . . . pay the expert a reasonable fee for time spent in responding to discovery." Rule 26(b)(4)(E) is not explicit about whether a party is required to compensate an expert for time spent preparing for a deposition.

2. [8.20] Experts Who Will Not Testify at Trial

Fed.R.Civ.P. 26(b)(4)(D) governs discovery of an expert "who has been retained or specially employed" in regard to the litigation but is not expected to be called as a witness at trial. Rule 26(b)(4)(D) provides for discovery of the "facts known or opinions held" by such an expert "only as provided in Rule 35(b)" or "on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means."

The Advisory Committee Notes to the 1970 Amendment to Fed.R.Civ.P. 26 point out that Rule 26(b)(4)(D) does not apply to experts who are not retained in anticipation of litigation (such as employees) or experts informally consulted but not retained or specially employed.

A party who succeeds in showing exceptional circumstances and obtains discovery under Rule 26(b)(4)(D) is obligated to pay "the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the [nontestifying] expert's facts and opinions." Fed.R.Civ.P. 26(b)(4)(E)(ii). The Advisory Committee Notes to the 1970 Amendment to Fed.R.Civ.P. 26 state that the court may issue the order concerning fees as a condition of discovery or after discovery is completed. In deciding whether to order payment for discovery under this rule, the Advisory Committee suggests that the court consider whether the discovering party is simply learning about the other party's case or is going beyond that to develop its own case and whether the rights of an indigent party will be affected adversely.

G. [8.21] Parties' and Witnesses' Statements

Both parties and witnesses may obtain copies of their own statements (and parties' statements) about the subject matter of the litigation. Fed.R.Civ.P. 26(b)(3)(C). For the purposes of Rule 26(b)(3)(C), "previous statement" is defined as "(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." If a party's or witness's request for his or her statement is refused, the person may move for a court order. Pursuant to Rule 37(a)(5), the court may award expenses incurred in obtaining the order if the request was unreasonably refused.

By contrast, a party does not have an unqualified right to a nonparty witness statement but instead must make the showing required to obtain work product under Rule 26(b)(3). However, if the witness is not hostile, a party can circumvent this burden by having the witness obtain the statement. Fed.R.Civ.P. 26(b)(3)(C).

III. SEQUENCE OF DISCOVERY — TIMING AND GENERAL STRATEGY CONSIDERATIONS

A. [8.22] Lack of Required Discovery Sequence

The federal courts have no formal priority of discovery. "[D]iscovery may be used in any sequence" unless otherwise ordered by the court, and "discovery by one party does not require any other party to delay its discovery." Fed.R.Civ.P. 26(d)(2). This does not mean, however, that timing and sequence are irrelevant in federal practice. To the contrary, the skilled practitioner will use the sequence of discovery as a tool to obtain the materials and evidence sought from the adversary. The order for using each discovery device might change depending on the particular circumstances of each case and the resources of each party.

B. [8.23] Initial Disclosures and Subsequent Timing

Pursuant to Fed.R.Civ.P. 26(a)(1), parties are required to disclose certain specified information without awaiting a discovery demand prior to the start of any formal discovery. Rule 26(a) disclosures are required to be made at or within 14 days after the Rule 26(f) meeting. Fed.R.Civ.P. 26(a)(1)(C). A party's violation of its Rule 26(a) initial disclosure obligations "*requires* that sanctions be imposed." [Emphasis in original.] *Dugan v. Smerwick Sewerage Co.*, 142 F.3d 398, 407 (7th Cir. 1998).

Rule 26(d)(1) prohibits discovery from any source before the parties have met and conferred, as required by Rule 26(f). Once the parties' discovery planning has occurred and the parties have exchanged their initial disclosures, litigants generally pursue discovery under Fed.R.Civ.P. 30, 33 – 36, and 45. The basic time requirements for the permissible discovery methods are as follows:

Interrogatories. See Fed.R.Civ.P. 33(a). Rule 26(d)(1) time for beginning discovery is invoked. Responses are due within 30 days of service of the interrogatories. Fed.R.Civ.P. 33(b)(2). Pursuant to Rule 29, the parties may agree in writing to extend the response period but may not alter a schedule already set by the court. A maximum of 25 interrogatories is permitted, but see Rule 26(b)(2)(A). Fed.R.Civ.P. 33(a)(1).

Requests to produce tangibles. See Fed.R.Civ.P. 34(b). Rule 26(d)(1) time for beginning discovery is invoked. Responses are due within 30 days of service of the request to produce. Fed.R.Civ. 34(b)(2)(A). Pursuant to Rule 29, the parties may agree in writing to extend the response period but may not alter a schedule already set by the court. There is no limit on the number of requests to produce, but see Rule 26(b)(2)(C).

Depositions. See Fed.R.Civ.P. 30(a), 30(b). Rule 26(d)(1) time for starting discovery is invoked, unless leave of court has been obtained or unless the "reasonable written notice" of deposition contains a certification with supporting facts that the deponent is expected to leave the United States and will be unavailable in this country. Fed.R.Civ.P. 30(a)(2)(A)(iii). There is no limit on the number of depositions, but see Rule 26(b)(2)(A).

Physical and mental examinations. See Fed.R.Civ.P. 35. Rule 26(d)(1) time for beginning discovery is invoked. Moreover, these examinations are conducted by agreement or order of the court.

Requests for admission. See Fed.R.Civ.P. 36. Rule 26(d)(1) time for beginning discovery is invoked. Responses are due within 30 days after receipt of service of the request to admit. Fed.R.Civ.P. 36(a)(3). The parties may agree in writing to extend the response period if such an agreement does not alter a schedule already set by the court pursuant to Rule 29. *Id.* There is no limit on the number of requests to admit, but see Rule 26(b)(2)(A).

Subpoenas. Fed.R.Civ.P. 45 provides the rules for what a litigant must do for a subpoena to be issued and served.

C. [8.24] Basic Sequence of Discovery for Most Cases

After disclosures under Fed.R.Civ.P. 26(a)(1) have been exchanged, the logical sequence of discovery for most substantial cases is as follows:

1. interrogatories seeking basic information, such as

    a. identity of witnesses and areas of their knowledge of facts; and

    b. identity and location of documents;

2. requests to produce known documents and documents identified in the answers to interrogatories (or subpoenas duces tecum on nonparties); and

3. examination or depositions of known witnesses or witnesses identified in answers to interrogatories or documents.

Generally, a party will serve and obtain responses to interrogatories and requests for production prior to commencing depositions. In some situations, such as when documents may be destroyed or put beyond the reach of a party, documents should be requested or subpoenaed immediately. In other cases, witnesses may be in poor health or planning to leave the jurisdiction of the court and thus should be deposed by notice (if a party) or by subpoena (if a nonparty) as soon as possible. A deposition for which adequate preparation is not possible may be better than none at all.

D. [8.25] Discovery Conference

Parties in federal cases must confer to discuss the nature and basis of their claims and defenses and the possibilities for settlement, to make or arrange for any disclosures under Fed.R.Civ.P. 26(a)(1) (if required), and to develop a discovery plan that must be proposed to the district judge. Fed.R.Civ.P. 26(f)(2). The plan should include the parties' views and proposals concerning:

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

All attorneys of record and unrepresented parties are jointly responsible for arranging and attending this meeting and for preparing and submitting a report of the meeting and the parties' proposed plan. Fed.R.Civ.P. 26(f)(2). See §8.124 below for the definition and a more thorough discussion of electronically stored information.

E. [8.26] Depositions Before Action or Pending Appeal

The discussion in §§8.5 – 8.25 above is based on one of the principal assumptions of this chapter — that litigation has already been initiated. Fed.R.Civ.P. 27 provides the procedures for preserving or "perpetuating" testimony prior to the filing of an action or pending an appeal.

IV. [8.27] INTERROGATORIES

Fed.R.Civ.P. 33(a)(1) limits the number of interrogatories a party may propound to 25, including subparts. The number may be increased by leave of the court or by written stipulation with the responding party.

The parties may extend the time in which to answer interrogatories by written stipulation, except that the parties must apply to the court for approval if the extension would interfere with any time set for completion of discovery, for hearing of a motion, or for trial. Fed.R.Civ.P. 33(b)(2).

A. [8.28] Why and When To Use Interrogatories

Interrogatories most often are used to gather threshold information from parties (*e.g.*, the identity of parties, witnesses, or experts; the identity and location of documents; the basic factual position of one's adversaries; the sequence of relevant events). Interrogatories may be served only on parties to an action. Fed.R.Civ.P. 33(a)(1).

Under Fed.R.Civ.P. 26(d)(1), formal discovery may not commence until the parties have met and conferred as required by Rule 26(f). This means that, unless leave of the court is obtained, interrogatories may not be served prior to the meeting of the parties under Rule 26(f).

B. [8.29] Scope and Number of Interrogatories

Interrogatories may seek to ascertain a party's position on relevant issues. Fed.R.Civ.P. 33(a)(2) states:

> **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.**

As noted in §8.27 above, Rule 33(a)(1) limits the number of interrogatories to be served by each party to 25, including all discrete subparts. Parties must secure leave of court, consistent with Rule 26(b)(2) (or a stipulation from the opposing party), to serve a larger number of interrogatories. The purpose of the limit on interrogatories is to prevent "potentially excessive use of this discovery device." Advisory Committee Notes, 1993 Amendments, Subdivision (a), Fed.R.Civ.P. 33.

In some cases, it will be appropriate for the court to permit more than 25 interrogatories in the scheduling order entered under Rule 16(b). Rule 33(a)(1) gives the trial judge considerable discretion to allow leave to serve additional interrogatories.

If more than 25 interrogatories are outstanding when a case is removed from state to federal court, the party that served the interrogatories must seek leave allowing the additional interrogatories, specify which 25 are to be answered, or resubmit interrogatories that comply with Rule 33. Advisory Committee Notes, 1993 Amendments, Subdivision (a), Fed.R.Civ.P. 33.

C. [8.30] Filing of Interrogatories, Responses, and Other Discovery

The Federal Rules of Civil Procedure prohibit the filing of discovery requests and responses until either they are used in the proceeding or the court so orders. Fed.R.Civ.P. 5(d)(1). All three Illinois districts have similar local rules that generally prohibit the filing of interrogatories and other discovery requests and responses. See N.D.Ill. Local Rule 26.3; C.D.Ill. Local Civ. Rule 26.3(A); S.D.Ill. Local Rule 26.1(b)(1).

D. [8.31] Responding to Interrogatories

Fed.R.Civ.P. 33(b)(3) provides that "each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath." Furthermore, Rule 33(b)(5) requires that the "person who makes the answers must sign them, and the attorney who objects must sign any objections."

Note that Rule 33(b) compels some response, either an answer or an objection. Merely because an interrogatory (or any discovery request) is objectionable does not constitute a valid ground for an outright refusal to respond. Such a failure may subject the non-responding party to sanctions under Rule 37(d).

N.D.Ill. Local Rule 33.1, C.D.Ill. Local Civ. Rule 33.1, and S.D.Ill. Local Rule 33.1(a) require the responding party to set out the interrogatory in full immediately preceding the answer or objection. S.D.Ill. Local Rule 33.1(a) also requires an objection to be served as a separate pleading and to "be accompanied by citation to legal authority."

1. [8.32] Duty of Responding Party

The answering party has a duty to make a reasonable effort to gather information to answer the interrogatories, even if this requires work, research, and expense. *Rogers v. Tri-State Materials Corp.,* 51 F.R.D. 234 (N.D.W.Va. 1970). If a party fails to respond completely to another party's interrogatories, the court may prohibit this party from entering into evidence information that should have been included in the answers to the interrogatories. *Soderbeck v. Burnett County, Wisconsin,* 821 F.2d 446, 453 (7th Cir. 1987). For example:

a. If an interrogatory seeking information about numerous facilities or products is deemed objectionable but a more limited interrogatory seeking data on fewer facilities or products would be acceptable, "the interrogatory should be answered with respect to the latter even though an objection is raised as to the balance of the facilities or products." Advisory Committee Notes, 1993 Amendments, Subdivision (b), Fed.R.Civ.P. 33.

b. Additional time needed to respond to some interrogatories or to some aspects of some questions does not justify a delay in responding to questions or parts of questions that can be answered within the prescribed time. *Id.*

2. [8.33] Objections

Objections to discovery requests must be signed by the attorney making them. Fed.R.Civ.P. 33(b)(5). Objections should be served within the 30-day response period unless the time is extended by the court. Fed.R.Civ.P. 33(b)(2).

Objections (or qualifications to answers) may be based on scope (*i.e.,* irrelevancy under Rule 26(b) standards), vagueness, privilege, or other related matters. See §8.5 above. Objections should be based precisely on sustainable grounds. Lack of knowledge does not constitute a

ground for objecting to an interrogatory; rather, the fact that a party does not possess certain knowledge actually may constitute the answer to a question. Later-acquired knowledge is subject to the rules governing supplementation of discovery responses.

Rule 33(b)(4) clarifies that objections must be justified with specificity. Unstated or untimely grounds for objection ordinarily are waived. Advisory Committee Notes, 1993 Amendments, Subdivision (b), Fed.R.Civ.P. 33. Rule 26(b)(5) also was added to require a responding party to indicate when it is withholding information under a claim of privilege or as trial preparation materials.

All provisions should be read in light of Rule 26(g), which permits the court to sanction a party and an attorney making an unfounded objection to an interrogatory.

E. [8.34] Option To Produce Business Records

Fed.R.Civ.P. 33(d) allows a party to produce business records in lieu of answering an interrogatory if

1. the answer to the interrogatory "may be determined by examining, auditing, compiling, abstracting, or summarizing" these business records; and

2. "the burden of deriving or ascertaining the answer will be substantially the same for either party."

Occasional abuse by responding parties who produce or offer to produce masses of unorganized records in response to interrogatories led to the addition of the following provisions of Fed.R.Civ.P. 33(d) that require the responding party to

> **(1) specify[ ] 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) giv[**e**] the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.**

As is the case with all discovery, the interrogating party who is dissatisfied with a Rule 33 response may move the court pursuant to Rule 37. Such a motion would not be appropriate without first attempting in good faith to resolve the dispute amicably. Fed.R.Civ.P. 37(a)(1). Note also that Rule 33(d) was amended, effective December 1, 2006, to allow a party to produce business records in the form of electronically stored information in lieu of answers to interrogatories.

F. [8.35] Use of Interrogatories at Trial

Fed.R.Civ.P. 33(c) provides that answers to interrogatories "may be used [at trial] to the extent allowed by the Federal Rules of Evidence." Answers most often are introduced as

admissions against interest, to lay foundation for testimony, or to authenticate documents. They also may be referred to in argument when describing an adversary's position on the issues.

G. [8.36] Sample Forms

The sample forms in §§8.37 – 8.43 below should not be used blindly but should be tailored to the facts and circumstances of each particular case.

NOTE: Some judges have shown varying degrees of hostility toward the use of the type of forms set forth here. Counsel should be careful to check a judge's practice before using these or any other forms.

1. [8.37] Definitions for Interrogatories

Many attorneys have developed definitional forms for both interrogatories and requests for production of documents and tangibles. If the inquiry is brief or simple, many or all of the following definitions can be eliminated.

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

2. [8.38] Interrogatory — Communications

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

3. [8.39] Interrogatory — Documents

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

4. [8.40] Interrogatory — Witnesses

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

COMMENT: This interrogatory requires identification of nonparties as well as agents or employees of parties and requires the responding party to disclose each such person's affiliation.

5. [8.41] Interrogatory — Subparagraphs

Quite often, an interrogatory will seek basic information about an event, allegation, or defense. For example, in a suit to recover a broker's commission for the sale of real estate that the plaintiff-broker believes has been consummated, the plaintiff would inquire as follows:

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

In the same case, the defendant-seller may raise the defense that the plaintiff-broker was not the procuring cause of the sale. An appropriate interrogatory by the defendant to the plaintiff is as follows:

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

Although this interrogatory may require the plaintiff to list a large number of communications, in the type of case described these communications and activities are relevant to the controversy and are therefore properly discoverable under Fed.R.Civ.P. 26(b).

6. [8.42] Objection to Interrogatory

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

7. [8.43] Answer to Interrogatory

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

V. [8.44] REQUESTS TO PRODUCE DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND TANGIBLES AND REQUESTS FOR ENTRY ON LAND

Fed.R.Civ.P. 34 historically governed the production of documents and other tangible items by parties. Rule 34, as amended, also governs requests for and the production of electronically stored information.

Requests to produce under Rule 34, like interrogatories, may be served only on parties. Fed.R.Civ.P. 34(a). Thus, only a party may request production of any relevant document or ESI in the "possession, custody, or control" of any other party. Fed.R.Civ.P. 34(a)(1). However, nonparties still may be required to produce these things by subpoena under Rule 45. Fed.R.Civ.P. 34(c).

In addition to the above requests for production, Rule 34(a)(2) allows parties to request access to certain property and objects for the purposes of surveying, photographing, testing, or sampling the property and objects.

A. [8.45] Duty of Requesting Party

Fed.R.Civ.P. 34(b)(1)(A) requires the request for production to "describe with reasonable particularity each item or category of items to be inspected." Prior independent investigation and answers to interrogatories usually provide the requesting party with sufficient knowledge to specify the relevant items or categories of items.

Rule 34(b)(1)(C) allows the requesting party to "specify the form or forms in which electronically stored information is to be produced." There are typically three forms in which ESI is produced in litigation: in "PDF" (personal document format) form; as a "TIFF" (tagged image file format); or in the native format in which the information is stored.

Although a protective order under Fed.R.Civ.P. 26(c) will prevent abuse or reduce the burden of unduly broad or vague requests, some frequently used requests are incurably objectionable.

B. Duty of Responding Party

1. [8.46] Written Responses

Fed.R.Civ.P. 34(b)(2) requires a response to be served within 30 days that states, "[f]or each item or category, . . . that [either] inspection and related activities will be permitted as requested or . . . an objection to the request, including the reasons." Importantly, "if a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable portions." Advisory Committee Notes, 1993 Amendments, Fed.R.Civ.P. 34.

Fed.R.Civ.P. 26 includes a provision that electronically stored information from sources that are not "reasonably accessible" because of undue burden or cost may not need to be produced unless and until the requesting party files a motion to compel and the district judge compels the production of the withheld ESI. Fed.R.Civ.P. 26(b)(2)(B). Hence, a litigant may want to consider objecting to producing certain information, particularly data stored on computer backup tapes, because it is not "reasonably accessible." However, Rule 26(b)(2)(B) places the burden on the responding party to demonstrate that the ESI is inaccessible. *See IWOI, LLC v. Monaco Coach Corp.*, No. 07-3453, 2011 WL 2038714 (N.D.Ill. May 24, 2011).

If the court determines that the requested electronic data is not "reasonably accessible," the court may nevertheless order that the responding party produce it but shift the cost of production — in whole or in part — to the requesting party. *See Clean Harbors Environmental Services, Inc. v. ESIS, Inc.*, No. 09 C 3789, 2011 WL 1897213 at *2 (N.D.Ill. May 17, 2011), citing *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 284 (S.D.N.Y. 2003). In determining whether it is appropriate to shift the cost of production to the requesting party, courts in the Seventh Circuit consider eight factors:

> **1) the likelihood of discovering critical information; 2) the availability of such information from other sources; 3) the amount in controversy as compared to the total cost of production; 4) the parties' resources as compared to the total cost of production; 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; 7) the importance of the requested discovery in resolving the issues at stake in the ligation; and 8) the relative benefits to the parties of obtaining the information.** 2011 WL 1897213 at *2.

2. [8.47] Actual Production

Fed.R.Civ.P. 34(b)(2)(E)(i) provides:

> **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.**

Thus, a responding party may not play "go fish" by shuffling documents and "deliberately [mixing] critical documents with others in the hope of obscuring significance." Advisory Committee Notes, 1980 Amendment, Subdivision (b), Fed.R.Civ.P. 34, quoting *Report of the Special Committee for the Study of Discovery Abuse*, p. 22 (American Bar Association, 1977).

Fed.R.Civ.P. 34(b)(2)(E) further provides:

> **(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.**

Fed.R.Civ.P. 45(e)(1)(A) similarly provides that nonparties must produce documents as kept in the ordinary course of business. The rule also requires the production of "electronically stored information . . . in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms." Fed.R.Civ.P. 45(e)(1)(B).

C. [8.48] Inspection and Sampling of Tangibles and Land

In addition to obtaining documentary information, Fed.R.Civ.P. 34(a)(2) allows a party to file a request "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."

D. Sample Forms

1. [8.49] Prefatory Language for Request To Produce

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

2. [8.50] Definitions for Requests To Produce

The definitions for interrogatories in §8.37 above may also be used for requests to produce.

3. [8.51] Requests

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

4. [8.52] Response

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

5. [8.53] Objection

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

VI. [8.54] DEPOSITIONS

Although depositions may be oral (Fed.R.Civ.P. 30) or written (Fed.R.Civ.P. 31), the latter method is rarely used by litigants. Oral depositions are considered the most useful discovery tool because they

a. develop or lead to evidence or may be used as evidence;

b. require a witness to state his or her factual position on the record;

c. may obtain admissions;

d. preserve testimonial evidence;

e. allow a conversational setting in which to obtain facts and test the merits of the case; and

f. allow the examining lawyer to assess firsthand a witness's appearance, credibility, and demeanor.

While a skillful practitioner can make important use of depositions, the pitfalls for the examining party include that depositions

a. can be very expensive, particularly if lengthy and in a location that is far from where the attorney and client reside;

b. require thorough preparation because, without good cause, a party normally may not take a witness's deposition more than once;

c. if ill-timed, may lack the benefit of later acquired knowledge; and

d. if of a third party, may reveal evidence damaging to the examining party, which is now memorialized and in some cases can be used as substantive evidence in motions and at a trial.

A. [8.55] When and Whose Depositions Should Be Taken

Depositions ordinarily should not be taken until the examining party has had the benefit of responses to interrogatories and document requests, as well as whatever other investigation is available. The disadvantages of taking a deposition prematurely usually outweigh the advantages gained by swift action.

When planning whom to depose initially, the skilled practitioner will choose those persons whose testimony is most necessary:

1. the opposing party or key representatives of the opposing party;

2. occurrence witnesses;

3. nonparties who possess documents or important information not otherwise available; and

4. persons who are likely to be unavailable later or for trial (due to health, age, location, or disposition).

The necessity of deposing other persons may become apparent as discovery progresses.

Fed.R.Civ.P. 30(a)(2)(A)(i) requires a party to obtain leave of court or written stipulation if more than ten depositions are being taken.

B. [8.56] Procedures: Notice of Deposition and Subpoena of Nonparties — Requirements, Time, Place, Witness, and Method

The first step in the deposition process is a notice of deposition to opposing counsel. The notice of deposition is a rather simple form that states the time, place, and person (or general description of the person) to be deposed. Fed.R.Civ.P. 30(b)(1). Each of these elements is addressed by the rules.

Parties may be compelled to attend a deposition pursuant to notice. Nonparties must be subpoenaed pursuant to Rule 45. Although parties also may be subpoenaed for deposition, this procedure is used rarely because subpoenas, unlike deposition notices, must be served personally on the witness.

Rule 45 deals with the scope and procedures for issuing subpoenas. The Advisory Committee noted five reasons for its drastic revision in 1991:

> **(1) to clarify and enlarge the protections afforded persons who are required to assist the court by giving information or evidence; (2) to facilitate access outside the deposition procedure provided by Rule 30 to documents and other information in the possession of persons who are not parties; (3) to facilitate service of subpoenas for depositions or productions of evidence at places distant from the district in which an action is proceeding; (4) to enable the court to compel a witness found within the state in which the court sits to attend trial; (5) to clarify the organization of the text of the rule.** Advisory Committee Notes, 1991 Amendment, Purposes of Revision, Fed.R.Civ.P. 45.

Rule 29 was amended to require court approval for parties stipulating to extend the time provided in Rules 33, 34, and 36 for responses to discovery only if they "would interfere with dates set by the court for completing discovery, for hearing of a motion, or for trial." Advisory Committee Notes, 1993 Amendments, Fed.R.Civ.P. 29.

Rule 30(a)(2)(A) requires leave of court if the person to be examined by oral deposition is in prison and if, without the written stipulation of the parties,

> **(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.**

Rule 30(b)(3)(A) allows the party noticing a deposition to specify non-stenographic means of recording. In addition to the method specified by the party noticing a deposition, Rule 30(b)(3)(B) allows a party, other than the one noticing the deposition, to arrange at its own expense for the recording of the deposition using another method. Moreover, the Rules allow for a deposition to be video recorded as long as an intention to record a deposition is made a part of a notice of deposition and the person in charge of recording complies with the provisions of Rule 30(b)(5).

1. [8.57] Form and Issuance of Notices and Subpoenas

Subpoenas are required to include a statement of the rights and duties of witnesses that are set forth in Fed.R.Civ.P. 45(c) and 45(d). Fed.R.Civ.P. 45(a)(1)(A)(iv). Notices of deposition for party witnesses have no such requirement.

Rule 45(a)(3) provides that a "subpoena issues from the court where the action is pending [and] specifies that an attorney authorized to practice in that court may issue a subpoena"

2. [8.58] Time

Depositions may be taken at any time after commencement of the action, except a party must get leave of court if 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." Fed.R.Civ.P. 30(a)(2)(A)(iii).

The requirement of "reasonable written notice" in Rule 30(b)(1) means just that: notice should allow sufficient time to prepare and, if appropriate, to travel. 7 MOORE'S FEDERAL PRACTICE §30.20[2] suggests that a five-day notice is generally adequate, but the realities of modern practice often require additional time.

However, shorter notice may suffice. In *Natural Organics, Inc. v. Proteins Plus, Inc.*, 724 F.Supp. 50, 52 n.3 (E.D.N.Y. 1989), for example, the trial judge held that one day's notice was reasonable under the circumstances. The parties were on an expedited discovery schedule, the need for the deposition arose suddenly, and the deposition was brief and telephonic. *See also Green v. Konica Minolta Business Solutions U.S.A., Inc.*, No. 11-CV 03745, 2012 U.S. Dist. LEXIS 76602 at **4 – 6 (N.D.Ill. June 4, 2012) (holding that eight days' notice was reasonable under circumstances).

When setting a deposition early in the litigation, the examining party would be wise to remember the following provisions:

> **(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.** Fed.R.Civ.P. 32(a)(5).

Moreover, C.D.Ill. Local Civ. Rule 30.1 requires counsel to "make a good faith effort to coordinate with all opposing counsel the scheduling of a time that is mutually convenient to all opposing counsel and the parties." By signing and serving the deposition notice, counsel certifies that he or she has complied with this local rule. *Id.*

3. [8.59] Place

Depositions of local persons in local lawsuits generally pose little problem and usually are taken at the examining attorney's office. Controversy may arise, however, when the witness is not so conveniently located. The procedure varies depending on the capacity of the witness:

a. A plaintiff generally is required to be available for deposition in the forum district in which the plaintiff commenced the action. See 7 MOORE'S FEDERAL PRACTICE §30.20[1][b][ii]. See also 8A Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE §2112 (3d ed. 1998). Nevertheless, a plaintiff may seek a protective order under Fed.R.Civ.P. 26(c) to relieve any undue hardship, particularly if the plaintiff had no real choice in the forum.

b. A defendant generally is not required to appear for deposition outside his or her home district, although this too may be altered by an appropriate protective order.

c. A nonparty witness must be served with a subpoena under Rule 45(d)(3)(A)(ii), which provides that the court can quash or modify any subpoena that calls for a nonparty witness to travel more than 100 miles from where the party lives, works, or regularly transacts business in person.

According to Rule 45, a witness may be subpoenaed to a deposition anywhere within 100 miles from the place in which the person resides, is employed, or transacts business in person.

Rule 45(a)(1) allows attorneys to subpoena a nonparty to produce tangibles or permit inspection of premises without having to appear at a deposition. Advisory Committee Notes, 1991 Amendment, Subdivision (a), Fed.R.Civ.P. 45. If additional documents are needed, a subsequent subpoena may be issued to the same party. *Id.* Note also that Rule 45(a)(1) permits a subpoena that requires a nonparty to produce electronically stored information.

Under Rule 45, a nonparty witness is subject to the same scope of production of materials as persons who are parties under Rule 34. *Id.* This includes documents that are under the nonparty's control regardless of whether the materials are located within the district or within the territory where the subpoena can be served. *See, e.g., Alliance Healthcare Services, Inc. v. Argonaut Private Equity, LLC,* 804 F.Supp.2d 808, 813 (N.D.Ill. 2011) (holding that "Rule 45 permits the court to require [a] person or entity produce records pursuant to a subpoena even if they are not physically located in the District which Rule 45 permits the subpoena to be served"), citing *Hay Group, Inc. v. E.B.S. Acquisition Corp.,* 360 F.3d 404, 412 (3d Cir. 2004).

Rule 28(b) provides that depositions may be taken in a foreign country pursuant to any applicable treaty or convention and that depositions may be taken pursuant to a letter of request, regardless of whether it is captioned a "letter rogatory."

4. [8.60] Persons To Be Deposed

Generally any person, party, or nonparty may be deposed. There are, however, some exceptional categories of persons that require leave of court before they may be deposed.

Fed.R.Civ.P. 30(a) and 31(a) govern depositions of prison inmates. In *Miller v. Bluff*, 131 F.R.D. 698, 700 (M.D.Pa. 1990), the plaintiff was an inmate, and the defendant took his deposition prior to obtaining leave of the court. The court sua sponte granted leave to depose, stating that because the plaintiff commenced the litigation, the defendant was entitled to depose him.

Although the notice of deposition usually specifies the deponent by name and address, there are two exceptions:

a. Rule 30(b)(1) provides that when a deponent's name is unknown, the notice may set forth "a general description sufficient to identify the person or the particular class or group to which the person belongs."

b. Rule 30(b)(6) provides that if the deponent is a public or private corporation, partnership, association, or governmental agency, the notice or subpoena 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.**

This provision allows the corporation to choose the witness it wishes to present, although further witnesses may be deposed by the examining party.

5. [8.61] Method of Conducting Deposition

Having decided the who, when, and where of the deposition, the parties must decide the how. This may be done by stipulation or by court order on motion.

a. [8.62] Stenographic Reporting by Court Reporter

A deposition should be taken by a certified court reporter who, as a notary public, is authorized to administer oaths. No stipulation or court order is required to employ this method. Fed.R.Civ.P. 28 prescribes the qualifications of persons before whom depositions may be taken within the United States and foreign countries, and it should be consulted if any issue arises as to the qualifications of the court reporter. Note that any objection to the reporter's qualifications must be made at once or will be waived. Fed.R.Civ.P. 32(d)(2).

Although some court reporters commonly tape-record the deposition to ensure the accuracy of the transcript, this tape recording (unless otherwise stipulated as discussed in §8.65 below) does not constitute part of the transcript.

b. [8.63] Innovative Techniques

Even though the vast majority of depositions are taken by stenographic means, as discussed in §§8.64 – 8.66 below, the Federal Rules of Civil Procedure allow, and indeed encourage, the use of other methods.

(1) [8.64] Depositions without a court reporter

Fed.R.Civ.P. 29(a) provides that unless the court orders otherwise, the parties may stipulate that "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." As amended, Rule 29 no longer requires parties to stipulate in writing regarding discovery procedures. See 6 MOORE'S FEDERAL PRACTICE §29.05[1]. 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." *Id.* Thus, the parties may stipulate that the deposition be taken by a person who is not a notary public or court reporter, that no transcript be made, or that the transcript be non-verbatim.

(2) [8.65] Electronic depositions

Fed.R.Civ.P. 30(b)(3)(A) provides:

> **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.**

Objections, signing, corrections, and certification are handled by a separate written instrument.

This method allows the audiovisual or audio recording of depositions. Note that the parties may avoid by stipulation the necessity of employing a notary to administer the oath.

All depositions must be recorded by an officer appointed or designated under Rule 28. Fed.R.Civ.P. 30(b)(5)(A). Depositions taken by non-stenographic means begin with a statement by the officer that must include the officer's name, the date and time of the deposition, and the name of the deponent "at the beginning of each unit of the recording medium." Fed.R.Civ.P. 30(b)(5)(B).

Rule 30(b)(5)(B) further provides that "[t]he deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques." *Id.* The officer shall state for the record when the deposition is concluded and will state any stipulations made by the parties regarding custody of the recordings, exhibits, or other pertinent matters. Fed.R.Civ.P. 30(b)(5)(C). These provisions were added to provide basic assurance of the "utility and integrity of recordings" taken by other than stenographic means. Advisory Committee Notes, 1993 Amendments, Subdivision (b), Fed.R.Civ.P. 30.

(3) [8.66] Telephone depositions

Fed.R.Civ.P. 30(b)(4) permits a deposition to be taken by "telephone or other remote means" when agreed to by the parties or authorized by the court. All other rules apply, allowing the parties to stipulate the recording of a deposition by electronic means or by stenographic transcription. The deposition is considered to be taken in the district and place where the deponent answers the questions. *Id.* This technique can save substantial travel expenses and is most appropriate when the questions are few or simple and there are no significant documentary exhibits.

6. [8.67] Document Production in Connection with Depositions

Depositions of parties or nonparties may be accompanied by a document production, although it is generally best to request document production prior to the deposition pursuant to Fed.R.Civ.P. 34. In the case of parties, Fed.R.Civ.P. 30(b)(2) provides:

> **The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.**

In the case of nonparties, Fed.R.Civ.P. 45 governs the subpoena duces tecum, which requires the witness to produce documents. For both parties and nonparties, Rule 45(d)(2)(B) allows parties to object to discovery orders. The issuing party must obtain a court order to inspect and copy the materials. With respect to the notice of deposition, Rule 30(b)(2) provides:

> **If a subpoena duces tecum is to be served on the deponent, the material designated for production, as set out in the subpoena, must be listed in the notice or in an attachment.**

The general practice is to attach a full copy of the subpoena to the notice of deposition. See §8.85 below for a sample form of a notice of deposition.

In *Contardo v. Merrill Lynch, Pierce, Fenner & Smith*, 119 F.R.D. 622, 624 (D.Mass. 1988), the court ruled that a Rule 45 subpoena duces tecum may not be used to obtain an opposing corporate party's documents from an employee of the corporation.

7. Conduct of the Deposition

a. [8.68] Beginning the Deposition

Unless otherwise stipulated or ordered, the deposition is begun by the court reporter taking the oath of the witness and the parties reciting any stipulations appropriate to the taking of the deposition (*e.g.*, reserving certain objections).

The actual examination and cross-examination may "proceed as they would at trial under the Federal Rules of Evidence." Fed.R.Civ.P. 30(c)(1). This provision is a bit inaccurate. For example, cross-examination at a deposition is not limited to the scope of direct examination (8A Wright, FEDERAL PRACTICE AND PROCEDURE §2113) as is cross-examination at trial,

unless otherwise ordered. See Fed.R.Evid. 611(b). Moreover, like all discovery, depositions need meet only the relevancy standard of Fed.R.Civ.P. 26(b)(1), not the stricter evidentiary standard of Fed.R.Evid. 401. The latter standard will be applied only to deposition testimony submitted to the court as evidence.

Fed.R.Civ.P. 30(c), which governs examination and cross-examination of witnesses at a deposition, expressly states that the Federal Rules of Evidence apply except for Rules 103 and 615. Fed.R.Evid. 615 relates to the exclusion of other potential deponents from a deposition. Exclusion can be obtained by order of the court under Fed.R.Civ.P. 26(c). Fed.R.Evid. 103 relates to rulings on evidence that is elicited in a courtroom setting and therefore is not generally applicable to depositions.

Questions should be concise and precise. Copies of exhibits should be provided to opposing counsel to expedite the proceeding.

b. [8.69] Objections

Strategies and content of examination generally are beyond the scope of this chapter. Objections are not.

Objections must be noted on the record, and evidence objected to shall be "taken subject to any objection." Fed.R.Civ.P. 30(c)(2). Often, only objections to the form of the question need be made on record at a deposition in order to allow the examining party the opportunity to rephrase or correct any error. Objections based on relevance, hearsay, and other technicalities are reserved for trial. Rule 32(d)(3) governs this practice:

> **(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.**

As discussed in §§8.70 and 8.71 below, there are certain types of questions that justify counsel instructing a defending party's witness not to answer.

(1) [8.70] Questions calling for privileged information

Because a privilege is waived once the content of the privileged communication is revealed, the attorney defending a witness or party asserting the privilege may instruct the witness not to answer a question calling for privileged information. See §§8.7 – 8.20 above for discussion of privilege and work product. Indeed, the witness may refuse to answer such a question without any instruction. Although the witness or his or her attorney could stop the deposition and move the court to limit the examination under Fed.R.Civ.P. 30(d), when a party wishes to assert a privilege, the instruction not to answer is usually more appropriate because it preserves the record and allows the examination to continue as to other matters.

(2) [8.71] Questions calling for wholly irrelevant material

If the examining party goes far afield, exceeding the breadth of Fed.R.Civ.P. 26(b)(1), an objection may and should be made on the record. If the objectionable questioning continues or if the irrelevant information sought is embarrassing or confidential, the witness may be instructed not to answer. The attorney so instructing must be extremely cautious because, in effect, the attorney is taking it on himself or herself to rule on the propriety of the opponent's conduct in an area accorded great liberality by the rules and the courts.

c. [8.72] Motion To Terminate or Limit Examination

Fed.R.Civ.P. 30(d)(3)(A) allows an objecting party or deponent to suspend the deposition on demand for purposes of filing a motion to terminate or limit the scope and manner of taking the deposition. Such a motion would seek a protective order under Rule 26(c). The moving party must show that the examination "is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party." Fed.R.Civ.P. 30(d)(3)(A). Under Rule 26(c), limitations may prohibit inquiry into certain matters, protect confidential information, or compel payment of costs.

Due to the cumbersome procedure required by Rule 30(d) and the requirements of good-faith efforts to resolve discovery disputes (see Rule 37(a)), Rule 30(d) is rarely used. The better practice is to define the areas of dispute on the record at the deposition and proceed with the remaining examination.

Fed.R.Civ.P. 30(c)(2) requires that any objections to evidence during a deposition "be stated concisely in a nonargumentative and nonsuggestive manner." Further, a party 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)." *Id.*

Rule 30(d)(1) limits the time permitted for conducting a deposition to one day of seven hours. Rule 30(d)(1), however, also allows for additional time "if needed to fairly examine the deponent or if the deponent, another person, or any other circumstances impedes or delays the examination." If the court finds such a delay or other conduct that has frustrated the fair examination, sanctions may be imposed. Fed.R.Civ.P. 30(d)(2).

d. [8.73] Concluding the Deposition — Transcription

If the deponent or a party so requests before completion of the deposition, the deponent will have 30 days after the transcript or recording becomes available to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting these changes and the reasons given by the deponent for making them. Fed.R.Civ.P. 30(e)(1). See §8.74 below. The court officer must indicate in the certificate required under Rule 30(f)(1) whether this review was requested and must append any of the deponent's changes during the period allowed. Fed.R.Civ.P. 30(e)(2). Copies of the transcript or recording shall be furnished to any party or the deponent upon payment of reasonable charges. Fed.R.Civ.P. 30(f)(3).

8. Procedure After Transcription

a. [8.74] Changing and Signing the Transcript

As mentioned in §8.73 above, Fed.R.Civ.P. 30(e) allows the examination and reading by the deponent of the transcript, if requested. Rule 30(e) also allows the deponent to cause the court reporter to make any desired change in form or substance on the deposition transcript, giving the reasons for any such changes. Both the original and altered versions (along with the reasons for changes) are admissible at the trial. Moreover, substantial changes may be grounds for reopening depositions. 8A Wright, FEDERAL PRACTICE AND PROCEDURE §2118. In *Combs v. Rockwell International Corp.,* 927 F.2d 486, 488 (9th Cir. 1991), the court dismissed the plaintiff's case as a sanction for falsifying a deposition. The plaintiff had given his attorney permission to make any changes, and the attorney made 36 material changes to the transcript. The plaintiff signed a statement that he had reviewed and made the changes to the document when he had done neither.

Under Rule 30(e), review and signature of a deponent are required only if requested by a deponent or a party before completion of the deposition. If requested, the deponent shall have 30 days for review after being notified that a transcript or recording is available.

b. [8.75] Certifying and Delivering the Transcript

Fed.R.Civ.P. 30(f) prescribes the method by which the officer (court reporter) certifies and delivers the deposition transcript. Rule 30(f)(2) provides that, if requested by any party, all documents produced at a deposition must be marked for identification and annexed to the deposition. Copies may be substituted at the option of the person producing the documents. Rule 30(f)(4) states that the "party who files the deposition must promptly notify all other parties of the filing." In practice, however, the court reporter often prepares and serves this notice.

N.D.Ill. Local Rule 26.3 and C.D.Ill. Local Civ. Rule 26.3 forbid the filing of deposition transcripts. However, C.D.Ill. Local Civ. Rule 26.3(C) provides that "[a]ny motion filed under Fed. R. Civ. P. 26(c) or 37 shall be accompanied by the relevant portions of discovery material relied upon or in dispute." The Southern District also forbids the filing of deposition transcripts with the court except when any part of the deposition will be "used at trial" or is necessary to a pretrial motion that might result in a final order on any issue. S.D.Ill. Local Rule 26.1(b)(4). In those cases, any portions used must be filed with the motion or at the outset of the trial.

Fed.R.Civ.P. 30(f)(1) requires the officer to send the deposition transcript "to the attorney who arranged for the transcript or recording" unless otherwise ordered by the court. Rule 30(f)(3) requires the officer to retain stenographic notes or a copy of the recording of any deposition, depending on the method used, unless otherwise ordered by the court or agreed to by the parties.

9. [8.76] Failure To Attend or To Serve Subpoenas

Fed.R.Civ.P. 30(g) is clear and concise:

> **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.**

Therefore, the examining party should confirm deposition dates with adversaries and witnesses and be sure to notify them of any changes.

C. [8.77] Depositions on Written Questions

Fed.R.Civ.P. 31 prescribes the procedure for taking depositions of parties and nonparties on written questions propounded by a court reporter or other appointed officer. This procedure is succinctly set forth in Rule 31, but it is used rarely due to its cumbersome nature and the lack of most of the advantages gained by oral depositions (*e.g.*, the ability to ask follow-up questions).

D. [8.78] Uses of Depositions

At the trial or in a preliminary proceeding such as a motion for summary judgment, all or any part of a deposition (as far as admissible under rules of evidence, which are to be applied as though the witness was then present and testifying, thereby eliminating the hearsay objection to the witness's testimony) may be used against any party who was present or represented at the taking of the deposition or who had notice thereof. Fed.R.Civ.P. 32(a).

1. [8.79] Impeachment

A deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent who testifies as a witness or for any other purpose permitted by the Federal Rules of Evidence. Fed.R.Civ.P. 32(a)(2).

2. [8.80] Admissions

The deposition of a party or a deponent who was an officer, director, managing agent, or person designated to testify on behalf of a corporation, partnership, or similar entity at the time

the deposition was taken may be used by an adverse party for any purpose. Fed.R.Civ.P. 32(a)(3). The most frequent application of this doctrine lies in the use of deposition testimony as an admission by a party.

3. [8.81] Unavailability of Deponent

In Illinois state courts, a deposition of a nonparty witness may be used in place of the witness at the trial only if the deposition was noticed as an evidence deposition. Illinois Supreme Court Rule 212(b). In federal courts, however, there is no distinction between discovery depositions and evidence depositions.

Fed.R.Civ.P. 32(a)(4) provides that any deposition of a witness, regardless of whether the witness is a party, may be used by any party for any purpose if the court finds at the time of trial that any of the following apply:

a. The witness is dead.

b. The witness is at a distance greater than 100 miles from the place of trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition.

c. The witness cannot attend or testify because of age, illness, infirmity, or imprisonment.

d. The party offering the deposition could not procure the witness's attendance by subpoena, though the court can refuse to admit the deposition testimony of a witness if the offering party has not been diligent in procuring the attendance of a witness with a subpoena. *See Thomas v. Cook County Sheriff's Department*, 604 F.3d 293, 308 (7th Cir. 2009) (holding that district court did not err by permitting party to introduce unavailable witness's deposition testimony when party, inter alia, issued two subpoenas compelling witness's attendance at trial and employed private investigator to bring witness to court).

e. Exceptional circumstances makes 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.

4. [8.82] Use of Only a Portion of Deposition

If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering party to introduce any other part that, in fairness, should be considered. Fed.R.Civ.P. 32(a)(6). Many judges require the parties to designate in a pretrial order portions of depositions to be read into the record at trial.

5. [8.83] Substitution of Parties

Substitution of parties pursuant to Fed.R.Civ.P. 25 as a result of death generally does not affect the right to use depositions previously taken. Fed.R.Civ.P. 32(a)(7). Moreover, all

depositions taken in a prior action brought by the same parties (or their representatives or successors) and involving the same subject may be used in the later action as if taken in that case. Fed.R.Civ.P. 32(a)(8).

6. [8.84] Objection to Admissibility

Fed.R.Civ.P. 32(b) provides that "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." The only exceptions are objections to the form of questions or errors and irregularities covered by Rule 32(d)(3) and those concerning foreign depositions by letters rogatory as provided by Rule 28(b).

E. [8.85] Sample Form of Notice of Deposition

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

COMMENT: An attachment requesting documents should conform to Fed.R.Civ.P. 34. If the notice of deposition is for a third party who is being subpoenaed, the notice of deposition should refer to the attached subpoena duces tecum. Of course, if the notice of deposition seeks only a few specific documents, they should be set forth on the face of the notice rather than in an attached addendum.

VII. [8.86] PHYSICAL AND MENTAL EXAMINATIONS

Unlike most other forms of discovery, a party does not have a right to conduct a physical or mental examination without first obtaining a court order or an agreement by the person to be examined. Fed.R.Civ.P. 35 governs this procedure.

A. [8.87] Standard for Compelling Examination

Fed.R.Civ.P. 35(a)(1) provides that the court "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 may order an examination "only on motion for good cause and on notice to all parties and the person to examined." Fed.R.Civ.P. 35(a)(2)(A).

The standards for ordering an examination were set forth by the Supreme Court in *Schlagenhauf v. Holder,* 379 U.S. 104, 13 L.Ed.2d 152, 85 S.Ct. 234 (1964). The *Schlagenhauf* Court held that the requirements that the physical or mental condition be "in controversy" and that the moving party show "good cause"

> **are not met by mere conclusory allegations of the pleadings — nor by mere relevance to the case — but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination.** 85 S.Ct. at 242 – 243.

These requirements are easily met in a personal injury case in which the plaintiff is claiming permanent injuries or when a witness's physical ability (*e.g.*, eyesight) or mental capacity is relevant to testimonial accuracy or is an alleged cause of the occurrence.

In many cases, counsel will agree on the propriety of the medical examination and may enter a stipulation under Fed.R.Civ.P. 29. In such a case, the procedures discussed in §§8.88 – 8.93 below will be agreed on without the necessity of court intervention.

B. [8.88] The Examiner

Fed.R.Civ.P. 35(a)(1) requires the mental or physical examination of a party to be conducted by a "suitably licensed or certified examiner." Rule 35 authorizes the court to "assess the credentials of the examiner to assure that no person is subjected to a court-ordered examination by an examiner whose testimony would be of such limited value that it would be unjust to require the person to undergo the invasion of privacy associated with the examination." Advisory Committee Notes, 1991 Amendment, Fed.R.Civ.P. 35.

C. [8.89] Time, Place, and Type of Examination

Fed.R.Civ.P. 35(a)(2)(B) requires a trial judge, in any order granting an examination, to "specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it."

D. [8.90] Exchange of Examiner's Report

Fed.R.Civ.P. 35(b) governs the disclosure of the examiner's report and allows the examined person or the party against whom the order is made the right to obtain a copy of the examiner's findings. The report shall contain the results of all tests (*e.g.*, X-rays and cardiograms), diagnoses, and conclusions, together with reports of earlier examinations of the same condition.

After this report is furnished to the examined party, the party who caused the examination is entitled to receive from the party against whom the order of examination was made "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." Fed.R.Civ.P. 35(b)(3). The testimony of any examiner who fails or refuses to make a report may be excluded at the trial. Fed.R.Civ.P. 35(b)(5).

E. [8.91] Waiver of Privilege on Obtaining Report

Fed.R.Civ.P. 35(b)(4) provides that the party who obtains a report or takes the deposition of the examiner "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."

F. [8.92] Relation of Rule 35 to Other Discovery Devices

Fed.R.Civ.P. 35(b)(6) (previously Rule 35(b)(3)) was added in 1970 to clarify that medical examination reports may be obtained by other discovery devices. Thus, Rule 35 is not preemptive; Rule 34 (document requests), Rules 30 and 31 (depositions), and Rule 26 (procedures for obtaining expert opinions) also may be employed. Rule 35 is necessary, however, if the reports sought are privileged.

G. [8.93] Sanctions

The sanctions applying to Fed.R.Civ.P. 35 differ somewhat from those applying to other forms of discovery. Thus, Rule 37(b)(2)(B) provides that in the event a party fails to produce another person for examination after an order is entered, the normal range of sanctions will not be imposed if the party failing to comply "shows that it cannot produce the other person." In *Sloane v. Thompson*, 128 F.R.D. 13, 15 (D.Mass. 1989), dismissal of the case was found to be the appropriate sanction when the plaintiff's theory of damages was based on her health and she was capable of but refused to comply with the court's order to appear for an examination. For a full discussion of enforcement of discovery rights and sanctions, see §§8.116 and 8.117 below.

H. Sample Forms

1. [8.94] Motion for Order Compelling Physical and/or Mental Examination

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

2. [8.95] Order Compelling Physical and/or Mental Examination

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

VIII. [8.96] REQUESTS FOR ADMISSION

A request for admission, explicitly permitted by Fed.R.Civ.P. 36, is not a true "discovery" device since such a request seeks an admission of facts presumably known by the requesting

party. Requests for admission may be served only on a party to the action and may be used as judicial admissions (as opposed to evidentiary admissions) only in connection with the action in which they are served. These requests serve a useful function in narrowing and defining the issues for trial.

A. [8.97] Filing Requests

S.D.Ill. Local Rule 26.1(b)(1) requires requests for admissions and responses to those requests to be filed with the court and to be served on "other counsel or parties." Conversely, N.D.Ill. Local Rule 26.3 and C.D.Ill. Local Civ. Rule 26.3 prohibit the filing of requests for admission and responses thereto unless needed for trial, pretrial motion, or appeal.

B. [8.98] Time

For a request for admission, the time under Fed.R.Civ.P. 26(d) for beginning discovery is invoked unless otherwise ordered by the court. Responses are due within 30 days after service of the requests unless otherwise ordered by the court or agreed by the parties, subject to Fed.R.Civ.P. 29. Fed.R.Civ.P. 36(a)(3).

C. [8.99] Purposes of Requests for Admission

The purposes of requests for admission are succinctly stated in the Advisory Committee Notes to the 1970 Amendment, which substantially changed Fed.R.Civ.P. 36:

> **Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be.**

D. [8.100] Scope of Requests

A party may seek the admission "for purposes of the pending action only, [of] 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 document." Fed.R.Civ.P. 36(a)(1). Thus, requests to admit must meet only the relevancy test of Fed.R.Civ.P. 26, not the test of Fed.R.Evid. 401. The court will determine at trial whether the admissions can be introduced.

Rule 36(a) allows requests to seek admissions of "opinions of fact or of the application of law to fact." Advisory Committee Notes, 1970 Amendment, Subdivision (a), Fed.R.Civ.P. 36. Examples of such "mixed" questions include

1. the existence of an agency, employment, or a contractual relationship;

2. whether an employee acted within the scope of employment; and

3. whether premises or instrumentalities were under the control of a party.

E. [8.101] Form of Requests

Fed.R.Civ.P. 36(a)(2) provides, "Each matter must be separately stated." Thus, requests should be concise and directed to a specific issue capable of being admitted without further explanation. Form 51, Request for Admissions Under Rule 36, in the Appendix of Forms in the Federal Rules of Civil Procedure provides a template for a Rule 36 request for admissions.

F. [8.102] Responding to Requests for Admission

The responding party to a request for admission has five options: (1) not respond at all; (2) answer the request by admitting or denying the request; (3) object to the entirety of the request; (4) object in part to the request and respond to the remaining part; or (5) state why he or she cannot respond to the request. All responses must be in writing, signed by the party or the attorney, and, in the Southern District, filed with the court. S.D.Ill. Local Rule 26.1(b)(1). Each type of response is expressly governed by Fed.R.Civ.P. 36. "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." Fed.R.Civ.P. 36(a)(3). However, the requesting party may seek a shorter time for responding, and the responding party, on the other hand, may seek to extend the 30-day response period. "A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court." *Id.*

1. [8.103] Failure To Respond Will Constitute Admission

Fed.R.Civ.P. 36(a)(3) provides that the matter of which a request is made "is admitted unless . . . the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter." The responding party, therefore, must serve either a substantive response or a written objection to a request in order to avoid admitting the requested matter.

Any admission under Rule 36, including admissions arising out of a failure to timely respond, can serve as the factual basis for summary judgment. The proper procedure for withdrawing or modifying an admission is by motion pursuant to Rule 36(b). In *United States v. Kasuboski,* 834 F.2d 1345, 1350 (7th Cir. 1987), the Seventh Circuit held that a party could not contradict admissions it "made" through the failure to respond to a Rule 36 request by filing affidavits and referring to deposition testimony that was inconsistent with those admissions.

2. [8.104] Objections

Fed.R.Civ.P. 36(a)(5) provides that litigants shall state the reasons for each particular objection. Objections typically are based on the contention that the request calls for privileged material, is oppressive, or is wholly irrelevant to the action.

The responding party should exercise caution, especially if an objection is based on a ground other than privilege (which must be asserted at the first opportunity (see §8.8 above)), because of

the sanctions under Fed.R.Civ.P. 37(c) that specifically apply to responses to requests for admission. See §8.117 below regarding sanctions. If requests appear overly burdensome or irrelevant, counsel may seek a protective order under Fed.R.Civ.P. 26(c) rather than rely solely on an objection.

In addition, Fed.R.Civ.P. 36(a)(5) provides another cautionary note:

> **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.**

Thus, merely because a matter is in contest is no ground for an objection.

3. [8.105] Answers

Fed.R.Civ.P. 36(a)(4) provides that when a party intends to deny a matter, "the answer must specifically deny [the matter]. . . . 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." If the responding party considers a request to contain multiple matters, the party should specify the particular matters to which the party admits and the distinct matters to which the party denies, using the language of the request as much as possible. Moreover, a party who is not in a position to admit or deny a request for an admission after a reasonable inquiry must specifically say so: "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." Fed.R.Civ.P. 36(a)(4).

G. [8.106] Enforcement Procedures

Fed.R.Civ.P. 36(a)(6) is clear: The burden of moving "to determine the sufficiency of an answer or objection" is on the party requesting the admissions. The court has a number of options under Rule 36(a)(6) in ruling on such a motion:

1. If an objection has been asserted, the court may sustain it.

2. "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." *Id.* This provision is meant to prevent the unfair surprise that could result by giving a defective answer the automatic effect of an admission.

3. The court may defer ruling on objections or the sufficiency of answers to a pretrial conference or a designated time prior to trial.

Rule 37(c)(2) expressly provides that the expenses incurred in proving a matter must be awarded for failure to admit a matter later proved to be true or a document later proved to be genuine unless

1. the request was objectionable.

2. the admission sought was of no substantial importance;

3. the responding party had reasonable ground to believe that he or she might prevail; or

4. there was other "good reason" for the failure to admit.

Both the requesting and responding parties should be guided by this language in their approach to Rule 36 requests.

H. [8.107] Effect of Admission

Although answers to a request for an admission need not be sworn, Fed.R.Civ.P. 36(b) provides that "[a] matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended." Thus, a Rule 36 admission is tantamount to a "judicial admission" for purposes of the action in which the request for admission was made. The Advisory Committee Notes to the 1970 Amendment to Subdivision (b) of Fed.R.Civ.P. 36 state:

> **In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party. . . . Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated. [**Citations omitted.**]**

I. [8.108] Withdrawing an Admission

Fed.R.Civ.P. 36(b) anticipates that a party may seek to amend or withdraw an admission to avoid the effect of the admission. Such an amendment or withdrawal may be allowed if to do so would aid the "presentation of the merits of the action" and would not prejudice the adverse party. *Id.* The allowance of an amendment is subject to the provisions of Rule 16(e), governing amendments of pretrial orders (*i.e.*, that doing so would "prevent manifest injustice").

J. [8.109] Use of Admission in Another Proceeding

"An admission under [Rule 36] . . . cannot be used against the party in any other proceeding." Fed.R.Civ.P. 36(b). Consequently, "a statement made in one lawsuit cannot be a judicial admission in another. . . . It can be *evidence* in the other lawsuit, but no more." [Emphasis in original.] [Citation omitted.] *Kohler v. Leslie Hindman, Inc.*, 80 F.3d 1181, 1185 (7th Cir. 1996).

K. [8.110] Definitions for Requests for Admission

The definitional forms for interrogatories and requests for production (see §8.37 above) are generally not applicable to requests for admission. The exceptions include definitions of the parties, terms of art describing a corporation or person, or abbreviations.

L. [8.111] Request for Admission of Facts and Genuineness of Documents

Form 51, Request for Admissions Under Rule 36, in the Appendix of Forms in the Federal Rules of Civil Procedure provides a template for a Fed.R.Civ.P. 36 request for admissions.

M. [8.112] Sample Form of Answer to Request for Admission

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

COMMENT: Note that the requests are set out above the answers. This is not required, but it is generally considered better practice.

IX. [8.113] SUPPLEMENTING DISCOVERY RESPONSES

A party who has made disclosures under Fed.R.Civ.P. 26(a) or has responded to requests for discovery must supplement or correct its disclosure or response

a. in a timely manner if the party learns that in some material respect the response is incomplete or incorrect, and the additional or corrective information has not otherwise been made known through the discovery process or in writing;

b. as ordered by the court; and

c. as to an expert witness who must provide a report under Rule 26(a)(2)(B), this duty extends to information included in the report and to information given in the expert's deposition. Fed.R.Civ.P. 26(e).

Rule 37(c)(1) explicitly provides for sanctions for failure to supplement disclosures or responses when required. However, no particular form of supplementation is specified, and the duty to supplement is satisfied if the information has otherwise been made known to the other parties during discovery or in writing. Fed.R.Civ.P. 26(e).

X. [8.114] ENFORCEMENT OF ORDERS AND SANCTIONS

A district judge's powers to enforce discovery rules and impose sanctions against parties unjustifiably resisting discovery are governed by Fed.R.Civ.P. 37. Rule 37 has been amended at several points to include sanctions for failure to make the disclosures required by Rules 26(a) and 26(e). Of particular note is Rule 37(c)(1), which provides that a party may not offer as evidence information that, without substantial justification, was not included in an initial disclosure or by supplemental disclosure unless this failure is deemed harmless. In addition to or in lieu of this sanction, the court may impose, after affording an opportunity to be heard, other appropriate sanctions, including attorneys' fees caused by the failure, as well as any of the actions authorized under Rule 37(b)(2).

Lawyers for both the requesting and responding parties should be aware that courts are increasingly using sanctions, such as dismissal and default, to enforce discovery rights or to punish the failure to obey discovery rules or orders. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 49 L.Ed.2d 747, 96 S.Ct. 2778, 2781 (1976) (district court did not abuse its discretion in dismissing complaint as sanction for party's bad faith in discovery process); *Greviskes v. Universities Research Association, Inc.*, 417 F.3d 752, 759 – 760 (7th Cir. 2005) (same). A lawyer's failures often are imputed to the client. *Magala v. Gonzales*, 434 F.3d 523, 525 (7th Cir. 2005) ("[I]t has long been understood that lawyers' mistakes in civil litigation are imputed to their clients."). This is particularly true with respect to electronic discovery failures.

Several provisions of Rule 37 have been amended to include the requirement that a person moving for relief include a certification that the movant has in good faith conferred or attempted

to confer with the person or party failing to make discovery in an effort to secure the information or materials without court action. This requirement is consistent with the established practice in Illinois requiring a good-faith attempt to settle discovery disputes before a party may file a discovery motion with the court. See, *e.g.,* N.D.Ill. Local Rule 37.2.

Moreover, Rule 37 was amended in 2006 to provide a safe harbor that, when applicable, would serve to protect a party from sanctions even though the party may have failed to preserve and produce certain electronically stored information: "Absent exceptional circumstances, a court may not impose sanctions . . . 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). Thus, in order to benefit from the safe harbor, a responding party must demonstrate that the loss of information was not only an accident but also the result of the routine, good-faith operation of an electronic information system.

A. [8.115] Appropriate Court

A party seeking to compel discovery generally must file its motion in the court in which the action is pending (*i.e.,* the "forum court"). Fed.R.Civ.P. 37(a)(2). Rule 37(a)(2) also provides that motions to compel discovery from nonparties must be made in a court of the district in which the discovery is being taken. *See Atlas Bolt & Screw Co. v. Textron Inc.,* No. 90 C 6503, 1991 WL 214064 at *2 (N.D.Ill. Oct. 17, 1991) ("[P]laintiff must present its motion to compel the appearance of this non-party in the district court where the deposition will be taken."). When relief is sought from the court in the district in which the deposition is being taken, the court may treat the conduct complained of (*e.g.,* failure to be sworn or to answer a question after being directed to do so by that court) as contempt of that court. Fed.R.Civ.P. 37(b)(1). Magistrate judges also have the authority to grant motions to compel discovery and assess costs, including attorneys' fees. *Coates v. Johnson & Johnson,* 85 F.R.D. 731, 733 (N.D.Ill. 1980).

B. Enforcement Orders and Sanctions

1. [8.116] Enforcement

Unless the responding person or party fails to make any Fed.R.Civ.P. 26(a) disclosures or respond to discovery (*e.g.,* fails to file an answer or objection to an interrogatory or to appear at a duly noticed deposition), the enforcement procedure begins with a motion to compel discovery or disclosure under Rule 37(a)(1). As part of the motion, the movant must certify that he or she has conferred or attempted to confer with the person against whom relief is sought. If the motion is denied, in whole or in part, the court may enter a protective order as authorized under Rule 26(c). Fed.R.Civ.P. 37(a)(5)(B), 37(a)(5)(C).

Examples of reasons for motions to compel include

a. failure to answer a particular interrogatory;

b. failure to produce certain documents;

c. failure of a corporation to designate a deponent pursuant to Rule 30(b)(6) or Rule 31(a);

d. refusal to answer a particular question or line of questions at a deposition;

e. submission of an "evasive or incomplete" answer, which is "treated as a failure to disclose, answer, or respond" under Rule 37(a)(4); and

f. assertion of an objection that the inquiring party believes to be unsound.

In addition to ordering compliance, Rule 37(a)(5) provides that the court "must" require the losing party to a discovery motion, the attorney who advised this party, or both to reimburse the successful party for its reasonable expenses, including attorneys' fees, unless "(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." If a motion is granted in part and denied in part, the court may apportion such an award of expenses and fees. Fed.R.Civ.P. 37(a)(5)(C). The Advisory Committee Notes to the 1970 Amendment to Subdivision (a)(4) of Rule 37 state:

> **[**E**]xpenses should ordinarily be awarded unless a court finds that the losing party acted justifiably in carrying his point to court. At the same time, a necessary flexibility is maintained, since the court retains the power to find that other circumstances make an award of expenses unjust — as where the prevailing party also acted unjustifiably.**

Further, Rule 37 states that sanctions should encompass all expenses, whenever incurred, that would not have been sustained had the opponent conducted itself properly. The Seventh Circuit has held that this includes expenses incurred as a result of a party's appeal of sanctions entered against the party. *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469, 475 (7th Cir. 1984) ("Requiring [the appellee] to bear these costs could offset substantially the very award that the party has obtained.").

Former Rule 37(f), which had precluded an award of expenses against the United States, was repealed by the Equal Access to Justice Act, Pub.L. No. 96-481, 94 Stat. 2321 (1980). For a full discussion, see 7 MOORE'S FEDERAL PRACTICE §37App.05.

2. [8.117] Sanctions

Fed.R.Civ.P. 37 allows a district court to impose sanctions when a party fails to comply with a court order (Rule 37(b)); fails to disclose or supplement a prior disclosure or refuses to admit (Rule 37(c)); and fails to attend its own deposition, serve answers to interrogatories, or respond to requests for inspection (Rule 37(d)). Rule 37(b)(2) provides a wide range of sanctions and allows a court to enter an order

a. directing that the matters in dispute "be taken as established for purposes of the action, as the prevailing party claims" (Fed.R.Civ.P. 37(b)(2)(A)(i));

b. prohibiting the disobedient party from supporting or opposing designated claims or defenses or introducing designated evidence (Fed.R.Civ.P. 37(b)(2)(A)(ii));

c. striking pleadings or parts thereof (Fed.R.Civ.P. 37(b)(2)(A)(iii));

d. staying further proceedings until the order is obeyed (Fed.R.Civ.P. 37(b)(2)(A)(iv));

e. dismissing the action or proceeding in whole or part (Fed.R.Civ.P. 37(b)(2)(A)(v));

f. rendering a default judgment (Fed.R.Civ.P. 37(b)(2)(A)(vi));

g. finding a party in contempt of court (Fed.R.Civ.P. 37(b)(2)(A)(vii)); and

h. awarding fees and expenses (Fed.R.Civ.P. 37(b)(2)(C)).

To avoid having to pay attorneys' fees and costs associated with a motion to compel, or other sanctions, a party should serve timely responses to discovery requests or move for appropriate relief. See Fed.R.Civ.P. 37(d)(2) ("A failure [to respond to a discovery request] 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)."). Thus, even when a party receives objectionable discovery requests (*e.g.,* requests that are unduly burdensome or irrelevant or that call for privileged material), the party must respond (*e.g.,* by filing answers and objections or moving for a protective order) to prevent the possibility of sanctions. Further, when a party moves for a protective order, the court must still grant any such relief as "the filing of a motion under Rule 26(c) is not self-executing — the relief authorized under that rule depends on obtaining the court's order to that effect." Advisory Committee Notes, 1993 Amendments, Subdivision (d), Fed.R.Civ.P. 37 ("If a party's motion has been denied, the party cannot argue that its subsequent failure to comply would be justified."). One exception, however, is Fed.R.Civ.P. 37(e), which provides that absent "exceptional circumstances," a court may not impose sanctions for a party's failure to provide electronically stored information that was lost as "a result of the routine, good-faith operation of an electronic information system."

While a district court has broad discretion to impose sanctions for failure to obey a court order, "[i]t is well settled that a district judge should tailor the choice of sanction to the severity of the misconduct." *Charter House Insurance Brokers, Ltd. v. New Hampshire Insurance Co.,* 667 F.2d 600, 605 (7th Cir. 1981). Typically, a district court will impose a less drastic sanction, such as requiring the disobedient party to pay the opposing party's expenses and attorneys' fees, before imposing more drastic sanctions, such as dismissal or entry of default judgment. *See Powers v. Chicago Transit Authority,* 846 F.2d 1139, 1143 (7th Cir. 1988) (sanction of contempt "ought to be the last rather than the first recourse in a discovery dispute"); *Persson v. Faestel Investments, Inc.,* 88 F.R.D 668, 671 (N.D.Ill. 1980); *Aerwey Laboratories, Inc. v. Arco Polymers, Inc.,* 90 F.R.D 563, 565 – 566 (N.D.Ill. 1981); *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979,* 90 F.R.D. 613, 620 – 622 (N.D.Ill. 1981).

The sanctions of dismissal and default are usually imposed only when a party's failure to comply with a court's discovery orders is willful, in bad faith, or otherwise the fault of the party. *See Charter House Insurance Brokers, supra,* 667 F.2d at 605 ("A Rule 37 dismissal requires a showing of 'willfulness, bad faith, or fault' by the dismissed party."). *See also In re Oil Spill by Amoco Cadiz Off Coast of France on March 16, 1978,* 93 F.R.D. 840, 842 (N.D.Ill. 1982)

("Where a party has intentionally or willfully refused to comply with a court's order directing discovery, the court is free to employ the sanctions of dismissal or entry of judgment."). Hence, when a party continues to interfere with discovery and purposefully fails to obey a court's orders compelling discovery, a court is more likely to dismiss the action or enter default judgments as a sanction. *See Hindmon v. National-Ben Franklin Life Insurance Corp.*, 677 F.2d 617, 621 – 622 (7th Cir. 1982) (dismissal of complaint was appropriate sanction for plaintiff's willful failure to comply with court-ordered discovery).

Although a district court will usually employ other less severe sanctions prior to dismissal, the Seventh Circuit has held that it is not an abuse of discretion for a district court to dismiss a complaint or enter a default judgment prior to imposing a lesser sanction. *See United States v. Di Mucci*, 879 F.2d 1488, 1493 (7th Cir. 1989) ("We have . . . declined to adopt a rule that the imposition of less drastic sanctions is an absolute prerequisite to the entry of a default judgment."). *See also Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir. 2003) ("[I]t is axiomatic that the appropriateness of lesser sanctions need not be explored if the circumstances justify imposition of the ultimate penalty — dismissal with prejudice."); *Hal Commodity Cycles Management Co. v. Kirsh*, 825 F.2d 1136, 1139 (7th Cir. 1987) ("A district court is not required to fire a warning shot.").

Fed.R.Civ.P. 37(b)(2) also authorizes a court to enter any "just" order, which allows a court broad discretion in shaping an appropriate sanction. *See Smith v. Chicago School Reform Board of Trustees*, 165 F.3d 1142, 1145 (7th Cir. 1999) (order barring party from "presenting witnesses is the sort of sanction contemplated by Rule 37(b)(2)(B)" and order "informing the jury that disputed factual issues actually were *agreed* between the parties, or otherwise 'established', is the sort of sanction contemplated by Rule 37(b)(2)(A)" [emphasis in original]). *See also Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 72 L.Ed.2d 492, 102 S.Ct. 2099, 2106 – 2107 (1982) (ordering that facts relevant to personal jurisdiction that were subject of discovery requests were taken as established for purposes of action in question); *Associates Financial Services Co. v. Mercantile Mortgage Co.*, 727 F.Supp. 371, 375 (N.D.Ill. 1989) (imposing injunctive relief to sanction former employees' alleged use of confidential information because of defendants' "cavalier response" to discovery orders).

Courts may also hold an attorney personally responsible for a party's failure to comply with a court's discovery order and impose sanctions on the attorney. *See Tamari v. Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469, 472 (7th Cir. 1984) ("Federal Rule of Civil Procedure 37(b) provides that a court may impose various sanctions on a party or his attorney who fail to comply with a court order."). *See also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 65 L.Ed.2d 488, 100 S.Ct. 2455, 2464 (1980) ("If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes."); *Castillo v. St. Paul Fire & Marine Insurance Co.*, 938 F.2d 776, 779 – 780 (7th Cir. 1991) (no abuse of discretion to enter order finding counsel in contempt until he paid opposing party's costs and attorneys' fees); *Wright v. Touhy*, No. 97 C 742, 2003 WL 22439864 at *8 (N.D.Ill. Oct. 28, 2003) (imposing Rule 37 sanctions against party's attorney requiring him to pay opposing party's attorneys' fees incurred in connection with responding to discovery motions).

Sanctions consisting of "excessive" costs and fees also may be imposed pursuant to 28 U.S.C. §1927 against an attorney who acts "unreasonably and vexatiously." The Seventh Circuit has held that §1927 "clearly is punitive" and is intended to "penalize attorneys who engage in dilatory conduct." *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 226 (7th Cir. 1984). "To be liable under section 1927, counsel must have engaged in 'serious and studied disregard for the orderly process of justice.' " *Id.*, quoting *Overnite Transportation Co. v. Chicago Industrial Tire Co.*, 697 F.2d 789, 795 (7th Cir. 1983). However, an attorney's subjective bad faith is not a prerequisite for the imposition of §1927 sanctions. *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1201 – 1202 (7th Cir. 1987). Further, while due process must be satisfied before a fee award is made under §1927, a hearing is necessary only if it would aid the court in determining whether sanctions are appropriate. *Id.*

These cases demonstrate that counsel should dutifully observe the discovery rules and expect little patience from the court for willful disregard of those rules. Remember also that Rule 26 has been amended to provide for sanctions for abusive use of discovery. See §§8.6, 8.114 – 8.117.

C. [8.118] Expenses for Failure To Admit

Fed.R.Civ.P. 37(c)(2) governs the award of expenses for the failure of a party under Rule 36 to admit the truth of a matter later proved to be true or the genuineness of a document later proved to be genuine.

D. [8.119] Participation in Framing a Discovery Plan

Fed.R.Civ.P. 26(f) encourages parties to discuss and agree to discovery plans. Rule 37(f) also was added in 1980 to provide that expenses and attorneys' fees may be awarded against any party or attorney who "fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f)." Readers should note that discovery planning does not end once discovery begins. For example, in *Nemmers v. United States*, 681 F.Supp. 567, 583 (C.D.Ill. 1988), the failure of the defendant's counsel to notify the plaintiff's counsel that its expert witness was unprepared to answer pertinent medical questions at a deposition scheduled well after discovery commenced was ruled to constitute "reckless disregard of the framing of a meaningful or realistic discovery plan" in violation of Rule 37(f).

E. [8.120] Appealability of Discovery Orders

Discovery orders are interlocutory and not appealable until final judgment has been entered. Usually, they do not satisfy the requirements for interlocutory appeal under 28 U.S.C. §1292(b) because they do not involve "a controlling question of law as to which there is substantial ground for difference of opinion" and because an immediate appeal will not "materially advance the ultimate termination of the litigation." Neither are discovery orders usually reviewable under a petition for mandamus because they are reviewable on appeal from final judgment.

Specifically, the Seventh Circuit has held that an order to pay money as a sanction for abusing the discovery process, absent the unusual circumstance in which the order causes

irreparable harm to the party ordered to pay, is not immediately appealable. Instead, the party must pay and await refund of its money if, on appeal from final judgment, it convinces the reviewing court that sanctions should not have been imposed. *Mulay Plastics, Inc. v. Grand Trunk Western R.R.*, 742 F.2d 369, 370 – 371 (7th Cir. 1984).

However, a nonparty may be able to appeal an order requiring the instant payment of sanctions by invoking the collateral order rule. This doctrine applies when an order conclusively determines the disputed question, resolves an issue that is independent of the merits of the case, and is effectively not reviewable on appeal from the final judgment. The possibility of serious liquidity problems strengthens the argument for allowing immediate appeal. *See Ortho Pharmaceutical Corp. v. Sona Distributors*, 847 F.2d 1512, 1515 (11th Cir. 1988) ("When [a court] directs a non-party . . . to pay immediately — that is, before entry of final judgment — significant attorney fees and costs, this court has jurisdiction to hear immediate appeal of the sanction order.").

F. Sample Forms

1. [8.121] In General

It would serve little purpose to propose a form of discovery motion because the disputes are as varied as the requests and responses that generate them. Counsel should remember to ask for the specific relief appropriate (*e.g.*, an order to compel the responding party to answer particular questions) along with expenses and reasonable attorneys' fees. If the motion seeks compliance with a court order, counsel for the moving party should specify which of the Fed.R.Civ.P. 37(b) sanctions he or she is seeking.

2. [8.122] Certification of Compliance with Requirement To Resolve Discovery Dispute

As noted in §§8.34, 8.42, 8.72, and 8.116 above, moving counsel is required to certify that a good-faith effort has been made to resolve a discovery dispute. Fed.R.Civ.P. 37(a)(1); N.D.Ill. Local Rule 37.2. This certification should be included as an addendum to all discovery motions:

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

XI. [8.123] ELECTRONIC DISCOVERY IN ILLINOIS FEDERAL COURTS

Electronic discovery continues to be a hot topic throughout the federal courts, including the district courts in Illinois. Electronic discovery is the discovery of electronically stored information, such as e-mails, word-processing documents, databases, and all other information that is created or stored in some electronic way. A party's obligation to preserve and produce ESI is generally the same as its obligation to preserve and produce paper files. See E-DISCOVERY (IICLE®, 2012).

The Seventh Circuit Bar Association created an Electronic Discovery Pilot Program for use in the three Illinois district courts, as well as the district courts in Indiana and Wisconsin. The purpose of the Pilot Program (which is further explained in §8.128 below) is to reduce the rising burden and cost of discovery of ESI in litigation and to promote the early resolution of disputes regarding the discovery of ESI.

A. [8.124] Electronically Stored Information

Until their amendment in 2006, the rules governing initial disclosures (Fed.R.Civ.P. 26(a)(1)) and the production of tangible items (Fed.R.Civ.P. 34) referred specifically to the disclosure and production of "data compilations." This term, which had been a term used in the Federal Rules of Civil Procedure since 1970, was interpreted to include all electronically stored information, including e-mails, word processing files, and other electronic data. Note, however, that Rules 26 and 34 were amended, effective December 1, 2006, specifically to use the term "electronically stored information" in the list of data that is discoverable. Fed.R.Civ.P. 26(a)(1)(A)(ii), 34(a)(1)(A).

B. [8.128] Seventh Circuit Electronic Discovery Pilot Program

In May 2009, a number of judges, lawyers (including in-house counsel, private practitioners, government attorneys, academics, and litigation expert consultants), and representatives of bar associations met with key experts on the discovery of electronically stored information and formed the Seventh Circuit Electronic Discovery Committee, which in turn eventually developed the Seventh Circuit Electronic Discovery Pilot Program. The Pilot Program is in its third and presumably final phase with the ultimate goal of "providing justice to all parties while minimizing the cost and burden of discovery in litigation in the United States." Final Report on Phase Two, p. 103, www.discoverypilot.com/sites/default/files/Phase-Two-Final-Report-Appendix.pdf (case sensitive).

The Committee's website, www.discoverypilot.com, is a terrific source of valuable information, including the Committee's Principles Relating to the Discovery of Electronically Stored Information, www.discoverypilot.com/sites/default/files/Principles8_10.pdf (case sensitive); a proposed standing order used by most of the district and magistrate judges participating in the program, www.discoverypilot.com/sites/default/files/StandingOrde8_10.pdf (case sensitive); and a list of important cases involving ESI in the Seventh Circuit and elsewhere, www.discoverypilot.com/cases. Counsel appearing in cases pending in any of the districts in the Seventh Circuit are encouraged to visit the website for guidance on how best to raise and resolve disputes concerning ESI in discovery.