CHAPTER 7

Discovery

A hundred years ago, if a complaint survived a motion to dismiss, the case would go to trial if the plaintiff wanted it to. That is no longer true. In contemporary litigation the chief significance of a complaint's surviving dismissal is that it enables the plaintiff to reach the "pretrial" stage—the intermediate stage between pleading and trial. Today most lawsuits end at this pretrial stage. In part they end at this stage because of the procedural device explored in this chapter—discovery. Discovery ends lawsuits for two reasons. First, discovery produces information about the merits of the lawsuit and permits parties to make informed judgments about the strength of their and their opponent's positions. Such information can hasten a lawsuit's end either through settlement or summary judgment, both explored in the next chapter. Second, because discovery costs time and money, it might enable one party simply to wear the other down—or both sides to wear each other down—without regard to the merits of the case. This chapter explains why discovery has both these potentials and explores how the Rules try to maximize the first reason and minimize the second reason that lawsuits can end at this stage.

A. MODERN DISCOVERY

Previous practice included only a limited range of discovery devices only against some persons, and only in some kinds of actions. Discovery was not always a matter of right, and often did not include all the issues that would be relevant at trial. This recipe could produce good courtroom drama, but not, critics argued, truth or justice.

Modern discovery has changed that picture. Both state courts and the federal system have adopted broad civil discovery rules that permit a lawyer to uncover, in advance of trial, enormous amounts of information lying solely in the possession of her adversary. Parties can use multiple tools to unearth information. And parties can unearth information relevant to their claims or defenses, even if the information is damning to their case, and even if the information will not ultimately be used at trial. Courts can limit discovery in various ways that we will explain in this chapter. Even with these limits, however, the scope and depth of modern U.S. discovery practice make it unique among today's legal systems.

In many respects the obligations of discovery begin well before formal discovery. As you will see in *Zubulake* (infra page 509) the law obliges those who see the possibility of a lawsuit looming to *preserve* evidence that might be relevant. That duty attaches even to evidence that might be adverse and is enforced through a system of sanctions

we explore at the end of the chapter. Although imposing a duty to preserve adverse evidence seems to run counter to natural human impulses, it flows from the existence of the tools of discovery. Were it not for this duty to preserve evidence, one imagines that each lawsuit would be preceded by a flurry of document-shredding and digital file-wiping, with the result that by the time the discovery regime began to function there would be little to discover.

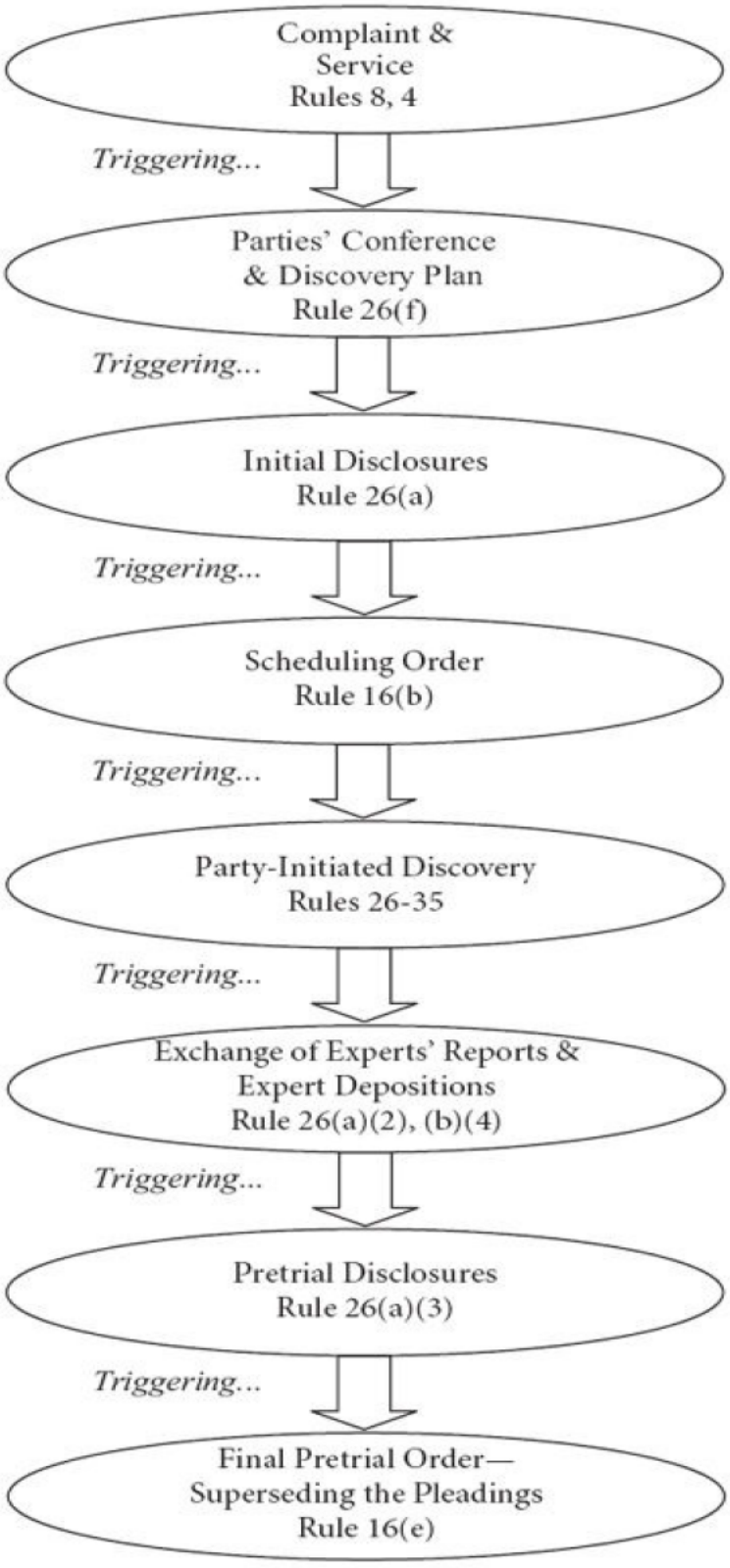
Some commentators believe that our expansive discovery rules make litigation unnecessarily slow and expensive, particularly for defendants who often possess the lion's share of discoverable information. (You have seen some of these concerns play out in *Twombly* and *Iqbal*, in Chapter 6, and the Supreme Court's efforts to address them through pleading standards.) Periodic revisions of the discovery rules have sought to curb abuses, reduce the cost of discovery, encourage cooperation among adversaries, and deal with the challenges presented by the digitization of much information in contemporary life. Whether past reforms have achieved their intended goals, and whether future modifications are necessary, is a perpetual subject of debate and examination.

B. THE STAGES OF DISCOVERY

Most of attorneys' time in most civil cases is spent not in researching arcane bits of law, but in unearthing the facts of the case. Factual investigation not involving the discovery rules is entirely possible and can sometimes be more important than formal discovery. Telephone calls, informal interviews, examination of public records, online searches, and the like will often yield enormous amounts of information. It is important for the beginning lawyer not to become so mesmerized by the tool kit of formal discovery as to forget the existence of other means of gathering information.

But in the great majority of cases lawyers also need to understand the workings of the discovery tools at their disposal. The easiest way to understand how these tools function is first to read Rules 16 and 26-37; then, refer again to specific Rules as this survey touches on them. As you read, consider why the discovery rules contain more detail than, say, the pleading rules.

Rule 26 is the master rule. It catalogues the types of information subject to discovery. See Rules 26(b) and (c). It also imposes discovery-related requirements on the parties throughout the litigation. Rule 26(f) instructs the parties to confer with each other at the outset of a case about predicted subjects of discovery, anticipated disputes about the discoverability of desired information, and other issues that the judge might be able to resolve at an early stage. Within two weeks of this planning meeting—and before an initial conference with the judge—the parties must exchange the "initial disclosures" required by Rule 26(a)(1). Once the judge has the initial conference with the parties, and issues a scheduling order (required by Rule 16(b)), further discovery can follow. Typically, that discovery will consist of requests for documents, interrogatories, requests for admission, and depositions, followed by reports of expert witnesses if they are to be used, and, if the case proceeds to trial, another round of disclosures mandated by Rule 26—this time the list of witnesses and other evidence each party will present at trial. Rule 26(a)(3). Finally, Rule 16, whose scheduling conference began the sequence, also closes discovery after a final pretrial conference and order for cases destined for trial. Rule 16(e). Graphically displayed, the sequence looks like this:



A Prototypical Pretrial Sequence (Focused on Discovery)

This section will survey these stages of discovery, using as its guide the order in which lawyers use them in typical litigation.

1. Required Disclosures—First Round

Rule 26(a) describes the first stage, which it calls "required disclosures." These can be extensive and themselves come in stages, the first of which the Rules call the "Initial Disclosure." Rule 26(a)(1) requires the parties to exchange categories of information "that the disclosing party may use to support its claims or defenses." That information includes the names and locations of witnesses and descriptions and location of documents, as well as calculations of damages, and copies of insurance agreements. Each party must exchange such information without its having been requested by her opponent and before the initial conference with the judge. Rule 26(a)(1)(C). All this requires cooperation by the lawyers, a timetable, and mechanisms for enforcing discovery and disclosure obligations.

Read Rule 26(a)(1) and answer the questions below.

Notes and Problems

1. Albert's complaint alleges that Barbara "negligently collided" with his car; Barbara's answer has denied negligence.

a. Albert's lawyer has interviewed him, obtained copies of his medical and wage records, and has spoken with various other potential witnesses. Albert's lawyer intends to present a straightforward version of the case: Barbara ran a red light and collided with Albert, who as a result lost wages and incurred medical expenses. A witness, Wilma, who was at the intersection will testify that Barbara ran the light. There are, however, some soft spots in the case: Albert has a poor driving record and has himself been cited for running red lights; his job situation has been precarious, and Albert thinks that his boss might testify that he was about to be fired (thus reducing potential damages for lost wages). What disclosures must Albert make under Rule 26(a)(1)?

b. Now consider Barbara's disclosures. Her lawyer has interviewed her and knows the name and address of a mechanic who can testify about the maintenance of her car (he will say it was well maintained), her boss (with whom she had a major argument just before the accident), and a bystander, Bruce, who saw the accident. Bruce will testify that the light was green for Barbara when she entered the intersection. But Bruce is both legally blind and has a prior conviction for credit card fraud; therefore, Albert could challenge both his ability to perceive and his credibility at trial. Explain how Barbara's boss and Bruce might have information relevant to the lawsuit. Which of their names should Barbara's lawyer supply at the time appropriate for the disclosure required in Rule 26(a)(1)(A)(i)?

c. Suppose Barbara fails to list Bruce, thinking that she will not call him as a witness. At trial her lawyer changes his mind and seeks to call Bruce as a witness. What objection does Albert have? Read Rule 37(c)(1).

2. Suppose a party has fully complied with its disclosure requirements, but then learns of an additional witness or document. Read Rule 26(e) and Rule 37(c)(1).

a. Albert, suing Barbara for negligently inflicted injuries in an auto accident, supplies her with all of his medical bills pursuant to Rule 26(a)(1)(A)(ii). Thereafter, he receives a substantial new bill from the treating surgeon. What must Albert do?

b. Albert does not inform Barbara of the new surgeon's bill, but its existence comes to light during a deposition of the surgeon. Thereafter, Barbara seeks to block admission of the bill as part of the evidence on damages. How should the judge rule?

3. Disclosure will not occur in all cases. Rule 26(a)(1)(B) exempts a number of cases from initial disclosures—smaller claims and those in which either a well-developed record or the absence of counsel make disclosure unnecessary or potentially unfair. Very large cases, in which close judicial supervision will displace the mandatory disclosure of the Rules, may also be exempted by the court.

WHAT'S NEW HERE?

- The initial round of disclosures asks each party to put its basic evidentiary cards on the table.
- In the process it helps each lawyer form a general idea of the case he will be facing. That *may* produce

settlement discussions, and it also gives a very general sneak preview of the main evidentiary attractions at summary judgment and trial.

2. Documents, Things, Land, and Bytes: Requests for Production (Rules 34 and 45)

After the Rule 26(f) meeting between the parties and the mandatory disclosures are out of the way, the parties' lawyers can embark on the next phases of discovery. Although attorneys will use different discovery tools in different sequences, they will often begin with requests for production. In many cases the lawyers will know at the outset of the suit (perhaps from the initial disclosures) that there are documents or physical objects they want to get their hands on: the e-mails, the hospital bill, the vehicle maintenance records, and so on. When the lawyer knows of the existence and identity of such items, or has a good hunch about what might exist, she will often start the discovery process by requesting them. In a few cases the lawyer's first question is *whether* there are any relevant documents. In such a case the first step will be to deploy interrogatories aimed at answering that question. For our purposes we shall assume that the lawyer knows of at least some such items she wants to see and that she requests them as a first step.

Rule 34 enables such discovery. It has a broad scope, encompassing not only documents but any tangible item, land, or electronically stored information. An e-mail message stored on a computer's hard drive, or on a backup tape made for crash-recovery purposes, is a "document," as is a photograph or videotape. So is a software program with embedded accounting data or other information.

How exactly must the requester identify the document in question? In practice, very broad requests are usually allowed because the party propounding the request does not always know what documents the responding party has. A typical request might seek all documents in the custody or control of the responding party that "refer, relate or pertain in any manner" to subject *X*. Such broad requests might end up calling for hundreds, thousands, or even millions of documents, only a small portion of which bear even the remotest potential relevance to the lawsuit. The responding party, faced with such a request, has several choices. It might object to the request as overbroad, or begin a negotiation process whereby it seeks to have the propounding party redefine or narrow the request. Rule 26(b)(2)(C), to which we will return shortly, guides these disagreements and negotiations. The party might, in the alternative, assign its employees the time-consuming task of searching all files and digital locations where responsive information might be found. Or the party might point to a warehouse full of two million files, leaving the requesting party with the daunting challenge of separating wheat from chaff. Read Rule 34(b)(2)(E)(i) and think about how this rule might justify this third approach.

The growth of digital data storage has substantially expanded the amount of information subject to discovery in lawsuits and has spawned an entire sub-industry devoted to searching electronic records. Consider the fact that modern word-processing software will save multiple versions of a document, even versions that were not shared with others. Presumably, each version would be discoverable if the discovering party has the foresight to request each draft. Rule 34(b)(2)(E) explores the party's obligations when the request does not otherwise specify what forms of electronically stored information to produce. Note that, as electronic discovery has become more expansive, parties' obligations to preserve that data in advance of reasonably anticipated litigation also have gotten more complicated. In *Zubulake*, at the end of this chapter, we will learn more about the scope of those obligations.

Thus far, we have focused on requests for production served on parties to the case. Similar requests can be made of a nonparty, but the nonparty must be served with a subpoena issued under Rule 45(a)(1)(A)(iii).

Despite the many complications of Rules 34 and 45, it is critical for lawyers to understand and become adept at using these Rules. In a contract dispute over the interpretation of an ambiguous provision of a contract, for example, each side will want to see any drafts, memos, or notes that might reflect the other side's contemporaneous interpretation of the disputed provision, and will want later to use these documents in deposing the other side's witnesses. These types of documents will often be critical in establishing or disproving liability. Documents can also be critical in establishing damages. Medical records, for example, are central to damage discovery in personal injury cases, and accounting records would be the core of discovery in a case seeking lost profits.

Notes and Problems

1. Alice brings suit against Centerville Village, claiming that its police officer assaulted her during a political demonstration and severely injured her. Alice's lawyer makes a Rule 34 request for "all documents, memoranda, and reports relating to this incident."

a. Centerville Village learns that on the day of Alice's assault, the officer in question wrote in an e-mail to another officer (on a Village e-mail account): "Cracked some skulls today, and proud of it." As attorney for Centerville, must you produce this e-mail?

b. The Centerville Police Department has recently moved to an almost entirely digital format. The city attorney learns that the final police report went through multiple drafts, with some early drafts containing language suggesting the officer had used excessive force against Alice. The Rule 34 request is silent as to digital formats.

i. Can Centerville simply produce the final draft of the report in a hard-copy version?

ii. If Centerville does produce a digital version of the report, may it do so in a form (e.g., PDF) that does not contain traces of the earlier drafts?

iii. Does your response to the preceding two questions change if Alice's original request specified that each digital document be produced in a format that tracked previous drafts? If so, notice that it becomes critical for the requesting lawyer to have thought about such matters in framing the request.

2. Randolph files suit for damages after being injured in an accident with a truck owned and operated by Craven. Randolph has reason to think that Craven's truck was serviced at Elaine's Garage and wants to see the service record. Randolph doubts Elaine will produce it voluntarily. What steps can Randolph take to obtain the documents?

3. Asking Questions in Writing, Seeking Admissions: Interrogatories and Admissions (Rules 33 and 36)

While requests for production seek production of documents and things, interrogatories (Rule 33) seek out categories of information that can guide further document requests and depositions. For example, in an employment discrimination case brought by Patricia against ABC Company, interrogatories can be used to learn the names and addresses of all the employees involved in the decision to fire Patricia, every type of employment review and evaluation conducted by the Company, and information about all of the people interviewed for Patricia's job after she was fired.

Interrogatories have some benefits: They can get at information not contained in any document, and they are typically much cheaper than conducting a deposition because one can inexpensively frame a set of appropriate questions, send it to an adverse party, and sit back and wait for the answers. A drawback to interrogatories is that, because the questioner cannot follow up evasive answers with a question designed to pin things down, interrogatories that go beyond fairly routine requests for specific information may yield little of value. Another limitation of interrogatories is that parties are presumptively limited to 25 questions (including subparts). Parties must seek permission of the court—or a stipulation from their opponents—before propounding more. A third limitation is that interrogatories may be sent only to a party; nonparty witnesses may be deposed but need not answer written interrogatories. (In contrast, parties can make unlimited requests for production of documents and things, and can make these requests to nonparties through a subpoena.)

Requests for Admissions (Rule 36) share three characteristics with interrogatories. They are usable only against parties; in writing; and relatively cheap. One significant difference between the two is that parties can make an unlimited number of requests for admission. This makes sense if one views Rule 36 as much a pleading rule as a discovery device. While interrogatories uncover categories of evidence, requests for admission seek to take issues out of controversy. Suppose plaintiff pleads that defendant is a corporation but does so in a paragraph of the complaint that contains other allegations as well, making defendant's denial of the entire paragraph ambiguous. (Cf. *Zielinski v. Philadelphia Piers*, supra page 435.) Plaintiff might well seek an admission as to defendant's corporate status. Because of Rule 37(c)(2), Rule 36 has teeth.

Rule 36 functions best when used to eliminate essentially undisputed issues—for example, that the defendant is incorporated in Washington or that at the time of the accident the automobile was registered to Martha. Disputes over Rule 36 have arisen when, either by design or inadvertence, one party has asked the other to admit a fact that seemed to be at the core of the case. One type of such a question might be normative: "Were you driving negligently?" "Did defendant breach the contract?" Another type might be historical: "Were you driving 50 mph at the time of the accident?" "Did defendant on February 22 deliver 500 rolls of paper?" In either case the question may lie at the center of the case. How should a party respond to such a question? Rule 36 instructs parties to admit, deny, or explain in detail why they can neither admit nor deny. As with answers to pleadings, parties can also admit in part or deny in part. Responding in good faith to requests to admit without showing too much of one's hand is an exercise in subtlety and discretion.

Complications can arise when the party served with a request for admission of critical facts has simply let the time for reply elapse without responding. Read literally, the Rule suggests that the requested facts should be deemed admitted, and occasionally courts have so held. For example, see Morast v. Auble, 164 Mont. 100, 519 P.2d 157 (1974). Other courts have ignored the literal language or have glossed over it with an interpretation suggesting that

admissions were meant to deal with peripheral rather than central issues in the case. See Pickens v. Equitable Life Assurance Society, 413 F.2d 1390 (5th Cir. 1969). The Rule states that such an interpretation is erroneous and that a party who wishes in good faith to contest an issue may, if the facts permit, deny it and thereby put the other side to its proof.

Read Rules 33 and 36, together with Rule 37(a)(3) and (b), and apply them to the questions below.

Notes and Problems

1. Having sustained injuries from a household appliance, Cora sues Manufacturer. The required discovery conference and the ensuing disclosures occur. Cora then serves 55 interrogatories on Manufacturer and 20 interrogatories on Department Store, which sold her the product. Both Store and Manufacturer refuse to answer.
   a. Explain why Store needn't answer even if the questions are relevant and not privileged.
   b. What is Manufacturer's likely objection to Cora's interrogatories? Can Cora get a court to compel Manufacturer's answers?

2. One of Cora's interrogatories asks Manufacturer to specify the cost of designing, developing, and testing the appliance.
   a. Suppose that Manufacturer does not conduct its accounting in a way that would quickly yield an answer to that question. Can it simply list the payroll and other records that would be required to answer that question, indicating that Cora is free to consult them? See Rule 33(d).
   b. Suppose Manufacturer responds to the question about the cost of designing the appliance by producing a CD-ROM disk that, it says, contains the relevant accounting records. Cora believes that it will take her expert weeks of expensive work to extract the information from this CD, and that Manufacturer could do so much more quickly and cheaply. What should she do?

3. Greg is injured on a Scout outing when he stumbles on a tent wire after returning from a late night raid on the campsite of another troop. He brings suit against the Boy Scouts of America, Inc. Another Scout, Scott, tells defense counsel he saw four other boys trip over the same wire the day before Greg was injured.
   a. Plaintiff serves an interrogatory seeking the names of anyone who witnessed or has knowledge of other injuries resulting from the tent wires. Must defendant identify Scott in its response to the interrogatory?
   b. Plaintiff serves on defendant a Rule 36 notice to admit that, prior to this incident, four boys had stumbled on the same wire. Must defendant admit that the other boys tripped?

4. Asking Questions in Person: Depositions (Rule 30) and Physical and Mental Evaluations (Rule 35)

By this point, in most litigation the parties will have accumulated a good deal of information. Interrogatories will have led to document requests, and to examination of land or objects. In some cases experts' reports will have been exchanged (a topic we will discuss soon). As each of these pieces of information arrives, the lawyers will be trying to join them together with existing information, conferring with their clients, and continuing to conduct informal investigation: unsworn interviews with potential witnesses and study of the industry, product, or transaction type in question. Now comes the moment to try to pin down parties' and witnesses' stories before trial. That moment comes in depositions. Rules 27-32 concern issues related to depositions, but it is Rule 30 that sets out the most significant aspects of deposition rules and procedures.

In one respect, a deposition is like questioning a witness at trial without the judge—except that the location will be a lawyer's office or conference room rather than a courthouse. A lawyer for each party is present, as are the witness and a court reporter or recording device. The lawyer who "noticed" (lawyer-talk for requested) the deposition will ask questions that the witness must answer orally under oath. The witness's lawyer may object to the content or form of the questions and may ask questions of his own when the other lawyer finishes. The court reporter makes a verbatim transcript of the deposition, and the testimony is often visually recorded as well.

In other respects, depositions are quite unlike trials. At trial, a good lawyer will be trying to use questions and other evidence to tell a single, coherent, clear story leading to a favorable verdict or judgment for the client. By contrast, at depositions lawyers have opportunities to explore what may turn out to be blind alleys, and to ask questions without having the least notion of what the answer might be—something they will not intentionally do at trial. A version of the same contrast applies to the treatment of hostile witnesses: At trial, a lawyer will seek to undermine their credibility and expose weaknesses in their testimony. In deposition, the goal is different. Although a lawyer will be delighted if the opposing party admits that his claims or defenses are a pack of lies, she is not expecting or aiming at that goal. Instead, she is meticulously trying to pin down an adverse witness to whatever story that witness wants to tell; once the story is pinned down under oath, the lawyer can decide what to do with it.

Finally, depositions free lawyers from some constraints of evidentiary rules. At trial, if a lawyer asks a question whose answer is subject to an evidentiary objection and the other side's lawyer objects, the trial judge will direct the witness not to answer the question. In a deposition, the witness must proceed to answer the question (unless the answer would reveal privileged information or information protected by court order); the objection is noted on the record, and the court may prevent this portion of the deposition from being used at trial, but the answer is recorded.

The major advantage of a deposition over interrogatories is that the lawyer can ask a series of questions that forces the witness to take a position as to the matters at issue, and the lawyer can immediately follow up with further questions if the witness is evasive or if the testimony opens up new avenues of inquiry. The disadvantage is expense to all concerned. In a full-blown deposition, both sides have their lawyers present; if the witness is not one of the parties, he or she may also be represented by a lawyer. In addition, the lawyer who noticed the deposition must arrange for a court reporter to transcribe the deposition and, sometimes, a videographer. In a case with multiple parties, each hour of deposition time may amount to thousands of dollars in attorneys' fees and stenographer and recorders' time.

As with interrogatories, the Rules place limits on depositions. Without seeking permission, the total number of depositions taken by one side (plaintiff(s), defendant(s), third-party defendant(s)) may not exceed ten, no deposition may exceed a day of seven hours, and no person may be deposed a second time without the permission of the court or the other side. See Rule 30(a)(2)(A)(i).

Conducting depositions of witnesses embedded in large organizations (corporations, governments, universities, etc.) presents special problems. Sometimes the lawyer will want to depose a person with knowledge about a particular area—product design, marketing, curriculum, etc.—without knowing who in the organization has that information. Rule 30(b)(6) allows the requester to identify a topic to be explored, placing the burden on the organization to produce a knowledgeable person.

Parties can undergo an additional, particularly sensitive type of questioning and investigation, this time by doctors instead of lawyers. Rule 35 allows physical and mental examinations of parties and usually is employed only when the physical or mental condition of the party is at stake in the case. Take, for example, *Reise*, in Chapter 1, in which the court orders a psychological evaluation of a plaintiff who alleges emotional injuries resulting from defendants' actions. Similarly, a plaintiff who alleges physical injury might have a medical evaluation by a doctor chosen by the defendant who can assess plaintiff's injuries. Unlike other discovery provisions, Rule 35 requires a special application to the court and a showing of "good cause" for such an evaluation. The disputes here focus on what constitutes "good cause," with courts asked to balance need against issues of privacy.

Note on Physical and Mental Examinations

It is well settled that a plaintiff who puts his mental or physical condition at issue by seeking damages for mental or physical injury can be required to undergo a mental or physical examination. The same is true where a defendant has specifically asserted a defense that puts his mental or physical condition at issue. If the defendant in a contract case files an answer that pleads as an affirmative defense that the defendant was mentally incompetent and therefore could not enter into a binding contract, the defendant could be required to undergo an examination regarding his mental state.

But the law is much less permissive about allowing physical or mental exams where a party has not clearly put her own physical or mental condition at issue. In the leading case, Schlagenhauf v. Holder, 379 U.S. 104 (1964), a Greyhound bus rear-ended a tractor-trailer. Passengers on the bus were injured and brought suit against Greyhound, the driver, the owner of the tractor, and the owner of the trailer. The tractor and trailer owners sought—and the district judge ordered—vision, neurological, psychiatric, and internal medicine exams of the defendant bus driver. In support of the exams, the tractor owner's counsel submitted an affidavit which stated that the driver had testified at his deposition that he had seen the rear lights of the vehicle ahead of him for 10-15 seconds, but had not slowed down, and had rear-ended the vehicle. The affidavit also established that the bus driver had been involved in a prior similar accident.

A divided Supreme Court held that the record supported at most a vision exam of the driver. The majority concluded that "[n]othing in the pleadings or affidavit would afford a basis for a belief that Schlagenhauf was suffering from a mental or neurological illness warranting wide-ranging psychiatric or neurological examinations. Nor is there anything stated justifying the broad internal medicine examination." The dissenters would have allowed all of the exams ordered by the district court. The dissenting opinion reasoned: "In a collision case like this one, evidence concerning very bad eyesight or impaired mental or physical health which may affect the ability to drive is obviously of the highest relevance. It is equally obvious, I think, that when a vehicle continues down an open road and smashes into a truck in front of it although the truck is in plain sight and there is ample time and room to avoid

collision, the chances are good that the driver has some physical, mental or moral defect. When such a thing happens twice, one is even more likely to ask, 'What is the matter with that driver? Is he blind or crazy?'"

Notes and Problems

1. Pursuant to Rule 30(b)(6), Cora serves on Manufacturer a request to depose an employee or officer responsible for the "design and safety engineering" of the appliance in question.

a. Manufacturer designates Geraldine Chen, a vice president for product design. In part because Manufacturer's lawyer has lodged numerous objections to the questions asked by Cora's lawyer, the deposition, which started at 9 A.M., ends at 5 P.M. (with a one-hour break for lunch) without Cora's lawyer having reached her most important questions. When Cora's lawyer asks that the deposition be continued, Manufacturer's lawyer refuses, citing Rule 30(d)(1), which presumptively limits depositions to seven hours. What is Cora's lawyer's strongest argument for additional time to continue the deposition?

b. Suppose Cora's lawyer finishes deposing Chen on the design and safety features of the product. At trial, Cora's lawyer introduces Chen's deposition testimony (Rule 32(a) permits such trial use of deposition testimony). Then Manufacturer seeks to present a rebuttal witness, the gist of whose testimony will be that Chen was not really the person in charge of product design and that her deposition testimony was therefore inaccurate. Does Rule 30(b)(6) give Cora a basis for excluding this testimony?

2. Pat is injured in an automobile crash with Dunham; Pat sues and alleges physical injuries resulting from the crash. As part of his initial disclosures Pat identifies medical records and the names of treating physicians. As soon as the initial disclosures have been exchanged, Dunham seeks to have Pat examined by a physician who will likely testify for Dunham.

a. Should the court grant the request?

b. If the examination takes place, is Pat entitled to see a copy of the physician's report to Dunham?

c. Pat requests a copy of the physician's report and receives it. Dunham then requests from Pat copies of her physician's reports on her injury. Is Dunham entitled to these?

3. One should not overlook the deposition as a source of unintentional humor. Consider the following excerpts, all but the last collected by Mary Louise Gilman, the editor of National Shorthand Reporter and published in Richard Lederer, Anguished English (1987):

Q: Doctor, did you say he was shot in the woods?
A: No, I said he was shot in the lumbar region.
Q: What is your name?
A: Ernestine McDowell.
Q: And what is your marital status?
A: Fair.
Q: Mrs. Smith, do you believe that you are emotionally unstable?
A: I should be.
Q: How many times have you committed suicide?
A: Four times.
Q: When he went, had you gone and had she, if she wanted to and were able, for the time being excluding all the restraints on her not to go, gone also, would he have brought you, meaning you and she, with him to the station?
Mr. Brooks: Objection. That question should be taken out and shot.

Finally, consider what Professor Richard Friedman reports as "an actual trial transcript," whose accuracy he has confirmed with one of the lawyers:

The Court: Next witness.
Ms. Olschner: Your Honor, at this time I would like to swat Mr. Buck in the head with his client's deposition.
The Court: You mean read it?
Ms. Olschner: No, sir. I mean to swat him [in] the head with it. Pursuant to Rule 32[(a)(3)], I may use the deposition [of a party] "for any purpose" and that is the purpose for which I want to use it.
The Court: Well, it does say that.
(Pause.)
The Court: There being no objection, you may proceed.
Ms. Olschner: Thank you, Judge Hanes.
(Whereupon Ms. Olschner swatted Mr. Buck in the head with a deposition.)
Mr. Buck: But Judge . . .
The Court: Next witness.
Mr. Buck: We object.
The Court: Sustained. Next witness.

PERSPECTIVES

On Trial as Discovery

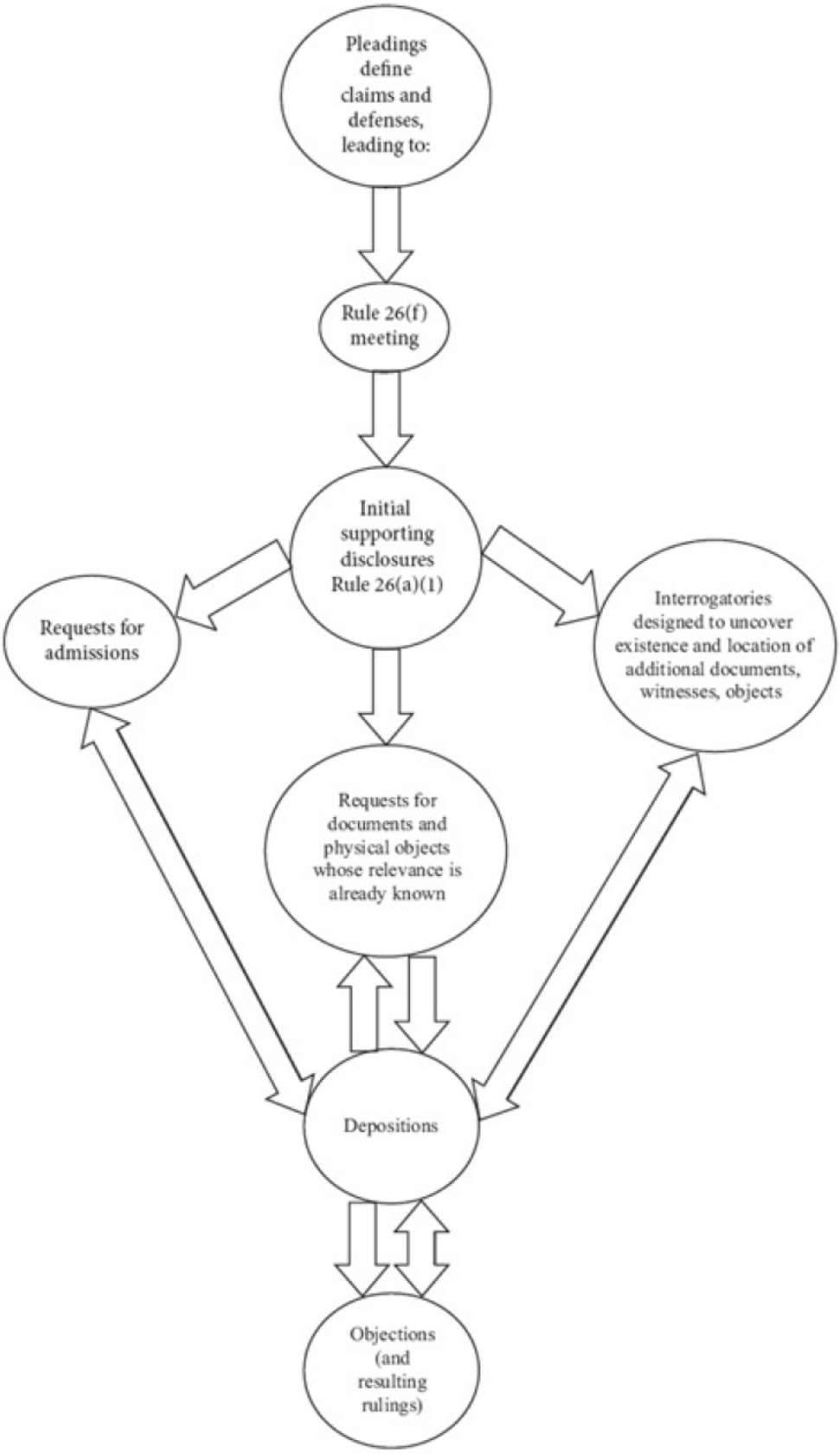
Before modern discovery, how did lawyers uncover evidence that might be in the hands of an adversary, or of a third party uninterested in disclosing it?

As watchers of television series like the one shown at right know, sometimes well-conducted investigation, without the aid of court orders, does the job.

In other situations trial itself might be a form of discovery. Courts of equity had the power to compel testimony under penalty of punishment (that's the root of *subpoena*). So, in some cases the only way to compel the testimony of an unwilling witness or see the critical document was to go to trial armed with a subpoena.

One way of understanding the decline in trial rates since the rise of extensive discovery is that parties can now get access to such information *before* trial—and when they do, they can settle their cases on terms that reflect the weight of the evidence uncovered.

4. Discussing each of the procedural tools one by one—required disclosures, requests for documents, interrogatories, requests for admission, and depositions—fails to capture the ways in which different types of requests can relate one to the other and inspire further inquiry. Imagine, for example, that Cora conducts her Rule 30(b)(6) deposition of Geraldine Chen, the vice president for product design. Cora learns during Chen's deposition that Manufacturer developed another appliance but did not ultimately manufacture that appliance because extensive testing revealed similar safety concerns as those for the product that injured Cora. Cora's attorney will most likely submit a document request seeking testing records for that other appliance. Upon reviewing those records, Cora's attorney might learn that Manufacturer has a testing protocol, and demand production of records reflecting that protocol. Cora's attorney might also submit an interrogatory seeking a list of all appliances that Manufacturer has developed but found to have safety concerns during testing. In other words, parties will usually make comprehensive document requests before taking depositions but depositions can prompt additional document requests and interrogatories; those documents and interrogatory responses can prompt additional depositions and requests. The next chart attempts to illustrate the fluidity with which these discovery tools may be used.


Pleadings define claims and defenses, leading to:
Rule 26(f) meeting
Initial supporting disclosures Rule 26(a)(1)
Requests for admissions
Interrogatories designed to uncover existence and location of additional documents, witnesses, objects
Requests for documents and physical objects whose relevance is already known
Depositions
Objections (and resulting rulings)

5. Pretrial Witness Lists and the Pretrial Order

The last stages of discovery require still another round of disclosures, this time a list of the witnesses and other evidence—expert reports, exhibits, documents—that each side proposes to introduce at trial. Rule 26(a)(3). Contrary to the impression one might gain from depictions of trials in film and other media, in modern civil litigation the surprise witness provides not dramatic excitement, but grounds for reversal. (For an illustration of this possibility, see Problem 1c at page 468, involving the car accident between Albert and Barbara, and Barbara's surprise witness, Bruce. See also *Monfore v. Phillips,* infra page 630, for an illustration of the constraints a final pretrial order can place on trial.) In many cases this final pretrial disclosure will be set in concrete by the judge's final pretrial conference and the ensuing order. Rule 16(e).

David and Goliath Do Discovery: A Taxonomy of Problems

Because the parties bear the costs of fact investigation in the U.S. legal system, imbalances in each side's financial resources could affect the outcome of cases regardless of the merits. Note that the problem isn't merely or even primarily "which litigant has the most money." A poor litigant with a strong claim for substantial damages will have plenty of litigation resources if she finds a well-financed lawyer to take her case on a contingent fee basis. As is described in Chapter 5, parties with strong claims can also "borrow" to finance litigation, including discovery. As a result, a wealthy defendant whose defense is being financed by a liability insurer seeking to reduce litigation expenses may have fewer resources than a poorer plaintiff with strong financial backing. And a defendant who perceives that more is at stake than the individual case suggests—reputation, subsequent similar claims—may be willing to spend more than the case warrants. Although the motivations and resources available to parties vary from case to case, there are undoubtedly many situations in which David is battling Goliath.

What impact does mismatched resources have on discovery? The problem has two versions. First, what happens if one party lacks resources to do adequate discovery? The most troubling case would arise if most of the likely evidence was in defendant's hands, and the case suggested that assembly of evidence would be complex—perhaps in a product liability or environmental hazard claim. Without access to discovery, such a claim has no chance of succeeding. Although the Rules nowhere address this problem specifically, several possibilities present themselves. The party with fewer resources may be able to collect much evidence from various public sources—government or public documents, press sources, and the like. Digital media and the Internet have made such searches much faster and cheaper than they were 50 years ago. Moreover, a disciplined discovery scheme making maximum use of cheap discovery (such as document requests and interrogatories) may yield a good deal. With large public and private institutions, well-planned document requests can produce rich veins of information. With the information developed from such cheap discovery, a party might be able to approach one of the growing number of firms that advance litigation costs on the basis of their assessment of the merits of an individual case (see supra pages 350-51). It is also worth remembering that in most large institutions there is (a) often another copy of the missing document and (b) someone in whose interest it is to disclose that document or say who destroyed it—if only to avoid blame falling on him.

It may also be possible to ride free on the discovery efforts of others: A deposition conducted by one party will likely yield useful information for a coparty or a future litigation. One Rule makes this avenue more difficult to pursue. Rule 5(d)(1) forbids parties from filing with the court many discovery responses "until they are used in the proceeding or the court orders filing." The motivation behind this amendment was simple: Courts were running out of space to store such documents. But the consequences may be to curtail the availability of discovery materials in separate but factually related cases, making it harder for an ill-funded party to "piggyback" on another's efforts unless the attorneys in the cases coordinate.

The second problem comes if we assume grossly mismatched resources: A modestly financed plaintiff faces an institutional defendant who perceives a mass of similar cases following it is therefore motivated to spend what appears to be an irrational amount on the particular case. Again, this may be more a problem of litigation finance than of the discovery rules, but a few comments may put the issue in context. If plaintiff's lawyer perceives this is the case, one possibility is to seek to partner with other lawyers who may be interested in financing this case because they relish the possibility of the future cases the defendant is seeking to avert. Another possibility would be to try to use defendant's fears as leverage for a settlement: An unlitigated case will not yield discovery that can be used in future cases. Parties can also use the rules to address some of these resource issues. Rule 26(b)(1), amended in 2015, now provides that the scope of discovery be "proportional to the needs of the case," determined, in part, by the parties' resources. And a party might seek to use the provision of Rule 26(g) that requires each lawyer to certify that

discovery requests or objections are "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."

C. THE SCOPE OF DISCOVERY

Having now surveyed the types of discovery tools that each side can use to uncover information, we now turn to the breadth of information that can be uncovered with these tools. Both the power and the destructive potential of the discovery tools hinge on the scope of their reach.

Rule 26(b)(1) allows the parties, without court approval, to seek discovery "regarding any nonprivileged matter that is *relevant* to any party's claim or defense." Discoverability does not, however, turn on relevance alone. Even relevant information can be protected from discovery if it is *privileged* (Rule 26(b)(1)); if it is unduly cumulative, duplicative, burdensome, or not proportional to the needs of the case (Rules 26(b)(1) and 26(b)(2)(c)); or if its potential for annoyance, embarrassment, oppression, or undue burden or expense outweigh its evidentiary value (Rule 26(b)(2)(c)). We will consider the scope of each of these terms.

1. Relevance

To be admissible at trial, evidence must be relevant. "Relevance" links admissibility to the substantive law and to common-sense patterns of inference. Start with common sense: How I tie my shoelaces is irrelevant to whether it will rain today; how the sky looks is highly relevant to that question. But legal relevance demands more than this. For a piece of information to be relevant to a legal proposition, that information must tend to prove or disprove something the governing substantive law says matters. If it doesn't matter, the law of evidence will prevent that information from being presented at trial. For example, if, in a contract dispute, the defendant contends that he failed to pay for goods because the goods were defective, the condition of the goods will be relevant and can be offered in evidence. If the defendant instead contends that he failed to pay for the goods because he used the money to support a sick relative, the state of the relative's health would be legally irrelevant. Its irrelevance flows from the law of contract, which says that one's motives for breaching a contract don't matter.

Because the discovery rules aim to unearth information that would be admissible at trial, they too are linked to relevance. But for discovery the links can be more attenuated. Rule 26(b) long made clear that "[r]elevant information need not be admissible at trial [in order to be discoverable] if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The 2015 amendments to Rule 26 removed this sentence, but the Advisory Committee notes explain that, as before, "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." For a simple example of information that would be relevant and discoverable—because likely to lead to admissible evidence—but not directly admissible, consider a deposition in an auto accident case. Plaintiff seeks evidence that the light was red when defendant entered the intersection. Witness has already said he did not observe the color of the light. Lawyer asks, "Did you hear anyone say that he or she saw that the light was red?" At trial, a judge would, if defendant objected, tell the lawyer not to ask that question because it calls for hearsay. But in discovery the question is proper because Witness's response may well lead to identification of another witness who can say from personal observation whether the light was red.

Both substantive law and pleading narrow the range of potentially relevant and thus discoverable information. In a claim for breach of contract to deliver goods, suppose the defendant pleaded, as his sole defense, the running of the statute of limitations. On the basis of that pleading, information about whether the plaintiff had fulfilled her part of the agreement would not be "relevant to" the defendant's "defense." By contrast, if in addition to pleading the running of the statute of limitations, defendant admitted that he failed to deliver the goods but asserted that he did so because plaintiff had not paid him for those goods, questions about plaintiff's performance would become relevant and subject to discovery.

The next case illustrates how pleadings define the limits of relevance.

Favale v. Roman Catholic Diocese of Bridgeport

233 F.R.D. 243 (D. Conn. 2005)

SQUATRITO, J.

Now pending in the above-captioned matter is plaintiffs' motion to compel and defendant's motion for a protective order.... For the reasons that follow, plaintiffs' motion to compel is DENIED and defendant's motion for a protective order is GRANTED.

Background

Plaintiff Maryann Favale worked as an administrative assistant at Saint Joseph's School in Brookfield, Connecticut, for approximately twenty-one years. During this time period, in November of 2002, Sister Bernice Stobierski became the new interim principal. Then, in May 2003, Sister Stobierski assumed the position of full-time principal. Maryann Favale alleges that Sister Stobierski subjected her to "severe and repeated sexual harassment" in the workplace from December 2002 to June 2003. Specifically, plaintiff alleges that Sister Stobierski touched her inappropriately, made sexually suggestive comments, exhibited lewd behavior, and requested physical affection. Plaintiff first informed her employer, the Roman Catholic Diocese of Bridgeport, ("the Diocese") of the alleged sexual harassment on June 11, 2003. Maryann Favale, who no longer works at Saint Joseph's School, seeks damages against the Diocese for sexual harassment, retaliation, defamation, intentional and negligent infliction of emotional distress, negligent hiring, negligent supervision, and other causes of action. In addition, co-plaintiff Mark Favale asserts a claim for loss of consortium against the defendant. Sister Stobierski is not a party to this case.

Plaintiffs now seek to compel Sister Stobierski to testify to any prior treatment she may have received for her alleged anger management history and psychological or psychiatric conditions. Plaintiffs also move to compel the Diocese to produce any records it has of any such treatment. [The Diocese objects to both motions to compel on relevance grounds, among others.]…

Sister Stobierski's Testimony

Plaintiffs assert that Sister Stobierski's testimony regarding the treatment she received for her alleged anger management, psychological, and psychiatric conditions is relevant to their claims of negligent hiring and negligent supervision. To assert a negligent hiring claim under Connecticut law, a plaintiff must "[p]lead and prove that she was injured by the defendant's own negligence in failing to select as its employee a person who was fit and competent to perform the job in question and that her injuries resulted from the employee's unfit or incompetent performance of his work." Roberts v. Circuit-Wise, Inc., 142 F. Supp. 2d 211, 214 n.1 (D. Conn. 2001). Similarly, Connecticut law requires that a plaintiff bringing a negligent supervision claim

> **[p]lead and prove that he suffered an injury due to the defendant's failure to supervise an employee whom the defendant had a duty to supervise. A defendant does not owe a duty of care to protect a plaintiff from another employee's tortious acts unless the defendant knew or reasonably should have known of the employee's propensity to engage in that type of tortious conduct.**

Abate v. Circuit-Wise, Inc., 130 F. Supp. 2d 341, 344 (D. Conn. 2001). Both negligent hiring and negligent supervision claims turn upon the type of wrongful conduct that actually precipitated the harm suffered by plaintiff. "It is well settled that defendants cannot be held liable for their alleged negligent hiring, training, supervision or retention of an employee accused of wrongful conduct unless they had notice of said employee's propensity for the type of behavior causing the plaintiff's harm." Elbert v. Connecticut Yankee Council, Inc., No. CV010456879S, 2004 WL 1832935, at *13 (Conn. Super. Ct. July 16, 2004) (citations, internal quotation marks, and punctuation omitted).

Plaintiffs allege that the defendant negligently hired and supervised an individual who was not fit to be the principal of an elementary school. They contend that the "defendant knew or reasonably should have known that Sister Stobierski was unfit to be the principal of St. Joseph's School as a result of her prior emotional and anger management issues, and limited school administration experience."…Yet, plaintiffs do not allege that Sister Stobierski's prior emotional and anger management issues harmed plaintiff.

Rather, the only type of harm alleged to have been suffered by Maryann Favale was harm resulting from repeated acts of sexual harassment, and plaintiffs do not maintain that Sister Stobierski's alleged anger management and psychological or psychiatric conditions contributed to the sexual harassment. Accordingly, Sister Stobierski's testimony pertaining to the treatment she allegedly received for her anger management, psychological, or psychiatric conditions is not relevant because it does not pertain to the defense or claim of any party.

Indeed, even if the Diocese was aware of Sister Stobierski's alleged anger management history or psychological or psychiatric conditions, this knowledge would have no bearing on plaintiffs' claims for negligent supervision and negligent hiring because the wrongful conduct of which the Diocese would have had notice was not the same type of wrongful conduct that caused Maryann Favale harm. Notice of Sister Stobierski's alleged anger management history or psychological or psychiatric conditions does not equate to notice of Sister Stobierski's propensity to commit acts of sexual harassment. The Diocese's objection to plaintiffs' motion to compel the testimony of Sister Stobierski is sustained, and plaintiffs' motion is denied.

The Production of Defendant's Records Relating to Sister Stobierski

Plaintiffs assert that any documentation that the Roman Catholic Diocese of Bridgeport may have regarding Sister Stobierski's treatment for anger management or psychological and psychiatric conditions is

relevant to their claims of negligent hiring and negligent supervision. The elements of these claims are discussed above.... [E]ven if the defendant possessed documents relating to treatment Sister Stobierski received for her alleged anger management or psychological and psychiatric conditions, these records would not establish Sister Stobierski's propensity for the type of behavior that caused Maryann Favale harm because they would not demonstrate a propensity for sexual harassment. Again, it is significant that plaintiffs do not allege that Maryann Favale was harmed by Sister Stobierski's alleged inability to control her anger or her alleged psychological or psychiatric conditions. Sexual harassment is the only type of harm alleged by plaintiffs....

Defendant's motion for a protective order is granted. A protective order shall enter barring future discovery into Sister Stobierski's anger management or psychological and psychiatric treatment as the court finds that this information is profoundly personal and, as stated herein, not relevant to the claims in this case.

WHAT'S NEW HERE?

- Relevance is *relational*: It asks whether information is pertinent *given the claim or defense at issue.*
- The question then becomes: Would the information sought in the case help the party seeking it prove or defeat the claim in question?

Notes and Problems

1. One might think that evidence showing the Diocese hired a school principal knowing her to have anger management problems would be relevant to a legal claim about the quality of its hiring and supervision practices. Yet this information was found to be irrelevant to Favale's negligent hiring and supervision claims. Why?

2. To solidify your understanding of the link between relevance and substantive law, imagine that the complaint in this case alleged that Sister Stobierski yelled at and hit Favale. Explain why these changes would render the information sought in *Favale* relevant.

3. Consider the practical finality of this district court's discovery decision. If Favale disagrees with the district court's ruling, can she seek review in the court of appeals? The answer is yes, but not until there is a final judgment in the case. (See *Reise* in Chapter 1.) Realistically, Favale will not appeal the decision unless she loses her case against the Diocese on summary judgment or at trial. If she wins the case, this discovery dispute will no longer matter to her. If the case settles, a condition of settlement would most certainly be to foreclose further litigation of this matter.

4. Assessments of relevance are sometimes counterintuitive when it comes to questions about defendants' financial assets. Consider the following problems:

a. Albert and Barbara are involved in an automobile collision. Albert sues Barbara, alleging negligence. Barbara denies liability. Albert seeks to discover the size of Barbara's bank account. (He wants to know whether she will be capable of satisfying a damage judgment.) Is this information discoverable? Probably not; the information, while relevant to Albert's ability to recover, is not relevant to whether Barbara was negligent.

b. Same facts as in 4a, except that in addition to asserting negligence, Albert alleges that Barbara intentionally collided with him. Intentional torts carry with them the possibility of punitive damages, and in many jurisdictions a jury asked to award punitive damages may consider the wealth of the defendant, the idea being that the punishment should be tailored to the defendant's circumstances. Albert again seeks to discover the size of Barbara's bank account. It is now "relevant to a claim or defense" and thus discoverable because the amount of Barbara's assets will determine an appropriate sanction. What has changed here is not the rules of discovery but the substantive law.

c. Same lawsuit as in 4a—that is, a negligence action, with no allegations of intentional harm. Albert, fearing that Barbara may lack assets to pay damages, seeks to discover whether Barbara has a liability insurance

policy that would be available to satisfy a damage judgment if he wins the suit. If one considers only relevance to a claim or defense, the insurance policy would seem irrelevant for the reasons described in the discussion of Problem 4a. Yet Rule 26(a)(1)(A)(iv) requires Barbara to disclose this information. This disclosure requirement, outside the bounds of relevance, appears to reflect a policy choice to discourage litigation pursued in the hope of non-existent assets.

2. Proportionality and Privacy

Discovery aims at uncovering truth and permitting lawsuits to be decided on their merits. But the truth sometimes hurts, and a party being asked to disclose information can seek protection from the court if he believes that the burdens of producing the information outweigh the benefits.

The Rules give district courts this power to protect. A court can limit discovery if (1) it is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive"; (2) "the party seeking discovery has had ample opportunity to obtain the information by discovery"; or (3) it is outside the scope permitted by Rule 26(b)(1), which limits discovery that is not "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Rule 26(b)(2)(c). In addition, the court can limit discovery "to protect a party or person from annoyance, embarrassment, [or] oppression." Rule 26(c). The following two cases consider the breadth of these protections.

Price v. Leflore County Detention Center Public Trust

2014 WL 3672874 (E.D. Okla. 2014)

PAYNE, J.

[Plaintiff Loretta Price brings claims on her behalf and on behalf of her son, Duane E. Sweeten, who died on August 15, 2011 while incarcerated in Leflore County Jail.]

…Plaintiff seeks to compel Defendant, Leflore County Detention Center Public Trust, to respond to the following discovery request:

> **INTERROGATORY NO. 15: Please identify any written complaints concerning failure to provide medical treatment to inmates at the detention center for the ten years prior to the filing of this action.**

Plaintiff argues these records are relevant to her allegations that Defendant Trust had an unconstitutional policy of denial of medical treatment to its prisoners and that Defendant Brandi Saulsberry was negligent in her supervision.

…The Defendant argues that in order to identify all written complaints, Defendant and counsel would have to review each inmate's file individually, which would be overly burdensome. The Court may limit discovery when "the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii).[*] Further, the following non-exclusive list of factors that should be considered is set out in Rule 26(b)(2)(C)(iii): "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[†] Here, prior written complaints regarding failure to provide medical treatment have clear relevance and importance to resolving the Plaintiff's claim that Defendant engaged in a custom and policy of conduct that led to the alleged violation of Sweeten's Constitutional rights. There is no alternative or less burdensome means of obtaining this information. Further, the burden of responding to the Plaintiff's request is primarily due to Defendant Trust's own system for filing and retaining written complaints. As the United States District Court for the Northern District of California notes, "it would be anomalous to permit defendants to avoid discovery because they have chosen to store grievances in a disorganized way." Henderson v. City & County of San Francisco, No. C-05-234 VRW, 2006 WL 2547611 (N.D. Cal. Sept. 1, 2006).

Finally, Defendant argues that the time frame of the request in Interrogatory 15 is overly broad and unreasonably burdensome. The Plaintiff asks the Defendant to identify all written complaints in the ten years preceding the filing of this suit. The Court finds Defendant's contentions regarding the scope of the Interrogatory No. 15 persuasive. Rule 26(b)(2)(C) instructs courts to limit discovery to the extent that "the burden or expense of the proposed discovery outweighs its likely benefit." Here, the burden and expense of reviewing the Defendant's records for written complaints regarding medical treatment during the ten years preceding this suit outweighs the likely benefit. Plaintiff notes in her Motion to Compel Discovery that Defendant Brandi Saulsbury began employment at the detention center in 2006, the same year that the new detention center facility opened, according to Defendant Trust. Thus, the Court finds that discovery should be

limited to written complaints between January 1, 2006 and the filing of this lawsuit on February 19, 2013.

Rengifo v. Erevos Enterprises, Inc.

2007 WL 894376 (S.D.N.Y. Mar. 20, 2007)

ELLIS, M.J.

Plaintiff, Willy Rengifo ("Rengifo") [who brings this action against his former employers to recover unpaid overtime wages under the federal Fair Labor Standards Act (FLSA) and New York Labor Law, among other claims] requests this Court to issue a protective order pursuant to Federal Rule of Civil Procedure 26(c) barring discovery related to his immigration status, social security number, and authorization to work in the United States.…

Rule 26(c) authorizes courts, for good cause, to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including…that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters.…" Fed. R. Civ. P. 26(c). "[T]he burden is upon the party seeking non-disclosure or a protective order to show good cause." Dove v. Atlantic Capital Corp., 963 F.2d 15, 19 (2d Cir. 1992) (citations omitted).

Rengifo argues that discovery related to his immigration status, authorization to work in this country, and social security number are not relevant to his right to recover unpaid wages. Further, Rengifo argues that the intimidating effect of requiring disclosure of immigration status is sufficient to establish "good cause" when the question of immigration status only goes to a collateral issue. Defendants argue that documents containing Rengifo's social security number or tax identification number, such as tax returns, are relevant to the issue of whether he is entitled to overtime wages, which is a central issue in this case. Additionally, defendants argue that the validity of Rengifo's social security number, his immigration status and authorization to work in this country are relevant to his credibility.…

Courts have recognized the *in terrorem* effect of inquiring into a party's immigration status and authorization to work in this country when irrelevant to any material claim because it presents a "danger of intimidation [that] would inhibit plaintiffs in pursuing their rights." Liu v. Donna Karan International, Inc., 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (citations omitted). Here, Rengifo's immigration status and authority to work is a collateral issue. The protective order becomes necessary as "[i]t is entirely likely that any undocumented [litigant] forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face…potential deportation." Topo v. Dhir, 210 F.R.D. 76, 78 (S.D.N.Y. 2002).…

Rengifo also seeks to prevent disclosure of his social security number or tax identification number. Defendants note that, in support of his claim for unpaid overtime wages, Rengifo has produced an incomplete set of pay stubs that do not reflect all of the compensation he has received from corporate defendants, and that he has not produced any records regarding the number of hours he has worked on a weekly basis. Defendants contend, therefore, that discovery of documents containing his tax identification number or social security number, such as tax returns, is necessary and relevant to obtain this information. [The court rejects defendants' argument, reasoning that t]he information sought is not relevant to the claims in this case. Even if it were, however, the corporate defendants possess relevant data on hours and compensation, and there is no reason to assume that defendants' records are less reliable than any records maintained by Rengifo.…

Defendants also assert that the documents requested would allow them to test the truthfulness of Rengifo's representations to his employer. They argue that by applying for a job and providing his social security number, Rengifo represented to defendants that he was a legal resident and they are entitled to test the truthfulness of that information. Defendants further argue that if Rengifo filed tax returns, this information would be relevant to his overtime claim, but if he failed to file tax returns, this fact would affect the veracity of statements he would potentially make at trial.

While it is true that credibility is always at issue, that "does not by itself warrant unlimited inquiry into the subject of immigration status when such examination would impose an undue burden on private enforcement of employment discrimination laws." Avila-Blum v. Casa de Cambio Delgado, Inc., 236 F.R.D. 190, 192 (S.D.N.Y. 2006). A party's attempt to discover tax identification numbers on the basis of testing credibility appears to be a back door attempt to learn of immigration status. See E.E.O.C. v. First Wireless Group, Inc., 2007 WL 586720, *2 (E.D.N.Y. Feb. 20, 2007). Further, the opportunity to test the credibility of a party based on representations made when seeking employment does not outweigh the chilling effect that disclosure of immigration status has on employees seeking to enforce their rights. "While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution." Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064 (9th Cir. 2004). Granting employers the right to

inquire into immigration status in employment cases would allow them to implicitly raise threats of such negative consequences when a worker reports illegal practices. *Id.* at 1065.

While defendants suggest a compromise whereby discovery would be limited to the present litigation and not disclosed to any third party for any purpose beyond this litigation, the limitation does not abate the chilling effect of such disclosure. "Even if the parties were to enter into a confidentiality agreement restricting the disclosure of such discovery…, there would still remain 'the danger of intimidation, the danger of destroying the cause of action' and would inhibit plaintiffs in pursuing their rights." *Liu*, 207 F. Supp. 2d at 193 (*quoting* Ansoumana v. Gristede's Operating Corp., 201 F.R.D. 81 (S.D.N.Y. 2001)). This Court finds that defendants' opportunity to test the credibility of Rengifo does not outweigh the public interest in allowing employees to enforce their rights.

For the foregoing reasons, Rengifo's application for a protective order barring defendants from inquiring into his immigration status, social security number or tax identification number, and authorization to work in the United States is GRANTED.

WHAT'S NEW HERE?

- The information sought in *Price* and *Rengifo* is arguably relevant. But the court still orders partial protection from discovery in *Price* and complete protection in *Rengifo*.
- These protections are based on a weighing of burdens to the producing party's money, privacy, and even liberty against the likely evidentiary value of the information sought.
- Such weighings are inevitably highly discretionary and highly case-specific.

Notes and Problems

1. Be clear about the procedural settings and the nature of the arguments. First consider *Price*.
   a. What information was the plaintiff in *Price* seeking?
   b. Why did plaintiff think that information was relevant?
   c. Was the defendant claiming that the information was privileged?
   d. If not, on what grounds did defendant seek to block discovery?
   e. How does the court assess the burdensomeness of plaintiff's requests?

2. Recent revisions to Rule 26(b) might change how the discovery dispute in *Price* would be argued and decided.
   a. In 2015, Rule 26(b)(1) was amended to provide that discovery sought should be not only relevant but also "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."
   b. Rule 26(b)(2)(C) was amended as well; it now allows a court to limit discovery if "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)."
   c. Imagine you are representing the defendant, Leflore County Detention Center Public Trust. How would you use these amended provisions of Rule 26(b) to argue against production of information about the written complaints?
   d. How do you imagine that the plaintiff would respond to these arguments?
   e. Do you think that these modifications to Rule 26(b) would cause the court to reach a different conclusion?

3. Now consider *Rengifo*. In this case, it is the defendant who wants information.
   a. What is Erevos Enterprises seeking?
   b. On what ground does Rengifo attempt to block discovery? How does this argument differ from that in *Price*?
   c. To ask the question a different way, having read *Price* and *Rengifo*, how would you distinguish the types of

arguments in favor of the discovery limits set forth in Rule 26(b)(2)(C) from those set forth in Rule 26(c)?

4. Protective orders are commonly used, but will not solve all clashes between the broad scope of discovery and parties' interests in keeping certain matters confidential. In *Rengifo* the court considered and then rejected the possibility of using a protective order because disclosure of information about Rengifo's immigration status would be chilling whether or not it was under seal. Another example arose in connection with Coca-Cola Bottling Co. v. Coca-Cola Co., 107 F.R.D. 288 (D. Del. 1985), in which Coca-Cola bottlers sued the manufacturer over the division of profits from Diet Coke. The primary issue in contention was "whether the contractual term 'Coca-Cola Bottler's Syrup' includes the syrup used to make Diet Coke." Id. at 289. The bottlers contended that the question could be resolved by discovering the ingredients used in both drinks. The defendant manufacturer strongly resisted the effort, for reasons the opinion explains:

> The complete formula for Coca-Cola is one of the best kept trade secrets in the world.…The ingredient that gives Coca-Cola its distinctive taste is a secret combination of flavoring oils and ingredients known as "Merchandise 7X." The formula for Merchandise 7X has been tightly guarded since Coca-Cola was first invented and is known by only two persons within The Coca-Cola Company.…The only written record of the secret formula is kept in a security vault…which can only be opened upon a resolution from the Company's Board of Directors.

The court, ruling that the formula was relevant and unprotected by any privilege, ordered disclosure but also scheduled hearings on ways in which to protect the trade secret from disclosure to third parties. Defendant still refused to comply:

> By letter…counsel for the Company informed the Court that the Company would not disclose its formulae, "[i]n light of the overriding commercial importance of the secrecy of the formulae to the entire Coca-Cola system…even under the terms of a stringent protective order.…"

Coca-Cola Bottling Co. v. Coca-Cola Co., 110 F.R.D. 363, 366 (D. Del. 1986).

The court held a hearing on sanctions, but declined to impose a default judgment, on the grounds that a lesser sanction would be adequate. As that lesser sanction, the court would instruct the jury to infer that the formulas were identical. It also ordered the defendant to pay attorneys' fees and costs on the motion to compel, though not the costs related to its original resistance to discovery.

3. Privilege

Rule 26(b)(1) contains another explicit exception to its broad scope: It makes discoverable "any *nonprivileged* matter that is relevant…" (emphasis added). The law of evidence—not discovery rules—creates privileges, and you will study them in Evidence. For now a brief sketch will supply enough information to let us explore how the discovery system protects privileges.

Very briefly, one can say that privileges typically protect information *from certain sources*. For example, in a criminal case the prosecutor cannot call the defendant to the stand and ask her if she committed the crime; such an action would violate the Fifth Amendment privilege against self-incrimination. Privileges would also protect the defendant's communications with his attorney, doctor, clergy, and spouse. For an example, recall *Butler v. Rigsby*, in Chapter 1, where on grounds of privilege the judge blocked disclosure of the names of patients other than the plaintiffs. These privileges are premised on the notion that it is important to protect free communication with these sorts of people, no matter how beneficial the information would be to the public. Notice first that a privilege objection has nothing to do with relevance: whether the defendant committed the crime is highly relevant. Second, notice that although privileges typically block information from a particular source, they do not block the underlying facts. Thus, in the prosecution in the criminal case, though barred by the Fifth Amendment from asking the defendant about her guilt, and barred by the attorney-client privilege from asking similar questions of her lawyer, the prosecutor can introduce evidence proving the defendant's guilt from other, unprivileged sources.

A notable characteristic of evidentiary privileges is that they are not self-actuating. In other words, privileges will have effect only if a party asserts them. Moreover, privileges, even if asserted, can later be waived. For example, suppose in a deposition or trial, Peters's lawyer asks Dodge, "What did you tell your lawyer about this incident?" If Dodge's lawyer objects on privilege grounds, Dodge will not have to answer the question. But if no objection is raised and Dodge answers the question, the privilege will be waived, and Dodge can be asked additional questions about his communications with his lawyer.

Waiver can also result from taking some action inconsistent with claiming the privilege—such as disclosing the privileged material to a third party. For example, suppose that well before suit was filed, Dodge disclosed to a friend the contents of his statements to his lawyer: That action will likely be held to be a waiver of the privilege that would otherwise apply. And, very important for our purposes, parties can waive privileges by taking certain stances in litigation. For example, if Peters sues Dodge for injuries resulting from a car accident, Peters waives the doctor-patient privilege for communications with his treating physician about his injuries from the accident because he has

put the issue into dispute in the case. Discussing all of the privileges and the conditions for their invocation and waiver would take us far beyond the scope of a course in civil procedure. Our focus instead is on the interaction of privileges and discovery in civil lawsuits.

WHAT'S NEW HERE?

- Privileged information will often be relevant, sometimes acutely so (e.g., "Did you shoot him?"). So the task —tackled not here but in your evidence course—is to understand why the law ranks protecting the information higher than getting at the truth.
- To understand discovery you do *not* need to master the law of evidentiary privileges. Instead, working with just a few privileges that will be familiar to you in a general way (e.g., privilege against self-incrimination, doctor-patient privilege, attorney-client privilege), the task is to see how these privileges interact with discovery principles.

Notes and Problems

1. Albert and Barbara are involved in an automobile collision. Albert sues Barbara, alleging that Barbara intentionally drove her car into Albert's. Barbara denies liability. In a deposition Albert's lawyer asks Barbara, "Did you intentionally collide with Albert?"

a. Can Barbara object on the grounds that the question is irrelevant?

b. Barbara objects on grounds of privilege. What privilege, among those that have just now been described, would be the best fit?

c. Same lawsuit, except that in addition to negligence and battery, Albert alleges that Barbara intentionally inflicted emotional distress. Barbara's answer denies causation and her lawyer plans to argue at trial that Albert has been emotionally unstable for years. During discovery Barbara's lawyer learns that Albert had been in psychotherapy for some time before the accident. (The state in question recognizes a privilege for psychotherapist-patient communications.) Can Albert successfully claim psychotherapist-patient privilege as a basis for refusing to answer questions about his therapy? Why would Albert's assertion of privilege be rejected by the court?

2. The potential for inadvertent waiver of privilege often can turn discovery into a haunted house with trap doors. The general rules on waiver of privilege are straightforward, and are incorporated in Rule 502 of the Federal Rules of Evidence. Any privilege may be waived. Production of a privileged document—even if inadvertent—or testimony about a privileged conversation will operate as a waiver, and prevent a party from asserting the privilege as to any other privileged communications on the same subject matter, with subject matter interpreted very broadly. The purpose of this Rule is to prohibit a party from selectively waiving the privilege—that is, producing some privileged documents that tend to support the party's position, but withholding as privileged other documents that would tend to undercut the party's position.

a. When privileged documents may be mixed in among nonprivileged documents, the possibility of waiver of privilege requires the producing party to review all of the documents before production, and to remove any documents that could be claimed to be privileged. Any documents removed from production based on a claim of privilege must then be listed on a "privilege log" provided to the party requesting the documents. The privilege log would provide sufficient information about the document to allow the requesting party to assess the claim of privilege and decide whether to contest the claim. See Fed. R. Civ. P. 26(b)(5).

b. These principles all worked reasonably smoothly in the world before the copy machine and digital devices. But they create major problems in an information age. In some cases, thousands or millions of documents need to be reviewed before production because of the remote possibility that one or a few of them might be privileged. If any one of the produced documents is deemed to have been privileged, even if innocuous itself, its production could be deemed to constitute a waiver of privilege as to all other documents and oral communications on the same broad subject matter. There are few things a lawyer fears more than a court determining that his production of a privileged document in discovery operated as a waiver of the privilege as to all of his communications with his client.

c. Rule 26(b)(5)(B) tries to address this problem of inadvertent disclosure with what has come to be known in the profession as a "claw-back" provision. Read it while hoping fervently that you will never need to be the party doing the "clawing." Rule 16, dealing with pretrial conferences, scheduling, and case management, also allows the court to consider agreements "for asserting claims of privilege…after production."

4. Trial Preparation Material

Privilege forces the discovery rules to accommodate the goals of discovery with larger social values. Another problem arises because of the internal dynamics of a system in which the opposing parties must represent their own interests while conducting the case in conformity with the Rules. Discovery thus poses a question about what it means to be an "adversary" in litigation. Some lawyers have difficulty reconciling the required disclosure of potentially harmful information to one's adversary with the competitive stance that adversarial litigation otherwise fosters. Moreover, the present scheme of discovery often requires opposing counsel to cooperate with each other. This section will examine contexts in which discovery clashes with adversarial impulses and with other social goals.

Hickman v. Taylor is the leading case to tackle this issue; as you read it, consider why that might be. It may be helpful to note that the original Rules had no provision covering trial preparation materials. (Rule 26(b)(3) did not become effective until 1970.)

Hickman v. Taylor

329 U.S. 495 (1947)

Mr. Justice MURPHY delivered the opinion of the Court.

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

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

A public hearing was held on March 4, 1943, before the United States Steamboat Inspectors, at which the four survivors were examined. This testimony was recorded and made available to all interested parties. Shortly thereafter, Fortenbaugh privately interviewed the survivors and took statements from them with an eye toward the anticipated litigation; the survivors signed these statements on March 29. Fortenbaugh also interviewed other persons believed to have some information relating to the accident and in some cases he made memoranda of what they told him. At the time when Fortenbaugh secured the statements of the survivors, representatives of two of the deceased crew members had been in communication with him. Ultimately claims were presented by representatives of all five of the deceased; four of the claims, however, were settled without litigation. The fifth claimant, petitioner herein, brought suit in a federal court under the Jones Act on November 26, 1943, naming as defendants the two tug owners, individually and as partners, and the railroad.

One year later, petitioner filed 39 interrogatories directed to the tug owners. The 38th interrogatory read: "State whether any statements of the members of the crews of the Tugs 'J.M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug 'John M. Taylor.' [Plaintiff also asked for] exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports."…

The tug owners, through Fortenbaugh,…while admitting that statements of the survivors had been taken,…declined to summarize or set forth the contents. They did so on the ground that such requests called "for privileged matter obtained in preparation for litigation" and constituted "an attempt to obtain indirectly counsel's private files." It was claimed that answering these requests "would involve practically turning over not only the complete files, but also the telephone records and, almost, the thoughts of counsel."…[When the district court ordered Fortenbaugh to produce the requested statements, he refused, and the court ordered him imprisoned until he complied (but stayed the order pending an appeal).]

The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the

deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.…

We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries. As indicated by Rules [26(c) and 30(d)], limitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26(b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.

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

But the impropriety of invoking that privilege does not provide an answer to the problem before us. Petitioner has made more than an ordinary request for relevant, non-privileged facts in the possession of his adversaries or their counsel. He has sought discovery as of right of oral and written statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired. He has sought production of these matters after making the most searching inquiries of his opponents as to the circumstances surrounding the fatal accident, which inquiries were sworn to have been answered to the best of their information and belief. Interrogatories were directed toward all the events prior to, during and subsequent to the sinking of the tug. Full and honest answers to such broad inquiries would necessarily have included all pertinent information gleaned by Fortenbaugh through his interviews with the witnesses. Petitioner makes no suggestion, and we cannot assume, that the tug owners or Fortenbaugh were incomplete or dishonest in the framing of their answers. In addition, petitioner was free to examine the public testimony of the witnesses taken before the United States Steamboat Inspectors. We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney Fortenbaugh without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice. For aught that appears, the essence of what petitioner seeks either has been revealed to him already through the interrogatories or is readily available to him direct from the witnesses for the asking.…

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

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed

by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

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

But as to oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production.…

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

Mr. Justice JACKSON, concurring.…

"Discovery" is one of the working tools of the legal profession. It traces back to the equity bill of discovery in English Chancery practice and seems to have had a forerunner in Continental practice. See Ragland, Discovery Before Trial (1932) 13-16. Since 1848 when the draftsmen of New York's Code of Procedure recognized the importance of a better system of discovery, the impetus to extend and expand discovery, as well as the opposition to it, has come from within the Bar itself. It happens in this case that it is the plaintiff's attorney who demands such unprecedented latitude of discovery and, strangely enough, amicus briefs in his support have been filed by several labor unions representing plaintiffs as a class. It is the history of the movement for broader discovery, however, that in actual experience the chief opposition to its extension has come from lawyers who specialize in representing plaintiffs because defendants have made liberal use of it to force plaintiffs to disclose their cases in advance. Discovery is a two-edged sword and we cannot decide this problem on any doctrine of extending help to one class of litigants.…

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

The real purpose and the probable effect of the practice ordered by the district court would be to put trials on a level even lower than a "battle of wits." I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him. …

Mr. Justice FRANKFURTER joins in this opinion.

WHAT'S NEW HERE?

- The information sought here was *not* privileged. Instead, it was protected by a Court-made interpretation of the discovery rules.
- The doctrine originally created by the Court goes under the name of "work product" or "trial preparation material."
- That doctrine *conditionally* bars discovery of some information from some sources even though it is relevant and not privileged.
- This conditional protection distinguishes work product from privilege: Unlike work product, privileged information is absolutely protected from discovery, no matter how much the other side may need it.

Notes and Problems

1. It is easy to miss the point of *Hickman* unless one focuses on the precise question decided.
   a. What information was sought?
   b. Why wasn't it discoverable?

2. Attorneys sometimes loosely refer to a "privilege" for attorney work product. This terminology can create confusion. As we have seen in the preceding section, true privilege, such as the attorney-client privilege, is absolute unless waived. A litigant cannot obtain privileged material by explaining how much she needs it. An attorney cannot be required to disclose confidential conversations she had with a client, even if the client is no longer available to be deposed and the information in those attorney conversations cannot be obtained by any other means. By contrast, the work product protection recognized in *Hickman* is conditional and qualified. The Court holds, for example, that witness statements taken by one attorney might be discoverable by an opposing party if the witness is no longer available.

3. What does it take to overcome a claim of work product? How "substantial" must be the need, how "undue" the hardship?
   a. What if Fortenbaugh had interviewed the crew members in the hospital, and they had died before giving their testimony to the agency inquiring into the accident?
   b. What if the crew members were still alive but there had been no public hearing on the accident, and the witnesses claimed not to be able to remember events clearly? Does your answer depend on whether the witnesses revealed to Fortenbaugh information that might lead him to admissible evidence concerning the causes of the sinking?

4. At the time of *Hickman*, Rule 26 did not deal specifically with the topic of trial preparation materials. It now does—dealing both with "general" trial preparation protections in Rule 26(b)(3) and with the special issues of trial preparation protection for expert witnesses (dealt with in the next section). The Rules also incorporate the qualified protections for trial preparation materials, allowing disclosure of the information if its substantial equivalent cannot be obtained without significant hardship. See Rule 26(b)(3) and Rule 26(b)(4)(D).

5. Rule 26(b)(3) protects from disclosure "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representatives." Not surprisingly, disputes arise over whether a document has been prepared "in anticipation of litigation." A diary entry, written by a party, is unlikely to fall in this category; notes from a lawyer's interview of that party most certainly will. Although both may concern the incident that gives rise to litigation, only the latter was prepared in anticipation of that litigation. There may also be disputes, particularly in large companies, about whether internal reports of incidents were made as part of the regular course of business or in anticipation of litigation. Compare Rakus v. Erie-Lackawanna Railroad, 76 F.R.D. 145 (W.D.N.Y. 1977) (employees' accident reports to claims department are discoverable) and Nesselrotte v. Allegheny Energy Inc., 242 F.R.D. 338 (W.D. Pa. 2007) (report of an internal investigation that employer hired attorney to conduct in connection with complaint of discrimination made by another employee is protected from disclosure).

6. Just as privilege protects certain sources of information, but not the information itself, trial preparation protections protect documents and things prepared in anticipation of litigation without protecting all the

underlying information. Imagine that, preparing for trial, Plaintiff's lawyer hires a private investigator who uncovers an eyewitness to the accident and writes a memo to the lawyer setting out what that witness saw.

a. If Defendant demanded a copy of the memo in discovery, Plaintiff could successfully protect the memo from disclosure—unless it fell within the exceptions in Rule 26(b)(3)—because it is trial preparation material.

b. If, on the other hand, defendant served an interrogatory asking for the names of all eyewitnesses, Plaintiff could not protect the identity of the witness from disclosure. The witness's identity is not covered by the trial preparation protection, just the memo itself.

7. Consider *Hickman* from another angle. Like *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal* (Chapter 6), it represents a gloss—a doctrinal overlay—by the Supreme Court on a Federal Rule of Civil Procedure.

a. Just nine years after the Rules' promulgation, the *Hickman* Court added to discovery a protection not then present in the Rules. The work product doctrine proved sufficiently workable and functional to be codified in the 1970 amendments to the Rules.

b. Seventy years after the Rule's promulgation, the *Twombly* and *Iqbal* Courts added pleading requirements not contained in the Rules. It remains to be seen how workable and functional the new pleading doctrines will prove.

D. EXPERTS

Another critical aspect of modern civil litigation—and modern civil discovery—is experts. Experts enter civil litigation in two ways. In some cases experts may participate in events that give rise to litigation. Imagine that City designs and builds a bridge over the Mississippi River; the bridge later collapses, killing a number of people. Wrongful death litigation may focus on flaws in design and construction. In such a case the engineers and builders who designed and built the bridge, though experts in their fields, will be "fact witnesses" in the same way as those who saw it collapse. A second kind of expert enters the picture if plaintiffs in the bridge collapse hire experts—to testify, for example, that the design or construction of the bridge was faulty. Such experts range from the standard professionals—physicians, accountants, engineers—to experts in "accident reconstruction" and "brand name identification." Such hired experts typically testify to the inferences one can draw about the causes or effects of an event by applying their special knowledge to the information available.

Before a court will let a hired expert testify at trial, the party offering the testimony must establish that the witness is an expert and that the expertise is relevant to contested issues. In the federal courts, both Rules of Evidence and case law require that a judge certify an expert as "reliable," in the sense that the witness is drawing on a testable body of knowledge and is qualified to testify about the particular dispute. Such judicial validation will usually require that the judge pass on the expert's credentials well before trial and will sometimes occasion fierce battles about the admissibility of experts' testimony.

Just as Rule 26(a) requires parties to disclose witnesses and information they may use to support their claims, Rule 26(a)(2) sets requirements for disclosure of expert witnesses. Rule 26(a)(2)(D) requires that 90 days before trial (or 30 days for rebuttal testimony) the parties identify experts who may testify. Rule 26(a)(2) implicitly divides experts into two groups: experts who must provide an elaborate written report (26(a)(2)(B)) and those who need not (26(a)(2)(C)). The division roughly corresponds to the distinction made above—between "fact witness" experts (e.g., the engineers who designed the bridge in the hypothetical above) and those who were hired specially for the lawsuit (e.g., engineers hired to testify about proper bridge design). The latter must produce an elaborate written report, the former not. But, because even non-retained experts are experts, and it will be very difficult for the opposing lawyer effectively to depose or examine them, Rule 26(a)(2)(C) requires, as part of the pretrial disclosures, that even "fact witness" experts summarize "facts and opinions" to which they expect to testify. (The Rule is silent as to who will write this summary, and one imagines that, in practice, it will frequently be the lawyers who want to call the witnesses.) After producing their report, experts can be deposed by opposing counsel. Rules 26(a)(2), 26(b)(4). These reports and the ensuing depositions will often be the last significant discovery events.

Expert witnesses can serve a third role in litigation; as advisers to the attorney who retained them. Sometimes experts (jury consultants, for example) may be hired in anticipation of litigation but with no expectation of ever testifying at trial. Other times, an expert might be consulted with the expectation that he would testify at trial—he might even prepare a report—but the lawyer might decide not to call him as a witness. Rule 26(b)(4) addresses work product problems surrounding experts. The 2010 amendments to the Rule focused on retained experts and their communications with lawyers as they prepare their reports and testimony. Both the defense and plaintiff bars apparently agreed that it was important to extend work product protection to drafts of experts' opinions; the amended Rule does so. Rule 26(b)(4)(D) protects reports and opinions by witnesses retained in anticipation of litigation who will not testify, with exceptions similar to those in Rule 23(b)(3) for trial preparation materials.

WHAT'S NEW HERE?

- One can think of expert testimony as a special kind of trial preparation or work product: It comes into being only because the parties are anticipating a trial.
- Like work product, experts may generate documents and information that is not going to be used at trial.
- Like work product, experts who will not testify at trial get only qualified protection: Unlike privilege, their opinions can be discovered under some circumstances, if a party makes the requisite showing of special circumstances and need.

Notes and Problems

1. Suppose John is seriously injured in an automobile accident and is taken to Lake Hospital for emergency care. In the emergency room, he is examined by Dr. House, who subsequently operates on John's back. John sues Mary, the driver of the other car, for negligently inflicted injuries. John's lawyer expects to call Dr. House to testify at trial.

a. What information about Dr. House must John's lawyer give to Mary's lawyer as part of the initial disclosure required by Rule 26(a)(1)?

b. Dr. House is clearly an "expert" and he is likely to be called as a witness. Does that make him an expert witness whose identity must be disclosed as specified by Rule 26(a)(2)? What part of the definition of a 26(a)(2) witness does Dr. House not fulfill?

2. Several months later John's lawyer hires Dr. Welby, an orthopedic specialist, to testify at trial. In preparation for that testimony Dr. Welby examines John.

a. How must John's lawyer go about notifying Mary's lawyer of Welby's likely testimony? See Rule 26(a)(2).

b. In the course of preparing to testify, Dr. Welby exchanges several drafts of his proposed report with John's lawyer. As Welby and Lawyer exchange drafts, Lawyer also asks Welby to change some assumptions about the possible kind of future employment John might seek—asking him to suppose, for example, that John might change from an office job to one requiring substantial physical activity. Mary's lawyer requests all of these exchanges between Welby and Lawyer. Is Mary's lawyer entitled to any of this?

3. Suppose now that John's lawyer changes his mind (perhaps after reviewing a draft of Welby's report) and decides not to call Dr. Welby at trial. Need John's lawyer supply any information about him as part of the disclosures required by Rule 26(a)(2)?

4. Same situation as in Problem 3, but now suppose that shortly after Dr. Welby examined John, John slipped on an icy sidewalk, exacerbating his back injury. Mary's lawyer may want to try to show that John's condition at trial was due at least in part to the fall on the ice, not to the auto accident. Rule 26(b)(4)(D) may give Mary's lawyer an argument that he should be able to depose Dr. Welby, a nontestifying expert; what would that argument be?

5. Problem 4 introduces the most difficult questions that arise in connection with Rule 26(b)(4)(D), which tries to balance the adversaries' abilities to prepare their cases against the possibility that a nontestifying expert may have the only access to facts. The next two cases deal with such situations.

Thompson v. The Haskell Co.

65 Fair Empl. Prac. Cas. (BNA) 1088 (M.D. Fla. 1994)

SNYDER, M.J.

This cause is before the Court on Plaintiff's Motion for Protective Order filed on May 13, 1994 (hereinafter Motion). Plaintiff seeks to shield from discovery documents related to her in the possession of Lauren Lucas, Ph.D., a psychologist. She contends that Rule 26(b)(4) of the Federal Rules of Civil Procedure (FRCP) protects the psychological records in Dr. Lucas' possession. In particular, Plaintiff represents Dr. Lucas was retained by her prior counsel to perform a diagnostic review and personality profile, and that, after seeing Plaintiff on one occasion on June 15, 1992, Dr. Lucas prepared a report for her prior counsel.

Rule 26(b)(4)[(D)] of the FRCP provides:

[Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or
(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.]

Assuming arguendo that Dr. Lucas' report is covered by Rule 26(b)(4), it would nevertheless be discoverable under the circumstances presented in this case. In the instant lawsuit, Plaintiff alleges that, as a result of sexual harassment by co-defendant Zona, a supervisor in the employ of the Defendant, she was "reduced to a severely depressed emotional state and her employment was terminated when she did not acquiesce to the advances of [Zona]." Complaint, filed on September 23, 1993, at 6. According to a complaint filed with the Jacksonville Equal Opportunity Commission, Plaintiff apparently was terminated from her position with Defendant Haskell Company on June 5, 1992. Thus, her mental and emotional state ten days later on June 15, 1992, the date on which she was examined by Dr. Lucas, is highly probative with regard to the above-quoted allegation, which is essential to her case.

This highly probative information is discoverable notwithstanding Rule 26(b)(4), moreover, given the nature of the report at issue. Apparently, no other comparable report was prepared during the weeks immediately following Plaintiff's discharge. Thus, the Defendant could not obtain the information contained in Dr. Lucas' report by other means. In a case almost on all fours with the instant one, the Court recognized that even "independent examinations…pursuant to Rule 35 would not contain equivalent information." Dixon v. Cappellini, 88 F.R.D. 1, 3 (M.D. Pa. 1980). Under these facts, it appears there are exceptional circumstances favoring disclosure of Dr. Lucas' report, and that the Defendant could not obtain comparable information by other means. Accordingly, the Motion is DENIED.…

Chiquita International Ltd. v. M/V Bolero Reefer

1994 U.S. Dist. LEXIS 5820 (S.D.N.Y. 1994)

FRANCIS, M.J.

This is a maritime action in which the shipper, Chiquita International Ltd. ("Chiquita"), sues the carrier, International Reefer Services, S.A. ("International Reefer"), for cargo loss and damage. Chiquita alleges that International Reefer was engaged to transport 154,660 boxes of bananas from Puerto Bolivar, Ecuador to Bremerhaven, Germany aboard the M/V Bolero Reefer. However, because of alleged malfunctions of the vessel's loading cranes and side-ports, only 111,660 boxes were loaded. Thus, 43,000 boxes of bananas were left on the wharf and were later disposed of. The cargo that did arrive in Germany was allegedly in poor condition.

International Reefer has submitted a letter in support of an application to compel discovery of Joseph Winer. Mr. Winer is a marine surveyor who examined the vessel and loading gear at Chiquita's request shortly after the vessel arrived in Bremerhaven. International Reefer seeks Mr. Winer's deposition and production of the file he assembled in connection with his inspection. Chiquita has objected to these demands on the ground that Mr. Winer is a non-testifying expert as to whom discovery is closely circumscribed by Rule 26(b)(4)([D]) of the Federal Rules of Civil Procedure. International Reefer replies that Mr. Winer is a fact witness rather than an expert. Moreover, even if he is an expert, International Reefer argues that the fact that he is the only surveyor who observed the vessel shortly after it docked is an exceptional circumstance warranting discovery.…

[The opinion quotes Rule 26(b)(4)(D).]

[A] non-testifying expert is generally immune from discovery.

Mr. Winer qualifies as such an expert. He is a marine engineer who was specifically engaged by Chiquita to examine the vessel in connection with the cargo loss claim. He is clearly an "expert" in that he brought his technical background to bear in observing the condition of the gear and offering his opinion to Chiquita. He does not forfeit this status merely because he made a personal examination of the vessel and therefore learned "facts," rather than simply offering an opinion based on the observations of others. Rule 26(b)(4)[(D)] generally precludes discovery of "facts known or opinions" held by a non-testifying expert, and so it anticipates that such an expert may make his or her own investigation. Thus, the relevant distinction is not between fact and opinion testimony but between those witnesses whose information was obtained in the normal course of business and those who were hired to make an evaluation in connection with expected litigation. See Harasimowicz v. McAllister, 78 F.R.D. 319, 320 (E.D. Pa. 1978) (medical examiner subject to ordinary discovery on routine autopsy); Congrove v. St. Louis-San Francisco Railway, 77 F.R.D. 503, 504-05 (W.D. Mo. 1978) (treating physician subject to ordinary discovery). Here, Mr. Winer falls into the latter

category and Rule 26(b)(4)[(D)] therefore applies.

International Reefer nevertheless contends that discovery should be permitted under the "exceptional circumstances" clause of the rule, since no other marine surveyor viewed the vessel shortly after docking. This argument would have merit if International Reefer had been precluded from sending its own expert to the scene by forces beyond its control. Thus, for example, in Sanford Construction Co. v. Kaiser Aluminum & Chemical Sales, Inc., 45 F.R.D. 465, 466 (E.D. Ky. 1968), the court found there to be exceptional circumstances where the plaintiff allowed its own expert to examine the item at issue while barring the defendant's experts until the item was no longer accessible.

However, that is not the case here. The vessel and equipment were at least as available to International Reefer as to Chiquita from the time of loading. Indeed, during the three-week voyage to Bremerhaven, International Reefer's employees had the exclusive opportunity to examine the loading cranes. Under these circumstances, the failure of International Reefer to engage its own marine surveyor in a timely manner should not be rewarded by permitting discovery of Chiquita's expert. To do so would permit the exceptional circumstances exception to swallow Rule 26(b)(4)[(D)].

Finally, International Reefer maintains that even if it is foreclosed from deposing Mr. Winer, it should be given access to his file. However, Rule 26(b)(4)[(D)] applies to document discovery as well as to depositions. Nevertheless, International Reefer is correct that information does not become exempt from discovery merely because it is conveyed to a non-testifying expert. Thus, while the file may contain Mr. Winer's recorded observations and opinions which need not be disclosed, it may also include discoverable information provided to Mr. Winer by others. Such documents shall be produced.

Conclusion

For the reasons set forth above, International Reefer's application to take the deposition of Joseph Winer is denied. By May 13, 1994, Chiquita shall produce from Mr. Winer's file those documents that do not reflect his observations and opinions or are otherwise privileged. Chiquita shall prepare a log of any documents withheld, identifying them with the specificity required by Local Rule 46(e).

SO ORDERED.

Notes and Problems

1. Focus first on what was being sought in each case:
   a. What was the defendant seeking in *Thompson*?
   b. What was the defendant seeking in *Chiquita*?
2. *Thompson* and *Chiquita* deal with similar information, which the respective courts concede is relevant and not privileged. But the *Thompson* court orders disclosure, while the *Chiquita* court denies disclosure (of the expert's observations and conclusions if not the rest of his file).
   a. Why?
   b. What facts would one change about each case to reach a different result?
   c. In *Chiquita* the views of someone familiar with crucial facts are suppressed. How does one justify that result, given the general thrust toward disclosure in the discovery rules?
3. In *Chiquita*, the court says there is no question that Mr. Winer is an expert "retained or specially employed to provide expert testimony in the case" (Rule 26(a)(2)(B)). In *Thompson*, the court suggests in passing that Dr. Lucas might not be such a specially retained expert: "Assuming arguendo that Dr. Lucas' report is covered by Rule 26[(a)(2)(B)], it would nevertheless be discoverable under the circumstances presented in this case." If Dr. Lucas was not a specially retained expert, but instead treated Thompson and in the course of that treatment discussed facts related to her sexual harassment claim, would her report be discoverable?

E. ENSURING COMPLIANCE AND CONTROLLING ABUSE OF DISCOVERY

Even with the preceding doctrinal framework in mind, one of the hardest concepts for the student to grasp is the "culture" of discovery. *Hickman*'s fears that the advent of discovery would mean the demise of the adversary system appear to have been greatly exaggerated. Instead, discovery has become the field on which some of unrestrained advocacy's least attractive features have displayed themselves. Delay, evasiveness, abusive use of various discovery devices, use of discovery to buy time or to force a hard-pressed opponent to settle for less, and the like appear

among such tactics. Such depressing behavior has several sources, some of which lie in the design of the discovery system itself. The Federal Rules envisioned discovery's operating largely without judicial supervision, and the Rules therefore speak of lawyers exchanging various discovery requests without intervention by the court. Judges become involved only when the system breaks down. We now consider the ways in which the discovery system can break down, and the powers courts have to intervene.

1. Types of Discovery Disputes

Before assessing the effectiveness of court interventions, it may help to understand some types of disagreements that become full-fledged discovery disputes, often involving the judge. One common subject of dispute is the proper scope of discovery. Imagine that Peters has sued Dodge for injuries resulting from an auto accident. Dodge asks Peters for documents reflecting all of Peters's medical treatments for the past ten years. Peters objects: He believes that the request is overbroad and at least some of the documents requested are privileged. Dodge maintains that the request is appropriate, as past medical records would indicate whether some of the injuries claimed by Peters predated the accident. In Peters's view, Dodge has abused the discovery tools by asking for more information than the claim justifies. In Dodge's view, Peters is stonewalling—resisting appropriate requests for discovery.

A second common subject of dispute concerns whether a party has lost or destroyed important evidence. Imagine, again, that Peters has sued Dodge for injuries resulting from an auto accident. Dodge requests all e-mails sent or received by Peters since the time of the accident that reference the crash. Peters does not object to the scope of the request, but responds that he deleted all of his e-mails when he sold his computer and so the information sought is no longer available. Until recently, the Rules did not expressly address this type of problem, but the common law did. Now, the Rules do as well, at least concerning electronic discovery. Read Rule 37(e). Under the common law and now the Rules, parties are obligated to preserve evidence relevant to pending or reasonably foreseeable litigation. The failure to preserve or destruction of this type of evidence is called *spoliation*, and courts can sanction parties who do so.

Some cases of spoliation involve truly nefarious conduct: Having received the document request from her lawyer, Party shreds the relevant document. In other cases, difficulties arise not from misconduct by either side, but from the complexity of data management in the modern world, combined with age-old human problems of poor communication and inattention to detail. The resulting mistakes and misunderstandings—not just among lawyers, but between lawyers and their own clients—force courts to sort out who made a mistake, what was their level of culpability, and what can and should be done to correct the problem.

Zubulake v. UBS Warburg LLP

229 F.R.D. 422 (S.D.N.Y. 2003)

SCHEINDLIN, J.

…What is true in love is equally true at law: Lawyers and their clients need to communicate clearly and effectively with one another to ensure that litigation proceeds efficiently. When communication between counsel and client breaks down, conversation becomes "just crossfire," and there are usually casualties.

I. Introduction

This is the fifth written opinion in this case, a relatively routine employment discrimination dispute in which discovery has now lasted over two years. Laura Zubulake is once again moving to sanction UBS for its failure to produce relevant information and for its tardy production of such material.…

II. Facts

…Zubulake is an equities trader specializing in Asian securities who is suing her former employer for gender discrimination, failure to promote, and retaliation under federal, state, and city law.

A. Background

Zubulake filed an initial charge of gender discrimination with the EEOC on August 16, 2001. Well before that, however—as early as April 2001—UBS employees were on notice of Zubulake's impending court action. After she received a right-to-sue letter from the EEOC, Zubulake filed this lawsuit on February 15, 2002.

Fully aware of their common law duty to preserve relevant evidence, UBS's in-house attorneys gave oral instructions in August 2001—immediately after Zubulake filed her EEOC charge—instructing employees not to destroy or delete material potentially relevant to Zubulake's claims, and in fact to segregate such material into separate files for the lawyers' eventual review.… [These same instructions were reiterated in August 2001, and again in February, August, and September of 2002.]

B. Procedural History

In *Zubulake I,* I addressed Zubulake's claim that relevant e-mails had been deleted from UBS's active servers and existed only on "inaccessible" archival media (*i.e.,* backup tapes). Arguing that e-mail correspondence that she needed to prove her case existed only on those backup tapes, Zubulake called for their production. UBS moved for a protective order shielding it from discovery altogether or, in the alternative, shifting the cost of backup tape restoration onto Zubulake. Because the evidentiary record was sparse, I ordered UBS to bear the costs of restoring a sample of the backup tapes.

After the sample tapes were restored, UBS continued to press for cost shifting with respect to any further restoration of backup tapes. In *Zubulake III,* I ordered UBS to bear the lion's share of restoring certain backup tapes because Zubulake was able to demonstrate that those tapes were likely to contain relevant information.… In the restoration effort, the parties discovered that certain backup tapes [were] missing. They also discovered a number of e-mails on the backup tapes that were missing from UBS's active files, confirming Zubulake's suspicion that relevant e-mails were being deleted or otherwise lost.

***Zubulake III* begat *Zubulake IV,* where Zubulake moved for sanctions as a result of UBS's failure to preserve all relevant backup tapes, and UBS's deletion of relevant e-mails. Finding fault in UBS's document preservation strategy but lacking evidence that the lost tapes and deleted e-mails were particularly favorable to Zubulake, I ordered UBS to pay for the re-deposition of several key UBS employees—Varsano, Chapin, Hardisty, Kim, and Tong—so that Zubulake could inquire about the newly-restored e-mails.**

C. The Instant Dispute

The essence of the current dispute is that during the re-depositions required by *Zubulake IV,* Zubulake learned about more deleted e-mails and about the existence of e-mails preserved on UBS's active servers that were, to that point, never produced. In sum, Zubulake has now presented evidence that UBS personnel deleted relevant e-mails, some of which were subsequently recovered from backup tapes (or elsewhere) and thus produced to Zubulake long after her initial document requests, and some of which were lost altogether. Zubulake has also presented evidence that some UBS personnel did not produce responsive documents to counsel until recently, depriving Zubulake of the documents for almost two years.… Zubulake now moves for sanctions as a result of UBS's purported discovery failings. In particular, she asks—as she did in *Zubulake IV*—that an adverse inference instruction be given to the jury that eventually hears this case.

III. Legal Standard

Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis. The authority to sanction litigants for spoliation arises jointly under the Federal Rules of Civil Procedure and the court's inherent powers.

The spoliation of evidence germane to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction. A party seeking an adverse inference instruction (or other sanctions) based on the spoliation of evidence must establish the following three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind" and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

In this circuit, a "culpable state of mind" for purposes of a spoliation inference includes ordinary negligence. When evidence is destroyed in bad faith (*i.e.,* intentionally or willfully), that fact alone is sufficient to demonstrate relevance. By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions.…

IV. Discussion

…In *Zubulake IV,* I summarized a litigant's preservation obligations:

> **Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (*e.g.,* those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (*i.e.,* actively used for information retrieval), then such tapes *would* likely be subject to the litigation hold.**

A party's discovery obligations do not end with the implementation of a "litigation hold"—to the contrary, that's only the beginning.…

Once a "litigation hold" is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed "on hold," to the extent required in *Zubulake IV*. To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with the "key players" in the litigation, in order to understand how they stored information. In this case, for example, some UBS employees created separate computer files pertaining to Zubulake, while others printed out relevant e-mails and retained them in hard copy only. Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected.…

To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit, counsel must be more creative.… [I]t is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take *some reasonable steps* to see that sources of relevant information are located.

…The *continuing* duty to supplement disclosures strongly suggests that parties also have a duty to make sure that discoverable information is not lost. Indeed, the notion of a "duty to preserve" connotes an ongoing obligation. Obviously, if information is lost or destroyed, it has not been preserved.…

There are thus a number of steps that counsel should take to ensure compliance with the preservation obligation. While these precautions may not be enough (or may be too much) in some cases, they are designed to promote the continued preservation of potentially relevant information in the typical case.

***First,* counsel must issue a "litigation hold" at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.**

***Second,* counsel should communicate directly with the "key players" in the litigation, *i.e.,* the people identified in a party's initial disclosure and any subsequent supplementation thereto. Because these "key players" are the "employees likely to have relevant information," it is particularly important that the preservation duty be communicated clearly to them. As with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place.**

***Finally,* counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place.…**

As more fully described above, UBS's in-house counsel issued a litigation hold in August 2001 and repeated that instruction several times from September 2001 through September 2002. Outside counsel also spoke with some (but not all) of the key players in August 2001. Nonetheless, certain employees unquestionably deleted e-mails. Although many of the deleted e-mails were recovered from backup tapes, a number of backup tapes—and the e-mails on them—are lost forever. Other employees, notwithstanding counsel's request that they produce their files on Zubulake, did not do so.…

Counsel failed to communicate the litigation hold order to all key players. They also failed to ascertain each of the key players' document management habits. By the same token, UBS employees—for unknown reasons—ignored many of the instructions that counsel gave. This case represents a failure of communication, and that failure falls on counsel and client alike.

At the end of the day, however, the duty to preserve and produce documents rests on the party. Once that duty is made clear to a party, either by court order or by instructions from counsel, that party is on notice of its obligations and acts at its own peril. Though more diligent action on the part of counsel would have mitigated some of the damage caused by UBS's deletion of e-mails, UBS deleted the e-mails in defiance of explicit instructions not to.

Because UBS personnel continued to delete relevant e-mails, Zubulake was denied access to e-mails to which she was entitled. Even those e-mails that were deleted but ultimately salvaged from other sources… were produced 22 months after they were initially requested. The effect of losing potentially relevant e-mails is obvious, but the effect of late production cannot be underestimated either.… I therefore conclude that UBS acted willfully in destroying potentially relevant information, which resulted either in the absence of such information or its tardy production.… Because UBS's spoliation was willful, the lost information is presumed to be relevant.… [The court's decision about what sanctions were appropriate can be found infra page 518.]

WHAT'S NEW HERE?

- *Zubulake* illustrates the scope of a party's duty to preserve evidence.
- The obligation to preserve is shared by the attorney (who must take pains to ensure her clients retain relevant documents) and the client (who must comply with those obligations).

Notes and Problems

1. Start by considering what plaintiff's objective was in requesting production of the e-mails.

a. The plaintiff would hope to find e-mails from her boss explicitly stating that he failed to promote Zubulake because of her gender.

b. Beyond this type of "smoking gun" evidence, what else might Zubulake have hoped to find?

2. This case concerns multiple related discovery requests and disputes. Make sure that you keep track of them all: Zubulake sought out the e-mails; some e-mails were deleted and existed only on backup tapes; Judge Scheindlin required UBS to restore those backup tapes; after restoring several backup tapes the parties discovered that some backup tapes were missing and that some e-mails on existing backup tapes did not exist in UBS's active files; the court ordered redepositions of key witnesses; and during those depositions Zubulake learned about more lost and never-produced e-mails. Discovery exchanges and disputes are often complex and interconnected, as they are in this case.

3. The court makes clear that an attorney seeking to avoid sanctions for spoliation must do more than notify her client of a litigation hold; she must also take meaningful steps to ensure compliance with that hold. The attorney must understand the client's document retention policies, and communicate both with personnel directly involved with document retention and with the key players in the litigation.

4. *Zubulake* was decided before the adoption of two sets of amendments to the Rules that clarified obligations concerning electronic discovery. One set of amendments was made in 2006 and a second set became effective December 1, 2015. The 2006 amendments made several major changes; time will tell the impact of the 2015 amendments.

a. In 2006, Rule 37(e) was amended to provide: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of routine, good-faith operation of an electronic information system." The Advisory Committee Notes to this amendment made it clear that the Rule was not intended to have a meaning substantially different from the holding in *Zubulake*. Destruction of backup tapes, or the normal cleansing of old information in electronic storage systems, would not be "routine" or in "good faith" under the new Rule if the party reasonably anticipated litigation and failed to implement a litigation hold. The 2015 amendment to Rule 37(e) eliminated this sentence, but the Advisory Committee notes make clear that, "as under the [2006] rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information."

b. The more significant 2015 amendment to Rule 37(e) concerns the consequences of failing to preserve electronically stored information. Before 2015, the rules did not specify how courts should assess whether to sanction a party for failing to preserve electronically stored information. The amended rule provides that:

> (e)…If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (c) dismiss the action or enter a default judgment.

Judge Scheindlin, the author of *Zubulake*, harshly criticized these amendments when they were proposed,

writing that "imposing sanctions only where evidence is destroyed willfully or in bad faith creates perverse incentives and encourages sloppy behavior. Under the proposed rule, parties who destroy evidence cannot be sanctioned (although they can be subject to 'remedial curative measures') even if they were negligent, grossly negligent, or reckless in doing so." Sekisui Am. Corp. v. Hart, 945 F. Supp. 2d 494, 503 n.51 (S.D.N.Y. 2013). Would defendants' behavior in *Zubulake* merit sanctions if assessed under Rule 37(e) as amended in 2015?

c. As the opinion suggests, UBS sought at one point to require Zubulake to pay for the costs of restoring backup tapes. Rule 26(b)(2)(B) was added in 2006 to try to deal with some of the financial burdens associated with electronic information. It excuses a party from providing discovery of electronically stored information that is "not reasonably accessible because of undue burden or cost." In many instances, electronically stored information (some backup systems, for example) cannot easily be searched for relevant information. It may be a relatively simple matter, for example, to ask employees to print out (or produce in electronic form) all e-mails on their computer to or from certain individuals, or all e-mails that contain a specified subject. But it may be prohibitively expensive to conduct the same search of e-mails on backup tapes because it can only be done manually. This new Rule allows courts to conduct a cost-benefit analysis to determine if the cost of production outweighs the potential benefit.

d. Rule 26(b)(5)(B) and Rule 26(f)(4) were added in 2006, together with an amendment to Rule 502 of the Rules of Evidence, to address the problem of inadvertent waiver of attorney-client privilege, or of work product protection, in discovery. The goal was to give courts tools to avoid finding a waiver of privilege so that document production could proceed more smoothly, and at less expense.

2. Ensuring Compliance

All discovery methods need enforcement mechanisms. The Rules provide means of enforcing compliance by both the propounding and the answering party. Rule 26(g), like Rule 11, requires that discovery requests and responses be signed, and states that the signature implies discovery requests are reasonable and discovery responses are complete. Unlike Rule 11, Rule 26(g) suggests that attorneys' fees will be an appropriate sanction for most violations of its obligations.

Rule 37 establishes a system of sanctions for parties violating more specific obligations. Under that Rule, a court may impose punishments ranging from awards of expenses to dismissals of an entire case or the entry of a default judgment. Some sanctions are available on the occurrence of misbehavior. See Rule 37(d), (f). Other sanctions cannot be sought until after the court has ordered a party to comply, but it has refused. See Rule 37(b). And, as we have discussed, the failure to preserve electronically stored information has its own rule regarding sanctions. See Rule 37(e).

Notes and Problems

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1. Consider some stages at which the question of sanctions might occur.

a. Auto accident. Plaintiff makes initial disclosures that include damage calculations, names of treating physicians, and the identity of a witness to the accident. Discovery proceeds on the assumption that these are the relevant witnesses, but when plaintiff discloses the list of trial witnesses as required by Rule 26(a)(3), a new name appears. Are sanctions available? On what theory? What sanctions?

b. Contract dispute between plaintiff (Supplier) and defendant (Producer), with the parties' understanding of a clause at issue. Supplier serves a request for production requesting "all memoranda, e-mail, and internal correspondence" regarding the contract in question. If Producer believes that the request for production is overbroad, what should it do? If Producer produces only one memo, and Supplier believes there are many more, what should it do? How might this dispute lead to sanctions, according to Rule 37?

c. Same contract dispute. Supplier asks Producer to admit that the first shipment of goods arrived on time; Producer does not admit this. At trial, Supplier introduces evidence to that effect, and Producer does not challenge it. Is there a sanction available? What?

d. Same contract dispute. Supplier makes another request for documents. First, suppose that Producer simply fails to respond to the request. What steps must Supplier follow to force Producer either to comply or suffer sanctions? Read carefully Rule 37(a)(1)-(3). See Shuffle Master Inc. v. Progressive Games, Inc., 170 F.R.D. 166 (D. Nev. 1996) (refusing to order sanctions in the absence of a certificate demonstrating good faith effort to confer with adversary).

e. Same contract dispute. Now suppose two of the documents covered by the request happen to be letters from Producer's lawyer to Producer, answering questions about the interpretation of the contract in question;

Producer believes that both documents are protected by the attorney-client privilege. How should Producer raise that objection? See Rules 26(c) and 37(a). If the parties cannot agree on whether the documents are privileged, each has an option: Supplier can move to compel production of the document, and Producer can resist by asserting privilege. Or, Producer can move for a protective order under Rule 26(c) and Supplier can resist the motion by arguing that the letters are not privileged. If you were representing Supplier, which path would you prefer? If you were representing Producer?

f. Producer's response to Supplier's request states simply, "The requested documents have not been produced because they are protected by the attorney-client privilege." What should Supplier do? See Rules 26(b)(5)(A), 37(a)(4), 37(a)(3)(B).

2. Having filed a complaint against Baxter Corp. for breach of contract and received the required disclosures, Arthur Corp. sends Baxter a set of interrogatories seeking some routine information about the details of company organization, such as which officers and employees are responsible for which aspects of the company's affairs. Baxter refuses to answer any of the interrogatories, noting in its response that these matters are not relevant to the claims and defenses of the action. Arthur's lawyer believes that the interrogatories are entirely proper because they enable her to decide which officers to depose—and so are included within Rule 26(b)(1).

a. How should Arthur's lawyer proceed if she wants to get answers to her interrogatories?

b. Can Arthur seek sanctions? Under what Rule(s)?

c. Baxter serves a notice to take the deposition of Alice Arthur, the President of Arthur Corp. On the appointed day, Arthur doesn't show up. As attorney for Baxter, what remedies would you seek? See Rule 37(d).

d. When Baxter seeks sanctions, Arthur claims that Baxter purposefully scheduled the deposition at an extremely inconvenient place and requests that the location be changed. Should that argument, if true, block or mitigate sanctions?

e. When Baxter deposes Alice Arthur, her lawyer interposes numerous objections, with the result that at the end of seven hours, the deposition is just getting into the core inquiries Baxter has planned. Alice and her lawyer stand, call for the end of the deposition, and draw Baxter's attention to the seven-hour provision of Rule 30(d)(1). What should Baxter do?

f. Arthur and Baxter serve discovery on each other, including interrogatories, notices of depositions, and requests for the production of documents. Arthur believes that it has responded in good faith to Baxter's requests but that Baxter has been systematically uncooperative, raising many barely tenable objections, declining to produce documents until threatened with a motion seeking a court order, producing incomplete sets of documents, then producing overwhelming quantities of documents in which the relevant material is buried, and similar tactics. What should Arthur do?

3. Remedies: Management and Sanctions

Having decided that a party has violated its discovery obligations, the court must then decide what sanctions to apply. Read Rule 37(b); it gives courts wide latitude to determine appropriate sanctions for discovery violations, including dismissal of claims, limiting the evidence parties can use at trial, and awards of attorneys' fees.*

Recall the *Zubulake* case, in which Judge Scheindlin concluded that defendant UBS had failed to preserve e-mails and deleted presumably relevant e-mails willfully. Following is Judge Scheindlin's assessment of appropriate sanctions for UBS:

> Having concluded that UBS was under a duty to preserve the e-mails and that it deleted presumably relevant e-mails willfully, I now consider the full panoply of available sanctions. In doing so, I recognize that a major consideration in choosing an appropriate sanction—along with punishing UBS and deterring future misconduct—is to restore Zubulake to the position that she would have been in had UBS faithfully discharged its discovery obligations. That being so, I find that the following sanctions are warranted.
>
> *First,* the jury empanelled to hear this case will be given an adverse inference instruction with respect to e-mails deleted after August 2001, and in particular, with respect to e-mails that were irretrievably lost when UBS's backup tapes were recycled. [An adverse inference instruction would tell the jury to infer that these lost and destroyed e-mails would have been favorable to the plaintiff.] No one can ever know precisely what was on those tapes, but the content of e-mails recovered from other sources—along with the fact that UBS employees willfully deleted e-mails—is sufficiently favorable to Zubulake that I am convinced that the contents of the lost tapes would have been similarly, if not more, favorable.
>
> *Second,* Zubulake argues that the e-mails that *were* produced, albeit late, "are brand new and very significant to Ms. Zubulake's retaliation claim and would have affected [her] examination of every witness…in this case."…These arguments stand unrebutted and are therefore adopted in full by the Court. Accordingly, UBS is ordered to pay the costs of any depositions or re-depositions required by the late production.
>
> *Third,* UBS is ordered to pay the costs of this motion.
>
> Finally, I note that UBS's belated production has resulted in a self-executing sanction. Not only was Zubulake unable to question UBS's witnesses using the newly produced e-mails, but UBS was unable to prepare those witnesses with the aid of those e-mails. Some of UBS's witnesses, not having seen these e-mails, have already given deposition testimony that seems to contradict the newly discovered evidence.…

Consider also the following case, in which the court despairs of excessive gamesmanship during discovery and imposes a creative sanction for one attorney who crossed the line.

Security National Bank of Sioux City v. Abbott Laboratories

2014 WL 3704277 (N.D. Iowa July 28, 2014)

BENNETT, J.

Something is rotten, but contrary to Marcellus's suggestion to Horatio, it's not in Denmark. Rather, it's in discovery in modern federal civil litigation right here in the United States.…

Discovery—a process intended to facilitate the free flow of information between parties—is now too often mired in obstructionism. Today's "litigators" are quick to dispute discovery requests, slow to produce information, and all-too-eager to object at every stage of the process. They often object using boilerplate language containing every objection imaginable, despite the fact that courts have resoundingly disapproved of such boilerplate objections. Some litigators do this to grandstand for their client, to intentionally obstruct the flow of clearly discoverable information, to try and win a war of attrition, or to intimidate and harass the opposing party. Others do it simply because it's how they were taught.… Whatever the reason, obstructionist discovery conduct is born of a warped view of zealous advocacy, often formed by insecurities and fear of the truth. This conduct fuels the astronomically costly litigation industry at the expense of "the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. It persists because most litigators and a few real trial lawyers—even very good ones, like the lawyers in this case—have come to accept it as part of the routine chicanery of federal discovery practice.

But the litigators and trial lawyers do not deserve all the blame for obstructionist discovery conduct because judges so often ignore this conduct, and by doing so we reinforce—even *incentivize*—obstructionist tactics.… Unless judges impose serious adverse consequences, like court-imposed sanctions, litigators' conditional reflexes will persist. The point of court-imposed sanctions is to stop reinforcing winning through obstruction.

While obstructionist tactics pervade all aspects of pretrial discovery, this case involves discovery abuse perpetrated during depositions. Earlier this year, in preparation for a hard-fought product liability jury trial, I was called upon by the parties to rule on numerous objections to deposition transcripts that the parties intended to use at trial. I noticed that the deposition transcripts were littered with what I perceived to be meritless objections made by one of the defendant's lawyers, whom I refer to here as "Counsel." I was shocked by what I read. Thus, for the reasons discussed below, I find that Counsel's deposition conduct warrants sanctions.…

[The court describes "hundreds of unnecessary objections and interruptions" by Counsel during depositions, most of which "completely lacked merit and often ended up influencing how the witnesses responded to questions."]

Based on Counsel's deposition conduct, I would be well within my discretion to impose substantial monetary sanctions on Counsel. But I am less interested in negatively affecting Counsel's pocketbook than I am in positively affecting Counsel's obstructive deposition practices. I am also interested in deterring others who might be inclined to comport themselves similarly to Counsel.… Deterrence is especially important given that so many litigators are *trained* to make obstructionist objections. For instance, at trial, when I challenged Counsel's use of "form" objections, Counsel responded, "Well, I'm sorry, Your Honor, but that was my training.…" While monetary sanctions are certainly warranted for Counsel's witness coaching and excessive interruptions, a more outside-the-box sanction may better serve the goal of changing improper tactics that modern litigators are trained to use. *See* Matthew L. Jarvey, Note, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them,* 61 Drake L. Rev. 913, 931-36 (2013) (discussing the importance of unorthodox sanctions in deterring discovery abuse).

In light of this goal, I impose the following sanction: Counsel must write and produce a training video in which Counsel, or another partner in Counsel's firm, appears and explains the holding and rationale of this opinion, and provides specific steps lawyers must take to comply with its rationale in future depositions in any federal and state court.… The lawyer in the video must state that the video is being produced and distributed pursuant to a federal court's sanction order regarding a partner in the firm, but the lawyer need not state the name of the partner, the case the sanctions arose under, or the court issuing this order. Upon completing the video, Counsel must file it with this court, under seal, for my review and approval. If and when I approve the video, Counsel must (1) notify certain lawyers at Counsel's firm about the video via e-mail and (2) provide those lawyers with access to the video. The lawyers who must receive this notice and access include each lawyer at Counsel's firm—including its branch offices worldwide—who engages in federal or state litigation or who works in any practice group in which at least two of the lawyers have filed an appearance in any state

or federal case in the United States. After providing these lawyers with notice of and access to the video, Counsel must file in this court, under seal, (1) an affidavit certifying that Counsel complied with this order and received no assistance (other than technical help or help from the lawyer appearing in the video) in creating the video's content and (2) a copy of the e-mail notifying the appropriate lawyers in Counsel's firm about the video.… Failure to comply with this order within 90 days may result in additional sanctions.…

Depositions can be stressful and contentious, and lawyers are bound to make the occasional improper objection. But Counsel's improper objections, coaching, and interruptions went far beyond what judges should tolerate of any lawyer, let alone one as experienced and skilled as Counsel.… For the reasons stated in this opinion, I find that sanctions are appropriate in response to Counsel's improper deposition conduct, which impeded, delayed, and frustrated the fair examination of witnesses in the depositions related to this case that Counsel defended. I therefore impose the sanction described above.

Notes and Problems

1. Make sure you understand what the courts have done in these cases.
   a. What sanctions are ordered in *Zubulake*?
   b. What sanctions are ordered in *Abbott*?
   c. What goals are the judges attempting to achieve through the sanctions that they impose in each case?

2. Consider, were you the judge in these cases, what sanctions you would have imposed to achieve these results.

3. The court's decision in *Abbott Laboratories* was overturned by the Eighth Circuit Court of Appeals, which concluded that any sanctions should have been ordered within the timeframe of the sanctionable conduct and that the attorney should have had notice of the particular sanction that the court was considering so that she "would have a meaningful opportunity to respond."
   a. Note that the Court of Appeals did not reject the nature of the sanctions, or the district court's conclusion that the conduct was sanctionable.
   b. Note also that five amici, including the American Association of Justice (a plaintiffs' bar organization) and the American Board of Trial Advocates (a group consisting of experienced lawyers from both the defense and plaintiffs' bars), defended the district court's order as an appropriate way to address obstructionist discovery tactics.
   c. The Eighth Circuit, in reversing, did not remand the case to the lower court, concluding that "a remand would have little value. Assuming without deciding that there was sanctionable conduct here, defense counsel has already suffered 'inevitable financial and personal costs,' and any additional sanction proceeding so long after the disputed conduct would not usefully serve the deterrent purpose of Rule 30(d)." Abbot Bank of Sioux City v. Jones Day, 2015 WL 5042248 (Aug. 27, 2015).
   d. Imagine that you are the attorney who was sanctioned. The district court's sanctions order did not reference you by name but required you to produce a video explaining the basis for the court's sanctions. The court of appeals reversed the district court's sanctions order, but in its opinion referenced you and your firm by name, described, again, your conduct, and assumed that that conduct was sanctionable. Is the Eighth Circuit's reversal of the district court's decision a victory in your mind? Assuming both decisions resulted in a kind of sanction, which do you consider to be harsher?

* * *

Having looked at some of the obstacles to the smooth functioning of discovery, step back and consider its place in the larger scheme. The Supreme Court's recent glosses on Rule 8 (in *Twombly* and *Iqbal*) will prevent some cases from reaching discovery. For those that do, the lawsuit will be in a paradoxical state: It will be ready for trial, but trial will probably not occur. The next two chapters focus on those outcomes and explain the paradox. Chapter 8 looks at formal and informal ways in which parties may avoid trial. Chapter 9 looks at trial itself.

The paradoxical consequences of discovery flow from its dual role. It aims to prevent surprise at trial and to assure that cases will be resolved justly on their merits. Surprise witnesses make good courtroom drama but do not reassure us that justice has been done. To avoid such surprises at trial, discovery aims at laying bare both the parties' positions and the facts of the case.

In its other guise, discovery aims to put the parties in a position from which they can realistically assess the merits. In an ideal world, such assessments would match (that is, the parties would both accurately predict the results of a trial). When that happens, the parties will often settle. The next chapter explores the dynamics of settlement.

When the parties' assessments of the merits are inaccurate or mismatched, settlement is unlikely, but other mechanisms, like summary judgment, may use the products of discovery to end the case.

Still other parties may be so averse to the litigation process—including discovery—that they seek to take themselves outside the adjudicatory system. U.S. law gives them amazing freedom to do so in recognizing a number of contractual alternatives to litigation.

The next chapter explores both the voluntary and involuntary ways in which litigation may be avoided altogether or in which it can end without a trial.

Assessment Questions

Q1. In a lawsuit brought in federal district court a complaint and an answer have been filed. If the case follows a typical pattern, which of the following discovery events would precede the others?

A. Exchange of experts' reports

B. Planning conference

C. Depositions

D. Interrogatories

E. Rule 26(a)(1) disclosures

Q2. Barbara brings a diversity action against Donald in federal district court, seeking damages for breach of contract. Barbara has a number of documents she believes support her position, as well as a witness, Ethan (a former employee), and a document that will make it harder for her to prevail on her claim. Which the following statements are accurate?

A. In her initial disclosure, Barbara must identify Ethan and all of the documents.

B. In her initial disclosure, Barbara need not reveal Ethan or the unhelpful document, but she must reveal them if she is subsequently sent an interrogatory asking her to identify any relevant document or witness.

C. If the document is a letter from her lawyer advising her about the claim, she need not produce it either in the initial disclosure or at any later stage.

D. If Donald somehow learns of the existence of Ethan, he is free to interview him.

E. Whether or not he interviews Ethan, Donald can take his deposition.

Q3. The *Barbara v. Donald* lawsuit continues. Donald, having learned through interrogatories the identity of Ethan, subpoenas him to appear at a deposition. If in the deposition Donald's lawyer asks Ethan about his sexual history, which is irrelevant to the lawsuit…

A. Ethan's lawyer can object on grounds of irrelevance, and if Ethan's lawyer so objects, Donald cannot ask Ethan to answer the question.

B. Ethan's lawyer can object on grounds of irrelevance and then recess the deposition to seek a protective order.

C. Ethan's lawyer can instruct the witness not to answer on grounds of irrelevance.

D. If Ethan's lawyer objects but Ethan nevertheless answers the question, it can be used at a later stage of the case because, by answering, Ethan has waived any objection.

Q4. Still *Barbara v. Donald*. Through interrogatories, Donald learns that Barbara's in-house chief financial officer, a certified public accountant, may have relevant information about such matters as damages suffered by Barbara. Which of the following statements are accurate?

A. Because anyone serving as a chief financial officer has expertise in the area of finances and accounting, Donald can expect to receive a written report as specified in Rule 26(a)(2)(B).

B. If Barbara does not plan to call the chief financial officer as a witness, Donald cannot depose him without making a showing of "exceptional circumstances under which it is impracticable for [Donald] to obtain facts or opinions on the subject [of the CFO's testimony] by other means."

C. Donald can depose the CFO whether or not Barbara plans to call him as a witness.

D. Even if Barbara plans to call the CFO as a witness, he need not prepare an elaborate Rule 26(a)(2)(B) report.

Q5. More *Barbara v. Donald*. Donald has his own problems with discovery:

1. When he learned that Barbara was contemplating a lawsuit, he ordered an employee to shred some relevant documents.

2. He failed during initial disclosures to produce a document that he then used as an exhibit in Barbara's deposition.

3. He failed to appear at his properly noticed deposition.

4. When he did finally appear to be deposed, he repeatedly gave evasive and incomplete answers to the questions.

5. In response to a request for documents he failed to produce the document in question, on the (erroneous) ground that it was irrelevant.

As to each of these actions, Barbara wishes to obtain the requested information and to seek sanctions if they are available. Identify which of these statements are true.

A. As to 1, no sanction is available because he shredded the documents before any discovery request had obliged Donald to produce this information.

B. As to 2, Donald will not able to use the document at trial.

C. As to 3, Barbara can expect that at a minimum she would receive the fees and costs attributable to Donald's failure to appear.

D. As to 4 and 5, Barbara must first seek a ruling ordering Donald to comply with the request before seeking any sanctions.

Analysis of Assessment Questions

Q1. B is the correct response; see Rule 26(d)(1). A is incorrect; although the parties must early on disclose the identity of experts they plan to use (Rule 26(a)(2)), the exchange of reports typically comes quite late in the process (see Rule 26(a)(2)(D)(i)). C and D are wrong because Rule 26(d)(1) forbids depositions or interrogatories before the parties' planning conference. E is wrong because, although these initial disclosures will be among the first required exchanges of information, they do not come until 14 days *after* the planning conference (Rule 26(a)(1)(C)).

Q2. B, C, D, and E are correct responses. B is correct (and A is incorrect) because at the initial disclosure stage a party need disclose only information *supporting* her claim or defense. C is correct because such a letter would be information protected by the attorney-client privilege and thus undiscoverable. Note, though, that in response to such a request Barbara would have to comply with Rule 26(b)(5), explaining what the document was and why she was claiming privilege. D is correct because the discovery rules do not prohibit informal information gathering. E is correct because, if we assume the employee has relevant, unprivileged information, he can be deposed.

Q3. B is the only correct response. Rule 30(d)(3) permits such a recess, and under the circumstances it seems very likely that the court would issue a protective order. A is wrong because Rule 30(c)(2) provides that for any objection except on grounds of privilege, the question must be answered but the "testimony is taken subject to any objection." C is wrong because Rule 30(c)(2) provides that a person "may instruct a deponent not to answer only when necessary to protect a privilege, enforce [a court-ordered limitation on discovery] or to present a motion under Rule 30(d)(3)." D is wrong because what it means to take testimony "subject to any objection" (Rule 30(c)(2)) is precisely that the objection is preserved and may be renewed if Donald tries to use Ethan's answer in any later stage, say in a motion for summary judgment or during cross-examination at trial; at that point the judge will rule on the objection and exclude the evidence if, as in this case, it is irrelevant.

Q4. C and D are the correct responses. A and B are wrong because their provisions apply only to experts "retained in anticipation of litigation." As a CPA, this witness is certainly an expert, but he was hired to run Barbara's company finances, not specially to testify in this case. Thus, though an expert, he is not an expert hired in anticipation of litigation and thus not subject to the provisions of Rule 26(b)(4). Therefore no report (so A is

wrong) and no immunity from deposition (so B is wrong). C is correct because as a witness in possession of relevant unprivileged information he can be deposed. D is correct because the Rule 26(a)(2)(B) report applies only to experts retained in anticipation of litigation.

Q5. C and D are the correct responses. A is wrong because the duty to preserve evidence (enforced through the common law doctrine of spoliation) attaches whenever one is aware (or should be aware) that litigation is reasonably likely. B is wrong because Rule 37(c) states that a court need not sanction a party for failing to disclose a document required by Rule 26(a) if the error is harmless. Here, Barbara has received the document while discovery is still ongoing and is, therefore, unlikely to be harmed by the earlier failure to disclose. C is correct because Rule 37(d)(3) specifically so provides. D is correct because both instances require a specific court order (which is then disobeyed) before one can seek sanctions (Rule 37(a) and (b)).

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* [Note that 2015 amendments to Rule 26(b) change these relevant provisions in significant measure. See question 2, infra at page 491, which considers the impact of these changes.—EDS.]

† [This provision of Rule 26(b) was amended in 2015 as well. See question 2, infra at page 491.—EDS.]

* [The 2015 amendment to Rule 37(e) suggests that courts have less latitude when it comes to failing to preserve electronically stored information: the rule sets out three possible sanctions from which a court must choose.—EDS.]