



Chapter 8 Discovery
Geoffrey A. Vance
Charles M. Evans
Brian A. Fogerty

This chapter was first published in
FEDERAL CIVIL PRACTICE (IICLE, 2010)

Available for purchase at www.iicle.com
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8

Discovery

GEOFFREY A. VANCE
CHARLES M. EVANS
BRIAN A. FOGERTY
McDermott Will & Emery LLP
Chicago

The contribution of Derek J. Meyer to prior editions of this chapter is gratefully acknowledged.

I. Procedures Prior to Beginning Formal Discovery

- A. [8.1] Initial Disclosures
- B. [8.2] Parties' Planning Meeting
- C. [8.3] Consultation of Local Rules
- D. [8.4] District Court Websites

II. Scope of Discovery

- A. [8.5] Standard of Discoverability
- B. [8.6] Certification That Discovery Is Proper
- C. Material Protected from Discovery Altogether
 - 1. [8.7] Irrelevant Material
 - 2. [8.8] Privileged Material
 - a. [8.9] Attorney-Client Privilege
 - b. [8.10] Accountant and Taxpayer Privileges
 - c. [8.11] Other Privileges
 - d. [8.12] Asserting and Challenging the Privilege
 - e. [8.13] Exception to Privilege Between Insurer and Insured
- D. [8.14] Material Subject to Limited Protection
 - 1. [8.15] Sensitive or Confidential Material
 - 2. [8.16] Material Difficult or Expensive To Gather
- E. [8.17] Materials That May Be Discovered by a Showing of Substantial Need —
Work Product
- F. [8.18] Work Product Exceptions: Statements and Materials of Experts
 - 1. [8.19] Experts Who Will Testify at Trial
 - 2. [8.20] Experts Who Will Not Testify at Trial
- G. [8.21] Parties' and Witnesses' Statements

III. Sequence of Discovery — Timing and General Strategy Considerations

- A. [8.22] Lack of Required Discovery Sequence
- B. [8.23] Initial Disclosures and Subsequent Timing
- C. [8.24] Basic Sequence of Discovery for Most Cases
- D. [8.25] Discovery Conference
- E. [8.26] Depositions Before Action or Pending Appeal

IV. [8.27] Interrogatories

- A. [8.28] Why and When To Use Interrogatories
- B. [8.29] Scope and Number of Interrogatories

- C. [8.30] Filing of Interrogatories, Responses, and Other Discovery
- D. [8.31] Responding to Interrogatories
 - 1. [8.32] Duty of Responding Party
 - 2. [8.33] Objections
- E. [8.34] Option To Produce Business Records
- F. [8.35] Use of Interrogatories at Trial
- G. [8.36] Sample Forms
 - 1. [8.37] Definitions for Interrogatories
 - 2. [8.38] Interrogatory — Communications
 - 3. [8.39] Interrogatory — Documents
 - 4. [8.40] Interrogatory — Witnesses
 - 5. [8.41] Interrogatory — Subparagraphs
 - 6. [8.42] Objection to Interrogatory
 - 7. [8.43] Answer to Interrogatory

V. [8.44] Requests To Produce Documents, Electronically Stored Information, and Tangibles and Requests for Entry on Land

- A. [8.45] Duty of Requesting Party
- B. Duty of Responding Party
 - 1. [8.46] Written Responses
 - 2. [8.47] Actual Production
- C. [8.48] Inspection and Sampling of Tangibles and Land
- D. Sample Forms
 - 1. [8.49] Prefatory Language for Request To Produce
 - 2. [8.50] Definitions for Requests To Produce
 - 3. [8.51] Requests
 - 4. [8.52] Response
 - 5. [8.53] Objection

VI. [8.54] Depositions

- A. [8.55] When and Whose Depositions Should Be Taken
- B. [8.56] Procedures: Notice of Deposition and Subpoena of Nonparties — Requirements, Time, Place, Witness, and Method
 - 1. [8.57] Form and Issuance of Notices and Subpoenas
 - 2. [8.58] Time
 - 3. [8.59] Place
 - 4. [8.60] Persons To Be Deposed

5. [8.61] Method of Conducting Deposition
 - a. [8.62] Stenographic Reporting by Court Reporter
 - b. [8.63] Innovative Techniques
 - (1) [8.64] Depositions without a court reporter
 - (2) [8.65] Electronic depositions
 - (3) [8.66] Telephone depositions
6. [8.67] Document Production in Connection with Depositions
7. Conduct of the Deposition
 - a. [8.68] Beginning the Deposition
 - b. [8.69] Objections
 - (1) [8.70] Questions calling for privileged information
 - (2) [8.71] Questions calling for wholly irrelevant material
 - c. [8.72] Motion To Terminate or Limit Examination
 - d. [8.73] Concluding the Deposition — Transcription
8. Procedure After Transcription
 - a. [8.74] Changing and Signing the Transcript
 - b. [8.75] Certifying and Delivering the Transcript
9. [8.76] Failure To Attend or To Serve Subpoenas
- C. [8.77] Depositions on Written Questions
- D. [8.78] Uses of Depositions
 1. [8.79] Impeachment
 2. [8.80] Admissions
 3. [8.81] Unavailability of Deponent
 4. [8.82] Use of Only a Portion of Deposition
 5. [8.83] Substitution of Parties
 6. [8.84] Objection to Admissibility
- E. [8.85] Sample Form of Notice of Deposition

VII. [8.86] Physical and Mental Examinations

- A. [8.87] Standard for Compelling Examination
- B. [8.88] The Examiner
- C. [8.89] Time, Place, and Type of Examination
- D. [8.90] Exchange of Examiners' Reports
- E. [8.91] Waiver of Privilege on Obtaining Report
- F. [8.92] Relation of Rule 35 to Other Discovery Devices
- G. [8.93] Sanctions
- H. Sample Forms
 1. [8.94] Motion Compelling Physical and/or Mental Examination
 2. [8.95] Order Compelling Physical and/or Mental Examination

VIII. [8.96] Requests for Admission

- A. [8.97] Filing Requests
- B. [8.98] Time
- C. [8.99] Purposes of Requests for Admission
- D. [8.100] Scope of Requests
- E. [8.101] Form of Requests
- F. [8.102] Responding to Requests for Admission
 - 1. [8.103] Failure To Respond Will Constitute Admission
 - 2. [8.104] Objections
 - 3. [8.105] Answers
- G. [8.106] Enforcement Procedures
- H. [8.107] Effect of Admission
- I. [8.108] Withdrawing an Admission
- J. [8.109] Use of Admission in Another Proceeding
- K. [8.110] Definitions for Requests for Admission
- L. [8.111] Request for Admission of Facts and Genuineness of Documents
- M. [8.112] Sample Form of Answer to Request for Admission

IX. [8.113] Supplementing Discovery Responses**X. [8.114] Enforcement of Orders and Sanctions**

- A. [8.115] Appropriate Court
- B. Enforcement Orders and Sanctions
 - 1. [8.116] Enforcement
 - 2. [8.117] Sanctions
- C. [8.118] Expenses for Failure To Admit
- D. [8.119] Participation in Framing a Discovery Plan
- E. [8.120] Appealability of Discovery Orders
- F. Sample Forms
 - 1. [8.121] In General
 - 2. [8.122] Certification of Compliance with Requirement To Resolve Discovery Dispute

XI. [8.123] Electronic Discovery in Illinois Federal Courts

- A. [8.124] Electronically Stored Information
- B. [8.125] Metadata
- C. [8.126] Failures To Preserve or Produce
- D. [8.127] Illinois Federal Caselaw
- E. [8.128] Seventh Circuit Electronic Discovery Pilot Program

I. PROCEDURES PRIOR TO BEGINNING FORMAL DISCOVERY

A. [8.1] Initial Disclosures

As a beginning premise, federal litigants should remember that the Federal Rules of Civil Procedure establish a broad policy that favors full disclosure of facts during discovery. *See Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009). Fed.R.Civ.P. 26(a)(1) requires parties to exchange disclosures of a great deal of information at the outset of the litigation, without the need for any formal request, including the identity of every individual “likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses,” copies or descriptions of documents in a party’s possession, a computation of damages claimed including documents or other evidentiary material on which the computation is based, and insurance agreements. These initial disclosures must be made within 14 days after the parties’ meeting required by Rule 26(f) unless otherwise stipulated by the parties or ordered by the district court. Fed.R.Civ.P. 26(a)(1)(C). The purpose of the meeting is to formulate a discovery plan prior to any appearance in court or the initiation of any formal discovery.

Previously, each district was given the opportunity to decide whether to apply and enforce the initial disclosure provisions of Rule 26(a)(1). However, the Federal Rules of Civil Procedure were amended in 2000 so that districts could not opt out of the initial disclosure provisions. Thus, the Central, Northern, and Southern Districts of Illinois have promulgated local rules that serve to govern the implementation of Rule 26. See C.D.Ill. Local Civ. Rule 26.2; N.D.Ill. Local Rule 26.1; S.D.Ill. Local Rule 26.1.

B. [8.2] Parties’ Planning Meeting

Fed.R.Civ.P. 26(f) requires a discovery planning meeting of counsel for all parties, and Rule 26(d)(1) provides that no discovery shall be sought before the Rule 26(f) conference unless the parties agree or the trial judge orders otherwise. The discovery planning meeting is to be held at least 21 days before a scheduling conference is held with the court or a scheduling order is due under Fed.R.Civ.P. 16(b). Fed.R.Civ.P. 26(f)(1). Thus, unless otherwise ordered by the court, the parties normally should hold a meeting to discuss all aspects of the case, including claims and defenses, the possibility of early settlement, and discovery, within 69 days after the first defendant has filed its appearance (*i.e.*, 21 days before a scheduling order is normally due under Rule 16(b)(2)). Fed.R.Civ.P. 16(b). See also §8.25 below for a more comprehensive discussion of the issues that must be raised and discussed in the parties’ planning meeting.

C. [8.3] Consultation of Local Rules

Litigants should always be cognizant of any local rules that might influence their discovery plan. District courts enjoy extremely broad discretion in controlling discovery, and the rules may vary greatly between districts. *See Packman v. Chicago Tribune Co.*, 267 F.3d 628, 647 (7th Cir. 2001). The Seventh Circuit has recognized that judges are to be “commended rather than criticized for keeping tight reins” on discovery proceedings and are given the power to monitor discovery closely. *Olivieri v. Rodriguez*, 122 F.3d 406, 409 (7th Cir. 1997). Numerous judges in each Illinois district have issued standing orders governing the initial stages of cases on their

calendars. These orders frequently require a written report outlining a discovery plan, among other items, prior to the first court appearance. Therefore, it is imperative for lawyers to know the practices peculiar to the judge assigned to the case. Copies of standing orders may be obtained from chambers prior to the time the court issues them to the parties in any particular case.

D. [8.4] District Court Websites

All three Illinois districts maintain websites that provide much of the districts' local rules as well as individual judges' rules. The addresses for these sites are:

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

These sites contain valuable information and may provide convenient answers to questions regarding court hours, filing fees, and forms of pleadings and other court papers. Increased access to technology makes it easier for litigants to stay apprised of slight changes in local rules that may greatly affect the outcome of litigation before a particular judge. It also makes it more important for litigants to check with each court's website, and each particular judge's webpage, periodically over the course of each case.

II. SCOPE OF DISCOVERY

A. [8.5] Standard of Discoverability

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

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears *reasonably calculated to lead to the discovery of admissible evidence.*
[Emphasis added.]

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

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

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

B. [8.6] Certification That Discovery Is Proper

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

***Signature Required; Effect of Signature.* Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney’s own name — or by the party personally, if unrepresented — and must state the signer’s address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry:**

- (A) with respect to a disclosure, it is complete and correct as of the time it is made; and**
- (B) with respect to a discovery request, response, or objection, it is:**
 - (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;**
 - (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and**
 - (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.**

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

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

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

C. Material Protected from Discovery Altogether

1. [8.7] Irrelevant Material

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

2. [8.8] Privileged Material

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

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

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

***Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.**

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

a. [8.9] *Attorney-Client Privilege*

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

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

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

Note that the privilege does not apply to every communication between attorney and client. “[I]t protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.” *Roth v. Aon Corp.*, 254 F.R.D. 538, 540 (N.D.Ill. 2009), quoting *Fisher v. United States*, 425 U.S. 391, 48 L.Ed.2d 39, 96 S.Ct. 1569, 1577 (1976). In *Refuse & Environmental Systems, Inc. v. Industrial Services of America*, 120 F.R.D. 8, 10 (D.Mass. 1988), the court stated that the privilege does not shield all details of the attorney-client relationship from inquiry. In *Refuse & Environmental Systems*, the district court concluded that the fact that an attorney was consulted; the date, length of time, and place of the meeting; who was present during consultation; and communications to an attorney not acting as a lawyer but as

a negotiator or business advisor were discoverable and not protected by the attorney-client privilege. *See also Roth, supra*, 254 F.R.D. at 540 (explaining that “the attorney-client privilege protects disclosure of communications, but not the underlying facts by those who communicated with the attorney”); *Kelchner v. International Playtex, Inc.*, 116 F.R.D. 469, 471 (M.D.Pa. 1987); *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36, 41 (D.Mass. 1987).

The privilege can be waived in a variety of ways (*e.g.*, if the material is communicated to a third party, as by copying in a third person on a letter or other communication to a non-client, or under certain circumstances, by asserting reliance on counsel as an essential element of a defense). *See, e.g., Claffey v. River Oaks Hyundai*, 486 F.Supp.2d 776, 778 (N.D.Ill. 2007) (“The attorney-client privilege may be waived ‘when the client asserts claims or defenses that put his attorneys’ advice at issue in the litigation.’”), quoting *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175 n.1 (7th Cir. 1995). *But see Ward v. Succession of Freeman*, 854 F.2d 780, 788 (5th Cir. 1988) (privilege not waived when court compelled defendants to disclose privileged communications that then were used by plaintiffs to prove element of their claim). Waiver also may occur when a document is inadvertently produced during discovery. *See Wunderlich-Malec Systems, Inc. v. Eisenmann Corp.*, No. 05 C 4343, 2006 WL 3370700 at *2 (N.D.Ill. Nov. 17, 2006) (explaining approach used by courts in Northern District of Illinois in ruling on motions involving inadvertent production of documents), citing *Sanner v. Board of Trade of City of Chicago*, 181 F.R.D. 374, 376 (N.D.Ill. 1998), and *Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 115 (N.D.Ill. 1996).

The attorney-client privilege is applied narrowly, and the courts will determine item by item the necessary degree of protection. *See United States v. Holifield*, 909 F.2d 201, 204 (7th Cir. 1990) (holding that blanket assertions of attorney-client privilege do not suffice because they “[do] not address the applicability of the privilege with respect to each individual document [that the party seeks] to exclude . . . [or] set forth any ‘specific facts’ to support [the] legal conclusions”); *Anderson v. Torrington Co.*, 120 F.R.D. 82, 85 (N.D.Ind. 1987) (rejecting blanket assertion of privilege to cover all documents). This privilege is construed in this manner because courts agree that the scope of discovery should be broad in order to aid in the search for truth. *White, supra*, 950 F.2d at 430; *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*, 152 F.R.D. 132, 135 (N.D.Ill. 1993).

The attorney-client privilege applies whether the client is a natural person or a corporation. In determining whether a communication between a corporate client and the attorney is protected, the Seventh Circuit has used the test in *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491 (7th Cir. 1970). *See Muro v. Target Corp.*, 243 F.R.D. 301, 306 (N.D.Ill. 2007). In *Decker*, the Seventh Circuit held that an employee’s communications to the corporation’s attorney are privileged if made “at the direction of his superiors in the corporation and where the subject matter upon which the attorney’s advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.” 423 F.2d at 491 – 492. This test does not seem to be at variance with the Supreme Court’s discussion of the privilege in *Upjohn Co. v. United States*, 449 U.S. 383, 66 L.Ed.2d 584, 101 S.Ct. 677 (1981), in which the Supreme Court rejected the “control group test” as being too narrow.

When state law on privilege applies, the control-group test still is applicable. After the United States Supreme Court rejected this test in *Upjohn, supra*, the Illinois Supreme Court reaffirmed its validity under Illinois law in *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill.2d 103, 432 N.E.2d 250, 257 – 258, 59 Ill.Dec. 666 (1982). The Illinois Supreme Court broadened the test to include not only top management but also “an employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority.” 432 N.E.2d at 257. For later cases in which the control-group test has been applied, see *Sterling Finance Management, L.P. v. UBS PaineWebber, Inc.*, 336 Ill.App.3d 442, 782 N.E.2d 895, 900, 270 Ill.Dec. 336 (1st Dist. 2002).

There are limitations on the scope of the attorney-client privilege. For example, courts have held that the privilege does not apply to business advice. See *Marusiak v. Adjustable Clamp Co.*, No. 01 C 6181, 2003 WL 21321311 (N.D.Ill. June 5, 2003). Fee arrangements and bills generally are not privileged unless they contain confidential communications. See *Pandick, Inc. v. Rooney*, No. 85 C 6779, 1988 WL 61180 (N.D.Ill. June 3, 1988) (finding time sheets that did not reveal substance of communications or work performed to be discoverable). In addition, the attorney-client privilege does not protect documents whose descriptions are vague and therefore insufficient to establish the privilege. *Mold-Masters Ltd. v. Husky Injection Molding Systems, Inc.*, No. 01 C 1576, 2001 WL 1558303 at *2 (N.D.Ill. Dec. 6, 2001) (“If the description . . . fails to provide sufficient information for the court and the party seeking disclosure to assess the applicability of the attorney-client privilege or work-product doctrine, then disclosure of the document is an appropriate sanction.”); *In re Stern Walters Partners, Inc.*, No. 94 C 5705, 1996 WL 115290 (N.D.Ill. Mar. 13, 1996) (when court cannot discern from description of documents that privilege applied, documents must be produced).

b. [8.10] Accountant and Taxpayer Privileges

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

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

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

1. The communication must be made with the expectation that it will not be disclosed.
2. Confidentiality must be necessary to the relationship between the parties.
3. The community must believe that the relationship should be encouraged.
4. The injury resulting from disclosure must be greater than the benefits of obtaining the information.

See also Zepter v. Dragisic, 237 F.R.D. 185, 189 (N.D.Ill. 2006). *October 1985 Grand Jury, supra*, is also notable because the Illinois Supreme Court joined the overwhelming majority of federal courts in holding that the attorney-client privilege does not apply to tax information given to an attorney in connection with the presentation of that information to the government. 530 N.E.2d at 457.

c. [8.11] Other Privileges

Fed.R.Evid. 501 provides that privilege “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” In addition to the Fifth Amendment privilege against self-incrimination, the federal courts recognize common-law privileges, including professional privileges, such as the privilege between a psychotherapist and patient. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1, 135 L.Ed.2d 337, 116 S.Ct. 1923, 1928 – 1929 (1996). A diverse group of these interests has been recognized, including the spousal relationship, votes on elections conducted by secret ballot, and various governmental privileges, such as for reports required by statute to be confidential, state secrets, and the identity of an informer. The informer’s privilege was discussed in *Dole v. Local 1942, International Brotherhood of Electrical Workers*, 870 F.2d 368, 372 (7th Cir. 1989), and *Bigelow v. District of Columbia*, 119 F.R.D. 300 (D.D.C. 1988).

By contrast, Illinois law (which governs insofar as the privilege relates to “an element of a claim or defense as to which State law supplies the rule of decision” (Fed.R.Evid. 501)) provides statutory definitions of various privileges. Under the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.*, Illinois recognizes the physician-patient privilege (735 ILCS 5/8-802), the clergy-advisee privilege (735 ILCS 5/8-803), the “source of information” (or reporter’s) privilege (735 ILCS 5/8-901), and the husband-wife privilege (735 ILCS 5/8-801). Under the Clinical Psychologist Licensing Act, 225 ILCS 15/1, *et seq.*, Illinois recognizes the psychologist-patient privilege (225 ILCS 15/5). Under the Clinical Social Work and Social Work Practice Act, 225 ILCS 20/1, *et seq.*, Illinois recognizes the social worker-client privilege (225 ILCS 20/16). As noted in §8.10 above, under the Illinois Public Accounting Act, Illinois recognizes the accountant-client

privilege (225 ILCS 450/27). The Illinois Supreme Court also has declared that communications between a litigant and the litigant's liability insurance carrier are protected because they fall within the attorney-client privilege. *People v. Ryan*, 30 Ill.2d 456, 197 N.E.2d 15, 17 (1964).

d. [8.12] Asserting and Challenging the Privilege

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

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

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

The privilege likewise is waived for any documents that the client testifies have been used to refresh his or her recollection, including documents used to prepare for a deposition. Fed.R.Evid. 612; *Reed v. Advocate Health Care*, No. 06 C 3337, 2008 WL 162760 at *2 (N.D.Ill. Jan. 17, 2008) (explaining that preparation of binder of documents to prepare witness for deposition constituted attorney work product “but that the use of the binder to refresh the witness's memory prior to testifying constituted a waiver of the protection”); *United States Equal Employment Opportunity Commission v. Continental Airlines, Inc.*, 395 F.Supp.2d 738 (N.D.Ill. 2005); *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11, 13 (N.D.Ill. 1972). Moreover, if a client voluntarily waives the privilege, it may be deemed waived for all other communications between the same client and the same attorney on the same subject. *See Neal v. Honeywell, Inc.*, No. 93 C 1143, 1995 WL 591461 (N.D.Ill. Oct. 4, 1995).

A party wishing to challenge an assertion of the privilege will file a motion to compel discovery compliance before the court. Fed.R.Civ.P. 37(a)(1). A successful challenge to the privilege depends on showing that it does not apply or that it has been waived. A party challenging the privilege will need the fullest description possible of the material being sought to particularize the party's argument. Counsel asserting the privilege will want the description to be sparse to maintain the benefit of the privilege and avoid the risk of being deemed to have waived the privilege. The court may solve this conflict by ordering an in camera review of the disputed materials to decide whether the privilege applies. *In re JP Morgan Chase & Co. Securities Litigation*, No. 06 C 4674, 2007 WL 2363311 (N.D.Ill. Aug. 13, 2007) (trial judge conducted in camera review of material that was claimed to be protected from disclosure by attorney-client privilege).

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

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

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

D. [8.14] Material Subject to Limited Protection

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

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

Rule 26(c) gives each district judge discretion to manage discovery by balancing the broad scope of inquiry permissible under the relevancy standard of Rule 26(b)(1) against potential harmful abuses of the discovery process. The provisions of Rule 26(c) apply to every method of

discovery at every step of litigation. The rule can be used by any party to an action as well as by any person, including a nonparty who receives a subpoena or is otherwise being examined. With the exception of protective orders on matters relating to a subpoena, application for a protective order generally must be made to the court in which the action is pending. See Fed.R.Civ.P. 26(c)(1), 45(c)(3).

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

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

1. [8.15] Sensitive or Confidential Material

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

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

The Supreme Court has held that a protective order prohibiting parties seeking discovery from publishing, disseminating, or using the information in any way, except when necessary to prepare for trial, does not violate the First Amendment. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 81 L.Ed.2d 17, 104 S.Ct. 2199, 2205 (1984). See also *Citizens First National Bank of*

Princeton v. Cincinnati Insurance Co., 178 F.3d 943, 945 (7th Cir. 1999). Nevertheless, parties still must show, and the court must find, “good cause” for keeping information confidential. *Id.*; Fed.R.Civ.P. 26(c)(1). The issuance of a protective order does not have any preclusive effect as a determination of good cause if, at some point in the future, a party or some other interested member of the public moves for relief from the limitations of the protective order. *See Citizens First National Bank*, 178 F.3d at 946. *But see Bond, supra.*

2. [8.16] Material Difficult or Expensive To Gather

Fed.R.Civ.P. 26(c) generally is used to protect confidentiality, but its scope allows protection for other purposes, including curtailing the difficulty and expense of gathering information.

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

Rule 26(c)(1)(C) allows the court to order that discovery be had by a method other than the one requested. Rule 26(c)(1)(C) is used most frequently to order that depositions be taken only on written questions because oral examination would be unnecessarily expensive (*e.g.*, when a series of straightforward questions are to be asked of an unimportant witness who is available only some distance away). 6 MOORE’S FEDERAL PRACTICE §26.105[4]. Under Fed.R.Civ.P. 30(b)(4), added in 1980, telephone depositions may be used in such a case. *See* §8.66 below. Rule 26(c)(1)(D) also enables a court to ease the burden or expense of discovery by limiting the scope of examination or by entirely forbidding inquiry into certain matters.

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

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

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

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

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

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

Generally, a party will not be able to meet the burden merely by showing that it will be expensive or time-consuming to gather the material sought through other readily available discovery procedures. Rather, a party must show that alternative means of obtaining the information are not available, such as when a witness has died or is hostile and refuses to disclose protected information. *See Eagle Compressors, Inc. v. HEC Liquidating Corp.*, 206 F.R.D. 474, 478 (N.D.Ill. 2002). Opinion work product is protected even when undue hardship exists. *Id.*

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

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

1. [8.19] Experts Who Will Testify at Trial

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

Like in many state courts, litigants in federal courts must disclose their testifying experts. However, the federal disclosure is much more onerous a task than in most state courts. A federal litigant has a mandatory requirement to provide all other parties with a written report before a deposition, the other form of discovery, may be conducted at the party's discretion. Fed.R.Civ.P. 26(b)(4)(A).

The written report is to be prepared and signed by the expert as provided in Rule 26(a)(2)(B) and must contain a significant amount of information, including:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;**
- (ii) the data or other information considered by the witness in forming them;**
- (iii) any exhibits that will be used to summarize or support them;**
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;**
- (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and**
- (vi) a statement of the compensation to be paid for the study and testimony in the case.** Fed.R.Civ.P. 26(a)(2)(B).

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

A failure to disclose an expert through the failure to provide a written report generally means that the expert may not testify at trial. *See Fidelity National Title Insurance Company of New York v. Intercounty National Title Insurance Co.*, 412 F.3d 745, 750 (7th Cir. 2005). A party who, for some reason, does not disclose all of the information considered by his or her expert risks an order barring this expert from testifying.

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

Payment for deposition time is set forth in Fed.R.Civ.P. 26(b)(4)(C), which provides that "[u]nless manifest injustice would result, the court must require that the party seeking discovery . . . pay the expert a reasonable fee for time spent in responding to discovery." Rule 26(b)(4)(C) is not explicit about whether the fee includes preparation time.

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

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

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

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

G. [8.21] Parties’ and Witnesses’ Statements

Both parties and witnesses may obtain copies of their own statements (and parties’ statements) about the subject matter of the litigation. Fed.R.Civ.P. 26(b)(3)(C). For the purposes of Fed.R.Civ.P. 26(b)(3)(C), “previous statement” is defined as “(i) a written statement that the person has signed or otherwise adopted or approved; or (ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person’s oral statement.” If a party’s or witness’ request for his or her statement is refused, the person may move for a court order. Pursuant to Fed.R.Civ.P. 37(a)(5), the court may award expenses incurred in obtaining the order if the request was unreasonably refused.

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

III. SEQUENCE OF DISCOVERY — TIMING AND GENERAL STRATEGY CONSIDERATIONS

A. [8.22] Lack of Required Discovery Sequence

The federal courts have no formal priority of discovery. “[D]iscovery may be used in any sequence” unless otherwise ordered by the court, and “discovery by one party does not require

any other party to delay its discovery.” Fed.R.Civ.P. 26(d)(2). This does not mean, however, that timing and sequence are irrelevant in federal practice. To the contrary, the skilled practitioner will use the sequence of discovery as a tool to obtain the materials and evidence sought from the adversary. The order for using each discovery device might change depending on the particular circumstances of each case and the resources of each party.

B. [8.23] Initial Disclosures and Subsequent Timing

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

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

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

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

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

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

Requests for admission. See Fed.R.Civ.P. 36. Rule 26(d)(1) time for beginning discovery is invoked. Responses are due within 30 days after receipt of service of the request to admit.

Fed.R.Civ.P. 36(a)(3). The parties may agree in writing to extend the response period if such an agreement does not alter a schedule already set by the court pursuant to Rule 29. *Id.* There is no limit on the number of requests to admit, but see Rule 26(b)(2)(A).

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

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

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

1. interrogatories seeking basic information, such as
 - a. identity of witnesses and areas of their knowledge of facts; and
 - b. identity and location of documents;
2. requests to produce known documents and documents identified in the answers to interrogatories (or subpoenas duces tecum on nonparties); and
3. examination or depositions of known witnesses or witnesses identified in answers to interrogatories or documents.

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

D. [8.25] Discovery Conference

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

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c). Fed.R.Civ.P. 26(f)(3).

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

E. [8.26] Depositions Before Action or Pending Appeal

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

IV. [8.27] INTERROGATORIES

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

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

A. [8.28] Why and When To Use Interrogatories

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

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

B. [8.29] Scope and Number of Interrogatories

Interrogatories may seek to ascertain a party's position on relevant issues:

An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time. Fed.R.Civ.P. 33(a)(2).

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

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

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

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

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

D. [8.31] Responding to Interrogatories

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

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

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

1. [8.32] Duty of Responding Party

The answering party has a duty to make a reasonable effort to gather information to answer the interrogatories, even if this requires work, research, and expense. *Rogers v. Tri-State Materials Corp.*, 51 F.R.D. 234 (N.D.W.Va. 1970). If a party fails to respond completely to another party’s interrogatories, the court may prohibit this party from entering into evidence information that should have been included in the answers to the interrogatories. *Soderbeck v. Burnett County, Wisconsin*, 821 F.2d 446, 453 (7th Cir. 1987). The following are two illustrations of the duty to provide full answers to the extent not objectionable:

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

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

2. [8.33] Objections

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

Objections (or qualifications to answers) may be based on scope (*i.e.*, irrelevancy under Fed.R.Civ.P. 26(b) standards), vagueness, privilege, or other related matters. See §8.5 above. Objections should be based precisely on sustainable grounds. Lack of knowledge does not constitute a ground for objecting to an interrogatory; rather, the fact that a party does not possess certain knowledge actually may constitute the answer to a question. Later-acquired knowledge is subject to the rules governing supplementation of discovery responses.

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

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

E. [8.34] Option To Produce Business Records

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

1. the answer to the interrogatory “may be determined by examining, auditing, compiling, abstracting, or summarizing” these business records; and
2. “the burden of deriving or ascertaining the answer will be substantially the same for either.”

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

(1) specify[] the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

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

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

F. [8.35] Use of Interrogatories at Trial

Fed.R.Civ.P. 33(c) provides that answers to interrogatories “may be used [at trial] to the extent allowed by the Federal Rules of Evidence.” Answers most often are introduced as admissions against interest, to lay foundation for testimony, or to authenticate documents. They also may be referred to in argument when describing an adversary’s position on the issues.

G. [8.36] Sample Forms

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

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

1. [8.37] Definitions for Interrogatories

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

[Caption]

Plaintiff, _____, by its attorney, _____, pursuant to Rule 33 of the Federal Rules of Civil Procedure, serves the interrogatories set forth below on defendant, _____, to be answered fully in writing under oath within 30 days of service.

Definitions and Instructions

A. “Plaintiff” means or refers to [if a corporation, name of plaintiff], its divisions, subsidiaries; related companies or corporations, predecessors, and successors; all present and former officers, directors, agents, attorneys, employees; and all other persons acting or purporting to act on behalf of any of them.

B. “Defendant” means or refers to [if an individual, name of party]; his or her personal representatives, agents, employees, assigns, attorneys; and all other persons acting or purporting to act on behalf of any of them.

[COMMENT: Definitions A and B also may be used for nonparties related to the case (*e.g.*, “‘Widget Co.’ means or refers to . . .”). These definitions allow succinctly phrased interrogatories and require the answering party to include related persons and entities within the scope of the answer.]

C. “Communications” shall mean or refer to all inquiries, discussions, conversations, negotiations, agreements, understandings, meetings, telephone conversations, electronic mail, letters, notes, telegrams, advertisements, or other forms of information exchange, whether oral or written.

[COMMENT: This is one of the most useful definitions because it helps reveal the sequence, nature, and frequency of dealings between the parties.]

D. “Documents” shall mean or refer to all written or graphic matter of every kind or description, however produced or reproduced, whether draft or final, original or reproduction, and all electronically stored information and tangible things within the scope of Rule 34(a) of the Federal Rules of Civil Procedure, specifically including but not limited to writings, drawings, graphs, charts, photographs, sounds recordings, images, data compilations (stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form), letters, correspondence, memoranda, minutes, notes, contracts, agreements, memoranda of conversations, microfilm, desk calendars, periodicals, bulletins, circulars, notices, rules, regulations, prospectives,

directions, teletype messages, interoffice and intraoffice communications, reports, company worksheets, credit files, evidences of indebtedness, negotiable instruments, or material similar to any of the foregoing, however denominated, that is in the possession, custody, or control of the party on whom this request is served or to which the party can obtain access.

[COMMENT: Definition D is probably broader than needed in most cases; the authors believe that in developing these forms it is better to err on the side of over-breadth than on the side of narrowness.]

E. “Identify,” when used with respect to a communication, means to state the name and present address of each person present at the communication and to state the subject matter of the communication. If the communication was in writing, identify all documents that relate to the communication in the manner provided above.

F. “Identify,” when used with respect to an individual, means to state the person’s full name, present business affiliation and position, if known, present home address, and past position and business affiliation, if any, with any of the parties herein.

G. “Identify,” when used with respect to a company or other business entity, means to state the company’s legal name and the names under which it does business, to specify its form (partnership, corporation, etc.), and to identify its principal proprietors, officers, or directors.

H. “Identify,” when used with respect to a document, means to state the date, author, addressee, and type of document (*e.g.*, letter) and to identify its last known custodian and location. In lieu of identifying any document, you may make the document or documents available for inspection and copying pursuant to Rule 33(d) of the Federal Rules of Civil Procedure by so stating in your answer.

I. “Person” means or refers to any individual, corporation, partnership, association, organization, and any other entity of all types and natures.

J. “Relate to,” including its various forms such as “relating to,” shall mean consist of, refer to, reflect, or be in any way logically or factually connected with the matter discussed.

[COMMENT: As demonstrated in the form interrogatories in §§8.38 – 8.41 below, this definition removes the necessity of using overly cumbersome language.]

K. Whenever appropriate, the singular form of a word should be interpreted in plural. “And” as well as “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of this request any information that otherwise might be construed to be outside the scope.

L. The period of time encompassed by this request shall be from _____, _____, to the date of production hereunder, unless otherwise indicated.

M. With respect to the production of any documents that are claimed to be privileged, a statement shall be provided by the attorneys for the defendants setting forth as to each document:

- 1. the name of the sender, if any, of the documents;**
- 2. the name of the author of the document;**
- 3. the names of the persons, if any, to whom copies were sent;**
- 4. the date of the document;**
- 5. the date on which the document was received by those having possession of the document;**
- 6. a brief description of the nature and the subject matter of the document; and**
- 7. the statute, rule, or decision that is claimed to give rise to the privilege.**

[NOTE: See the discussion of privilege and work product in §§8.7 – 8.20 above.]

2. [8.38] Interrogatory — Communications

Identify each communication between plaintiff and defendant that relates to [describe the event or transaction].

3. [8.39] Interrogatory — Documents

Identify each document that relates to [describe the event or transaction].

COMMENT: The party responding to this interrogatory may opt to produce documents and/or electronically stored information pursuant to Fed.R.Civ.P. 33(d). Such an answer must reasonably identify the documents that are responsive to the query.

4. [8.40] Interrogatory — Witnesses

Identify each person who participated in [describe the event or transaction (*e.g.*, “the design, manufacture, or distribution of the product” or “the negotiation of the agreement at issue”)].

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

5. [8.41] Interrogatory — Subparagraphs

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

State whether _____ has sold, transferred, or otherwise conveyed any interest in the real property known as _____ Street, _____, Illinois (Property), and unless the answer is other than an unqualified negative:

- a. describe the type of transaction (sale, gift, or lease) and the consideration received by _____;
- b. identify the person to whom and the date on which the Property was sold, transferred, or conveyed;
- c. identify all persons having knowledge thereof;
- d. identify all documents relating thereto; and
- e. identify all communications relating thereto.

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

Identify and describe the actions, including promotional and marketing activities, conducted by Plaintiff relating to the Property, and in connection with this answer:

- a. identify the date(s) of each activity;
- b. identify each communication that relates thereto;
- c. identify each person having knowledge thereof; and
- d. identify each document that relates thereto.

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

6. [8.42] Objection to Interrogatory

Interrogatory No. __. [Set out the interrogatory in full.]

Plaintiff objects to Interrogatory No. __ on the grounds [set forth grounds with precision (e.g., “that the answer would require the responding party to reveal privileged information” (describe which privilege) or “that the interrogatory is too vague or requires undue burden”)].

COMMENT: If the responding party does not possess the information requested, this fact should be stated as an answer. If the responding party is in the process of investigating the subject inquired about, this fact also should be set forth as an answer. Counsel must remember that informal good-faith efforts must be made to resolve objections before a motion to compel an answer will be entertained. See Fed.R.Civ.P. 37(a)(1).

7. [8.43] Answer to Interrogatory

Interrogatory No. __ [from plaintiff to defendant].

Identify each communication between Plaintiff and Defendant that relates to the contract between them dated _____, ____.

Answer:

a. Meeting between Plaintiff and Defendant on or about _____, ____, at Defendant’s office, _____ Street, _____, Illinois. Also present: _____, Defendant’s broker, of _____ Street, _____, Illinois;

b. Numerous telephone communications between Plaintiff and Defendant between _____, ____, and _____, ____, exact dates unknown;

c. Meeting between Plaintiff and Defendant on _____, ____; same place and participants as in answer (a) above;

d. Closing on _____, ____, at _____ Title and Trust Company, _____ Street, _____, Illinois. Same participants as in answer (a) above, along with _____ Title and Trust Company title officer _____;

e. Copies of all written communications will be/have been produced pursuant to Rule 33(d) of the Federal Rules of Civil Procedure.

Investigation continues as to communications between and among Plaintiff and persons representing Defendant.

By: _____
Attorney for Defendant

[If executed within the United States] [NOTE: The unsworn declaration of a party representative in federal cases is provided for by 28 U.S.C. § 1746.]

I declare (or certify, verify, or state) under penalty of perjury as the duly authorized agent of Defendant herein that the above answers to interrogatories are true and correct.

By: _____

Title: _____

Date: _____

[If executed outside the United States]

I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America as the duly authorized agent of Defendant herein that the above answers to interrogatories are true and correct.

By: _____

Title: _____

Date: _____

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

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

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

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

A. [8.45] Duty of Requesting Party

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

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

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

B. Duty of Responding Party

1. [8.46] Written Responses

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

Fed.R.Civ.P. 26 includes a provision that electronically stored information from sources that are not “reasonably accessible” due to undue burden or cost may not need to be produced unless and until the requesting party files a motion to compel and the district judge compels the production of the withheld ESI. Fed.R.Civ.P. 26(b)(2)(B). Thus, a litigant may want to consider objecting to producing certain information, particularly data stored on computer backup tapes, because it is not “reasonably accessible.” See *W.E. Aubuchon Co. v. Benefirst, LLC*, 245 F.R.D. 38, 43 (D.Mass. 2007) (applying five categories of electronic data discussed in *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003), in determining whether electronic data is “reasonably accessible”).

2. [8.47] Actual Production

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

A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.

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

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

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

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

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

In addition to obtaining documentary information, Fed.R.Civ.P. 34(a)(2) allows a party to file a request “to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.”

D. Sample Forms

1. [8.49] Prefatory Language for Request To Produce

[Caption]

_____, Plaintiff herein, by its attorneys, pursuant to Rule 34 of the Federal Rules of Civil Procedure, hereby requests _____, Defendant in this action, to produce the documents and electronically stored information described below at the offices of Plaintiff’s counsel, _____ Street, _____, Illinois, on _____, 20__, at ____ [a.m.] [p.m.].

COMMENT: Note that the prefatory language to a request to produce should specify the time and place that production is required. This would be appropriate, of course, when seeking documents or the inspection of smaller tangible items. In the case of voluminous documents, ESI, larger tangibles, and entry on land, the prefatory language should be tailored accordingly.

2. [8.50] Definitions for Requests To Produce

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

3. [8.51] Requests

A. Each document identified in the answers to Plaintiff’s first set of interrogatories.

[COMMENT: In theory, if a thorough set of interrogatories preceded or was filed contemporaneously with the document request, this would be the only request needed. It would be unwise, however, to rely on this theory because unresolved objections or delays in answering the interrogatories should not be allowed automatically to delay document production.]

B. Each document that relates to [describe the event or item].

C. Each written communication between _____ and _____ and each document that relates thereto.

D. All intracompany memoranda that relate to the contract between Plaintiff and Defendant entered _____, ____.

[COMMENT: This request is appropriate when the requesting party has reason to believe that a particular type of relevant document exists. Although such a document should be covered in the more general request, a specific request leaves no doubt about what is being sought.]

4. [8.52] Response

[Caption]

_____, Defendant herein, by its attorneys, in response to the request for production of documents filed by Plaintiff herein, states as follows:

Defendant has produced or agreed to produce copies of all the requested documents to Plaintiff's counsel at a mutually convenient date and time prior to _____, 20__.

 By: _____
Attorney for Defendant

COMMENT: This response is appropriate if there are no objections and copies of all the requested documents are not burdensome to produce and transmit. If the documents are voluminous, a proper general response would be as follows:

Defendant has agreed to produce for inspection and to make available for copying by plaintiff all the documents requested at the office of Defendant's counsel at a mutually convenient date and time prior to _____, 20__.

COMMENT: When the responding party has objections to some but not all of the document requests, affirmative responses should be made on an item-by-item basis and the objection set forth clearly as discussed in §8.53 below.

5. [8.53] Objection

Request No. __. [Set out the request in full.]

Defendant objects to plaintiff's request No. __ on the ground that it calls for disclosure of attorney-client communications. [Describe communications by type of document, date, author, recipients, and general subject matter.]

COMMENT: This objection is appropriate when the request specifies only documents that fall within the privilege. If the request is broader and covers both non-privileged and privileged documents, parties generally list or describe the privileged documents by date, author, recipient, and general subject matter and agree to produce the non-privileged documents falling within the category.

VI. [8.54] DEPOSITIONS

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

- a. develop or lead to evidence or may be used as evidence;
- b. require a witness to state his or her factual position on the record;
- c. may obtain admissions;
- d. preserve testimonial evidence;
- e. allow a conversational setting in which to obtain facts and test the merits of the case; and
- f. allow the examining lawyer to assess firsthand a witness' appearance, credibility, and demeanor.

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

- a. can be very expensive, particularly if lengthy and in a location that is far from where the attorney and client reside;
- b. require thorough preparation because, without good cause, a party normally may not take a witness' deposition more than once;
- c. if ill-timed, may lack the benefit of later-acquired knowledge; and
- d. if of a third party, may reveal evidence damaging to the examining party, which is now memorialized and in some cases can be used as substantive evidence in motions and at a trial.

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

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

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

1. the opposing party or key representatives of the opposing party;
2. occurrence witnesses;

3. nonparties who possess documents or important information not otherwise available; and
4. persons who are likely to be unavailable later or for trial (due to health, age, location, or disposition).

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

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

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

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

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

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

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

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

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

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time.

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

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

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

Fed.R.Civ.P. 45(a)(3)(B) grants attorneys the authority to issue subpoenas as officers of the court on behalf of a court in which the attorney is authorized to practice or “a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.”

2. [8.58] Time

Depositions may be taken at any time after commencement of the action, except a party must get leave of court if the party “seeks to take the deposition before the time specified in [Fed.R.Civ.P.] 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time.” Fed.R.Civ.P. 30(a)(2)(A)(iii).

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

However, shorter notice may suffice. In *Natural Organics, Inc. v. Proteins Plus, Inc.*, 724 F.Supp. 50, 52 n.3 (E.D.N.Y. 1989), for example, the trial judge held that one day’s notice was reasonable under the circumstances. The parties were on an expedited discovery schedule, the need for the deposition arose suddenly, and the deposition was brief and telephonic.

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

(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken.

(B) *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition. Fed.R.Civ.P. 32(a)(5).

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

3. [8.59] Place

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

a. A plaintiff generally is required to be available for deposition in the forum district in which the plaintiff commenced the action. See 8A Charles Alan Wright et al., *FEDERAL PRACTICE AND PROCEDURE* §2112 (2d ed. 1994). Nevertheless, a plaintiff may seek a protective order under Fed.R.Civ.P. 26(c) to relieve any undue hardship, particularly if the plaintiff had no real choice in the forum.

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

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

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

Rule 45(a)(1) allows attorneys to subpoena a nonparty to produce tangibles or permit inspection of premises without having to appear at a deposition. Advisory Committee Notes, 1991 Amendment, Fed.R.Civ.P. 45. If additional documents are needed, a subsequent subpoena

may be issued to the same party. *Id.* Note also that Rule 45(a)(1) permits a subpoena that requires a nonparty to produce electronically stored information.

Under Rule 45, a nonparty witness is subject to the same scope of production of materials as persons who are parties under Fed.R.Civ.P. 34. Advisory Committee Notes 1991 Amendment, Fed.R.Civ.P. 45. This includes documents that are under the nonparty's control regardless of whether the materials are located within the district or within the territory where the subpoena can be served.

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

4. [8.60] Persons To Be Deposed

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

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

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

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

b. Fed.R.Civ.P. 30(b)(6) provides that if the deponent is a public or private corporation, partnership, association, or governmental agency, the notice or subpoena must

describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify.

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

5. [8.61] Method of Conducting Deposition

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

a. [8.62] *Stenographic Reporting by Court Reporter*

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

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

b. [8.63] *Innovative Techniques*

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

(1) [8.64] Depositions without a court reporter

Fed.R.Civ.P. 29(a) provides that unless the court orders otherwise, the parties may stipulate that “a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified — in which event it may be used in the same way as any other deposition.” As amended, Rule 29 no longer requires parties to stipulate in writing regarding discovery procedures. See 6 MOORE'S FEDERAL PRACTICE §29.05[1]. Although, “counsel are advised to reduce all stipulations to writing to avoid later disputes as to precisely what, if anything, was the subject of the stipulation.” *Id.* Thus, the parties may stipulate that the deposition be taken by a person who is not a notary public or court reporter, that no transcript be made, or that the transcript be non-verbatim.

(2) [8.65] Electronic depositions

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

The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

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

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

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

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

(3) [8.66] Telephone depositions

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

6. [8.67] Document Production in Connection with Depositions

Depositions of parties or nonparties may be accompanied by a document production, although, as mentioned in §8.24 above, it is generally best to request document production prior to the deposition pursuant to Fed.R.Civ.P. 34. In the case of parties, Fed.R.Civ.P. 30(b)(2) provides:

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

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

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

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

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

7. Conduct of the Deposition

a. [8.68] *Beginning the Deposition*

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

The actual examination and cross-examination may “proceed as they would at trial under the provisions of the Federal Rules of Evidence.” Fed.R.Civ.P. 30(c)(1). This provision is a bit inaccurate. For example, cross-examination at a deposition is not limited to the scope of direct examination (8A Wright, FEDERAL PRACTICE AND PROCEDURE §2113) as is cross-examination at trial unless otherwise ordered. See Fed.R.Evid. 611(b). Moreover, like all discovery, depositions need meet only the relevancy standard of Fed.R.Civ.P. 26(b)(1), not the stricter evidentiary standard of Fed.R.Evid. 401. The latter standard will be applied only to deposition testimony submitted to the court as evidence.

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

Questions should be concise and precise. Exhibits are best marked in advance, and copies should be made available to opposing counsel to expedite the proceeding.

b. [8.69] *Objections*

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

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

(A) *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence — or to the competence, relevance, or materiality of testimony — is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if:

- (i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and**
- (ii) it is not timely made during the deposition.**

(C) *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

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

(1) [8.70] Questions calling for privileged information

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

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

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

c. [8.72] Motion To Terminate or Limit Examination

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

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

Fed.R.Civ.P. 30(c)(2) requires that any objections to evidence during a deposition “be stated concisely in a nonargumentative and nonsuggestive manner.” Further, a party may instruct a deponent not to answer only “to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).” *Id.*

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

d. [8.73] Concluding the Deposition — Transcription

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

8. Procedure After Transcription

a. [8.74] Changing and Signing the Transcript

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

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

b. [8.75] Certifying and Delivering the Transcript

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

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

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

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

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

A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney’s fees, if the noticing party failed to:

- (1) attend and proceed with the deposition; or**
- (2) serve a subpoena on a nonparty deponent, who consequently did not attend.**

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

C. [8.77] Depositions on Written Questions

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

D. [8.78] Uses of Depositions

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

1. [8.79] Impeachment

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

2. [8.80] Admissions

The deposition of a party or a deponent who was an officer, director, managing agent, or person designated to testify on behalf of a corporation, partnership, or similar entity at the time the deposition was taken may be used by an adverse party for any purpose. Fed.R.Civ.P. 32(a)(3). The most frequent application of this doctrine lies in the use of deposition testimony as an admission by a party.

3. [8.81] Unavailability of Deponent

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

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

- a. The witness is dead.
- b. The witness is at a distance greater than 100 miles from the place of trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition.
- c. The witness cannot attend or testify because of age, illness, infirmity, or imprisonment.
- d. The party offering the deposition could not procure the witness's attendance by subpoena, though the court can refuse to admit the deposition testimony of a witness if the offering party has not been diligent in procuring the attendance of a witness with a subpoena. *See Hanson v. Parkside Surgery Center*, 872 F.2d 745, 750 (6th Cir. 1989).

e. Exceptional circumstances makes it desirable — in the interest of justice and with due regard to the importance of live testimony in open court — to permit the deposition to be used.

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

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

5. [8.83] Substitution of Parties

Substitution of parties pursuant to Fed.R.Civ.P. 25 as a result of death generally does not affect the right to use depositions previously taken. Fed.R.Civ.P. 32(a)(7). Moreover, all depositions taken in a prior action brought by the same parties (or their representatives or successors) and involving the same subject may be used in the later action as if taken in that case. Fed.R.Civ.P. 32(a)(8).

6. [8.84] Objection to Admissibility

Fed.R.Civ.P. 32(b) provides that “an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.” The only exceptions are objections to the form of questions or errors and irregularities covered by Rule 32(d)(3) and those concerning foreign depositions by letters rogatory as provided by Fed.R.Civ.P. 28(b).

E. [8.85] Sample Form of Notice of Deposition

[Caption]

TO:

DEPONENT:

You are hereby notified that pursuant to the provisions of the Federal Rules of Civil Procedure the undersigned will take the deposition of the above-named deponent before a notary public or any other duly authorized officer at _____ Street, _____, Illinois, on the _____ day of _____, 20__, at _____ [a.m.] [p.m.]

[If the notice is for the deposition of an adverse party or a managing agent of an adverse party, add the following statement:]

You are hereby further notified pursuant to the Federal Rules of Civil Procedure that you are by this notice required to have the deponent present at the date, time, and place stated for oral examination.

Deponent is required to produce at deposition the documents listed in the attached addendum.

 By: _____
 Attorney for _____

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

VII. [8.86] PHYSICAL AND MENTAL EXAMINATIONS

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

A. [8.87] Standard for Compelling Examination

Fed.R.Civ.P. 35(a)(1) provides that “[t]he court . . . may order a party whose mental or physical condition — including blood group — is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner.” The court may order an examination “only on motion for good cause and on notice to all parties and the person to be examined.” Fed.R.Civ.P. 35(a)(2)(A).

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

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

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

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

B. [8.88] The Examiner

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

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

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

D. [8.90] Exchange of Examiners’ Reports

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

After this report is furnished to the examined party, the party who caused the examination is entitled to receive from the party against whom the order of examination was made “like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.” Fed.R.Civ.P. 35(b)(3). The testimony of any examiner who fails or refuses to make a report may be excluded at the trial. Fed.R.Civ.P. 35(b)(5).

E. [8.91] Waiver of Privilege on Obtaining Report

Fed.R.Civ.P. 35(b)(4) provides that the party who obtains a report or takes the deposition of the examiner “waives any privilege it may have — in that action or any other action involving the same controversy — concerning testimony about all examinations of the same condition.”

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

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

G. [8.93] Sanctions

The sanctions applying to Fed.R.Civ.P. 35 differ somewhat from those applying to other forms of discovery. Thus, Fed.R.Civ.P. 37(b)(2)(B) provides that in the event a party fails to

produce another person for examination after an order is entered, the normal range of sanctions will not be imposed if the party failing to comply “shows that it cannot produce the other person.” In *Sloane v. Thompson*, 128 F.R.D. 13, 15 (D.Mass. 1989), dismissal of the case was found to be the appropriate sanction when the plaintiff’s theory of damages was based on her health and she was capable of but refused to comply with the court’s order to appear for an examination. For a full discussion of enforcement of discovery rights and sanctions, see §§8.116 and 8.117 below.

H. Sample Forms

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

[Caption]

MOTION FOR ORDER COMPELLING [PHYSICAL] [MENTAL] EXAMINATION

_____, plaintiff herein, by [his] [her] attorney, moves the court pursuant to Rule 35 of the Federal Rules of Civil Procedure to order _____ to appear at the offices of _____ at a time and day certain for purposes of [physical] [mental] examination. In support of this motion, plaintiff states as follows:

[State the “good cause” for the order and explain why the condition of the party to be examined is “in controversy.” *Id.*]

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

[Caption]

ORDER

This matter coming on to be heard, pursuant to Rule 35 of the Federal Rules of Civil Procedure, on the motion of plaintiff for a physical examination of _____, all parties and [the person to be examined] being given notice of said motion, and the court finding that plaintiff has shown good cause for the examination and that [identify the condition] is in controversy in this action,

IT IS HEREBY ORDERED:

_____ shall appear for a [physical] [mental] examination by _____ on _____, 20__, at _____ [a.m.] [p.m.], to be examined [identify the type of examination by nature and scope].

Date _____

ENTER

Judge

VIII. [8.96] REQUESTS FOR ADMISSION

A request for admission, explicitly permitted by Fed.R.Civ.P. 36, is not a true “discovery” device since such a request seeks an admission of facts presumably known by the requesting party. Requests for admission may be served only on a party to the action and may be used as judicial admissions (as opposed to evidentiary admissions) only in connection with the action in which they are served. These requests serve a useful function in narrowing and defining the issues for trial.

A. [8.97] Filing Requests

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

B. [8.98] Time

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

C. [8.99] Purposes of Requests for Admission

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

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

D. [8.100] Scope of Requests

A party may seek the admission “for purposes of the pending action only, [of] the truth of any matters within the scope of Rule 26(b)(1) relating to (A) facts, the application of law to fact, or opinions about either; and (B) the genuineness of any described document.” Fed.R.Civ.P. 36(a)(1). Thus, requests to admit must meet only the relevancy test of Fed.R.Civ.P. 26, not the test of Fed.R.Evid. 401. The court will determine at trial whether the admissions can be introduced.

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

1. the existence of an agency, employment, or contractual relationship;
2. whether an employee acted within the scope of employment; and
3. whether premises or instrumentalities were under the control of a party.

E. [8.101] Form of Requests

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

F. [8.102] Responding to Requests for Admission

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

1. [8.103] Failure To Respond Will Constitute Admission

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

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

2. [8.104] Objections

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

The responding party should exercise caution, especially if an objection is based on a ground other than privilege (which must be asserted at the first opportunity (see §8.8 above)), because of the sanctions under Fed.R.Civ.P. 37(c) that specifically apply to responses to requests for admission. See §8.117 below regarding sanctions. If requests appear overly burdensome or irrelevant, counsel may seek a protective order under Fed.R.Civ.P. 26(c) rather than rely solely on an objection.

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

The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial.

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

3. [8.105] Answers

Fed.R.Civ.P. 36(a)(4) provides that when a party intends to deny a matter, “the answer must specifically deny [the matter]. . . . A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest.” If the responding party considers a request to contain multiple matters, the party should specify the particular matters to which the party admits and the distinct matters to which the party denies, using the language of the request as much as possible. Moreover, a party who is not in a position to admit or deny a request for an admission after a reasonable inquiry must specifically say so: “The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.” Fed.R.Civ.P. 36(a)(4).

G. [8.106] Enforcement Procedures

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

1. If an objection has been asserted, the court may sustain it.
2. “On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served.” Fed.R.Civ.P. 36(a)(6). This provision is meant to prevent the unfair surprise that could result by giving a defective answer the automatic effect of an admission.

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

Fed.R.Civ.P. 37(c)(2) expressly provides that the expenses incurred in proving a matter must be awarded for failure to admit a matter later proved to be true or a document later proved to be genuine unless any of the following applies:

1. The request was objectionable.
2. The admission sought was of no substantial importance.
3. The responding party had reasonable ground to believe that he or she might prevail.
4. There was other “good reason” for the failure to admit.

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

H. [8.107] Effect of Admission

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

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

I. [8.108] Withdrawing an Admission

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

J. [8.109] Use of Admission in Another Proceeding

“An admission under [Rule 36] . . . cannot be used against the party in any other proceeding.” Fed.R.Civ.P. 36(b). Consequently, “a statement made in one lawsuit cannot be a judicial

admission in another. . . . It can be *evidence* in the other lawsuit, but no more.” [Emphasis in original.] [Citation omitted.] *Kohler v. Leslie Hindman, Inc.*, 80 F.3d 1181, 1185 (7th Cir. 1996).

K. [8.110] Definitions for Requests for Admission

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

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

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

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

[Caption]

DEFENDANT’S ANSWERS TO PLAINTIFF’S FIRST SET OF REQUESTS FOR ADMISSION OF FACTS AND GENUINENESS OF DOCUMENTS

As [its] [his] [her] answers to Plaintiff’s first requests for admissions of facts and genuineness of documents, Defendant, _____, states as follows:

Request No. 1. Plaintiff is a Delaware corporation having its principal place of business in Illinois.

Answer. Defendant admits the matters set forth in Request No. 1.

Request No. 2. Plaintiff is a duly licensed real estate broker.

Answer. Defendant admits that Plaintiff holds itself out as a licensed real estate broker but is unable to admit or deny that Plaintiff is in fact a licensed real estate broker because, after reasonable investigation, Defendant has been unable to obtain a certification from the Illinois Department of Financial and Professional Regulation indicating that Plaintiff either is or is not duly licensed in Illinois as a real estate broker.

* * *

By: _____
Attorney for Defendant

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

IX. [8.113] SUPPLEMENTING DISCOVERY RESPONSES

A party who has made disclosures under Fed.R.Civ.P. 26(a) or has responded to requests for discovery with a disclosure or response is under a duty to supplement or correct this disclosure or response to include information thereafter required only if ordered by the court or in the following circumstances:

a. Rule 26(a) disclosures must be supplemented at appropriate intervals if a party learns that in some material respect the disclosures are incomplete or incorrect and the additional or correctional information has not been disclosed otherwise through the discovery process or in writing. Fed.R.Civ.P. 26(e)(1)(A). An expert witness who must provide a report under Rule 26(a)(2)(B) and who has testified on deposition must supplement the deposition testimony. Fed.R.Civ.P. 26(a)(2)(D).

b. The parties are under a duty to seasonably amend a prior response to an interrogatory, a request for production, or a request for admission if the party learns that the response is in some material respect incomplete or incorrect and that the additional or corrective information has not been made known otherwise through the discovery process or in writing.

No particular form of supplementation is specified, and the duty to supplement is satisfied if the information has been made known to the other parties during discovery or in writing. Fed.R.Civ.P. 26(e).

Practitioners should note that Fed.R.Civ.P. 37(c)(1) explicitly provides for sanctions for failure to supplement disclosures or responses when required.

X. [8.114] ENFORCEMENT OF ORDERS AND SANCTIONS

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

Lawyers for both the requesting and responding parties should be aware that courts are increasingly using sanctions, such as dismissal and default, to enforce discovery rights or to punish the failure to obey discovery rules or orders. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 49 L.Ed.2d 747, 96 S.Ct. 2778, 2781 (1976); *Greviskes v. Universities Research Ass'n*, 417 F.3d 752, 759 – 760 (7th Cir. 2005). A lawyer's failures often are imputed to the client. *Magala v. Gonzales*, 434 F.3d 523, 525 – 526 (7th Cir. 2005). This is particularly true with respect to electronic discovery failures.

Several provisions of Rule 37 have been amended to include the requirement that a person moving for relief include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make discovery in an effort to secure the information or materials without court action. This requirement is consistent with the established practice in Illinois requiring a good-faith attempt to settle discovery disputes before a party may file a discovery motion with the court. See, *e.g.*, N.D.Ill. Local Rule 37.2.

Moreover, litigants should note that effective December 1, 2006, Rule 37 was amended to provide a safe harbor that, when applicable, would serve to protect a party from sanctions even though the party may have failed to preserve and produce certain electronically stored information: “Absent exceptional circumstances, a court may not impose sanctions . . . for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” Fed.R.Civ.P. 37(e). Thus, in order to benefit from the safe harbor, a responding party must demonstrate that the loss of information was not only accidental but also the result of the routine, good-faith operation of an electronic information system.

A. [8.115] Appropriate Court

A party seeking to compel discovery generally must file its motion in the court in which the action is pending (*i.e.*, the “forum court”). Fed.R.Civ.P. 37(a)(2). Rule 37(a)(2) also provides that motions to compel discovery from nonparties must be made in a court of the district in which the discovery is being taken. See *Contardo v. Merrill Lynch, Pierce, Fenner & Smith*, 119 F.R.D. 622, 624 (D.Mass. 1988).

B. Enforcement Orders and Sanctions

1. [8.116] Enforcement

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

Examples of reasons for motions to compel include:

- a. failure to answer a particular interrogatory;
- b. failure to produce certain documents;
- c. failure of a corporation to designate a deponent pursuant to Fed.R.Civ.P. 30(b)(6) or Fed.R.Civ.P. 31(a);

- d. refusal to answer a particular question or line of questions at a deposition;
- e. submission of an “evasive or incomplete” answer, which is “treated as a failure to answer” under Rule 37(a)(4); and
- f. assertion of an objection that the inquiring party believes to be unsound.

In addition to ordering compliance, Fed.R.Civ.P. 37(a)(5) provides that the court “must” require the losing party to a discovery motion, the attorney who advised this party, or both to reimburse the successful party for its reasonable expenses, including attorneys’ fees, unless “(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party’s nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust.” If a motion is granted in part and denied in part, the court may apportion such an award of expenses and fees. The Advisory Committee Notes to the 1970 Amendment to Subdivision (a)(4) of Rule 37 state:

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

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

2. [8.117] Sanctions

Sanctions refer to measures more drastic than ordering compliance with discovery requests or avoiding fees and expenses. Allowable sanctions are governed by Fed.R.Civ.P. 37(b) (failure to comply with court orders), 37(c) (failure to disclose or supplement, false or misleading disclosure, and refusals to admit), and 37(d) (failure of a party to attend its own deposition, serve answers to interrogatories, or respond to requests for inspection) and include dismissal, default, and, in the case of disobedience of an order, contempt.

In the case of depositions, if relief is sought from a court in the district in which the deposition is being taken but the action is not pending, this court may treat the conduct complained of (failure to be sworn or to answer a question after being directed to do so by that court) as a contempt of that court. Fed.R.Civ.P. 37(b)(1). In all other cases (*i.e.*, when relief is sought from the forum court), Rule 37(b)(2) provides a wide range of sanctions. These include:

- a. orders directing that the matters in dispute “be taken as established for purposes of the action, as the prevailing party claims” (Fed.R.Civ.P. 37(b)(2)(A)(i));
- b. orders prohibiting the disobedient party from supporting or opposing designated claims or defenses or introducing designated evidence (Fed.R.Civ.P. 37(b)(2)(A)(ii));

- c. orders striking pleadings or parts thereof (Fed.R.Civ.P. 37(b)(2)(A)(iii));
- d. orders staying proceedings until the order is obeyed (Fed.R.Civ.P. 37(b)(2)(A)(iv));
- e. orders dismissing the action or proceeding in whole or part (Fed.R.Civ.P. 37(b)(2)(A)(v)) or rendering a default judgment (Fed.R.Civ.P. 37(b)(2)(A)(vi));
- f. orders allowing the court, in lieu of the above, to treat the disobedience of a discovery order as a contempt of court (Fed.R.Civ.P. 37(b)(2)(A)(vii));
- g. orders allowing the court to invoke one of the sanctions described in items a – f above if a party fails to comply with a Fed.R.Civ.P. 35(a) order to produce another person for examination “unless the disobedient party shows that it cannot produce the other person” (Fed.R.Civ.P. 37(b)(2)(B)); and
- h. orders allowing the court to award fees and expenses (Fed.R.Civ.P. 37(b)(2)(C)).

Fed.R.Civ.P. 37(d)(2) contains a cautionary provision:

A failure [to respond] is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

Even if the inquiring party files discovery requests that are objectionable (*e.g.*, unduly burdensome, irrelevant, or calling for privileged material), the responding party must file something to prevent the possibility of sanctions.

The trend to impose sanctions for failure to obey the discovery rules, established in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 49 L.Ed.2d 747, 96 S.Ct. 2778, 2781 (1976), has continued. Generally, when the failure to comply results from bad faith, willfulness, or sometimes even mere negligence, courts first will assess expenses, including attorneys’ fees, against the disobedient party. *Ladien v. Astrachan*, 128 F.3d 1051, 1057 (7th Cir. 1997); *Persson v. Faestel Investments, Inc.*, 88 F.R.D 668, 671 (N.D.Ill. 1980); *Aerwey Laboratories, Inc. v. Arco Polymers, Inc.*, 90 F.R.D 563, 565 – 566 (N.D.Ill. 1981); *In re Air Crash Disaster near Chicago, Illinois on May 25, 1979*, 90 F.R.D. 613, 620 (N.D.Ill. 1981). However, as noted in §8.114 above, Fed.R.Civ.P. 37(f), as amended and effective December 1, 2006, provides that absent “exceptional circumstances,” a court may not impose sanctions for a party’s failure to provide electronically stored information that was lost as “a result of the routine, good-faith operation of an electronic information system.”

Rule 37 states that sanctions should encompass all expenses, whenever incurred, that would not have been sustained had the opponent conducted itself properly. The Seventh Circuit has held that this includes an award of expenses on appeal. *Tamari v. Bache & Company (Lebanon) S.A.L.*, 729 F.2d 469, 475 (7th Cir. 1984). However, it should be noted that “the filing of a motion under Rule 26(c) is not self-executing — the relief authorized under that rule depends on

obtaining the court's order to that effect." Advisory Committee Notes, 1993 Amendments, Subdivision (d), Fed.R.Civ.P. 37. "If a party's motion has been denied, the party cannot argue that its subsequent failure to comply would be justified." *Id.*

Magistrate judges also have the authority to grant motions to compel discovery and assess costs, including attorneys' fees. *Coates v. Johnson & Johnson*, 85 F.R.D. 731, 733 (N.D.Ill. 1980).

Courts also are becoming more willing to hold attorneys responsible for the failure to comply with discovery requests. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 65 L.Ed.2d 488, 100 S.Ct. 2455, 2464 (1980). Attorneys of record have

- a. been held liable for the expenses, including attorneys' fees, incurred by the opposite party in connection with compelling discovery (*In re International Systems & Controls Corporation Securities Litigation*, 94 F.R.D. 640, 641 – 642 (S.D.Tex. 1982));
- b. had fines assessed against them personally (*J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 350 (D.Conn. 1981)); and
- c. been ordered to show cause why they should not be held in contempt (*Hawkins v. Fulton County*, 96 F.R.D. 416, 423 (N.D.Ga. 1982)).

But see Powers v. Chicago Transit Authority, 846 F.2d 1139, 1143 (7th Cir. 1988), in which the court explained that a sanction of contempt ought to be the last, as opposed to the first, recourse in a discovery dispute.

Moreover, the Seventh Circuit has held that an order to pay money as a form of sanctions for abuse of discovery, absent the unusual circumstance in which the order causes irreparable harm to the party ordered to pay, is not immediately appealable. Instead, the party must pay and await refund of its money if, on appeal from final judgment, it convinces the reviewing court that sanctions should not have been imposed. *Mulay Plastics, Inc. v. Grand Trunk Western R.R.*, 742 F.2d 369, 370 – 371 (7th Cir. 1984).

In *Pereira v. Narragansett Fishing Corp.*, 135 F.R.D. 24, 26 (D.Mass. 1991), a judge ordered the plaintiff's counsel to pay the defendant's counsel's costs and fees but found that they were too small to constitute "an appropriate sanction considering the egregious nature of the violations." The judge further ordered counsel to pay the court \$2,500 as "a punitive monetary sanction" for disobeying the court's discovery deadlines. 135 F.R.D. at 28. This ruling was made without the court having conducted contempt proceedings. The judge stated that this was appropriate under the language in Rule 37(b)(2)(D), stating that failure to obey discovery orders may be treated as contempt.

A nonparty may be able to appeal an order requiring the instant payment of sanctions by invoking the collateral order rule. This doctrine applies when an order conclusively determines the disputed question, resolves an issue that is independent of the merits of the case, and is

effectively not reviewable on appeal from the final judgment. The possibility of serious liquidity problems strengthens the argument for allowing immediate appeal. *Ortho Pharmaceutical Corp. v. Sona Distributors*, 847 F.2d 1512, 1515 (11th Cir. 1988).

When parties continue to interfere with discovery and fail to obey court orders compelling discovery, courts increasingly will dismiss the action or enter default judgments as sanctions. See *Loctite Corp. v. Fel-Pro Inc.*, 94 F.R.D. 1, 11 – 12 (N.D.Ill. 1980), *aff'd in part, remanded in part*, 667 F.2d 577 (7th Cir. 1981); *Hindmon v. National-Ben Franklin Life Insurance Corp.*, 677 F.2d 617, 621 – 622 (7th Cir. 1982).

The extreme punishment of dismissal or default generally is not imposed when a party refuses to comply with court orders unless the refusal is willful, in bad faith, or otherwise the fault of the party. *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 2 L.Ed.2d 1255, 78 S.Ct. 1087, 1096 (1958); *In re Oil Spill by Amoco Cadiz off Coast of France on March 16, 1978*, 93 F.R.D. 840, 842 (N.D.Ill. 1982).

While operating within this standard, the federal courts of appeal differ in their attitude toward dismissal or default. The Seventh Circuit has held that the district court did not abuse its discretion in dismissing a case after the imposition of lesser sanctions did not produce compliance. *Powers v. Chicago Transit Authority*, 890 F.2d 1355, 1362 (7th Cir. 1989). In *United States v. Di Mucci*, 879 F.2d 1488, 1493 – 1494 (7th Cir. 1989), a case dealing with apartment owners violating the Fair Housing Act, 42 U.S.C. §3601, *et seq.*, brought by the United States, when the defendants failed to comply with five orders compelling discovery, the court ruled that it was not necessary for the court to impose lesser sanctions prior to dismissal. Further, the Seventh Circuit has held that the sanction of dismissal is essential to the courts' ability to manage their caseloads effectively and would be almost worthless if the courts could not hold a party responsible for the acts of the party's attorney. *Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir. 2003) ("it is axiomatic that the appropriateness of lesser sanctions need not be explored if the circumstances justify imposition of the ultimate penalty — dismissal with prejudice"); *Patterson v. Coca-Cola Bottling Company Cairo-Sikeston, Inc.*, 852 F.2d 280, 283 (7th Cir. 1988); *Roland v. Salem Contract Carriers, Inc.*, 811 F.2d 1175, 1177 – 1178 (7th Cir. 1987). The Third Circuit has held that because dismissal affects "possibly blameless clients," the court record must contain an explanation of the basis for the trial judge's action sufficient to enable the reviewing court to consider the court's dismissal of the action and its rejection of sanctions less severe than dismissal. *In re MacMeekin*, 722 F.2d 32, 35 (3d Cir. 1983). See also *Hicks v. Feeney*, 124 F.R.D. 79, 81 – 82 (D.Del. 1987).

Courts also can use their own initiative and imagination in deciding on an appropriate sanction. In *Park-Tower Development Group, Inc. v. Goldfeld*, 87 F.R.D. 96, 98 – 99 (S.D.N.Y. 1980), the judge required the uncooperative party to file a bond in the penal sum of \$40,000 as an incentive to cooperate in bringing the litigation to a conclusion. In *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 72 L.Ed.2d 492, 102 S.Ct. 2099, 2107 (1982), the Supreme Court held that the trial court did not violate a party's due process rights by ordering that the facts relevant to personal jurisdiction, which were the subject of discovery requests, were taken as established for purposes of the action in question.

In accordance with the language in Rule 37(b)(2), which authorizes the court to make any orders that seem “just,” the Northern District imposed injunctive relief to sanction former employees’ alleged use of confidential information because of the defendants’ “cavalier response” to discovery orders. *Associates Financial Services Co. v. Mercantile Mortgage Co.*, 727 F.Supp. 371, 375 (N.D.Ill. 1989).

Sanctions consisting of “excess” costs and fees also may be imposed pursuant to 28 U.S.C. §1927 against an attorney who acts unreasonably and vexatiously. The Seventh Circuit has held that before a court may assess fees under §1927, it must find that the attorney intentionally filed or prosecuted a claim that lacked a plausible legal or factual basis. *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 226 (7th Cir. 1984). Counsel must engage in “serious and studied disregard for the orderly process of justice” in order to be found responsible to pay §1927 “vexatious litigation” sanctions. *Bender v. Freed*, 436 F.3d 747, 751 (7th Cir. 2006), quoting *Knorr Brake, supra*, 738 F.2d at 226.

The Seventh Circuit has made clear that an attorney’s subjective bad faith is not a prerequisite for the imposition of §1927 sanctions. The court also has indicated that while due process must be satisfied before a fee award is made under §1927, a hearing is necessary only if it would aid the court in determining whether sanctions are appropriate. *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1202 (7th Cir. 1987).

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

C. [8.118] Expenses for Failure To Admit

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

D. [8.119] Participation in Framing a Discovery Plan

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

E. [8.120] Appealability of Discovery Orders

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

F. Sample Forms

1. [8.121] In General

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

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

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

Certification Pursuant to Fed.R.Civ.P. 37(a)(1)
[and any applicable local rule]

[Alternative #1 (to be used if opposing party never responds):]

_____, attorney for _____, certify that I contacted _____, counsel for _____, on [insert dates] by [telephone, fax, letter, or electronic mail] and, to date, _____ has not responded. Consequently, my attempts to engage in a consultation to resolve the differences set forth in the foregoing motion were unsuccessful due to no fault of my own.

Counsel for _____

[Alternative #2 (to be used if a discovery conference was conducted but unsuccessful):]

_____, attorney for _____, certify that after consultation with opposing counsel [in person or by telephone] and after good faith attempts to resolve the differences set forth in the foregoing motion, counsel for the parties were unable to reach an accord.

The discussions concerning these differences were held on [dates], at the office of plaintiff's counsel, with the undersigned and [defendant's counsel] in attendance. In addition, said counsel discussed these differences in several telephone conversations on [dates].

Counsel for _____

XI. [8.123] ELECTRONIC DISCOVERY IN ILLINOIS FEDERAL COURTS

Electronic discovery continues to be a hot topic throughout the federal courts, including the district courts in Illinois. Electronic discovery is the discovery of electronically stored information, such as e-mails, word processing documents, databases, and all other information that is created or stored in some electronic way. A party's obligation to preserve and produce ESI is generally the same as its obligation to preserve and produce paper files. See E-DISCOVERY (IICLE, 2006).

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

A. [8.124] Electronically Stored Information

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

B. [8.125] Metadata

There are a number of differences between hard copy documents and electronically stored information. One of the most important differences is the metadata that is a part of an e-mail and other ESI. "Meta" is Greek for "about" or "beyond." Metadata is embedded data that describes the history and use of the ESI, such as who sent an e-mail, who created or modified a word processing file, or what "comments" were included in a redlined document that was transmitted to someone else in final form. Metadata also reviews importance values that a user places on a document, such as "high" or "important," and other values, such as "confidential" or "personal" that an author assigns to an e-mail or other material.

C. [8.126] Failures To Preserve or Produce

A party has distinct obligations related to the preservation of electronically stored information and the production of this information in the course of a federal case. As a general rule, litigants must preserve electronic data irrespective of the form or format in which it is stored. This sometimes means that backup tapes must be preserved and a company's electronic systems (including e-mail servers and other network shares) must be modified to ensure that data is not automatically overwritten. The failures to preserve and produce electronic data are for the most part subject to the same rules and sanctions that apply to the failure to preserve and produce paper copies.

D. [8.127] Illinois Federal Caselaw

When the 2006 edition of this handbook was published, there were only a handful of cases in the three Illinois federal districts in which the courts discussed electronic discovery. Since then, judges in all three Illinois districts have penned numerous thoughtful opinions discussing issues related to the preservation and production of electronically stored information in the course of discovery. Litigants are encouraged to read the several e-discovery-related opinions in *Zubulake v. UBS Warburg, LLC*, beginning with the opinion reported at 217 F.R.D. 309 (S.D.N.Y. 2003), and the considerable number of cases in which courts continue to refer to or supplement the *Zubulake* series of opinions. *See, e.g., Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 572 (N.D.Ill. 2004) (citing factors for courts to consider when asked to shift costs of producing ESI); *APC Filtration, Inc. v. Becker*, No. 07 C 1462, 2007 WL 3046233 (N.D.Ill. Oct. 12, 2007) (sanctioning defendant for disposing of his personal computer, but declining to enter default judgment because plaintiff was able to find or recover most of ESI that was on destroyed computer); *Wells v. Berger, Newmark & Fenchel, P.C.*, No. 07 C 3061, 2008 WL 4365972 (N.D.Ill. Mar. 18, 2008) (concluding that defendant failed to preserve relevant ESI and deciding that adverse jury instruction is appropriate sanction); *Grochocinski v. Schlossberg*, No. 08 C 4124, 402 B.R. 825 (N.D.Ill. 2009) (district court affirming bankruptcy judge's decision to enter default judgment against defendant who installed disk cleaning system, destroyed over 16,000 files by overwriting ESI, and installed program to verify integrity of destruction); *1100 West, LLC v. Red Spot Paint & Varnish Co.*, No. 1:05-CV-1670, 2009 WL 1605118 (S.D.Ind. June 5, 2009) (entering default judgment against defendant for its failure to produce ESI that was material to central issue of case).

E. [8.128] Seventh Circuit Electronic Discovery Pilot Program

On May 20, 2009, a number of judges, lawyers (including in-house counsel, private practitioners, government attorneys, academics, and litigation expert consultants), and representatives of bar associates met with key experts on the discovery of electronically stored information. That group became known as the Seventh Circuit Electronic Discovery Committee, which eventually developed the Seventh Circuit Electronic Discovery Pilot Program that is now underway.

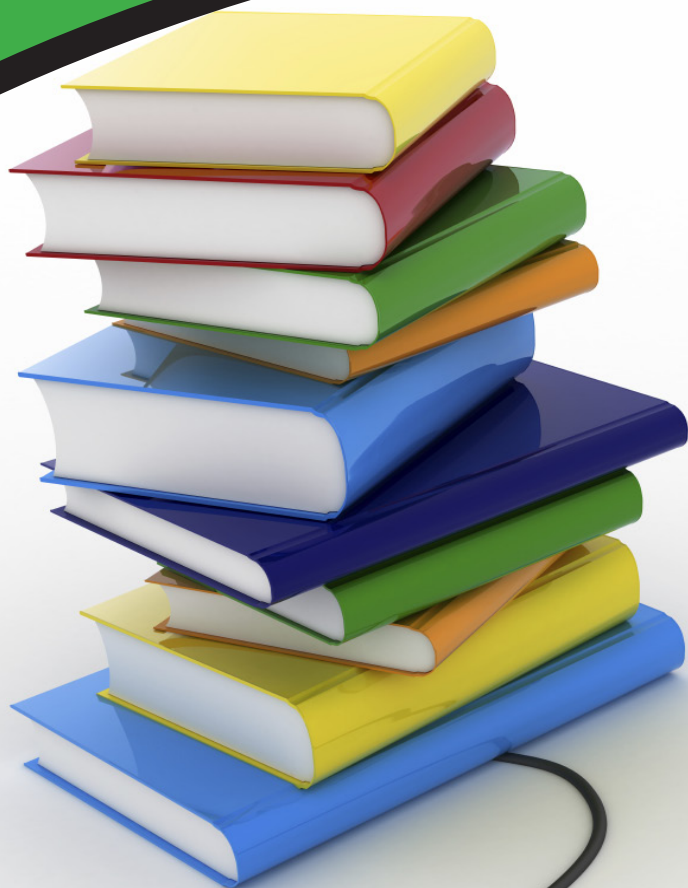
The Pilot Program is divided into two phases. During Phase One, which began on October 1, 2009, and will end on May 1, 2010, a number of district judges, magistrate judges, and

bankruptcy judges in each of the Illinois federal district courts have agreed to adopt the Committees' Principles Relating to the Discovery of Electronically Stored Information, by entering a form standing order in selected cases. (The principles, standing order, and additional information about the Pilot Program can be found on the Seventh Circuit Bar Association's website at www.7thcircuitbar.org). That standing order addresses a variety of ESI-related topics, including cooperation, discovery proportionality, the duty to meet and confer on discovery and identify disputes for early resolution, the designation of an "e-discovery liaison" for each party, the scope of preservation, and the electronic format in which ESI is to be produced.

The judges who have elected to be part of the Pilot Program and the lawyers who represented clients in cases before those judges will be asked to complete questionnaires designed to assess the efficacy of the Principles. The results of the questionnaires will be presented at the Seventh Circuit Annual Meeting in May 2010 and likely will prompt an evaluation and refinement of the Principles. Phase Two will proceed from June 2010 to May 2011, when the Committee will formally present its findings and recommend a final version of the Principles to be used in future cases.



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