

Discovery in Federal Courts:

Comparisons to Texas State Court Practice



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Discovery in Federal Court

- **Federal Court Discovery Procedures**
- **Differences Between State & Federal Courts**
- **Texas State Court variations on Discovery**
- **Texas Federal District variations on Discovery**
- **Individual Texas federal judge's variations on discovery procedures.**



First Steps: Rule 26(f) and Rule 16 Conferences



Discovery Moratorium

- **Generally speaking, unless the case is exempt under FRCP 26(a)(1)(E), discovery may not be sought until after the parties have conducted their Rule 26(f) conference.**
- **This bar on discovery can be set aside by agreement of the parties or court order.**



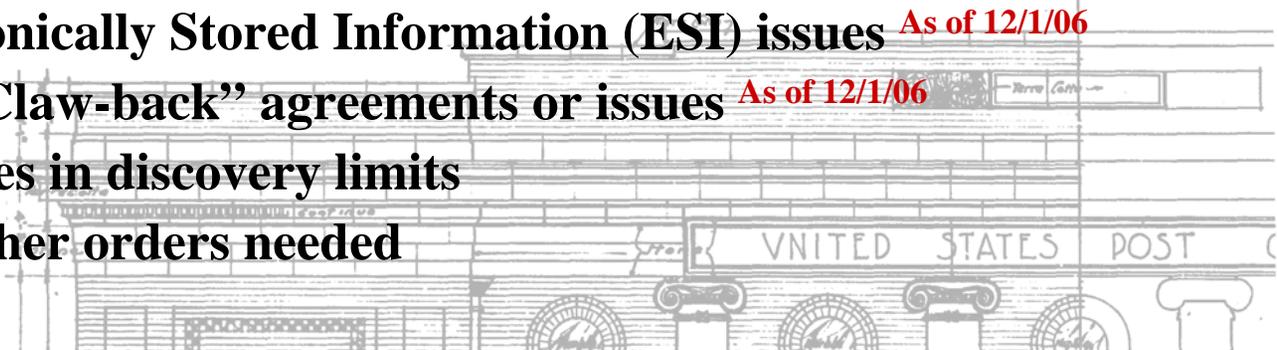
Rule 26(f) conference

- **Deadline – must confer not less than 21 days before scheduling conference**
- **Must file report within 14 days of conference.**
- **Court may set specific deadlines for conference and report.**



Rule 26(f) conference

- **Parties required to discuss:**
 - Nature & basis of claims & defenses
 - Possibility of prompt settlement
 - Arranging for 26(a)(1) disclosures
 - Plan for preserving discoverable information **As of 12/1/06**
- **Must develop discovery plan including:**
 - Changes & schedule for FRCP 26(a)(1) disclosures
 - Discovery (subjects, schedule, phasing, etc.)
 - Electronically Stored Information (ESI) issues **As of 12/1/06**
 - Any “Claw-back” agreements or issues **As of 12/1/06**
 - Changes in discovery limits
 - Any other orders needed



Federal Rules Changes

- **Bookmark Federal Rulemaking page**
<http://www.uscourts.gov/rules/index.html>



FRCP 16 scheduling conference

- Applies to most cases, unless exempted by the court. FRCP 26(a)(1)(E)
- No deadline, but theoretically scheduling order must issue w/i 90 days of first defendant appearing and 120 days of defendant being served.
- Schedule can be expedited by court. FRCP 26(f).



Scheduling Order

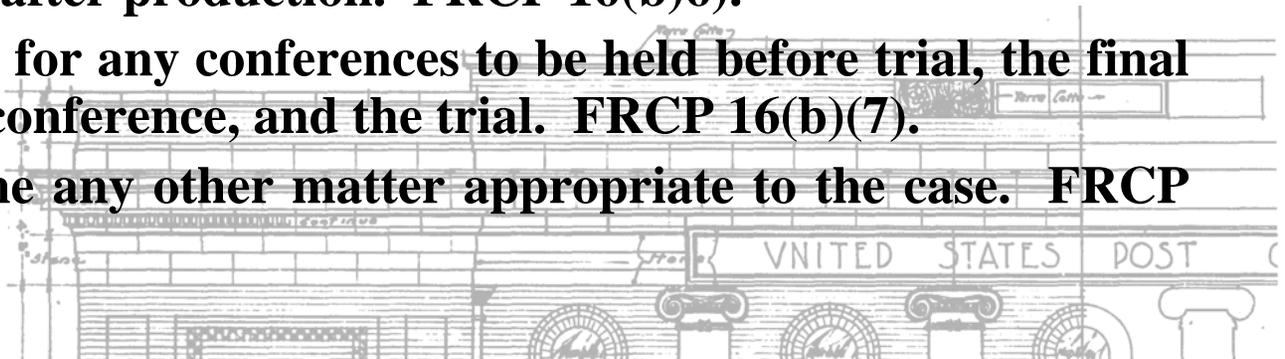
- **Mandatory items – deadlines to:**
 - **Join other parties and amend the pleadings. FRCP 16(b)(1)**
 - **File motions. FRCP 16(b)(2)**
 - **Complete discovery. FRCP 16(b)(3)**



Scheduling Order

- **Permissive items.**

- **Modify the times for disclosures under FRCP 26(a) and FRCP 26(e)(1). FRCP 16(b)(4).**
- **Modify the extent of discovery to be permitted. *Id.***
- **Include provisions for discovery/disclosure of electronically stored information. FRCP 16(b)(5). *Eff. 12/1/06***
- **Set forth any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production. FRCP 16(b)(6). *Eff. 12/1/06***
- **Set dates for any conferences to be held before trial, the final pretrial conference, and the trial. FRCP 16(b)(7).**
- **Determine any other matter appropriate to the case. FRCP 16(b)(8).**



Modifying Dates/Limits

- The 2000 amendments to FRCP 26 eliminated most of the “opt out” language in local rules. *See 2000 Notes to FRCP 26 at ¶6.*
- The discovery rules still allow parties to modify discovery procedures and limitations by written stipulation and permit courts to control discovery by issuing appropriate discovery orders on a “case-by-case basis”. (*Nudge, nudge*).
- The parties may agree to modify discovery procedures and limitations if the modification is not specifically prohibited. *See FRCP 29* (modification cannot interfere with any time set for completion of discovery).

Initial Disclosures – 26(a)(1)

- **FRCP 26(a)(1) disclosures - exchange information about potential witnesses, documentary evidence, damages, and insurance that the party “may use to support its claims or defenses” early in the case.**
- **Some categories of cases are exempt from the mandatory disclosure requirement. FRCP 26(a)(1)(E).**
- **Initial disclosures are due within 14 days of the FRCP 26(f) conference, unless (1) a different time is set by stipulation or court order or (2) a party objects during the FRCP 26(f) conference. FRCP 26(a)(1).**
- **A court may, by order, exclude or modify disclosures, or the parties may agree to forgo them. FRCP 26(a)(1).**

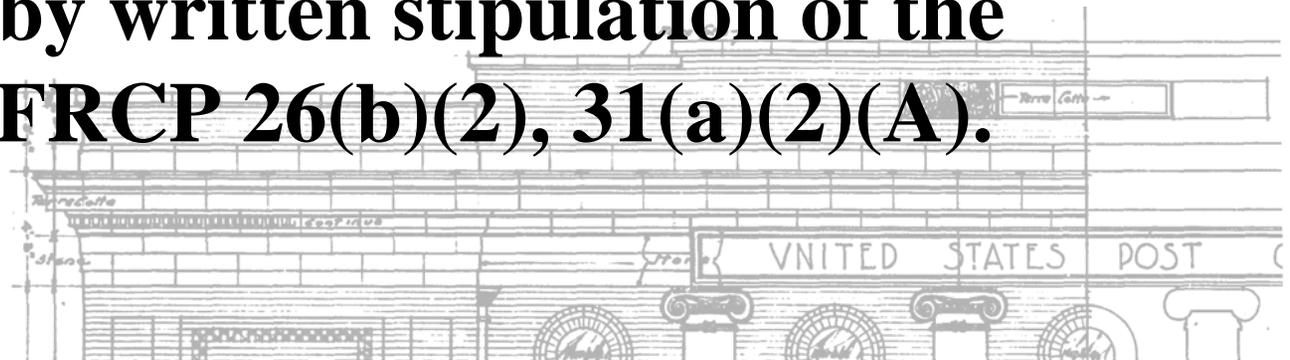
Oral Depositions

- **FRCPP 30**
- **Limited to ten per side, but this limit may be increased by leave of court or by written stipulation of the parties. FRCPP 26(b)(2), 30(a)(2)(A).**
- **A deposition is limited to seven hours in one day, unless extended by stipulation or court order. FRCPP 30(d)(2). a)(2)(A).**



Depositions on Written Questions

- **FRCPP 31**
- **Depositions on written questions are included with oral depositions in the ten-deposition limit of FRCPP 30 and 31, but this limit may be increased by leave of court or by written stipulation of the parties. FRCPP 26(b)(2), 31(a)(2)(A).**



Interrogatories

- **FRCP 33**
- **Limited to 25, but this limit may be increased by leave of court or by written stipulation of the parties. FRCP 26(b)(2), 33(a).**



Requests for Admissions

- **FRCP 36**
- **No limit on the number of requests for admissions, but a court may limit the number of requests by order or local rule. FRCP 26(b)(2).**



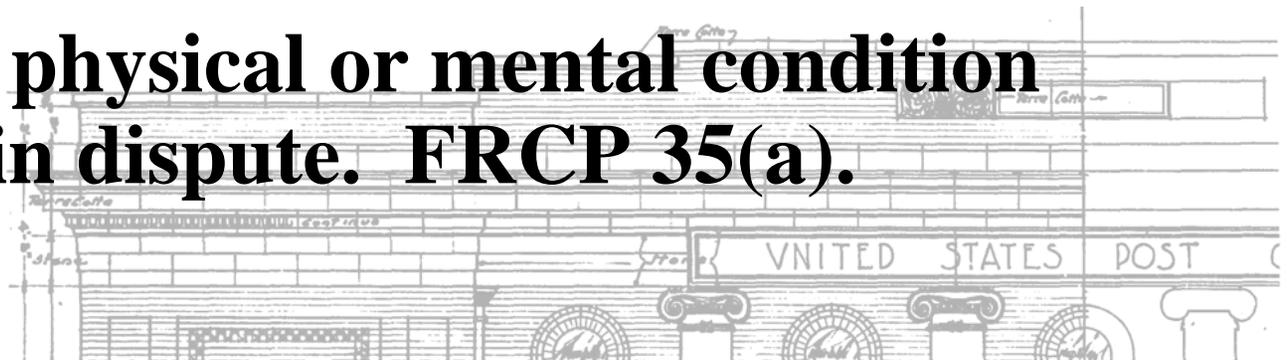
Requests for Production

- **FRCP 34**
- **No limit on numbers.**
- **A person who is not a party may be required to produce documents and other things through service of a subpoena.**
FRCP 45(a)(1)(C).



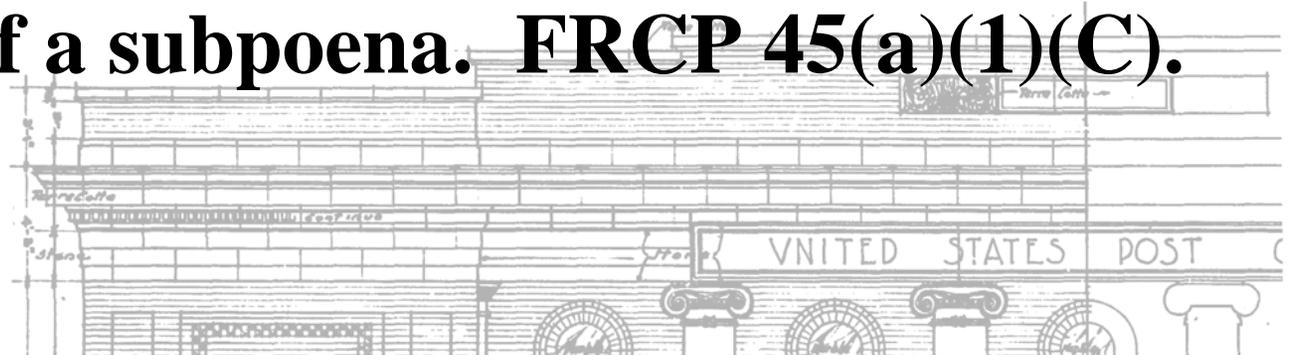
Motion for Physical/Mental Examination

- **FRCPP 35**
- **A party may ask the court for an order requiring another party or someone in the other party's custody or legal control to submit to a physical or mental examination,**
- **Person's physical or mental condition must be in dispute. FRCPP 35(a).**



Request for Entry on Land

- **A party may request permission to enter land in the possession or control of another party to inspect the land or anything on it. FRCP 34(a)(2).**
- **A party may seek entry and inspection of land owned by a nonparty through service of a subpoena. FRCP 45(a)(1)(C).**



Discovery Deadlines

- When parties are served with requests for written discovery, the discovery request must provide at least 30 days to respond.
- Depending on whether the type of service is personal delivery, the party may have an additional 3 days to respond. *See* FRCP 6(e).
- 3 days are added “after the prescribed period would otherwise expire.” *Id.*; *see Note to 2005 amendment. Don't just add three days to the response time!*



Scope of Discovery

- A party must produce information that is relevant to the claims or defenses involved in the action. FRCP 26(b)(1); *see 2000 Notes to FRCP 26* at ¶¶24-26.
- If the discovery request seeks information relevant to the subject matter of the lawsuit, but is not limited to the parties' claims or defenses, a party must produce responsive information only if the court finds good cause to permit the broader discovery. FRCP 26(b)(1).

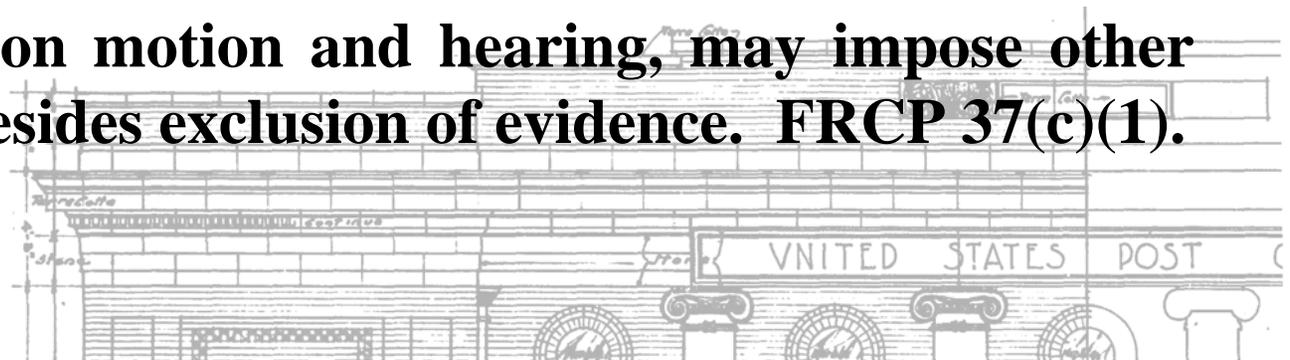


Supplementation

- **A party has a duty to supplement its discovery disclosures and responses if they are incomplete or incorrect. FRCP 26(e).**
- **Supplementation is not required if the information has otherwise been made known to the other parties during the discovery process or in writing. FRCP 26(e)(1)-(2).**
- **Disclosures under FRCP 26(a) must be supplemented “at appropriate intervals.” FRCP 26(e)(1). Discovery responses must be supplemented “seasonably.” FRCP 26(e)(2).**

Supplementation - sanctions

- **If a party does not timely supplement disclosures under FRCP 26(e)(1) or amend an earlier response to discovery as required by FRCP 26(e)(2), the party cannot use any witness or evidence not disclosed unless the nondisclosure is harmless. FRCP 37(c)(1)**
- **The sanction of exclusion is automatic and mandatory unless the party who failed to supplement can show that its violation was either justified or harmless.**
- **The court, on motion and hearing, may impose other sanctions besides exclusion of evidence. FRCP 37(c)(1).**



Resisting discovery

- The burden is on the party resisting discovery to object. *See* FRCP 33(b)(1); FRCP 34(b); FRCP 36(a). No matter how improper the discovery request, the party must object, or it waives any objections. *In re U.S.*, 864 F.2d 1153, 1156 (5th Cir.1989).
- The burden is on the party resisting discovery to notify the other parties that it is withholding information subject to a claim of privilege or work product. *See* FRCP 26(b)(5). The party's response must include information sufficient to allow the requesting party to evaluate the applicability of the claimed privilege or protection. *Id.*



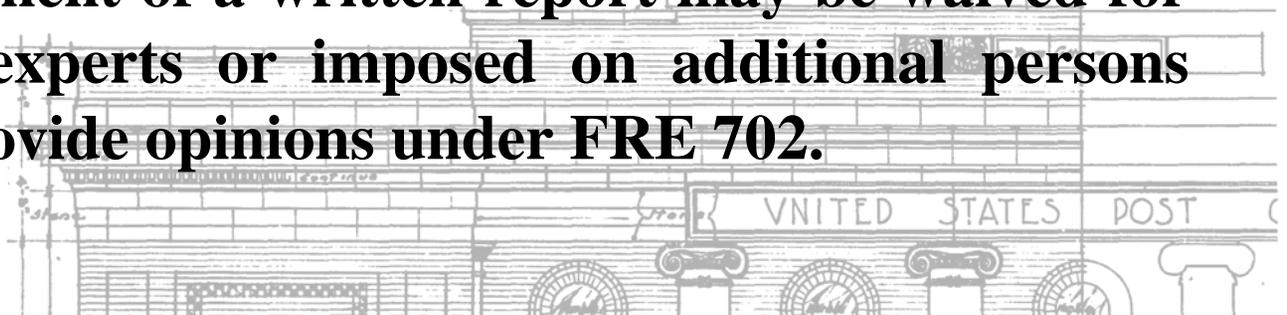
Motion for Protective Order

- The court may make any order that protects a party or person from annoyance, embarrassment, oppression, or undue burden or expense. FRCP 26(c).
- The producing party must show there is good cause for a protective order. FRCP 26(c).



Expert Discovery – 26(a)(2)

- Only a retained testifying expert is required to submit an expert report. FRCP 26(a)(2)(B); *Pena-Crespo v. Puerto Rico*, 408 F.3d 10, 13 (1st Cir.2005); *Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875, 882 (5th Cir.2004). Nonretained experts are not required to submit an expert report or make other expert disclosures. *Id.*
- However, by local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed on additional persons who will provide opinions under FRE 702.



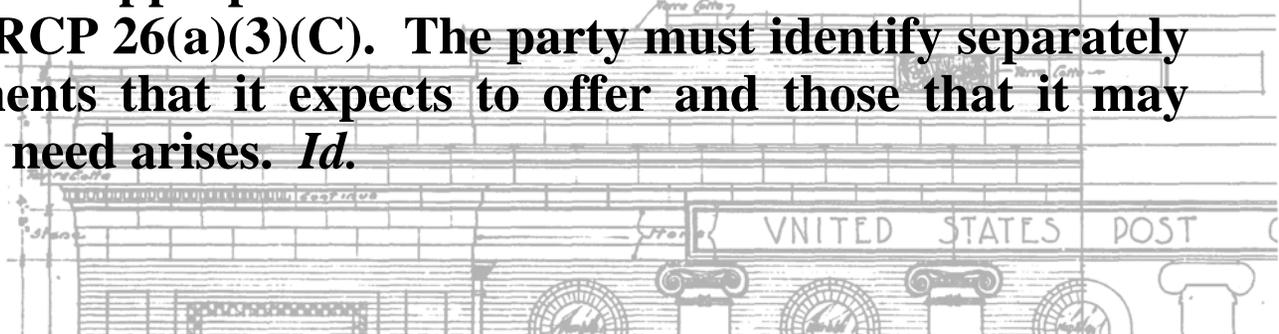
Expert Discovery: who pays?

- The court may require the party seeking discovery from the opposing party's retained testifying expert to pay a reasonable fee for time spent in responding to discovery. FRCP 26(b)(4)(C); *Rogers v. Penland*, No. 1:04-CV-611, 2005 U.S. Dist. LEXIS 19739, September 9, 2005



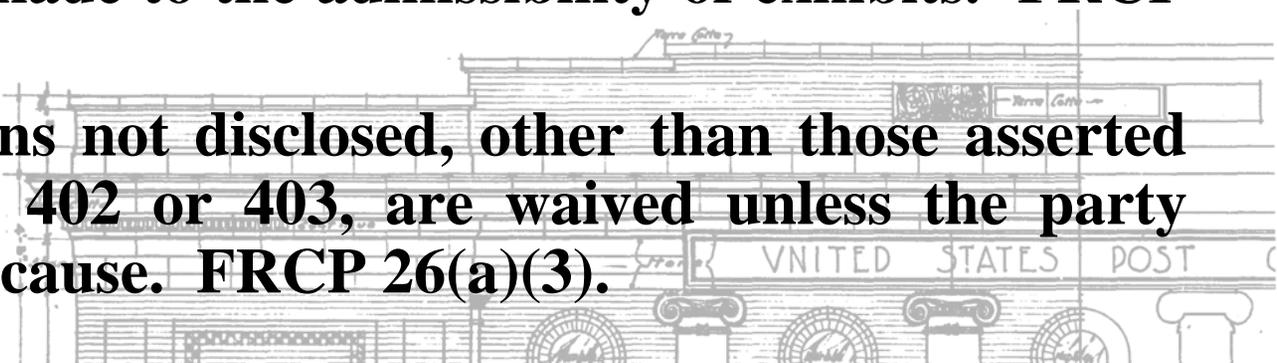
Pretrial Disclosures – 26(a)(3)

- **FRCPP 26(a)(3)** requires the parties to serve and file their final pretrial disclosures at least 30 days before trial, unless the evidence is to be used only for impeachment purposes.
 - **Witnesses.** The name of each person the party expects to call as a witness, separately from those the party might call as witnesses if the need arises. **FRCPP 26(a)(3)(A).** (*Note: no address or telephone no's.*)
 - **Witnesses by depo.** The designation of witnesses whose testimony is expected to be presented by deposition. **FRCPP 26(a)(3)(B).** (*Rule doesn't require page & line.*)
 - **Exhibits.** An appropriate identification of each document or exhibit. **FRCPP 26(a)(3)(C).** The party must identify separately the documents that it expects to offer and those that it may offer if the need arises. *Id.*



Objections to Pretrial Disclosures

- **Objections to the opposing party's pretrial disclosures must be filed within 14 days after the disclosures are made, unless the court directs otherwise. FRCP 26(a)(3).**
 - **Objections to the use, under FRCP 32(a), of a deposition designated by another party. FRCP 26(a)(3)**
 - **Objections and the grounds for the objections that may be made to the admissibility of exhibits. FRCP 26(a)(3)**
- **All objections not disclosed, other than those asserted under FRE 402 or 403, are waived unless the party shows good cause. FRCP 26(a)(3).**

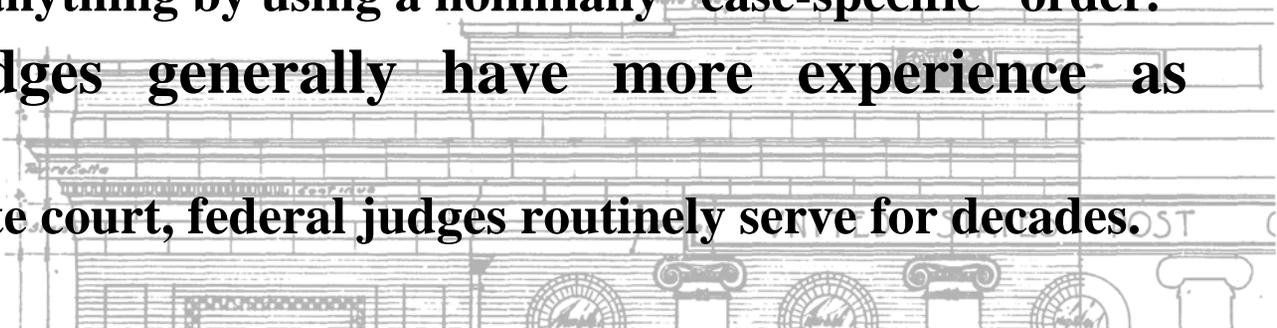


Differences Between State & Federal Courts



General Observations

- **More uniformity in discovery rules across state courts**
 - Fewer variations from court to court
- **Elected state judges can be more receptive to attorneys**
 - Attorneys tend to drive cases in state court.
- **Federal judges have more staff**
 - Be nice to your judge’s law clerks.
- **Federal judges have more individual authority**
 - Contrast to TRCP 191.1 cmt 1 – federal judges can “opt out” of almost anything by using a nominally “case-specific” order.
- **Federal judges generally have more experience as judges**
 - Unlike state court, federal judges routinely serve for decades.



Texas State Court Discovery Variations



Dallas County Civil District Court

2.11. FILING OF DISCOVERY AND RELATED MATERIALS

The filing of discovery in the Dallas County Civil District Courts and the County Courts at Law is governed by the Texas Rule of Civil Procedure 191.1, a copy of which is attached as Appendix 1.

2.12. EFFECT OF MOTION TO QUASH DEPOSITION

- a. For purposes of this rule, the date of delivery of a notice of deposition or motion to quash a notice of deposition is the date of actual delivery to counsel or a party, unless received after 5:00 p.m. in which case the date of delivery is deemed to be the next day on which the courthouse is open. Delivery by mail is presumed to be the third business day following mailing.
- b. The filing of a motion to quash a deposition with the district clerk and service on opposing counsel or parties in accordance with Local Rule 2.05, if done no later than the third day the courthouse is open after delivery of the notice of deposition, is effective to stay the deposition subject to determination of the motion to quash. The filing of a motion to quash does not otherwise stay a deposition.
- c. The parties may, by Rule 11 agreement, agree to proceed with a partial deposition while still reserving part or all of the objections made in the motion to quash.



TO:

FROM:

DATE:

RE: (Cause Number) / (Motion)

NOTICE

Effective March 1, 2001

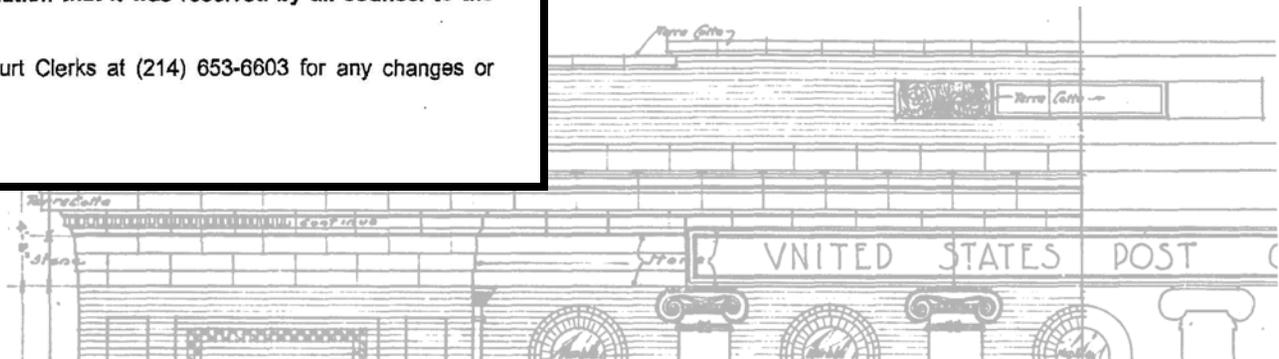
You have filed a motion relating to a discovery dispute and have requested a hearing on the matter. This Court has adopted a policy regarding discovery disputes, and your motion has been scheduled in accordance with this policy:

Counsel involved in the discovery dispute are required to appear at _____ p.m. on Friday, (**DATE OF HEARING**) an attempt to reach a resolution. If a resolution has not been reached by _____ p.m. the Court will hear argument. *This hearing will not be evidentiary or on the record.* Should a record or more time be required after this hearing, the matter will be resumed at an appropriate date and time.

Please immediately provide a copy of this notice to all counsel by fax, certified mail, or delivery. Please bring confirmation that it was received by all counsel to the hearing. Thank you.

Please contact the 95th District Court Clerks at (214) 653-6603 for any changes or cancellations.

**95th District Court,
Dallas County
Judge Karen Gren
Johnson**



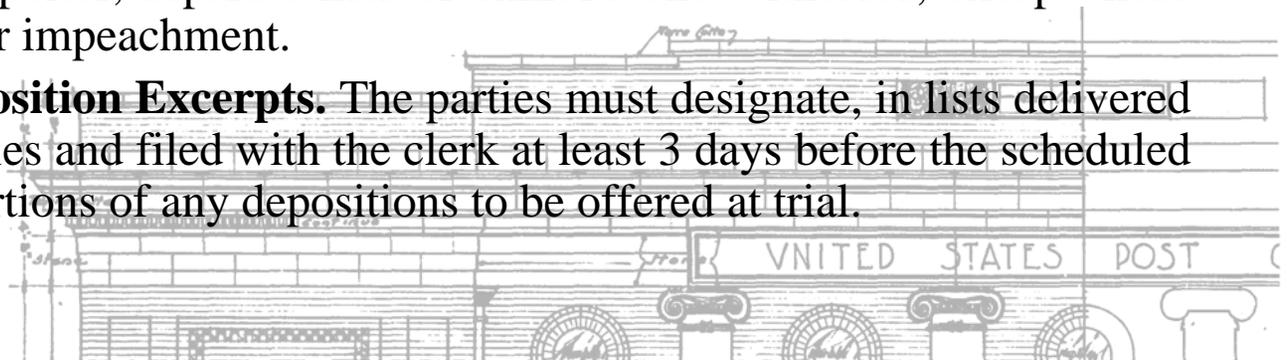
Texas Federal District Court Discovery Variations



Northern District of Texas

LR 26.2 EXCHANGING EXHIBITS, EXHIBIT LISTS, AND WITNESS LISTS; DESIGNATING DEPOSITION EXCERPTS

- a. Exchanging Exhibits.** All exhibits that a party intends to offer at trial, except those offered solely for impeachment, must be marked with gummed labels or tags that identify them by the exhibit number under which they will be offered at trial, and must be exchanged with opposing parties at least 3 days before the scheduled date for trial. When practicable, a copy of such exhibits must be furnished to the presiding judge at a time and in a manner prescribed by the presiding judge.
- b. Exchanging Exhibit and Witness Lists.** At least 3 days before the scheduled trial date, the parties must file with the clerk and deliver to opposing parties and the court reporter, separate lists of exhibits and witnesses, except those offered solely for impeachment.
- c. Designating Deposition Excerpts.** The parties must designate, in lists delivered to opposing parties and filed with the clerk at least 3 days before the scheduled trial date, the portions of any depositions to be offered at trial.



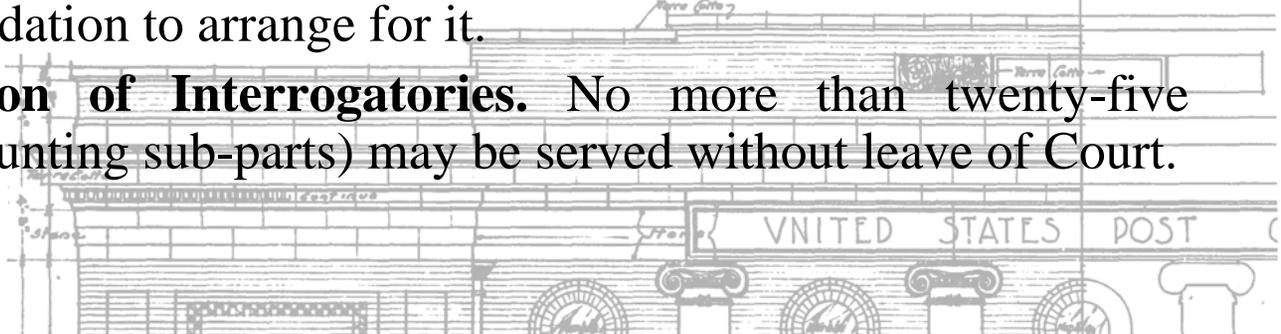
Southern District of Texas

LR26.1 Use of Discovery. When a discovery document is needed in a pretrial procedure, the required portions may be filed as an exhibit to a motion or response. Discovery material needed at trial or hearing may be introduced in open court under the Federal Rules of Evidence.

LR26.2 Placement of Discovery. Every answer, objection, or other response to any interrogatory, request for admission, or to produce shall be preceded by the question or request to which the response pertains.

LR30.1 Video-Taped Depositions. By this rule, leave of Court is granted, in civil cases, for video-taped depositions without contemporaneous stenographic recordation. The notice or subpoena must indicate that the deposition is to be by video-tape to allow anyone desiring stenographic recordation to arrange for it.

LR33.1 Limitation of Interrogatories. No more than twenty-five interrogatories (counting sub-parts) may be served without leave of Court.



Eastern District of Texas – part 1

LOCAL RULE CV-26. PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE

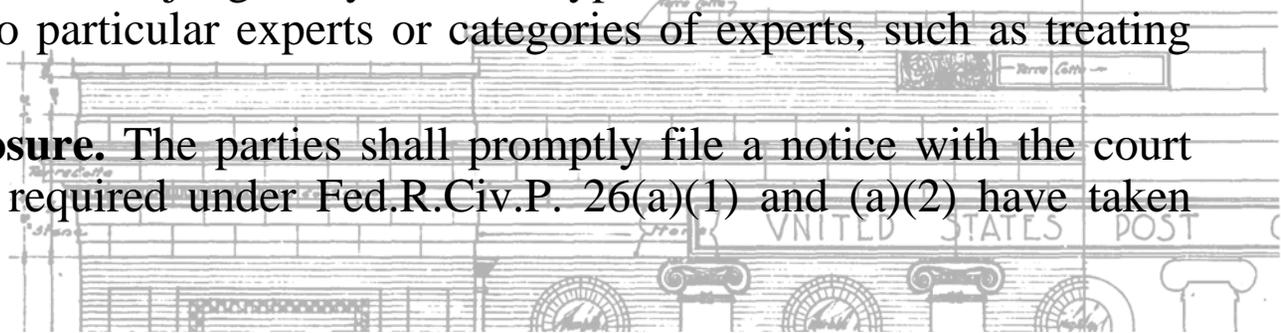
(a) No Excuses. Absent court order to the contrary, a party is not excused from responding to discovery because there are pending motions to dismiss, to remand or to change venue. Parties asserting the defense of qualified immunity may submit a motion to limit discovery to those materials necessary to decide the issue of qualified immunity.

(b) Disclosure of Expert Testimony.

(1) When listing the cases in which the witness has testified as an expert, the disclosure shall include the styles of the cases, the courts in which the cases were pending, the cause numbers, and whether the testimony was in trial or deposition.

(2) By order in the case, the judge may alter the type or form of disclosures to be made with respect to particular experts or categories of experts, such as treating physicians.

(c) Notice of Disclosure. The parties shall promptly file a notice with the court that the disclosures required under Fed.R.Civ.P. 26(a)(1) and (a)(2) have taken place.

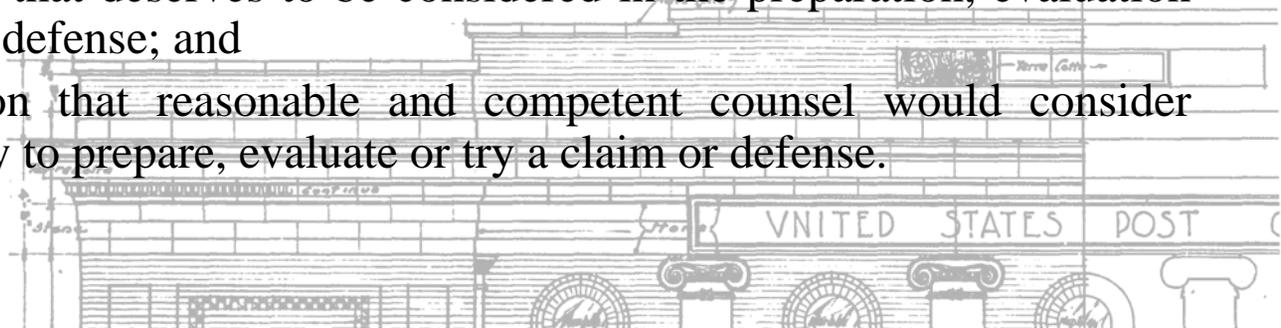


Eastern District of Texas – part 2

LOCAL RULE CV-26. PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE (con't)

(d) Relevant to the Claim or Defense. The following observations are provided for counsel's guidance in evaluating whether a particular piece of information is "relevant to the claim or defense of any party:

- (1) It includes information that would not support the disclosing parties' contentions;
- (2) It includes those persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties;
- (3) It is information that is likely to have an influence on or affect the outcome of a claim or defense;
- (4) It is information that deserves to be considered in the preparation, evaluation or trial of a claim or defense; and
- (5) It is information that reasonable and competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense.



Eastern District of Texas – part 3

LOCAL RULE CV-26. PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE (con't)

(e) **Discovery Hotline**--(903) 590-1198. The Court shall provide a judge on call during business hours to rule on discovery disputes and to enforce provisions of these rules. Counsel may contact the judge by dialing the hotline number listed above for any case in the district and get an immediate hearing on the record and ruling on the discovery dispute, including whether a particular discovery request falls within the applicable scope of discovery, or request to enforce or modify provisions of the rules as they relate to a particular case.



Eastern District of Texas – part 4

LOCAL RULE CV-30. DEPOSITIONS UPON ORAL EXAMINATION

In cases where there is a neutral non-party witness or a witness whom all parties must examine, the time limit shall be divided equally among plaintiffs and defendants. Depositions may be taken after 5:00 p.m., on weekends, or holidays with approval of a judge or by agreement of counsel. Unless permitted by Fed.R.Civ.P. 30(d)(1), a party may not instruct a deponent not to answer a question. Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." Objections to testimony during the oral deposition are limited to "Objection, nonresponsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the oral deposition to be later raised with the court. The objecting party must give a clear and concise explanation of an objection if requested by the party taking the oral deposition, or the objection is waived.



Eastern District of Texas – part 5

LOCAL RULE CV-34. PRODUCTION OF DOCUMENTS AND THINGS

Authorizations. At any time after the parties have conferred as required by Rule 26(f), a party may request medical records, wage and earning records or Social Security Administration records of another party as follows:

(1) Where a party's physical or mental condition is at issue in the case, that party shall provide to the opposing party's counsel either the party's medical records or a signed authorization so that records of health care providers which are relevant to injuries and damages claimed may be obtained. If additional records are desired, the requesting party will have to show the need for them.

(2) Where lost earnings, lost earning capacity or back pay is at issue in the case, the party making such claims shall furnish signed authorizations to the opposing party's counsel so that wage and earning records of past and present employers, and the Social Security Administration records, may be obtained.

(3) Copies of any records obtained with authorizations provided pursuant to sections (1) or (2) above shall be promptly furnished to that party's counsel. Records which are obtained shall remain confidential. The attorney obtaining such records shall limit their disclosure to the attorney's client (or in the case of an entity, those employees or officers of the entity necessary to prepare the defense), the attorney's own staff and consulting and testifying experts who may review the records in connection with formulating their opinions in the case.

Eastern District of Texas – part 6

APPENDIX D: JOINT FINAL PRETRIAL ORDER

L. CERTIFICATIONS

The undersigned counsel for each of the parties in this action do hereby certify and acknowledge the following:

- (1) Full and complete disclosure has been made in accordance with the Federal Rules of Civil Procedure and the Court's orders;
- (2) Discovery limitations set forth in the Federal Rules of Civil Procedure, the Local Rules, and the Court's orders have been complied with and not altered by agreement or otherwise;
- (3) Each exhibit in the List of Exhibits herein:
 - (a) is in existence;
 - (b) is numbered; and
 - (c) has been disclosed and shown to opposing counsel.



Western District of Texas – part 1

RULE CV-26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) If relief is sought under Rule 26(c), Fed.R.Civ.P., concerning any interrogatories, requests for production or inspection, requests for admissions, answers to interrogatories or responses to requests for admissions, copies of the portions of the interrogatories, requests, answers or responses in dispute shall be attached to the motion.

(b) The full text of the definitions and rules of construction set forth in this paragraph is deemed incorporated by reference into all discovery requests, but shall not preclude (i) the definition of other terms specific to the particular litigation, (ii) the use of abbreviations or (iii) a more narrow definition of a term defined in this paragraph. This Rule is not intended to broaden or narrow the scope of discovery permitted by the Federal Rules of Civil Procedure. The following definitions apply to all discovery requests:

(1) *Communication.* The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

(2) *Document.* The term "document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a). A draft of a non-identical copy is a separate document within the meaning of this term.

Western District of Texas – part 2

RULE CV-26. GENERAL PROVISIONS GOVERNING DISCOVERY (con't)

(3) *Identify (With Respect to Persons)*. When referring to a person, "to identify" means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(4) *Identify (With Respect to Documents)*. When referring to documents, "to identify" means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s), and recipient(s).

(5) *Parties*. The terms "plaintiff" and "defendant" as well as a party's full or abbreviated name or pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

(6) *Person*. The term "person" is defined as any natural person or business, legal or governmental entity or association.

Western District of Texas – part 3

RULE CV-26. GENERAL PROVISIONS GOVERNING DISCOVERY (con't)

(7) *Concerning*. The term "concerning" means relating to, referring to, describing, evidencing or constituting.

(c) Upon motion by any party, the Court shall enter a protective order in the form set out in Appendix H, absent a showing of good cause by any party opposing entry of the order. In cases where the parties agree to a protective order, the form set out in Appendix H is approved.

(d) A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless--within ten (10) days or a longer or shorter period ordered by the court, or specified by Local Rule CV-16(e), after the producing party has actual notice that the document will be used--the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.

Western District of Texas – part 4

RULE CV-30. DEPOSITIONS UPON ORAL EXAMINATION

(a) Notice. The notice for a deposition shall be in the form prescribed in Rule 30, FED. R. CIV. P., and in addition shall state the identity of persons who will attend other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition. If any party intends to have any other persons attend, that party must give reasonable notice to all parties of the identity of such other persons.

(b) Procedures, Examinations and Objections. The parties are permitted to stipulate on the record of the deposition any agreement regarding the rules for the deposition. Objections during depositions shall be stated concisely and in a non-argumentative and non-suggestive manner. An attorney shall not, in the presence of the deponent, make objections or statements which might suggest an answer to the deponent. An attorney for a deponent shall not initiate a private conference with the deponent regarding a pending question, except for the purpose of determining whether a claim of privilege should be asserted. An attorney who instructs a deponent not to answer a question shall state, on the record, the legal basis for the instruction consistent with Federal Rule of Civil Procedure 30(d)(1).

Western District of Texas – part 5

RULE CV-30. DEPOSITIONS UPON ORAL EXAMINATION (con't)

If a claim of privilege has been asserted as a basis for an instruction not to answer, the attorney seeking discovery shall have reasonable latitude during the deposition to question the deponent and establish relevant information concerning the appropriateness of the assertion of the privilege, including (i) the applicability of the privilege being asserted, (ii) the circumstances that may result in the privilege having been waived, and (iii) circumstances that may overcome a claim of qualified privilege. A violation of the provisions of this local rule may be deemed to be a violation of a court order and may subject the violator to sanctions under Federal Rule of Civil Procedure 37(b)(2).

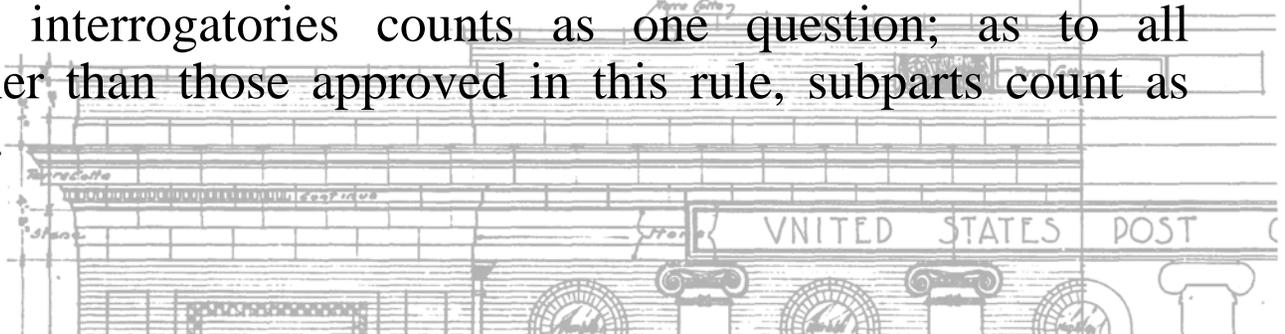
(c) Videotaped and Audiotaped Depositions. If the deposition is to be recorded by videotape or audiotape, the party noticing the deposition or subpoenaing the witness shall be responsible for ensuring that the equipment used is adequate to produce a clear record. If the deposition is to be recorded by videotape, the procedures set out in Appendix "I" shall govern the deposition proceedings, except upon stipulation of the parties or order of the Court upon motion and showing of good cause.

Western District of Texas – part 6

RULE CV-33. INTERROGATORIES TO PARTIES

(a) All answers to interrogatories must be signed by the party except that, if circumstances prevent a party from signing responses to interrogatories, the attorney may serve the responses without the party's signature if an affidavit is served simultaneously stating that properly executed responses to interrogatories will be filed within twenty (20) days. Such time may be extended by order of the Court.

(b) Each party that chooses to submit written interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure may use the following questions. The Court will not entertain any objection to these approved interrogatories, except upon a showing of exceptional circumstances. Each of the following interrogatories counts as one question; as to all interrogatories other than those approved in this rule, subparts count as separate questions.



Western District of Texas – part 7

RULE CV-33. INTERROGATORIES TO PARTIES (con't)

- (1) Identify all persons who you believe have knowledge of relevant facts and identify the issues upon which you believe they have knowledge.
- (2) Identify all persons or legal entities who have a subrogation interest in the cause of action set forth in your complaint [or counterclaim], and state the basis and extent of said interest.
- (3) If [name of party to whom the interrogatory is directed] is a partner, a partnership, or a subsidiary or affiliate of a publicly owned corporation that has a financial interest in the outcome of this lawsuit, list the identity of the parent corporation, affiliate, partner, or partnership and the relationship between it and [the named party]. If there is a publicly owned corporation or a holding company not a party to the case that has a financial interest in the outcome, list the identity of such corporation and the nature of the financial interest.
- (4) If the defendant is improperly identified, give its proper identification and state whether you will accept service of an amended summons and complaint reflecting the information furnished by you in answer hereto.
- (5) If you contend that some other person or legal entity is, in whole or in part, liable to [the plaintiff or defendant] in this matter, identify that person or legal entity and describe in detail the basis of said liability.

Western District of Texas – part 8

RULE CV-36. REQUESTS FOR ADMISSION

Requests for admission made pursuant to Rule 36, Fed.R.Civ.P., will be limited to thirty (30) requests, which shall in like manner include all separate paragraphs and sub-parts contained within a number request. The Court may permit further requests upon a showing of good cause.



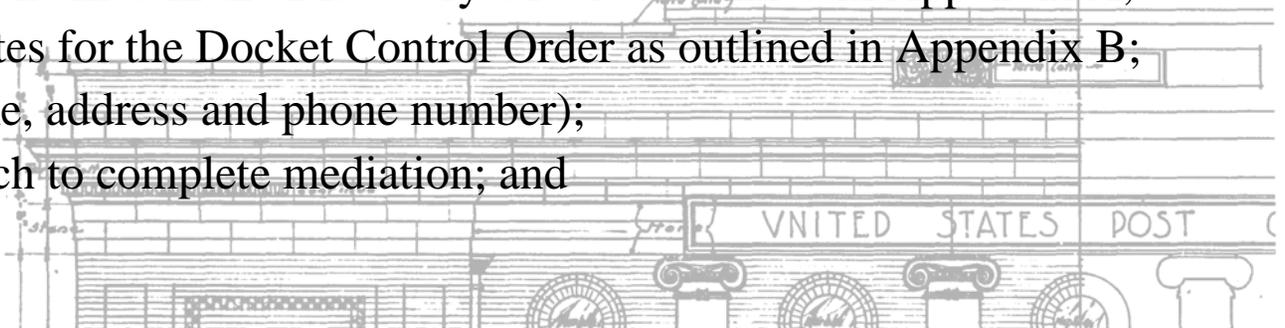
**NOTICE OF SCHEDULING CONFERENCE,
PROPOSED DISCOVERY ORDER, AND
PROPOSED DATES FOR DOCKET CONTROL
ORDER – Civil Jury Trial (Non-Patent Case)**

- Pursuant to Fed. R. Civ. P. 16 and Local Rule CV-16, the Scheduling Conference in **this case is set for _____, 2006 at _____ a.m. at the United States District Court, 211 West Ferguson, 3rd Floor, Courtroom of Judge Leonard Davis, Tyler, Texas.** The parties are directed to meet and confer in accordance with Fed. R. Civ. P. 26(f) no later than fourteen (14) days before the conference. The parties are excused from the requirement of filing a written proposed discovery plan in this case.



NOTICE OF SCHEDULING CONFERENCE, PROPOSED DISCOVERY ORDER, AND PROPOSED DATES FOR DOCKET CONTROL ORDER – Civil Jury Trial (Non-Patent Case)

- The Court does not require the parties to attend the Scheduling Conference if the parties agree to the following and file a Notice of Agreement containing this information at least seven days before the conference date. **IF THE PARTIES FAIL TO FILE AN AGREEMENT NOTICE WITH THE COURT SEVEN (7) DAYS BEFORE THE CONFERENCE DATE, THE PARTIES MUST ATTEND THE SCHEDULING CONFERENCE ON THE DATE SET FORTH ABOVE.** Upon receipt of the Notice of Agreement, the Court will issue a Docket Control Order, Discovery Order, and Mediation Order without the necessity of the parties' appearance. The Notice of Agreement is to contain the following information:
 - The guidelines contained in the Discovery Order as outlined in Appendix A;
 - The proposed dates for the Docket Control Order as outlined in Appendix B;
 - A mediator (name, address and phone number);
 - Deadline by which to complete mediation; and
 - Length of trial.



PROPOSED DISCOVERY ORDER

- At the Scheduling Conference, the parties may make requests and/or suggestions to the Court regarding discovery. In the interim, after a review of the pleaded claims and defenses in this action and in furtherance of the management of the Court's docket under Fed. R. Civ. P. 16, the Court enters the following Discovery Order:

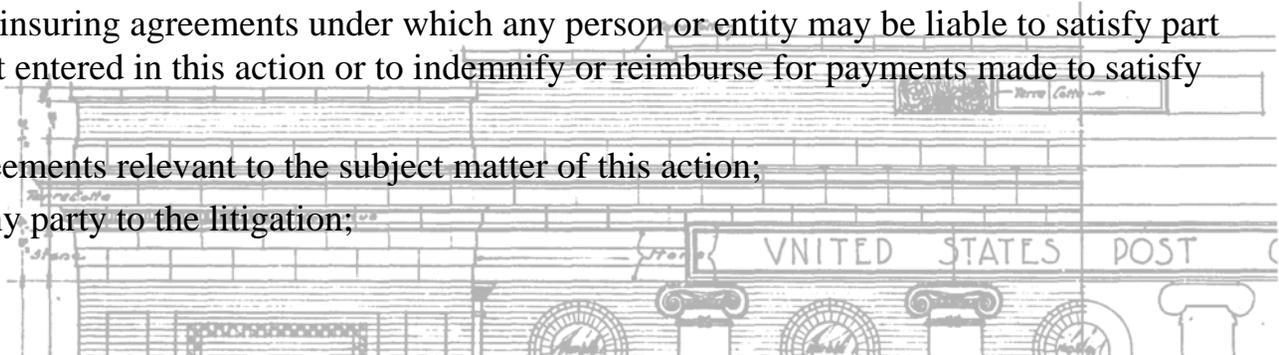


PROPOSED DISCOVERY ORDER

par. 1

1. **Disclosures.** Within thirty (30) days after the Scheduling Conference (or the date the Docket Control Order is signed by the Court if no Scheduling Conference was held) and without awaiting a discovery request, each party shall disclose to every other party the following information:

- A. the correct names of the parties to the lawsuit;
- B. the name, address, and telephone number of any potential parties;
- C. the legal theories and, in general, the factual bases of the disclosing party's claims or defenses (the disclosing party need not marshal all evidence that may be offered at trial);
- D. the name, address, and telephone number of persons having knowledge of relevant facts, a brief statement of each identified person's connection with the case, and a brief, fair summary of the substance of the information known by such person;
- E. any indemnity and insuring agreements under which any person or entity may be liable to satisfy part or all of a judgment entered in this action or to indemnify or reimburse for payments made to satisfy the judgment;
- F. any settlement agreements relevant to the subject matter of this action;
- G. any statement of any party to the litigation;



PROPOSED DISCOVERY ORDER

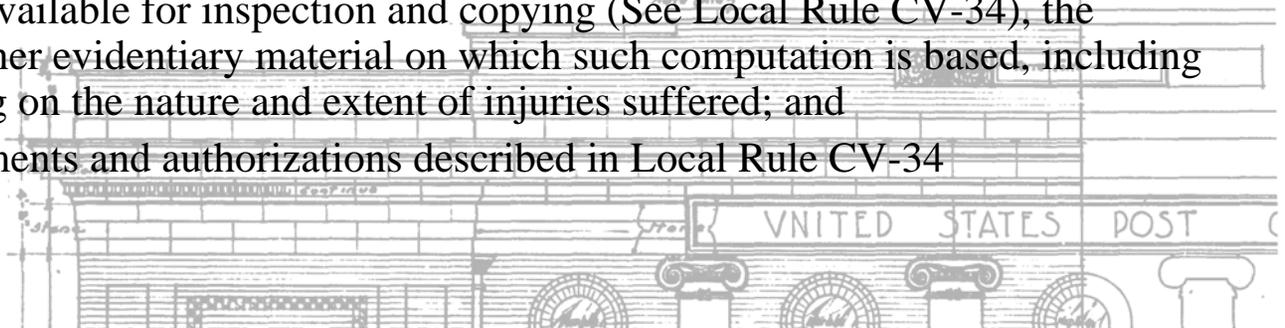
par. 2

2. **Additional Disclosures.** Within forty-five (45) days after the Scheduling Conference or the date the Docket Control Order is issued by the Court, and without awaiting a discovery request, each party shall provide to every other party the following information:

A. a copy of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to the pleaded claims or defenses involved in this action. By written agreement of all parties, alternative forms of disclosure may be provided in lieu of paper copies. For example, the parties may agree to exchange images of documents electronically or by means of computer disk; or the parties may agree to review and copy disclosure materials at the offices of the attorneys representing the parties instead of requiring each side to furnish paper copies of the disclosure materials;

B. a complete computation of any category of damages claimed by any party to the action, making available for inspection and copying (See Local Rule CV-34), the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

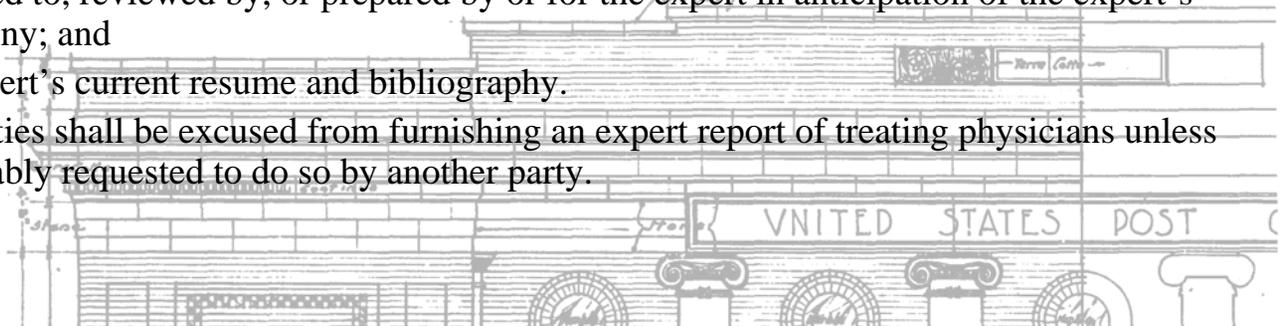
C. those documents and authorizations described in Local Rule CV-34



PROPOSED DISCOVERY ORDER

par. 3

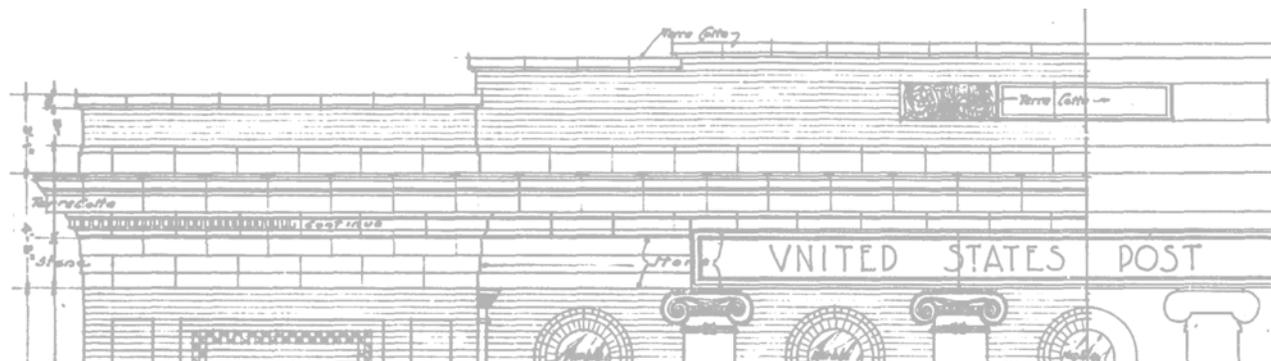
- 3. Testifying Experts.** By the date provided in the Docket Control Order, each party shall disclose to the other party or parties:
- A. the expert's name, address, and telephone number;
 - B. the subject matter on which the expert will testify;
 - C. the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the disclosing party, documents reflecting such information.
 - D. if the expert is retained by, employed by, or otherwise subject to the control of the disclosing party;
 - (1) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
 - (2) the expert's current resume and bibliography.
 - (3) the parties shall be excused from furnishing an expert report of treating physicians unless reasonably requested to do so by another party.



PROPOSED DISCOVERY ORDER

par. 4

- Discovery Limitations.** Discovery is limited in this cause to the disclosures described in Paragraphs 1 - 3 together with 25 interrogatories, 25 requests for admissions, the depositions of the parties, depositions on written questions of custodians of business records for third parties, depositions of two fact witnesses and two expert witnesses per side or the parties may agree to a number of hours of depositions. “Side” means a party or a group of parties with a common interest.



PROPOSED DISCOVERY ORDER

par. 5

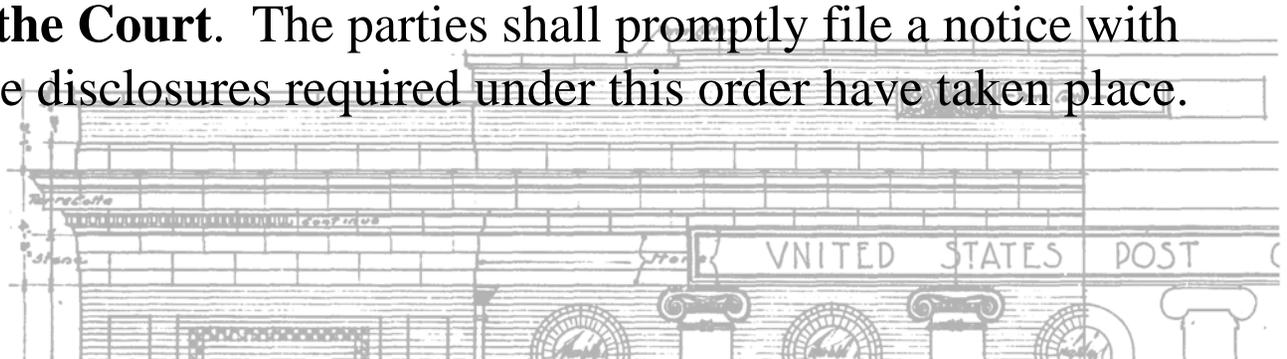
- 5. Privileged Information.** There is no duty to disclose privileged documents or information. However, the parties are directed to meet and confer concerning privileged documents or information after the Scheduling Conference. By the date provided in the Docket Control Order, the parties shall exchange privilege logs identifying the documents or information and the basis for any disputed claim of privilege in a manner that, without revealing information itself privileged or protected, will enable the other parties to assess the applicability of the privilege or protection. A party may move the Court for an order compelling the production of any privileged documents or information identified on any other party's privilege log. If such a motion is made, the party asserting privilege shall file with the Court within thirty (30) days of the filing of the motion to compel any proof in the form of declarations or affidavits to support their assertions of privilege, along with the documents over which privilege is asserted for *in camera* inspection. If the parties have no disputes concerning privileged documents or information, then the parties shall file a notice so stating by the date provided in the Docket Control Order.



PROPOSED DISCOVERY ORDER

par. 6-9

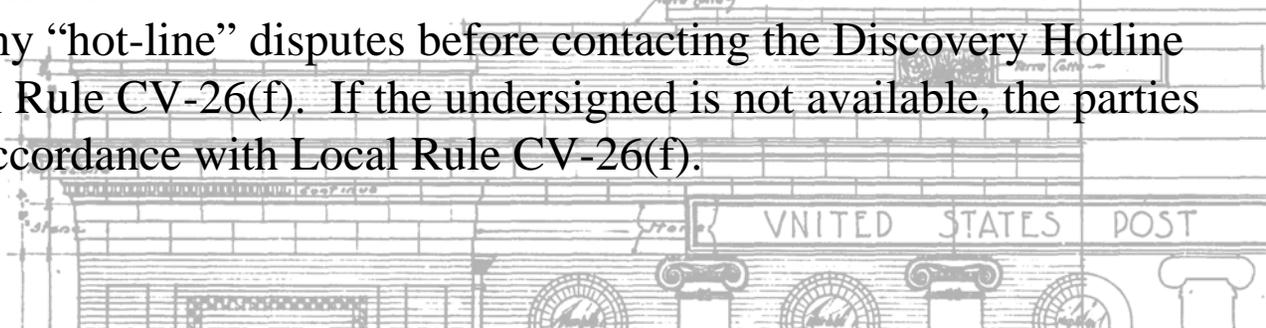
6. **Pretrial disclosures.** (restates FRCP 26(a)(3))
7. **Signature.** The disclosures required by this order shall be made in writing and signed by the party or counsel and shall constitute a certification that, to the best of the signer's knowledge, information and belief, such disclosure is complete and correct as of the time it is made.
8. **Exchange of Disclosures.** If feasible, counsel shall meet to exchange disclosures required by this order; otherwise, such disclosures shall be served as provided by Fed. R. Civ. P. 5.
9. **Notification of the Court.** The parties shall promptly file a notice with the Court that the disclosures required under this order have taken place.



PROPOSED DISCOVERY ORDER

par. 10-12

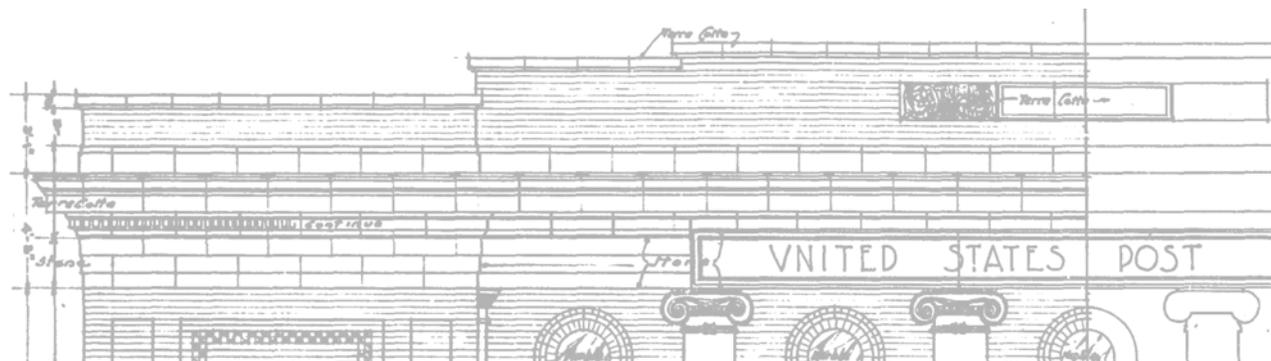
- 10. Duty to Supplement.** After disclosure is made pursuant to this order, each party is under a duty to supplement or correct its disclosures immediately if the party obtains information on the basis of which it knows that the information disclosed was either incomplete or incorrect when made, or is no longer complete or true.
- 11. Protective Orders.** A copy of the Court's standard protective order is available on the Court's website at www.txed.uscourts.gov entitled "Judge Davis Standard Protective Order." A party may request that the Court issue the Protective Order. However, a party may propose the issuance of or move to modify the terms of the Protective Order for good cause.
- 12. Discovery Disputes.** Counsel are directed to contact the chambers of the undersigned for any "hot-line" disputes before contacting the Discovery Hotline provided by Local Rule CV-26(f). If the undersigned is not available, the parties shall proceed in accordance with Local Rule CV-26(f).



PROPOSED DISCOVERY ORDER

par. 13

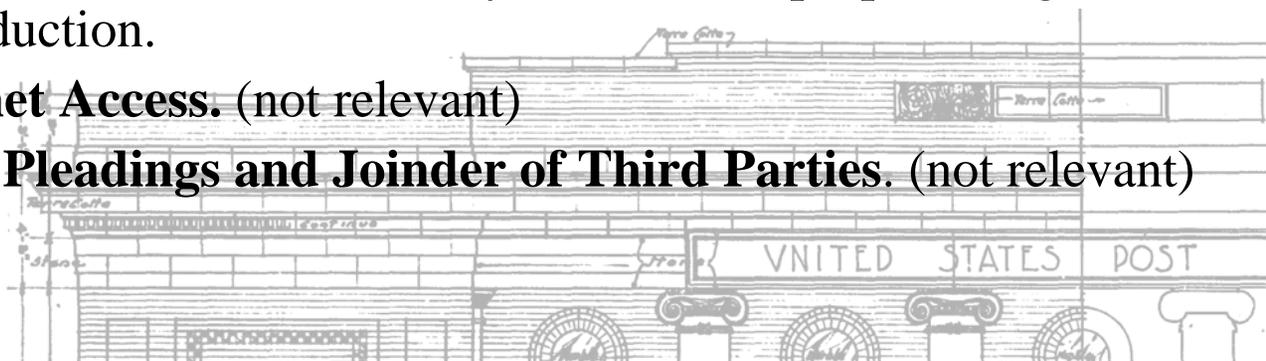
13. No Excuses. A party is not excused from the requirements of this Discovery Order because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosures, or because another party has not made its disclosures. Absent court order to the contrary, a party is not excused from disclosure because there are pending motions to dismiss, to remand or to change venue. Parties asserting the defense of qualified immunity may submit a motion to limit disclosure to those materials necessary to decide the issue of qualified immunity.



PROPOSED DISCOVERY ORDER

par. 14-19

14. **E-Filing** (not relevant)
15. **Courtesy Paper Copies.** (not relevant)
16. **Hearing notebooks.** (not relevant)
17. **Requests for Production.** Because documents relevant to any claim or defense are to be produced pursuant to paragraphs one and two of this order, requests for production are unnecessary. However, should a party believe that certain relevant documents have not been produced, that party may request said documents by letter. The Court will entertain a motion to compel documents without the necessity of a movant propounding formal requests for production.
18. **Wireless Internet Access.** (not relevant)
19. **Amendment of Pleadings and Joinder of Third Parties.** (not relevant)



PROPOSED DEADLINES

(excerpt)

OTHER LIMITATIONS

- (a) All depositions to be read into evidence as part of the parties' case-in-chief shall be **EDITED** so as to exclude all unnecessary, repetitious, and irrelevant testimony; **ONLY** those portions which are relevant to the issues in controversy shall be read into evidence.
- (b) The Court will refuse to entertain any motion to compel discovery filed after the date of this Order unless the movant advises the Court within the body of the motion that counsel for the parties have first conferred in a good faith attempt to resolve the matter. See Eastern District of Texas Local Rule CV-7(h).
- (c) The following excuses will not warrant a continuance nor justify a failure to comply with the discovery deadline:
 - (i) The fact that there are motions for summary judgment or motions to dismiss pending;
 - (ii) The fact that one or more of the attorneys is set for trial in another court on the same day, unless the other setting was made prior to the date of this order or was made as a special provision for the parties in the other case;
 - (iii) The failure to complete discovery prior to trial, unless the parties can demonstrate that it was impossible to complete discovery despite their good faith effort to do so.

Conclusions?

- **Assume nothing. Read everything – federal rules, local rules, standing orders, and judge-specific rules.**
 - Federal judges take their own rules very seriously. **They assume you do as well.**
- **Look up your judge’s published opinions.**
 - Judges publish what’s important to them.
- **Find similar cases on PACER and read the docket online to see how the judge manages similar cases.**
- **Get local counsel with experience before the judge.**

And above all, remember ...



You can never be too nice to a federal judge.

Copy of Power Point can be downloaded at

www.EDTexweblog.com