Lect 33

Discovery & Disclosure

Disclosure concerns material that must be given over to the other side without asking.

Discovery is stuff that must be asked for.

Disclosure 26(a)

Mandatory Disclosure 26(a)(1)

- - Used to be: obligation to disclose all witnesses “likely to have discoverable information ***relevant to disputed facts alleged with particularity*** in the pleadings” and all documents and tangible things “in possession custody or control of party that are ***relevant to disputed facts alleged with particularity*** in the pleadings”

- but federal districts had ability to opt out and many did

-

now – only good evidence for disclosing party – no ability to opt out

R 26(a)(1)(A)(i) “the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use ***to support its claims or defenses, unless the use would be solely for impeachment***”

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and ***may use to support its claims or defenses, unless the use would be solely for impeachment***;

TWO OTHER FORMS OF DISCLOSURE

Let’s say you spring a new witness or document or deposition on your opponent during trial – perry mason example

- Is this OK?

- NO - in viol. of 26(a)(3), which governs pretrial disclosure

R 26(a)(3) Pretrial Disclosures.  
*Pretrial Disclosures.*  
(A) *In General.* In addition to the disclosures required by [Rule 26(a)(1)](https://www.law.cornell.edu/rules/frcp/rule_26) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:  
(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;  
(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and  
(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

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DISCLOSURE concerning EXPERTS will deal with later

26(a)(2)

Discovery

- generally done w/o ct intervention

- if an improper objection, must make a motion to compel

Scope of Discovery

Used to be:

26(b)(1): 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***.

Now is:

used to say:

All information relevant to any party’s claim or defense is discoverable – R. 26(b)(1)

Now:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

•Exception for privileged matter

•Exception for work-product under Hickman and 26(b)(3)

Also…

26(b)(2)(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:  
(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;  
(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or  
(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

privileges

–Privilege against self-incrimination

•Applicable in civil proceedings if testimony will tend to submit one to criminal prosecution

* There is no privilege not to testify in a civil case simply because it will lead one to lose the civil case
* There is no privilege against “self-enliablization”

–Common-Law Privileges (attorney-client privilege, spousal privileges, priest-penitent privilege, doctor-patient privilege)

•If state substantive law is being used, state common-law privileges are applied – Fed. R. Evid. 501

•Otherwise use federal common-law privileges

- Mechanics of discovery…

* During discovery it has become clear that D was looking the other way while driving his car
* P’s lawyer thinks that D would have admitted this allegation if it had been put in P’s complaint
* What does P’s lawyer do?

get a request for an admission

Rule 36. Requests for Admission

- note really a discovery rule, since it assumes that the questioner knows the answer

- why not use an interrogatory?

- admission settles the issue – takes it outside the scope of discovery and proof at trial

* X was a witness to the car accident that P is suing D for
* May P’s lawyer use R. 36 to request an admission from X that D was looking the other way during the accident?

- no only between parties

- Can an insurer impleaded request an admission from the P, or a P from a co-P?

- yes, need not be between opposing parties

* The P Corp. is suing the D Corp. for violations of antitrust law
* Counsel for the P Corp. wants any documents that the X Corp. might have concerning agreements with the D Corp. to fix the price of widgets
* What should the counsel for the P Corp. do?

- subpoena duces tecum

- subpoenas also for bringing nonparties to depositions and to trial

- subpoenas under R 45

- basically drawn up by the attorney, although signed by clerk of ct

- served personally by someone not party, 18 or older

- - proof of service filed w/ ct

- objections to subpoena duces tecum

- served on atty serving subpoena

- with 14 days after service

- eg privileged or not within scope of discovery

- party subpoenaing must then get order compelling

* How would counsel for the P Corp. get the same type of documents from the D Corp.?

- document request under R 34

- - document requests are ugly

- 30 days to respond in writing (includes turning over docs)

- can object on the basis of privilege, or that documents are outside the scope of discovery

* P is suing the D Corp. for securities fraud for misrepresenting its loan loss reserves as adequate
* P’s lawyer wants to find out who at the D Corp. knows how the loan loss reserves were determined
* What does P’s lawyer do?

Use an Interrogatory

- R 33

- written questions that are answered by party (or, usually, their counsel)

- best for finding out the background in order to have more focused document requests and depositions

* X was a witness to the car accident that P is suing D for
* P’s lawyer wants X to answer questions about what he saw, X refuses
* How does P’s lawyer do so?

- can you serve an interrogatory upon him?

- NO

- only parties

- need a deposition upon oral exam R30

- must you subpoena a party for a deposition?

- No

- do you need ct’s permission to depose? No

- only if +10 depositions

- or if a person is deposed more than once

* Must P’s lawyer use a deposition to get this information from X?

no can simply question if X is friendly

* During a deposition, opposing counsel asks your client for irrelevant material
* What do you do? Object but have client answer
  + This keeps the deposition from breaking down due to disagreements about the scope of discovery
    - Most of these disagreements will not end up mattering at all
    - You still have the objection reserved if the other side attempts to introduce the irrelevant matter at trial
* What if she asked for hearsay material that you think will be inadmissible at trial?
  + cannot object at all – the fact that it is inadmissible does not mean it is not subject to discovery, as long as nit is reasonably calculated to lead to admissible evidence
* What if she asked for confidential communications between you and your client?
  + Here you must tell you client not to answer
  + If the other side gets the information that is privileged a good deal of damage will have been done even if they cannot introduce the material at trial

- what if she harasses the deponent with many irrelevant questions?

30(d)(3) Motion to Terminate or Limit.   
(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party.

Privileges

Atty-Client Priv.

Restatement (Third) of The Law Governing Lawyers

§ 68. Attorney–Client Privilege

[T]he attorney-client privilege may be invoked as provided in § 86 with respect to:

(1) a communication

(2) made between privileged persons

(3) in confidence

(4) for the purpose of obtaining or providing legal assistance for the client.

Protects only communications (not “facts”)

Between privileged persons

* applies to communication from lawyer to client as well as other direction
* also includes other privileged parties – eg legal secretaries, receptionists, translators for client
* in confidence (reasonable belief that it will stay only among privileged persons)
* for purpose of obtaining legal advice

Why does the a-c privilege exist?

* To encourage free exchange of information between lawyer and client?

e.g.

* Your client tells you that he was looking the other way when he drove into the plaintiff.
* Your client receives an interrogatory asking whether he said to you that he was looking the other way.
* Does your client have to answer the interrogatory?

doesn’t have to answer

* Problem
* If the interrogatory asks whether your client was looking the other way when driving does he have to answer?

- must answer yes

What if your client says he was not looking the other way on the stand?

Must inform court – cannot offer evidence you know to be false

So atty client priv is worthless?

- in the end, client has no incentive to be honest with lawyer?

Notice that the situation in civil case is different from criminal action because lawyer can simply advise client not to take the stand – that is not an option in a civil case

The a-c privilege is not worthless (though it is not as protective as many clients think)

* Your client tells you that he was looking the other way when he drove into the plaintiff.
* Subsequently he credibly tells you that when he said he was he was looking the other way he was not actually doing so at the moment of the accident, he was feeling guilty because he had done so around a minute before
* Your client receives an interrogatory asking whether he said to you that he was looking the other way when the accident occurred.
* Does your client have to answer the interrogatory?

NO

* So even though the a-c privilege cannot be used to free your client from having to answer honestly, it can keep out communications that could be readily used to impeach your client

Work Product privilege

Hickman was partially codified in R 26(b)(3)

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.

- Understandable that need to protect atty’s theories

BUT Let’s say there is material that has no lawyer’s theories in it, but is work product

-- why exclude from discovery?

- problem of free-riding?

- one side will free ride on the other side’s investigation if there is no w-p privilege?

- Green finds this unlikely – the other side will investigate in a way that serves their interests, not yours

- Green: Real problem is that the other side’s work product is too easy to use as impeachment evidence against their witnesses – there will always be slight differences between the witness’s statements in the work product and their statement on the stand

- and in the end the creator of the WP will be called to take the stand to testify about the discrepancy

- plus w/o the WP privilege, lawyers, the parties, and their agents will be discouraged from creating WP at all – they will instead try to commit it to memory

- does that mean WP is never discoverable?

- no - must show substantial need and the inability w/o undue hardship to obtain their substantial equivalent by other means.

- what about material containing thoughts and strategies of counsel?

- never discoverable