Discovery

Scope of Discovery: Unless otherwise limited by court order, 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**,

Proportionality considerations: (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties’ relative access to relevant information, (4) the parties’ resources, (5) the importance of the discovery in resolving the issues, and (6) 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.

Privileges which bar discovery

1. Privilege against self-incrimination – Doesn’t apply in a civil action, cant invoke privilege if statement would make you liable for damages, but DOES apply if statement would subject them to criminal liability
2. Attorney-Client Privilege – Restatement §68:
3. Protects the *communications* between a client and their attorney (also includes those people necessary to that relationship)
   1. May be invoked 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
   2. Why does this privilege exist?
      1. To make sure client and lawyer’s discussions are honest and open, not worried about the other side/court hearing your conversations
4. Eg 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 when he drove into the plaintiff  
     
   does your client have to answer the interrogatory? NO A-C priv applies
5. BUT if the interrogatory asks whether your client was looking the other way when he drove into the plaintiff does he have to answer?
6. YES – your client cannot refuse to answer a question relevant to the case simply because the answer was communicated in an A-C privileged communication
   1. This is sometime put as this way: the A-C privilege does not protect facts, only communications
   2. Notice things are different in a criminal case because your client xan simply refuse to testify
7. what if your client says he was not looking the other way on the stand?
   1. You have to notify the ct that your client is lying
8. So what good is the AC priv? Clients will not be encouraged to speak freely even with the AC priv because they know that if they say something bad their lawyer will force them to be truthful about it in discovery or on the stand
9. Well, the AC priv does do something…
10. - your client tells you that he was looking the other way when he drove into the plaintiff  
      
    - subsequently he credibly tells you that he was not actually looking the other way at the time of the accident – when he said that he was he was feeling guilty because he looked the other way about 20 seconds before the accident  
      
    - your client receives an interrogatory asking whether he said to you that he was looking the other way when he drove into the plaintiff  
      
    - does your client have to answer the interrogatory? NO AC priv

- your client receives an interrogatory asking whether he was looking the other way when he drove into the plaintiff – what can your client say? He wasn’t

so the AC priv does keep prejudicial communications from getting to the other side

* + - Who controls AC priv?
      * Client
      * Lawyer can waive privilege when acting on client’s behalf
        + If done improperly could be grounds for malpractice
      * But it is the Client’s privilege
  + Corporate attorney-client privilege
    - Disagreement on this
    - Common law AC privilege varies from state to state
    - Fed approach (Upjohn)
      * Comprehensive – any communication of corporate atty with an employee of corp is within the corp AC privilege (assuming that other requirements are satisfied) – basically, all employees are privileged parties
    - alternative way to think about it is client is control group – only officers, directors – not all employees
      * Fed approach are that any employee of corp. is covered by privilege
        + Communications would be covered by work-product privilege anyway

Upjohn wrongly decided (Green)

* + Work-product privilege
    - Hickman v. Taylor (U.S. 1947)
      * Defendants attorney requested all of plaintiffs notes from interviews with witnesses
      * Not under attorney-client privilege because not communication between privileged parties
      * District court held not privileged
        + Overturned by 3rd circuit (affirmed by Sup Court)
      * Why have work-product privilege
        + Witnesses don’t control privilege

So it does not encourage them to speak freely

* + - * + Client’s privilege

Some circumstances, possibly attorney’s privilege

* + - * + Encourages careful lawyering

Without this, lawyers wouldn’t write things down

* + - * + Also obvious that you need to protect Trial strategies and Legal conclusions
        + But why protect fact work product, eg witness statements?
        + Prevents free rider problem

Opposing counsel won’t get such statements because they know they can get the other side’s

Green: Sounds unrealistic

Other side won’t ask the questions you want

* + - * + Lawyers might try and produce misleading work-product
        + Lawyer would turn into a witness

The witness statement will inevitably vary from what the witness says on the stand

That discrepancy will be very useful for impeachment purposes

And then the person who created the WP will be asked to defend the version in the WP against the word of the friendly witness

* + - Originally Hickman was a common law privilege but now some of it is in R 26(b)(3)
    - 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).
      * Not just lawyers can create WP
      * Clients can do it all alone
      * also other agents
      * Fact intensive to figure out whether something is work-product
        + Particularly when compared to attorney-client privilege
        + Have to know history and motivation behind document
        + Not necessarily identifiable by who produced It or for whom it was produced
    - Not something that cannot be overcome at all
    - 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. prepared in anticipation of litigation or for trial by or for another party or its representative [
    - Opinion work-product treated differently than fact work-product
    - 26(b)(3)(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.
      * Really hard to discover opinion work-product compared to fact work-product – maybe cannot be overcome at all
    - Existence of work-product is not itself work-product
      * If this weren’t true you would never be able to overcome privilege
        + Wouldn’t know it exists
    - Can’t use work-product privilege to refuse to answer truthfully about a fact
      * Similar to point about AC privilege
    - Question about how much you have to anticipate litigation – does not have to be a suit yet, but
      * Normal documents generated in the course of business not work product
        + Good example is insurance

Normal documents that an adjuster generates not work product

Only if genuine worry that you’re going to be sued

* + - * Unsolicited letter from witness?
        + Is it prepared in anticipation of litigation?
        + Is it by or for another party?

If witness did it for you then it could be described as work-product

* + - One way to overcome privilege: if one party interviewed witnesses shortly after the events in question and the other party doesn’t have the opportunity to do so until substantial time has passed
      * Witnesses may not recall everything that happened later
      * Would put the discovering party at a disadvantage if they didn’t have access to this info
    - Sometimes you can overcome work-product privilege in order to impeach witness
      * Don’t want to make it impossible to do this
      * But also don’t want to allow someone to simply say “I want access to WP because it might have stuff that would impeach the witnesses”
        + That would eviscerate the WP priv
      * To overcome privilege, you have to have some non-privileged info that you can show to the court that will then justify access to privileged material – something suggesting that the witness said something different in the WP from what they will say on the stand
        + Court than can look at WP in camera to determine whether overcoming priv would actually be justified
    - Can p request in discovery any surveillance tapes that d may have made of p after the accident
      * Impeachment evidence against your own witness (in this case the P)
      * In general the federal rules assume that impeachment evidence is not discoverable
      * There is no obligation to overturn impeachment evidence against other side in disclosure (whether at the beginning of suit or pre-trial)
        + Allowing access would allow the witness to change his story to accommodate the evidence
        + Surprise seems important
        + Same problem for non-work-product impeachment evidence
      * BUT not allowing access could be a problem
        + Maybe impeachment evidence is trumped up

Surprise at trial means something is happening that other side can’t respond to

* + - * + Now impeachment evidence tends to be treated as discoverable

BUT before turning over impeachment evidence you have on other side’s witness, the court will allow you to depose witness before turning over

Can get element of surprise in the deposition, while allowing other side has a chance to check the impeachment evidence to make sure it is genuine

* + - Witness can always get their own statement
      * Friendly witness can request statement and give it to their side
  + **Waiver**
    - Privileges can be waived
    - You can waive it by bringing it into issue
      * “I acted reasonably because I acted on advice of counsel”
        + this creates right for other side to access those communications – and the context in which those communications were made
      * very dangerous to even refer to privilege
        + will end up waiving more than you think
  + **mechanism of disclosure**
    - disclosure is term used for info you are obligated to turn over without being asked
    - discovery is term for info you only have to turn over if asked
    - used to 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
      * broad disclosure obligation
      * didn’t work well
      * now it is limited to ‘good stuff’ – in support of you claims or defenses
    - pretrial disclosure obligation
      * have to disclose evidence you will bring at trial other than impeachment evidence 30 days before trial
    - disclosure concerning experts
      * when you have an expert testifying at trial: witness has to write report to give to other side that discloses compensation, history as witness, and evidence that they looked at (even if its privileged information)
  + **mechanism of discovery** 
    - request for admission
      * you discover that something happened that you think other party would have admitted to had it been in complaint
      * mostly used to determine validity of documents
      * can insurer impleaded by defendant request an admission from the plaintiff?
        + Yes
        + 3rd party defendant can raise any defense that the defendant can raise so make sense that can also request admissions
      * also, true for co-plaintiffs/co-defendants – can ask admissions from one another (even though they cannot offer the other’s defenses)
    - document request can only be served on a party
      * get documents from 3rd parties via subpoena duces tecum
        + need subpoena to put any third party under control of court
    - p’s lawyer wants to find out who at D Corp. knows how something specific was done
      * use interrogatories
        + corp. has to provide any information that it has access to
        + usually done first, followed by document request and finally depositions
    - deposition applicable to both parties and non-parties
      * have to subpoena non-party
      * almost like trial
        + will be used for settlement or summary judgement
      * in depositions, counsel can object, but client must be allowed to answer the question
        + objections can then be brought up later

**Discovery methods review**

* **Rule 36: Requests for Admission**
* **Rule 45: Subpoena**
  + During discovery way of getting non-party to show up to deposition, also way of getting documents from non-party
* **Rule 34:** Producing documents, electronically stored information, and tangible things, or entering onto land, and inspection for other purposes
  + applies to parties
* **Rule 33:** Interrogatories to Parties:set number of questions
  + **Useful for getting background notes for what type of document to request**
* **Rule 30. Deposition by Oral Examination**
  + notice that to keep a deposition from breaking down you should have the deposed party answer a question even if there is an objection
    - You do not want deposition to immediately break down, but if someone is asking for privileged materials, person answering should refuse to answer and deposition might break down
  + and to keep the other side from overreaching…
    - **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.**

**E-Discovery 26(b)(2)**

* Way being presented in book is e-discovery makes discovery more burdensome **but Green thinks makes discovery easier on (1) giving materials over (2) going over the materials.**
* new rule for when E-Discovery may create burden – the discoverability of the material takes that burden into account
* 26(b)(2) *Limitations on Frequency and Extent.*  
  … (B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**motions to compel, sanctions**

**Hypo:**

* D did not turn over disclosure materials, made frivolous discovery request, and illegitimately refused to turn over materials that were within the scope of your discovery requests – what to do?
* first, every discovery request and discovery/disclosure response is signed and that results in a certification under Rule 26(g) (like Rule 11)
* 26(g) Signing Disclosures and Discovery Requests, Responses, and Objections.  
      (1) 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....
  + notice expansive view about what is proper legal refusal to turn over materials
* violation of 26(g) can result in sanctions  
      (3) Sanction for Improper Certification.  If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney’s fees, caused by the violation.

But even if the refusal to turn over discovery material is frivolous and results in sanctions under 26(g), how do you get the materials?

* motion to compel

**Rule 37: Failure to make disclosures or to cooperate in Discovery; Sanctions**

1. Motion for an order compelling disclosure or discovery
2. In general
   * On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has ***in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery*** in an effort to obtain it without court action.
   * if you the court grants your motion to compel discovery and the party still does not turn over the materials, there will be sanctions that usually amount to losing on that issue

(b)(2) Sanctions in the District Where the Action Is Pending.  
(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent ...fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders.   
They may include the following:  
(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;   
(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;   
(iii) striking pleadings in whole or in part;   
(iv) staying further proceedings until the order is obeyed;   
(v) dismissing the action or proceeding in whole or in part;   
(vi) rendering a default judgment against the disobedient party

* on the other hand, if there is a motion to compel disclosure, the court can sanction in conjunction with the motion to compel
  + 37(c) ***Failure to Disclose***; to Supplement an Earlier Response, or to Admit.  
    (1) Failure to Disclose or Supplement.   
    If a party fails to provide information or identify a witness as required by Rule 26(a) or 26(e), ***the party is not allowed to use that information*** or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:  
    (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;  
    (B) may inform the jury of the party's failure; and   
    (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi)
  + that is because there was an affirmative obligation to turn over the disclosure material without being asked

**Protective Orders**

* if you think material the other side is asking for is not discoverable (eg because privileged), rather than waiting for the other side to bring a motion to compel, you can bring a motion for a protective order
* protective orders also can be used even when material is discoverable, to put on obligation on the other side to protect the privacy of info - eg trade secrets