Work product privilege

* + - 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

**Terminating litigation before trial**

Ways actions can be dismissed before trial : 12(b)(6) failure to state a claim, 12(c) motion for judgment on the pleadings

* 12(c) motion does not look to the evidence but comes to a conclusion that a judgment for the plaintiff for defendant is possible simply by looking to the pleadings, the complaint and the answer
* A motion to dismiss for failure to state a claim brought after the period allowed under 12(b) will be in the form of a motion for judgment on the pleadings under 12(c)
* But plaintiffs can also bring motions for a judgment on the pleadings under 12(c)- for example the defendant may admit all of the plaintiff’s allegations and rely on a affirmative defense that is legally insufficient

Federal rules also create possibility that you can avoid trial due to evidentiary insufficiency

summary judgment

* Summary judgment generally happens at end of discovery period, because then you have all the evidence that would be presented trial. The standard for summary judgment is “No reasonable person could rule in favor of the non-movant”
* Directed verdict and judgment notwithstanding the verdict are same general idea as summary judgment, but happen at trial.

Burden of production: burden to get the ball rolling during trial by presenting sufficient evidence to show that a reasonable jury could find in your favor. P has this burden for cause of actions, D has it for affirmative defenses.

P satisfied his burden of production at trial concerning every element of the cause of action  
D offers no evidence  
directed verdict for P?

No – P has only offered enough evidence such that it is possible for reasonable jury to find in his favor, not of such that a reasonable jury must find in his favor

* The case goes to trial even though the defendant has no contrary evidence

- P sues D for negligence  
- P offers evidence that at trial would satisfy the burden of production concerning negligence and damages but nothing concerning causation  
- D offers no evidence and moves for summary judgment

- must be granted to D

summary judgment for defendant concerning a cause of action is appropriate when  
no reasonable jury could find for the plaintiff with respect to at least *one* element of the cause of action

* Just one element is all that is needed
* That is why it is easier for the defendant to get summary judgment in his favor and the plaintiff

summary judgment for plaintiff concerning a cause of action is appropriate when  
no reasonable jury could find for the defendant with respect to *each* element of the cause of action

- P sues D for negligence  
- P offers sufficient evidence concerning negligence, causation and damages such that a reasonable jury *would have* to find in his favor   
- D offers rebutting evidence concerning causation

- in this case partial summary judgment would be appropriate

P get summary judgment on negligence and damages, but the matter of causation goes to trial