

24th Annual
LABOR AND EMPLOYMENT
LAW CONFERENCE

June 12—13, 2017
Austin, Texas

**What's New in Seeking, Getting and Using
Discovery**

Susan Hutchison

Susan Hutchison
Hutchison & Stoy, PLLC
Fort Worth, Texas

hutch@hsjustice.com
512.555.5555

WHAT'S NEW IN GETTING AND USING DISCOVERY

TABLE OF CONTENTS

Table of Contents

I. Discovery Requests—Organize Early 9

 Federal..... 9

 A. Early Discovery FRCP 26(d)(2) 9

 B. Meet and confer FRCP 26(f)..... 10

 C. Certifying discovery..... 10

 State..... 10

 A. Discovery Control Plan TRCP 190.1 11

II. Scope of Discovery 11

 Federal..... 11

 A. FRCP 26(b)(1) as amended 2015:..... 11

 B. Cases addressing “proportionality” after amendments 11

 C. Reliance upon pre-amendment case law:..... 12

 State..... 11

 A. TRCP 192.3 “reasonably calculated to lead to the discovery of admissible evidence” 12

 1. "Bias" discovery from experts..... 11

 2. Constructive possession..... 12

 B. Scope of Discovery in Employment Cases..... 13

 C. Personnel Files/Employment Information 13

 1. Other employee files..... 13

 Federal..... 13

 a. Similarly situated employees..... 13

 b. Limitations on areas of work/same decision maker/same job duties..... 13

 c. Limitations on type of information obtained..... 14

 State..... 15

 a. Definition of personnel file..... 15

 b. System, scheme or plan..... 15

 c. Privacy rights..... 15

 D. Other complaints of discrimination 16

 Federal..... 16

 1. Relevance..... 16

 2. Notice..... 16

 3. Negating affirmative defense..... 16

 4. Limitations--not similarly situated..... 16

 E. Tax Records 18

 Federal..... 18

 State..... 18

 F. Medical Records 19

 Federal..... 19

State.....	20
G. Social Media	20
Federal.....	21
1. Discoverable, not privileged but limits on intrusion.....	21
State.....	21
III. E Discovery.....	22
Federal.....	22
A. References.....	22
B. Early Consideration	22
1. Early Discovery.....	22
2. Initial Discovery Conference.....	22
C. Scope of ESI Discovery FRCP 26(b)(2)(B).....	23
1. Request for ESI.....	23
2. Reasonably accessible.....	26
D. ESI Search Techniques	27
1. Keyword searches.....	26
2. Technology assisted review (TAR) (aka predictive coding).....	27
E. Responding to Request for ESI FRCP 34(b)(2)(D)	27
1. Ordinarily maintained or reasonably usable.....	27
2. Manner of production FRCP 34(b)(2)(E).....	28
F. Costs.....	30
G. ESI From Non Parties	30
H. Spoliation/Sanctions FRCP 37(e)	30
State.....	30
A. TRCP 196.4 Electronic or Magnetic Data	31
B. Early Consideration	31
C. <i>In re Weekley Homes</i> —8 Step Procedure for EIS Discovery	31
D. Requirement for Default if Seeking Access to Electronic Storage Device	33
E. Cases Applying <i>In re Weekley</i> :.....	33
IV. Pre-suit Discovery.....	35
Federal.....	35
A. FRCP 27 Deposition to Perpetuate Testimony	35
State.....	35
A. TRCP 202 Depositions to Investigate Claims, Narrowing its Use	36
1. Must have jurisdiction of potential claim.....	35
2. Potential claims must be "ripe".....	35
3. Arbitration.....	36
4. Evidence that benefit outweighs burden.....	36
V. Resisting Discovery	37
Federal.....	37
A. Objections	37
1. Burden.....	36
2. Fully Respond.....	37
3. Redactions.....	39
State.....	39

A.	TRCP 193.2.....	40
1.	Burden on party resisting.....	39
2.	Overbreadth/Relevance.....	39
VI.	Miscellaneous Cases on Privileges	40
Federal.....		40
A.	Attorney Client.....	40
1.	Former Human Resources Employee as Plaintiff.....	40
B.	Privilege Log FRCP 26(b)(5).....	41
State.....		42
A.	Attorney Client includes representatives.....	42
B.	Work Product—When is Investigation in Anticipation of Litigation.....	43
VII.	Motions for Summary Judgment—Additional Discovery	44
State.....		44
Rule 166a(g).....		44

TABLE OF AUTHORITIES

Cases

<i>Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dept. of Homeland Sec.</i> , 255 F.R.D. 350 (S.D.N.Y. 2008).....	29
<i>Aliotti v. Vessel SENORA</i> , 217 F.R.D. 496 (N.D. Cal. 2003).....	18
<i>Arters v. Univision Radio Broad.</i> , 2009 WL 1313285, at *3 (N.D. Tex. May 12, 2009).....	13
<i>Autotech Tech. Ltd. Partnership v. Automationdirect.com, Inc.</i> , 248 F.R.D. 556 (N.D.Ill. 2008).....	24
<i>Beasley v. First Am. Real Estate Info. Servs., Inc.</i> , 2005 WL 1017818 at *10–11 (N.D. Tex. Apr. 27, 2005).....	15
<i>Beaumont v. Basham</i> , 205 S.W.3d 608(Tex. App.—Waco 2006, pet. denied).....	15
<i>Benplace, Inc. v. Pitney Bowes, Inc.</i> , 2016 WL 880204 (W.D.Tex. March 7, 2016).....	11
<i>Braud v. Geo Heart Exchangers, LLC</i> , 314 F.R.D. 386 (M.D. La. 2016).....	15
<i>Burd v. Ford Motor Co.</i> , 2015 WL 4137915 at * 9 (S.D.W.V. July 8, 2015).....	23
<i>Burrell v. Crown Cent. Petroleum, Inc.</i> 177 F.R.D. 376 (E.D. Tex. 1997).....	19
<i>Carr v. State Farm</i> , 312 FRD 459 (N.D.Tex. Dec. 7, 2015).....	11, 37
<i>Chevron Corp. v. Stratus Consulting, Inc.</i> , 2010 WL 3489922 at * (D.Col. August 31, 2010)....	30
<i>Chico Auto Parts & Service, Inc. v. Crockett</i> , 512 S.W3d 560 (Tex. App.—El Paso 2017, no pet.).	44
<i>Consumer Elecs. Ass'n v. Compras & Buys Magazine, Inc.</i> , No. 08-21085-CIV, 2008 WL 4327253, at *3 (S.D. Fla. Sept. 18, 2008).....	38
<i>Corley v. La., Div. of Admin.</i> , 2010 WL 3328307, at *2–3 (M.D. La. Aug. 18, 2010).....	14
<i>Cory v. George Carden Int'l Circus, Inc.</i> , 2016 WL 3460781 at * 3 (E.D.Tex. Feb. 5, 2016)....	21
<i>Coughlin v. Lee</i> , 946 F.2d 1152 (5 th Cir. 1991).....	13, 14
<i>Covad Communications Co. v. Revonet, Inc.</i> 254 F.R.D. 147 (D.C. 2008).....	25, 26, 29
<i>Da Silva Moore v. Puclicis Groupe</i> , 287 F.R.D. 182 (S.D.N.Y. 2012).....	27
<i>Davenport v. State Farm Mutual Auto Insurance Company</i> , 2012 WL 555759, at *1 (M.D. Fla., Feb. 21, 2012).....	21
<i>Doe v. District of Columbia</i> , 230 F.R.D. 47 (D.D.C., 2005).....	23
<i>Durbin v. Dal-Briar Corp.</i> , 871 S.W.2d 263 (Tex. App.—El Paso 1994, writ. den.).....	15
<i>E.E.O.C. v Ian Schragger Hotels, Inc.</i> , 2000 WL 307470 at *3 (C.D. Cali. March 8, 2000).....	13
<i>Echevarrio-Soto v. Edwards Lifesciences Technology SARL, LLC</i> , 303 F.R.D. 175, 177 (D. Puerto Rico 2014).....	35
<i>Equal Opportunity Employment Commission v. BDO USA, LLP</i> , --F.3d--, 2017 WL 1746035 (5th Cir. May 4, 2017).....	40, 41
<i>Ernie Green. EEOC v. Packard Elec. Div., Gen. Motors Corp.</i> , 569 F.2d 315 (5th Cir.1978) ...	14
<i>Evon v. Law Offices of Sidney Mickell</i> , 2010 WL 455476, at *2 n.1 (E.D. Cal. 2010).....	39
<i>F.T.C. v. TRW, Inc.</i> , 628 F.2d 207 (D.C. Cir. 1980).....	41
<i>FDIC v. LeGrand</i> , 43 F.3d 163 (5 th Cir. 1995).....	18
<i>Fisher v. United States</i> , 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976).....	41
<i>Flores v. Fourth Court of Appeals</i> , 777 S.W.2d 38 (Tex. 1989),.....	43
<i>Ford Motor Co. v. Edgewood Props., Inc.</i> , 257 F.R.D. 418 (D.N.J. 2009).....	29
<i>Freeport-McMoran Sulphur, LLC v. Mike Mullen Energy Equip. Res., Inc.</i> , No. 03-1496, 2004 WL 1299042, at *9 (E.D. La. June 4, 2004).....	42
<i>Freundensprung v. Offshore Technical Servs., Inc.</i> , 379 F.3d 327 (5th Cir.2004).....	14

<i>Fuller v. City of Oakland, Cal.</i> , 47 F.3d 1522, 1529 (9th Cir. 1995)	17
<i>Fulton v. Livingston Financial, LLC</i> , 2016 WL 3976558 (W.D. Wash. July 25, 2016)	12
<i>GAF Corp. v. Caldwell</i> , 839 S.W.2d 149 (Tex. App.–Houston [14th Dist.] 1992, orig. proceeding)	44
<i>Gondola v. USMD PPM, LLC</i> , 2016 WL 3031852 at *11 (N.D.Tex. May 27, 2016)	passim
<i>Green v. Adm’rs of the Tulane Educ. Fund</i> , 284 F.3d 642 (5 th Cir. 2002)	17
<i>Green v. Nicholson Manuf. Co.</i> , No. 9:04cv227, 2005 U.S. Dist. LEXIS 45905 (E.D. Tex. Sept. 22, 2005)	14
<i>Guy Chem. Co. v. Romaco AG</i> , 243 F.R.D. 310, 313 (N.D.Ind. 2007)(.....	30
<i>Hall v. Lawlis</i> , 907 S.W.2d 493 (Tex.1995)	19
<i>Hatley v. Hilton Hotels Corp.</i> , 308 F.3d 473 (5 th Cir. 2002).	17
<i>Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.</i> , 2007 WL 1054279, at *4 (D.Kan. Apr. 9, 2007)	23
<i>Heller v. City of Dallas</i> , 303 F.R.D. 466 (N.D.Tex.2014).....	37, 38
<i>Hightower v. Group I Automotive, Inc.</i> , 2016 WL 3430569 at *3 (E.D. La. June 22, 2016).....	11
<i>In re Amarillo II Enterprises, LLC</i> , 2017 WL 491938 at *2 (Tex. App.—Amarillo February 3, 2017 orig. proceeding)(.....	36
<i>In re Brewer Leasing, Inc.</i> , 255 S.W.3d 708 (Tex. App.—Houston [1 st Dist.] 2008, orig. proceeding)	19
<i>In re Certain Underwriters at Lloyd's London</i> , 294 S.W.3d 891 (Tex.App.-Beaumont 2009, orig. proceeding)	12
<i>In re Christus Health Southeast Texas</i> , 399 S.W.3d 343 (Tex.App.—Beaumont 2013) (per curiam)	22
<i>In re CI Host, Inc.</i> , 92 S.W.3d 514 (Tex. 2002)(orig. proceeding)	40
<i>In re City of Dallas</i> , 501 S.W.3d 71 (Tex. 2016).....	36
<i>In re Clear Vision Technologies</i> , 2016 WL 3452760 at *2 (Tex. App.—Amarillo, June 21, 2016, orig. proceeding).....	19
<i>In re Crestcare Nursing and Rehabilitation Center</i> , 222 S.W.3d 68, 73 (Tex. App.—Tyler 2006 orig. proceeding).....	16
<i>In re DePinho</i> , 505 S.W.3d 621 (Tex. 2016)(.....	36
<i>In re Fairway Ethanol, LLC</i> , --S.W.3d--, 2017 WL 422006 at *3 (Tex.App.—Houston [14 th Dist.] January 31, 2017, orig. proceeding).....	42, 43
<i>In re FedEx Ground Package Sys., Inc. Emp’t Practices Litig.</i> , 2007 WL 79312, at *5 (N.D. Ind. 2007)	39
<i>In re Ford Motor Co.</i> , 427 S.W.3d 396 (Tex. 2014)	12
<i>In re Heaven Sent Floor Care</i> , 2017 WL 462352 at *2 (Tex. App.—Dallas January 30, 2017, orig. proceeding)	37
<i>In re Honza</i> , 242 S.W.3d 578 (Tex.App.—Waco 2008, orig. proc. [mand. denied]).....	32
<i>In re La Vernia Nursing Homes</i> , 12 S.W.3d 566 (Tex. App.—San Antonio 1999, orig. proceeding)	15
<i>In re Leatherwood</i> , 1998 WL. 800341 at *2 (Tex. App.—San Antonio Nov. 18, 1998, orig. proc.)	20
<i>In re Master Flow Valve, Inc.</i> , 485 S.W.3d 207, 219 (Tex. App.—Houston [14 th Dist.] 201633, 34, 40	
<i>In re McDaniel</i> , No. 14–13–00127–CV, 2013 WL 1279454, at *3 (Tex. App.–Houston [14th Dist.] Mar. 28, 2013, orig. proceeding) (per curiam)	44

<i>In re Memorial Hermann Healthcare System</i> , 274 S.W.3d 195 (Tex.App.—Houston [14th Dist.] 2008, orig. proceeding).....	40
<i>In re Nance</i> , 143 S.W.3d 506 (Tex. App.—Austin 2004).....	20
<i>In re Pinnacle Eng'g Inc.</i> , 405 S.W.3d 835 (Tex. App.—Houston [1 st Dist.] 2013, orig. proceeding).....	33, 35
<i>In re Santa Fe Int'l Corp.</i> , 272 F.3d 705 (5th Cir.2001).....	38
<i>In re Siroosian</i> , 449 S.W.3d 920 (Tex.App.—Fort Worth 2014, orig. proceeding).....	12
<i>In re State Farm Lloyds</i> , 2015 WL 6520998 (Tex. App.—Corpus Christi Oct. 28, 2015, orig. proc.).....	33
<i>In re State Street Bank & Trust Co. Fixed Income Funds Inv. Litig.</i> , 2009 WL 1026013, at *1 (S.D.N.Y. 2009).....	39
<i>In re Summersett</i> , 438 S.W.3d 74 (Tex.App.—Corpus Christi 2013, orig. proceeding).....	12
<i>In re U-Haul Int'l</i> , 87 S.W.3d 653 (Tex.App.-San Antonio 2002, orig. proceeding).....	12
<i>In re Univ. Serv. Fund Tel. Billing Pracs. Litig.</i> , 232 F.R.D. 669 (D. Kan. 2005).....	42
<i>In re USA Waste Mgmt. Res., L.L.C.</i> , 387 S.W.3d 92 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding).....	43
<i>In re Wal-Mart Stores, Inc.</i> , --S.W.3d--, 2016 WL 7230399 at *5 (Tex. App.—El Paso December 14, 2016, orig. proceeding).....	40
<i>In re Weekley Homes, L.P.</i> , 295 S.W.3d 309 (Tex. 2009).....	31, 32, 33
<i>In re XL Specialty Ins. Co.</i> , 373 S.W.3d 46 (Tex. 2012).....	42
<i>Jackson v. Unisys, Inc.</i> , No. 08-3298, 2010 WL 10018, at *2-3 (E.D. Pa. Jan. 4, 2010).....	18
<i>Johnson v. PPI Technology Services, L.P.</i> , 2013 WL 4508128 (E.D. La., Aug. 22, 2013).....	21
<i>Keycorp v. Holland</i> , No. 3:16-cv-1948-D, 2016 WL 6277813, at *11 (N.D. Tex. Oct. 26, 2016).....	38
<i>King v. University Healthcare System, LC</i> , 645 F.3d 713 (5 th Cir. 2011),.....	41, 42
<i>Kleppinger v. Texas Dept. Transportation</i> , 2012 WL 12893655 at *6 (S.D.Tex Sept. 30, 2012).....	14, 16, 17
<i>Krantz v. State Farm</i> , 2016 WL 320148 (M.D. La. Jan. 25, 2016).....	11
<i>Lee v. Kan. City S. Ry. Co.</i> , 574 F.3d 253 (5th Cir. 2009).....	17
<i>Marshall v. Westinghouse Elec. Corp.</i> , 576 F.2d 588 (5th Cir.1978).....	14
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792, 804–05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).....	16
<i>McKinney v. Metropolitan Life</i> , 2016 WL 98603 (N.D. Tex. Jan. 8, 2016).....	11
<i>McKinney/Pearl Restaurant Partners, L.P. v. Metropolitan Life Insurance Company</i> , 2016 WL 98603 at *3 (N.D.Tex. January 28, 2016).....	38
<i>McLeod, Alexander, Powel & Apffel, P.C. v. Quarles</i> , 894 F.2d 1482 (5th Cir.1990).....	37
<i>Merrill v Waffle House, Inc.</i> , 227 F.R.D. 467 (N.D.Tex. 2005).....	19, 38
<i>Montgomery-Smith v. La. Dept. of Health & Hospitals</i> , 2011 WL 1831707 at *7 (E.D.La. May 11, 2011).....	14
<i>Moore v. Wayne Smith Trucking Inc.</i> , 2015 WL 6438913, at *2 (E.D. La., Oct. 22, 2015).....	21
<i>Mr. Mudbug, Inc. v. Bloomin' Brands, Inc.</i> , 2017 WL 111268 at *3 (E.D.La. Jan. 11, 2017)....	24
<i>Nat'l Tank Co. v. Brotherton</i> , 851 S.W.2d 193, 204 (Tex. 1993).....	43, 44
<i>National Gas Pipeline Co. of America</i> , 2 F.3d 1397, 1411 (5th Cir.1993).....	19
<i>Newman v. Borders</i> , 257 F.R.D.1,3 (D.D.C.2009).....	23
<i>Nutmeg Ins. Co. v. Atwell, Vogel & Sterling</i> , 120 F.R.D. 504, 510 (W.D. La. 1988).....	42
<i>Okla. Press Publ. Co. v. Walling</i> , 327 U.S. 186, 213, 66 S.Ct. 494, 90 L.Ed. 614 (1946).....	41
<i>Osores v. Reed</i> , 2017 WL 371485 at *3 (Tex.App.—Beaumont January 26, 2017).....	44

<i>Passons v. Univ. of Tex.</i> , 969 S.W.2d 560, 564 (Tex.App.-Austin 1998, no pet.)	15
<i>Patton Boggs, LLP v. Moseley</i> , 394 S.W.3d 565 (Tex. App.—Dallas 2011, no pet., orig. proceeding),	36
<i>Pavillion Bank v. OneBeacon American Ins. Co.</i> , 2013 WL 12126258 at *3 (N.D.Tex. Dallas November 13, 2013)	39
<i>Perkins v. Gregg Cty.</i> , 891 F.Supp. 361 (E.D. Tex. 1995)(citation omitted)	41
<i>Peskoff v. Faber</i> , 251 F.R.D. 59 (D.D.C.2008)	25
<i>Powell v. Int’l Corp.</i> , 788 F.2d 279, 283 (5 th Cir. 1986)	13
<i>R.K. v. Ramirez</i> , 887 S.W.2d 836, 842 (Tex. 1994)	20
<i>RealPage, Inc. v. Enterprise Risk Control, LLC</i> , 2017 WL 1165688 (E.D.Tex. March 29, 2017)38, 39	
<i>Reine v. Honeywell Intern, Inc.</i> , 2008 WL 1901398 at *2 (M.D. La April 25, 2008).....	13
<i>S.E.C. v. Brady</i> , 238 F.R.D. 429 (N.D.Tex.2006)	38
<i>Samsung Electronics America, Inc. v. Yang Kun “Michael” Chung</i> , --F.R.D.--, 2017 WL 89697 at *9 (N.D. Tex March 7, 2017)(.....	38
<i>Scholtisek v. Eldre Corp.</i> , 441 F.Supp.2d 459, 462–63 (W.D.N.Y. 2006).....	41
<i>Scott v. United States Postal Service</i> , 2016 WL 7440468, at *4 (M.D.La. Dec. 27, 2016)	21
<i>Sekisui American Corp. v. Hart</i> , 945 F.Supp.2d 494, 507-08 (S.D.N.Y. 2013).....	30
<i>Smith v. DeTar Hosp. LLC</i> , 2011 WL 6217497 at *3 (S.D.Tex. Dec. 14, 2011).....	15
<i>Stoffels v. SBC Commc’ns, Inc.</i> , 263 F.R.D. 406, 411 (W.D. Tex. 2009).....	41
<i>Texas Dept. of Family and Protective Services v.Parra</i> , 503 S.W.3d 646 (Tex. App—El Paso, 2016 pet. filed).....	15
<i>Tinal v. Norton Healthcare, Inc.</i> , 2014 WL 12581760 at *4 (W.D. Ky July 14, 2014) (ADA Case)	13
<i>Trevino v. Celanese</i> , 701 F.2d 397, 405 (5 th Cir. 1983).....	13
<i>U.S. E.E.O.C. v. Guardsmark, LLC</i> , 2010 WL 2756798 at * 1 (S.D. Tex. July 12, 2010):	20
<i>United States ex rel. Simms v. Austin Radiological Ass’n</i> , 292 F.R.D. 378, 386 (W.D. Tex. 2013)39	
<i>United States v. El Paso Co.</i> , 682 F.2d 530, 541 (5 th Cir. 1982).....	41
<i>United States v. Kelly</i> , 569 F.2d 928, 938 (5 th Cir. 1978).....	41
<i>United States v. Robinson</i> , 121 F.3d 971, 974 (5 th Cir. 1997)	41
<i>Vance v. Union Planters Corp.</i> , 209 F.3d 438, 445 (5 th Cir. 2000).....	16
<i>von Bulow v. von Bulow</i> , 811 F.2d 136, 145–46 (2d Cir. 1987).....	42
<i>White v. Graceland Coll. Ctr. For Prof’l Dec. & Lifelong Learning, Inc.</i> , 586 F.Supp.2d 1250, 1264-65 (D.Kan. 2008).....	14, 27, 29
<i>Wilson v. Martin County Hosp. Dist.</i> , 149 F.R.D. 553, 555 (W.D. Tex. 1993).....	13, 14
<i>Wyeth v. Impax Labs., Inc.</i> , 248 F.R.D. 169, 170-72 (D. Del. 2006)	24
<i>Zubulake v. UBS Warburg, LLC</i> , 217 F.R.D. 309, 318 (S.D.N.Y. 2003).....	26, 30

Other Authorities

1993 Advisory Comm. Notes to Fed. R. Civ. P. 26 ¶ 33	41
Advisory Committee Notes FRCP 34, par. 9.....	28
Advisory Committee Notes to Rule 34, par. 13.....	30
Black's Law Dictionary (10th ed. 2014).....	39
Committee Note to Rule 26(b)(1).....	37
Merriam-Webster Collegiate Dictionary (11th ed. 2007).....	39
Report of the Judicial Conference, Agenda E-18, at Rules App. C-25	9

Rule 26 Advisory Committee Notes to Rule 26, par. 5	26
<i>Sedona Conference Commentary on the Use of Search & Information Retrieval Methods</i> , at 15.27, 29	
<i>Sedona Principles, Second Edition</i> , Principle 8 at 45.....	26, 28, 29
<i>The Sedona Principles: Second Edition, Best Practices Recommendations & Principles for Addressing Electronic Document Production (June 2007)</i> (available at https://thesedonaconference.org/download-pub/81).....	22, 29, 30

Rules

FED. R. CIV. P. 16(b).....	9
FED. R. CIV. P. 26	13, 30, 41
FED. R. CIV. P. 26(a)(1)(A)(ii).....	11
FED. R. CIV. P. 26(b).....	38
FED. R. CIV. P. 26(b)(1).....	10, 11, 12, 19, 23, 37
FED. R. CIV. P. 26(b)(2)(B).....	23
FED. R. CIV. P. 26(b)(2)(C).....	27
FED. R. CIV. P. 26(b)(5).....	41
FED. R. CIV. P. 26(d)(2).....	9, 22
FED. R. CIV. P. 26(d)(2)(A)	22
FED. R. CIV. P. 26(d)(2)(B).....	9
FED. R. CIV. P. 26(f)	9, 22, 28
FED. R. CIV. P. 26(f)(2).....	22
FED. R. CIV. P. 26(f)(3).....	9, 10
FED. R. CIV. P. 26(f)(3)(C).....	9, 22
FED. R. CIV. P. 26(g).....	10
FED. R. CIV. P. 26(g)(3).....	10, 37
FED. R. CIV. P. 26(g)(1)(B).....	37
FED. R. CIV. P. 27	35
FED. R. CIV. P. 30(b)(6).....	11, 23
FED. R. CIV. P. 34	passim
FED. R. CIV. P. 34(b).....	24, 27
FED. R. CIV. P. 34(b)(2)(B).....	38
FED. R. CIV. P. 34(b)(2)(C).....	39
FED. R. CIV. P. 34(b)(2)(D).....	24, 27
FED. R. CIV. P. 34(b)(2)(E).....	28, 33
FED. R. CIV. P. 34(b)(2)(E)(i)	39
FED. R. CIV. P. 34(b)(2)(E)(ii).....	29
FED. R. CIV. P. 34(c).....	30
FED. R. CIV. P. 37(e).....	30
FED. R. CIV. P. 45(a)(1)(A)(iii).....	30
FED. R. EVID. 502.....	9, 10
TEX. R. CIV. P. 166a(g).....	44
TEX. R. CIV. P. 190.1	10
TEX. R. CIV. P. 191	10
TEX. R. CIV. P. 191.2.....	32
TEX. R. CIV. P. 192.3	12

TEX.R. CIV. P. 192.4(b)	32
TEX.R. CIV. P.192.6(b).	33
TEX. R. CIV. P. 193.2	40
TEX.R. CIV. P. 193.4(a).....	32
TEX.R. CIV. P. 196.4	31, 32, 33, 35
TEX. R. CIV. P. 196.6	35
TEX. R. CIV. P. 202	35, 36
TEX. R. CIV. P. 202.1(b)	36

I. Discovery Requests—Organize Early

Federal

A. Early Discovery FRCP 26(d)(2)

The 2015 amendment to this rule provides that a request for production or inspection can be delivered to a party as early as 22 days after service of the summons and complaint—even before the rule 26(f) conference. The early request is considered “served” at the first Rule 26(f) conference. FRCP 26(d)(2)(B). The purpose of early delivery is to facilitate discussion of production at the Rule 26(f) conference, particularly with respect to electronically stored information.

B. Meet and confer FRCP 26(f)

FRCP 26(f) requires the parties and attorneys to meet and confer “as soon as practicable” and in any event at least 21 days before a scheduling conference or a scheduling order is due under FRCP 16(b). Among other things, the parties must discuss any issue about preserving discoverable information and develop a proposed discovery plan. FRCP 26(f) lists six categories of information that must be addressed in the discovery plan, including “any issues about disclosure, discovery or preservation of electronically stored information, including the form or forms in which it should be produced.” FRCP 26(f)(3)(C). (ESI will be addressed in more detail in “E Discovery,” below).

FRCP 26(f)(3) also requires the parties to address in the initial meeting any issues about claims of privilege or of protection as trial preparation materials and whether to ask the court to include their agreement in an order under FRE 502 (relating to attorney client and work product privileges, inadvertent disclosure, agreement for no waiver of privilege for use in proceedings). See Report of the Judicial Conference, Agenda E-18, at Rules App. C-25: given the extensive amount of time and money that can be spent reviewing large volumes of data for privilege or protection—particularly electronically stored information—FRCP 26(f) encourage the parties to develop a plan that reduces the producing party’s time and cost for privilege review and speeds up the requesting party’s access to the materials. Incorporating the agreement into a court order makes it binding outside of the instant litigation.

FRCP 26(f)(3) was amended in 2015 to add two items to the discovery plan—issues about preserving electronically stored information and court order under FRE 502 as discussed above.

Most federal courts in Texas require the filing of some type of joint discovery plan following the scheduling conference, including specifying the form for production of ESI.

C. Certifying discovery

FRCP 26(g) states that an attorney’s signature on every disclosure, discovery request, response or objection certifies that it is consistent with the rules, consistent with the law, not for an improper purpose and 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.

A party may move for sanctions if the other party did not properly certify its disclosures or discovery, including expenses and attorney’s fees caused by the violation. FRCP 26(g)(3)

State

A. Discovery Control Plan TRCP 190.1

A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2 or 3 of the rule. Once a suit is designated as a Level 3 plan, all changes to the default provisions of Level 2 must be made by court order. TRCP 191 cmt. 1

II. Scope of Discovery

Federal

A. FRCP 26(b)(1) as amended 2015:

Scope in General. 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.

B. Cases addressing "proportionality" after amendments

Gondola v. USMD PPM, LLC, 2016 WL 3031852 at *11 (N.D. Tex. May 27, 2016)

An employment discrimination and retaliation case applying the proportionality standard to a variety of discovery requests from the defendant to the plaintiffs, including prior and subsequent personnel records (allowing plaintiffs the choice of obtaining relevant records and providing them with a certificate from the records custodian or signing an authorization), information concerning subsequent employers (although prohibiting defendant from contacting a subsequent employer without further order), documents supporting claims or defenses (the Court merely ordered the plaintiff to comply with FRCP 26(a)(1)(A)(ii) regarding disclosures); tax returns (can provide alternative means of showing income); social media requests (court ordered the parties to confer on a more limited scope such as mention of defendant by name, discussion of termination, discussion of job searches, effects of termination)

McKinney v. Metropolitan Life, 2016 WL 98603 (N.D. Tex. Jan. 8, 2016)—addressing discovery issues, the court explains the application of the proportionality rules to discovery requests, objections, motions to compel, protective orders and electronically stored information. (commercial lease dispute)

Carr v. State Farm, 2015 WL 8010920 (N.D. Tex. Dec. 7, 2015)—analysis of proportionality and application to discovery dispute (UIM claim removed to federal court)

Krantz v. State Farm, 2016 WL 320148 (M.D. La. Jan. 25, 2016)—application of proportionality rules to 30(b)(6) deposition (homeowner's bad faith claim against State Farm)

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: What's New in Seeking, Getting, and Using Discovery

Also available as part of the eCourse

[2017 Labor and Employment Law eConference](#)

First appeared as part of the conference materials for the 24th Annual Labor and Employment Law Conference session "What's New in Seeking, Getting, and Using Discovery"