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What's New in Seeking, Getting and Using Discovery

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WHAT'S NEW IN GETTING AND USING DISCOVERY

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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)

<u>State</u>

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)

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

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