

PURSUANT TO RULE 27(f) OF THE MISSISSIPPI RULES OF APPELLATE PROCEDURE, THE RULES COMMITTEE ON CIVIL PRACTICE AND PROCEDURE SEEKS COMMENTS FROM THE BENCH, THE BAR AND THE PUBLIC ON THE PROPOSED AMENDMENT TO **RULE 26 OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE**

Comments should be filed with the Clerk of the Supreme Court, Gartin Justice Building, P.O. Box 249, Jackson, Mississippi 39205-0249.
Deadline: **December 1, 2011.**

IN THE SUPREME COURT OF MISSISSIPPI

IN RE: THE MISSISSIPPI RULES
OF CIVIL PROCEDURE

RULES 89-R-99001

**MOTION TO AMEND RULE 26 OF THE
MISSISSIPPI RULES OF CIVIL PROCEDURE**

The Advisory Committee on Rules (“Committee”) recommends that the Court adopt amendments to Rule 26 of the Mississippi Rules of Civil Procedure and to its Comment. In support thereof, the Committee would show unto the Court the following:

1.

Given the advancement of technology and its ever increasing presence in litigation, the Committee recommends amending Rule 26(b)(1) to delete the reference to “electronic or magnetic data” and to insert and substitute “electronically stored information”. Further, the Committee recommends striking in whole Rule 26(b)(5) regarding discovery of electronic data and adopting in its stead the following:

(5) Specific Limitations on Discovery of 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 concerns of Rule 26(d)(2). The court may specify conditions for the discovery. Such conditions may include: (i) limiting the frequency or extent of electronic discovery; (ii) requiring the discovery to be conducted in stages with progressive showings by the requesting party of a need for additional information; (iii) limiting the sources of electronically stored information to be accessed or searched; (iv) limiting the amount or type of electronically stored information to be produced; (v) modifying the form in which the electronically stored information is to be produced; (vi) requiring a sample production of some of the electronically stored information to determine whether additional production is warranted; and (vii) allocating to the requesting party some or all of the cost of producing electronically stored information that is not reasonably accessible because of undue burden or cost.

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The proposed amendment of Rule 26(b)(5), in addition to eliminating the reference to “data or information in electronic or magnetic form” also provides a non-exhaustive list of the types of conditions a judge may place on electronic discovery.

2.

DISCOVERY PERTAINING TO EXPERT WITNESSES

Committee recommends that Rule 26(b)(4)(A) be amended to provide for two-tiered discovery regarding witnesses who will offer expert testimony at trial.

(A)(i) A requesting party may, through interrogatories, require any other party to identify any witness whom the responding party expects to call as a witness at trial to present evidence under Mississippi Rule of Evidence 702, 703, or 705.

With respect to retained and specially employed expert witnesses who are expected to testify at trial, the proposed amendment authorizes more detailed interrogatories than those permitted concerning other expert witnesses, (i.e., the treating physician, the mechanic who repairs the vehicle, the plumber, etc.) expected to testify

because a party can expect retained and specially employed experts to fully cooperate during discovery and trial.

a. Proposed amendment Rule 26(b)(4)(A)(ii) authorizes interrogatories requesting not only a statement of the opinions the expert is expected to offer and the basis and reasons therefore, but also a statement of the facts and data considered, not just those relied upon by the expert as well as information concerning the witness's qualifications, publications, previous expert testimony, the witness's compensation to be paid; and a list of any exhibits that will be used to summarize or support the opinions.

(ii) If such witness has been retained or specially employed to provide expert testimony, the requesting party may, through interrogatories, require the responding party to state the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the facts or data considered by the witness in forming the opinions, regardless of when and how the facts or data were made known to the witness; any exhibits that will be used to summarize or support the opinions; the witness's qualifications, including a list of all publications authored by the witness in the previous ten years; a list of cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and, for retained experts, a statement of the compensation to be paid for the study and testimony in the case.

b. Proposed amendment Rule 26(b)(4)(A)(iii) establishes a more limited scope for interrogatories concerning expert witnesses who were not retained or specially employed but who are expected to testify at trial, i.e., treating physicians, who will often offer expert testimony at trial even though they have not been retained or specially employed by a party. The more limited duty to respond to interrogatories concerning this category of experts is based upon the recognition that some such witnesses may not fully cooperate with the party who intends to call them at trial thereby making it difficult or

impossible for the party intending to call such witness to fully and adequately respond to interrogatories requesting the more detailed information that is discoverable with respect to retained or specially employed expert witnesses expected to testify at trial. A party's response under Rule 26(b)(4)(A)(iii) would be sufficient if it gives reasonable notice of the expert's testimony, taking into account the limitations of the party's knowledge of the facts known by and the opinions held by the expert.

(iii) If such witness has not been retained or specially employed to provide expert testimony, the requesting party may, through, interrogatories, require the responding party to state the subject matter on which the witness is expected to present evidence under Mississippi Rule of Evidence 702, 703, or 705; and a summary of the facts and opinions to which the witness is expected to testify.

c. Proposed amendment Rule 26(b)(4)(A)(iv) permits the deposition of expert witnesses once the interrogatory response has been received and the timing of said deposition.

(iv) A party may depose any person who has been identified as a witness who will present evidence at trial under Mississippi Rule of Evidence 702, 703 or 705. Such expert depositions shall not be taken until the party desiring to depose such expert has received interrogatory responses concerning such expert's expected testimony.

d. Proposed amendment Rule 26(b)(4)(C) and Rule 26(b)(4)(D) grant trial preparation material or "work product" protection to draft responses to expert interrogatories and certain attorney-expert communications in an effort to avoid costly and inefficient discovery and to encourage more open and robust communication between the attorney and expert so that the attorney and expert may come to a better understanding of the case. The protection is not absolute. A party may be entitled to overcome the trial preparation material protection, pursuant to Rule 26(b)(3).

(C) Rule 26(b)(3) protects drafts of any interrogatory responses required under Rule 26(b)(4)(A)(ii) regardless of the form in which the draft is recorded.

(D) Rule 26(b)(3) protects communications between the party's attorney and any expert witness who has been retained or specially employed to present evidence at trial under Mississippi Rules of Evidence 702, 703 or 705, regardless of the form of the communications, except to the extent that the communications: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

e. Proposed amendment Rule 26(b)(4)(E) addresses compensation of a retained or specially employed expert witness appearing for a deposition and for discovery obtained under Rule 26(b)(4)(B).

~~(C)~~ (E) Unless manifest injustice would result, ~~(i)~~ the court shall require ~~that the party seeking discovery taking the deposition of an opposing party's expert who has been specially retained or employed to present expert testimony at trial to pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(4)(A)(ii) and (b)(4)(B) giving deposition testimony and a reasonable fee for up to two hours actually spent preparing for such deposition. and (ii)~~ With respect to discovery obtained under subsection ~~(b)(4)(A)(ii) of this rule, the court may require, and with respect to discovery obtained under subsection~~ (b)(4)(B) of this rule, the court shall require ~~the~~ the party seeking discovery: (i) to pay the expert a reasonable fee for time spent in responding to such discovery; and (ii) to pay the other party who retained or specially employed the expert a fair portion of the fees and expenses reasonably incurred by the latter such party in obtaining the facts and opinions from the expert.

3.

The Committee recommends adopting proposed Rule 26(b)(6) which requires a responding party to generally describe information withheld from discovery based on an allegation of privilege or trial preparation material and establishes a process to deal with inadvertent production of privileged or trial preparation material.

(6) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, electronically stored information, or tangible things not

produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

4.

Committee recommends amendments as follows to Rule 26(d) which adds a provision setting out considerations for the limiting of discovery by the court:

(d) Protective Orders.

(1) In General. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending, or in the case of a deposition the court that issued a subpoena therefor, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

- (1) (A) that the discovery not be had;
- (2) (B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) (C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) (D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) (E) that discovery be conducted with no one present except persons designated by the court;
- (6) (F) that a deposition after being sealed is to be opened only by order of the court;
- (7) (G) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- (8) (H) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

~~(9) (I) the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, oppression or undue burden or expense, including provision for that payment of some or all of the expenses attendant upon such deposition or other discovery device be made by the party seeking same.~~

(2) Limiting Discovery. In determining whether to enter an order limiting the frequency or extent of discovery, the court may consider, among other things, whether 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; whether the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; and whether the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving those issues.

(3) Ordering Discovery. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(4) Awarding Expenses. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

5.

Committee recommends the following amendment to Rule 26(f) pertaining to supplementation of discovery responses:

f) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty ~~seasonably~~ to seasonably supplement that party's response with respect to any question directly addressed to ~~(A) the identity and location of persons (i) (A) having knowledge of discoverable matters, or (ii) (B) who may be called as witnesses at the trial, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony.~~ A party is also under a duty to seasonably supplement that party's response to any interrogatory authorized pursuant to subsection (b)(4)(A)(i),(ii) or (iii) of this rule.

(2) A party is under a duty ~~seasonably~~ to seasonably amend a prior response if that party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

6.

Attached hereto as Exhibit 1 to this motion is a copy of the proposed changes/amendments and the proposed amended and explanatory comment.

7.

Attached as Exhibit 2 to this motion is a copy of the entire text of Rule 26 with the proposed amendments and deletions.

The Committee respectfully requests that the Court consider the proposed amendments to Rule 26 of the Mississippi Rules of Civil Procedure and requests an opportunity, if it pleases the Court, to meet with the Court to discuss the proposed amendments, especially the two tiered approach to discovery as to experts and those pertaining to the discovery of electronically stored information.

Respectfully submitted, this, the 16th day of September, A.D., 2011.

MISSISSIPPI SUPREME COURT
ADVISORY COMMITTEE ON RULES

BY: _____
COLETTE A. OLDMIXON, Chair

Rule 26. General Provisions Governing Discovery

(a) Discovery methods.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party. The discovery may include the existence, description, nature, custody, condition and location of any books, documents, ~~electronic or magnetic data~~ electronically stored information, or other tangible things, and the identity and location of persons (i) having knowledge of any discoverable matter or (ii) who may be called as witnesses at the trial. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Insurance Agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial Preparation: Materials.*

(4) *Trial Preparations: Experts.*

Discovery of facts known and opinions held by experts, otherwise discoverable under subsection (b)(1) of this rule ~~and acquired or developed in anticipation of litigation or for trial,~~ may be obtained only as follows:

~~(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.~~

(A)(i) A requesting party may, through interrogatories, require any other party to identify any witness whom the responding party expects to call as a witness at trial to present evidence under Mississippi Rule of Evidence 702, 703, or 705.

EXHIBIT 1

(ii) If such witness has been retained or specially employed to provide expert testimony, the requesting party may, through interrogatories, require the responding party to state the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the facts or data considered by the witness in forming the opinions, regardless of when and how the facts or data were made known to the witness; any exhibits that will be used to summarize or support the opinions; the witness's qualifications, including a list of all publications authored by the witness in the previous ten years; a list of cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and, for retained experts, a statement of the compensation to be paid for the study and testimony in the case.

(iii) If such witness has not been retained or specially employed to provide expert testimony, the requesting party may, through, interrogatories, require the responding party to state the subject matter on which the witness is expected to present evidence under Mississippi Rule of Evidence 702, 703, or 705; and a summary of the facts and opinions to which the witness is expected to testify.

~~(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subsection (b)(4)(C) of this rule, concerning fees and expenses, as the court may deem appropriate.~~

(iv) A party may depose any person who has been identified as a witness who will present evidence at trial under Mississippi Rule of Evidence 702, 703 or 705. Such expert depositions shall not be taken until the party desiring to depose such expert has received interrogatory responses concerning such expert's expected testimony.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Rule 26(b)(3) protects drafts of any interrogatory responses required under Rule 26(b)(4)(A)(ii) regardless of the form in which the draft is recorded.

(D) Rule 26(b)(3) protects communications between the party's attorney and any expert witness who has been retained or specially employed to present evidence at trial under Mississippi Rules of Evidence 702, 703 or 705, regardless of the form of the communications, except to the extent that the communications: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

~~(C)~~ (E) Unless manifest injustice would result, ~~(i)~~ the court shall require ~~that the party seeking discovery taking the deposition of an opposing party's expert who has been specially retained or employed to present expert testimony at trial to pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(4)(A)(ii) and (b)(4)(B) giving deposition testimony and a reasonable fee for up to two hours actually spent preparing for such deposition.~~ ~~and (ii)~~ With respect to discovery obtained under subsection (b)(4)(A)(ii) of this rule, the court may require, and with respect to discovery obtained under subsection (b)(4)(B) of this rule, the court shall require ~~—~~ the party seeking discovery: (i) to pay the expert a reasonable fee for time spent in responding to such discovery; and (ii) to pay the ~~other~~ party who retained or specially employed the expert a fair portion of the fees and expenses reasonably incurred by ~~the latter~~ such party in obtaining the facts and opinions from the expert.

~~(5) *Electronic Data.* To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot through reasonable efforts retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.~~

~~(5) *Specific Limitations on Discovery of 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 concerns of Rule 26(d)(2). The court may specify conditions for the discovery. Such conditions may include: (i) limiting the frequency or extent of electronic discovery; (ii) requiring the discovery to be conducted in stages with progressive showings by the requesting party of a need for additional information; (iii) limiting the sources of electronically stored information to be accessed or searched; (iv) limiting the amount or type of electronically stored information to be produced; (v) modifying the form in which the electronically stored information is to be produced; (vi) requiring a sample production of some of the electronically stored information to determine whether additional production is warranted; and (vii) allocating to the requesting party some or all of the cost of producing electronically stored information that is not reasonably accessible because of undue burden or cost.~~

(6) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, electronically stored information, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Discovery Conference.

(d) Protective Orders.

(1) In General. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending, or in the case of a deposition the court that issued a subpoena therefor, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

- ~~(1)~~ (A) that the discovery not be had;
- ~~(2)~~ (B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- ~~(3)~~ (C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- ~~(4)~~ (D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- ~~(5)~~ (E) that discovery be conducted with no one present except persons designated by the court;
- ~~(6)~~ (F) that a deposition after being sealed is to be opened only by order of the court;
- ~~(7)~~ (G) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- ~~(8)~~ (H) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

~~(9) (I) the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, oppression or undue burden or expense, including provision for that payment of some or all of the expenses attendant upon such deposition or other discovery device be made by the party seeking same.~~

(2) Limiting Discovery. In determining whether to enter an order limiting the frequency or extent of discovery, the court may consider, among other things, whether 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; whether the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; and whether the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving those issues.

(3) Ordering Discovery. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(4) Awarding Expenses. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(e) Sequence and Timing of Discovery.

(f) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty ~~seasonably~~ to seasonably supplement that party's response with respect to any question directly addressed to ~~(A) the identity and location of persons~~ ~~(i) (A) having knowledge of discoverable matters, or~~ ~~(ii) (B) who may be called as witnesses at the trial, and~~ ~~(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony.~~ A party is also under a duty to seasonably supplement that party's response to any interrogatory authorized pursuant to subsection (b)(4)(A)(i),(ii) or (iii) of this rule.

(2) A party is under a duty ~~seasonably~~ to seasonably amend a prior response if that party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective _____, Rule 26(b) was amended. Rule 26(b)(4) was amended so as to provide for two-tiered discovery regarding witnesses who will offer expert testimony at trial. The amended rule authorizes more detailed interrogatories concerning expert witnesses who are retained or specially employed and more general interrogatories concerning other witnesses who will provide expert testimony. The amendment also authorizes depositions of any witness who will provide expert testimony at trial. Rule 26(b)(C) and (D) have amended so that certain communications between a party and a party's expert who has been retained or specially employed to provide expert testimony at trial are deemed trial preparation material. Rule 26(b)(5) governing discovery of electronically stored information was amended so as to refer to "electronically stored information" rather than "data or information in electronic or magnetic form." The amendment also provides a non-exhaustive list of the types of conditions a judge may place on electronic discovery. Rule 26(b) was further amended so as to include subsection (6), which requires a responding party to generally describe information withheld from discovery based an allegation of privilege or trial preparation material and established a process to deal with inadvertent production of privileged or trial preparation material.

Effective May 29, 2003, Rule 26(b) was amended by adding subsection (5) governing discovery of data or information in electronic or magnetic form.

Effective April 13, 2000, Rule 26(c) was amended to allow the court on its own motion to convene a discovery conference, 753-754 So. 2d XVII (West Miss.Cas. 2000).

Effective March 13, 1991, Rule 26(b)(1)(ii) was amended to delete the oral testimony of witnesses from the listing of matter that might be discovered by a party. Rule 26(d) was amended to provide that in the case of depositions protective orders might be made by the court that issued a subpoena therefor. 574-576 So. 2d XXIII (West Miss. Cas. 1991).

Effective March 1, 1989, Rule 26(b)(1) and Rule 26(f)(1) were amended to provide for the identification of (and supplementation of the prior identification of) those, in addition to experts, who may be called as witnesses at the trial. 536-538 So. 2d XXIV (West Miss. Cas. 1989).

COMMENT

~~*With two important exceptions MRCP 26 is identical to Miss. Code Ann. § 13-1-266 (1972); subdivision 26(b)(1) narrows the scope of permissible discovery, although it does permit the discovery of the identity and location of persons who may be called as*~~

~~witnesses at the trial; a new subdivision (c) is added and the original subdivisions are renumbered accordingly.~~

~~Sweeping and abusive discovery is encouraged by permitting discovery confined only by the "subject matter" of a case—the language of [Miss. Code Ann. § 13-1-226\(b\)](#) (1972)—rather than limiting it to the issues presented. Discovery should be limited to the specific practices or acts that are in issue. Determining when discovery spills beyond "issues" and into "subject matter" will not always be easy, but M.R.C.P. 26(b)(1) is intended to favor limitations, rather than expansions, on permissible discovery. Accordingly, "admissible evidence" referred to in the last sentence of 26(b)(1) must be limited by the new relevancy which emerges from the term "issues," rather than from the more sweeping term "subject matter."~~

~~Rule 26(b) was amended effective May 29, 2003, adding subsection (5) to make specific provision for discovery of data and information existing in electronic and magnetic form. Recognizing that special problems may exist in the retrieval of such data, the rule limits the duty to that of production of electronic and magnetic data to that which is reasonably available to the responding party in its ordinary course of business. Further, if extraordinary steps are required to retrieve and produce the information, the court may require the requesting party to pay the expense of those steps, in addition to costs which may be assessed under Rule 26(d)(9). The production of data compilations which are subject to production under Rule 34 is also subject to the limitations of Rule 26(b)(5).~~

~~Rule 26(c) establishes a discovery conference convened on the court's own motion or at the request of any party. This conference is a corollary to the limitation on the scope of discovery dictated by Rule 26(b)(1). Whether the conference is convened on the court's own motion or upon a litigant's certified request, the court has control over the time of its convening and the scope of its reach.~~

~~Rule 26(c) provides the procedure for early judicial control but continues to impose principal responsibility upon the litigating bar for the preparation of a case. In the great majority of cases, opposing counsel should be able, without judicial intervention, to formulate an appropriate plan and schedule of discovery in relation to issues readily defined by agreement. In those instances, however, where it would facilitate the discovery process, the court may hold a discovery conference on its own motion or upon the request of either party.~~

~~The discovery conference will produce an order defining: (a) a "plan" in which the types and subjects of discovery are set forth, e. g., oral depositions of A, B and C; production of contracts and any letters, correspondence or memoranda explaining or modifying them, etc.; (b) a "schedule" for discovery which specifies the time and place for discovery events, e. g., the dates and places for the taking of depositions of A, B and C, or the time within which documents are to be produced, and (c) such "limitations" as might otherwise be employed in protective orders, e. g., the documents of C shall be disclosed only to B's lawyers.~~

The rule also provides for "allocation of expenses." This provision would permit courts, as justice dictates, to reassign the usual financial burdens of discovery. For example, a court might condition discovery demanded by party A upon the payment by A of all or part of party B's expenses, including attorneys' fees.

An early accord or order on discovery may require later modification. Rule 26(c) allows such amendments freely. Again, cooperation among counsel should be the rule rather than the exception.

Rule 26(b)(2) limits discovery to "any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party." Earlier precedent authorized discovery of any matter, not privileged, relevant to the "subject matter" of the case. The current rule limiting discovery to the issues raised by any claim or defense was intended to narrow the scope of discovery.

Rule 26(b)(4)(A) establishes a two-tiered procedure for discovery concerning witnesses who will provide expert testimony at trial. With respect to retained and specially employed expert witnesses who are expected to testify at trial, the rule authorizes more detailed interrogatories than those permitted concerning other expert witnesses expected to testify at trial because a party can expect retained and specially employed expert witnesses to fully cooperate during discovery and trial. Thus, the rule authorizes interrogatories requesting not only a statement of the opinions the expert is expected to offer and the basis and reasons therefore, but also a statement of the facts and data considered, not just those relied upon, by the expert as well as information concerning the witness's qualifications, publications and previous expert testimony. Although Rule 26(b)(4)(A)(ii) authorizes interrogatories concerning exhibits that will be used to support or illustrate a retained or specially employed expert witness's opinion expected to be offered at trial, a complete response to such an interrogatory may not be possible until closer to trial because some such exhibits may not be created until they are actually needed for trial. Thus, a response or supplemented response concerning such exhibits should not be deemed untimely if it was reasonably made in advance of trial. Rule 26(b)(4)(A)(iii) establishes a more limited scope for interrogatories concerning expert witnesses who were not retained or specially employed but who are expected to testify at trial. Treating physicians and public accident investigators will often offer expert testimony at trial even though they have not been retained or specially employed by a party. The more limited duty to respond to interrogatories concerning this category of experts is based upon the recognition that some such witnesses may not fully cooperate with the party who intends to call them at trial thereby making it difficult or impossible for the party intending to call such witness at trial to fully and adequately respond to interrogatories requesting the more detailed information that is discoverable with respect to retained or specially employed expert witnesses expected to testify at trial. A response under Rule 26(b)(4)(A)(iii) is sufficient if it gives reasonable notice of the expert's testimony, taking into account the limitations of the party's knowledge of the facts known by and the opinions held by the expert.

Rule 26(b)(4)(C) & (D) grant trial preparation material or “work product” protection to draft responses to expert interrogatories and certain attorney-expert communications in an effort to avoid costly, and oftentimes inefficient, discovery and to encourage more open and robust communication between the attorney and expert so that the attorney and expert may come to a better mutual understanding of the case. The protection is not absolute. Discovery may be had in the three excepted areas. In addition, pursuant to Rule 26(b)(3), a party may overcome the trial preparation material protection by showing a substantial need for the material in preparation of the case and an inability to obtain the substantial equivalent without undue hardship. The protection is not meant to foreclose inquiry into whether the expert explored other theories in the case at hand; whether the expert has ever explored other theories that were not explored in the case at hand, and if so why such theories were not explored in the case at hand; whether the expert considered any facts which were not relied upon and, if so, why such facts were not relied upon; whether any tests were run or models developed other than those disclosed in interrogatory responses and the results of such tests and/or models; and whether anybody other than the party’s attorney provided support or participation in framing the opinion.

Rule 26(b)(5) governs discovery of electronically stored information and provides that a party may initially refuse to produce electronically stored information from a source that is not reasonably accessible because of undue burden or cost. The rule further provides, however, that a court may grant a motion to compel discovery from such sources upon a showing of good cause after taking into account factors such as the burden, expense and likely benefit of such discovery. The rule explicitly authorizes a court to order the requesting party to pay for some or all of the costs associated with discovery of electronically stored information from a source that is not reasonably accessible.

Rule 26(b)(6) requires a party withholding information based on a claim of privilege or trial preparation material to generally describe such information so as to enable the requesting party to assess the claim. It also establishes a procedure to govern inadvertent disclosure of privileged or trial preparation material.

Rule 26(c) authorizes the court to hold a discovery conference and thereafter enter an order governing discovery. The rule grants the court discretion to limit discovery and to allocate some or all of the expense of discovery to the requesting party when appropriate.

Rule 26(d) grants a court discretion to enter a protective order, among other things, prohibiting or limiting discovery after considering factors such as burden, cost, and likely benefit of such discovery.

[Comment amended effective March 1, 1989; April 13, 2000. Comment amended effective May 29, 2003.]

Rule 26. General Provisions Governing Discovery

(a) Discovery methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; and requests for admission. Unless the court orders otherwise under subdivisions (c) or (d) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party. The discovery may include the existence, description, nature, custody, condition and location of any books, documents, ~~electronic or magnetic data~~ electronically stored information, or other tangible things, and the identity and location of persons (i) having knowledge of any discoverable matter or (ii) who may be called as witnesses at the trial. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Insurance Agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including that party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

EXHIBIT 2

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is: (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparations: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under subsection (b)(1) of this rule ~~and acquired or developed in anticipation of litigation or for trial,~~ may be obtained only as follows:

~~(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.~~

(A)(i) A requesting party may, through interrogatories, require any other party to identify any witness whom the responding party expects to call as a witness at trial to present evidence under Mississippi Rule of Evidence 702, 703, or 705.

(ii) If such witness has been retained or specially employed to provide expert testimony, the requesting party may, through interrogatories, require the responding party to state the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the facts or data considered by the witness in forming the opinions, regardless of when and how the facts or data were made known to the witness; any exhibits that will be used to summarize or support the opinions; the witness's qualifications, including a list of all publications authored by the witness in the previous ten years; a list of cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and, for retained experts, a statement of the compensation to be paid for the study and testimony in the case.

(iii) If such witness has not been retained or specially employed to provide expert testimony, the requesting party may, through, interrogatories, require the responding party to state the subject matter on which the witness is expected to present evidence under Mississippi Rule of Evidence 702, 703, or 705; and a summary of the facts and opinions to which the witness is expected to testify.

~~(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subsection (b)(4)(C) of this rule, concerning fees and expenses, as the court may deem appropriate.~~

(iv) A party may depose any person who has been identified as a witness who will present evidence at trial under Mississippi Rule of Evidence 702, 703 or 705. Such expert depositions shall not be taken until the party desiring to depose such expert has received interrogatory responses concerning such expert's expected testimony.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Rule 26(b)(3) protects drafts of any interrogatory responses required under Rule 26(b)(4)(A)(ii) regardless of the form in which the draft is recorded.

(D) Rule 26(b)(3) protects communications between the party's attorney and any expert witness who has been retained or specially employed to present evidence at trial under Mississippi Rules of Evidence 702, 703 or 705, regardless of the form of the communications, except to the extent that the communications: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

~~(C)~~ (E) Unless manifest injustice would result, ~~(i)~~ the court shall require ~~that the party seeking discovery taking the deposition of an opposing party's expert who has been specially retained or employed to present expert testimony at trial to pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(4)(A)(ii) and (b)(4)(B) giving deposition testimony and a reasonable fee for up to two hours actually spent preparing for such deposition. and (ii)~~ With respect to discovery obtained under subsection ~~(b)(4)(A)(ii)~~ of this rule, the court may require, ~~and with respect to discovery obtained under subsection (b)(4)(B) of this rule, the court shall require~~ – the party seeking discovery: (i) to pay the expert a reasonable fee for time spent in responding to such discovery; and (ii) to pay the other party who retained or specially employed the expert a fair portion of the fees and expenses reasonably incurred by the latter such party in obtaining the facts and opinions from the expert.

~~(5) *Electronic Data.* To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot through reasonable efforts retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the~~

~~reasonable expenses of any extraordinary steps required to retrieve and produce the information.~~

(5) *Specific Limitations on Discovery of 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 concerns of Rule 26(d)(2). The court may specify conditions for the discovery. Such conditions may include: (i) limiting the frequency or extent of electronic discovery; (ii) requiring the discovery to be conducted in stages with progressive showings by the requesting party of a need for additional information; (iii) limiting the sources of electronically stored information to be accessed or searched; (iv) limiting the amount or type of electronically stored information to be produced; (v) modifying the form in which the electronically stored information is to be produced; (vi) requiring a sample production of some of the electronically stored information to determine whether additional production is warranted; and (vii) allocating to the requesting party some or all of the cost of producing electronically stored information that is not reasonably accessible because of undue burden or cost.

(6) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, electronically stored information, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Discovery Conference. At any time after the commencement of the action, the court may hold a conference on the subject of discovery, and shall do so if requested by any party. The request for discovery conference shall certify that counsel has conferred, or made reasonable effort to confer, with opposing counsel concerning the matters set forth in the request, and shall include:

1. a statement of the issues to be tried;
2. a plan and schedule of discovery;
3. limitations to be placed on discovery, if any; and
4. other proposed orders with respect to discovery.

Any objections or additions to the items contained in the request shall be served and filed no later than ten days after service of the request.

Following the discovery conference, the court shall enter an order fixing the issues; establishing a plan and schedule of discovery; setting limitations upon discovery, if any; and determining such other matters including the allocation of expenses, as are necessary for the proper management of discovery in the case.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

The court may impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement. Upon a showing of good cause, any order entered pursuant to this subdivision may be altered or amended.

(d) Protective Orders.

(1) In General. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending, or in the case of a deposition the court that issued a subpoena therefor, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

- ~~(1)~~ (A) that the discovery not be had;
- ~~(2)~~ (B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- ~~(3)~~ (C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- ~~(4)~~ (D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- ~~(5)~~ (E) that discovery be conducted with no one present except persons designated by the court;
- ~~(6)~~ (F) that a deposition after being sealed is to be opened only by order of the court;
- ~~(7)~~ (G) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

~~(8) (H)~~ that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

~~(9) (I) the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, oppression or undue burden or expense, including provision for that payment of some or all of the expenses attendant upon such deposition or other discovery device be made by the party seeking same.~~

(2) Limiting Discovery. In determining whether to enter an order limiting the frequency or extent of discovery, the court may consider, among other things, whether 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; whether the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; and whether the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving those issues.

(3) Ordering Discovery. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(4) Awarding Expenses. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(e) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of the parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(f) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty ~~seasonably~~ to seasonably supplement that party's response with respect to any question directly addressed to ~~(A)~~ the identity and location of persons ~~(i) (A)~~ having knowledge of discoverable matters, or ~~(ii) (B)~~ who may be called as witnesses at the trial, ~~and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony.~~ A party is also under a duty to seasonably supplement that party's response to any interrogatory authorized pursuant to subsection (b)(4)(A)(i),(ii) or (iii) of this rule.

(2) A party is under a duty ~~seasonably~~ to seasonably amend a prior response if that party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response, though correct when

made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective _____, Rule 26(b) was amended. Rule 26(b)(4) was amended so as to provide for two-tiered discovery regarding witnesses who will offer expert testimony at trial. The amended rule authorizes more detailed interrogatories concerning expert witnesses who are retained or specially employed and more general interrogatories concerning other witnesses who will provide expert testimony. The amendment also authorizes depositions of any witness who will provide expert testimony at trial. Rule 26(b) was amended so that certain communications between a party and a party's expert who has been retained or specially employed to provide expert testimony at trial are deemed trial preparation material. Rule 26(b)(5) governing discovery of electronically stored information was amended so as to refer to "electronically stored information" rather than "data or information in electronic or magnetic form." The amendment also provides a non-exhaustive list of the types of conditions a judge may place on electronic discovery. Rule 26(b) was further amended so as to include subsection (6), which requires a responding party to generally describe information withheld from discovery based an allegation of privilege or trial preparation material and established a process to deal with inadvertent production of privileged or trial preparation material.

Effective May 29, 2003, Rule 26(b) was amended by adding subsection (5) governing discovery of data or information in electronic or magnetic form.

Effective April 13, 2000, Rule 26(c) was amended to allow the court on its own motion to convene a discovery conference, 753-754 So. 2d XVII (West Miss. Cas. 2000).

Effective March 13, 1991, Rule 26(b)(1)(ii) was amended to delete the oral testimony of witnesses from the listing of matter that might be discovered by a party. Rule 26(d) was amended to provide that in the case of depositions protective orders might be made by the court that issued a subpoena therefor. 574-576 So. 2d XXIII (West Miss. Cas. 1991).

Effective March 1, 1989, Rule 26(b)(1) and Rule 26(f)(1) were amended to provide for the identification of (and supplementation of the prior identification of) those, in addition to experts, who may be called as witnesses at the trial. 536-538 So. 2d XXIV (West Miss. Cas. 1989).

COMMENT

With two important exceptions MRCP 26 is identical to Miss. Code Ann. § 13-1-266 (1972); subdivision 26(b)(1) narrows the scope of permissible discovery, although it does

~~permit the discovery of the identity and location of persons who may be called as witnesses at the trial; a new subdivision (c) is added and the original subdivisions are renumbered accordingly.~~

~~Sweeping and abusive discovery is encouraged by permitting discovery confined only by the "subject matter" of a case—the language of [Miss. Code Ann. § 13-1-226\(b\)](#) (1972)—rather than limiting it to the issues presented. Discovery should be limited to the specific practices or acts that are in issue. Determining when discovery spills beyond "issues" and into "subject matter" will not always be easy, but M.R.C.P. 26(b)(1) is intended to favor limitations, rather than expansions, on permissible discovery. Accordingly, "admissible evidence" referred to in the last sentence of 26(b)(1) must be limited by the new relevancy which emerges from the term "issues," rather than from the more sweeping term "subject matter."~~

~~Rule 26(b) was amended effective May 29, 2003, adding subsection (5) to make specific provision for discovery of data and information existing in electronic and magnetic form. Recognizing that special problems may exist in the retrieval of such data, the rule limits the duty to that of production of electronic and magnetic data to that which is reasonably available to the responding party in its ordinary course of business. Further, if extraordinary steps are required to retrieve and produce the information, the court may require the requesting party to pay the expense of those steps, in addition to costs which may be assessed under Rule 26(d)(9). The production of data compilations which are subject to production under Rule 34 is also subject to the limitations of Rule 26(b)(5).~~

~~Rule 26(c) establishes a discovery conference convened on the court's own motion or at the request of any party. This conference is a corollary to the limitation on the scope of discovery dictated by Rule 26(b)(1). Whether the conference is convened on the court's own motion or upon a litigant's certified request, the court has control over the time of its convening and the scope of its reach.~~

~~Rule 26(c) provides the procedure for early judicial control but continues to impose principal responsibility upon the litigating bar for the preparation of a case. In the great majority of cases, opposing counsel should be able, without judicial intervention, to formulate an appropriate plan and schedule of discovery in relation to issues readily defined by agreement. In those instances, however, where it would facilitate the discovery process, the court may hold a discovery conference on its own motion or upon the request of either party.~~

~~The discovery conference will produce an order defining: (a) a "plan" in which the types and subjects of discovery are set forth, e. g., oral depositions of A, B and C; production of contracts and any letters, correspondence or memoranda explaining or modifying them, etc.; (b) a "schedule" for discovery which specifies the time and place for discovery events, e. g., the dates and places for the taking of depositions of A, B and C, or the time within which documents are to be produced, and (c) such "limitations" as might otherwise be employed in protective orders, e. g., the documents of C shall be disclosed only to B's lawyers.~~

~~The rule also provides for "allocation of expenses." This provision would permit courts, as justice dictates, to reassign the usual financial burdens of discovery. For example, a court might condition discovery demanded by party A upon the payment by A of all or part of party B's expenses, including attorneys' fees.~~

~~An early accord or order on discovery may require later modification. Rule 26(c) allows such amendments freely. Again, cooperation among counsel should be the rule rather than the exception.~~

Rule 26(b)(2) limits discovery to "any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party." Earlier precedent authorized discovery of any matter, not privileged, relevant to the "subject matter" of the case. The current rule limiting discovery to the issues raised by any claim or defense was intended to narrow the scope of discovery.

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Rule 26(b)(4)(C) & (D) grant trial preparation material or “work product” protection to draft responses to expert interrogatories and certain attorney-expert communications in an effort to avoid costly, and oftentimes inefficient, discovery and to encourage more open and robust communication between the attorney and expert so that the attorney and expert may come to a better mutual understanding of the case. The protection is not absolute. Discovery may be had in the three excepted areas. In addition, pursuant to Rule 26(b)(3), a party may overcome the trial preparation material protection by showing a substantial need for the material in preparation of the case and an inability to obtain the substantial equivalent without undue hardship. The protection is not meant to foreclose inquiry into whether the expert explored other theories in the case at hand; whether the expert has ever explored other theories that were not explored in the case at hand, and if so why such theories were not explored in the case at hand; whether the expert considered any facts which were not relied upon and, if so, why such facts were not relied upon; whether any tests were run or models developed other than those disclosed in interrogatory responses and the results of such tests and/or models; and whether anybody other than the party’s attorney provided support or participation in framing the opinion.

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Rule 26(d) grants a court discretion to enter a protective order, among other things, prohibiting or limiting discovery after considering factors such as burden, cost, and likely benefit of such discovery.

[Comment amended effective March 1, 1989; April 13, 2000. Comment amended effective May 29, 2003.]

