

**DISCOVERY FROM PRIVATE INDIVIDUALS
IN THE UNITED STATES**

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In discussing United States rules of discovery with a foreign audience, it must first be explained that there are actually 51 separate sets of discovery rules extant in the United States. Each state has its own rules of discovery and there also are the Federal Rules of Civil Procedure which contain the discovery rules which are in effect for all of the federal courts in the country. Although many of the individual state discovery rules are modeled after, and in some cases are identical to the federal rules, there can be minor deviations from state to state. Therefore, this presentation shall deal with the federal rules of discovery, since they are uniform throughout the federal system.

The rules are designed to promote complete discovery of information from each side. The judicial philosophy behind the rules is predicated upon the assumption that there are simply not enough courtrooms, judges, or jurors should every litigant insist upon trying his or her case to a verdict. Therefore, or so the philosophical underpinning would have it, by complete disclosure of one's evidence to the opposition, the strengths and shortcomings of each side's case will become known. Further, once each side is aware of the other side's case, it will lead to a more rational evaluation of the merits and value of the case, and then theoretically, lead to an out of court resolution, thus opening the courtrooms for those cases which are incapable of resolution.

In order to accomplish this, the discovery rules are broken down into five discrete discovery categories. They are:

1. Depositions - FRCP 30 and 31
2. Interrogatories - FRCP 33
3. Requests for Production of Documents - FRCP 34
4. Physical and Mental Examinations - FRCP 35
5. Requests for Admission - FRCP 36

A deposition is a procedure where opposing counsel can ask questions of a party or a witness, sworn and under oath, in order to learn facts and theories about the case. The Rules contemplate two types of deposition technique. The more commonly used is a deposition by way of oral examination (FRCP 30). This technique is one where questions and answers are given orally, whether in person or under more modern technology, by telephone, videoconference or some other means. The other type of deposition is that which is given by written questions and answers (FRCP 31) which is an alternative to an in person examination. Depositions can be taken of any person - whether a party or not.

Interrogatories are a series of written questions which are addressed to a party and must be answered, also in writing, and also under oath. Note that this technique of discovery is available only as to a party.

In order to obtain documentary discovery, a request for production of documents can be issued to a party pursuant to FRCP 34. Again, this discovery is only available from a party to the litigation. Non-party discovery can be obtained, but the process requires the issuance of a subpoena to do so.

When the physical or mental status of a plaintiff is an issue, counsel may request an examination by an appropriate professional to be conducted. Ordinarily, this is a type of discovery directed only to the plaintiff. If this form of discovery is invoked, it is mandatory under the rule that the examiner's report be provided to counsel for the party who undergoes the examination.

Finally, the last type of discovery is a request for admission pursuant to FRCP 36. Requests for admission can be used to narrow the issues which must be tried in a case or to gain concessions of fact or law from an opposing party. It is also available to obtain agreement as to the genuineness of specific documents. This rule is in the discovery section of the FRCP, but technically, this is not discovery per se. It has more utility near the conclusion of discovery, as a means to streamline trial issues, based upon discovery already conducted.

In December of last year, dramatic amendments were incorporated into the Federal Rules of Civil Procedure. Specifically, FRCP 26 now contains the concept of proportionality with respect to discovery. Discovery sought now must be "proportional to the needs of the case..." The Rule also includes several factors to aid the parties and the court in making a determination of whether or not a discovery request is appropriately proportionate to the needs of the case. Those factors include the:

1. Importance of the issues at stake
2. Relative access to all of the information.
3. The parties' resources.
4. The importance of the discovery in resolving the issues
5. Whether the burden or expense of the proposed discovery outweighs the likely benefit.

Previously, the language in the Rule was that discovery need be "reasonably calculated to lead to the discovery of admissible evidence."

There is an ongoing debate between the plaintiff bar and the defense bar as to whether or not the proportionality standard indeed has replaced the "reasonably calculated" standard or if it still continues. It is much too early to make that determination since the Rule change is still relatively recent. However, it is anticipated that litigation in the form of motion practice may ensue to see how the Rule will actually affect real world litigation.