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V. DEPOSITIONS AND DISCOVERY

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; physical and mental examinations; and requests for admission.

(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 subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the 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 the other 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 the 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.

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. The provisions of Rule 37(a)(4) apply 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 Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(A)(i) If the information is not already ordered to be produced by Court scheduling or other orders, 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, 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, and to identify the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions, the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years, and the compensation to be paid for the study and testimony, provided however, that, unless otherwise ordered by the court, information relating to qualifications, publications and compensation need not be provided for experts who have been treating physicians of a party for any injury that is a subject of the litigation; (ii) A party may take the testimony of each

person whom another party has designated as an expert witness for trial by deposition pursuant to Rule 30 or Rule 31.

(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 as provided in Rule 35(b) or 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) Communications between the party's attorney and any testifying expert witness, regardless of the form of the communications and including drafts of Rule 26(b)(4) disclosures ordered by the court and reports to the attorney, are protected from discovery except to the extent that the communications (i) relate to or contain information about 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 on in forming the opinions to be expressed.

Communications between the party's attorney and any testifying expert witness not meeting one or more of the above three criteria may be obtained in discovery only (i) as provided in Rule 35(b) or (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(D) Unless manifest injustice would result, the court shall require that the party seeking discovery of the expert pay the expert a reasonable fee for time spent at the deposition. Upon a showing of good cause, the court may award additional reasonable fees and expenses of the expert for expert discovery pursuant to this rule.

(5) *Information Withheld under Claims of Privilege or Protection of Trial Preparation Materials; Inadvertent Production of Privileged or Trial Preparation Material*.

(A) Claim of Privilege and Identification Required. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents,

communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Inadvertent Production of Privileged or Trial Preparation Material. If information is inadvertently produced in discovery that 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 and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(6) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or expense. On application under Rule 26(g) 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 expense. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations and remedies of Rule 26(c). The court may specify conditions for the discovery and shall impose on the requesting party the reasonable expense of producing such electronically stored information.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, any justice or judge of the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including without limitation one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other

confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; (9) that the party taking the deposition pay the traveling expenses of the opposite party and of his attorney for attending the taking of the deposition; and (10) that a witness under the control of the party taking the deposition be required to be brought within the state for his deposition. The power of the court under this rule shall be exercised with liberality toward the accomplishment of its purpose to protect parties and witnesses.

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. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of 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.

(e) 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 supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, 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 person's testimony.

(2) A party is under a duty seasonably to amend a prior response if the 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.

(f) Filing of Discovery.

(1) Unless otherwise ordered by the court, or necessary for use in the proceeding, notices, written questions and transcripts of depositions prepared in accordance with Rule 5(f), interrogatories, requests pursuant to Rules 34 and 36, and answers, objections and responses thereto shall be served upon other parties but shall not be filed with the court. Notification of the method and date on which discovery papers were served on the parties shall be prepared and served on the parties with the discovery papers but shall not be filed with the clerk. The party who has served notice of a deposition or has otherwise initiated discovery shall be responsible for preserving and ensuring the integrity of original transcripts and discovery papers for a period of two years after final judgment for use by the court or other parties.

(2) If depositions, interrogatories, requests or answers or responses thereto are to be used at trial, other than for purposes of impeachment or rebuttal, or are necessary to a ruling on a motion, the complete original of the transcript of the discovery material to be used, prepared in accordance with Rule 5(f), shall be filed with the clerk 7 days prior to trial or at the filing of the motion insofar as their use can be reasonably anticipated by the parties. A party relying on discovery transcripts or materials in support of or in opposition to a motion shall file with the memorandum required by Rule 7(b)(3) a list of specific citations to the parts on which the party relies. Discovery transcripts and materials thus filed with the court shall be returned to appropriate counsel after final disposition of the case.

(g) Discovery Motions

(1) *Motions.* No written motions under Rule 26 through 37 shall be filed without the prior approval of a justice or judge of the court in which the action is pending. The moving party shall first confer with the opposing party in a good faith effort to resolve by agreement the issues in dispute. If the dispute is not resolved by agreement, the moving party shall request a hearing from the clerk by letter. The letter shall succinctly and without argument or citation describe the nature of the dispute and the relief requested. In cases involving objections to interrogatories or document requests, the moving party shall attach to the letter copies of only the specific objections in question and the specific interrogatories or

requests to which objection has been made. In exigent circumstances a request for a hearing may be made to the clerk by telephone or in person. The request for a hearing constitutes a representation to the court, subject to Rule 11, that the conference with the opposing party has taken place and that the moving party has made a good faith effort to resolve the dispute. The clerk shall inform the moving party of the manner, date and time of the hearing. The moving party shall provide prompt notice of the hearing to all the other parties. If the hearing is to be conducted by telephone conference or video conference, the moving party shall connect all other parties who elect to participate and shall initiate the telephone or video conference call to the court.

(2) *Hearing or Conference.* The court may issue an order without a hearing if the request is based on a failure to either answer or object to outstanding discovery requests. In all other cases the parties shall be prepared to offer oral argument at a hearing or a telephone or video conference on the discovery issues in question if scheduled by the court. No written argument shall be submitted and no motion papers shall be filed with the clerk without prior leave of the court.

(3) *Orders at Hearing.* The justice or judge may make such orders at the hearing as are necessary to resolve the dispute. Such orders shall be reduced to writing and shall constitute orders for purposes of Rule 37. If the motion is not decided at the hearing, the justice or judge may order a written motion and supporting memoranda to be filed under Rules 7 and 37 and may make such orders as are necessary to narrow or dispose of the dispute.

Advisory Note – June 2014

Subdivision (b)(4)(A)(i) is amended to make it clear that the use of interrogatories in expert discovery is an option if the court has not issued a scheduling order requiring expert disclosures and Rule 26(b)(4) information. Interrogatories are not mandatory under the Rule, nor are they the sole means for obtaining discovery of an expert.

The addition of the new subdivision (b)(4)(C) regarding communications between a party's attorney and testifying expert witnesses was prompted by similar changes to the Federal Rule, protecting draft expert disclosures and reports and certain other communications as work product. Under the State Rule and practice, there was no similar protection. The Committee debated the merits of allowing freer communications between lawyers and their experts without fear of discovery and the countervailing concerns that protecting those communications limits the

ability of opposing counsel to conduct meaningful cross-examination. The amended protective Rule and its exceptions attempt to strike a reasonable balance, obviating the cumbersome and artificial practice of communicating with experts only orally while ensuring that communications important for cross-examining experts remain discoverable. Because the amendment protects only communications between the lawyer and her expert, anything else that is otherwise discoverable remains discoverable. The facts observed, the information learned, and the opinions reached by the expert are not protected from discovery simply because they are shared with the attorney. Changes in the expert's opinions are discoverable regardless of the fact that those changes were conveyed to the attorney, but the communications between the expert and the attorney about those changes are protected unless they meet one of the three exceptions.

Advisory Note – July 2012

This change is for the benefit of the clerks' offices and is designed to eliminate unnecessary paper accumulations in the official file. The requirement that notifications including method and date of discovery be served with the discovery documents allows for ease of reference by the parties.

Advisory Committee Notes
December 2010

Rule 26(b)(4)(A)(ii) has been modified to allow the deposition of a party's retained expert as a matter of course, rather than on motion, consistent with common discovery practice in civil cases. This is also consistent with practice in Federal Court.

Rule 26(b)(4)(C) is amended to state more clearly the responsibility of a party seeking discovery to pay the expert's reasonable fee for time spent in a deposition. The amendment clarifies that the time for which compensation is to be paid is the time at the deposition. The Rule continues to allow parties to move the court for additional expert fees or expenses, if appropriate, upon a showing of good cause.

Advisory Note
January 2009

This amendment to Rule 26(f)(1), in combination with the amendment to Rule 79(a) eliminates the requirement that clerks docket notices regarding

discovery to reduce unnecessary work in overburdened clerks' offices. Placing notices in the file, date stamped when received, will provide a sufficient record of events should any question of timeliness or other compliance with the rules arise. The amendment also eliminates an outdated reference to the Appendix of Forms that no longer exists.

Advisory Committee Note
July 2008

Rule 26(b)(5)(B) is adopted to govern the inadvertent production of privileged or trial preparation material. Subdivision (b)(6) is adopted to regulate the discovery of "electronically stored information" where the production of such information would cause undue burden and expense. The term "electronically stored information" as used now in the Maine Rules of Civil Procedure is intended to have the same broad meaning set forth in Rule 34(a), which permits discovery of electronically stored information regardless of the medium in which the information is stored or the method by which it is retrieved. These amendments are part of amendments to Rules 16, 26, 33, 34 and 37 to address the discovery of electronically stored information. The amendments are generally taken from the 2006 amendments to the Federal Rules of Civil Procedure governing electronic discovery. The Advisory Committee's Notes to the federal amendments are instructive and should guide the interpretation of the Maine amendments.

The amendment to Rule 26(b)(5)(B) recognizes that in discovery, especially in the production of a large volume of electronically stored information, privileged information or trial preparation material may inadvertently be produced. In this context, the term "privilege" includes material or information that is confidential and protected from disclosure in discovery, whether by statute, privilege or otherwise. Under the amendments, if a party has inadvertently produced documents or information that is subject to a claim of privilege or protection as trial preparation material, the party making the claim must notify the receiving parties of the claim and the basis for it. After notification, the receiving party may not use or disclose the documents or information until the claim is resolved. The receiving party may, at its option, return, sequester or destroy the information, together with any copies it has made or disseminated. If the receiving party disputes the claim of privilege, the receiving party may properly present the information to the court under seal and request a determination of the claim under Rule 26 (g). Since information may have been delivered to expert witnesses or other persons involved in the case, the receiving party must also "take reasonable

steps to retrieve" the information. Throughout this process and until the claim is determined, the producing party must preserve the information so that it is available to the court. These requirements are generally consistent with the Law Court's holding in *Corey v. Norman Hanson & DeTroy*, 1999 ME196, ¶ 19, 742 A.2d 933, 941, especially in its teaching that an inadvertent production does not, without more, automatically waive a privilege.

The intent of the amendment is to recognize that given tight discovery schedules and the volume of electronically stored or other information produced, a producing party may not have identified every document on which a claim of privilege may be appropriate. The amendment provides a procedure by which the producing party may notify other parties of a claim of privilege, stop the use of the information, and have the issue promptly determined. By its terms, the rule applies only where the production has been truly "inadvertent," and it is not intended to be used where information was knowingly produced and because of a change of tactics or circumstances, the privilege is belatedly asserted. Of course, the amendment to Rule 26(b)(5)(B) as a rule of procedure does not create any substantive law concerning privilege, trial preparation material or waiver of these protections.

Rule 26(b)(6) is also adopted to make clear that a party need not provide discovery of electronically stored information if that information is not "reasonably accessible because of undue burden or expense." The rule is taken from its federal counterpart, with an adaption to Maine practice by referring to Rule 26(c) and using the term "expense" in Rule 26(c) rather than "cost" in the federal rule. No substantive difference is intended. The new subdivision implements the commonsense principle that discovery is not unlimited.

If electronically stored information cannot be retrieved or translated into reasonably usable form without "undue burden or expense," the producing party must identify that fact to the requesting party. If an application is made to produce the information under Rule 26(g), the party resisting discovery bears the initial burden to show the court that the information is not, in fact, "reasonably accessible because of undue burden or expense." The requesting party must then show "good cause" why the information should be produced notwithstanding the burden and expense. The court then considers whether the showings required by the rule have been made and it has broad discretion and remedial powers in addressing the issue. If the information can be reasonably produced, even if there is some burden or cost that is not "undue," production should simply be ordered as routine discovery. On the other hand, if the producing party meets its burden and the requesting party

cannot show good cause for the production, no production is to be ordered. If the showings have been made, the court may still consider whether production should be required under the circumstances. If production is required, the court should consider, as Rule 26(c) contemplates, the extent of the production and what conditions the court may order to eliminate or mitigate "undue burden or expense." Assuming some "undue burden or expense" remains, however, the rule, unlike its federal counterpart, mandates that the requesting party pay the reasonable expense of that production.

Advisory Committee Note
December 2007

The adoption of M.R. Civ. P. 26(b)(5)[A] is intended to provide a procedure for identifying information or material withheld under a claim of privilege or work product. The provision is a verbatim adoption of its federal counterpart, Fed. R. Civ. P. 26(b)(5)(A).

Present practice frequently is for the withholding party simply to invoke the privilege in an objection to the discovery, leaving the requesting party no basis on which to evaluate whether the privilege is properly invoked. In response, the requesting party occasionally demands a "privilege log" so detailed that the protection of afforded by the privilege is lost. In either case, the court has no basis on which to resolve the dispute efficiently. The purpose of the rule is not to create a burdensome duty to provide a detailed list of documents or information withheld. The intent of the rule is to require a general description of what is withheld so that the requesting party can decide whether to contest the claim and the court has some basis on which to resolve the dispute. Obviously, the court in resolving the issue may require more detail or an *in camera* inspection, but the rule should obviate some disputes entirely and provide a basis for resolving most disputes if they require judicial intervention.

Advisory Notes
2004

Rule 26(g)(1) & (2) are amended to state the court's authority to utilize video and telephone conferencing options.

Advisory Note
January 1, 2003

The purpose of the amendment to M.R. Civ. P. 26(b)(4)(A)(i) is to exempt treating physicians from providing information on qualifications, publications and compensation. In practice such information has proven difficult to obtain from treating physicians with busy practices and varying billing rates, and the need for such information is less for treating physicians than for experts retained for case-related purposes.

Advisory Committee's Notes
May 1, 1999

There are three amendments to Rule 26. In Rule 26(a), the former last sentence of the subdivision, specifying that the frequency of use of discovery methods was not limited, has been deleted. Given the specificity of the other discovery rules, the provision became superfluous.

New language is added to Rule 26(b)(4)(A)(i) to expand the information required to be produced in the designation of expert witnesses. Under the amendment, a party is required to identify information and exhibits used by the expert to form or support opinions, and to set forth the qualifications, compensation, and publications of the expert. The intent of the amendment is to catalogue information that is now routinely requested by opposing parties and routinely allowed by the court. Although the rule still states that a party may obtain this information "through interrogatories," as a practical matter, the automatic disclosure provisions of the scheduling order will require production of this information as a matter of course. It is the intent of the rule that a full, good faith disclosure be made to avoid issues concerning expert testimony arising for the first time at trial.

Advisory Committee's Notes
May 1, 1999 (Second)

Subdivision (g) has been abrogated and replaced. Although a good faith discovery conference is required to resolve disputes by agreement, the rule prohibits written discovery motions unless otherwise ordered by the court. Discovery disputes will now be resolved by telephone or personal conference *or hearing* of a justice or judge of the court in which the action is pending. The purpose of the amendment is to provide a swift, inexpensive means for judicial intervention to resolve discovery disputes and to keep the case moving forward according to the original deadlines entered by the scheduling order. Most discovery

issues can be quickly and efficiently resolved by a judicial officer without the necessity of written motions and memoranda.

In order to initiate the new process, the party requesting *court action* simply contacts the appropriate clerk *by letter or, in exigent circumstances, by telephone or in person*. The request itself constitutes a representation to the court, subject to the sanction of Rule 11, that the issue remains unresolved after a discovery conference had been conducted in good faith. The clerk then sets up a time for the hearing *or conference* with the court and informs the moving party, who is responsible for notifying all other parties and for initiating *any* telephone conference.

The hearing *or conference* is intended to be as informal as the process of requesting it. It is the moving party's obligation to provide an unargumentative letter to the court describing the dispute succinctly and enclosing the discovery requests and responses at issue. No written argument is to be submitted and no *other* papers are to be filed with the clerk without prior leave of the court. The letter and the materials are intended simply as a guide to the court in the resolution of the dispute.

The rule explicitly gives the justice or judge conducting the hearing the authority to make "such orders at the hearing as are necessary to resolve the dispute." The orders are to be reduced to writing and constitute "orders" for the purposes of sanctions under Rule 37. If it appears that the nature of the dispute is such that the court would find written submissions helpful, the court may order the parties to file written motions and supporting memoranda on some or all of the issues. The process is intended to be swift, practical, inexpensive and flexible.

Advisory Committee's Notes
February 15, 1996

Rule 26(f) is amended to make clear that miniaturized deposition transcripts may be served and filed as provided in the simultaneous amendment of Rule 5(f).

Advisory Committee's Notes
1992

Rule 26(g) is added. The provision is adapted from Local Rule 16(e) of the United States District Court for the District of Maine. Its purpose is to reduce the number of contested discovery motions by requiring the moving party to make a

good faith effort to confer with opposing counsel prior to filing a motion and to certify that the conference has occurred or that it was not held for stated reasons.

Advisory Committee's Notes
1985

Rule 26(f) is added to eliminate the requirement of filing discovery materials with the Court unless otherwise ordered, or unless the material is to be used in the proceeding. See also simultaneous amendments of M.R. Civ. P. 5(d) and 30(f)(1) and additions of Form 17. The amendment is applicable in the District Court by virtue of its incorporation in M.D.C.Civ.R. 26.

The rule is taken from Rule 16(d), (g) of the Rules of the United States District Court for the District of Maine and from F.R.Civ.P. 5(d), upon which the local rule is based. The new rule is deemed necessary because currently the filing of large volumes of interrogatory requests and responses and deposition transcripts poses a significant problem for Superior Court clerk's offices. Further, including discovery in court files makes those files much more difficult to review. The party initiating the discovery should file Official Form 17, added by simultaneous amendment, to provide information from which the clerk may docket the service to provide entries that stop the running of the two-year period of Rule 41(b).

Under paragraph (1) of the new rule, discovery materials are to be retained by the party serving notice of a deposition or otherwise initiating discovery for a period of two years after final judgment. Note that, in the event of an appeal, the final judgment referred to is that entered after disposition of the appeal. The burden remains upon the party who would use a deposition as evidence under Rule 32(a), or use other discovery materials as part of the record, to obtain the original or appropriate copies from the party having custody for appropriate filing. The duty to preserve the integrity of the materials is a matter of professional responsibility on the part of the lawyer having custody.

Paragraph (2), taken from D. Me. D.R. 16(g), provides the procedure for filing when discovery material is to be used at trial and makes plain that, to assure that the full context is available, the complete deposition or other matter must be filed.

Advisory Committee's Note
February 1, 1983

Rule 26(a) is amended to make the rule consistent with the recent revision of Rule 33 whereby the limitation on the number of written interrogatories was removed.

Advisory Committee's Notes
October 1, 1970

General Discussion of Discovery Amendments

The Federal Rules of Civil Procedure relating to discovery have been extensively amended, effective on July 1, 1970. See 48 F.R.D. 459-80 (1970). Those amendments which affect F.R. 26 and 29-37 and certain related rules such as Rules 5(a), 45(d) (1), and 69 and Form 24 have been under consideration by the federal Advisory Committee on Civil Rules for several years. In November, 1967, that Committee presented to Bench and Bar a Preliminary Draft of the proposed Amendments for their comments.

This comprehensive review of the federal discovery rules, the first undertaken since their promulgation in 1938, has resulted in improvements which on their merits commend themselves for adoption in State practice. In addition, it is desirable for the convenience of Maine practicing lawyers to maintain substantial uniformity between the Federal Rules of Procedure and the Maine Rules of Civil Procedure. Substantial uniformity was a guiding principle in the original promulgation in 1959 of the Maine Rules. Also, a substantial body of amendments were made to the Maine Rules effective November 1, 1966, in order to conform to 1963 and 1966 Amendments to the Federal Rules. For both of these reasons, namely, the inherent merit of the amendments to the federal discovery rules and the desirability of maintaining uniformity between the State and federal practice, the Advisory Committee recommends amendment of the Maine discovery rules. At the same time, the Committee recommends that a limited number of differences be maintained for the same reasons which were deemed sufficient in 1959. First, whereas F.R. 30(b) provides for merely "reasonable notice" of the taking of a deposition, Maine Rule 30 requires a minimum of seven days' notice of a deposition unless the court otherwise orders. Secondly, whereas F.R. 33 puts no limitation upon the number or frequency of interrogatories, Maine Rule 33 permits, except by court order, only one set of interrogatories, numbering not in excess of thirty.

The principal changes in the discovery rules have been explained in an introductory statement by the federal Advisory Committee on Civil Rules in the following terms:

> "The discovery rules, as adopted in 1938, were a striking and imaginative departure from tradition. It was expected from the outset that they would be important, but experience has shown them to play an even larger role than was initially foreseen. Although the discovery rules have been amended since 1938, the changes were relatively few and narrowly focused, made in order to remedy specific defects. The amendments now proposed reflect the first comprehensive review of the discovery rules undertaken since 1938. These amendments make substantial changes in the discovery rules. Those summarized here are among important changes.
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> "Scope *of Discovery*. New provisions are made and existing provisions changed affecting the scope of discovery: (1) The contents of insurance policies are made discoverable (Rule 26(b) (2)). (2) A showing of good cause is no longer required for discovery of documents and things and entry upon land (Rule 34). However, a showing of need is required for discovery of 'trial preparation materials other than a party's discovery of his own statement and a witness discovery of his own statement; and protection is afforded against disclosure in such documents of mental impression, conclusions, opinions, or legal theories concerning the litigation. (Rule 26(b) (3)). (3) Provision is made for discovery with respect to experts retained for trial preparation, and particularly those experts who will be called to testify at trial (Rule 26(b) (4)). (4) It is provided that interrogatories and requests for admission are not objectionable simply because they relate to matters of opinion or contention, subject of course to the supervisory power of the court (Rules 33(b), 36(a)). (5) Medical examination is made available as to certain nonparties. (Rule 35(a)).
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> "*Mechanics of Discovery*. A variety of changes are made in the mechanics of the discovery process, affecting the sequence and timing of discovery, the respective obligations of the parties with respect to requests, responses, and motions for court orders, and the related powers of the court to enforce discovery requests and to protect against their abusive use. A new provision eliminates the automatic grant of priority in discovery to one side (Rule 26(d)). Another provides that a party is not under a duty to supplement his responses to requests for discovery, except as specified (Rule 26(e)).

"Other changes in the mechanics of discovery are designed to encourage extrajudicial discovery with a minimum of court intervention. Among these are the following: (1) The requirement that a plaintiff seek leave of court for early discovery requests is eliminated or reduced, and motions for a court order under Rule 34 are made unnecessary. Motions under Rule 35 are continued. (2) Answers and objections are to be served together and an enlargement of the time for response is provided. (3) The party seeking discovery, rather than the objecting party, is made responsible for invoking judicial determination of discovery disputes not resolved by the parties. (4) Judicial sanctions are tightened with respect to unjustified insistence upon or objection to discovery. These changes bring Rules 33, 34, and 36 substantially into line with the procedure now provided for depositions.

"Failure to amend Rule 35 in the same way is based upon two considerations. First, the Columbia Survey (described below)[*]* finds that only about 5 percent of medical examinations require court motions, of which about half result in court orders. Second and of greater importance, the interest of the person to be examined in the privacy of his person was recently stressed by the Supreme Court in Schlagenhauf v. Holder, 379 U.S. 104 (1964). The court emphasized the trial judge=s responsibility to assure that the medical examination was justified, particularly as to its scope.

"*Rearrangement of Rules*. A limited rearrangement of the discovery rules has been made, whereby certain provisions are transferred from one rule to another. The reasons for this rearrangement are discussed below in a separate section of this statement, and the details are set out in a table at the end of this statement.

"*Optional Procedures*. In two instances, new optional procedures have been made available. A new procedure is provided to a party seeking to take the deposition of a corporation or other organization (Rule 30(b) (6)). A party on whom interrogatories have been served requesting information derivable from his business records may under specified circumstances produce the records rather than give answers (Rule 33(c)).

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[*] [Field. McKusick & Wroth comment: "*See* Field, McKusick & Wroth § 26.1, n. 2; and Glaser, *Pre-Trial Discovery and the Adversary System* (1968)." Field, McKusick & Wroth, *Maine Civil Practice* at 204 (Supp. 1981).]

"*Other Changes*. This summary of changes is by no means exhaustive. Various changes have been made in order to improve, tighten, or clarify particular provisions, to resolve conflicts in the case law, and to improve language. All changes, whether mentioned here or not, are discussed in the appropriate note for each rule @ (48 F.R.D. 487-89 (1970)).

In general, the original discovery rules, both federal and Maine, were structured in terms of individual discovery devices. For example, Rules 26 and 28 through 32 dealt with taking depositions and Rules 33 to 36 dealt with written interrogatories, production of documents and things, physical or mental examination, and requests for admission. The amendment of the federal discovery rules makes Rule 26 the repository of general provisions applicable to all or most of the discovery devices. It includes new provisions in regard to the scope, timing and regulation of discovery generally. Other provisions in the existing Rule 26 relating only to depositions are transferred to Rules 30, 31 and 32. This rearrangement of the discovery rules produces a more coherent and intelligent pattern.

Table Showing Rearrangement of Rules

Existing Rule No.	New Rule No.
26(a)	30(a), 31(a)
26(c)	30(c)
26(d)	32(a)
26(e)	32(b)
26(f)	32(c)
30(a)	30(b)
30(b)	26(c)
32	32(d)

The foregoing over-all explanation of the federal discovery amendments serves a similar role for the Maine amendments. [A] separate Advisory Committee's Note accompanying each of the amended discovery rules points out the particular changes made thereby in Maine practice and the differences between the federal and the State amendments. For a study in depth of the background of the federal and Maine discovery amendments, resort may be had to the extensive federal Advisory Committee's Notes. See 48 F.R.D. 491-545.

Amendments to Rule 26

In carrying out the limited rearrangement of the discovery rules in order to establish Rule 26 as a rule governing in general all six discovery devices, certain subdivisions of existing Rule 26 are moved elsewhere: Existing Rule 26(a) dealing with when depositions may be taken, is moved to Rule 30(a) as to oral depositions and to Rule 31(a) as to depositions upon written questions. Existing Rule 26(c), relating to examination and cross-examination of deponents, is moved to Rule 30 (c). Existing Rules 26(d), (e), and (f), relating to the use of depositions, objections to admissibility, and the effect of taking and using depositions, become Rules 32(a), (b) and (c), where they are combined with the existing subject matter of Rule 32, which becomes subdivision (d), relating to the effect of errors and irregularities in depositions. To complete the rearrangement affecting Rule 26, existing Rule 30(b) providing for orders for the protection of parties and witnesses is moved to become new Rule 26(c).

Rule 26(a) merely lists the six methods of discovery and states that the frequency of use of such methods is unlimited, except as the use of written interrogatories is limited by Rule 33(a) to one set of not more than thirty interrogatories and also except as the court may otherwise direct in a protective order.

Rule 26(b) prescribes the permissible scope of discovery. The general statement of scope contained in Rule 26(b) (1) is in substance unchanged from existing Rule 26(b), broadened to apply to all discovery methods. Rule 26(b) (2) makes insurance coverage discoverable, but it is expressly declared that disclosure does not make the facts concerning insurance coverage admissible in evidence at trial. As the federal Advisory Committee's Note points out, "Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation." 48 F.R.D.487, 499. In light of the realities of personal injury and property damage litigation today, discovery of insurance coverage is as necessary to "the just, speedy, and inexpensive determination of every action" called for by Rule 1 as is discovery of the facts pertinent to liability and damages.

Rule 26(b) (3) declares the terms upon which trial preparation materials may be discovered. Maine Rule 26(b) as adopted in 1959 anticipated the express provision now contained in the new F.R.26(b) (3), requiring a special showing for the discovery of documents and tangible things prepared in anticipation of litigation or

for trial by the adverse party or his representative and giving absolute protection of disclosure of an attorney's mental impressions, conclusions, opinions or legal theories. The first paragraph of new Rule 26(b) (3) thus works no substantial change in Maine practice. Rule 26(b) (3) does, however, in its second paragraph eliminate the requirement of any showing to permit a party to obtain a copy of a statement concerning the action or its subject matter previously made by him. That paragraph will thus resolve a question that has previously been undecided in Maine. See Field, McKusick and Wroth § 26.16. A further change permits a non-party witness to obtain a copy of his own statement; he needs to make no special showing.

Rule 26(b) (4) spells out in detail the limited circumstances in which facts known and opinions held by experts and acquired or developed in anticipation of litigation or for trial may be discovered. The last sentence of present Maine Rule 26(b) extends a complete immunity from discovery to "the conclusions of an expert," except as provided in Rule 35(b) for reports of physical and mental examinations. Although the existing immunity is absolute, the scope of the protection is limited to "conclusions" and to "experts" who are not parties and who are specially employed in connection with the litigation. See Field, McKusick and Wroth § 26.17. The new rule reflects the view of much recent authority to the effect that there should not be any absolute immunity even of limited scope, that the identity and content of proposed testimony of an expert witness to be called at trial should be freely available, and that facts known or opinions held by other experts retained in anticipation of litigation, but not expected to be called at trial, should be available only under showing of exceptional circumstances. It is believed that the new rule in regard to experts is desirable in spelling out in greater detail the extent of discoverability of facts known and opinions held by experts and imposing allocation of fees and expenses.

Rule 26(c) is substantially identical to existing Rule 30(b). Items (9) and (10) are added to F.R. 26(c) to preserve two specific types of protective orders for which the Maine Rule from the beginning has expressly provided. The last sentence calling upon the court to exercise with liberality its power to issue protective orders is also preserved from the original Maine Rule 30(b) and does not appear in the corresponding Federal Rule.

Rule 26(d) is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. Although problems in this regard have been encountered in federal practice, see federal Advisory Committee's Note

to F.R. 26(d), 48 F.R.D. 506-07, it is not believed that any change in Maine practice will be produced by new Rule 26(d).

Rule 26(e) fills a gap existing in the present rules by setting forth those limited circumstances where a party who has responded to a request for discovery is under a duty to supplement his responses. The new F.R. 26(e) is substantially similar to Local Rule 15(c) of the United States District Court for Maine, and does not differ substantially from the duty which Maine lawyers feel they owe their fellow attorneys as a matter of fair dealing. See Field, McKusick and Wroth § 26.18a.

Explanation of Amendment
November 1, 1966

This amendment was taken from a 1963 amendment to F.R. 26(e). It simply incorporated a reference to Rule 28(b), which was amended at the same time in order to provide a greater degree of flexibility in the taking of depositions in foreign countries.

Reporter's Notes
December 1, 1959

This rule is substantially the same as Federal Rule 26, but with the addition of the last sentence of Rule 26(b). Under Rule 26(a) the deposition of any witness, including a party, may be taken on either oral or written interrogatories within or outside the state. Leave of court is not required except when a plaintiff seeks a deposition within 20 days after service upon the defendant, for at such time the defendant might not have retained counsel. This freedom to take the deposition of any person should be read in the light of Rule 26(d), which limits the use of depositions at trial. Under R.S.1954, Chap. 117, Sec. 5, 21 (repealed in 1959), the deposition of an adverse party may be taken by commission only when he is outside the state. The rule contains no such limitation. The effect of the rule is to make depositions broadly usable for discovery purposes even though the witness will presumably be available for trial.

Rule 26(b) makes it clear that the scope of examination on deposition is not limited by the standards of admissibility of evidence at trial. Inquiry may be made as to any matter, not privileged, which is relevant to the subject matter of the action. Depositions may be taken to obtain disclosure of an opponent's case and to obtain leads to aid in the development of one's own ease. That these leads are in the form of inadmissible hearsay is no ground for objection at the deposition stage,

although the testimony would be excluded on objection if the deposition were offered at trial. Thus a party can learn the names and addresses of witnesses unknown to him and what their story will be. He can find out about the existence and location of relevant books, documents and the like, so that he can proceed to obtain discovery of them. The sweep of disclosure is, however, limited by the last sentence of Rule 26(b), which is taken from the New Jersey rule. It forbids discovery of a written statement taken by or for an attorney in anticipation of litigation or in preparation for trial unless the court otherwise orders to prevent injustice or undue hardship. This reflects the holding of the Supreme Court of the United States in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), but is broader than that holding.

Rule 26(d) covers the use of depositions at trial, where the ordinary rules of admissibility govern. The deposition of an *adverse* party may be used for any purpose, so far as the rules of evidence permit. It may be used as substantive evidence even though the party is present and has testified. The deposition of a witness other than an adverse party may be used if the witness is unavailable for any of the reasons specified in the rule. The test of unavailability is somewhat broader than in the Maine statute. Naturally the deposition of any witness may be used to contradict or impeach his testimony, just as any other inconsistent statement can be.

Rule 26(e) allows objection to deposition evidence to be made for the first time at trial except objections based upon grounds which might have been obviated if presented at the taking of the deposition. This is similar to R.S.1954, Chap. 117, Sec. 18 (repealed in 1959).