PROPOSED REVISION TO NRCP 26

V. DEPOSITIONS AND DISCOVERY

Rule 26. General Provisions Governing Discovery

(a) **Discovery Methods**. At any time after the filing of a joint case conference report, or not sooner than 10 days after a party has filed a separate case conference report, or upon order by the court or discovery commissioner, any party who has complied with Rule 16.1(a)(1), Rule 16.2, or Rule 16.205 may obtain discovery by any means permitted by these rules.

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

(1) **Scope**. Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) **Limitations**.

(A) **Frequency**. The court may alter the limits in these rules on the number of depositions and interrogatories, the length of depositions under Rule 30 or the number of requests under Rule 36.

(B) **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 limitations of Rule 26(b)(2)(B). The court may specify conditions for the discovery, including costs of complying with the court's order.

(C) **When Required**. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that

(i) 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;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action ; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) **Trial Preparation: Materials**.

(A) **Documents and Tangible Things**. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) **Protection Against Disclosure**. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) **Previous Statement**. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(4) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) **Trial Preparation: Experts**.

(A) **Deposition of an Expert Who May Testify**. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Rules 16.1(a)(2)(B), 16.2(e)(3), or 16.205(e)(3) the deposition shall not be conducted until after the report is provided.

(B) **Trial-Preparation Protection for Draft Reports or Disclosures**. Rule 26(b)(3) protects drafts of any report or disclosure required under Rules 16.1(a), 16.2(d) and (e), 16.205(d) and (e), or 26(b)(1) regardless of the form in which the draft is recorded.

(C) **Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses**. Rule 26(b)(3) protects communications between the party's attorney and any witness required to provide a report under Rules 16.1(a), 16.2(d) and (e), or 16.205(d) and (e) 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 on in forming the opinions to be expressed.

(D) **Expert Employed Only for Trial Preparation**. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so 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.

(5) **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, 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) **Protective Orders**.

(1) **In General**. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to an out-of-state deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith

conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) **Ordering Discovery**. If a motion for a protective order is wholly or partially denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) **Awarding Expenses**. Rule 37(a)(5) applies to the award of expenses.

(d) **Sequence of Discovery**. Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(1) methods of discovery may be used in any sequence; and

(2) discovery by one party does not require any other party to delay its discovery

(e) **Supplementing Disclosures and Responses**.

(1) **In General**. A party who has made a disclosure under Rules 16.1, 16.2, 16.205—or responded to a request for discovery with a disclosure or response—is under a duty to timely supplement or correct the disclosure or response to include information thereafter acquired if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(2) **Expert Witness**. With respect to testimony of an expert from whom a report is required under Rules 16.1(a)(2)(B), 16.2(e)(3), or 16.205(e)(3) the duty extends both to information contained in the report and to information provided through a deposition of the expert. Any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rules 16.1(a)(3), 16.2(f), or 16.205(f) are due.

(f) **Form of Responses.** Answers and objections to interrogatories or requests for production shall identify and quote each interrogatory or request for production in full immediately preceding the statement of any answer or objections thereto. Answers, denials, and objections to requests for admission shall identify and quote each request for admission in full immediately preceding the statement of any answer, denial, or objection thereto.

(g) **Signing of Disclosures, Discovery Requests, Responses, and Objections**.

(1) **Signature Required; Effect of Signature**. Every disclosure and report made pursuant to Rules 16.1, 16.2, and 16.205, other than reports prepared and signed by an expert witness, and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must, when available, state the signer's physical and e-mail addresses, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) **Failure to Sign**. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the

court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) **Sanction for Improper Certification**. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

(h) **Demand for Prior Discovery**. Whenever a party makes a written demand for disclosures or discovery which took place prior to the time the party became a party to the action, whether under Rule 16.1 or this Rule 26, each party who has previously made disclosures or responded to a request for admission or production or answered interrogatories shall make available to the demanding party the document(s) in which the disclosures and responses to discovery are contained for inspection and copying, or furnish the demanding party a list identifying each such document by title. Upon further demand from the demanding party, at the expense of the demanding party, the recipient of such demand shall furnish a copy of any listed discovery disclosure or response specified in the demand or, in the case of document disclosure or request for production, shall make available for inspection by the demanding party all documents and things previously produced. Further, each party who has taken a deposition shall make a copy of the transcript thereof available to the demanding party at its expense.