

# The International Handbook on Private Enforcement of Competition Law

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## 10 Obtaining evidence

*Joseph Goldberg and Dan Gustafson*<sup>1</sup>

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### **Introduction**

This chapter discusses the pretrial discovery process in civil litigation only – either public or private. Also, it focuses only on litigation in the federal court system and not in the state court or administrative agency systems. The omission of discussion of state court civil litigation is explained by two factors. *First*, most states model their rules governing civil litigation after the federal rules, and, therefore, the description of discovery in federal litigation provides substantial insight into the processes in many of the state civil litigation systems. *Second*, under the Class Action Fairness Act,<sup>2</sup> much of the civil antitrust cases previously litigated in state courts are now being filed in or removed to federal court.

Certain attributes of civil antitrust litigation make the pretrial discovery process particularly important. *First*, much activity by firms in the marketplace raising antitrust concerns is covert. For example, cartel behavior is very often hidden by the cartel participants and so civil discovery is an important tool for uncovering that activity.<sup>3</sup> *Second*, antitrust litigation almost invariably calls for the use of expert consultants and expert testimony. For example, expert economists and statisticians often testify in antitrust litigation to prove both liability and damages. This extensive use of experts in civil antitrust litigation implicates the ‘expert’ provisions of the federal rules governing pretrial discovery. *Third*, civil antitrust litigation often involves claims for very large amounts of damages. The stakes of civil antitrust litigation are increased by the mandatory trebling of any damages awarded by the jury under the Clayton Act.<sup>4</sup> Because of these high stakes, plaintiffs and defendants have an incentive to aggressively use pretrial discovery procedures to uncover relevant information.

### **Theory of the Federal Rules of Civil Procedure: overview**

With a few exceptions, the Federal Rules of Civil Procedure govern the procedure in all civil actions in the United States district courts. The stated purpose of the Federal Rules – the administration of a ‘speedy’ or ‘inexpensive’ determination reaching ‘justice’<sup>5</sup>

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<sup>2</sup> 28 U.S.C. §1332(d) (2005).

<sup>3</sup> Of course, public agencies involved in criminal antitrust enforcement also have powerful tools available for uncovering covert anticompetitive behavior, including the availability of federal and state investigative agencies. In addition, public enforcement agencies have civil discovery tools available (such as civil investigative demands).

<sup>4</sup> 15 U.S.C. §15(a) (1982).

<sup>5</sup> See Fed. R. Civ. P. 1.

– is the touchstone for the administration of the discovery process in federal court litigation.

The Federal Rules govern the disclosure of discoverable information by all parties to federal court litigation. The Rules provide for initial disclosures,<sup>6</sup> expert disclosures<sup>7</sup> and pretrial disclosures.<sup>8</sup> These disclosures are required without formal discovery requests by the opposing party.

The Federal Rules also provide for formal discovery requests in which one party specifically requests certain information from another party. These can be in the form of depositions;<sup>9</sup> written interrogatories;<sup>10</sup> production of documents, electronically stored information and tangible things; entering onto land for inspection and other purposes;<sup>11</sup> physical and mental examinations;<sup>12</sup> and requests for admissions.<sup>13</sup> Each of these methods of discovery and the advantages or disadvantages to a plaintiff in a civil litigation is discussed in further detail below.

The discovery rules as they are now implemented in Fed. R. Civ. P. 26–37 provide the parties with the means to find out where the information relevant to the claims and defenses in the litigation is located; narrow the issues that are relevant to the litigation; and obtain that evidence for trial. Again, going back to the purpose of the Federal Rules of Civil Procedure, this reinforces the securing of a ‘just, speedy and inexpensive determination.’<sup>14</sup>

### Investigation/pre-filing discovery<sup>15</sup>

#### *a. Public enforcement agencies*

Both the Antitrust Division of the United States Department of Justice (‘DOJ’) and the Federal Trade Commission (‘FTC’) have public enforcement responsibilities. Often, private antitrust litigation follows on public enforcement efforts, and, as mentioned above, occasionally, public enforcement is stimulated by private litigation.<sup>16</sup>

<sup>6</sup> Fed. R. Civ. P. 26(a)(1).

<sup>7</sup> Fed. R. Civ. P. 26(a)(2).

<sup>8</sup> Fed. R. Civ. P. 26(a)(3).

<sup>9</sup> Fed. R. Civ. P. 27–32.

<sup>10</sup> Fed. R. Civ. P. 33.

<sup>11</sup> Fed. R. Civ. P. 34.

<sup>12</sup> Fed. R. Civ. P. 35.

<sup>13</sup> Fed. R. Civ. P. 36.

<sup>14</sup> The enactment of Rules 26–37 changed pre-existing discovery practices in federal courts. *See Hickman v. Taylor*, 329 U.S. 495, 500 (1947); *see also* 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* §2001 (2d ed. 1994) (discussing the purposes and problems of discovery).

<sup>15</sup> For further discussion of pre-filing investigation in the context of building a case, see Chapter 5 of this *Handbook*.

<sup>16</sup> An example of this latter occurrence is the public enforcement that came from the filing of the *Nasdaq Market-Makers Antitrust Litigation*. *See In re Nasdaq Market-Makers Antitrust Litig.*, MDL No. 1023 (S.D.N.Y.). The private cases were filed first, and the information uncovered in that private litigation resulted in public enforcement that resulted in a substantial restructuring of the Nasdaq organization. *See also* Arthur M. Kaplan, *Antitrust as a Public-Private Partnership: A Case Study of the NASDAQ Litigation*, 52 Case Western Res. L. Rev. 111 (2001). For further

The federal public enforcement agencies are severely restricted in sharing information obtained through their investigative powers with private individuals (not subject to the enforcement action)<sup>17</sup> and experience is consistent with those restrictions. That does not mean, however, that there is not communication between public enforcement agencies and private litigants with both mutually beneficial results and some tensions. For example, frequently private litigants voluntarily provide information to the DOJ or the FTC. Private litigants often gain helpful information from publicly available information resulting from public investigations, through indictments, criminal plea agreements, allocutions and proffers.<sup>18</sup>

*b. Amnesty program*

The Antitrust Division of the DOJ has a policy of according leniency to corporations reporting their illegal activity at an early stage, if they meet certain conditions. ‘Leniency’ means not charging such a firm criminally for the activity being reported. The policy also is known as the ‘corporate amnesty’ policy.

While this program encourages violators of the federal antitrust laws to reveal their illicit behavior, the threat of private antitrust litigation that may follow from any DOJ investigation could decrease incentives for early cooperation. In response to this concern, Congress passed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA), which provides that corporations that successfully enter the program will only have to pay the actual damages (as opposed to treble damages) plus attorneys’ fees, costs, and interest.<sup>19</sup> This limitation applies to antitrust violations litigated under both federal and state law and immunizes program participants from joint and several liability for the acts of their co-conspirators.<sup>20</sup> Significantly, the Act requires the trial court to

discussion of the interaction between public and private enforcement, see Chapter 13 of this *Handbook*.

<sup>17</sup> See e.g. Fed. R. Crim. P. 6(e) (generally prohibiting the disclosure of grand jury proceedings); 5 U.S.C. §552(b)(7) (exempting from the Freedom of Information Act ‘records and information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings; . . . or (D) the identity of a confidential source, including a State, local or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source. . . .’).

<sup>18</sup> On the other hand, the public enforcement agencies occasionally will seek to delay discovery in private litigation on their claim that discovery in the private litigation will unduly interfere with the public agency’s investigation. This claim will likely put the public agency and the private litigants (or at least the private plaintiffs) at odds with each other. See *In re Flash Memory Antitrust Litigation*, No. C 07-0086, 2007 WL 3119612 (N.D. Cal. Oct. 23, 2007) (recognizing that it is well established that the government may intervene in a civil action for the purpose of limiting discovery when there is a parallel criminal proceeding involving a common question of law or fact).

<sup>19</sup> Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, §213(a)–(b), 118 Stat. 665, 66–67 (2004).

<sup>20</sup> ‘Joint and several liability’ means that each member of a cartel or co-conspirator to an anticompetitive conspiracy is liable for the injured plaintiff’s full damages. Although the injured plaintiff may not recover more than the judgment amount, joint and several liability can place great pressure on each co-conspirator. For example, if there are three co-conspirators and the

certify that corporations seeking to limit damages under the Act also have cooperated with the civil plaintiffs by providing them with documentation and reasonable access to potential witnesses. In addition, the Act does not apply to Attorney General lawsuits.

Under ACPERA, in order to obtain the amnesty benefits, an amnesty defendant must:

- (a) have a currently effective antitrust leniency agreement with the DOJ, and
- (b) cooperate with private plaintiffs in the prosecution of the civil antitrust lawsuit.<sup>21</sup>

The court in which the civil action proceeds determines whether the amnesty defendant has provided satisfactory cooperation, after considering plaintiffs' submission regarding the cooperation.

In 2008, the DOJ clarified the leniency policy by establishing a list of 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters.'<sup>22</sup> The ACPERA was recently extended for one year and future hearings are likely to reveal information about its impact prior to further extensions.<sup>23</sup>

*c. Talking with employees/former employees of possible antitrust violators*

Prior to filing a lawsuit alleging antitrust violations, a lawyer for a party may wish to obtain more information by communicating with employees or former employees of the company that is suspected of committing antitrust violations. The lawyer may also have learned about the illegal activity from employees or former employees who came forward with the information.

Many states have rules governing lawyers' conduct that limit the contact that attorneys can have with employees or former employees of an adverse party. Violations of those rules may result in disqualification of counsel to participate in the litigation against the company for which the employees or former employees worked and other possible sanctions.<sup>24</sup>

plaintiff settles with two of them, each for \$100,000, and the jury after trial against the third co-conspirator finds damages in the amount of \$500,000, the remaining co-conspirator (because of joint and several liability) is liable for the full amount of the damages, trebled, minus the settlement amounts; or \$1,300,000. For further discussion of joint and several liability, see Chapter 11 of this *Handbook*.

<sup>21</sup> Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, §213(a)–(b), 118 Stat. 665, 66–67 (2004).

<sup>22</sup> US Dep't of Justice, Frequently Asked Questions Regarding the Antitrust Div.'s Leniency Program & Model Leniency Letters, available at <http://www.usdoj.gov/atr/public/criminal/239583.htm> (last visited Aug. 5, 2009).

<sup>23</sup> For a discussion of how the leniency program and ACPERA can assist a private plaintiff in deciding whether to bring a case, see Chapter 5 of this *Handbook*; for a discussion of how the leniency program and ACPERA impact the interplay of public and private enforcement generally, see Chapter 13 of this *Handbook*.

<sup>24</sup> See, e.g., *In re Potash Antitrust Litig.*, No. 3-93-197, 1993 WL 543013, \*16–17 (D. Minn. Dec. 8, 1993); compare *Camden v. Maryland*, 910 F.Supp. 1115 (D. Md. 1996) (disqualifying counsel for ex parte contact with former employee), with *In re EXDS, Inc.*, No. C05-0787, 2005 WL 2043020 (N.D. Cal. Aug. 24, 2005) (denying motion to disqualify counsel).

Rule 4.2 of the ABA Model Rules of Professional Conduct ('Model Rules')<sup>25</sup> reads:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.<sup>26</sup>

This Rule and similar rules adopted by individual states raise concern when counsel wants to talk with an employee or former employee of a corporation. Is that employee represented by counsel if the corporation is represented by counsel? Most states look at the employee's role within the corporate structure.

There are various tests that states apply to determine whether Rule 4.2 is violated by communications with an employee. One test is referred to as the 'control group' test in which opposing counsel cannot communicate with employees in the corporation's "'control group" – *i.e.*, the most senior corporate managers – without the corporate attorney's consent.<sup>27</sup> This view holds that only the employees with the power to control the corporation may properly be equated with the corporation.<sup>28</sup>

A second test was described in official Comment [4] to Rule 4.2 of the ABA Model Rules of Professional Conduct (1995). This test would prohibit communications about the matter in dispute by a lawyer for one party with persons having a managerial responsibility on behalf of the organization and with any person whose act or omission in connection with the matter may be imputed to the organization or whose statement may constitute an admission on the part of the organization.<sup>29</sup> The test often turns on the meaning of 'admission.' Various courts have applied different meanings, causing confusion as to what is permissible and what is not.<sup>30</sup>

In February 2002, the ABA revised Comment [4] (now Comment [7]) to Rule 4.2 to prohibit communications only with:

[A] constituent of the organization who supervises, directs or regularly consults with the organization's lawyers concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.<sup>31</sup>

<sup>25</sup> Since there is no single, federal rule governing this conduct and since the ABA Model Rules are widely adopted by the states, we use these Model Rules as the discussion reference.

<sup>26</sup> Model Rules of Prof'l Conduct R. 4.2.

<sup>27</sup> See Ellen J. Messing & James S. Weliky, *Contacting Employees of an Adverse Corporate Party: A Plaintiff's Attorney's View*, 19 Lab. Law. 353, 354–55 (2004).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 355–56 (citing Model Rules of Prof'l Conduct R. 4.2 cmt.4 (1995)); see also Mich. Rules of Prof'l. Conduct R. 4.2 cmt.

<sup>30</sup> Messing & Weliky, *supra* note 27, at 356–57; compare *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F.Supp. 723, 730 (N.D. Ill. 1996) (prohibition should be read narrowly to permit broad access to witnesses), with *In re Air Crash Disaster near Roselawn*, 909 F.Supp. 1116, 1121 (N.D. Ill. 1995) (broad prohibition because 'virtually every employee may conceivably make admissions binding on his or her employer.')

<sup>31</sup> Messing & Weliky, *supra* note 27, at 357.

Several states have now adopted the ABA's 2002 changes to the Model Rules and Comments and have either adopted or proposed changes identical to or substantially similar to those in the new Comment [7].<sup>32</sup>

Do these rules, however, apply equally to former employees? The specific language of the rules and comments does not appear to encompass former employees. The 2002 version of Comment [7] to Model Rule 4.2 clearly states that '[c]onsent of the organization's lawyer is not required for communication with a former constituent.'<sup>33</sup> The Comments caution, however, that a lawyer must not try to obtain any privileged communications or information from the former employee.<sup>34</sup>

When deciding whether to communicate with employees or former employees of the opposing party, it is important to remember that whether a court will find the communication permissible is a fact-intensive determination, and the standard varies from state to state.<sup>35</sup> As such it is difficult to generalize about what communications will be allowed and what communications will be prohibited. These concerns arise in almost every anti-trust case as these types of cases usually involve pre-filing investigations and often deal with information that is emanating from a former employee of one of the companies in question.

#### *d. Initial expert analysis*

Prior to filing a lawsuit, the plaintiff may want to retain an expert to do a preliminary analysis of the marketplace and an initial scope of damages. This expert may or may not ultimately be disclosed as a 'testifying expert' for the plaintiff. Unless the party has definitely determined at the outset that the expert hired to do the initial analysis will not be the testifying expert, the party should treat this expert as a potential witness and remember that materials given to the expert may become discoverable by the other party later in the litigation if the expert consultant is disclosed as a testifying expert or the expert's analyses or opinions become part of the basis for allegations in the complaint.

Prior to filing the lawsuit, an expert in a potential antitrust action can provide useful information as to the relevant marketplace. The expert can analyze the market and determine what products are in the market and what products are not. The expert can analyze how large the marketplace is and the amount of sales that may have been involved in the antitrust activity. The expert can provide an analysis of the behavior of the actual and potential competitors in the marketplace, whether characteristics of the marketplace and the behavior of the firms in the marketplace are consistent or not with the exercise of market power and whether the pricing in the marketplace appears to reflect a competitive market or whether the pricing supports a claim for antitrust violations. The expert

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<sup>32</sup> *Id.* at 358.

<sup>33</sup> *Id.* at 363.

<sup>34</sup> *Id.*; Model Rules of Prof'l Conduct R. 4.2 cmt.7; *see also Smith v. Kalamazoo Ophthalmology*, 322 F. Supp. 2d 883, 888 (W.D. Mich. 2004) ('A majority of courts that have considered the issue have held that Rule 4.2 does not bar *ex parte* communications with an adversary's former employees who are not themselves represented in the matter.' (citations omitted)).

<sup>35</sup> *See, e.g., US v. W.R. Grace*, 401 F. Supp. 2d 1065, 1067 (D. Mont. 2005); *In re Complaint of PMD Enters., Inc.*, 215 F. Supp. 2d 519, 526–27 (D.N.J. 2002) (applying New Jersey's version of Model Rule 4.2); *Camden*, 910 F.Supp. at 1116.

can also analyze the possible overcharge that occurred to the consumer as a result of the anticompetitive conduct and whether that overcharge is likely to be generally spread throughout the potential class.

This type of information would provide the plaintiff's counsel with important information to determine whether the market conditions and competitive activity would support the claims of antitrust violations and what the scope of damage might be in the case. It also may alert the plaintiff and plaintiff's counsel to possible pitfalls or problems in their lawsuit that might deter them from filing the suit or at least provide them with the knowledge of what issues might arise. Given the recent establishment of heightened pleading requirements in federal antitrust cases,<sup>36</sup> plaintiffs may wish to include information derived from any such expert analyses or opinions in support of the allegations in the complaint.

*e. FOIA requests/state law equivalent*

Also prior to initiating a lawsuit, the plaintiff or plaintiffs' counsel may want to issue Freedom of Information Act requests to federal agencies seeking relevant public information.<sup>37</sup> The Freedom of Information Act<sup>38</sup> ('FOIA' or 'the Act') generally provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of three special law enforcement record exclusions.<sup>39</sup>

Obtaining certain records from a governmental agency may be a beneficial investigative tool. For example, if a party wants to assert that a company misused its patent to keep a generic manufacturer off the market in violation of the antitrust laws,<sup>40</sup> it may be useful to see what records were submitted to the Patent Office by the company or the generic manufacturer.

Not all records are accessible. For example, Exemption 4 of the Act protects 'trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.'<sup>41</sup> This exemption is intended to protect the interests of both the government and submitters of information by allowing submitters to voluntarily provide the government with useful and reliable commercial or financial information with the assurance that the government will protect the information from being released. This exemption may come into play in the example of the FOIA request to the Patent Office.

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<sup>36</sup> See *Bell Atlantic Corp. v. Twombly*, 550 US 544 (2007); *Ashcroft v. Iqbal*, 556 US \_\_\_, 129 S. Ct. 1937 (2009). For further discussion of *Twombly* and *Iqbal*, see Chapter 9 of this *Handbook*.

<sup>37</sup> Most states have some sort of Freedom of Information Act or Public Records Act that provides a method by which citizens may request access to government records. Again, these are subject to exemptions similar to the Federal FOIA and, therefore, have somewhat limited utility. See, e.g., Minnesota Data Practices Act, Minn. Stat. §13.03; New York State Freedom of Information Law, N.Y. Pub. Off. Law §§84-90 (2008).

<sup>38</sup> 5 U.S.C. §552 (2000 & Supp. IV 2004).

<sup>39</sup> US Dep't of Justice, Guide to the Freedom of Information Act – Introduction, available at [http://www.usdoj.gov/oip/foia\\_guide07/introduction.pdf](http://www.usdoj.gov/oip/foia_guide07/introduction.pdf) (last visited Aug. 5, 2009).

<sup>40</sup> See, e.g., *In re Wellbutrin SR Antitrust Litig.*, Nos. 04-5525, 04-5898 & 05-396, 2006 WL 616292 (E.D. Pa. Mar. 9, 2006).

<sup>41</sup> 5 U.S.C. §552(b)(4).

The information that a company submits to the Patent Office might be considered ‘trade secret’ and thereby would be excluded from disclosures made pursuant to a FOIA request.

Another example of a useful FOIA request prior to filing a lawsuit would be a request for documents related to the initiation of any enforcement action against the company that is the subject of the potential antitrust lawsuit. In this case, however, Exemption 7 of FOIA may come into play.

Exemption 7 of FOIA protects from disclosure ‘records or information compiled for law enforcement purposes.’ There are, however, several exceptions to this exemption.<sup>42</sup>

### Written discovery

Fed. R. Civ. P. R. 26 sets forth the parties’ duties to disclose and other general provisions governing discovery. Rule 26 describes the requirements of initial disclosures, expert disclosures, pretrial disclosures and the timing for making those disclosures. It also identifies the scope of such discovery. Fed. R. Civ. P. 26(b)(1) sets forth the scope of discovery in civil matters:

Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.<sup>43</sup>

Rule 26 goes on to note that, ‘For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.’<sup>44</sup> Relevant subject matter includes information that may not be admissible at trial but that may reasonably lead to the discovery of admissible evidence.<sup>45</sup>

#### *a. Rule 26 initial disclosures*

Rule 26(a)(1) of the Federal Rules of Civil Procedure requires the parties to make certain initial disclosures unless exempted by Rule 26(a)(1)(B) or otherwise stipulated or ordered by the court. Without waiting for a discovery request, a party must provide to the other parties at a time early in the litigation:

- (i) The name and, if known, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
- (ii) A copy – or a description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its

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<sup>42</sup> 5 U.S.C. §552(b)(7); see US Dep’t of Justice, Guide to the Freedom of Information Act – Exemption 7, available at [http://www.usdoj.gov/oip/foia\\_guide07/exemption7.pdf](http://www.usdoj.gov/oip/foia_guide07/exemption7.pdf) (last visited Aug. 5, 2009).

<sup>43</sup> Fed. R. Civ. P. 26(b)(1).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

- possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
- (iii) A computation of each category of damages that the disclosing party is claiming, and that party must make available for inspection and copying, the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and
  - (iv) For inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.<sup>46</sup>

The plaintiff in an antitrust action likely will not have a lot of information to disclose at the time of initial disclosures. Most of the relevant information is going to be in the hands of the defendants. Plaintiffs may be aware of names of company executives who have been indicted or charged with antitrust violations and as such would indicate those individuals under Fed. R. Civ. P. 26(a)(1)(A)(i). Plaintiffs also may be able to identify generally the types of documents that may be relevant, but most of the relevant documents will likely be in the possession of the defendant in antitrust cases. In a price-fixing case, for example, plaintiffs likely will have invoices or other documents that will demonstrate that they purchased the products at issue and may provide some evidence of the prices charged for those products. Again, however, much of that information will be found in defendants' records. Part (iii) of Rule 26(a)(1)(A) asks for a computation of damages. Generally speaking, this information simply is not available at the time of initial disclosures. Computation of damages in antitrust cases often requires a statistical analysis of defendants' records and cannot be computed without those records. As such, plaintiffs usually will respond that damages will be in the form of overcharges paid by the plaintiffs on the products that were the subject of the anticompetitive activity, and detailed computations will be provided pursuant to expert testimony.<sup>47</sup>

Finally, Part (iv) of Rule 26(a)(1)(A) also is not particularly relevant to plaintiffs in an antitrust action. As the plaintiff is seeking damages and is generally not subject to a judgment, there is no insurance relevant to plaintiffs in these cases. Where the defendant has relevant insurance and that requirement is not waived or limited by court order, the policy must be made available for inspection or copying. There is no general rule or custom as to whether or not a corporation will have insurance that would pay for damages that may arise from an antitrust case. It must be determined on a case by case basis by the defendants, who must decide whether their insurance policies would apply to any damages that may be awarded.

The Federal Rules require that the initial disclosures be made within 14 days after the parties' Rule 26(f) conference.<sup>48</sup> The parties may stipulate or the court may order that

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<sup>46</sup> Fed. R. Civ. P. 26(a)(1)(A)(i)–(iv).

<sup>47</sup> For further discussion of calculating plaintiffs' damages, see Chapter 11 of this *Handbook*.

<sup>48</sup> Rule 26(f) requires that the parties meet and confer as soon as practicable (but in no event less than 21 days prior to the initial scheduling conference with the court) to discuss the nature of the claims and defenses, the possibility for settlement, the initial disclosures, and the development

initial disclosures be made at some other time. A party may also object during the Rule 26(f) conference that initial disclosures are not appropriate in this action, in which case the party must state the objection in the proposed discovery plan. 'In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.'<sup>49</sup> While the Federal Rules do call for these initial disclosures, including in antitrust cases, courts often do not strictly enforce these disclosure requirements in antitrust cases.

The initial disclosures under Rule 26(a)(1)(A) must be 'based on information then reasonably available' to a party.<sup>50</sup> A party is 'not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.'<sup>51</sup> That being said, the information available to an antitrust plaintiff will vary widely depending on the complexity of the issues, the number of defendants, the number and location of witnesses and documents, among other things.

Under Rule 26(e), these initial disclosures must be supplemented or corrected if the party learns that the disclosure is incomplete or incorrect. These corrections or supplementations must be made in a 'timely manner.'<sup>52</sup>

#### *b. Interrogatories*

Interrogatories are another method of discovery. These are formal written discovery requests that one party makes to another party seeking written responses, the answers to which are sworn to by the responding party and constitute evidentiary admissions.

When answering interrogatories, a party must answer in writing and the answers must be under oath signed by the party providing the information.<sup>53</sup> It is not sufficient for the attorney to sign the answers to interrogatories. Interrogatories must be answered by individuals that have the knowledge or information to provide the answer. Interrogatories that are directed to companies or other entities should be responded to by an officer, agent or employee who has the requisite knowledge.<sup>54</sup> A party may object to interrogatories but must state the objection with specificity and must include all grounds to support the objection.<sup>55</sup> Typical objections include assertions that the interrogatory is vague or ambiguous, overly broad, unduly burdensome, seeks privileged information and is outside the scope of Rule 26.

Fed. R. Civ. P. 33 addresses Interrogatories specifically. As set forth in that Rule, a party is limited to serving no more than 25 written interrogatories on any other party

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of a discovery plan. The discovery plan should include the parties' views and proposals on the timing of initial disclosures (if different from what is provided for by the rules), what discovery may be needed and when it should be completed, whether discovery should be conducted in phases, electronically stored discovery, issues relating to the privilege or work product protections, among other things.

<sup>49</sup> Fed. R. Civ. P. 26(a)(1)(C).

<sup>50</sup> Fed. R. Civ. P. 26(a)(1)(E).

<sup>51</sup> *Id.*

<sup>52</sup> Fed. R. Civ. P. 26(e).

<sup>53</sup> Fed. R. Civ. P. 33(b)(5).

<sup>54</sup> Fed. R. Civ. P. 33(b)(1)(B).

<sup>55</sup> Fed. R. Civ. P. 33(b)(4).

unless the parties agree to a different number or a court order permits additional interrogatories.<sup>56</sup> This limitation includes subparts, so a party may not attempt to circumvent this limitation through formal labeling.<sup>57</sup> Rule 33 and Rule 26 thus work together to encourage parties to be selective in determining both the amount and scope of information they seek through interrogatories. For this reason, interrogatories are best used to obtain specific, objective information. For example, interrogatories asking for names, titles, dates or the identification of specific documents can be useful. Interrogatories that are not as specific or narrowly focused can elicit vague answers that are usually qualified with so many objections that they become almost meaningless.

A party may ask ‘contention’ interrogatories, in which it seeks all facts that the opposite party possesses that support or refute any claims or defenses in the litigation. The party may follow that up by asking for all documents that support the opposite party’s response to that ‘contention’ interrogatory. For example, a plaintiff may ask the defendants to ‘identify all facts that support the defendant’s affirmative defense.’ The plaintiff may also ask for all documents that support its affirmative defense. These interrogatories may be effective in forcing a party to identify what the real claims at issue are and what evidence it has to support those claims. Often courts will set a deadline by which both parties will have to respond to ‘contention’ discovery. This deadline is frequently extended beyond the 30-day deadline set forth in Fed. R. Civ. P. 33(b)(2) to give the parties until further along in the discovery process (or even until the end of discovery) to respond.

Under Fed. R. Civ. P. 33(d), a party may opt to produce business records in lieu of responding to interrogatories under certain conditions.<sup>58</sup> The production of documents or the identification of documents instead of a response has advantages and disadvantages. On one hand, identifying or producing documents in response to an interrogatory puts the burden on the requestor to uncover the answer within those documents. This is not to say that a responding party can hide the answer among a mass of documents, most of which are not responsive to the interrogatory. Most courts in these circumstances will require the responder to identify the responsive documents.<sup>59</sup> On the other hand, merely identifying the documents or producing the documents rather than responding does not allow the responding party to craft the answer in the light most favorable to itself.

### *c. Request for production of documents*

Another means of obtaining discovery is through requests for the production of documents. Fed. R. Civ. P. 34 permits a party to serve upon another party a request to produce (or permit for inspection, copying, testing or a sample) any designated documents or

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<sup>56</sup> Fed. R. Civ. P. 33(a)(1).

<sup>57</sup> *Id.*

<sup>58</sup> Fed. R. Civ. P. 33(d).

<sup>59</sup> *Graske v. Auto-Owners Ins. Co.*, 647 F. Supp. 2d 1105 (D. Neb. Aug. 13 2009) (recognizing that ‘if a party responds to interrogatories pursuant to Rule 33(d), it must specify the documents from which the responses to the interrogatories can be derived in sufficient detail to enable the interrogating party to locate the documents as readily as the responding party could.’) (citing Fed. R. Civ. P. 33(d)); *see also In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 326 (N.D. Ill. 2005) (finding that it is not sufficient for a responding party to simply direct the interrogating party to a mass of business records).

electronically-stored information or any designated tangible thing.<sup>60</sup> In collusion cases, defendants' internal documents, obtained through discovery, are often a primary source of evidence of defendants' collusive behavior. Documents or electronically-stored information include writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations.<sup>61</sup> In antitrust litigation, document requests are a primary means of pretrial discovery and are typically served during the first wave of discovery. It is through such document requests that an antitrust plaintiff may obtain a defendant's transactional data that often is important in estimating damages. Again, however, the scope of documents or other information that may be sought by a party is limited by Rule 26.<sup>62</sup>

Rule 34 is limited to parties and itself does not require a non-party to respond to a request for production of documents. Rule 45, however, allows for such discovery from a non-party and will be discussed in more detail below.

There is no limit set forth in the Federal Rules on the number of document requests that a party can serve (although some courts place limits on the extent of discovery under Rule 34 in their local court rules), and a party responding to the request must either state that inspection will be permitted or a copy produced or else object to the request. If a party objects to one part of the request it must still produce documents in response to the non-objectionable portions of the request.<sup>63</sup>

Rule 34 requires only the production of those documents or information that is in the responding party's possession, custody or control.<sup>64</sup> The question of what is meant by 'possession, custody or control' has been addressed by several courts in various situations. Possession and custody includes both actual and constructive possession and custody. Control includes situations where the responding party has the legal right to obtain the documents, regardless of whether the document is actually in the party's possession.<sup>65</sup> For example, a party can be required to produce a document that is not in its direct possession but is in the possession of its legal counsel, its insurance company or its other agents.<sup>66</sup>

In an antitrust case, the plaintiff is often suing large corporations that have many organizational divisions or entities. The question of whether the party has possession, custody or control will often arise in the context of whether the duty to search and produce responsive documents extends beyond the accused organizational entity to related entities. If the facts suggest that one of the corporate entities essentially controls

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<sup>60</sup> Fed. R. Civ. P. 34(a)(1)(A) & (B). As noted, Rule 34 also permits requests for items other than documents or electronically-stored information. This is not as likely to come into play in an antitrust case as it would in, for example, a patent case, where the design of the product is at issue. Rule 34 also allows for the inspection, among other things, of land or other property. Fed. R. Civ. P. 34(a)(2). This is also an unlikely request in an antitrust case.

<sup>61</sup> *Id.*

<sup>62</sup> Rule 26 was amended in 2006 to provide additional guidance on electronically stored discovery, which will be discussed in more detail below.

<sup>63</sup> Fed. R. Civ. P. 34(b)(2)(B) & (C).

<sup>64</sup> Fed. R. Civ. P. 34(a)(1).

<sup>65</sup> 8A Wright, Miller & Marcus, *supra* note 14, §2210.

<sup>66</sup> *Id.*

the other, the court will likely find that the party is in ‘control’ of the documents held at the related corporation for purposes of Rule 34.<sup>67</sup>

Similarly, the question in antitrust cases will often arise with regard to documents of a former employee of a party corporation. Courts have generally found that corporations do not have control over former employees but may require the corporations to make inquiries of former employees.<sup>68</sup>

A party responding to document requests may object to all or part of any request for production of documents. Common objections to document requests include an objection that the documents are not in the party’s possession, custody or control or are no longer in existence; that the request is unduly burdensome, overly broad or vague; and that the documents requested are privileged. Again, these objections must specify which part of the request is objectionable. The responding party must reply within 30 days after service of the request and must either produce the documents or identify a time and place for inspection and/or copying of the documents.<sup>69</sup> A responding party must also produce the documents in their native format or must organize and label them to correspond to the categories in the request.<sup>70</sup> The production of electronically-stored documents is discussed below.

#### *d. Electronic discovery*

Electronic discovery or e-discovery is an area that has been much discussed and written about. As originally adopted, Rule 34 addressed discovery of ‘documents’ and ‘things.’<sup>71</sup> In 1970, the Rule was amended to include discovery of ‘data compilations.’<sup>72</sup> This amendment anticipated the rise in the use of computerized technology and included in Rule 34 a means for discovery of computerized information. In 2006, Rule 34 was again amended to further take into account the issues raised by electronically-stored information, including stored electronic data and stored electronic documents.<sup>73</sup> The 2006 amendments make clear that discovery of electronically stored information ‘stands on equal footing with discovery of paper documents.’<sup>74</sup> The Comments state, ‘[t]he change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined.’<sup>75</sup> As such, requests for production of documents under Rule 34 should be understood to encompass, and the response should include, electronically-stored information unless otherwise specified.

Rule 26(f) was amended to direct the parties to meet and confer prior to a Rule 26(f) conference to discuss any issues about the disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.<sup>76</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Fed. R. Civ. P. 34(b)(2)(A).

<sup>70</sup> Fed. R. Civ. P. 34(b)(2)(E)(i).

<sup>71</sup> Fed. R. Civ. P. 34 cmt. 2006 Amendment.

<sup>72</sup> Fed. R. Civ. P. 34 cmt. 1970 Amendment.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Fed. R. Civ. P. 26(f)(3)(C); *See also* Fed. R. Civ. P. 26(f) cmt. 2006 Amendment.

In reality, and as the Comment states, the issues to be addressed during the Rule 26(f) conferences relating to e-discovery depend on the nature and extent of the contemplated discovery and the parties' information systems.<sup>77</sup> The Comment encourages parties to discuss those issues prior to the conference and become familiar with the systems at issue so the parties can develop a discovery plan that takes into account the capabilities of the various systems.<sup>78</sup> Such pre-conference meet-and-confers among the parties are especially helpful in antitrust cases where the parties tend to include large firms and where there will be extensive electronic discovery. Typically, issues discussed at these meet-and-confers include, among other things: (i) the nature, extent and identification of information systems and databases; (ii) the format of production of electronic documents, such as 'native', 'tiff', 'pdf', etc.; (iii) the extent of 'metadata'<sup>79</sup> produced with electronic documents and whether the documents will be 'searchable'; (iv) search parameters, including identification of document custodians and locations and electronic search terms; and (v) the medium of production (i.e., electronic files, disks, hard-drives, etc.). Often, it is helpful for the parties to have individuals who are familiar with the various computer systems utilized by the parties or who possess particular IT expertise involved in these early discussions.<sup>80</sup> Often, these discussions result in agreed-on protocols governing this facet of discovery. At least one state, Maryland, has adopted a suggested Protocol for Discovery of Electronically Stored Information.<sup>81</sup>

In addition to meet-and-confers among the parties as to electronic document production (e.g. emails), it is also helpful to discuss production of the relevant parties' electronic transaction data. Often, in antitrust cases, these data sets are large and can be complex. Almost invariably, they are referred to the parties' economic or statistical experts for analysis. Typically, parties discuss and seek to reach agreement on issues with respect to transaction data, such as: (i) the existence of 'data dictionaries' or other documents that would assist in identifying what information is in particular fields in the data; (ii) the existence of 'cross-walks' or other documents that would assist in identifying products, customers and locations; and (iii) the availability of party IT personnel for informal consultation on data questions. Sometimes, such agreements are incorporated into an agreed protocol.

Rule 26(b)(2) was amended to address the specific limitations on e-discovery. Rule 26(b)(2)(B) states:

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<sup>77</sup> Fed. R. Civ. P. 26(f) cmt. 2006 Amendment.

<sup>78</sup> *Id.*

<sup>79</sup> Metadata is structured information about an electronic file that is embedded in the file but not normally visible when viewing a printed or on screen rendition of the document, and which describes the characteristics, origins, usage and validity of the electronic file. See The Sedona Conf. Working Group on Elec. Doc. Retention & Prod., *The Sedona Glossary: for E-Discovery & Digital Information Mgmt.*, 33 (Conor Crowley & Sherry Harris eds., 2d ed. 2007), available at [http://www.thesedonaconference.org/dltForm?did=TSCGlossary\\_12\\_07.pdf](http://www.thesedonaconference.org/dltForm?did=TSCGlossary_12_07.pdf).

<sup>80</sup> In 2006, Rule 16(b) was also amended to alert the court to the possible need to address the handling of discovery of electronically stored information at the pretrial conference. Fed. R. Civ. P. 16(b)(3)(B)(iii).

<sup>81</sup> See D. Md., Suggested Protocol for Discovery of Electronically Stored Information ('ESI'), available at <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf> (last visited Aug. 5, 2009).

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)(C).<sup>82</sup>

As the Comments make clear, the determination of whether the information is reasonably accessible or not is made on a case by case basis. ‘It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information.’<sup>83</sup> The Comments also make clear that ‘[a] party’s identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence.’<sup>84</sup> Again, it is beneficial for the parties to discuss whether a party believes the information sought will be reasonably accessible at the outset of the case so those issues can either be agreed upon by the parties or brought before the court.

Finally, Rule 37(e) was amended in 2006 to protect a party from sanctions for failing to provide electronically stored information ‘lost as a result of the routine, good faith operation of an electronic information system.’<sup>85</sup>

The Comments to the Rule confirm that ‘The good faith requirement . . . means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.’<sup>86</sup>

In other words, if, for example, a system has an automatic purge of information after 30 days, a party must take steps to disengage that feature if failure to do so would result in the loss of otherwise discoverable information. If a party is able to do so but does not do so, it may be found to have not acted in good faith and thus sanctions may be appropriate. Again, what type of automatic purging of information or destruction of information occurs in a party’s computer systems should be discussed early in the litigation so it can be addressed by agreement either of the parties or the court.

#### *e. Requests for admissions*

Fed. R. Civ. P. 36 governs requests for admissions. Rule 36 allows a party to serve on another party a written request to admit the truth of any matter that is otherwise discoverable under Rule 26(b)(1) relating to: ‘(a) facts, the application of law to facts or opinions about either; and (b) the genuineness of any described documents.’<sup>87</sup>

Requests for admissions are not as commonly used as interrogatories, depositions or requests for production of documents but can help narrow the disputed issues for a hearing or trial. Rule 36 requires that if a party cannot admit the information set forth in the request, that the party must ‘specifically deny it or state in detail why the answering party

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<sup>82</sup> Fed. R. Civ. P. 26(b)(2)(B).

<sup>83</sup> Fed. R. Civ. P. 26(b)(2) cmt. 2006 Amendment.

<sup>84</sup> *Id.*

<sup>85</sup> Fed. R. Civ. P. 37(e).

<sup>86</sup> Fed. R. Civ. P. 37(f) cmt. 2006 Amendment.

<sup>87</sup> Fed. R. Civ. P. 36(a)(1).

cannot truthfully admit or deny it.<sup>88</sup> Unlike interrogatories, which allow the responding party to craft the answer, requests to admit are closed-ended questions that are crafted by the requesting party. An admission in response to a request is conclusive and that issue need not be proven any further at the hearing or trial.<sup>89</sup> As such, requests for admission carefully propounded and properly responded to can be a powerful tool for a litigant. Often, requests for admission are employed to establish foundation facts for important documents anticipated to be used at trial, thereby avoiding burdening the trial with detailed and repetitive evidentiary foundation testimony. The federal rules do not limit the number of requests to admit although local rules or court orders may do so.

A party that does not respond to a request for admission is deemed to have admitted the request.<sup>90</sup> However, apart from admitting or denying, a responding party may object to the request for admission based on Rule 26(b) relevancy grounds; defective drafting grounds, such as overly broad, vague, or compound, among others; or based on a legal privilege. A party may also respond that he or she lacks the information or knowledge to admit or deny the request. The responding party, however, has to state that it made a reasonable inquiry and that the information it knows is insufficient to enable it to admit or deny.<sup>91</sup> A responding party may not object solely on the ground that the request presents a genuine issue for trial.<sup>92</sup>

*f. Third party discovery*

A party may also seek formal discovery from a non-party, or third party, to the litigation in the form of depositions or document requests. This can only be accomplished through the service of a subpoena on a third party, which is governed by Fed. R. Civ. P. 45. A subpoena can command the person to whom it is directed to attend and testify at a deposition (or trial); to produce designated documents, electronically stored information or tangible things in that person's possession, custody or control; or to permit the inspection of premises.<sup>93</sup> A party may not serve interrogatories or requests for admission on a third party.

A subpoena for attendance at a hearing or a trial must be issued from the court for the district where the hearing or trial will be held. A subpoena for attendance at a deposition must be issued from the court for the district where the deposition is going to take place. Finally, a subpoena for production or inspection of documents or tangible things must be issued from the court for the district where the production or inspection is to be made, unless the request is included on a subpoena to command attendance at a deposition, trial or hearing.<sup>94</sup>

A subpoena must also be accompanied by one day of witness fees and mileage to cover the cost of traveling to the hearing or trial.<sup>95</sup>

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<sup>88</sup> Fed. R. Civ. P. 36(a)(4).

<sup>89</sup> Fed. R. Civ. P. 36(b).

<sup>90</sup> Fed. R. Civ. P. 36(a)(3); 8A Wright, Miller & Marcus, *supra* note 14, §2259.

<sup>91</sup> Fed. R. Civ. P. 36(a)(4).

<sup>92</sup> Fed. R. Civ. P. 36(a)(5).

<sup>93</sup> Fed. R. Civ. P. 45(a)(1)(A)(iii).

<sup>94</sup> Fed. R. Civ. P. 45(a)(2).

<sup>95</sup> Fed. R. Civ. P. 45(b)(1).

The court that issued the subpoena must quash or modify the subpoena if: (1) the subpoena fails to allow a reasonable time to comply; (2) the subpoena requires a person who is not a party nor a party's officer to travel more than 100 miles from where the target of the subpoena resides, is employed, or regularly transacts business in person; (3) the subpoena requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (4) the subpoena subjects a person to undue burden.<sup>96</sup>

As with production under Rule 34, a person responding to a subpoena requesting documents must produce the documents as they are kept in the ordinary course of business or must label them to correspond to the categories in the demand.<sup>97</sup> Similarly if the subpoena does not specify the form of production for electronic documents, the producing party must produce the information in the form in which it is ordinarily maintained or in a reasonably usable form.<sup>98</sup> Again, as under Rule 34, a person need not provide discovery of electronically-stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost.<sup>99</sup>

*g. Supplements to discovery*

A party has a continuing obligation to supplement discovery responses in a timely manner as the litigation progresses.<sup>100</sup> This duty to supplement applies if the party learns that in some material respect the disclosure or response is incomplete or incorrect and if additional or corrective information has not otherwise been made known to the other party during the discovery process.<sup>101</sup> Under Rule 26(e)(2), expert disclosures must be supplemented no later than the pretrial disclosures called for under Rule 26(a)(3) – at least 30 days before trial, unless otherwise agreed to or ordered by the court.

## **Depositions<sup>102</sup>**

Fed. R. Civ. P. 30 governs depositions by sworn oral examination.<sup>103</sup> Depositions by oral examination are a useful and often utilized discovery tool.<sup>104</sup> They allow a party to

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<sup>96</sup> Fed. R. Civ. P. 45(c)(3)(A).

<sup>97</sup> Fed. R. Civ. P. 45(d)(1)(A).

<sup>98</sup> Fed. R. Civ. P. 45(d)(1)(B).

<sup>99</sup> Fed. R. Civ. P. 45(d)(1)(D).

<sup>100</sup> Fed. R. Civ. P. 26(e).

<sup>101</sup> Fed. R. Civ. P. 26(e).

<sup>102</sup> Another method of formal discovery is depositions upon written questions. *See* Fed. R. Civ. P. 31. The difficulty with written depositions is that counsel cannot ask follow-up questions based on answers given as all of the questions have to be submitted ahead of time. Similarly, it is difficult to anticipate what areas would be fruitful for cross examination without knowing how the witness is going to answer the direct examination questions. For these reasons and given the efficacy of other means of discovery, depositions on written questions are rarely used.

<sup>103</sup> *See* Fed. R. Civ. P. 30. Fed. R. Civ. P. 28 identifies persons before whom a deposition may be taken, distinguishing between depositions taken in the United States and outside the United States. Within the United States, a deposition must be taken before an officer authorized to administer oaths and take testimony either by federal law or by the law in the jurisdiction the deposition is taking place or a person appointed by the court where the action is pending. The term 'officer' as defined in Rule 28, applies to Rules 30, 31 and 32. *See* Fed. R. Civ. P. 28(a)(2).

<sup>104</sup> A party seeking to depose an individual or corporation must provide written notice to the deponent and all other parties to the litigation. The notice must state the time and place of the

question individuals (and corporations, as will be discussed below) to determine what information witnesses know and do not know. Depositions are a way to obtain information in a more spontaneous setting, in that the witnesses must answer the questions posed in the deposition without consulting with their counsel or counsel for the opposing party. They also allow the examiner to ask follow-up questions in response to any given answer. These are discovery techniques that are not available through interrogatories or requests for admissions. The examining party also preserves testimony of witnesses that can later be used to impeach a party if they provide inconsistent testimony at trial or in future depositions. Depositions are the best way to discover what the strengths and weaknesses of each party's case are likely to be.

The scope of depositions, like all discovery in civil cases, is limited by Rule 26(b). As such, deposition questions are limited to any non-privileged matter that is relevant to any party's claim or defense and, for good cause shown, the court may order discovery of any matter relevant to the subject matter involved in the action.<sup>105</sup> A party may take the deposition of any person, including a party, without leave of court, except under certain limited situations. Leave of court is required if (i) the deposition would exceed the deposition limit established by the Rules or by agreement of the parties or order of the court, (ii) the deponent has already been deposed or (iii) the deposition is sought before the parties have conferred pursuant to Rule 26(d).<sup>106</sup> A party must also seek leave of court to depose a person confined in prison.<sup>107</sup>

Because each deponent ordinarily can only be deposed once in his or her individual capacity, when to take a deposition of an individual is a strategy decision. Sometimes an early deposition may be useful to help facilitate crafting more useful interrogatories or document requests as the witness can help solidify the facts. Early depositions may also provide more accurate testimony as they will occur closer in time to the events at issue. Also, depending on the answers to the deposition questions, they may help facilitate an early settlement. Often, however, in antitrust cases, the plaintiff will want to obtain documents requested in discovery requests from the defendants prior to taking depositions. This will allow the plaintiff to better identify the key employees or decision makers that may have participated in the antitrust conduct. In cartel cases it will also

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deposition and, if known, the deponent's name and address. Fed. R. Civ. P. 30(b)(1). If a party wants a deponent to bring documents or other tangible items to a deposition, a subpoena duces tecum must be served on the deponent and a list of the documents or other items sought must be attached or, if the deponent is a party, the notice must include a Request for Production of Documents, pursuant to Rule 34. Fed. R. Civ. P. 30(b)(2). The party issuing the notice of deposition may specify the location of the deposition (if the deposition is not of a non-party, and the location is not limited by the requirement of Rule 45, set out above). If, however, the deponent believes that the location of the deposition is unreasonable, the deponent may seek a protective order from the court pursuant to Rule 26(c). Fed. R. Civ. P. 26(c)(2). Often, however, the issue of location of depositions will be discussed early in the litigation and may even be part of the Rule 26(f) conference and the parties will reach agreement on where the deposition will occur. For example, the parties may agree that the depositions will occur where the deponent is located or they may agree that the depositions will occur where counsel is located.

<sup>105</sup> Fed. R. Civ. P. 26(b)(1).

<sup>106</sup> Fed. R. Civ. P. 30(a)(1) & (2).

<sup>107</sup> Fed. R. Civ. P. 30(a)(2)(B).

assist the plaintiff in better understanding the methods used to implement any collusive agreements and thereby assist in framing the information that should be sought through further written discovery or by deposition. Depositions also allow plaintiffs to obtain, prior to trial, testimony by defendants' witnesses on key documents that will be used at trial, as well as testimony to be used at trial by witnesses who cannot be compelled to appear at trial. They also may help identify any weaknesses in the plaintiff's claims or the defendant's defenses. This allows the parties then to gather further evidentiary support to shore up their cases.

Rule 30 limits the number of depositions that any party can take to ten unless the parties agree otherwise and the court so orders.<sup>108</sup> Often in complex antitrust cases, the parties enter into agreements that expand the number of depositions available to each side. Any limitation on the number of depositions may counsel in favor of waiting until after some written discovery is complete so as to not 'waste' depositions on individuals that do not have relevant information. Rule 30(d)(1) limits a single deposition to one day of seven hours unless otherwise stipulated to or ordered by the Court. However, the Court can allow additional time if needed to fairly examine the witness or if the deposition has been impeded or delayed.<sup>109</sup>

### **Rule 30(b)(6) depositions**

A party may also notice a deposition of an entity, such as a corporation. Obviously, a corporation itself cannot appear at a deposition so the question becomes what individual should appear at the deposition on behalf of a corporation. Rule 30(b)(6) addresses depositions of corporations, partnerships, associations, governmental agencies, or other entities. The rule provides that the notice naming one of these entities as the deponent must also describe with reasonable particularity the matters that are going to be the subject of the deposition questions.<sup>110</sup> The named entity must then designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf. It may also set out the matters on which each person designated will testify.<sup>111</sup> The rule requires that the person designated must testify about information known or reasonably available to the organization; and such testimony is binding on the corporation.<sup>112</sup>

These Rule 30(b)(6) deponents therefore must be prepared to testify about the subject matters for which they are designated. There is no limit on the number of individuals a corporation can designate to testify on the subject matters identified in the notice. However, regardless of the number of individuals designated, a single Rule 30(b)(6) deposition will only count as one deposition for purposes of the deposition limits.<sup>113</sup> However, again, Rule 30(d) limits a single deposition to seven hours.<sup>114</sup> Courts have found that the Comments to Rule 30(b)(6) do not mean that each designated witness can

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<sup>108</sup> Fed. R. Civ. P. 30(a)(2)(A)(i).

<sup>109</sup> Fed. R. Civ. P. 30(d)(1).

<sup>110</sup> Fed. R. Civ. P. 30(b)(6).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Fed. R. Civ. P. 30 cmt. 1993 Amendments; *see also In re Sulfuric Acid Antitrust Litig.*, No. 03-C-4576, 2005 WL 1994105, at \*3 (N.D. Ill. Aug. 19, 2005).

<sup>114</sup> Fed. R. Civ. P. 30(d)(1).

be deposed for seven hours, as this would reward parties that issue very broad Rule 30(b)(6) notices that would require multiple designees.<sup>115</sup>

If, during the course of the deposition, it becomes clear that the designated witness is not knowledgeable about the subject matter for which he or she is designated, the party noticing the deposition may request that the deponent corporation produce a different witness and, if need be, may move to compel the production of a different witness.

The fact that a witness is designated as a Rule 30(b)(6) witness for a corporation does not preclude the parties from taking that person's deposition a second time in his or her individual capacity.<sup>116</sup> This situation may arise when an individual is designated for a single topic listed in the Rule 30(b)(6) deposition notice, but the plaintiff also wants to depose that individual as to his or her knowledge of other areas of the litigation as well. During the Rule 30(b)(6) deposition, the plaintiff is not permitted to ask questions beyond the subject matters for which that individual is designated under the Rule 30(b)(6) notice. Therefore, that individual must also be served with an individual deposition notice if plaintiff wishes to pursue different subject matters. Often, counsel will try to work out a process in which the individual deposition of the person takes place at the same time or immediately following the Rule 30(b)(6) deposition so the individual does not have to appear more than once.

### **Trial depositions**

There are two types of depositions that may be used in trial. If counsel knows that a person is going to be unavailable to testify at trial, the party may take a trial deposition. Although the rules for depositions still apply to a trial deposition, the strategy is different. Unlike a deposition taken during the course of discovery, where the purpose is fact-finding, a trial deposition should mirror what would occur if that witness appeared live at the trial. As such, generally, neither counsel would typically ask questions where the answers were unknown, as they would not want to be surprised at trial. This type of deposition is less about fact-finding and more about eliciting facts that help support the claims or defenses for the party calling the witness. If the witness is hostile, the examiner will ask leading questions, as would occur at trial.

Rule 32 of the Federal Rules of Civil Procedure sets out the parameters of using a deposition in a court proceeding. The rules provide that a deposition may be used against a party when the party was present or represented at the deposition or had reasonable notice of the deposition.<sup>117</sup> Rule 32(a)(2)–(8) discusses the ways in which a deposition may be used at trial. For example, a deposition may be used at a hearing or trial to contradict or impeach the testimony given by a deponent as a witness.<sup>118</sup> A deposition may also be used at a hearing or trial if the witness is unavailable to appear at trial.<sup>119</sup>

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<sup>115</sup> See *In re Rembrandt Techs.*, No. 09-CV-00691, 2009 WL 1258761, at \*14 (D. Colo. May 4, 2009) (limiting the Rule 30(b)(6) deposition topics and expanding the seven hour limitation for the Rule 30(b)(6) deposition to ten hours regardless of the number of designees required to testify on those topics).

<sup>116</sup> See Fed. R. Civ. P. 30(b)(6).

<sup>117</sup> Fed. R. Civ. P. 32(a)(1)–(8).

<sup>118</sup> Fed. R. Civ. P. 32(a)(2).

<sup>119</sup> Fed. R. Civ. P. 32(a)(4) explains when a witness may be considered unavailable, including

If the witness is unavailable, either a trial deposition may be used or a previously taken ‘discovery’ deposition may be used. If a party offers only parts of a deposition, the adverse party may offer other parts of the deposition of that same witness.<sup>120</sup>

Any objection that may be made to testimony if the witness was appearing live at the trial may also be made to testimony being offered through the deposition.<sup>121</sup>

### **Expert discovery**

Parties often hire experts to assist them in the preparation of their cases or in the presentation of testimony at trial. There are different types of experts and the federal rules acknowledge these differences. One type of expert is a testifying expert. This expert will actually provide a report that includes the expert’s opinions that will be served upon all other parties in the litigation.

In antitrust cases, experts in the fields of economics, statistics and econometrics are often employed, as well as experts in the industries or markets involved in the litigation. Often these experts are found in litigation consulting firms<sup>122</sup> or from academic ranks or from the industries involved. Since experts do not testify as to percipient facts but rather to their expert opinions, they may be – and invariably are – paid for their testimony. Since expert opinions in antitrust cases often involve complex computer modeling employing large volumes of data, these expert fees – both for the testifying experts and the people who assist them – can amount to sizeable sums, often in the millions of dollars.

Parties also hire non-testifying consultants to assist in either the preparation of the case or the initial investigation of the case (as discussed above).<sup>123</sup> Non-testifying consultants do not provide written reports or depositions, and their opinions and work product are not discoverable unless used by a testifying expert. In antitrust cases, the parties will often utilize testifying economic and statistical experts to opine on liability, causation and damages issues, the industry and relevant markets. These experts may utilize non-testifying consultants and assistants to help in preparing their analyses.

Sometimes a party will have employees that would be considered ‘experts’ in their field. Rule 702 of the Federal Rules of Evidence (‘FRE’) defines what is considered ‘expert testimony.’ FRE 702 states that:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

because the witness is deceased, otherwise unable to attend for enumerated reasons, or, on motion and notice, in the interests of justice in exceptional circumstances.

<sup>120</sup> Fed. R. Civ. P. 32(a)(6).

<sup>121</sup> Fed. R. Civ. P. 32(b).

<sup>122</sup> There are large and small litigation consulting firms. The larger firms (such as LECG, CRA and Compass/Lexecon) tend to be defense oriented and the smaller firms (such as Nathan Associates, InfoTech, or ERS Group) often consult with plaintiffs or defendants. Most of the litigation consulting firms have arrangements with college and university professors to work with the consulting firms on assignments as testifying experts.

<sup>123</sup> For further discussion of the use of experts during the initial investigation of the case, see Chapter 5 of this *Handbook*.

experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>124</sup>

FRE 701 states:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.<sup>125</sup>

Therefore, FRE 701 and 702 should guide the determination of whether an employee's opinions fall within the definition of 'expert testimony' that must be disclosed.

Fed. R. Civ. P. 26(a)(2) sets out the requirements for disclosure of expert testimony and Fed. R. Civ. P. 26(b)(4) discusses the discovery of information from either testifying or non-testifying experts.

Rule 26(a)(2) requires a party to disclose to the other parties the identity of any witnesses that may be used at trial to present evidence under Federal Rules of Evidence 702 (Testimony by Experts), 703 (Bases of Opinion Testimony by Experts) or 705 (Disclosure of Facts or Data Underlying Expert Opinion).<sup>126</sup> Rule 26 requires that the disclosure be made through a written report that is prepared and signed by the expert, if the expert is going to provide expert testimony in the litigation. The written report must contain a complete statement of all opinions the witness will testify to and the basis and reasons for those opinions. The report must also contain the data or other information considered by the expert in forming those opinions, any exhibits that the expert will use to summarize or support the opinions, the expert's qualifications (including a list of all publications authored in the previous ten years), a list of all other cases in which the expert has testified as an expert at trial or by deposition in the past four years and a statement of the compensation to be paid for the study and testimony in the case.<sup>127</sup>

Rule 26 requires that these disclosures be made at the times and in the sequence that the court orders, or absent an order or stipulation, at least 90 days before the date set for trial or, if the evidence is solely to contradict or rebut evidence on the same subject matter identified by another party, then within 30 days after the other party's disclosure.<sup>128</sup> The timing and sequence of disclosing expert reports, pursuant to Fed. R. Civ. P. 26(a)(2), are usually set out in the court's scheduling order. Often, the party with the burden of proof on any issue will be required to submit its expert disclosures first, usually shortly after the close of discovery, with response expert reports from the opposing side due sometime thereafter (for example, 30–60 days after the initial reports), and sometimes the courts

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<sup>124</sup> Fed. R. Evid. 702.

<sup>125</sup> Fed. R. Evid. 701.

<sup>126</sup> Fed. R. Civ. P. 26(a)(2)(A); *see also* Fed. R. Evid. 702, 703 & 705.

<sup>127</sup> Fed. R. Civ. P. 26(a)(2)(B).

<sup>128</sup> Fed. R. Civ. P. 26(a)(2)(C).

will allow reply expert reports (for example, 30 days or so after the rebuttal reports). Parties usually discuss the timing and sequence of the expert disclosures and reports during their initial meet-and-confer prior to the Rule 26 conference and either will agree to a schedule or submit competing proposals to the court.

Rule 26(b)(4) addresses depositions of expert witnesses.<sup>129</sup> Rule 26(b)(4) permits the deposition of an expert that has been identified as one whose opinions may be presented at trial, but it requires that the deposition occur only after the report has been provided.<sup>130</sup>

A party may not discover facts known or opinions held by a consultant who has been retained by a party but who is not identified as an expert who will testify at trial. Rule 35(b) may provide the only limited exception to this limitation on discovery, allowing discovery from non-testifying consultants on a showing of exceptional circumstances under which the party cannot obtain facts or opinions on the same subject matter by other means.<sup>131</sup>

The scheduling for deposing testifying experts is often set forth in the court's scheduling order and usually follows along the same schedule as the expert reports. Often, the schedule will provide for the deposition of experts following submission of their expert reports but prior to either the rebuttal or reply report. So, for example, the party with the burden of proof will submit the expert report and that expert will be deposed prior to the opposing party's submission of the rebuttal report. Once the expert rebuttal report is submitted the rebuttal expert will be deposed prior to the submission of the reply report. Sometimes courts will defer all depositions until all reports are submitted.

Finally, parties have a duty to supplement expert reports or testimony if appropriate.<sup>132</sup> Therefore, if the expert learns new information or new facts that he or she considers in forming his or her opinions, then the party must disclose that new information or new facts. If that information changes the expert's opinion, those new opinions must be disclosed. Rule 26(e)(2) sets a time limit on making such additions or changes, requiring that new information be disclosed by the time the party's pretrial disclosures are due under Rule 26(a)(3), no later than 30 days prior to trial, unless otherwise agreed or ordered by the court.<sup>133</sup>

### **Daubert**

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>134</sup> the United States Supreme Court replaced the pre-existing and restrictive 'general acceptance' test of admissibility of expert testimony under *Frye v. United States*.<sup>135</sup> While still recognizing that the judge

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<sup>129</sup> Fed. R. Civ. P. 26(b)(4).

<sup>130</sup> *Id.*

<sup>131</sup> Fed. R. Civ. P. 26(b)(4)(B).

<sup>132</sup> Fed. R. Civ. P. 26(e)(2) ('For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition.').

<sup>133</sup> *Id.*; see also Fed. R. Civ. P. 26(a)(3)(B).

<sup>134</sup> 509 US 579 (1993).

<sup>135</sup> 293 F. 1013 (D.C. Cir. 1923). The *Frye* test limited admissibility of expert opinions to those that were accorded widespread acceptance within the relevant discipline.

plays a ‘gatekeeper’ role in ensuring that only expert opinions and testimony that will be of assistance to the jury will be admitted, the Supreme Court in *Daubert* liberalized the standards of admissibility.<sup>136</sup> *Daubert* established a three-part test: (1) is the expert qualified to testify competently on the matters at hand? (2) is the methodology employed by the expert sufficiently reliable? (3) will the testimony assist the trier of fact to determine a fact in issue?<sup>137</sup>

Since expert testimony plays a significant role in antitrust cases and since antitrust plaintiffs often rely on expert testimony to establish essential elements of their claims (such as damages and causation and sometimes liability), *Daubert* challenges to exclude expert testimony have quickly become a staple of antitrust litigation practice. While the Supreme Court clearly indicated that it was ‘liberalizing’ the rules of admissibility of expert opinions and the Advisory Committee to the Federal Rules of Evidence has stated explicitly that ‘rejection of expert testimony is the exception rather than the rule,’<sup>138</sup> there is some reason to believe that the increasing frequency of *Daubert* challenges is having an adverse impact on the successful prosecution of private plaintiffs’ civil antitrust actions.<sup>139</sup>

The trial judge’s ‘gatekeeper’ role under *Daubert* is not intended to replace the adversary system.<sup>140</sup> The focus is on the expert’s methodology and not on the conclusions of the experts.<sup>141</sup> Therefore, so long as the expert’s methodology is reliable, the court need not resolve disputes between the plaintiff’s and the defendant’s experts as to conclusions. That is for the jury to decide.

Often, an antitrust plaintiff will employ expert testimony to prove damages.<sup>142</sup> Where an expert’s opinion on damages is challenged under *Daubert*, the courts need to be especially wary of excluding the expert opinions. The United States Supreme Court has recognized a lenient standard for the admission of evidence estimating antitrust damages because the ‘wrongdoer is not entitled to complain that [damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is

<sup>136</sup> See *Daubert*, 509 US at 588. See also *Estate of Bud Hill v. Conagra Poultry Co.*, 1997 WL 538887 at \* 3 (D. Ga. 1997) (*Daubert* ‘relaxed the standard for admitting scientific evidence.’).

<sup>137</sup> 509 US at 589.

<sup>138</sup> Fed. R. Evid. 702, Notes of Advisory Committee on 2000 Amendments.

<sup>139</sup> See James Langenfeld and Chris Alexander, *Daubert* Challenges of Antitrust Experts, available at <http://www.antitrustinstitute.org/node/11022>. But, many courts have rejected *Daubert* challenges in antitrust cases. See e.g. *In re Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D. 154, 164–65 (S.D. Ind. Sept. 9, 2009); *In re Scrap Metal Antitrust Litig.*, No. 1:02 CV 0844, 2006 WL 2850453 at \*16 (N.D. Ohio, Sept. 30, 2006). See also *In re High Pressure Laminates*, No. 00 MDL 1368, 2006 WL 931692, at \*1 (S.D.N.Y. April 7, 2006); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 652, 660–61 (7th Cir. 2002); *In re Linerboard Antitrust Litig.*, 497 F. Supp. 2d 666 (E.D. Pa. 2007); *In re Mercedes-Benz Antitrust Litig.*, No. 99-4311, 2006 WL 2129100, at \*7–9 (D.N.J. July 26, 2006); *In re Bulk Popcorn Antitrust Litig.*, 792 F.Supp. 650, 652 (D. Minn. 1992).

<sup>140</sup> *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir. 1998).

<sup>141</sup> *Daubert*, 509 US at 595.

<sup>142</sup> For further discussion of plaintiffs’ proof of damages, see Chapter 11 of this *Handbook*.

responsible for making, were otherwise.<sup>143</sup> This more lenient standard of proof may make a *Daubert* challenge as to expert opinions on damages more difficult.<sup>144</sup>

Typically, *Daubert* challenges are brought at the close of expert discovery (which itself is often deferred until after the close of fact discovery). Often, the trial judge will hold an evidentiary hearing to evaluate the expert opinions, although such an evidentiary hearing is not required. Occasionally, *Daubert* challenges are brought as to expert opinions at the class certification stage. Often, these *Daubert* challenges at class certification have been rejected as premature,<sup>145</sup> but because of more recent decisions requiring district courts to resolve more factual controversies at class certification,<sup>146</sup> the courts may be more receptive to considering *Daubert* challenges at this early stage.<sup>147</sup>

### **Compelling discovery – motion practice**

Despite the guidance set forth in the Federal Rules of Civil Procedure, parties often do not agree on what are appropriate discovery requests or discovery responses. The Federal Rules of Civil Procedure set forth a mechanism for addressing these discovery disputes. Initially, however, if the responding party receives a discovery request that it believes to be overly broad or outside the scope of discovery or, alternatively, if the requesting party receives discovery responses that it believes are inadequate, the parties may be able to resolve the disputes without formal motion practice.

The parties should, prior to involving the court through formal motions to compel or motions for protective order, attempt to meet and confer regarding the discovery at issue and see if they can reach a mutually agreeable solution. Indeed, the federal rules

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<sup>143</sup> *Story Parchment v. Pasterson Parchment Paper Co.*, 282 US 555, 562 (1931); see also *Bigelow v. RKO Pictures, Inc.*, 327 US 251, 264 (1946); *Metrix Warehouse, Inc. v. Daimler-Benz AG*, 825 F.2d 1033, 1043 (4th Cir. 1987).

<sup>144</sup> See *In re Polypropylene Carpet Antitrust Litig.*, 996 F.Supp. 18, 29 (1997).

<sup>145</sup> See, e.g., *Bert v. AK Steel Corp.*, No. 1:02-CV-00467, 2006 WL 1071872, at \*7 (S.D. Ohio Apr. 24, 2006) ('In ruling on Plaintiffs' class certification motion, the Court need not determine whether or not Dr. Bradley's opinion can survive a *Daubert* challenge'); *Nichols v. Smithkline Beecham Corp.*, NO. CIV.A. 00-6622, 2003 WL 302352 (E.D. Pa. Jan. 29, 2003) ('At [the class certification] stage of the proceeding the Court does not consider whether an expert witness's opinion would be admissible pursuant to *Daubert*. . .'); *In re Monosodium Glutamate Antitrust Litig.*, 205 F.R.D. 229, 234–35 (D. Minn. 2001) ('Even assuming that there are problems with Dr. Beyer's methodology, however, Defendants' attack on that methodology is premature. The *Daubert* inquiry requires a more searching analysis than is appropriate at this preliminary stage') (citations omitted).

<sup>146</sup> *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 209 (3d Cir. 2008) (finding that class certification is proper only if the court is satisfied, after 'a rigorous analysis' of the 'factual and legal allegations' that Rule 23 is met) (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 US 147, 161 (1982); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001)); *In re Initial Public Offering Securities Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) (disavowing the suggestion that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed. A district judge is to assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit).

<sup>147</sup> See *In re Fed Ex Ground Package Sys., Inc. Employment Practices Litig.*, NO. 3:05-MD-527RM (MDL-1700), 2007 WL 3027405, at \*4 (N.D. Ind. 2007) (noting that a 'more relaxed' Rule 702 standard may be appropriate at class certification stage).

and many local rules require that the parties meet and confer prior to bringing a motion, and if they fail to do so the motion can be denied on that basis alone.<sup>148</sup> At the very least, the parties may be able to narrow the issues of dispute prior to bringing a motion so that neither the parties nor the court will have to expend resources on discovery disputes that may easily be resolved through a meet-and-confer process.

If, however, the parties have attempted to resolve the discovery disputes but are unable to do so, then a party may move for an order compelling the disclosure of discovery requested.<sup>149</sup> Specifically, Rule 37 provides for motions to compel in situations where a party fails to make a disclosure required by Rule 26(a). It also provides that a party seeking discovery may move for an order compelling an answer, designation, production or inspection if (1) the deponent fails to answer a question during a deposition (either oral or written), (2) an entity fails to make a designation under Rule 30(b)(6) or 31(a)(4), (3) a party fails to answer an interrogatory or (4) a party fails to respond that an inspection will be permitted or fails to permit an inspection requested under Rule 34.<sup>150</sup>

If the court grants the motion to compel, the court must, after giving the parties an opportunity to be heard, require the losing party, deponent or attorney whose conduct or advice necessitated the motion to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees.<sup>151</sup> A party will not be awarded these costs if the movant did not in good faith try to obtain the discovery prior to making the motion or if the opposing party's non-disclosure, response or objection was substantially justified or if other circumstances make the award unjust.<sup>152</sup>

If, after the court orders that the discovery be responded to or produced, the party still refuses to provide the information, the court may impose sanctions on that party.<sup>153</sup> Rule 37(b)(2) sets out the various sanctions that a court may impose for failure to comply with an order compelling discovery, including: (1) directing that the matters or facts that were the subject of the order compelling discovery be taken as established for purposes of the litigation; (2) prohibiting the non-compliant party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence; (3) striking pleadings in whole or in part; (4) staying further proceedings until the order is complied with; (5) dismissing the action or proceeding in whole or in part; (6) rendering default judgment against the non-compliant party or (7) treating as contempt of court the failure to comply with the order.<sup>154</sup> These sanctions can be imposed against the parties but can also be imposed against the parties' attorneys.<sup>155</sup>

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<sup>148</sup> Fed. R. Civ. P. 37(a)(1); *see also, e.g.*, D. Minn. LR 37.1; *see also Use Techno Corp. v. Kenko USA, Inc.*, No. 06-02754, 2007 WL 3045996, at \*1 (N.D. Cal. Oct. 18, 2007) (denying motion to compel for failure to demonstrate good faith attempt to meet and confer).

<sup>149</sup> Fed. R. Civ. P. 37(a)(1).

<sup>150</sup> Fed. R. Civ. P. 37(a)(3)(A)–(B).

<sup>151</sup> Fed. R. Civ. P. 37(a)(5)(A); *see also* Fed. R. Civ. P. 26(c)(3) (Expenses awarded with regard to motions for protective orders are also governed by Rule 37(a)(5)).

<sup>152</sup> Fed. R. Civ. P. 37(a)(5)(A).

<sup>153</sup> Fed. R. Civ. P. 37(b).

<sup>154</sup> Fed. R. Civ. P. 37(b)(2).

<sup>155</sup> Fed. R. Civ. P. 37(b)(2)(C) ('. . . the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure. . . .').

## Limits on discovery

### *a. Protective/confidentiality orders*

As indicated throughout this chapter, there are limits on discovery. The Federal Rules limit the scope of discovery as discussed above. The Rules also recognize that discovery can be unduly burdensome and can be used to embarrass or harass the responding party. The Rules recognize that discovery sought may require that trade secret information or other confidential or commercially sensitive information be produced. In those situations, a party may seek a protective order to prevent the disclosure of the information or to protect the information from being publicly disclosed.

Rule 26 provides that a party from whom discovery is sought may move for a protective order in the court where the action is pending, or for a deposition in the court for the district where the deposition will be taken.<sup>156</sup> Again, the motion must confirm that the parties have met and conferred in good faith in an effort to resolve the dispute.<sup>157</sup> The court may, for good cause shown, issue an order to protect a party from annoyances, embarrassment, oppression or undue burden or expense by: (a) forbidding the disclosure or discovery; (b) specifying the terms, including the time and place, for 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; (e) designating the persons who may be present while the discovery is conducted; (f) requiring that a deposition be sealed and opened only on a 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.<sup>158</sup>

Often, the parties will discuss and try to stipulate to the entry of a protective order or confidentiality order prior to the initiation of discovery. These types of protective orders or confidentiality orders will try to address the parties' interest in protecting trade secret and other confidential commercial information. If the parties can agree on a proposed order, courts will often just enter it prior to the start of discovery. If the parties do not agree on the language of a proposed protective order, often the parties will submit competing proposed protective orders and the court will enter one or the other or its own protective order. The entrance of a protective order prior to the start of discovery will expedite the discovery process at the outset as it will provide comfort to the parties that their trade secrets or confidential information will be protected.

### *b. Privilege logs*

The Federal Rules also recognize that certain information is subject to privileges and as such, does not have to be produced. Rule 26(b)(1) states that discovery is limited to 'non-privileged matter.' The laws of evidence have determined what information is

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<sup>156</sup> Fed. R. Civ. P. 26(c)(1).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

considered privileged.<sup>159</sup> Generally, privileges may apply to communications that occur in furtherance of certain relationships (e.g., doctor and patient, lawyer and client) that have been found to warrant various forms of protection.<sup>160</sup>

Among the common privileges asserted in litigation are the attorney–client privilege and work product protection. If a party has communications with his or her attorney that are intended to be confidential, those communications are privileged and do not need to be produced or disclosed during discovery, except under very limited circumstances. Similarly, if counsel for a party creates a document as part of the litigation that contains the mental thoughts or impressions of the attorney, then that document, or portions of the document that reflect the attorneys mental thoughts or impressions, may be protected from disclosure by the ‘work product’ exception to discovery.<sup>161</sup>

A party that is withholding information based on privilege that would otherwise be discoverable must expressly make the claim and describe the nature of the documents, communications or tangible things not produced or disclosed, and must do so in a manner that will enable the other party to assess the claim.<sup>162</sup> Generally, parties will provide to the other parties a ‘privilege log’ which will identify the type of document being withheld and the stated privilege. Often, the log will include the types of document, the names of the author and recipients, the date of the documents and a general description of the nature of information. The issue of whether or not a privilege log complies with Rule 26(b)(5) will frequently be the subject of meet-and-confers among the parties and may result in motions to compel a more complete privilege log to allow the requesting party to assess whether the claim of privilege should be challenged.

### *c. Expert stipulations*

Another limitation that may be agreed upon by the parties is the scope of discovery relating to expert witnesses. Often, parties will agree to and enter into a stipulation limiting the materials that the parties need to produce to opposing parties with respect to their expert witnesses. For example, the parties may agree that they will not have to produce drafts of written expert reports or that they will not have to produce communications between the attorneys and the testifying experts. Although arguably this information otherwise must be produced under Fed. R. Civ. P. 26(a)(2), the parties may agree not to require its production in order to facilitate communication between the attorneys and the expert witnesses that the parties have retained.

There are proposed amendments to Fed. R. Civ. P. R. 26 to provide for expert stipulations. The amendments would provide that for witnesses that are required to provide a written report, unless stipulated or otherwise ordered by the court, the Rule 26(a)(2)(A) disclosure must state:

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<sup>159</sup> See Fed. R. Evid. 501.

<sup>160</sup> See *Perrigon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 458 (D.C. Cal. 1978) (‘The law of privilege is not just a rule governing the admissibility of evidence. Its primary purpose is to protect the confidentiality of certain communications where such confidentiality serves broad societal goals.’).

<sup>161</sup> See generally Fed. R. Evid. 502 (setting forth the provisions that apply when information protected by the attorney–client privilege or work product doctrine is disclosed).

<sup>162</sup> Fed. R. Civ. P. 26(b)(5).

- (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, 705; and
- (ii) a summary of the facts and opinions to which the witness is expected to testify.<sup>163</sup>

The proposed amendments would also provide for protection for draft reports of expert witnesses and communications between a party's attorney and an expert witness.<sup>164</sup>

*d. In camera proceedings*

Occasionally, the court may decide that it needs to see the documents that are at issue either with respect to whether or not they are properly the subject of a motion to compel (i.e., they truly do fit within the scope of discovery) or to assess whether or not the documents should be withheld on privilege grounds. The court may issue an order that the party opposing production of certain information or documents produce those documents to the court in camera, which means that the party will have to produce those documents to the court only and the court will review the documents to assess whether the documents should be produced or whether the documents are privileged. The court may also have the parties pay for a special master to review the documents for the court and make a recommendation as to whether the documents should be produced. As a practical matter, the more often the parties come before the court on discovery disputes, generally the more frustrated the court gets with the parties' inability to work through these issues. This may play a role in whether or not a court decides to appoint a special master at cost to the parties. If the parties are constantly before the court on discovery disputes and the court believes that the parties are not trying to resolve these issues on its own, it may believe that the parties will be more likely to resolve the disputes if they are required to pay a special master to resolve them rather than being able to simply go to the court for relief. Parties should generally try to resolve discovery disputes and only resort to motion practice on those issues that are critical to the case; otherwise the parties will lose credibility with the court if it believes they are unwilling to try and reach resolution on any discovery disputes.

### **Conclusion**

Given the stakes and nature of antitrust litigation, pretrial discovery plays a significant role in this type of litigation. The formal categories of discovery are established by the federal rules. And, while the federal rules regime relies on lawyer initiative, the discovery and discovery disputes are subject to court supervision and control. While the object of the federal rules is to encourage full pretrial disclosure of relevant information or information that likely would lead to relevant evidence, the recent, more restrictive trend of the courts in applying the discovery rules may have an adverse impact on plaintiffs, who rely substantially on discovery to get at the evidence that will reveal covert anticompetitive activity.

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<sup>163</sup> ABA, Proposed Amendments to the Fed. R. Civ. P., available at [http://www.abanet.org/litigation/committees/expertwitnesses/docs/1008\\_rule26.pdf](http://www.abanet.org/litigation/committees/expertwitnesses/docs/1008_rule26.pdf).

<sup>164</sup> *Id.*