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# INFORMAL DISCOVERY IN STATE AND FEDERAL COURTS

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## I. Introduction

Informal discovery refers to the ability of a litigant to learn relevant information about its case in advance of or without reliance on formal discovery devices such as document requests or interrogatories. The various principles at stake in discovery—among them, disclosure, fairness and the efficient resolution of disputes—are all served by informal discovery.

This paper focuses primarily on seeking informal discovery from the other side in a litigation.[1] An informal exchange of information between parties (or people or entities before they are parties) may be useful to foster settlement, to narrow the scope of the dispute or simply to increase trust and encourage cooperation. One particularly helpful use of pre-litigation discovery for the producing party may be to convince the requesting party that some or all of it claims are without factual or legal support.

Informal discovery is contemplated under New York CPLR 3102 and Federal Rule of Civil Procedure 26. Both state and federal courts in New York have encouraged the use of informal discovery. "[C]ourts and parties recognize that cooperative discovery devices . . . are sometimes the most efficient method for conducting discovery." *In re Joint E. & S. Districts Asbestos Litig.*, 151 F.R.D. 540, 545 (E.D.N.Y. 1993). Likewise, the Court of Appeals often has expressed its favor of

[1] Informal discovery also can be obtained from non-parties, witnesses and experts.

informal discovery. *See, e.g., Niesig* v. *Team I,* 76 N.Y.2d 363, 372 (1990) ("informal discovery of information . . . may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes"); *Muriel, Siebert & Co.* v. *Intuit Inc.*, 8 N.Y.3d 506, 511 (2007) ("the importance of informal discovery underlies our holding here").

After an overview of the law relating to informal discovery, we will address practice points for the proactive use of informal discovery.[2]

## II. Procedures Governing Informal Discovery

### A. CLPR Section 3012 – Method of Obtaining Disclosure

CPLR Section 3012(a) sets forth the formal methods of obtaining discovery in a state court action: "Information is obtainable by one or more of the following disclosure devices: depositions upon oral questions or without the state upon written questions, interrogatories, demands for addresses, discovery and inspection of documents or property, physical and mental examinations of persons, and requests for admission."

Section 3012(c) also explicitly acknowledges the possibility of obtaining discovery before an action has been formally commenced. "Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order." A party bringing a motion for pre-

[2] The Appendix addresses the work of The Sedona Conference think tank, which encourages cooperation in discovery. The Sedona Conference issued a highly publicized Cooperation Proclamation in 2008 urging lawyers, judges and others to sign on to the Proclamation and pledge to work against the culture of adversarial discovery that delays and increases the costs of litigation.

commencement discovery must "demonstrate that [it] has a meritorious cause of action." *Stump* v. *209 East 56th Street Corp.*, 622 N.Y.S. 2d 517, 518 (1st Dep't 1995).

The Court of Appeals has noted that informal discovery is welcomed in New York courts. "We have written before about the importance of informal discovery practices in litigation—in particular, private interviews of fact witnesses." *Arons* v. *Jutkowitz*, 9 N.Y. 3d 393, 406 (2007). In *Jutkowitz*, the Court held that an attorney may interview an adverse party's treating physician. The Court based its decision on the importance of informal discovery. "Attorneys have always sought to talk with nonparties who are potential witnesses as part of their trial preparation. Article 31 does not close off these avenues of informal discovery, and relegate litigants to the costlier and more cumbersome formal discovery devices." *Id.* at 409 (internal quotations and citation omitted).

**B. Current Federal Discovery Rules**

Discovery under the Federal Rules of Civil Procedure is governed principally by Rule 16 and Rules 26 through 37. The federal rules, too, contemplate the use of informal discovery.

Rule 16 provides for a pretrial conference for the purposes of "(1) expediting disposition of the action; (2) establishing early and continuing control so that the case will not be protracted because of lack of management; (3) discouraging wasteful pretrial activities; (4) improving the quality of the trial through more thorough preparation; and (5) facilitating settlement." Notably, each of these goals also is facilitated by informal discovery. Indeed, the American Bar Association's Civil Discovery Standards (adopted in 1999 and amended in 2004) recommended that parties,

before the Rule 16 scheduling conference, discuss "the possibility of informal production of documents or other information." A copy of the Standards is available at the website of the ABA Section of Litigation, www.abanet.org/litigation.

Rule 26 provides for "General Provisions Governing Discovery" and requires that parties engage in informal discovery. Rule 26(a) sets forth disclosures required to be made by the parties "without awaiting a discovery request":

> (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 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 claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 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.

Although the rule clearly requires the parties to make these disclosures without requiring an adversary to provide for them in a formal discovery request, in practice they are generally included in formal requests for documents and information.

Rule 26(b) sets forth the scope of party discovery: "Parties may obtain discovery regarding any nonprivileged 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." All discovery is subject to the limitations imposed by Rule 26(b)(2)(C), namely, that discovery may be limited by the court if: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."

And Rule 26(f) requires that the parties cooperate in discovery planning. In particular, Rule 26(f)(2) requires that the parties consider their claims and defenses and develop a proposed discovery plan. None of these requirements forecloses incorporating informal discovery into a larger discovery plan; indeed, their emphasis on cooperation suggests just the opposite.

As in state court, informal discovery guided by the principles set out in the formal rules is permissible in litigation in federal court. *See, e.g.*, *Family Dollar Stores, Inc.* v. *United Fabrics Int'l, Inc.*, No. 11 Civ. 2574 CM JCF, 2012 WL 1123736, at *6 (S.D.N.Y. Apr. 4, 2012) ("it is not uncommon among attorneys in [the Southern and Eastern Districts] of New York to utilize less formal methods for making discovery requests, or for courts to enforce such demands"); *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at *3 (S.D.N.Y. May 1, 2008) ("Prior to and during negotiations, Plaintiffs conducted formal

and informal discovery to be able to evaluate the strengths and weaknesses of their claims and set a factual predicate for a proposed resolution.").

### C. Proposed Amendments to Federal Discovery Rules

In the summer of 2013, the Judicial Conference Advisory Committee on Civil Rules proposed amendments to some of the civil rules concerning discovery, including proposed changes to Rules 1 and 26. The public comment period began on August 15, 2013 and concluded on February 18, 2014. The amendments were approved in September 2014 and are pending Supreme Court review. The Report of the Advisory Committee noted that the approved amendments developed out of a 2010 conference at Duke University, during which the "three main themes" discussed were "proportionality in discovery, cooperation among lawyers and early and active judicial case management."[3] The amendments relevant to informal discovery are discussed below.

a. Cooperation Under Rule 1. The amended Rule 1 provides that the civil rules "be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding." The Committee noted that "[e]ffective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure."

b. Proportional Discovery Under Rule 26. Several proposals to the Rules seek to promote the use of discovery proportional to the needs of the case. Although the current text of Rule 26(b)(2)(C) provides for limitations on discovery when the burden of

[3] Memorandum from Hon. Jeffrey S. Sutton, Chair, Comm. on Rules of Practice & Procedure, to Hon. David G. Campbell, Chair, Adv. Comm. on Civil Rules, at 260 (May 8, 2013, as supplemented June 2013) ("2013 Report"), *available at* http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx.

proposed discovery outweighs its likely benefit, the committee report noted that such balancing is not often observed in practice. The report explained, "[s]urveys produced in connection with the Duke Conference by various groups, including the Federal Judicial Center, the ABA Section of Litigation, the National Employment Lawyer's Association, and Lawyers for Civil Justice, indicate that excessive discovery occurs in a worrisome number of cases, particularly those that are complex, involve high stakes, and generate contentious adversary behavior."

The proposed new rule transfers the burden analysis required by the current Rule 26(b)(2)(C)(iii) to become a limit on the scope of discovery in Rule 26(b)(1), so that, if enacted, discovery must be "proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." In some cases, limited informal discovery will be all that is necessary to bring a dispute to settlement – and, thus, the only discovery proportional to the needs of the case.

More broadly, the proposed change to Rule 26(b)(1) would eliminate the rule's current reference to discovery "relevant to the subject matter involved in the action." This change would perhaps help to reorient discovery towards the claims and defenses of the parties, rather than broad demands for anything "reasonably calculated to lead to the discovery of admissible evidence." This change, too, may encourage parties to use pre-litigation discovery to assess the strengths and weaknesses of their cases because formal discovery has the potential to be greatly limited in comparison to the old rules.

Finally, an amended Rule 26(c)(1)(B) would allow courts to enter a protective order that allocates the expenses of discovery. The committee report acknowledges that this change would be "an explicit recognition of the . . . power . . . implicit in present Rule 26(c)," which "is being exercised with increasing frequency" by courts.

## III. Proactive Informal Discovery: Practice Points

### A. Public Sources of Informal Discovery

Informal discovery can and should be obtained from public sources before turning to one's adversary. Public sources include court dockets revealing the party's conduct in other lawsuits, articles and news stories, annual reports, SEC filings and UCC financing statements. In the employment context, an employee's social media profiles are a rich source of informal discovery.[4]

### B. Informal Discovery From One's Adversary

The goal of informal discovery between the parties should be to achieve targeted and efficient discovery to better achieve the goals of the client. Informal exchanges of information may be used in aid of settlement or to narrow the issues in dispute. Information may also be provided voluntarily by the producing party under the expectation that the judge or arbitrator would more than likely conclude that the

[4] The New York City Bar Association issued Formal Opinion 2010-2 stating that "a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence." The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2010-2: Obtaining Evidence From Social Networking Websites, *available at* http://www.nycbar.org/ethics/ethics-opinions-local/2010-opinions/786-obtaining-evidence-from-social-networking-websites.

requesting party is entitled to that information. For example, the producing party may voluntarily disclose information about its relevant policies and procedures, its informal practices, or information concerning its adversary instead of requiring that the requesting party serve a formal interrogatory.

Informal discovery can begin as early as the preparation of the complaint. A complaint can be drafted with the goal of having one's adversary agree to some discovery by framing the contested issues to encourage the informal exchange of documents or information. For instance, the plaintiff may send a draft complaint to the defendant to open discussion and negotiation. A defendant then may be able to inform the plaintiff or provide documents to show that certain claims are likely to be unsuccessful. Such informal exchange of documents and information can narrow the issues in the complaint that ultimately gets filed. It can also obviate the need for later motion practice.

There are, of course, risks as well as advantages to the use of informal discovery during the pre-complaint phase. Initial document production may allow plaintiffs to enhance their complaint, rather than to prune it. Defendants may avoid this outcome by putting in place a confidentiality agreement that provides that any informal discovery will be used in aid of settlement only.

Once a formal complaint has been served, the parties can make use of informal discovery in the period before formal discovery requests are served. In an article for The Sedona Conference Journal, Steve S. Gensler explains: "[T]he parties can greatly streamline the discovery process by reaching agreement on scope and source issues. The parties know best where the 'low hanging fruit' is located. The parties know

best what issues are *most important* to advancing the case, where that information is *most likely* to be found, and how that information can be accessed with the *least amount* of cost or burden."[5] Informal discussions about the scope of document production before document requests are served can greatly reduce the number of requests ultimately served, which is no small accomplishment in the age of expansive electronic discovery.

As an illustrative example of the uses of informal discovery, assume that a potential claimant wishes to bring a complaint against a former employer claiming that her employment was terminated because of her sex, her pregnancy, and for having taken leave pursuant to the Family and Medical Leave Act ("FMLA"). The claimant alleges that her employer did not inform her or otherwise provide notice that she would forfeit her right to reinstatement if her leave extended beyond the 12-week statutory leave entitlement under the FMLA. At the end of 12 weeks, the claimant asserts that she was fully capable of returning to work and performing all of the essential functions of her position as of that date. Informal discovery on the FMLA claim may be helpful to have that claim removed from the complaint or preclude expansive discovery requests on that issue. The employer voluntarily might provide documents reflecting the number of days of leave taken by the employee, the employee's timesheets, or the employer's policy and notices to employees regarding FMLA leave. Those documents might show the claimant that she had already taken more than the 12 weeks of maternity leave provided for under the FMLA and that the employer's policies state explicitly that the period of time protected under the FMLA expires in the course of a typical maternity leave.

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[5] Steven S. Gensler, *A Bull's-Eye View of Cooperation in Discovery*, The Sedona Conference Journal, Volume 10 Supplement, Fall 2009.

In conclusion, informal discovery among adversaries has many advantages. In some cases, limited informal discovery will be all that is necessary to bring a dispute to settlement. It surely can be helpful to reduce unnecessary or extra costs for one's client – whether in discovery or motion practice. And it is particularly likely to be useful where there is a small practice bar and advocates know and trust one another.

**The Sedona Cooperation Proclamation**

The Cooperation Proclamation

In July 2008, the Sedona Conference issued its Cooperation Proclamation ("the Proclamation") (*available at* www.thesedonaconference.org). The Proclamation describes the costs of discovery, particularly in light of electronic information, as untenable, and urges litigants and courts to stress the value of cooperation: "The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information ("ESI"). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes—in some cases precluding adjudication on the merits altogether—when parties treat the discovery process in an adversarial manner. Neither law nor logic compels these outcomes. With this Proclamation, the Sedona Conference launches a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery."

The Proclamation notes that cooperation in discovery is required by the Federal Rules of Civil Procedure. Over 40 state and federal judges have formally endorsed the Cooperation Proclamation.

Since the issuance of the Proclamation, many judges have noted the Proclamation with approval. *See, e.g., Capitol Records, Inc.* v. *MP3tunes, LLC*, 261 F.R.D. 44, 48 (S.D.N.Y. 2009); *William A. Gross Const. Associates, Inc.* v. *American*

*Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) ("Of course, the best solution in the entire area of electronic discovery is cooperation among counsel. This Court strongly endorses The Sedona Conference Cooperation Proclamation."); *Mancia* v. *Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 359, 361 n.3 (D. Md. 2008) ("Courts repeatedly have noted the need for attorneys to work cooperatively to conduct discovery, and sanctioned lawyers and parties for failing to do so."). Many other decisions citing the Proclamation are collected at http:///www.sedonaconference.org/content/tsc_cooperation_proclamation.