

"Do I Really Have To? New CIT Discovery Rules 2002": Overview of the New Discovery Rules

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**THE UNITED STATES COURT OF
INTERNATIONAL TRADE**

AND

**THE CUSTOMS AND INTERNATIONAL
TRADE BAR ASSOCIATION**

PRESENT

**“DO I REALLY HAVE TO? NEW CIT
DISCOVERY RULES 2002”: OVERVIEW OF
THE NEW DISCOVERY RULES**

JOSEPH F. DONOHUE, JR.*

INTRODUCTION

The Rules of the United States Court of International Trade (“USCIT R.”) substantially follow the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”), with relatively minor differences to reflect circumstances unique to the specialized nature or national jurisdiction of the CIT.¹ In 1993, the federal rules on discovery

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1 The “legislative history” of the CIT Rules is contained in the advisory committee notes to the rules, which are prepared by the Court’s Advisory Committee. These materials can be found in the CIT library. When researching a CIT rule, it is

were amended substantially, with a view to streamline the discovery process where possible to eliminate abuses and reduce costs to the litigants.² The federal rules were amended further effective December 1, 2000. The United States Court of International Trade ("CIT") amended its discovery rules effective January 1, 2001 and again effective April 1, 2002 to bring them in line with the federal rules.³

A side-by-side comparison of the CIT's prior and amended discovery rules is attached.⁴ Also included are the prior and amended versions of Rules 5(d) and 16 which, although not discovery rules themselves, refer to the discovery process and were amended to reflect changes related to the 2001 and 2002 amendments. The narrative portion of this paper does not attempt to discuss all aspects of the discovery process or to present a detailed discussion comparing the old and the new rules. It is intended only to highlight those rules that were recently amended.⁵ It is expected that other seminar participants will discuss how the rules are intended to work in specific cases.

RECENT AMENDMENTS TO RULES 26-37

Rule 26. General Provisions Governing Discovery

Rule 26 is the map for much of the discovery process. The amended rule differs substantially from its predecessor.

recommended that both the CIT advisory committee notes, as well as the advisory committee notes for the parallel federal rule, be consulted.

² See generally Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 549 (2001) (opining that 1993 Amendments constituted "the most contested discovery changes in the history of the Federal Rules").

³ See generally USCIT R. 89(u) (Jan. 1, 2001 effective date); USCIT R. 89(v) (Apr. 1, 2002 effective date) (noting application of the amendments to the referenced effective dates).

⁴ The "prior" version is the version that existed before the January 1, 2001 amendments. The "amended" version is the version that became effective April 1, 2002. Thus, the version in effect from January 1, 2001 to April 1, 2002 is not separately shown.

⁵ In doing so, it will often summarize or paraphrase the relevant portion of the amended rule. For the full text of the rule, the side-by-side should be consulted.

(a) Required Disclosures; Methods to Discover Additional Matter

(1) Initial Disclosures

Rule 26(a)(1) requires parties to make the “initial disclosure” of four categories of basic information without first being served with any request for discovery.⁶ The information to be disclosed includes: (1) identification of each individual likely to have discoverable information that the disclosing party may use to support its claim or defenses; (2) a copy of, or description and location of, documents and other materials in the custody, possession or control of the party which the disclosing party may use to support its claims or defenses; (3) a computation of damages claimed by the disclosing party; and (4) any insurance agreement which may be called upon to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.⁷

Six categories of proceedings are exempt from initial disclosure. In general, they are actions in which there is likely to be little or no discovery, or actions in which initial disclosure is not likely to contribute to the effective development of the case.⁸ The exempted actions include actions for review of an administrative record, which would include, for example, review of antidumping and countervailing duty determinations, “escape clause” determinations and worker adjustment decisions.⁹ Actions tried *de novo* under 28 U.S.C. 1581(a) or (b) are not exempt.¹⁰

⁶ See, e.g. Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV. 479, 489-95 (1995) (discussing formal discovery and automatic disclosure requirements imposed by Rule 26(a)).

⁷ These documents are considered generally necessary in most cases to prepare for trial or to make informed decisions about settlement and are generally requested early in the litigation process. The rule seeks to accelerate the exchange of basic information about the case and eliminate paperwork involved in requesting such information. Initial disclosure has been referred to as the “functional equivalent of court-ordered interrogatories.” See FED. R. CIV. P. 26(a) (advisory committee’s note) (1993 amendments).

⁸ See Elizabeth G. Thornburg, *Giving the “Haves” a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 236 n.39 (1999) (stating categories of cases thought to involve little or no discovery are exempted from initial disclosure).

⁹ See USCIT R. 26(a)(1)(E) (outlining exemptions from initial disclosure).

¹⁰ See 28 U.S.C. § 1581 (discussing civil actions against The United States).

The disclosures must be made at, or within 14 days after, the Rule 26(f) conference (discussed below), unless the court orders or the parties stipulate to a different time, or unless a party objects during the Rule 26(f) conference that initial disclosures are not appropriate in the circumstances of the action.¹¹ The party must state the objection in the Rule 26(f) discovery plan and the court will then rule on the objection.¹² A party's obligation to disclose is not excused because its investigation is not completed, the other party has not disclosed, or the party is challenging another party's disclosure.¹³

(2) Disclosure of Expert Testimony

A party must disclose to other parties the identity of any person who may be used as an expert witness and must accompany the disclosure with a report prepared by the witness containing the opinions to be expressed, and the basis for same; information considered by the witness in forming its opinion; exhibits to be used to support the opinion; qualifications of and compensation to be paid to the witness; and a listing of other cases in which the witness has testified as an expert within the preceding four years. The disclosures must be made at least 90 days before the trial date, in the absence of other direction from the court or stipulation of the parties. If the expert's testimony is intended to rebut evidence of another expert, the disclosures must be made within 30 days of disclosure of the other party.

11 See generally Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 63 (1997) (opining that discovery conference required by Rule 26(f) works particularly well when counsel complies with Rule 26(a)(1) disclosure requirements).

12 See generally United States Army Legal Services Agency, *Litigation Division Note: Changes to the Federal Rules of Civil Procedure and Federal Rules of Evidence*, 2001 ARMY LAW. 37, 40 (2001) (explaining that when facing objection to Rule 26(f) discovery plan, courts must rule on this objection and determine "what disclosures, if any, should be made").

13 See Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 534-35 (1998). The initial disclosure requirement first appeared in the Federal Rules as a result of the 1993 amendments. In 1997, the Federal Judicial Center conducted a survey and found that, in general, initial disclosure seemed to lead to reduced litigation costs and amount of discovery, quicker disposition of the actions and added to procedural fairness and fairness of the case outcome.

(3) Pretrial Disclosures

Rule 26(a)(3) requires a party to disclose and to file with the court, without request or special order of the court, information generally required for final preparation of trial such as identification of witnesses, designation of witnesses whose testimony is expected to be presented by depositions, and identification of documents and exhibits which the party expects to offer. Disclosure must occur at least 30 days before trial unless the court directs otherwise and objections must be made within 14 days.

(4) Form of Disclosures

The disclosures required by Rule 26(a)(1)-(3) must be in writing, signed and served.

(b) Discovery Scope and Limits

(1) In General

Unless otherwise limited by the court, discovery is allowed with respect to any matter not privileged that is “relevant to the claim or defense of any party . . .”¹⁴ The amended rule is narrower than the prior rule, which allowed discovery of any matter “relevant to the subject matter involved in the pending action.”¹⁵ For good cause the court may order discovery of any matter relevant to the subject matter involved in the action.¹⁶

(2) Limitations

Rule 26(b)(2) allows the court, by order, to put limitations on the number and/or length of depositions,¹⁷ the number of

¹⁴ USCIT R. 26(b)(1).

¹⁵ Stempel, *supra* note 2, at 541 (noting previous permissible discovery requests).

¹⁶ When the parallel federal rule was amended in 2000, it was intended to prevent unnecessarily broad discovery and the related delays and litigation costs. At the same time, it was intended that the court would retain authority to permit discovery, for good cause, of any matter relevant to the subject matter involved in the action. The amendment was designed to “involve the court more in regulating the breadth of sweeping or contentious discovery.” See FED. R. CIV. P. 26(b)(1) advisory committee’s note (2000 amendment).

¹⁷ See USCIT R. 30 (addressing depositions upon oral examination).

requests for admission¹⁸ and to otherwise limit the frequency or extent of discovery.

(4) Trial Preparation: Experts

A party may depose an expert whose opinions may be presented at trial.¹⁹ If a report from the expert is required under Rule 26(a)(2)(B), the deposition cannot be conducted until the report is provided.²⁰

(5) Claims of Privilege or Protection of Trial Preparation Materials

A party who withholds information that is otherwise discoverable by claiming it is privileged or subject to protection as trial preparation material, must provide specific information as set forth in Rule 26(b)(5) so that the other parties will be able to assess the applicability of the privilege or protection.²¹

(c) Protective Orders

Before a party may seek a protective order from the court on a discovery matter, the party seeking protection must certify that it has conferred with or attempted to confer with other affected parties to resolve the dispute without court action.²²

18 See USCIT R. 36 (dealing with requests for admission).

19 See Michael J. Saks, *Towards More Reliable Jury Verdicts?: Law, Technology, and Media Development Since the Trials of Dr. Sam Sheppard: Scientific Evidence and the Ethical Obligations of Attorneys*, 49 CLEV. ST. L. REV. 421, 435 (2001) (commenting that logic behind FED. R. CIV. P. 26(b)(4) is that expert witnesses' knowledge is not "shielded in the way that the knowledge of the advocate is").

20 See Christa L. Klopfenstein, Note, *Discoverability of Opinion Work Product Materials Provided to Testifying Experts*, 32 IND. L. REV. 481, 492-93 (1999) (noting FED. R. CIV. P. 26(a)(2) requires mandatory disclosure of reports prepared and signed by expert witnesses).

21 See Linda S. Mullenix, *Adversarial Justice, Professional Responsibility, and the New Federal Discovery Rules*, 14 REV. LITIG. 13, 30 (1994) (stating Rule 26(b)(5) requires parties invoking claims of privilege or immunity to expressly state that privilege).

22 See Laurie Kratky Dore, *Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 349 n.269 (1999) (noting 1993 amendments to discovery rules added certificate of conference as prerequisite to motions for protective order).

(d) Timing and Sequence of Discovery

A party may not seek discovery before the parties have conferred in accordance with Rule 26(f) (discovery conference) except if the action falls within one of the exempt categories of actions²³ or when authorized under the rules, or by court order or by agreement of the parties.²⁴

(e) Supplementation of Disclosures and Responses

Parties are under a duty to supplement or correct Rule 26(a) disclosures and discovery responses to include information acquired after disclosure or discovery if ordered by the court, or if the party learns the disclosure or discovery response is in some material respect incomplete or incorrect (and, in the case of disclosure, has not been made known to the other parties in the course of discovery).²⁵

(f) Conference of Parties; Planning for Discovery

Parties are required to confer as soon as practicable after the complaint is filed, but no later than 21 days before the scheduling conference²⁶ is held or a scheduling order is due under Rule 16(b).²⁷ At the conference the parties are to discuss the basis for their claims and defenses and the possibility for prompt settlement or resolution of the case, and to make or arrange for the Rule 26(a)(1) disclosures (“initial disclosures”) and to develop a proposed discovery plan.²⁸ Within 14 days after the conference, the parties must submit a written report to the court outlining the discovery plan.²⁹ The court may accelerate the Rule 26(f)

23 See USCIT R. 26(a)(1)(E) (outlining exemptions from initial disclosure).

24 See USCIT R. 26(d) (describing order of discovery process); see also *Steppes Apartment v. Armstrong*, 188 F.R.D. 642, 643-45 (D. Utah 1999) (analyzing FED. R. CIV. P. 26(d) and (f) with respect to third parties, “discovery can go forward against later joined parties without a further 26(f) conference after the initial conference”).

25 See *Klonoski v. Mahlab*, 156 F.3d 255, 268 (1st Cir. 1998) (stating “the rules require prompt supplementation of [a party’s] additional material so the opposing party is not misled by the original discovery responses”).

26 See USCIT R. 26(f) (noting method of party conferences).

27 The timing of the conference is tied to the filing of a complaint, and therefore, the filing of a summons alone (e.g., 28 U.S.C. § 1581(a)) would not trigger the Rule 26(f) conference. The practice comment to Rule 26(f) notes that, “time permitting, parties may frequently find it more practical to confer after the answer has been filed.”

28 See USCIT R. 26(f) (discussing how parties plan for discovery).

29 See *id.* (asserting “[t]he attorneys of record . . . are jointly responsible for . . . submitting to the court within 14 days after the conference a written report outlining the

conference or the filing of the report on the discovery plan. A party or its attorney who fails to participate in good faith in the development and submission of the discovery plan may be required by the court to pay the costs related to failure to participate.³⁰

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

The attorney of record must sign every disclosure made under Rule 26(a)(1) or (3) and the signature constitutes a certification that the disclosure is complete and correct at the time it is made.³¹

Rule 27. Depositions Before Action or Pending Appeal

The only changes resulting from the amendments are of a clerical nature (e.g. replace alphabetic reference with a numeric reference).³²

Rule 28. Persons Before Whom Depositions May Be Taken

(a) Within the United States

Depositions taken within a territory or insular possession subject to U.S. jurisdiction shall be taken before the same officer as a deposition taken within the United States.

Rule 29. Stipulations Regarding Discovery Procedure

The parties may stipulate in writing to modify the procedures governing, or other limitations placed on, discovery. Parties may stipulate to extend time to answer interrogatories,³³ produce

plan”).

30 See USCIT R. 37(c)(1) (discussing remedies for failure of disclosure).

31 See USCIT R. 26(a)(4) (stating “all disclosures under Rules 26(a)(1) through (3) [to] be made in writing, signed, and served”).

32 See FED. R. CIV. P. 27 (advisory committee note) (informing that changes to Rule 27 “are intended to be stylistic only”).

33 See USCIT R. 33(a) and (c) (describing availability and scope of interrogatories).

documents and things³⁴ and respond to requests for admission³⁵ without court approval unless such extension would interfere with the time set for completion of discovery, for hearing a motion or for trial.³⁶

Rule 30. Depositions Upon Oral Examination

(a) When Depositions May Be Taken; When Leave Required

A party may take the deposition of any other person without leave of court except if the specific deposition would result in more than ten depositions being taken by plaintiffs, defendants or third-party defendants, or the person to be examined has already been deposed, or the party seeks to take the deposition before the time specified in Rule 26(d). Leave of court is not required if the parties have stipulated to allow the depositions in the above circumstances.

(b) Notice of Examination; General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone

The party taking the deposition must state in the notice the method by which it will be taken (e.g. sound, sound-and-visual, stenographic). Another party, by notice, may designate another method to record the deponent's testimony. Certain information must be put on the record at the beginning of the deposition.³⁷

34 See USCIT R. 33(b) (stating that written responses need to be served within 30 days of service unless parties agree otherwise).

35 See USCIT R. 36(a) (stating that requests for admission may not be served before the time specified in Rule 26(d) without leave of court or written stipulation).

36 The ability of the parties to stipulate in writing to extensions or other modifications of discovery limitations helps to reduce many discovery related motions. See FED. R. CIV. P. 30(a) (advisory committee note) (1993 amendment).

37 See USCIT R. 30(b)(4) (describing the preliminary statement to be made on the record by the officer conducting the deposition).

(d) Schedule and Duration; Motion to Terminate or Limit Examination

Any objection to a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to protect a privilege, to enforce a limitation on evidence directed by the court or to present a motion under Rule 30(d)(4) (motion showing deposition being conducted in bad faith, to annoy, embarrass, etc.) A deposition is limited to one day of seven hours unless otherwise ordered by the court or stipulated by the parties.³⁸ Any person who impedes, delays or frustrates the deposition is subject to sanctions.

Rule 31. Depositions Upon Written Questions

(a) Serving Questions - Notice

A party must obtain leave of court if the person to be examined is confined to prison or if, without written stipulation of the parties: (1) a proposed deposition would result in more than 10 depositions by plaintiffs, defendants or third-party defendants; (2) the person to be examined has already been deposed; or (3) the party seeks to take the deposition before the time specified in Rule 26(d).

Cross questions, redirect questions and recross questions may be served within the time periods set forth in Rule 31(a)(4).

³⁸ The limitation of 7 hours is intended to help control the litigation costs and delays. The limitation contemplates that there will be breaks during the day and that the only time to be counted is the time spent on the deposition itself. See FED. R. CIV. P. 30(d) advisory committee note (2000 amendment).

Rule 32. Use of Depositions in Court Proceedings

(a) Use of Depositions

A deposition taken without leave of court pursuant to Rule 30(a)(2)(C) shall not be used against a party who demonstrates that it was unable to obtain counsel to represent it at the deposition; or against a party who received less than 11 days notice of a deposition and promptly filed for a protective order requesting that the deposition not be held or that it be held at a different time and place, and the motion is pending at the time the deposition is held.

(c) Form of Presentation

A party may offer a deposition in stenographic or nonstenographic form, but if in nonstenographic form it must be accompanied by a transcript of the portions offered.³⁹

Rule 33. Interrogatories to Parties

(a) Availability

Interrogatories may not be served before the Rule 26(f) conference, without leave of court or written stipulation of the parties.⁴⁰

(b) Answers and Objections

If a party objects to an interrogatory, it must state the reasons for the objection and answer to the extent the interrogatory is not objectionable. Answers must be served within 30 days after service of the interrogatories.⁴¹ The parties may stipulate to a shorter or longer response time as long as such stipulation does

³⁹ See FED. R. CIV. P. 32(c) advisory committee note (1993 amendment) (explaining how this rule contemplates using video-recorded and audio-recorded depositions).

⁴⁰ The CIT Rules contain no interrogatory limit. See FED. R. CIV. P. 33 (limiting number of interrogatories that may be served without leave of court to 25); see also FED. R. CIV. P. 26(d) (explaining timing and sequence of discovery).

⁴¹ The 30 days response time also applies to defendant. Under the prior rule, defendant had 45 days to respond.

not interfere with the time set for completion of discovery, for hearing a motion, or for trial.⁴²

Grounds for objections to an interrogatory must be stated with specificity or they are waived, unless the party's failure to object is excused by the court for good cause shown.⁴³

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(b) Procedure

The request to produce documents may be served any time after the Rule 26(f) conference.⁴⁴ Responses are due within 30 days after service of the request, unless the court orders, or parties stipulate, otherwise, subject to Rule 29. If a party objects to part of the request for inspection, the part must be specified and inspection permitted of the remaining parts.

Rule 35. Physical and Mental Examinations of Persons

This rule was not amended.

Rule 36. Requests for Admission

(a) Request for Admission

A party may not serve a request for admission until after the Rule 26(f) disclosure conference except by leave of court or written stipulation of the parties. The response time is 30 days

⁴² See USCIT R. 33(b)(3) (allowing for shorter or longer answer period to interrogatory if "agreed to in writing by the parties subject to Rule 29").

⁴³ See USCIT R. 37(a) (compelling discovery following objection or failure to answer).

⁴⁴ See USCIT R. 26(d) (stating "[A] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)").

after service unless the court allows, or the parties stipulate to, a shorter or longer period, subject to Rule 29.⁴⁵

Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions

(a) Motion for Order Compelling Disclosure or Discovery

(1) Motion

A party may move for an order compelling disclosure if another party fails to disclose as required by rule 26(a). The motion must include a certification that the movant has in good faith conferred or attempted to confer with the other party in an effort to secure disclosure without court action. A similar certification must be made in a motion to compel discovery under Rules 30 (depositions upon oral examination), 31 (depositions upon written questions), 33 (interrogatories) and 34 (request to produce or inspect).

(2) Evasive or incomplete disclosure, answer, or response

An evasive or incomplete disclosure, answer to an interrogatory or response to a request to produce is treated as a failure to disclose, answer or respond.

(3) Expenses and Sanctions

If a motion to compel disclosure or discovery is granted (or if the disclosure or discovery is provided after the motion is made), the court shall require the offending party or its attorney, or both, to pay reasonable expenses incurred in making the motion, including attorney's fees, unless certain circumstances are met as set forth in Rule 37(a)(3)(A). If the motion is denied, the court may require the moving party or the attorney, or both, to pay the party who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees. If the motion is

⁴⁵ See USCIT R. 36(a) (noting the timing requirements of admission under the Rules).

granted in part and denied in part, the court may apportion the expenses among the parties.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit

A party who, without substantial justification, fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior discovery response, is barred from using as evidence at a trial, at a hearing, or on a motion, any witness or information not disclosed, unless the failure to disclose is harmless. The court may also impose other sanctions, including a requirement to pay expenses caused by the failure and sanctions authorized under Rule 37(b)(1), (2) and (3).

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection

Any motion claiming a failure of a party to serve answers or objections to interrogatories under Rule 33, or to serve a written response to a request for inspection submitted under Rule 34, must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. The court shall require the party failing to act or the attorney advising the party, or both, to pay the reasonable expenses, caused by the failure, unless the court finds that the failure was substantially justified or other circumstances make an award of expenses unjust.

AMENDMENTS TO RULES 5(D) AND 16

Rule 5. Service and Filings of Pleadings and Other Papers

(d) Filing: When Required

Disclosures made under Rules 26(a)(1) or (2) (as well as other

discovery materials) are not to be filed until used in the proceeding or the court orders filing.

Rule 16. Postassignment Conferences; Scheduling; Management

* * *

(b) Scheduling and Planning

The scheduling order by the court may include, among other things, “modifications of the times for disclosures under Rule 26(a) and 26(c)(1) and of the extent of discovery to be permitted.”⁴⁶ The scheduling order, or the order that a scheduling order will not aid in the disposition of the action, will issue as soon practicable, but in no event more than 90 days after the action is assigned. The schedule will not be modified, except by leave of the court upon a showing of good cause.

(c) Subjects for Consideration at Postassignment Conferences

Among the subjects that may be considered at the postassignment conference are “the control and scheduling of discovery, including orders affecting disclosure and discovery pursuant to Rule 26 and Rules 29 through 37.”⁴⁷

⁴⁶ USCIT R. 16(b)(4).

⁴⁷ USCIT R. 16(c)(6).

