

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

**IN RE: AMENDMENT TO COURT OF CHANCERY RULES TO
AMEND SECTION I, RULE 1 AND SECTION V, RULES
26, 34, AND 37**

This 16th day of May 2019, IT IS HEREBY ORDERED that the Court of Chancery Rules Section I, Rule 1 and Section V, Rules 26, 34, and 37 shall be amended, effective July 1, 2019.

Rule 1. Scope and purpose of Rules.

These Rules shall govern the procedure in the Court of Chancery of the State of Delaware with the exceptions stated in Rule 81. They shall be construed ~~and,~~ administered, and employed by the Court and the parties, to secure the just, speedy and inexpensive determination of every proceeding.

Rule 26. General provisions governing discovery.

Rule 26(b)(1)

(b) Discovery scope and limits. -- Unless otherwise limited by order of the Court in accordance with these Rules, the scope of discovery is as follows:

(1) In general. -- Parties may obtain discovery regarding any ~~matter, not non-~~privileged, which matter that is relevant to ~~the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party~~ any party's claim or defense and proportional to the needs of the case, including the existence, description, nature, custody, condition and location of any documents, electronically stored information, or tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial ~~if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.~~

The frequency or extent of use of the discovery methods set forth in paragraph (a) shall be limited by the Court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery ~~is unduly burdensome or expensive, taking into account sought is not proportional to~~ the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, ~~limitations on~~ the parties' relative access to relevant information, the parties' resources, and the importance of the issues at stake in the litigation discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. The Court may act upon its own initiative after reasonable notice or pursuant to a motion under paragraph (c).

Comment: The 2019 amendment to Delaware Court of Chancery Rule 26(b)(1) follows the Federal Rules of Civil Procedure in confirming that relevance is the touchstone for discovery. Under this standard, relevant evidence is discoverable, even if it may not be admissible. The 2019 amendment removes the qualification about the information appearing “reasonably calculated to lead to the discovery of admissible evidence.” As the comments to Federal Rule of Civil Procedure 26(b)(1) explain, this phrase “has been used by some, incorrectly, to define the scope of discovery.” To avoid this implication, the drafters of the federal rules removed the language and replaced it with the direct statement that information within the scope of discovery need not be admissible in evidence to be discoverable. Subject to other considerations, such as privilege and proportionality, all relevant evidence is discoverable, whether or not it is admissible. This clarification is not intended to change the scope of available discovery under the Delaware rules. The scope of discovery remains “broad and far-reaching...” *Cal. Pub. Emps. Ret. Sys. v. Coulter*, 2004 WL 1238443, at *1 (Del. Ch. May 26, 2004) (citation omitted). “[T]he spirit of Rule 26(b) calls for all relevant information, however remote, to be brought out for inspection not only by the opposing party but also for the benefit of the Court” *Boxer v. Husky Oil Co.*, 1981 WL 15479, at *2 (Del. Ch. Nov. 9, 1981). Relevance “must be viewed liberally,” and discovery into relevant matters should be permitted if there is “any possibility that the discovery will lead to relevant

*evidence.” Loretto Literary & Benevolent Inst. v. Blue Diamond Coal Co., 1980 WL 268060, at *4 (Del. Ch. Oct. 24, 1980).*

Rule 26(c)

(c) Protective orders. -- Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the Court or alternatively, on matters relating to a deposition taken outside the State of Delaware, a court in the state where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including 1 or more of the following: (1) That the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the Court; (6) that a deposition after being sealed be opened only by order of the Court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Court. A party has standing to move for a protective order with respect to discovery directed at a non-party on the basis of annoyance, embarrassment, oppression, or undue burden or expense that the moving party will bear. A non-party from another state from whom discovery is sought always may move for a protective order from the court in the state where discovery is sought or, alternatively, from this Court provided the non-party agrees to be bound by the decision of this Court as to the discovery in question.

If the motion for a protective order is denied in whole or in part, the Court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Rule 34. Production of documents, electronically stored information, and tangible things and entry upon land for inspection and other purposes.

Rule 34(b)

(b) Procedure. -- The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The Court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the grounds and reasons for objection(s) shall be stated with specificity. An objection must state whether the responding party is withholding or intends to withhold any responsive materials on the basis of that objection, and the responding party is under a duty to supplement its response to the extent it subsequently determines that it will withhold any responsive material on the basis of an objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

Unless the document request expressly requires that the documents must be produced for inspection, the responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection, in which case the production must then be completed no later than the time for inspection specified in the request, another reasonable time specified in the response, or as otherwise agreed between the requesting and responding parties

Rule 34(d)

(d) Requests for production of documents or electronically stored information. ~~— Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:~~ A party may state in its request the form for producing documents or electronically stored information. ~~The response may state an objection to a requested form for producing documents or electronically stored information. If a party so states, the responding party objects to a requested form, the party must state must produce electronically stored information in the form or forms it intends to use requested.~~ If a request does not specify a form for producing documents or electronically stored information, or if the form specified is unreasonable, a party must produce it in a form or forms in which it is ordinarily maintained or in which it is reasonably usable. Absent a showing of good cause, a party need not produce the same documents or electronically stored information in more than one form.

Rule 37. Failure to make discovery; Sanctions.

Rule 37(a)(2)

(a) Motion for order compelling discovery. -- A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate court. -- An application for an order to a party may be made to the Court or, alternatively, on matters relating to a deposition taken outside the State of Delaware, to a court in the state where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a court in the state where the deposition is being taken.

(2) Motion. -- If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection or production submitted under Rule 34, fails to produce documents or ESI, or fails to respond that inspection will be permitted as requested, or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection or production in accordance with the request. When taking a deposition on oral examination, the proponent of the question may

complete or adjourn the examination before the proponent applies for an order.

Rule 37(e)

(e) Failure to preserve ESI. -- If ESI that should have been preserved in the reasonable anticipation of or actual notice of imminent litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted recklessly or with the intent to deprive another party of the information's use in the litigation, may, among other things: (A) presume that the lost information was unfavorable to the party; or (b) dismiss the action or enter a default judgment.