

## CIVIL PROCEDURE II

### Class #1 Discovery--introduction, devices

#### **Readings:**

Preview the semester by studying the list of topics in the syllabus in this Addendum p. 3.  
Preview discovery by studying the Outline in the Nutshell pp. VIII-IX.  
Study Nutshell pp. 129-47; Rules 26-37, 45 and Forms 50, 51, 52 in the rules handbook;  
Addendum pp. 26 (Rule 104), 63-66 (Rules 4.2-4.4).

#### **Understand:**

1. Regarding discovery, generally:
  - a. What are the purposes of discovery?
  - b. What was the precursor to discovery under the Federal Rules? See casebook p. 204 (middle ¶).
  - c. What is the scope of discovery?
  - d. At what stage does discovery occur in the litigation process? But cf. Rule 27 (before action and pending appeal) and Rule 69 (in aid of execution).
  - e. Ethical, factual, and tactical considerations, as well as legal limitations (FRCP, Federal Rules of Evidence, law of privilege), relate to the use of discovery.
  - f. What is the sequence of discovery? See "Note" 1 below. Cf. Rule 26(a) (mandatory initial disclosures).
  - g. Are discovery materials admissible at trial?
  - h. How are discovery disputes resolved? Cf. Rule 29 (stipulations).
  - i. What duty is there to supplement earlier responses?
  - j. What alternatives are there to discovery? See also Rules 27(c) and 34(c) (1991 note) (independent court suit for discovery) and federal, state, and local public information or freedom of information acts.
  - k. What are the advantages and disadvantages of discovery, compared with informal investigation?
    - l. What defense has one against whom discovery is sought? See Rule 26(c). What aid has a person seeking discovery? See Rule 37.
2. Regarding the discovery devices:
  - a. What devices are there? Rules 26(a)(1), 27, 30, 31, 33-36. Cf. Rule 45(a)(1) (subpoena duces tecum).
  - b. Which devices may be used against non-parties, as well as parties?
  - c. What device, as a matter of course, requires a prior court order? What showings must be made to get the order?
  - d. How is discovery from an organization made? See Rules 30(b)(6), 33.
  - e. Match the following rules with discovery devices and with their characteristics:

<u>Rule</u>	<u>Device</u>	<u>Characteristic</u>
26	Answers to interrogatories	Advance court approval required
30	Deposition on written Q's	Conclusively establishes facts
31	Initial disclosures	Court reporter asks questions
33	Medical examination	Evidence, if authenticated
34	Oral deposition	Inexpensive, written by lawyers
35	Production/entry	Spontaneous A's, follow-up Q's
36	Admissions	Without request
3.	Regarding mandatory initial disclosure:	
	a.	What items are included? <u>See</u> Rule 26(a)(1).
	b.	How are they obtained? <u>See</u> Rule 26(f).
	c.	When are they not required? <u>See</u> Rule 26(a)(1)(B).
	d.	What is the sanction for non-disclosure? <u>See</u> Rule 37(c)(1).
4.	What are the mandatory later disclosure items? <u>See</u> Rule 26(a)(2),(3).	

**Note:**

1. In commercial litigation lawyers generally use the following sequence of discovery--interrogatories, document requests, depositions. In personal injury litigation lawyers usually depose witnesses and the opposing party first.
2. Both plaintiffs, Sibbach, Nutshell p. 140, and defendants, Schlagenhauf, Nutshell p. 144, were held subject to medical examinations, notwithstanding privacy claims.

**For class discussion:**

1. Addendum pp. 118(25), 147(4), 150(12), 151(20), 169(9).
2. How does discovery fit into the stages of litigation?
3. In "Whose Monet?":
  - a. You represent De Weerth:
    - i. Before suit how do you get Wildenstein to reveal the identity of the painting's possessor? See pp. 19, 27.
    - ii. What do you want to know from Wildenstein and Baldinger about the sale? What devices do you use to get that information? See pp. 128-29.
  - b. You represent Baldinger—what do you want to know from De Weerth? What devices do you use to get that information? See pp. 126, 223-32.

**For further thought:**

Why do the Federal Rules provide for liberal (far-reaching) discovery? Is that a good thing?

**Occasional learning paper:**

Be thinking about (and doing) the assignment for the first learning paper of the semester, due at the beginning of the fifth class, which is a local state circuit court visitation and observation assignment. See the learning paper assignment for that class.