



**USNYWD'S PRO SE HANDBOOK
CHAPTER 6: DISCOVERY
[ALL-IN-ONE DOCUMENT]**

Pro Se Handbook
Chapter 6
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PRO SE HANDBOOK

US DISTRICT COURT, NEW YORK, WESTERN DISTRICT

CHAPTER: 6 DISCOVERY

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ITEMS: 6.01 through 6.11



6.01 | INTRO - DISCOVERY

Discovery is the exchange of information between opposing parties. Rules 26 through 37 of the Federal Rules of Civil Procedure provide for pretrial discovery. In addition, each judge has his or her own set of discovery procedures which are contained in pretrial instructions. The Local and Federal Rules are followed in every judge's court.

There are five devices for conducting discovery:

- (1) depositions: oral or by written questions (Federal Rules 27-32);
- (2) interrogatories to parties (Federal Rule 33);
- (3) production for inspection of documents and other tangibles (Federal Rule 34);
- (4) physical or mental examinations (Federal Rule 35); and
- (5) requests for admission (Federal Rule 36).

The Federal Rules also define the scope of discovery, as well as set forth both the means for compelling the other side to turn over discovery material and protection from discovery that is too broad or too intrusive.

Federal Rule 26(b) states that the matter sought must be relevant to a claim or defense of any party or relevant to the subject matter involved in the pending action. However, the Federal Rules grant immunity from discovery to privileged information, i.e., communication between attorneys and clients, patient and physicians, information that may be self-incriminatory, information involving state or military secrets, etc. Discovery is also limited by the right of any person from whom discovery is sought to seek a court order protecting him or her from "annoyance, embarrassment, oppression, or undue burden or expense." (See Federal Rule 26(c).)

Note that relevancy for discovery purposes is much broader than relevancy for the purposes of admitting evidence at trial.

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6.02 | SCHEDULING CONFERENCE/ORDER

Generally, once an answer is filed by the defendant, the Court will issue an order or notice scheduling a conference with the assigned Judge or Magistrate Judge under Federal Rules of Civil Procedure 16(b) and 26(f). The order or notice will set forth what is to be covered at the Conference and notify the parties that they are required to meet and confer (except in prisoner cases) at least 21 days prior to the conference (either in person or by telephone) in order to discuss a proposed schedule for how the case is to progress. At the Conference, the parties will meet with the Judge or Magistrate Judge (or maybe his or her law clerk) and discuss, among other things, the issues involved in the case, settlement, and a proposed scheduling order. Following the Conference, the Court will issue a Scheduling Order pursuant to Federal Rule of Civil Procedure 16(b), which will set forth a schedule as to when certain phases of the case must be completed.

For example, the Scheduling Order will set forth dates as to when

- (1) all initial (mandatory) disclosures must be produced (Federal Rules of Civil Procedure, 26(a)(1);
- (2) all motions to amend or join parties must be filed;
- (3) all discovery must be completed; and
- (4) all dispositive motions must be filed.

It may also set forth dates for further pre-trial conferences, a settlement conference and trial.

In some limited circumstances, generally cases filed by prisoners, a scheduling conference may not be held and the Judge or Magistrate Judge will issue a Scheduling Order.

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6.03 | FILING OF DISCOVERY

Local Rule of Civil Procedure 7.1(a)(1) requires that all discovery in pro se prisoner cases be filed with the Clerk's Office.

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6.04 | INITIAL (MANDATORY) DISCLOSURES

Federal Rules of Civil Procedure 26(a)(1) requires that all parties in all cases, except cases brought by prisoners pro se, must produce certain information to the opposing party without first receiving a discovery request or notice for such information. The information that must be provided without a request or notice is:

(A) the name and addresses, if known, of any person who may have information relevant to the lawsuit;

(B) a copy, or a description by category and location of, all documents and other tangible things that are relevant to the lawsuit, except information that will be used solely for impeachment (See p. 23);

(C) a computation or listing of all money damages that are being claimed by plaintiff in the lawsuit (this is generally only provided by the plaintiff); and

(D) a copy of any insurance policy which may require an insurance company to pay for any damages awarded to a plaintiff (this is generally only provided by the defendant, if there is any insurance).

Rule 26(a)(1) requires that this information be produced within 14 days after a conference is held with the Judge or Magistrate Judge but, in some cases, a date will be set by the Judge at the scheduling conference as to when this information must be produced. See Federal Rules of Civil Procedure 16(b) and 26(f). All other information that is not required to be produced initially may be requested, if relevant, through the five discovery devices discussed below.

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6.05 | DEPOSITIONS (FEDERAL RULES OF CIVIL PROCEDURE 27-32)

After commencement of a civil action, a deposition may be taken of any witness, whether or not a party. The witness, called the deponent, is examined under oath by the discovering party; adverse parties may cross-examine the deponent. A question and answer format is used, and the testimony is recorded by a court reporter. While the Rule allows for some other recording methods, e.g. tape recording, a court reporter is the usual means unless the parties agree to, or the Court orders, some other method. The party that requests the deposition be taken is responsible for having a court reporter present and bearing that expense, which may be very costly. Parties should discuss the costs of providing copies of the transcript of the deposition prior to scheduling the deposition. The deposition may also be taken by written question, as indicated above, rather than by oral deposition. This process is much less costly. The costs of depositions and any other discovery are not provided for by in forma pauperis status.

The discovering party initiates the process by notifying the other parties by mail of the time and place of taking the deposition and of the name and address of the deponent. (Where information is sought from an organization, such as a corporation, and the discovering party does not know what person in the organization has the desired information, the organization may be named as the deponent and the matter on which examination is sought must be set forth in the Notice of Deposition. The organization then designates the person to testify on that subject.) The deponent (witness), if a nonparty, must be subpoenaed to compel his attendance. See subpoena topic at the end of this section. This may require taking the deposition at a place other than where the action is pending. Subpoena forms are available in the Clerk's office and must be requested in writing by pro se litigants.

The deposition is taken before one authorized to administer oaths, generally the court reporter. But that officer is not a judge and has no power to rule on objections that arise during the course of taking the deposition. Some objections simply raise questions of admissibility at trial. As to those, the objection can be stated orally, the answer given and resolution deferred until the deposition is offered in evidence at trial. Other objections may require judicial intervention before the deposition can proceed further. Objections as to the form of the question, e.g., leading, confusing, argumentative, must be made at the time of the question or the objection will be waived.



After the discovery period has ended, depositions may be taken only pursuant to court order or with the consent of all other parties. The Court will allow post-discovery depositions to be taken if the purpose of the deposition is to perpetuate the testimony of a witness who will not be and/or cannot be made to appear at trial.

Please note that under Federal Rules of Civil Procedure 30(a)(2)(A) and 31(a)(2)(A), depositions are limited to seven hours each and ten depositions per side (not per party), unless the Court grants permission otherwise.

A deposition is used at trial to contradict or impeach testimony of the deponent given as a witness, or when the deponent is not available to testify as a witness at trial. A party may use the deposition of an adverse party at any time for any purpose.

As discussed above, the costs of depositions must be paid by the party that requests them. The costs of this and any other discovery are not provided for by in forma pauperis status. The granting of in forma pauperis status only allows a litigant to proceed without prepayment of filing fees and for service of the Summons and Complaint without charge by the U.S. Marshal's Service. All other costs are the responsibility of the litigant. Upon winning the case, it is possible that the costs of litigation may be awarded to the winner, but this does not happen in every case.

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6.06 | INTERROGATORIES TO PARTIES (FEDERAL RULE OF CIVIL PROCEDURE 33)

Any party may serve on any other party written interrogatories (questions), each of which must be answered in writing under oath unless it is objected to and the reasons for objection are stated in lieu of an answer. Interrogatories are confined to parties. Parties usually require that the interrogatories be supplemented as new information becomes available. Local Rule 5.2(c) sets forth the form you must use for papers containing responses to written questions or demands. Federal Rule of Civil Procedure 33(a) limits the number of interrogatories to 25, unless the Court grants permission otherwise.

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6.07 | PRODUCTION FOR INSPECTION OF DOCUMENTS (FEDERAL RULE OF CIVIL PROCEDURE 34)

A request for the production of tangible items for inspection may be served on any other party. The request should designate the tangible item sought, usually a document or videotape, and specify a time, place, and manner of making the inspection. Generally, the things requested (eg. documents) are mailed to the party making the request.

The party on whom the request is served is required to respond, either agreeing to the request and producing the document or item or stating the reasons for objection to production. The requesting party may seek a court order requiring production.

Document discovery is limited to parties and to items in their possession or control. The requesting party's legal right to obtain possession is the central inquiry, and the requested party may not avoid discovery simply by divesting himself of possession. Moreover, documents in the possession of nonparties may only be discovered by serving a subpoena on the non-party. See Request for Subpoenas, P. 21. A subpoena for the testimony of a deponent (witness) may also include a request for the deponent to produce documents at the deposition. Note: subpoenas are discussed later, including subpoenas to non-parties regarding documents when the non-parties are not to be deposed.

Local Rule 34 limits the number of document requests to 25.

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6.08 | PHYSICAL OR MENTAL EXAMINATIONS (FEDERAL RULE OF CIVIL PROCEDURE 35)

Federal Rule of Civil Procedure 35 provides that, when the physical or mental condition of a party or a nonparty over whom a party has custody or legal control is in controversy, on motion the Court may order a physical or mental examination. A showing of good cause is a prerequisite. The order defines the circumstances of the examination. It is usually the defendant requesting that the plaintiff be examined in relation to the injuries the plaintiff is seeking to be compensated for. The party against whom the order is made is entitled to request a copy of the examining physician's report. Such a request, however, obligates that party, in turn, to make available his own, similar reports of examinations previously or thereafter made. Moreover, by making such a request, the party examined waives any privilege (e.g., the patient-physician privilege) regarding the testimony of one making similar examinations. Usually, but not necessarily, the examination is conducted by a physician designated by the party seeking the examination. The examined party's own physician may -- but need not -- be present.

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6.09 | REQUESTS FOR ADMISSIONS (FEDERAL RULE OF CIVIL PROCEDURE 36)

Under Rule 36 a party may serve on another party requests for admission of the genuineness (or truth) of documents or of facts or of the application of law to fact. The party served is obligated to make reasonable inquiry before responding. Failure to answer constitutes an admission. In the answer the party served may admit, deny, state that he or she lacks knowledge or information sufficient to permit admission or denial (only after making inquiry), or object to the request. An admission is for the purpose of the pending action only; but it is conclusive, rather than evidentiary, unless leave is obtained to withdraw or amend it. The post-trial sanction for improper failure to admit is payment of the requesting party's expenses of the proof of that fact. Additionally, the requesting party may seek pretrial judicial scrutiny of the sufficiency of answers or objections; the Court may also order an answer, amendments to answers given, or even that the matter be deemed admitted if the Court determines that there was improper failure to admit.

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6.10 | REQUEST FOR SUBPOENAS IN PRO SE ACTION

Occasionally, parties may need to obtain information, documents or testimony from other witnesses who are not parties. Some information may be sought by subpoena. Pursuant to Rule 45 of the Federal Rules of Civil Procedure, "[t]he clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service." F. R. Civ. Pro. 45(a)(3). Thus, pro se litigants may request subpoenas in writing from the Clerk's Office for production of documents or for the deposition or trial testimony of witnesses.

Rule 45 of the Federal Rules of Civil Procedure does not require a motion for issuing a subpoena. Local practice, however, does require that a request for subpoena be in writing, including the name and address of the person/entity to whom the subpoena is directed and what is being sought. Where one is granted permission to proceed in forma pauperis, he or she may be granted service of subpoenas by the United States Marshal without paying the fee. If service by the United States Marshal is sought, that request must be in writing as well.

Pro Se litigants should bear in mind that subpoenas do have costs, which they will be required to pay. Also, the Court may impose appropriate sanctions on the party for violations of Rule 45. "A party... responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden, or expense on a person subject to that subpoena." F. R. Civ. Pro. 45(c)(1).

Additionally, to secure the production of a witness who is incarcerated, the pro se litigant must make written application to the Court to issue a writ to produce the incarcerated witness. Upon consideration of the application, the Court, if it agrees, will direct that the arrangements for the witness's testimony be made.

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6.11 | AMENDMENT OF THE PLEADINGS DURING OR AFTER DISCOVERY

A party may discover facts during discovery that may allow an additional claim, one not stated in the original complaint, to be proven. In such a situation, plaintiff may, consistent with the Judge's pre-trial instructions and schedule, request permission to amend the complaint. See Rule 15, Federal Rules of Civil Procedure.

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APPENDIX



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