Problems in Civil Procedure: DISCOVERY  Spring 2015  Andrews

SYLLABUS (12/30/14 draft)

COURSE OBJECTIVES AND PROCEDURES:

Course Description and Objectives: By the end of the semester, you will know 1) the policies and purposes of civil discovery, 2) general procedural and ethical duties in discovery, 3) practical application and assessment of discovery devices and responses and 4) the need to THINK and use judgment in conducting civil discovery.

Meeting Times and Place: Monday, Tuesday and Wednesday, 9:45 to 10:35, in Room 175. Due to my moot court travel, we may need to meet for a few makeup classes – time and place to be determined.

Texts: Discovery Problem & Their Solutions, Paul Grimm, Charles Fax & Paul Sandler (ABA, 3d Ed. 2014) ["GFS"], and Andrews Hand-out Book ["HB"] (both on sale in bookstore).

I did not assign a rule book as a text even though your primary study will be the discovery provisions of the Federal Rules of Civil Procedure ["FRCP"] and a few Federal Rules of Evidence ["FRE"]. The GFS book reprints most of the FRCP governing discovery at Appendix 1, and I include a few other assigned rules in the handout book (including an updated Rule 45, effective 12/1/2013.

In addition, I will regularly email you with class clarifications, hypotheticals and additional handouts.

Assignments: Some assignments on the attached syllabus pages are noted as “scan” or “review” assignments, which means merely general read as background for the study assignments. All other assignments are “study” assignments, requiring in-depth reading and reflection.

Attendance Policy: You must attend and sign the roster every day, including any make-up classes. You may not sign the roster if you are more than 10 minutes late. If you miss the roster, you may sign it retroactively only with my permission. If you miss more than nine classes you will be withdrawn from the course.

Final Examination and Grading: Your grade will be based on your performance on the final exam, which will be an in-class 3-hour exam at the place and time scheduled by the Records Office. The exam will include both essay and multiple-choice questions.

Office Hours, Email Updates and Conferences: I will be in my office daily from about 8:30 am until 4:30 pm. I welcome your visits. In addition, I regularly will communicate with the class through class-wide emails to announce class changes or syllabus clarifications and to distribute addition handouts and problem sets.

Seating and Special Accommodations: I will use the overhead projector and/or the whiteboard most days of class. Please sit in the middle, where you can see both. I will not require you to sign a seating chart. If you need other accommodations for visual or other disability, please let me know.

Computer Use, Dress, Cell Phones and Recordings In Class. This is a professional class, so act accordingly. Do not wear hats. Show courtesy to me and your classmates and turn off your cell phones. Do not use your computers in a disruptive manner. Please talk to me first if you want to record the class for any reason.
I. Introduction -- Historical Evolution and Overview of Methods and Basic Rules

Review:
- GFS Forward and Introduction (GFS, xi-xxvii)
- History of FRCP re Discovery [2006 Advisory Committee Notes] (HB, 20)
- Andrews’ Thinking Essay [Parts A and B] (HB, 159)
- Discovery Guidelines of US Dist, Maryland, Guideline #1 (GFS, App 2, 451)
- ABA Civil Discovery Standards, Table of Contents & Preface (GFS, 473-78)

Compare/scan FRCP 26 & ARCP 26 [Alabama Rule of Civil Pro] (HB, 12)

II. General Concepts and Duties

A. Relevance
- FRCP 26(b)(1)
- FRE 401 and advisory committee notes (HB, 17)
  Review FRE 403 & 407
- Sanyo Laser case [Parts I, II(A) & II(B)] (HB, 116)
- Hall case [Parts A & B] (HB, 74)
- Henry case [Parts A & C] (HB, 78)
- Mesa case (HB, 104)
- Café Asia case (HB, 128)
- Dorsey case [Parts A and D] (HB, 52)

B. Exceptions to Discovery

1. Privilege
   a. Attorney-client privilege
      - ARE [Alabama Rule of Evidence] 502 and ac notes (HB, 3-8)
      - UpJohn case [Parts I & II] (HB, 137)
      - Lynch case (HB, 93)
      - Westinghouse case (HB, 115)
   b. Other privileges

2. Work Product Protection

   a. History and Basic Definition
      - FRCP 26(b)(3)
      - Hickman case (HB, 82)

   b. Application of work product protection
      - AIA Holdings case (HB, 33)
      - UpJohn (Part III) (HB, 137)
      - Dunkin Donuts, Part II(A) (HB, 57)
      - Disability Rights Council case, Parts I & IIABC (HB, 44)

   c. Witness Statements
      - GFS discussion 10 (GFS, 135)
      - Norfolk Southern case (HB, 111)
3. Waiver of privilege or work product protection
   FRCP 16; FRCP 26(b)(5)(B)
   ARCP 26(b)(6)(B) (HB, 12)
   ARE 510 (HB, 8)
   FRE 502 (HB, 18)
   GFS Discussion 12 (GFS, 148-56)
   Andrews’ Thinking Essay [Part H] (HB, 166-67)
   Lynch case (HB, 93)
   Hall case, Parts C and D (HB, 74)
   Disability Rights Council case, Part IID (HB, 44)

4. Privilege/Work Product Logs
   FRCP 26(b)(5)(A)
   GFS discussion 11 (GFS, 143-47)
   ABA Civil Discovery Standards 25-27 (GFS, Appendix 4, 522-30)
   Discovery Guidelines of District Md, #10(d) (GFS, Appendix 2, 459)
   St Paul case [Part I & II(A)(2)] (HB, 120)

5. Work Product and Privilege Problem Set

C. Other Limitations on Discovery

1. Rule 26(b)(2) -- Balancing Need and Burden
   FRCP 26(b)(2) [Compare ARCP 26(b)(2)]
   Hall case [Parts A, B & E] (HB, 74)
   Dunkin Donuts case [Part II(B)] (HB, 57)
   Sanyo Laser case [Part IIA] (HB, 116)
   Henry case [Part B] (HB, 78)
   Dorsey case [Parts A and G] (HB, 52)

2. Rule 26(c) - Confidentiality and Related Concerns
   FRCP 26(c)
   Trujillo case [Parts I, II and IIIA] (HB, 131)
   Frankl case (HB, 60)

D. General (Procedural) Duties in Discovery

1. Supplementation
   FRCP 26(e) and 37(c)(1)
   ARCP 26(e)
   Andrews’ Thinking Essay, [Part F] (HB, 164)
   ABA Civil Discovery Standard 9 (GFS, Appendix 4, 493-94)

2. Good Faith, Cooperation and Reasonable Inquiry
   FRCP 26(f) and 26(g); FRCP 16; FRCP 37(f)
   St Paul case [Parts I & II(B)] (HB, 120)
   GFS Discussion 50 (GFS, 395)
   ABA Civil Discovery Standard 5 (GFS, Appendix 4, 488-89)
E. Ethical Duties in Discovery

1. Preservation/non-destruction/correction of evidence
   - FRCP 37(e)
   - MRPC 3.3 & 3.4(a)&(b) (HB, 145-47)
   - Alabama Code re Tampering with Evidence (HB, 2)
   - GFS Discussion 48 (GFS, 382)
   - ABA Civil Discovery Std 10 & Amended Std10 (GFS, App 4, 494 & 531)
   - Café Asia case (HB, 128)

2. Receipt of privileged/protected information
   - FRCP 16 and 26(b)(5)
   - AC notes, 2006 Amendments
   - MRPC 4.4(b) (HB, 149)
   - GFS Discussion concerning receipt (GFS, 154-56)
   - ABA Civil Discovery Standard 28 (GFS, Appendix 4, 526)

3. Informal Fact Gathering and Witness Contacts
   - MRPC 3.4(f), 4.1, 4.2, 4.3, 4.4(a) (HB, 146-50)
   - Gaylard case (HB, 69)
   - Gatti case (HB, 64)

4. Representation of corporate employees
   - MRPC 1.7, 1.13(a)(f)&(g), 4.2 & 7.3 (HB, 144+)
   - GFS Discussion 28 (GFS, 248)

5. Special Competency Duties and Issues in E-Discove ry
   - California Ethics Opinion (HB, 151-58)

F. Timing of Discovery, Initial Disclosures and Discovery Conference
   - FRCP 6; FRCP 26(d); FRCP 26(f); FRCP 27; FRCP 29; FRCP 16 Andrews’ Thinking Essay, [Part C] (HB, 161-62)
   - GFS Discussion 4 (GFS, 26-30)
   - ABA Civil Discovery Standards 1-4 (GFS, Appendix 4, 479-88)
   - In re Bridge Collapse case (HB, 40)
   - Review: ARCP 27 [on-line]

G. Non-party Discovery
   - FRCP 45 (HB, 29)
   - Henry case [Parts B and C] (HB, 78)
   - Dunkin Donuts case [Part I] (HB, 57)
   - Guy Chemical case (HB, 72)
   - Disability Rights Council case [Part IID] (HB, 44)
   - AIG case (HB, 106)

H. Informal fact-gathering
   - Henry case [Parts A & B] (HB, 78)
I. International Discovery [Review only]
   GFS Discussion 29 (GFS, 252)
   *Auction Houses* case [Parts A & C] (HB,37)

J. Service, Filing and Public Access to Discovery Materials
   FRCP 5; FRCP 26(c)
   *Frankl* case (HB, 60)

K. Appellate Review of Discovery Orders
   *Norfolk Southern* case [Part II] (HB, 111)
   *Hickman* case (HB, 82)
   *Henry* case [Part B] (HB, 78)
   *Dorsey* case [Part B] (HB, 52)

III. Interrogatories

A. Preparing and Serving Interrogatories
   FRCP 33 [*Compare* automatic disclosure provision of FRCP 26(a)(1)(A)]
   GFS Discussion 1-4 (GFS, 5-30)
   Andrews’ *Thinking* Essay [Parts D, E and F] (HB, 162)
   Standard Interrogatories of US District of Maryland (GFS, Appendix 3, 463)
   ABA Civil Discovery Standards 6 & 8 (GFS, Appendix 4, 489 & 493)

B. Responding to Interrogatories
   FRCP 33(b) & (d); FRCP 26(e)&(g); FRCP 29
   GFS Discussion 5 & 6 (GFS, 31-47)
   ABA Civil Discovery Standards 7 & 9 (GFS, Appendix 4, 490-93)
   Discovery Guidelines of Dist. Md, Nos. 9 & 10(a)&(b) (GFS, Appendix 2, 458-59)
   *Auction Houses* case [Part B] (HB, 37)
   *St Paul* case [Part II(A)(1) (HB, 120)
   *Dorsey* case [Parts A, E and H] (HB, 52)

C. Contention Interrogatories
   FRCP 26(b)(3); FRCP 33(a)(1) & (2)
   Andrews’ *Thinking* Essay (Part D ) (HB, 162)
   *Dorsey* case [Parts E and F] (HB, 52)
   ABA Standard 8 (GFS, 493)

D. Trial Use of Interrogatories
   FRCP 33(c)
   GFS Discussion 7 (GFS, 47-49)

E. Class Critique of District Maryland “Standard” Interrogatories (GFS, 467)
IV. Document Requests and Property Inspections

A. Preparing and Serving Document Requests
   FRCP 34; FRCP 45(a), (b) & (c)(2) [*Compare disclosure in FRCP 26(a)(1)(B)]
   GFS Discussion 8 (GFS, 50)
   *St Paul* case [Parts I & II(A)(3)] (HB, 120)

B. Responding to Document Requests
   FRCP 34(b); FRCP 26(b)(5); FRCP 26(e) & (g); FRCP 45(c)(2) & (d)
   ABA Civil Discovery Standards 10-14 & Amended Std 10 (GFS, App 4, 494 & 531)
   *Hall* case [Parts C & D] (HB, 74)
   *St Paul* case [Parts II(A)(1) and II(A)(3)] (HB, 120)
   *AIG* case (HB, 106)

C. Electronic Discovery
   FRCP 34, FRCP 45
   Advisory Committee Notes re 2006 Amendments to FRCP (HB, 20)
   ARCP 34 (HB, 16)
   Andrews’ *Thinking* Essay, [Part G] (HB, 165)
   GFS Discussion 9 (GFS, 59)
   ABA Civil Discovery Standards 29, 30; Amended Stds 29, 30 (GFS, 427 & 531)
   *Disability Rights Council* case, Part III (HB, 44)
   *Guy Chemical* case (HB, 72)
   *Café Asia* case (HB, 128)
   California Ethics Opinion (HB, 151)
   *Review* District Md, Suggested Protocol for ESI Discovery (GFS, Appendix 5, 547)

D. Social Network Discovery
   GFS Discussion 9A (GFS, 80-84)

V. Depositions

A. Initiating Depositions – Timing, Notices and Subpoenas
   FRCP 30(a), 30(b)(1)-(4), 30(g); FRCP 32(a)(5)(A); FRCP 37(d)(1)(A)(i)
   FRCP 45(a),45(b)(1)-(2), 45(c)(1) & 45 (f) (HB, 29)
   GFS Discussion 15 (GFS, 175)
   Discovery Guidelines of District Md, Nos. 4 and 9(b) (GFS, Appendix B, 454 & 459)
   ABA Civil Discovery Standards 16 (a),(b) & (f), comments (GFS, Appendix D, 502)
   *Review:* FRCP 27(a) and (c)(1)(B)
   Middle District Alabama Guideline II(A) [On-line/Class Handout]

B. Use of Depositions and Selection of Persons to Depose
   FRCP 30(a) and 30(b)(1); FRCP 32(a); FRCP 45(c)(1)
   GFS Discussion 30 (GFS, 261)
   *AIG* case (HB, 106)
C. Corporate Depositions
   FRCP 30(b)(6); FRCP 37(a)(3)(B)(ii) and 37(d)(1)(A)(i)
   GFS Discussion 25 (GFS, 232)
   ABA Civil Discovery Standards (GFS, Appendix D, 510)
   *Sanyo Laser* case [Parts I & II(C)] (HB, 126)
   *Dunkin Donuts* case [Part II] (HB, 67)
   *AIG* case (HB, 106)

D. Methods of Taking and Forms of Depositions
   1. Stenographic, video and phone depositions
      FRCP 30(b)(3), (4); FRCP 32(a)(6), FRCP 32(c)
      GFS discussion 21 (GFS, 208)
      Review Middle District Alabama Guideline II(H)&(I)
      FRCP 28(a) and 29(a)
   2. Depositions on Written Questions: FRCP 31 [Review only - not on exam]

E. Conduct of Depositions: Duration, Examinations and Objections, Motions to Terminate
   FRCP 30(c), 30(d); FRCP 32(b)&(d)
   GFS Discussion 16-20 (GFS, 180-207)
   *Dunkin Donuts* case [Part III] (HB, 67)
   Discovery Guidelines of District Md, Nos. 5 through 7 (GFS, Appendix B, 502)
   ABA Civil Discovery Standards 16(c), 17 and 18 (GFS, )
   Review: FRE 103
            Middle District Alabama Guideline II(D)-(G)

F. Other People Attending Depositions
   FRE 615
   FRCP 26(c)
   GFS Discussion 22 (GFS, 213)
   ABA Civil Discovery Standards 16(d) (GFS, 502)
   Review: Middle District Alabama Guideline II(B)
            D. Maryland, Local Rule 5(h) [on-line/class handout]

G. Investigation and Preparation for Depositions and Talking to Witnesses
   FRCP 26(g); MRPC 3.4(b)
   GFS Discussion 26 (GFS, 240)
   ABA Civil Discovery Standard 18 (GFS, Appendix D, 507)
   [Review assignments for waiver of privilege and ethical duties, ARE 502, FRE 502]

H. Review/Changes to Depositions
   FRCP 26(e); FRCP 30(e) & (f)
   MRPC 3.3
   GFS Discussion 23 (GFS, 220)

I. The “Usual Stipulations”
   Review: Middle District Alabama Guideline II(C)
VI Mental and Physical Exams
FRCP 35(a)
GFS Discussion 13 (GFS, 157)

VII. Requests to Admit
FRCP 36; FRCP 37(c)(2)
GFS Discussion 14 (GFS, 164)
Joseph case (HB, 87)

VIII. Automatic Disclosures
FRCP 26(a)(1), FRCP 26(a)(3); FRCP 26(e); FRCP 26(g); FRCP 37(c)(1)
GFS Discussion 43 (GFS, 332)
Andrews’ Thinking Essay, [Part E] (HB, 164)
Lomascolo case (HB, 89)

IX. Discovery Motions, Sanctions and Protective Orders

A. Introduction
FRCP 26(b)(2)
FRCP 37
GFS Discussion Overview (GFS, 328)
GFS Chart (401)

B. Motion to Compel Discovery (or For Protection from Discovery)
FRCP 37(a); FRCP 26(c); FRCP 45(c) & (d)
GFS Discussion 45 & 46 (GFS, 357-73)
Dunkin Donuts case [Part II] (HB, 57)
Trujillo case (HB, 131)
Mesa case (HB, 104)
Dorsey case [Part A] (HB, 52)

C. Sanctions for Non-compliance with Court Order
FRCP 37(b)
GFS Discussion 49 (GFS, 390)
Malautea case (HB, 97)

D. Other Discovery Sanctions and Motions
FRCP 37(c) & (d); FRCP 26(g); FRCP 30(g); FRCP 45(c) & (e)
GFS Discussion 43, 44 and 47 (GFS, 332 and 374)
St Paul case (HB, 120)
Stallworth case (HB, 126)

E. Review:
Andrews’ “Questions to Consider” [in-class handout]
X. Experts

A. Introduction
   FRCP 26(a)(2); FRCP 23(b)(4)
   ARCP 26
   FRE 702, FRE 703 & FRE 705
   ABA Civil Discovery Standards 20, 23 (GFS, Appendix 4, 512 & 520)

B. Expert Disclosures
   FRCP 26(a)(2) and 26(e)
   GFS Discussion 34 (GFS, 282)
   ABA Civil Discovery Standard 20, 21 (GFS, Appendix 4, 512-19)
   TV-3 case (HB, 135)

C. Expert Depositions
   FRCP 26(b)(4)(A) & (B); FRCP 35(b)
   GFS Discussion 33, 36, 41 (GFS, 278, 291, 311)
   ABA Civil Discovery Standards 22 (GFS, Appendix 4, 519)
   Disability Rights Council case (HB, 44) [Parts I and IV]

D. Non-testifying Experts
   FRCP 26(b)(4)(B)
   GFS Discussion 38, 39 (GFS, 299-306)

E. Other Privilege and Work Product Issues
   GFS Discussion 37 (GFS, 294)
   ABA Civil Discovery Standard 21(e) (GFS, Appendix 4, 516)
   TV-3 Inc. case (HB, 135)

F. Fees
   FRCP 26(b)(4)(C)
   GFS Discussion 42 (GFS, 317)
   Discovery Guidelines of District Md, No. 3 (GFS, Appendix 2, 516)

G. Treating Physicians
   FRCP 26(b)(4)(B); FRCP 35(b)
   GFS Discussion 35 (GFS, 287)

XI. Exam Review
   Andrews Thinking Essay
   Sample Andrews’ exam questions (HB, 168)