

SYLLABUS

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) 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 and Wednesday, 10:45 to noon, 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: Andrews Hand-out Book [“HB”] (on sale in bookstore). You also will need to regularly use (in and outside of class) the FRCP governing Discovery. We also will study a few of the Federal Rules of Evidence. You can use any current FRCP rulebook or access the rules on line. Make sure these are current editions: the federal discovery rules were amended in December 2015.

Assignments: The Syllabus is not divided by day. Some units will take a few class periods, and others will take only minutes in class. I usually will end each class with an instruction of which units to read for the next class.

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 not sign the roll on another day, unless you have my permission. If you miss more than six classes you will be withdrawn from the course.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, usually from about 8:30 am until 4:30 pm. I welcome your visits. I invite you to go to lunch or walk with me. 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.

Classroom Computer Use, Dress, Cell Phones and Recordings. 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.

Patience with My Mistakes. I have found that in recent years, I increasingly mis-speak: I am particularly prone to using the wrong name or noun. I realize that this can be confusing and frustrating in a class built on rule minutia. Be patient. You usually can tell the correct term from the context. I often will have the rule on the screen, and if you are still confused, ask me to clarify.

COURSE READINGS AND STUDY MATERIALS

I. Introduction -- Historical Evolution and Overview of Methods and Basic Rules

Andrews text, Part I (HB, 236-40)

Compare/scan FRCP 26 & ARCP 26 [Alabama Rule of Civil Pro] (HB, 15)

II. General Concepts and Duties

A. The Basic Scope of Discovery – Introduction

FRCP 26(b)(1) and recent amendments with AC notes (HB, 242-46)

Andrews Text, Part II(A) (HB, 241)

B. Scope – Relevance

FRCP 26(b)(1)

FRE 401 [*review* FRE 403 & 407]

Andrews' Intro, Part II(B) (HB, 247-49)

Hall case, Parts A & B (HB, 114)

Henry case, Parts A & C (HB, 124)

Mesa case (HB, 176)

Café Asia case (HB, 221)

United Oil case (HB, 224)

C. Scope – Proportional

FRCP 26(b)(1)

Advisory Committee Notes, 2015 Amendments to FRCP 26(b) (HB, 241)

Andrews' Intro, Part II(C) (HB, 249)

Bard case (HB, 70)

D. Other “Reasonableness” Limitations on Discovery

FRCP 26(b)(2) [*scan* FRCP 26(b)(2)(B)]

Andrews' Intro, Part II(D) (HB, 250)

Hall case, Parts A, B & E (HB, 114)

Dorsey case, Parts A, D and G (HB, 82)

E. Confidentiality and Related Concerns

FRCP 26(c) [*review* FRCP 5.2]

Andrews' Intro, Part II(E) (HB, 250-51)

Hibu case, Parts I & III(C) (HB, 119)

Frankl case (HB, 98)

F. “Privilege” and “Work Product”

1. Introduction and Overview

Andrews’ Intro, Part II(F)(1) & II(F)(2) (HB, 252-53)

2. Privilege

a. Attorney-client privilege

ARE [Alabama Rule of Evidence] 502 and ac notes (HB, 5-10)

UpJohn case, Parts I & II (HB, 224)

Lynch case (HB, 156)

Westinghouse case (HB, 204)

Newman case (HB, 196)

b. Other privileges

3. Work Product Protection

a. History and Basic Definition

FRCP 26(b)(3)

Hickman case (HB, 129)

b. Application of work product protection

AIA Holdings case (HB, 61)

UpJohn case, Part III (HB, 224)

Dunkin Donuts case, Part II(A) (HB, 88)

“*Mir I*” case, Parts A and B(I) (HB, 181)

c. Witness Statements

Norfolk Southern case (HB, 200)

4. Waiver of privilege or work product protection

FRCP 16; FRCP 26(b)(5)(B)

ARCP 26(b)(6)(B) (HB, 15)

ARE 510 (HB, 11)

FRE 502

Andrews Intro Text, Part II(F)(4) (HB, 255-57)

Lynch case (HB, 156)

Hall case, Parts C and D (HB, 116)

Mir I case, Parts B(2) & B(3) (HB, 181)

5. Privilege/Work Product Logs

FRCP 26(b)(5)(A)

St Paul case, Part I & II(A)(2) (HB, 213)

Middle District Alabama, Discovery Guideline I(J) (HB, 42)

Middle District Alabama, Sample Privilege Log (HB, 53)

6. Work Product and Privilege Problem Set (HB, 254)

G. General (Procedural) Duties in Discovery

1. Cooperation

FRCP 26(f); FRCP 37(f); FRCP 16
Andrews Intro, Part II(G)(1) (HB, 258-61)
Middle District Guidelines, Appendix II (HB, 54-55) (“Right Questions”)

2. Good Faith and Reasonable Inquiry

FRCP 26(g)
Andrews Intro, Part II(G)(2) (HB, 261-62)
St Paul case, Parts I & II(B) (HB, 213)

3. Supplementation

FRCP 26(e) and 37(c)(1)
ARCP 26(e) (HB, 18)
Andrews Intro, Part II(G)(3) (HB, 263-64)

H. Ethical Duties in Discovery

1. Preservation/non-destruction/correction of evidence

FRCP 37(e)
MRPC 3.3 & 3.4(a) & (b) (HB, 23-24)
Alabama Code re Tampering with Evidence (HB, 4)
Andrews Intro, Part II(H)(1) (HB, 265-67)
Café Asia case (HB, 221)
Living Color case, Parts I and II(B)(1) (HB, 146)
Silvestri case (HB, 207)

2. The Client “Lie” in Civil Discovery

ABA Opinion, 93-376 (HB, 29)
Andrews Intro, Part II(H)(2) (HB, 267)

3. Receipt of privileged/protected information

FRCP 16 and 26(b)(5)
MRPC 4.4(b) (HB, 27)
Andrews Intro, Part II(H)(3) (HB, 267-68)

4. Informal Fact Gathering and Witness Contacts

MRPC 3.4(f), 4.1, 4.2, 4.3, 4.4(a) (HB, 24-27)
Andrews Intro, Part II(H) (HB, 268-77)
Gaylard case (HB, 104)

5. Multi-state Discovery
Andrews Intro, Part II(H)(5) (HB, 278-79)
 6. Representation of corporate employees
MRPC 1.7, 1.13(a)(f)&(g), 4.2 & 7.3 (HB, 21+)
Andrews Intro, Part II(H)(6) (HB, 280-83)
 7. Special Competency Duties and Issues in E-Discovery
California Ethics Opinion (HB, 33)
Andrews Intro, Part II(H)(7) (HB, 283)
- I. Timing of Discovery: Star/Close of Discovery Period and Individual Time Limits
FRCP 6; FRCP 26(d); FRCP 26(f); FRCP 27; FRCP 29; FRCP 16
Andrews Intro Text (HB, 283-85)
In re Bridge Collapse case (HB, 74)
Mantiowac case (HB, 170)
Middle District Alabama, Discovery Guideline I(E) thru I(I) (HB, 41-42)
Middle District Alabama, Discovery Guideline, App. II (“Right Questions”) (HB, 54)
 - J. Non-party Discovery - General Overview
FRCP 45 (HB, 29)
Andrews Intro, Part II(J) (HB, 285-88)
Guy Chemical case (HB, 112)
AIG case (HB, 190)
Brown case (HB, 79)
 - K. Informal fact-gathering
Henry case, Parts A & B (HB, 124)
Andrews Intro, Part II(K) (HB, 288)
 - L. International Discovery [*Review only*]
Auction Houses case, Parts A & C (HB, 66)
Andrews Intro, Part II(L) (HB, 288)
 - M. Form, Service, Filing and Public Access to Discovery Materials
FRCP 5; FRCP 26(c)
Frankl case (HB, 103)
Andrews Intro, Part II(M) (HB, 289)
 - N. Appellate Review of Discovery Orders
Norfolk Southern case, Part II (HB, 200)
Hickman case (HB, 129)
Dorsey case Part B (HB, 82)
Andrews Intro, Part II(N) (HB, 289-90)

III. Interrogatories

- A. Introduction
 - FRCP 33
 - Andrews 2010 CLE, Parts A, B and C(3) (HB, 330)

- B. Preparing and Serving Interrogatories
 - FRCP 33 [*Compare* automatic disclosure provision of FRCP 26(a)(1)(A)]
 - Andrews 2010 CLE Sample Interrogatories (HB, 339+)
 - Krawczyk* case, Parts I & II(A) (HB, 138)
 - Middle District Alabama, Discovery Guideline IV(A) thru IV(D) (HB, 50-51)

- C. Responding to Interrogatories
 - FRCP 33(b); FRCP 26(e)&(g); FRCP 29
 - Auction Houses* case, Part B (HB, 66)
 - St Paul* case, Part II(A)(1) (HB, 213)
 - Dorsey* case, Parts A, D, E and H (HB, 82)
 - Krawczyk* Part II(B) (HB, 138)
 - Hibu* case Part III(B) (HB, 119)

- D. The Rule 33(d) (“Look It Up Yourself”) Option
 - FRCP 33(d)
 - Middle District Alabama, Discovery Guideline IV(E) (HB, 51)

- E. Contention Interrogatories
 - FRCP 26(b)(3); FRCP 33(a)(1) & (2)
 - Dorsey* case, Parts E and F (HB, 82)
 - Krawczyk*, Part II(B)(2) (HB, 138)
 - Hibu*, Part III(A) (HB, 119)

- F. Trial Use of Interrogatories
 - FRCP 33(c)

- G. Class Critique of District Maryland “Standard” Interrogatories (HB, 56)
 - Compare* Andrews CLE Sample Interrogatories (HB, 339+)

IV. Document Requests and Property Inspections

- A. Introduction
 - FRCP 34
 - Andrews 2010 CLE, Part C(1) (HB, 273-74)

- B. Preparing and Serving Document Requests
 - FRCP 34; [*Compare* disclosure in FRCP 26(a)(1)(B)]
 - Andrews’ 2010 CLE, Part (C)(1) (HB 235-36)
 - St Paul* case, Parts I & II(A)(3) (HB, 213)
 - United Oil* (HB, 224)
 - Mir II* case (HB, 185)

- C. Responding to Document Requests
 - FRCP 34(b); FRCP 26(b)(5); FRCP 26(e) & (g)
 - Hall* case, Parts C & D (HB, 114)
 - St Paul* case, Parts II(A)(1) and II(A)(3) (HB, 213)
 - AIG* case (HB, 190)
 - Middle District Alabama, Discovery Guideline III(C) (HB, 46)

- D. Non-Party Requests and Responses
 - FRCP 34; FRCP 45(a), (b), (c)(2) and (d)
 - Brown* case (HB, 79)
 - Guy Chemical* case (HB, 112)

- E. Discovery of Electronically Stored Information (“ESI”)
 - FRCP 26(b)(2)(B); FRCP 34(a)(1)(A)&(C), 34(b)(2)(D), 34(b)(2)(E)(ii)&(iii),
FRCP 37(e), FRCP 45(e) and ARCP 34 (HB, 16)
 - Guy Chemical* case (HB, 112)
 - Café Asia* case (HB, 221)
 - Living Color* case (HB, 146)
 - California Ethics Opinion (HB, 33)
 - Middle District Alabama, Discovery Guideline III(D) (HB, 48)

- F. Social Media Discovery
 - Simply Storage* case (HB, 92)
 - Gordan* case (HB, 108)
 - Review Federal Stored Communication Act (18 USC 2701)* (HB, 3)

- V. Depositions**
 - A. Introduction
 - Middle District Alabama, Discovery Guideline II (HB, 43-45)

 - B. 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), 45(c)(1) & 45 (d)
 - Review:* FRCP 27(a) and (c)(1)(B)
 - Middle District Alabama Guideline II(A) (HB, 43)

 - C. Use of Depositions and Selection of Persons to Depose
 - FRCP 30(a) and 30(b)(1); FRCP 32(a); FRCP 45(c)(1)

 - D. Entity Depositions
 - FRCP 30(b)(6); FRCP 37(a)(3)(B)(ii) and 37(d)(1)(A)(i)
 - Dunkin Donuts* case, Part II (HB, 88)
 - AIG* case (HB, 190)
 - King* case (HB, 136)
 - Reed* case (HB 205)

- E. Methods of Taking and Forms of Depositions
 - 1. Stenographic, video and phone depositions
FRCP 26(a)(3)(B), FRCP 30(b)(3), (4); FRCP 32(a)(6), FRCP 32(c)
Andrews Intro, Part V(E) (HB, 291-93)
Review Middle District Alabama Guideline II(F) & II(G) (HB, 45)
FRCP 28(a) and 29(a)
 - 2. Depositions on Written Questions: FRCP 31 [*Review* only - not on exam]

- F Conduct of Depositions: Duration, Examinations and Objections, Motions to Terminate
FRCP 30(c), 30(d); FRCP 32(b)&(d)
Andrews Intro, Part V(F) (HB, 293)
Dunkin Donuts case, Part III (HB, 88)
McKelvy case (HB, 178)
FRE 103
Middle District Alabama Guideline II(D)-(G) (HB, 44)

- F. Other People Attending Depositions
FRE 615 and FRCP 26(c)
Andrews Intro, Part V(F) (HB, 296)
Middle District Alabama Guideline II(B) (HB, 43)

- G. Investigation and Preparation for Depositions and Talking to Witnesses
FRCP 26(g); MRPC 3.4(b)
Andrews Intro, Part V(G) (HB, 297-99)
Newman case (HB, 196)

- H. Review/Changes to Depositions
FRCP 26(e); FRCP 30(e) & (f)
MRPC 3.3
Andrews Intro, Part V(H) (HB, 299)

- I. The “Usual Stipulations”
Middle District Alabama Guideline II(C) (HB, 44)
Andrews Intro, Part V(I) (HB, 300-302)
McKelvy case (HB, 178)

VI. Mental and Physical Exams

- FRCP 35(a)
- Andrews Intro, Part VI (HB, 303-04)

VII. Requests to Admit

- FRCP 36; FRCP 37(c)(2)
- Joseph* case (HB, 145)
- Andrews Intro, Part VII (HB, 305-06)
- Middle District Alabama, Discovery Guideline V (HB, 52)

VIII. Automatic Disclosures

FRCP 26(a)(1), and AC Notes (HB, 310)

Review: FRCP 26(a)(3); FRCP 26(e); FRCP 26(g); FRCP 37(c)(1)

Review: Arizona State Rule 26.1 (HB, 311)

Andrews Intro, Part VIII (HB, 307-09)

Lomascolo case (HB, 151)

Hibu case (HB, 119)

IX. Discovery Motions, Sanctions and Protective Orders

A. Introduction

FRCP 26(b)(2); FRCP 37

Andrews Intro, Part IX (A) (HB, 314)

B. Motion to Compel Discovery (or For Protection from Discovery)

FRCP 37(a); FRCP 26(c); FRCP 45 (d), (e) and (g)

Andrews Intro, Part IX(B) (HB, 315-19)

Dunkin Donuts case, Part II (HB, 88)

Mesa case (HB, 176)

Dorsey case, Part A (HB, 82)

C. Sanctions for Non-compliance with Court Order

FRCP 37(b); FRCP 45(g)

Andrews Intro, Part IX(C) (HB, 320-22)

Malautea case (HB, 161)

D. Other Discovery Sanctions and Motions

FRCP 37(c) & (d); FRCP 26(g); FRCP 30(g)

Andrews Intro, Part IX(D) (HB, 323-27)

Lomascolo case (HB, 151)

St Paul case (HB, 213)

Stallworth case (HB, 219)

E. ESI Sanctions

FRCP 37(e)

Andrews Intro, Part IX(E) (HB, 328)

Living Color case (HB, 146)

X. Experts (Review Only)

FRCP 26(a)(2); FRCP 23(b)(4)

ARCP 26

FRE 702, FRE 703 & FRE 705

XI. Exam Review - Sample Andrews' exam questions (HB, 348)