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## 1993 Amendments to the Federal Rules of Civil Procedure Effective December 1, 1993

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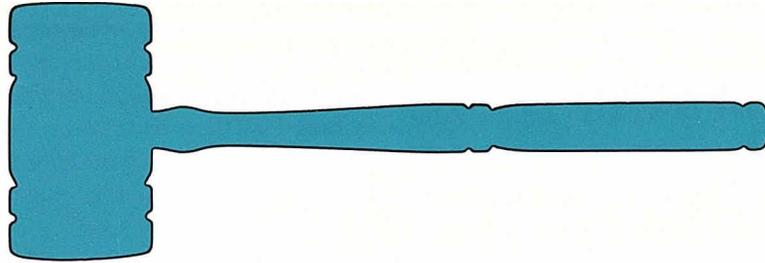
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# The New Mexico Trial Lawyer

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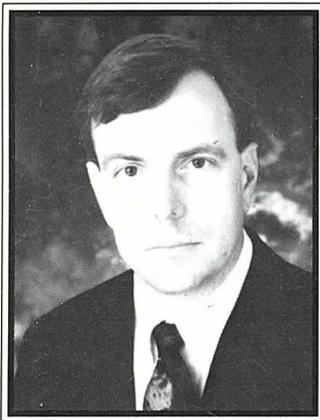
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## 1993 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE EFFECTIVE DECEMBER 1, 1993

by David J. Stout, J.D.

On December 1, 1993 Congress allowed an important series of amendments to the Federal Rules of Civil Procedure to pass into law. The proposed recommendations of the Judicial Conference as approved by the United States Supreme Court were accepted by default when the Senate adjourned for the holidays without taking action on the proposed rules. Those of you familiar with the Civil Justice Expense and Delay Reduction Plan of the United States District Court of New Mexico will already have experienced some of the provisions of the new federal rules.



David J. Stout

The amendments, particularly with regard to discovery, are extensive and you should carefully review the changes. The notes of the advisory committee for the 1993 amendments are extremely useful in describing the specific amendments and their underlying purpose. You should be sure to review those notes carefully. The discussions of the 1993 amendments consist of two articles. This article addresses the 1993 amendments as they affect the discovery process.<sup>1</sup> The second article by Paul Muro in next month's issue discusses the remaining amendments.

**Rule 26**

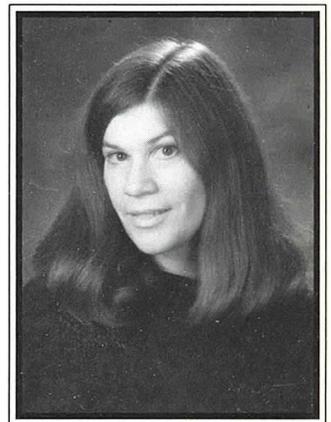
The heart of the 1993 amendments that pertain to discovery is the mandatory disclosure requirement set forth

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## QUALIFIED DOMESTIC RELATIONS ORDERS: Where To Start?

By: Laure van Heijenoort, J.D.

Dividing a pension thrusts the matrimonial lawyer into the clutches of that pervasive federal monster that we call "ERISA."<sup>1</sup> The Employee Retirement Income Security Act was written to protect the working person's rights to the retirement benefits promised by her employer. Its "anti-assignment" provision also tries to protect the employee from herself by prohibiting the assignment of pension benefits until they are actually distributed during retirement.<sup>2</sup> For many years this left divorce courts wondering what authority they had to order division of pensions before retirement, and left ex-spouses with an unwanted link to each other that could last beyond death.



Laure van Heijenoort

In 1984, the Retirement Equity Act, "REA," was passed, creating an exception to the anti-assignment provision for "qualified domestic relations orders"<sup>3</sup> or "QDROs."<sup>4</sup> Both actions were intended to correct some of the problems of divorce courts under ERISA.

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in Rule 26(a). The mandatory disclosure requirements mark a major change in the discovery process. The amendments are intended to expedite the discovery process by requiring the parties to disclose all information relevant to disputed facts. Whether the changes actually accomplish this salutary goal or result in an explosion of satellite litigation remains to be seen.

Rule 26 now requires the production of certain information without a discovery request. **Rule 26(a)(1).**

1. The parties must provide the name, address and telephone number of each person "likely to have discoverable information relevant to the disputed facts alleged with particularity in the pleadings." **Rule 26(a)(1)(A).** The standard raises two potential problems: *first*, it allows the parties to determine what are the disputed facts that trigger the discovery requirements<sup>2</sup>; *second*, it ties the discovery requirements to facts "alleged with particularity."

2. The parties must provide copies of documents or a description by category and location of all documents, data compilations, and tangible things in the custody or control of the party which are relevant to disputed facts alleged with particularity. **Rule 26(a)(1)(B).**

3. A computation of any category of damages claimed by the disclosing party and the non-privileged documents underlying the computation. **Rule 26(a)(1)(C).**

4. Any insurance agreement which may be available to satisfy all or part of a judgment. **Rule 26(a)(1)(D).**

These disclosures are to be made within 10 days of the Rule 26(f) conference, *see infra*, unless otherwise stipulated or ordered by the court. **Rule 26(a)(1)(D).**

The second major category of mandatory disclosures relates to expert witnesses. The amendments require that any person who may be used at trial as an expert pursuant to Fed. R. Evid. 702, 703, or 705 must be identified, **Rule 26(a)(2)(A)**, and provide a written report *signed by the expert* unless otherwise stipulated to or ordered by the court. **Rule 26(a)(2)(B).**<sup>3</sup> The report must contain: (1) a complete statement of the expert's opinions, (2) the basis underlying the opinion, (3) the information considered by the expert in arriving at the opinions, (4) exhibits to be used which support the opinions, (5) the qualifications of the witness including 10 years of publications, and (6) 4 years of cases in which the witness has testified as an expert. **Rule 26(a)(2)(B).**<sup>4</sup> The expert disclosures are to be made in a sequence directed by the court or by stipulation of the parties and at least 90 days prior to trial or prior to the time the case is ready for trial or within 30 days following disclosure by the other parties. **Rule 26(a)(2)(C).**

The third category of mandatory pretrial disclosures relates to trial evidence.<sup>5</sup> The amendments require: (1) the separate identification of witnesses the party expects to call and those who may be called "if need arises," **Rule 26(a)(3)(A);**

(2) the designation of witnesses to be called by deposition and, if nonstenographically reported, a transcript of the testimony, **Rule 26(a)(3)(B);** (3) the "appropriate" identification of each document or other exhibit including summaries. **Rule 26(a)(3)(C).** These disclosures shall be made at least at least 30 days before trial unless otherwise specified by the court. **Rule 26(a)(3)(C).**<sup>6</sup> A party *must* within 14 days of these disclosures serve and file any objections. Any objections not made, other than objections under Fed. R. Evid. 402 and 403, are waived unless excused by the court for good cause. **Rule 26(a)(3)(C)(ii).**

Every disclosure required by Rule 26(a)(1) and 26(a)(3) must be signed by the attorney of record or the unrepresented party. **Rule 26(g)(1).** The signature is a certification that "to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made." **Rule 26(g)(1).** If the certification is made without "substantial justification" then the court may order "an appropriate sanction" which may include an order to pay reasonable expenses incurred as a result of the violation and reasonable attorney's fees. **Rule 26(g)(3).**

The notes of the committee describe the requirement of "reasonable inquiry" for the initial mandatory disclosures as one which does "not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings." The committee identifies a number of relevant factors which will determine what is reasonable under the circumstances including "how long the party has to conduct an investigation either before or after filing the case."

There is an ongoing duty to supplement the mandatory disclosures, just as with traditional discovery responses. **Rule 26(e).** The Rule requires supplementation *and* correction of either mandatory disclosure or discovery responses in the following circumstances: (1) where ordered by the court, **Rule 26(e);** (2) at "appropriate intervals" if the information is "incomplete or incorrect and if the additional or corrective information has not otherwise been made known," **Rule 26(e)(1)**<sup>8</sup>; (3) a prior response must be seasonably amended "if the party learns that in some material respect the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." **Rule 26(e)(2).**

Does the requirement tying mandatory discovery to "disputed facts alleged with particularity in the pleadings" undermine the concept of notice pleading central to the modern civil practice? The answer remains to be seen; however, the notes of the committee indicate that the greater the specificity of pleading, the "more complete should be the listing of potential witnesses and types of documentary evidence." In addition, the notes of the committee appear to suggest that a party would not be expected to disclose information in response to allegations it considers overly broad or vague.

Broad, vague, and conclusory allegations sometimes tolerated in notice pleading — for example, the assertion that a product with many component parts is defective in some unspecified manner should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product.

The committee's solution to the potential difficulties caused by the "disputed facts with alleged particularity" standard is to note that the Rule contemplates that "these issues would be informally refined and clarified" by the parties, and addressed at the Rule 16 conference. *See* **Rule 26(f)** *supra*.

The initial reaction to the new requirements may be that they are fraught with potential for dispute and delay. The 1993 amendments have two vehicles to address possible conflicts early in the case. *First*, the amendments require the parties to develop and submit to the court a discovery plan prior to the Rule 16 conference. **Rule 26(f)**. The parties are to meet "as soon as practicable" but no later than 14 days prior to the Rule 16 conference or the date the scheduling order is due.<sup>9</sup> **Rule 26(f)**.

The discovery plan must include the following elements: (1) a recommendation for changes to the timing, form or requirements for the mandatory disclosures including a statement when the initial disclosures under Rule 26(a)(1) have been or will be made, **Rule 26(f)(1)**; (2) the subjects of

discovery which will be needed, when discovery should be completed and whether discovery should be conducted in phases or limited to certain issues, **Rule 26(f)(2)**; (3) any changes in the presumptive limitations on discovery, *see infra*, **Rule 26(f)(3)**. The parties are jointly responsible for developing the discovery plan and there is a duty to attempt in good faith to agree on the plan.<sup>10</sup> **Rule 26(f)(4)**. The plan must be submitted to the court within 10 days of the Rule 26(f) meeting. **Rule 26(f)(4)**. It is important to note that a party may not seek discovery from "any source" before the parties have conferred as required by Rule 26(f). **Rule 26(d)**.

#### **Limitations on Discovery**

The amendments provide that the number of depositions and requests for admissions may be limited by order or local rule. **Rule 26(b)(2)**. The amendments add a factor that the court may consider in limiting discovery and that is "the burden or expense of the proposed discovery outweighs its likely benefit." **Rule 26(b)(2)(iii)**.

The amendments require that a party withholding information otherwise discoverable based upon a claim of privilege or work product must describe the information not produced sufficiently so that the privilege can be evaluated by the other party. **Rule 26(b)(5)**.

The parties by stipulation may modify procedures for or limitations on discovery unless to do so would interfere with any time set for the completion of discovery, a hearing or for trial. **Rule 29**.

### Rule 30

The rules governing depositions are changed in three significant respects. *First*, the rules establish a “presumptive limit” of 10 depositions for each party. **Rule 30(a)(2)(A)**. This presumptive limit may be modified by court order or by written stipulation of the parties.<sup>11</sup> Leave of court is required to take a deposition prior to the time specified in Rule 26(d), the submission to the court of the discovery plan. *Second*, Rule 30 now allows that “sound, sound-and-visual, or stenographic means” may be used to record depositions. **Rule 30(b)(2)**. The notice must indicate the means to be used. **Rule 30(b)(2)**. Any party with notice to the deponent and the other parties may designate additional means of recording the deposition. **Rule 30(b)(3)**.

**The amendments require that any person who may be used at trial as an expert must be identified and provide a written report signed by the expert.**

*Third*, the amendments now make explicit that objections to deposition questions must be non-argumentative and “non-suggestive.” **Rule 30(d)(1)**. A party may instruct a deponent not to answer a question “only when necessary to preserve a privilege,” to enforce a court order or to present a motion to limit the deposition. **Rule 30(b)(1)**. The time permitted to conduct a deposition may be limited by either court order or local rule. **Rule 30(b)(2)**. If the court finds a party has delayed or impeded an examination, then it may impose sanctions. **Rule 30(b)(2)**.

### Rule 31

The Rule governing written depositions now conforms with Rule 30 and the requirements of Rule 26.

### Rule 32

A deposition taken without leave of court prior to the time requirements of Rule 26(d) cannot be used in court proceedings if the party against whom it is to be used shows that when served with the notice that party was unable with due diligence to obtain counsel. **Rule 32(a)(3)(E)**. Nor can the deposition be used if the party against whom it is to be used has filed a motion for a protective order pursuant to Rule 26(c)(2) and if the party received less than 11 days notice. **Rule 32(a)(3)(E)**.

A party may offer deposition testimony in stenographic or nonstenographic form, but if in nonstenographic form then the party shall provide the court with a transcript of the portions offered. **Rule 32(c)**. On request of a party, deposition testimony in a jury trial offered for other than impeachment purposes shall be presented in nonstenographic form. **Rule 32(c)**.

### Rule 33

Rule 33 establishes a presumptive limit of 25 for the number of interrogatories including subparts. **Rule 33(a)**. The number of interrogatories may be increased by leave of court

or by written stipulation. **Rule 33(a)**. All objections to an interrogatory must be stated with specificity and any ground not identified is waived unless the failure to object is excused by the court for good cause. **Rule 32(b)(4)**.

### Rules 34 and 36

The Rules have been amended to conform to the requirements of Rule 26.

### Rule 16

Under the amendments, the Rule 16 Scheduling Conference assumes a central role in case management. Rule 16 contemplates the entry of an order along the lines of the current Initial Pretrial Report which establishes various case deadlines for motions, and other pretrial conferences. In addition, the Rule 16 order may include modifications to the “disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted.” **Rule 16(b)(4)**. The order must be entered within 90 days of the defendant’s entry of appearance or 120 days following service of the complaint. **Rule 16(b)**.

The amendments expand the areas that the court may consider in establishing the Rule 16 order. *First*, the court may consider limitations on the use of expert testimony under Fed. R. Evid. 702. **Rule 16(c)(4)**.<sup>12</sup> The notes of the advisory committee indicate that the “court may preclude or limit such testimony if the costs to the litigants — which may include the

cost to adversaries of securing testimony on the same subjects by other experts — would be unduly expensive given the needs of the case and the other evidence available at trial.” *Second*, the court may address the appropriateness and timing of summary adjudication. **Rule 16(c)(5)**. *Third*, and central to the order, the court exercises its control over and scheduling of discovery including modification of the mandatory disclosures. **Rule 16(c)(6)**. *Fourth*, the court may consider separate trials with respect to claims or “any particular issue in the case.” **Rule 16(c)(13)**. *Fifth*, the court may direct the parties to present evidence early in the trial regarding a “manageable issue” that could result in a judgment as a matter of law. **Rule 16(c)(14)**. *Sixth*, the court may limit the time allowed for presenting evidence at trial. *Seventh*, the court may require the attendance or availability by telephone of a party or representative with settlement authority. **Rule 16(c)(16)**.

### Rule 37

Rule 37 has been expanded to include the mandatory disclosures. If a party moves to compel the mandatory disclo-

ures he must certify that the movant has in good faith conferred with the party or attempted to confer with the party. **Rule 37(a)(2)**. If the court grants the motion to compel or if the discovery is provided after the motion to compel is filed, then the court, after providing an opportunity to be heard may award reasonable expenses, including reasonable attorney’s fees unless the motion was filed without a good faith effort to confer or the non-producing party’s action was substantially justified. **Rule 37(a)(4)(A)**. If the motion is denied, the court may enter a protective order and award reasonable expenses unless the court finds that the motion was substantially justified. **Rule 37(a)(4)(B)**.

The failure to provide the mandatory disclosure may result in a substantial penalty including not being able to use the evidence at trial unless such failure was harmless or other “appropriate sanctions.” **Rule 37(c)(1)**. The court may also inform the jury of the failure to make the disclosure. **Rule 37(c)(1)**.

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## ENDNOTES

1. This article does not attempt to detail every change to the rules. Rather, it highlights major changes and attempts to provide an organizational context for the new procedures.

2. The notes of the committee indicate that “[t]here is no need for a party to identify potential evidence with respect to allegations that are admitted.”

3. The amendments now explicitly allow for the deposition of “any person identified as an expert whose opinions may be presented at trial.” *Rule 26(b)(4)(A)*.

4. The notes of the committee indicate that given the nature of the new disclosure requirements “litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.”

5. The Rule specifically excludes impeachment evidence from the mandatory disclosure. *Rule 26(a)(3)*.

6. The mandatory disclosures in Rule 26(a)(1) and 26(a)(3) must be made in writing and *filed* with the court unless otherwise specified by court order or local rule. *Rule 26(a)(4)*.

7. There are two practice pointers important here. *First*, the “reasonable circumstances” standard provides some measure of protection for the case that comes into the office just before the statute of limitations is set to run. *Second*, the longer a case is in the office the greater the disclosure requirements. This suggests that plaintiffs may want to contact the potential defendants in advance of filing the complaint to put them on notice of the nature of the claims.

8. This requirement applied to experts extends not only to opinions, but to materials provided to the expert. *Rule 26(e)(1)*.

9. The parties are also to discuss the claims, defenses, and possibility of settlement. *Rule 26(f)*.

10. The committee has added Form 35 as an appendix to the rules which provides an illustration of the type of report required and to serve as a checklist.

11. The amendments require virtually all agreements between the parties to alter or modify the requirements of the rules to take the form of a written stipulation.

12. Fed. R. Evid. 702 has been amended to allow the trial judge somewhat greater latitude in the admission of expert testimony. The language of the proposed amendment was drafted prior to the opinion in **Daubert v. Dow**, 113 S.Ct. 2786 (1993). The parallel New Mexico Rule of Evidence 702 has not been changed. The scope of the New Mexico Rule 702 was discussed extensively in **State v. Alberico**, 861 P.2d 192 (N.M. 1993) which abandoned the **Fry** test for the admission of expert testimony.