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# Stipulations Regarding Discovery Procedure

Jay E. Grenig<sup>†</sup>

## I. Introduction

The Federal Rules of Civil Procedure assume that discovery will be conducted largely by agreement of counsel.<sup>1</sup> Rule 29 of the Federal Rules of Civil Procedure expressly allows the parties to use written stipulations to vary the usual provisions governing discovery and disclosure.<sup>2</sup> Stipulations relating to discovery and disclosure are generally favored by the courts because they foster the flexibility intended by the discovery rules.<sup>3</sup> Nonetheless, a court still has the power to control discovery.<sup>4</sup>

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This Article is adapted from the forthcoming book, *West's Federal Discovery and Disclosure* by the author and Jeffrey S. Kinsler.

<sup>1</sup> See FED. R. CIV. P. 26(f) (providing attorneys are responsible for attempting in good faith to agree on a proposed discovery plan and submitting it to the court); see also FED. R. CIV. P. 29 (providing, unless otherwise directed by the court, parties may provide how discovery will be conducted); see also ROGER S. HAYDOCK ET AL., *FUNDAMENTALS OF PRETRIAL LITIGATION* 447 (2d ed. 1992) (stating, “[d]iscovery is designed to take place primarily . . . without court involvement”).

<sup>2</sup> Federal Rule of Civil Procedure 29 provides:

Unless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.

FED. R. CIV. P. 29; see generally 8 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D* § 2091 (1994).

<sup>3</sup> HAYDOCK ET AL., *supra* note 1, at 237.

<sup>4</sup> See FED. R. CIV. P. 29; see also FED. R. CIV. P. 16(b) (regarding scheduling orders).

The parties may use stipulations to restrict discovery to specific matters, to limit the future use of discovery, and to enter into joint requests for protective orders.<sup>5</sup> Disclosure obligations under Rule 26(a) may be modified and governed by the parties' stipulations.<sup>6</sup> Without a court order or written stipulation, a party may not engage in discovery before the Rule 26(f) initial meeting.<sup>7</sup> However, the parties may not stipulate to cancel or postpone the meeting without obtaining a court order.<sup>8</sup>

Stipulations may be helpful in reducing discovery abuse. For example, where a deposition has been scheduled at an unreasonable time or place, a request for a stipulation to hold the deposition at a reasonable time or place may correct the situation.<sup>9</sup> Stipulations may also be used to protect confidential information.

The parties may stipulate use of a magistrate judge or special master to supervise discovery.<sup>10</sup> Stipulations also can be of particular importance in conducting discovery abroad.<sup>11</sup> This Article examines the historical background of Rule 29, the required form for stipulations, uses of stipulations, and the role of courts with respect to stipulations.

## II. Historical Background

As originally adopted in 1938, Rule 29 allowed parties to vary the usual provisions governing depositions by written stipulation. Rule 29 was amended in 1970 to allow parties to modify by written stipulation the procedures provided by the Federal Rules of Civil Procedure for other

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<sup>5</sup> See WILLIAM S. SCHWARZER ET AL., *CIVIL DISCOVERY AND MANDATORY DISCLOSURE: A GUIDE TO EFFICIENT PRACTICE 1-74* (2d ed. 1994). See, e.g., *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264 (M.D.N.C. 1988).

<sup>6</sup> See FED. R. CIV. P. 26(a)(1).

<sup>7</sup> See FED. R. CIV. P. 26(d).

<sup>8</sup> See FED. R. CIV. P. 26(f).

<sup>9</sup> EDWARD J. IMWINKELRIED & THEODORE Y. BLUMOFF, *PRETRIAL DISCOVERY: STRATEGY AND TACTICS* § 12:04 (1986).

<sup>10</sup> See FED. R. CIV. P. 53; FED. R. CIV. P. 72.

<sup>11</sup> WRIGHT ET AL., *supra* note 2,21 § 2091.

methods of discovery.<sup>12</sup> The 1970 amendment expressly permitted the parties to stipulate that a deposition “may be taken before any person, at any time or place, upon any notice, and in any manner.”<sup>13</sup>

In 1993, Rule 29 was amended to give greater opportunity for litigants to agree upon modifications to discovery procedures or to limit discovery. The amendment explicitly authorized the parties to modify procedures for discovery whether or not provided by the Federal Rules of Civil Procedure.<sup>14</sup> The 1993 amendment encouraged counsel “to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc.”<sup>15</sup>

### III. Form of Stipulations

Any stipulation should be in writing and signed by the authorized representatives of all parties.<sup>16</sup> Although Rule 29 provides that the stipulation shall be “in writing,” an agreement made during a deposition or in open court upon the reporter’s record has the same effect as a written stipulation.<sup>17</sup> Any stipulation should conform with applicable local rules.<sup>18</sup> A request for a stipulation can be made by telephone. The telephone conversation should be confirmed in writing. Even if the stipula-

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<sup>12</sup> See FED. R. CIV. P. 29 advisory committee’s note (1970).

<sup>13</sup> FED. R. CIV. P. 29.

<sup>14</sup> FED. R. CIV. P. 29 advisory committee’s notes (1993).

<sup>15</sup> *Id.*

<sup>16</sup> See *Continental Ill. Nat’l Bank & Trust Co. v. Caton*, 130 F.R.D. 145, 148 (D. Kan. 1990) (holding letter between parties’ attorneys was not sufficient to constitute written stipulation).

<sup>17</sup> See *United States v. Ricks*, 475 F.2d 1326, 1327-28 (D.C. Cir. 1973) (ruling that a stipulation in open court that case might proceed with eleven jurors was valid); *United States v. Guerrero-Peralta*, 446 F.2d 876, 877 (9th Cir. 1971); *Penn Columbia Corp. v. Cemco Resources, Inc.*, 1990 WL 6555, at \*4-5 (S.D.N.Y. 1990) (enforcing a settlement agreement dictated to reporter at deposition); *Rosso v. Foodsales, Inc.*, 500 F. Supp. 274, 276 (E.D. Pa. 1980) (enforcing a settlement agreement dictated to a court reporter).

<sup>18</sup> See *Celenza v. Merdjanian*, 1990 WL 65759, at \*5 (E.D. Pa. 1990) (holding that a local rule required all stipulations to be in writing or memorialized by the court reporter in transcript).

tion is rejected, the request for the stipulation may meet the requirement that a party seeking to compel discovery has met and conferred in an attempt to resolve the dispute.<sup>19</sup>

A conference with opposing counsel as to acceptable deposition dates should be followed by a formal notice of deposition for the agreed dates. This avoids any risk of misunderstanding as to what was agreed upon and assures sufficiency of notice if it is necessary to enforce discovery. Counsel must be careful that any stipulations reached accurately reflect the parties' agreement. Any stipulations should be specified on the record and the record should clearly specify the substance of the stipulations.<sup>20</sup>

## IV. Uses of Stipulations

### A. Generally

Since the 1970 amendment of Rule 29, the parties may stipulate in writing to modify discovery procedures in addition to depositions.<sup>21</sup> Even before the 1970 amendment to Rule 29, it was a common practice for parties to agree on such variations.<sup>22</sup>

### B. Protective Orders

Before filing a motion for a protective order, the parties must meet and confer in an attempt to resolve the dispute.<sup>23</sup> If the parties reach an agreement it should be confirmed in writing. It is frequently prudent to obtain a court order confirming the agreement and to serve the court order on all parties. Where the stipulated protective order is in response to a request to disclose trade secrets or other confidential information, the

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<sup>19</sup> IMWINKELRIED & BLUMOFF, *supra* note 9, § 12:04.

<sup>20</sup> See FED. R. CIV. P. 16(b).

<sup>21</sup> FED. R. CIV. P. 29 advisory committee's notes to 1970 amendment.

<sup>22</sup> FED. R. CIV. P. 29 advisory committee's notes to 1970 and 1993 amendments. See, e.g., *Racine Educ. Ass'n v. Racine Unified School Dist.*, 82 F.R.D. 461 (E.D. Wis. 1979) (enforcing a stipulation regarding the production of documents).

<sup>23</sup> FED. R. CIV. P. 26(c).

stipulation should specify in detail the protected evidence.<sup>24</sup> The stipulation should also indicate the basis for regarding the evidence as protected.<sup>25</sup> If some persons may have access to the protected evidence, the stipulation should specify who may have access<sup>26</sup> and how those with access may use it.<sup>27</sup>

The stipulation may also describe how protected information will be designated (for example, marked "confidential")<sup>28</sup> and how it will be disposed of when the litigation is concluded.<sup>29</sup> The stipulation may also provide how it may be modified<sup>30</sup> and how confidentiality designations may be challenged.<sup>31</sup> It is not necessary to wait for a discovery request to seek a stipulation protecting confidential information.<sup>32</sup>

### C. Supplementing and Amending Discovery Responses

Consideration should be given to stipulating when supplementation or amendments to discovery responses must be made.<sup>33</sup> Stipulations

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<sup>24</sup> See *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 325 (10th Cir. 1981) (specifying the evidentiary requirements needed).

<sup>25</sup> See, e.g., *Digital Equip. Corp. v. Micro Tech., Inc.*, 142 F.R.D. 488, 490 (D. Colo. 1992) (holding greater protection given trade information than other business information).

<sup>26</sup> See FED. R. CIV. P. 26(c)(5).

<sup>27</sup> See generally FED. R. CIV. P. 26(c).

<sup>28</sup> See *Barnhart v. Safeway Stores, Inc.*, 1992 WL 443561, at \*7 (E.D. Cal. 1992) (discussing treatment of protective orders reached through stipulation).

<sup>29</sup> See *H. Salt Food Co. v. KFC Corp.*, 1991 WL 67070, at \*1 (6th Cir. 1991) (enforcing an agreement reached by stipulation between parties to destroy protected documents at the conclusion of litigation).

<sup>30</sup> See *Thermos Co. v. Igloo Prods. Corp.*, 1994 WL 282307, at \*4 (N.D. Ill. 1994) (entering an order to allow modification of an agreement pertaining to confidential information reached by shareholders).

<sup>31</sup> See *Shields Enter. Inc. v. First Chicago Corp.*, 1988 WL 142200, at \*1 (N.D. Ill. 1988) (enforcing an agreement reached by stipulation to allow parties to retain the right of challenge to protected information).

<sup>32</sup> See *Dunn v. Midwestern Indemnity*, 88 F.R.D. 191, 198 (S.D. Ohio 1980) (noting that parties must comply with protective order for all discovery requests throughout the proceeding).

<sup>33</sup> See FED. R. CIV. P. 26 advisory committee's notes.

regarding supplementation and amendments to discovery responses can be incorporated into the scheduling order to avoid argument.<sup>34</sup>

## D. Depositions

### 1. In General

Depositions may be taken only in accordance with the Federal Rules of Civil Procedure in the absence of a written stipulation.<sup>35</sup> Under Rule 29, the parties may stipulate in writing that depositions may be taken before any person,<sup>36</sup> at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.<sup>37</sup> Because the deposition procedures are potential sources of misunderstanding and conflict, it is usually advantageous for the parties to attempt to reach agreement on the deposition procedures before the deposition is taken.<sup>38</sup> Potential topics for stipulation include:

1. Number and length of depositions.<sup>39</sup>

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<sup>34</sup> See FED. R. CIV. P. 16(b).

<sup>35</sup> See WRIGHT ET AL., *supra* note 2, § 2091.

<sup>36</sup> FED. R. CIV. P. 28(a) provides that a person designated by the parties under FED. R. CIV. P. 29 is an "officer" within the meaning of Rules 30, 31, and 32. See, e.g., *Marlboro Prods. Corp. v. North Am. Philips Corp.*, 55 F.R.D. 487, 491 (S.D.N.Y. 1972) (stating as to the need of an independent officer to administer oaths, court "relies complacently upon our illustrious bar to cope by creative stipulation with these aspects of the enterprise"); *Laverett v. Continental Briar Pipe Co.*, 25 F. Supp. 790, 790 (E.D.N.Y. 1938) (finding attorney who stipulated that testimony be taken by deposition before any of five named persons without first satisfying himself as to possible disqualification of any of named persons, waived right to suppress deposition because deposition was taken and transcribed by stenographer employed by attorneys for opposing party).

<sup>37</sup> *Spaeth v. Warner Bros. Pictures, Inc.*, 1 F.R.D. 729, 730 (S.D. N.Y. 1941); see also *United States v. South Carolina*, 445 F. Supp. 1094, 1099 (D.S.C. 1977) (holding parties stipulated to conclude deposition by permitting deponent to answer written questions).

<sup>38</sup> See FED. R. CIV. P. 26 advisory committee's notes (noting that, "[o]nce it is clear to lawyers that they bargain on an equal footing, they are usually able to arrange for an orderly succession of depositions without judicial intervention").

<sup>39</sup> See FED. R. CIV. P. 30(a)(2)(A).

2. Persons who may attend the deposition.<sup>40</sup>
3. Order of examination.<sup>41</sup>
4. Number of attorneys questioning deponents.<sup>42</sup>
5. Right of nonattending parties to recall a witness for a resumed deposition.<sup>43</sup>
6. Uniform system for identifying documents.
7. Predeposition production or identification of documents to be used at deposition, other than those to be used for impeachment.

“Unless otherwise stipulated, it is prudent to insist that every stipulation preserve all objections to admissibility at the trial.”<sup>44</sup> The stipulation may also provide for the production of documents at the deposition.<sup>45</sup> In addition, the notice of taking depositions may be waived by stipulation.<sup>46</sup> The parties may stipulate that a deposition may be taken before a stenographer whose fees may be taxable as costs.<sup>47</sup> The parties may stipulate to extend the time for completion of discovery proceedings or

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<sup>40</sup> See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S. Ct. 2199, 2207-08, 81 L. Ed. 2d 17, 28 (1984) (holding that pretrial depositions are not public components of civil trial). *But see* *Wilk v. American Med. Ass’n*, 635 F.2d 1295, 1201 (7th Cir. 1980) (stating that discovery proceedings are presumptively public unless otherwise ordered by the judge).

<sup>41</sup> The examination and cross-examination of witnesses normally proceeds as permitted at trial. FED. R. CIV. P. 30(c). However, in complex cases, it may be appropriate for the parties to agree on the order of examination. See FED. R. CIV. P. 30(c) advisory committee notes.

<sup>42</sup> Normally one attorney for each party questions each witness. In some cases, responsibility for particular subjects may be assigned to different attorneys. See SCHWARZER ET AL., *supra* note 5, at 3-24.

<sup>43</sup> See FED. R. CIV. P. 30(a)(2)(B) (stating that, in absence of recall agreement, witness may not be redeposed without leave of court).

<sup>44</sup> 3A MARY B. COOK & JAY E. GRENIG, WEST’S FEDERAL FORMS: DISTRICT COURTS § 3318 (4th ed. 1991).

<sup>45</sup> *Id.* § 3319.5.

<sup>46</sup> *Id.* § 3318.

<sup>47</sup> See, e.g., *Liebert v. Netherlands Am. Steam Navigation Co.*, 2 F.R.D. 316 (S.D. N.Y. 1942) (holding that, under stipulation that stenographer’s fees would be taxable as costs, defendant is entitled to tax such fees, regardless of whether deposition was actually introduced into evidence).



for hearing discovery motions.<sup>48</sup> However, such stipulation cannot require the court to postpone or continue the trial date.<sup>49</sup>

## 2. Excluding of Persons From Deposition

Counsel frequently stipulate to the exclusion from depositions of non-party witnesses to important relevant events who have not yet testified.<sup>50</sup> However, it may not be appropriate to exclude expert witnesses.<sup>51</sup> The presence of an expert at the depositions of opposing experts may help sharpen the issues and save time and expense.<sup>52</sup>

## 3. Videotaped and Audiotaped Depositions

Anytime a videotape deposition is taken, the parties should stipulate to the procedure or they should obtain a court order setting out all of the procedures.<sup>53</sup> In *Marlboro Products Corp. v. North American Philips Corp.*,<sup>54</sup> the court ruled that testimony at a deposition could be recorded electronically, unless insurmountable obstacles were encountered preventing formulation of a workable order.<sup>55</sup> The court ruled that the burden was on the attorneys to work together to fashion an order specifying how the testimony was to be recorded, preserved and filed, and whatever additional safeguards were appropriate.<sup>56</sup>

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<sup>48</sup> See FED. R. CIV. P. 16(b) Subdivision Index III.

<sup>49</sup> *But see* FED. R. CIV. P. 16(e) Subdivision Index IV (stating pretrial order controls subsequent course of action unless modified by subsequent order).

<sup>50</sup> SCHWARZER ET AL., *supra* note 5, at 3-23.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*; see *Skidmore v. Northwest Eng'g Co.*, 90 F.R.D. 75, 76 (S.D. Fla. 1981) (holding that a party who seeks to have an expert present to assist counsel at deposition has light burden of establishing need and opposing party has considerably heavier burden to show need for exclusion); see also *Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451 (M.D. Ga. 1987).

<sup>53</sup> MARK A. DOMBROFF, DISCOVERY § 9.04 (1986); see *COOK & GREINIG, supra* note 44, §§ 3348.5-3348.25.

<sup>54</sup> 55 F.R.D. 487 (S.D. N.Y. 1972).

<sup>55</sup> *Marlboro Prods. Corp.*, 55 F.R.D. at 491.

<sup>56</sup> See also *United States v. Hargro*, 104 F.R.D. 451, 453 (N.D. Ga. 1984) (holding defendant could tape record deposition under conditions set forth by court).

## 4. Telephone Depositions

The parties may stipulate in writing that a deposition be taken by telephone.<sup>57</sup> The stipulation should clearly specify all the particulars of the proceeding including the following:

- How the testimony will be recorded.<sup>58</sup>
- If a court reporter is used, where the reporter will record the testimony.<sup>59</sup>
- Who will administer the oath to the deponent.<sup>60</sup>
- Disclosure of the identities of all persons in the room where the witness being deposed is and whether or not the witness looks at any notes or written materials.

## 5. Stipulations at the Deposition

After the introductions at a deposition, it is not uncommon for the deposing attorney to ask whether all parties present agree to the “usual stipulations.” Some attorneys readily agree to these stipulations. However, many attorneys frequently do not comprehend what the stipulations are to which they have just agreed. An agreement to the “usual stipulations” only creates the potential for future conflict among the parties.<sup>61</sup> A stipulation that the deposition will be taken in accordance with the Federal Rules of Civil Procedure is unnecessary because all applicable

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<sup>57</sup> FED. R. CIV. P. 30(b)(7); see COOK & GRENIG, *supra* note 44, §§ 3349-3350.

<sup>58</sup> Tape recording may be appropriate in a telephone deposition. See FED. R. CIV. P. 30(b)(4); see also COOK & GRENIG, *supra* note 44, § 3348.

<sup>59</sup> The reporter must be in a location that enables the reporter to hear all the questions and responses. DOMBROFF, *supra* note 53, § 11.05.

<sup>60</sup> A court reporter who is not at the same location as the deponent may be prohibited from administering the oath. Thus, it may be necessary to arrange for another person authorized to administer the oath to be present with the deponent. DOMBROFF, *supra* note 53, § 11.05.

<sup>61</sup> R. LAWRENCE DESSEM, *PRETRIAL LITIGATION: LAW, POLICY & PRACTICE* 341 (2d ed. 1996); see Gerson A. Zweifach, *Depositions Under the New Federal Rules*, 23 LITIG. 6, 8 (1997) (stating, “[a]t the outset of the deposition, make a point of expressly disavowing the stipulations, and state that the ‘Federal Rules’ govern everything, including review and filing of the transcript”).

civil procedure rules and court rules govern the deposition, whether or not the attorneys agree that they do so. If the deposition is used as an impeachment tool at trial, it is essential that the testimony be given under oath. The examining attorney must ensure that all deponents explicitly take the oath on the record. For this reason, Rule 30(c) requires the officer before whom the deposition is to be taken to administer an oath or affirmation.<sup>62</sup> A proposal to waive the oath should be rejected. A stipulation that withdrawn questions will be omitted from the transcript creates a cleaner record and saves transcription costs. However, the withdrawn question may be helpful in studying the potential trial strategy that may be disclosed in the deposing lawyer's questions.<sup>63</sup>

It may be inadvisable for the opposing attorney to stipulate that all evidentiary objections will be reserved until trial as the right to object can be an important weapon in controlling the hearing and protecting the deponent.<sup>64</sup> Furthermore, this stipulation may be invalid under Rule 32(d)(3), as that rule provides that "errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition."<sup>65</sup>

The stipulation that any opposing attorney's objection inures to the benefit of all parties eliminates the need of other attorneys having to make the same objection on the record. This stipulation results in fewer interruptions. However, without the stipulation, the lawyer opposing the objection can attempt to keep all but the objecting lawyer from participating, claiming the others have no standing with respect to that objection.<sup>66</sup>

A stipulation that, if opposing counsel instructs his or her client not to answer, the client is deemed to have refused to answer may save time at the hearing, since it provides a record for a subsequent motion to compel an answer.<sup>67</sup> This stipulation eliminates the need to ask a question to the objection, reasking the question to have the deponent confirm that

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<sup>62</sup> Paul M. Lisnek, *The Usual Stipulations at Deposition*, 67 WIS. LAW. 29 (1994); see FED. R. CIV. P. 30(c).

<sup>63</sup> Lisnek, *supra* note 62, at 29, 30.

<sup>64</sup> Gary S. Gildin, *A Practical Guide to Taking and Defending Depositions*, 88 DICK. L. REV. 247, 264-65 (1984).

<sup>65</sup> FED. R. CIV. P. 32(d)(3)(B); see Gildin, *supra* note 64, at 247, 264-65.

<sup>66</sup> Lisnek, *supra* note 62, at 29, 30.

<sup>67</sup> See FED. R. CIV. P. 37(a).

he or she will not answer the question on the advice of counsel, and then certifying the question.<sup>68</sup>

A stipulation to waive the reading of the deposition transcript should rarely be entered into. The possibility of error in the transcript is always present. Rule 30(c) permits the deponent, at the request of the deponent or any party, to review and make changes in the form or substance of the transcript.<sup>69</sup> Attorneys should take the time to read and ensure the accuracy of the deposition transcript. Changes made in a deposition may permit the deposing lawyer to redepose on those changes, but this may be less of a problem than the preservation of incorrect and dangerous testimony.<sup>70</sup>

Many attorneys prefer to have the deponent sign the transcript, believing that the absence of the deponent's signature makes the transcript less effective in impeaching the deponent.<sup>71</sup> The parties may stipulate that the transcript will be deemed signed if the deponent fails to sign it after a specified period of time. The parties may agree that the transcript can be signed in the presence of any notary. This may be appropriate when it would be inconvenient for the deponent to sign the transcript in the presence of the reporter who took the deposition.

## E. Interrogatories

The parties can stipulate to extend the time for responding or objecting to interrogatories, but if the time extension would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, the extension must be approved by the court.<sup>72</sup> If the attorney for the responding party wants to reserve the right to object to the interrogatories, the time extension should provide that the time is extended for answering, objecting, or responding to the interrogatories.<sup>73</sup>

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<sup>68</sup> Lisnek, *supra* note 62, at 29, 30.

<sup>69</sup> *See id.* at 29.

<sup>70</sup> *Id.*

<sup>71</sup> *See* COOK & GREINIG, *supra* note 44, § 3358.

<sup>72</sup> FED. R. CIV. P. 29.

<sup>73</sup> FED. R. CIV. P. 29(2).

Where the parties are willing to consider preliminary responses (such as when the parties are working toward early settlement), they may wish to stipulate that their initial interrogatory responses will not be admissible if they supply updated information by a specified date.

Parties are limited to serving twenty-five interrogatories, including subparts, unless a court order or written stipulation provides otherwise.<sup>74</sup> Some districts may have opted out of this limitation.<sup>75</sup>

## F. Production of Documents and Things

With respect to production of documents under Rule 26(a) and Rule 34, it is generally preferable if the parties stipulate to an exchange of documents. Because of the possibility that the parties in a case involving a large number of documents will inadvertently produce some privileged documents, the parties should consider entering into a stipulation that inadvertent production of privileged documents does not waive the privilege and that the parties will promptly return the privileged documents. The stipulation should provide that privileged documents inadvertently turned over shall not be considered as having been produced.<sup>76</sup> The parties may also wish to enter into a confidentiality agreement, limiting access to the documents or the information contained in them.

If testing of an item is to be conducted, the party conducting the test should obtain a written stipulation or court order detailing the testing procedure.<sup>77</sup> This is essential if the testing destroys or alters the item be tested.<sup>78</sup> The parties may also consider agreeing that any testing results be shared. In the event that the test will destroy or alter the tested item, the parties should consider stipulating to a mutually agreeable testing facility.

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<sup>74</sup> FED. R. CIV. P. 33(a).

<sup>75</sup> See, e.g., Eastern Dist. of Wis., order dated Jan. 7, 1994.

<sup>76</sup> IMWINKELRIED & BLUMOFF, *supra* note 9, § 8:09.

<sup>77</sup> ROGER S. HAYDOCK & DAVID F. HERR, *DISCOVERY PRACTICE* § 5.15 (2d ed. 1988).

<sup>78</sup> Cf. *City of Kingsport v. SCM Corp.*, 352 F. Supp. 287, 288 (E.D. Tenn. 1972) (authorizing defendant to remove portion or all of panel from roof so that engineers could conduct tests on it).

## G. Mental and Physical Examinations

Parties may stipulate to a physical or mental examination.<sup>79</sup> Most mental and physical examinations under Rule 35 are conducted pursuant to a stipulation between the parties.<sup>80</sup> It is usually quicker and more economical to obtain a stipulation than to notice a formal motion for an order requiring an examination.<sup>81</sup> The stipulation should specify the scope, time, place and any tests or procedures to be performed.<sup>82</sup> An examination notice should be prepared specifying the examiner's name; the date, time and place of the examination; and the scope of the examination.<sup>83</sup> The examination notice should also include the condition to be examined and the tests and procedures to be used in the examination.<sup>84</sup>

## H. Requests for Admission

Rule 36 permits the parties to modify, by a written stipulation, the time for responding to requests for admission.<sup>85</sup> If the extension interferes with any time set for completing discovery, a hearing, or a trial, the court must approve the time extension.<sup>86</sup>

## I. Depositions Upon Written Questions

Without the written stipulation of the parties, a party must obtain leave of the court in order to take the deposition upon written questions if:

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<sup>79</sup> See FED. R. CIV. P. 35.

<sup>80</sup> DOMBROFF, *supra* note 53, § 7.03; IMWINKELRIED & BLUMOFF, *supra* note 9, § 9:09.

<sup>81</sup> IMWINKELRIED & BLUMOFF, *supra* note 9, § 9:09.

<sup>82</sup> PETER JAKAB ET AL., *HANDLING FEDERAL DISCOVERY* 47:III.E. (1995).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See FED. R. CIV. P. 36.

<sup>86</sup> FED. R. CIV. P. 29.

- a proposed deposition would result in more than ten depositions taken under this rule by the plaintiffs, or by the defendants, or by third-party defendants;
- the person to be examined has already been deposed in the case; or
- a party seeks to take a deposition before the time specified in Rule 26(d).<sup>87</sup>

## J. Required Disclosures

Parties should consider stipulating with respect to matters covered by the required disclosure provisions of Rule 26.<sup>88</sup> A stipulation with respect to required disclosures may include the following:

- The time within which to complete the required disclosures. The time may either be extended or shortened.<sup>89</sup>
- The order of disclosure. For example, the parties may wish to provide for sequential disclosure of information about lay or expert witnesses.
- A provision for the disclosure of matters in addition to those required to be disclosed by Rule 26(a).
- Procedures for the supplementation of disclosures.<sup>90</sup>
- Protection of inadvertently disclosed privileged material or material protected by the work product doctrine.
- Procedures for resolving disputes relating to required disclosure.<sup>91</sup>
- A provision for protecting the confidentiality of certain information such as trade secrets.<sup>92</sup>

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<sup>87</sup> FED. R. CIV. P. 31(a)(2).

<sup>88</sup> See FED. R. CIV. P. 26(a).

<sup>89</sup> See FED. R. CIV. P. 26(a)(1), 26(a)(2)(C); see also FED. R. CIV. P. 26(f).

<sup>90</sup> See FED. R. CIV. P. 26(e).

<sup>91</sup> See FED. R. CIV. P. 26(c) (requiring the party moving for a protective order to certify that movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the discovery dispute without court action); see also FED. R. CIV. P. 37(a)(2)(A).

<sup>92</sup> See *Waller v. Financial Corp. of Am.*, 828 F.2d 579, 584 (9th Cir. 1987) (assuming stipulation of confidentiality was valid).

- An agreement to postpone disclosure until pre-answer dispositive motions are resolved.

The parties may also wish to stipulate that the required initial disclosure or expert report disclosure provisions are inapplicable to the proceeding or otherwise modified.<sup>93</sup> Judge Schwarzer suggests that courts not approve such stipulations because of a number of “compelling reasons for requiring these disclosures.”<sup>94</sup>

It appears that, with the exception of the timing of the disclosure, disclosure of the identities of expert witness cannot be avoided by stipulation.<sup>95</sup> In addition, the parties cannot negate the obligation to make the required pretrial disclosures through a stipulation.<sup>96</sup>

## V. Control by the Court

### A. Generally

Ordinarily, parties are not required to obtain a court’s approval regarding their stipulations.<sup>97</sup> However, any stipulation varying the procedures set out by the Federal Rules of Civil Procedure may be superseded by court order.<sup>98</sup> Courts most often object to deviations from the procedures

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<sup>93</sup> See FED. R. CIV. P. 26(a)(1) (providing that, “[e]xcept to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties); see also FED. R. CIV. P. 26(a)(2)(C) (permitting the parties to stipulate as to the timing and sequence of the disclosures); FED. R. CIV. P. 26 advisory committee’s note.

<sup>94</sup> FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 23 (1994).

<sup>95</sup> See FED. R. CIV. P. 26(a)(2)(A).

<sup>96</sup> See FED. R. CIV. P. 26(a)(3).

<sup>97</sup> See FED. R. CIV. P. 29 advisory committee’s note.

<sup>98</sup> See FED. R. CIV. P. 29 advisory committee’s note; see e.g., *In re Westinghouse Elec. Corp.*, 570 F.2d 899, 902 (10th Cir. 1978) (relieving party from stipulation entered as order where subsequent events revealed that order’s terms would deprive litigant of potentially critical facts); see also WRIGHT ET AL., *supra* note 2, § 2092. *But see Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 268 (M.D.N.C. 1988) (upholding confidentiality stipulation although plaintiff argued it was compelled to agree because of need for speedy discovery in face of an antagonistic adversary).



provided by the Federal Rules of Civil Procedure when the stipulated changes interfere with a court-imposed pretrial or trial schedule.<sup>99</sup>

A scheduling order may be amended on the court's own motion, or upon motion of a party for cause shown.<sup>100</sup> The decision to modify a scheduling order is within the trial court's discretion; its decision will be reversed only for an abuse of discretion.<sup>101</sup> Parties cannot stipulate to discovery procedures with respect to nonparty witnesses that would deviate from statutory subpoena requirements.<sup>102</sup>

## B. Extensions of Time

As discussed previously, Rule 29 does not expressly require court approval of stipulations, except where stipulations "extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court."<sup>103</sup> If the court's permission is required, a motion to extend the discovery response time must be filed with the court.<sup>104</sup> An explanation as to why the time extension is needed should be included, and the stipulation should be attached to the motion. Grounds for extension of time include (1) inadvertence and excusable neglect in not completing discovery earlier, and (2) discovery request outstanding when discovery period

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<sup>99</sup> See FED. R. CIV. P. 29 (stating that court approval is required if the stipulation extends the time provided in Rules 33, 34, and 36 for responses to discovery that would interfere with the time set for completion of discovery, for hearing a motion, or for trial); cf. *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 130 F.2d 185, 187 (3d Cir. 1942) (stating that stipulations could, as they have done in the past, materially prolong time for trial of case to suit litigants' convenience and interests).

<sup>100</sup> See FED. R. CIV. P. 45.

<sup>101</sup> See *Analytical Measurements, Inc. v. Keuffel & Esser Co.*, 843 F. Supp. 920, 926 n.4 (D.N.J. 1993) (stating that whether to permit amendment of final pretrial order is entirely within discretionary power of trial court).

<sup>102</sup> See FED. R. CIV. P. 45.

<sup>103</sup> FED. R. CIV. P. 29.

<sup>104</sup> See 2 JAY E. GRENIG, *WEST'S FEDERAL FORMS: DISTRICT COURTS* §§ 1354-1365 (4th ed. 1994).

ended.<sup>105</sup> The movant should also prepare a proposed order extending time.<sup>106</sup>

### C. Relief from Stipulations

The strong public policy of the federal discovery rules favoring full disclosure is of paramount importance.<sup>107</sup> Thus, when a party willingly agrees to the entry of a stipulation, a court should be hesitant to relieve that party of its obligations, particularly when the other party has produced discovery in reliance on that stipulation.<sup>108</sup> However, a court may relieve a party from an improvident stipulation or one that might work manifest injustice.<sup>109</sup>

## VI. Conclusion

Rule 29 gives litigants the opportunity to modify the discovery procedures to accommodate the particular circumstances. Properly used, stipulations can save the parties time and money. Although judicial approval of stipulations is not normally required, judicial approval is needed

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<sup>105</sup> See *Clonlara, Inc. v. Runkel*, 722 F. Supp. 1442, 1448-49 (E.D. Mich. 1989) (holding plaintiffs not entitled to order extending time for discovery where plaintiffs failed to show excusable neglect for failure to conduct discovery during two-year discovery period); see, e.g., *National R.R. Passenger Corp. v. Notter*, 677 F. Supp. 1, 8 (D. D.C. 1987).

<sup>106</sup> See GRENIG, *supra* note 104, §§ 1366-1368.

<sup>107</sup> See *Olympic Refining Co. v. Carter*, 332 F.2d 260, 264 (9th Cir. 1964) (stating the "purpose of federal discovery rules is to force a full disclosure"); *In re Sinclair Oil Corp.*, 881 F. Supp. 535, 539 (D. Wyo. 1995) (stating that "stipulation should be construed in harmony with Federal Rules of Evidence's policy of full disclosure rather than limiting disclosure").

<sup>108</sup> See *In re Sinclair Oil Corp.*, 881 F. Supp. at 535 (holding the prospective defendant was not relieved of its unequivocal stipulation for deposition perpetuating testimony of critical witness); see also *Parkway Gallery Furniture, Inc.*, 121 F.R.D. at 267 (stating the court will be hesitant to relieve party of its obligations under stipulated protective order, particularly when other party produced discovery in reliance on stipulation).

<sup>109</sup> See, e.g., *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 570 F.2d 899, 902 (10th Cir. 1978) (party relieved from stipulation against further deposition of nonparty witness where post-stipulation production of documents dealt with potentially critical events).

in a number of situations, including modification of scheduling orders under Rule 16.

Parties should be careful to follow the required formalities for stipulation. Additionally, no one should enter into a stipulation without carefully considering the consequences of agreeing to the proposed stipulation.