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**Rule 16(b). Scheduling and planning.** Except in categories of actions exempted by district court rule as inappropriate, the judge shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

- (1) to join other parties and to amend the pleadings;
- (2) to file and hear motions; and
- (3) to complete discovery.

The scheduling order also may include

- (4) the date or dates for conferences before trial, final pretrial conference, and trial;
- (5) provisions for disclosure or discovery of electronically stored information; and
- (6) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge upon a showing of good cause.

**History:** En. Sup. Ct. Ord. Oct. 9, 1984, eff. Oct. 9, 1984; amd. Sup. Ct. Ord. Feb. 28, 2007, eff. Feb. 28, 2007.

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**Rule 26(b). Discovery scope and limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of this subdivision. The court may specify conditions for the discovery.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

**History:** En. Sec. 26, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976; amd. Sup. Ct. Ord. Oct. 9, 1984, eff. Oct. 9, 1984; amd. Sup. Ct. Ord. May 1, 1990, eff. May 1, 1990; amd. Sup. Ct. Ord. Feb. 28, 2007, eff. Feb. 28, 2007.

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**Rule 26(f). Discovery conference.** At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

- (1) A statement of the issues as they then appear;
- (2) A proposed plan and schedule of discovery;
- (3) Any limitations proposed to be placed on discovery;
- (4) Any issues relating to discovery of electronically stored information, including the form or forms in which it should be produced;
- (5) Any other proposed orders with respect to discovery; and
- (6) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys in the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, including resolution of issues relating to the discovery of electronically stored information, including the form or forms in which it should be produced, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

**History:** En. Sup. Ct. Ord. Oct. 9, 1984, eff. Oct. 9, 1984; amd. Sup. Ct. Ord. May 1, 1990, eff. May 1, 1990; amd. Sup. Ct. Ord. Feb. 28, 2007, eff. Feb. 28, 2007.

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**Rule 33(c). Option to produce business records.** Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and identify, as readily as can the party served, the records from which the answer may be ascertained.

**History:** En. Sec. 33, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750, Nov. 28, 1966, eff. Jan. 1, 1967; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976; amd. Sup. Ct. Ord. Oct. 9, 1984, eff. Oct. 9, 1984; amd. Sup. Ct. Ord. Feb. 28, 2007, eff. Feb. 28, 2007.

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**Rule 34(a). Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which the information can be obtained, translated, if necessary, by the respondent into reasonably usable form), or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

**History:** En. Sec. 34, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976; amd. Sup. Ct. Ord. May 1, 1990, eff. May 1, 1990; amd. Sup. Ct. Ord. Feb. 28, 2007, eff. Feb. 28, 2007.

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**Rule 34(b). Procedure.** The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted, as requested, unless the request is objected to. An objection to the requested form or forms for producing electronically stored information shall state the reasons for the objection. If objection is made to part of an item or category, the part shall be specified. If objection is made to the requested form or forms for producing electronically stored information--or if no form was specified in the request--the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

- (i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;
- (ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable; and
- (iii) a party need not produce the same electronically stored information in more than one form.

**History:** En. Sec. 34, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976; amd. Sup. Ct. Ord. Oct. 9, 1984, eff. Oct. 9, 1984; amd. Sup. Ct. Ord. Feb. 28, 2007, eff. Feb. 28, 2007.

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**Rule 37(e). Electronically stored information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

**History:** En. Sup. Ct. Ord. Feb. 28, 2007, eff. Feb. 28, 2007.

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**Rule 45(a). Form--issuance.** (1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subparagraphs (c) and (d) of this rule. A command to produce evidence or to permit inspection, copying, testing or sampling may be joined with a command to appear at trial or hearing or at a deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) A subpoena shall issue from the court in which the action is pending.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of a court in which the action is pending.

(4) A party or an attorney responsible for the issuance and service of a subpoena seeking health care information, as defined by [50-16-504](#)(6), Montana Code Annotated, shall comply with the provisions of [50-16-535](#) and [50-16-536](#), Montana Code Annotated.

**History:** En. Sec. 45, Ch. 13, L. 1961; amd. Sup. Ct. Ord. Sept. 28, 1999, eff. Jan. 1, 2000; amd. Sup. Ct. Ord. July 8, 2003, eff. Sept. 1, 2003; amd. Sup. Ct. Ord. Feb. 28, 2007, eff. Feb. 28, 2007.

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**Rule 45(c). Protection of persons subject to or affected by subpoenas.** (1) A party or an attorney 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. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to subparagraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing or sampling, or any person affected thereby, may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing of any or all of the designated materials or inspection of the premises, or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample, the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, and to any affected person who has served written objection, move at any time for an order to compel the production, inspection, copying, testing or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing or sampling commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

- (i) fails to allow reasonable time for compliance; or
- (ii) requires in the case of a deposition or production prior to hearing or trial, a person to travel beyond the 100 mile radius provided in subparagraph (b)(2) of this rule; or
- (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) If a subpoena

- (i) requires disclosure of a trade secret or other confidential research, development, or commercial information; or
- (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or
- (iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

**History:** En. Sup. Ct. Ord. Sept. 28, 1999, eff. Jan. 1, 2000; amd. Sup. Ct. Ord. Feb. 28, 2007, eff. Feb. 28, 2007.

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**Rule 45(d). Duties in responding to subpoena.** (1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it, or in a form or forms that are reasonably usable.

A person responding to a subpoena need not produce the same electronically stored information in more than one form.

A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

**History:** En. Sec. 45, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976; amd. Sup. Ct. Ord. May 1, 1990, eff. May 1, 1990; amd. Sup. Ct. Ord. June 26, 1990, eff. June 26, 1990; amd. Sup. Ct. Ord. Sept. 28, 1999, eff. Jan 1, 2000; amd. Sup. Ct. Ord. Feb. 28, 2007, eff. Feb. 28, 2007.

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