On November 13, 2024, the Nebraska Supreme Court adopted the following rule amendments to Neb. Ct. R. Disc. §§ 6-326 to 6-337, with a delayed effective day of January 1, 2025:

CHAPTER 6: TRIAL COURTS

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Article 3: Nebraska Court Rules of Discovery in Civil Cases.

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§ 6-326. General provisions governing discovery.

(a) Discovery Methods and Sequence.

(1) Discovery Methods. Parties may obtain discovery by one or more of the following methods: required disclosures; depositions by ~~upon~~ oral examination or written questions; ~~written~~ interrogatories to parties; requests for producing ~~production of~~ documents, electronically stored information, and tangible ~~or~~ things or ~~permission to enter upon~~ entering onto land ~~or other property~~ for inspection and other purposes; subpoenas commanding nonparties to produce documents, electronically stored information, and tangible things or allowing entry onto land for inspection and other purposes; physical and mental examinations; and requests for admission. ~~Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.~~

(2) Sequence. Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(b) Discovery Scope ~~of Discovery~~ and Limits. ~~Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:~~

(1) Scope in ~~In~~ General. Parties may obtain discovery regarding any nonprivileged matter~~, not privileged, which~~ that 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, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.~~ It is not a 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.

(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 all or part ~~or~~

~~all~~ of a possible judgment ~~which may be entered~~ in the action or to indemnify or reimburse for payments made to satisfy the judgment. A party may also obtain through an interrogatory whether an insurance business is disputing the agreement's coverage of the claim. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this subpart ~~paragraph~~, an application for insurance is ~~shall~~ not be treated as part of an insurance agreement.

(3) ~~Trial Preparation:~~ Work Product Materials.

(A) Documents and Tangible Things. ~~Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of~~ Ordinarily, a party may not discover documents and tangible things ~~otherwise discoverable under subdivision (b)(1) of this rule and~~ that are prepared in anticipation of litigation or for trial by or for another party or ~~by or for that other party's~~ its representative (including ~~his or her~~ the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(c)(4), such materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it ~~only upon a showing that the party seeking discovery~~ has substantial need of the materials ~~in the preparation of his or her~~ to prepare its case and ~~that he or she is unable~~ cannot, without undue hardship, ~~to~~ obtain the substantial equivalent of the materials by other means.

(B) Protection Against Disclosure. If the court orders ~~In ordering~~ discovery of those ~~such~~ materials ~~when the required showing has been made~~, ~~the court shall~~ it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's ~~an~~ attorney or other representative ~~of a party~~ concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without making the showing required by Rule 26(b)(3)(A), obtain the person's own previous ~~A party may obtain without the required showing a~~ statement ~~concerning~~ about 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~~.~~, and ~~The provisions of~~ Rule 37(a)(5)~~(4) apply~~ applies 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.~~

(i) A previous statement is a person's nonprivileged recounting of what the person did, saw, heard, or knows about a matter and that is (1) recorded by audio, audiovisual, or stenographic means, (2) handwritten by the person, or (3) in a written or electronic form and signed by the person.

(ii) Deposition testimony is not a previous statement for purposes of this subpart.

(4) Claiming Privilege or Protection. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as work product, the party must:

(A) expressly make the claim; and

(B) describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(5) Waiver of Privileges or Protections. The following apply to documents that are produced in discovery, whether in response to a discovery request or pursuant to a disclosure obligation.

(A) The production of a privileged or protected document does not operate as a waiver of the privilege or protection if the production was inadvertent, the producing party took reasonable steps under the circumstances to prevent the inadvertent disclosure of the document, and the producing party promptly took reasonable steps under the circumstances to rectify the error of producing the document, including, if applicable, following subpart (B) of this rule.

(B) If a document produced in discovery is subject to a claim of privilege or protection, the ~~claimant~~ producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified document and any copies it has; must not use or disclose the document or its contents until the claim is resolved; must take reasonable steps to retrieve the document if the recipient disclosed it before being notified; and may promptly present the document to the court under seal for a determination of the claim. The producing party must preserve the document until the claim is resolved. Either the producing or receiving party may seek to have the claim resolved by filing a motion pursuant to Rule 26(d) in the court in which the action is pending.

(C) A lawyer who receives a document, including electronically stored information, that the lawyer knows or reasonably should know is subject to a claim of privilege or protection and also knows or reasonably should know was inadvertently produced must promptly notify the party who produced the document.

(c) Discovery From Experts.

~~(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 subdivisions (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.~~

(1) Required Disclosures. A party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Rules 702, 703, or 705 of the Nebraska Evidence Rules. Unless the court orders otherwise, the disclosure must be in writing, signed, and served.

(A) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report – prepared and signed by the witness – if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) a list of each publication within the scope of Nebraska Evidence Rule 803(18) on which the witness intends to rely for any opinion;

(v) the witness' qualifications to present evidence under Nebraska Evidence Rules 702, 703, or 705, which may be satisfied by the production of a resume or curriculum vitae and a list of any publications authored by the witness within the last 10 years that are not listed in the resume or curriculum vitae;

(vi) the title, court, and case number of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition, performed an independent medical examination, or otherwise provided evidence as an expert and for each such case, the party who retained the witness; and

(vii) a statement of the compensation to be paid for the witness' work and testimony in the case, which may be satisfied by production of a fee schedule.

(B) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, the disclosure must:

(i) state the subject matter on which the witness is expected to present evidence under Nebraska Evidence Rules 702, 703, or 705;

(ii) provide a summary of the facts and opinions to which the witness is expected to testify;

(iii) state the qualifications of the witness to present evidence under Nebraska Evidence Rules 702, 703, or 705, which may be satisfied by the production of a resume or curriculum vitae and a list of any

publications authored by the witness within the last 10 years that are not listed in the resume or curriculum vitae; and

(iv) state the compensation to be paid to the witness for providing testimony at a deposition or trial, which may be satisfied by production of a fee schedule.

(C) Report Requirements for Treating Physicians. A treating physician who is retained or specially employed to provide expert testimony in the case, or whose duties as the party's employee regularly involve giving expert testimony on behalf of the party, must provide a written report under Rule 26(c)(1)(A). Otherwise, a treating physician who is properly disclosed under Rule 26(c)(1) may be deposed or called to testify without providing a written report.

(i) A treating physician is not required to provide a written report under Rule 26(c)(1)(A) solely because the physician's testimony may discuss ancillary treatment, or the diagnosis, prognosis, or causation of the patient's injuries, that is not contained within the physician's medical chart, as long as the content of such testimony is properly disclosed under Rule 26(c)(1)(B)(i)-(iv).

(ii) A treating physician will be deemed a retained or specially employed expert witness subject to the written report requirement of Rule 26(c)(1)(A) if the party is asking the treating physician to provide opinions outside the course and scope of the treatment provided to the patient.

(iii) The disclosure regarding a non-retained or specially employed treating physician must include the information identified in Rule 26(c)(1)(B), to the extent practicable. If the treating physician will testify in accordance with the party's medical chart, it is sufficient to state that the physician will do so even if some of the records contained therein were prepared by another healthcare provider.

(2) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(A) within 180 days after the first responsive pleading was served; or

(B) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(c)(1), within 45 days after the other party's disclosure.

(3) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(4) Work Product Protection.

(A) Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(c)(1), regardless of the form in which the draft is recorded.

(B) Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report

under Rule 26(c)(1), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(5) Deposition of an Expert Witness. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(c)(1)(A) requires a report from the expert, the deposition may be conducted only after the report is provided.

~~(B)~~ (6) Discovery from a Consulting Expert. Ordinarily, a ~~A~~ party may not discover the identity of, facts known, or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare ~~preparation~~ for trial and who is not expected to be called as a witness at trial except~~, only~~ as provided in Rule 35(b). But a party may discover the identity of such an expert on showing good cause and may discover facts known or opinions held by such an expert on ~~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)~~ (7) Payment. Unless manifest injustice would result, ~~(i)~~ the court must ~~shall~~ require that the party seeking discovery:

(A) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(c)(5) or (6), which does not include time spent preparing for a deposition ~~subdivisions (b)(4)(A)(ii) and (b)(4)(B) of his rule of this rule~~; and

~~(ii)~~ (B) ~~with respect to~~ for discovery under Rule 26(c)(6), ~~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~~ also pay the other party a fair portion of the fees and expenses it reasonably incurred ~~by the latter party~~ in obtaining the expert's facts and opinions ~~from the expert~~.

~~(c)~~ (d) Protective Orders.

(1) In General. ~~Upon motion by a~~ A party or ~~by the~~ other person from whom discovery is sought~~, and for good cause shown,~~ may move for a protective order in the court in which the action is pending. ~~or alternatively, on matters relating to a deposition, the district court in the district where the deposition is to be taken,~~ The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an ~~make any~~ order ~~which justice requires~~ to protect a party or person from

annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

~~(1) that~~ (A) forbidding the disclosure or discovery ~~not be had~~;

~~(2) that the discovery may be had only on specified~~ (B) specifying terms ~~and conditions~~, including ~~a designation of the~~ time or place or the allocation of expenses, for the disclosure or discovery;

~~(3) that the discovery may be had only by~~ (C) prescribing a discovery method ~~of discovery~~ other than the one ~~that~~ selected by the party seeking discovery;

~~(4) that~~ (D) forbidding inquiry into certain matters ~~not be inquired into~~, or limiting ~~that~~ the scope of disclosure or ~~the~~ discovery ~~be limited~~ to certain matters;

~~(5) that discovery be conducted with no one present except~~ (E) designating the persons who may be present while the discovery is conducted ~~designated by the court~~;

~~(6)~~ (F) requiring that a deposition ~~after being~~ be sealed ~~be~~ and opened only on court ~~by~~ order ~~of the court~~;

~~(7)~~ (G) requiring that a trade secret or other confidential research, development, or commercial information not be ~~disclosed~~ revealed or be revealed ~~disclosed~~ only in a specified ~~designated~~ way; and

~~(8)~~ (H) requiring that the parties ~~simultaneously~~ file, serve, or deliver specified documents or information in a specified way, to be revealed or accessed only as ~~under seal with access only as directed by~~ the court directs.

(2) Denying or Limiting Discovery. The court may issue a protective order denying or limiting discovery if the court determines that:

(A) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(B) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(C) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) Ordering Discovery. If ~~the~~ a motion for a protective order is denied in whole or in part, the court may, on just ~~such~~ terms ~~and conditions as are just~~, order that any party or person provide or permit discovery.

(4) Awarding Expenses. ~~The provisions of~~ Rule 37(a)~~(4)~~(5) applies ~~apply~~ to the award of expenses ~~incurred in relation to the motion~~.

~~(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.~~

(e) ~~Supplementation of~~ Supplementing Disclosures and Responses.

(1) In General. A party who has made a disclosure under Rule 26(c) – or who has responded to an interrogatory, request for production, or request for admission – ~~discovery with a response that was complete when made is under no duty to~~ must supplement ~~his or her~~ or correct its disclosure or response ~~to include information thereafter acquired, except as follows~~:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Expert Witness. For an expert whose report must be disclosed under Rule 26(c)(1)(A), the party's duty to supplement in a timely manner extends both to information included in the report and to information given during the expert's deposition.

~~(1) A party is under a duty seasonably to supplement his or her response with respect to any question directly addressed to~~

~~(A) the identity and location of persons having knowledge of discoverable matters, and~~

~~(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he or she is expected to testify, and the substance of his or her testimony.~~

~~(2) A party is under a duty seasonably to amend a prior response if he or she obtains information upon the basis of which~~

~~(A) he or she knows that the response was incorrect when made, or~~

~~(B) he or she knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment~~.

~~(3) A duty to supplement responses may be imposed by order of the court or by agreement of the parties.~~

(f) Filing and Service of Discovery Documents. Section 6-1105 governs the filing and service of discovery documents. ~~Except as otherwise ordered by the court, every discovery document and every motion relating to discovery and response thereto required to be served upon a party shall be served upon each of the parties not in default for failure to appear.~~

(g) Access to Deposition for Use at Hearing ~~Filing of Discovery Materials~~. ~~Discovery materials that do not require action by the court shall not be filed with the court. All such materials, including notices of deposition, depositions, certificates of filing a deposition, interrogatories, answers and objections to interrogatories, requests for documents or to permit entry upon land and responses or objections to such requests, requests for admissions and responses or objections to such requests, subpoenas for depositions or other discovery and returns of service of subpoenas, and related notices shall be maintained by the parties.~~

~~Discovery materials shall be filed with the court only when ordered by the court or when required by law~~. If the original of a deposition is not in the possession of a party who intends to offer it ~~in~~ as evidence at a hearing, that party may give notice to the party in possession of it that the deposition will be needed at the hearing. ~~Upon~~ On receiving such notice, the party in possession of the deposition ~~shall~~ must either make it available to the party who intends to offer it or produce it at the hearing.

(h) Amendments. The Nebraska Court Rules of Discovery in Civil Cases apply to cases filed on or after January 1, 2025, and to cases pending on that date. But the trial court may order that the previous version of the Discovery Rules apply, either in whole or in part, to a case pending on January 1, 2025, if the court determines, in the exercise of its discretion, that application of the amended rule or rules to the case would be impracticable, unreasonable, or unjust.

COMMENTS TO ~~RULE 26~~ § 6-326

~~26(a) This subsection provides a catalog of the discovery devices, and is new to Nebraska law. Although there is no limit on the frequency of use of these methods, the limit on interrogatory questions in Rule 33 will restrict the extent of discovery by interrogatory.~~

~~26(b)(1) and (2) The definition of the scope of discovery in subsection (1) follows former Neb. Rev. Stat. § 25-1267.02 (Repealed 1982). The provision of subsection (2) was taken from the federal rules and follows the rule established in Walls v. Horback, 189 Neb. 479, 203 N.W.2d 490 (1973).~~

~~26(b)(3) Subsection (3) provides for protection of material often described as an attorney's work product, and follows the language of the federal rule. Prior Nebraska law on discovery of work product was established in Haarhues v. Gordon, 180 Neb. 189, 141 N.W.2d 856 (1966). A provision similar but not identical to the second paragraph of subsection (3) was found in Neb. Rev. Stat. § 25-1222.02 (Repealed 1982). That section, however, applied only to statements by parties and provided only the sanction of exclusion at trial. The language found in subsection (3) was adopted to maintain uniformity of language, to authorize a wider range of sanctions, and to cover statements by parties and nonparties.~~

~~26(b)(4) Subsection (4) on experts presents in the expanded language of the federal rules the idea found in former Neb. Rev. Stat. § 27-705(2) (Repealed 1982). The committee recommended repeal of that section, a part of the Nebraska Evidence Rules, because it is a discovery procedure better codified here in the discovery rules.~~

~~26(c) This provision on sanctions is substantially similar to former Neb. Rev. Stat. §§ 25-1267.22 and 25-267.31 (Repealed 1982), but is expanded to include all kinds of discovery and not just depositions and interrogatories.~~

~~26(d) This is a new provision identical to the federal rules; it would not appear to change current Nebraska practice.~~

~~26(e) This provision on supplementation of discovery was added to the federal rules in 1970 and is now adopted for the first time in Nebraska. The proposed language follows the federal rule, except that in subsection (e)(3) the federal language allowing imposition of the duty to supplement by a request for supplementation was rejected.~~

~~26(f) A provision on service of discovery papers is necessary because Nebraska law prior to the adoption of these rules did not cover the topic. This is a nonuniform addition to the language of the federal rules because such a provision is in Rule 5(a) of the federal rules, while Nebraska has no similar rule.~~

~~26(g) This rule has been adopted because the routine filing of discovery material has unnecessarily overcrowded court files. Parties are now required to keep possession of the discovery material and file it only upon court order or when required by law. Discovery materials used to support or resist a motion for summary judgment shall not be filed separately; Neb. Rev. Stat. § 25-1332 (Amended 2001) makes clear that the court may consider them only if they are admitted as evidence.~~

[1] Section 6-326 is the keystone of the discovery rules. Among other things, the rule governs the scope of discovery, the work product protection, the methods for obtaining discovery from experts, the grounds for a protective order, and the duty to supplement discovery disclosures and responses.

[2] Subpart (b)(1) governs the scope of discovery and is modeled on a pre-2015 version of Rule 26(b)(1) of the Federal Rules of Civil Procedure. In 2015, Federal Rule 26(b)(1) was amended to incorporate proportionality into the standard for discovery. Federal Rule 26(b)(1) currently provides that information is discoverable if it is relevant and proportional to the needs of the case. The 2024 Amendments incorporated the concept of proportionality into Nebraska § 6-326 but did so in a different way. Rather than being part of the standard for discovery, proportionality is a ground for seeking a protective order to deny or limit discovery pursuant to subpart (d)(2).

[3] The original version of subpart (b)(1) included examples of discoverable information such as the existence of documents and the identity of persons having knowledge of discoverable matters. Although the examples may have been helpful when the rule was promulgated in 1982, they are now so well known that there is no longer a good reason to keep them in the rule. Therefore, the examples were deleted by the

2024 Amendments. It should be underscored, however, that their deletion should not be construed as altering the scope or methods of discovery.

[4] Subpart (b)(2) allows parties to discover insurance agreements that may cover all or part of a possible judgment. Having access to the agreements can be helpful in making and evaluating settlement offers. Knowing whether coverage is disputed can also be helpful. Therefore, the 2024 Amendments added a provision that allows a party to serve an interrogatory asking if coverage is disputed. The provision, however, does not allow a party to discover the grounds for any such dispute. If the coverage dispute status changes, the party answering the interrogatory should supplement its answer pursuant to subpart (e).

[5] Subpart (b)(3) addresses the work product protection and allows a person to obtain a copy of the person's previous statement. The 2024 Amendments rewrote the definition of a previous statement to make the definition easier to understand and to exclude deposition testimony. The reason for the exclusion is to prevent a person who is unwilling to pay the reporter for a copy of the deposition from obtaining a copy for free from the party who took the deposition.

[6] Subpart (b)(4) was added by the 2024 Amendments to address what a party must do if the party withholds documents on the basis of a privilege or the work product protection. The subpart is modeled on Rule 26(b)(5) of the Federal Rules of Civil Procedure and requires a party to describe the documents in a manner that will allow the other parties to assess the claim that the documents are privileged.

[7] The nature of the description will vary with the privilege because different privileges have different elements. For example, the description for the attorney-client privilege will normally include the identities of the persons who prepared and received the document, the subject matter of the document, the date of the document, and the basis for the assertion of the privilege. In other words, the description will normally include the information listed in the Supreme Court's decision in *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32 (1997).

[8] But there may be situations in which it would be burdensome or unnecessary for a party to provide a description for each individual document. In those situations, a party may instead provide a description by categories of documents. Providing such a description may be appropriate when there is a large number of documents of the kind that are almost always privileged or protected – for example, email communications between in-house and outside counsel.

[9] Rule 511 of the Nebraska Rules of Evidence addresses the waiver of a privilege by voluntary disclosure. The rule, however, does not address the issue of whether a privilege or protection is waived by the inadvertent disclosure of documents in discovery. Subpart (b)(5) was added in 2024 to address the issue. The subpart is modeled on Rule 502(b) of the Federal Rules of Evidence. But there are differences. Subpart (b)(5) applies to all privileges while Federal Rule 502 only applies to the attorney-client privilege.

[10] Subpart (b)(5)(A) provides that disclosure is not a waiver of a privilege or protection if three requirements are met. First, the disclosure must have been inadvertent. This requirement focuses on

whether the disclosure was unintentional. Second, the disclosure occurred even though the producing party took reasonable steps to prevent the disclosure. This requirement focuses the procedures that the party used to review documents and to withhold privileged or protected documents. Third, the producing party took reasonable steps to correct its mistake. This requirement focuses on what the party did after it learned that it had mistakenly produced the documents.

[11] One step that the producing party may take to correct its mistake is to notify the receiving party that privileged or protected documents were inadvertently produced. Subpart (b)(5)(B) addresses what the receiving party must do if it receives such notice and makes it clear that either party can file a motion for a protective order if they disagree on whether the privileged or protection applies.

[12] Notice is sometimes a two-way street. If the lawyer for the receiving party knows or should know that a document was inadvertently produced, the lawyer has an ethical obligation to notify the person who produced the document. The obligation is stated in subpart (b)(5) and reflects the obligation imposed by § 3-504.4(b) of the Nebraska Rules of Professional Responsibility.

[13] Prior to 2024, § 6-326 provided that parties could obtain discovery about expert witnesses by serving an interrogatory and could not depose an expert unless they obtained a court order or stipulation. The 2024 Amendments replaced those provisions with disclosure requirements modeled on Rule 26(a)(2) of the Federal Rules of Civil Procedure.

[14] The disclosure requirements are stated in subpart (c)(1). A party must disclose the identity of any expert witness that it may use at trial. Furthermore, a party must disclose information about the expert and the expert's expected testimony. The content and form of the information depends on whether the expert was retained or specially employed to provide expert testimony.

[15] A retained or specially employed expert is one who will testify about facts the expert learned and opinions the expert developed for purposes of the litigation. In addition to disclosing the identity of such an expert, the party must provide a signed report from the expert that contains the information listed in subpart (c)(1)(A). Most (but not all) of the information corresponds to information required by Federal Rule 26(a)(2). The report must be "detailed and complete" and state "the testimony the witness is expected to present during direct examination, together with the reasons therefor." Fed. R. Civ. P. 26, Advisory Committee Notes on the 1993 Amendment.

[16] Some experts will testify about facts they learned and opinions they developed for purposes other than the litigation. For example, a treating physician may learn facts and form opinions for the purpose of treating the plaintiff's injuries. These kinds of experts – who are sometimes called "actor experts" – are not required to prepare a written report. The party who plans to use such an expert at trial must disclose the information listed in subpart (c)(1)(B).

[17] One of the issues that has divided the federal courts is whether a treating physician who testifies about causation should be classified as a retained or specially retained expert and therefore required to provide a signed report. Subpart (c)(1)(C)(ii) resolves the issue for the Nebraska courts by stating that a

treating physician is not required to provide a written report solely because the physician's testimony may discuss "the diagnosis, prognosis, or causation of the patient's injuries."

[18] Subpart (c)(2) addresses when the required disclosures must be made. Subpart (c)(2)(A) provides that disclosures must be made at the times and in the sequence the court orders. It would be helpful to all concerned if the court issued such an order. In terms of the sequence, the order could require the parties to make their disclosures at the same time or at different times – for example, the order could require the party with the burden of proof to make its disclosures first. If the court does not issue such an order, the parties may stipulate when their respective disclosures must be made. If there is no court order or stipulation, then the parties must make their disclosures by the times specified in subpart (c)(2)(B).

[19] To work effectively with a retained or specially employed expert, an attorney must be able to review drafts and to communicate with the expert without worrying about whether every draft and every communication is discoverable. Subpart (c)(4)(A) provides that the work product protection applies to draft reports and draft disclosures.

[20] Subpart (c)(4)(B) provides that the work product protection applies to communications between an attorney and a retained or specially employed expert. There are three exceptions, however. Those exceptions are set out in subpart (c)(4)(B)(i)-(iii). By its terms, subpart (c)(4)(B) is limited to an attorney's communications with a retained or specially employed expert. It does not cover communications with an actor expert.

[21] Subpart (c)(5) provides that a party may depose an expert witness. Because the report may help to focus the questioning or to eliminate the need for a deposition, an expert from whom a report is required may only be deposed after the report is provided.

[22] If a party deposes an expert witness, the party must normally pay the expert a reasonable fee for responding to discovery. Subpart (c)(7) makes it clear, however, that the fee does not include time spent preparing for the deposition. Prior to 2024, the rule contained a provision that gave courts the discretion to require the deposing party to pay a portion of the fees that the opposing party paid the expert. The provision was based on the assumption that depositions of testifying experts were the exception rather than the norm. The provision was deleted in 2024 because the assumption is no longer valid. Subpart (c)(5) now allows a party to depose testifying expert without a court order or stipulation.

[23] Subpart (d) addresses protective orders. Like a party filing a motion to compel pursuant to § 6-337(a), a party filing a motion for a protective order must first attempt to resolve a discovery dispute informally. Because the judge presiding over a case is in the best position to rule on discovery motions, all motions for a protective order – including those related to a deposition – must be filed in the court in which the action is pending.

[24] Rule 26(b) of the Federal Rules of Civil Procedure contains a provision that addresses the discovery of electronically stored information from sources that a party identifies as not reasonably accessible. Section 6-326 does not contain a comparable provision because the issue can be addressed on a motion for a protective order pursuant to subpart (d)(2).

[25] Subpart (e) specifies the circumstances under which a party must supplement an earlier disclosure or discovery response. The subpart was amended in 2024 so that it more closely follows the wording of Rule 26(e) of the Federal Rules of Civil Procedure. As amended, the subpart requires a party to supplement its earlier disclosure or response in a timely manner. In other words, a party is required to supplement its earlier disclosure or response within a reasonable time of acquiring the new information.

[26] The 2024 Amendments consolidated the filing and service requirements for pleadings, motions, and discovery documents in § 6-1105. As a result, the provisions in § 6-326 that previously discussed the filing and service requirements have been replaced with a cross-reference to § 6-1105. The cross-reference appears in subpart (f).

[27] Subpart (h) was added in 2024 to address the issue of whether rule amendments apply to cases pending on the effective date of the amendment. The subpart creates a presumption that an amendment applies to pending cases but gives trial courts the discretion not to apply the amendment to a pending case if it would be impracticable, unreasonable, or unfair to do so. Trial courts, however, do not have the same discretion in cases filed on or after the effective date. The first sentence of subpart (h) makes it clear that the amendment applies to those cases.

§ 6-327. Depositions to perpetuate testimony ~~before action or pending appeal~~.

(a) Before an Action Is Filed.

(1) Petition. A person who wants ~~desires~~ to perpetuate ~~his or her own~~ testimony ~~or that of another person regarding~~ about any matter ~~that may be~~ cognizable in a ~~any~~ court of this state may file a verified petition ~~verified by affidavit of the petitioner or his or her attorney~~ in the district court of the county where ~~in the district of the residence of~~ any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must ~~shall~~ be titled ~~entitled~~ in the petitioner's name ~~of the petitioner~~ and must ~~shall~~ show:

(A) ~~(i)~~ that the ~~The~~ petitioner expects to be a party to an action cognizable in a court of this state but ~~is~~ cannot presently ~~unable to~~ bring it or cause it to be brought;

(B) ~~(ii)~~ the subject matter of the expected action and the petitioner's ~~his or her~~ interest in the action ~~therein~~;

(C) ~~(iii)~~ the facts that the petitioner wants ~~which he or she desires~~ to establish by the proposed testimony and the ~~his or her~~ reasons ~~for desiring~~ to perpetuate it;

(D) ~~(iv)~~ the names or a description of the persons whom the petitioner ~~he or she~~ expects to ~~will~~ be adverse parties and their addresses, so far as known; and

(E) ~~(v)~~ the name, address, and expected ~~names and addresses of the persons to be examined and the~~ substance of the testimony of each deponent ~~which he or she expects to elicit from each, and shall ask for~~

~~an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony~~.

(2) Notice and Service. At least 21 days before the hearing date, the ~~The~~ petitioner must ~~shall thereafter~~ serve ~~a notice upon each person named in the petition as an~~ each expected adverse party~~, together~~ with a copy of the petition and a notice~~,~~ stating ~~that~~ the ~~petitioner will apply to the court, at a~~ time and place ~~named therein, for the order described in the petition. At least twenty days before the date~~ of the hearing. The ~~the~~ notice may ~~shall~~ be served in the manner provided for service of a summons. If~~; but if such~~ that service cannot be made with ~~due~~ reasonable diligence ~~be made upon~~ on an expected adverse party ~~named in the petition~~, the court may ~~shall~~ order service be made ~~by publication~~ in the manner provided in Rule 30(b)(3) ~~Rule 30(b)(1)(D),~~.

(3) Appointment of Attorney or Guardian. The court must ~~and shall~~ appoint~~, for persons not served in the manner provided for service of summons,~~ an attorney ~~who shall~~ to represent ~~them, and, in case they are not otherwise represented, shall~~ an expected adverse party and to cross-examine the deponent if the expected adverse party is served in the manner provided in Rule 30(b)(3) and is not otherwise represented. The court must appoint a guardian ad litem for any expected adverse party who is a minor or incompetent ~~the provisions of Neb. Rev. Stat. § 25-309 shall apply~~.

(4) ~~(3)~~ Order and Examination. If ~~the court is~~ satisfied that perpetuating ~~the perpetuation of~~ the testimony may prevent a failure or delay of justice, the court must issue ~~it shall make~~ an order that designates or describes ~~designating or describing~~ the persons whose depositions may be taken, specifies ~~and specifying~~ the subject matter of the examinations, ~~examination~~ and states whether the depositions ~~shall~~ will be taken ~~upon~~ by oral examination or by written questions. The depositions may then be taken under ~~in accordance with~~ these rules~~,~~; and the court may issue ~~make~~ orders like those authorized ~~of the character provided for~~ by Rules 34 and 35. ~~For the purpose of applying these rules to depositions for perpetuating testimony, each~~ A reference in these rules ~~therein~~ to the court where an ~~in which the~~ action is pending means, for purposes of this rule, ~~shall be deemed to refer to~~ the court where ~~in which~~ the petition for the ~~such~~ deposition was filed.

(5) ~~(4) Use of~~ Deposition. ~~If a~~ A deposition to perpetuate testimony ~~is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it~~ may be used under Rule 32(a) in any later-filed action in this state involving the same subject matter if the deposition either was taken under these rules or, if not so taken, would be admissible in evidence in the federal or state court that authorized it to be taken ~~subsequently brought in a district court in this state, in accordance with the provisions of Rule 32(a)~~.

(b) Pending Appeal.

(1) In General. If an appeal has been taken from a judgment, a party may file a motion in the appellate court for leave to depose witnesses to perpetuate their testimony for use in the event the action is remanded for further proceedings after an appeal. ~~of a district court, the appellate court, upon motion filed therein and notice and service thereof as if the action was pending in the district court, may remand the motion to the district court for consideration and ruling, may itself overrule the motion, or, if the appellate~~

~~court finds that the perpetuation of the testimony is proper to avoid failure or delay of justice, may itself enter an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.~~

(2) Motion. The motion must ~~shall~~ show:

(A) ~~(1)~~ the name, address, ~~names and addresses of persons to be examined~~ and ~~the~~ expected substance of the testimony of each deponent ~~which he or she expects to elicit from each~~; and

(B) ~~(2)~~ the reasons for perpetuating ~~their~~ the testimony.

(3) Court Order. The appellate court may itself rule on the motion or, while retaining jurisdiction of the appeal, remand the motion for a ruling by the court that rendered the judgment. If the court ruling on the motion finds that perpetuating the testimony may prevent a failure or delay of justice, the court must permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken under Rule 30 or 31 and used under Rule 32, just like other depositions in a pending action.

(c) Perpetuation by an Action. This rule does not limit a court's ~~the~~ power ~~of a court~~ to entertain an action to perpetuate testimony.

COMMENTS TO ~~RULE 27~~ § 6-327

~~The language of Rule 27 is substantially similar to federal rule 27 and to former Neb. Rev. Stat. §§ 25-1267.08 to 25-1267.13 (Repealed 1982).~~

[1] The primary purpose of the rule is to perpetuate evidence – in other words, to preserve evidence (usually, witness testimony) – that might otherwise be lost before the action is filed. The original version of the rule required the person seeking to perpetuate evidence to file a petition in the district court for the district in which any expected adverse party resides. The 2024 Amendments changed that to the district court for the county where any expected adverse party resides. As a result of the change, the venue provisions of the rule are now consistent with the residency provisions of the general venue statute, Neb. Rev. Stat. § 25-401.01(1).

[2] Subpart (a)(2) authorizes substitute service on an expected adverse party who cannot be served by the normal methods of service. Subpart (a)(3) requires the court to appoint an attorney to represent an expected adverse party who is served by substitute service. Subpart (a)(3) also requires the court to appoint a guardian ad litem for any expected adverse party who is a minor or an incompetent person. If a minor or an incompetent person is served by substitute service, then the court must appoint both an attorney and a guardian ad litem. The reason is that roles of the attorney and guardian are different. The role of an attorney is to represent the party's legal interests. The role of a guardian ad litem is to act in the

best interests of the party and to make decisions for the party, including the decisions that a client normally makes.

[3] The rule does not discuss who pays the attorney or the guardian. That is a matter left to the district court's discretion.

[4] Subpart (a)(5) discusses when a deposition that was taken to perpetuate evidence may be used in the action once it is filed. If the deposition was taken pursuant to Federal Rule 27 or the law of another state, then the deposition may be used if it would be admissible in the federal or state court that authorized it to be taken. The reason for including federal courts is that a petition to perpetuate could be filed in federal court and the action filed in state court.

[5] Subpart (b) governs motions to perpetuate testimony that are filed while an appeal is pending. The motion must be filed in the appellate court because the trial court loses jurisdiction once the appeal is filed. See *Billups v. Scott*, 253 Neb. 293, 294 (1997). Because the trial court may be more familiar with the case than the appellate court is, the rule gives the appellate court the discretion to remand the motion to the trial court. The appellate court, however, retains jurisdiction of the appeal.

[6] Subpart (b) only applies if an appeal has been taken. It does not authorize a party to file a motion to perpetuate after judgment is entered but before the time for appeal expires. The party's only option in that situation is to file an independent action to perpetuate testimony. Subpart (c) specifically provides that the rule does not limit a court's power to entertain an action to perpetuate testimony.

§ 6-328. Persons before whom depositions may be taken.

(a) Within the United States.

(1) Within this State. Within this state, a deposition must ~~depositions may~~ be taken before an officer authorized ~~a judge or clerk of the Supreme Court or district court, a county judge, clerk magistrate, notary public, or any person appointed by the court in which the action is pending. A person so appointed has power~~ to administer oaths by the law of this state ~~and take testimony~~.

(2) ~~(b)~~ Elsewhere Within the United States. Within other states of the United States or within a territory or insular possession subject to the jurisdiction of the United States, a deposition must ~~depositions may~~ be taken before:

(A) an officer authorized to administer oaths either by federal law ~~the laws of the United States~~ or by the law in ~~of~~ the place of ~~where the~~ examination; ~~is held,~~ or ~~before~~

(B) a person appointed by the court in which the action is pending~~. A person so appointed has power~~ to administer oaths and take testimony.

(3) Definition of Officer. The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

(b) ~~(c)~~ In a Foreign Country ~~Countries~~.

(1) In General. A deposition ~~In a foreign country, depositions~~ may be taken in a foreign country:

(A) under an applicable treaty or convention;

(B) under a letter of request, whether or not captioned a "letter rogatory";

(C) ~~(1)~~ on notice, before a person authorized to administer oaths either by federal law or by the law in the place ~~in which the~~ of examination; ~~is held, either by the law thereof or by the law of the United States,~~ or

(D) ~~(2)~~ before a person commissioned by the court~~, and a person so commissioned shall have the power by virtue of his or her commission~~ to administer any necessary oath and take testimony.~~, or~~

~~(3) pursuant to a letter rogatory.~~

(2) Issuing a Letter of Request or a Commission. A ~~commission or a~~ letter of request, a commission, or both may ~~rogatory shall~~ be issued:

(A) on ~~application and notice~~ appropriate terms after an application and notice of it; and

(B) without a showing that taking the deposition in another ~~that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other~~ manner is impracticable or inconvenient~~; and both a commission and a letter rogatory may be issued in proper cases~~.

(3) Form of a Request, Notice, or Commission. When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. ~~A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title.~~ A letter of request ~~rogatory~~ may be addressed "To the Appropriate Authority in [~~here~~ name the country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(4) Letter of Request – Admitting Evidence. Evidence obtained in response to a letter of request ~~rogatory~~ need not be excluded merely because ~~for the reason that~~ it is not a verbatim transcript, because ~~or that~~ the testimony was not taken under oath, or because of ~~or for~~ any similar departure from the requirements for depositions taken within the United States ~~under these rules~~.

~~(d)~~ (c) Disqualification ~~for Interest~~. ~~The officer before whom the~~ A deposition ~~is~~ must not be taken ~~and the~~ before a person ~~recording the testimony shall not be a~~ who is any party's relative, employee, or attorney; who is related to or employed by any party's ~~of any of the parties, nor a relative or employee of such~~ attorney~~,~~; or who is ~~nor~~ financially interested in the action.

~~(e) Depositions for Use in Other Jurisdictions. Rule 30A applies when the deposition of any person is to be taken in this state for use in proceedings in another state. When the deposition of any other person is to be taken in this state for use in proceedings in another country, witnesses may be compelled to appear and testify in the same manner and by the same process and proceedings as may be employed for the purpose of taking testimony in proceedings pending in this state. The district court for the county where the deponent is found may make such orders as could be made if the deposition were intended for use in this jurisdiction, having due regard for the laws and rules of the other country.~~

COMMENTS TO ~~RULE 28~~ § 6-328

~~Subsection (a) follows former Neb. Rev. Stat. § 25-1267.14 (Repealed 1982), with the deletion of mayors and master commissioners as unnecessary. Subsection (b) does not follow former Nebraska statutes; the language of federal rule 28(a) was adopted to describe the officer by reference to the laws of the sister state or of the United States. Subsection (c) is new language on depositions in foreign countries and is taken from federal rule 28(b) which sets out all possible ways of taking depositions outside the United States. Subsection (d) follows the language of Neb. Rev. Stat. § 25-1267.17 (Repealed 1982), by applying the disqualification rule to both the officer and the person recording the testimony, if those are not the same person.~~

[1] The original version of subpart (a) listed by title the officers before whom a deposition could be taken in Nebraska. The 2024 Amendments deleted the list and replaced it with a statement that a deposition may be taken in Nebraska before an officer authorized by law to administer oaths. Those officers are identified by statute. See Neb. Rev. Stat. § 24-1002; Neb. Rev. Stat. § 64-107; Neb. Rev. Stat. § 64-107.01. The 2024 Amendments also added subpart (a)(3) to make it clear that the term "officer" as used in §§ 6-330 to 6-332 includes a person who serves as the deposition officer by stipulation of the parties.

[2] Subpart (b) governs depositions taken in foreign countries for cases pending in Nebraska. The subpart was updated by the 2024 Amendments to include treaties and conventions. The original version of the rule included a subpart on taking depositions in Nebraska for cases pending in foreign countries. That subpart was deleted by the 2024 Amendments because it was unnecessary in light of 28 U.S.C. § 1782.

§ 6-329. Stipulations ~~regarding~~ about discovery procedure.

Unless the court orders otherwise, the parties may stipulate, by a written or otherwise recorded stipulation, that:

(a) ~~(1) Provide that depositions~~ a deposition may be taken before any person, at any time or place, ~~upon~~ on any notice, and in any manner specified – in which event it ~~and when so taken~~ may be used in the same way as any other deposition; ~~like other depositions,~~ and

(b) ~~(2) Modify the procedures provided by these rules for other methods of~~ other procedures governing or limiting discovery be modified – but a stipulation extending the time for any form of discovery must

have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

COMMENT TO ~~RULE 29~~ § 6-329

~~This provision is essentially new. It again authorizes the common practice of stipulations on discovery. It follows federal rule 29, but does not exclude certain subjects from stipulations as does the federal language. Similar language was originally included in former Neb. Rev. Stat. § 25-1267.19 (Repealed 1982), but had been dropped prior to the repeal of that section as the section had been amended several times to cover a different topic.~~

Stipulations can make the discovery process more efficient by allowing parties to vary from the Rules of Discovery when they think it best to do so. The reason for requiring a stipulation to be in writing is to minimize later disputes about the content of the stipulation. Stipulations normally do not need court approval. The 2024 Amendments added an exception in subpart (b) for stipulations extending time when those stipulations may affect certain deadlines and dates that the court has set.

§ 6-330. Depositions by ~~upon~~ oral examination.

(a) When and How Depositions May Be Taken.

(1) Without Leave. After commencement of the action, a ~~any~~ party may, by oral questions, depose any person, ~~take the testimony of any person,~~ including a party, ~~by deposition upon oral examination~~ without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena. ~~Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of thirty days after service of summons, except that leave is not required:~~

~~(1) If a defendant has served a notice of taking a deposition or otherwise sought discovery, or~~

~~(2) If special notice is given as provided in subdivision (b)(2) of this rule.~~

~~The attendance of witnesses may be compelled by subpoena. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.~~

(2) With Leave. Leave of court is required if:

(A) the plaintiff seeks to take the deposition within 30 days after service of the summons, unless

(i) the parties stipulate that the deposition may be taken,

(ii) the defendant has served a deposition notice in the action, or

(iii) the plaintiff certifies in the notice, with supporting facts, that the deponent is expected to leave the State of Nebraska and be unavailable for examination in the State after that time;

(B) the deponent has already been deposed in the action and the deponent and the other parties do not stipulate that the deponent may be deposed again; or

(C) the deponent is confined in prison.

(3) How Taken. Unless the court orders otherwise, a deposition may be taken in person, by videoconferencing, by telephone, or by a combination of these methods. The parties may stipulate or the court may on motion order that a deposition be taken by other methods that provide contemporaneous verbal or verbal-and-visual interaction among the participants and ensure preservation of an accurate record.

(4) Attendance by Different Method. Any party may notify the other parties, including the party taking the deposition, that the party will attend the deposition through a different method than the one stated in the notice. The party must notify the other parties within a reasonable time of the date of the deposition. The court may enter an order pursuant to Rule 26(d) specifying the method by which parties may attend a deposition.

(b) Notice of the Deposition; Other Formal Requirements. ~~Examination: General Requirements; Special Notice; Recording; Interpreters; Production of Documents and Things; Deposition of Organization; Officer's Duties.~~

(1)~~(A)~~ In General. A party who intends to depose a ~~desiring to take the deposition of any~~ person ~~upon~~ by oral questions must give reasonable written notice ~~in writing~~ to every other party ~~to the action~~.

(A) The notice must ~~shall~~ state ~~the time and place for taking the deposition and~~ the deponent's name and address ~~of each person to be examined~~, if known. ~~and if~~ If the name is unknown ~~not known~~, the notice must provide a general description sufficient to identify the person ~~him or her~~ or the particular class or group to which the person ~~he or she~~ belongs.

(B) The notice must state the date and time of the deposition and how it will be taken. If the deposition will be taken in person, the notice must state the place of the deposition. If the deposition will be taken by videoconferencing, the notice must state the name of the software and either include a link for the deposition or state that a link will be provided to the deponent and to every other party within a reasonable time before the deposition. If the deposition will be taken by telephone, the notice must contain instructions for joining the telephone call or state that the instructions will be provided to the deponent and to every other party within a reasonable time before the deposition.

(C) The notice ~~shall also~~ must state the name, address, telephone number, and email address (if any) of the party taking the deposition or if the party is represented, the party's attorney.

(D) If it is known that an interpreter will be used, the notice ~~shall~~ must state that an interpreter will be used and must also ~~shall~~ state the language that will be interpreted or the type of interpretation (e.g., sign language). If it is unknown whether an interpreter may be necessary, the notice ~~shall~~ must include the following advisory statement: "If you are a person who is deaf, hard of hearing, or unable to communicate in the English language, you should contact as soon as possible the attorney or the party whose name is stated in this notice or subpoena and let that attorney or party know that you will need the help of an interpreter to understand and answer questions during the deposition."

~~(B)~~(E) If a subpoena is to be served on the deponent ~~person to be examined~~, the subpoena ~~shall~~ must contain the same information required by Rule 30(b)(1)(~~C~~ D), except that the advisory statement ~~required by subdivision (C)~~ may be omitted from the notice if it is included in the subpoena.

(2) Producing Documents.

~~(C)(1)~~ (A) The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition. If a subpoena duces tecum is to be served on the deponent pursuant to Neb. Rev. Stat. § 25-1224 and Rule 34(A)(a)(3), ~~person to be examined, the designation of the materials to be produced pursuant to~~ a copy of the subpoena ~~shall~~ must be ~~listed~~ attached to ~~or included in~~ the notice. If the subpoena is served on a party deponent, the time for compliance may not be shorter than the time specified in Rule 34(c)(2)(A).

(B) If any of the materials are in a language other than English, the deponent must ~~person on whom the subpoena duces tecum is served shall~~ promptly notify the party serving the subpoena of the language(s). The party serving the subpoena must ~~shall~~ then promptly notify every other party ~~to the action~~ of the language(s).

~~(2) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.~~

~~(D)~~ (3) Unknown Parties. When the party against whom the deposition is to be used is unknown or is one whose whereabouts cannot be ascertained, the party ~~he or she~~ may be notified of ~~the taking of~~ the deposition by publication or by any manner ~~that is~~ approved by the court and reasonably calculated under the circumstances to provide the party with actual notice. The publication must be made once in some newspaper printed in the county where the action is pending, or if there is no such newspaper, then ~~if there be any printed in such county, and if not,~~ in some newspaper that is printed in the State of Nebraska and has ~~this state of~~ general circulation in that county. The publication must contain all the information ~~that is~~ required in a written notice and must be made at least 10 days prior to the deposition. Publication may be ~~proved in~~ proven in the manner prescribed in Neb. Rev. Stat. § 25-520. Before publication, a copy of the written notice ~~shall~~ must be filed with the court in which the action is pending.

~~(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice:~~

~~(A) States that the person to be examined is about to go out of the State of Nebraska and will be unavailable for examination in the State of Nebraska unless his or her deposition is taken before expiration of the thirty-day period, and~~

~~(B) Sets forth facts to support the statement.~~

~~The plaintiff's attorney shall sign the notice, and his or her signature constitutes a certification by him or her that to the best of his or her knowledge, information, and belief the statement and supporting facts are true.~~

~~If a party shows that when he or she was served with notice under subdivision (b)(2) he or she was unable through the exercise of diligence to obtain counsel to represent him or her at the taking of the deposition the deposition may not be used against him or her.~~

~~(3) The court may for good cause shown enlarge or shorten the time for taking the deposition.~~

(4) Method of Recording.

(A) Method Stated in the Notice. The notice ~~required by subdivision (1)~~ ~~shall~~ must state the method for recording the testimony. ~~means by which the testimony will be recorded and preserved. The court may make any order necessary to assure that the record of the testimony will be accurate and trustworthy (A)~~ Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means, or any combination of those means. The noticing party bears the cost of the recording ~~means~~ methods specified in the notice.

(B) Additional Method. With prior notice to the deponent and other parties, any party or the deponent may designate another method ~~means~~ of recording the testimony in addition to the method ~~means~~ specified in the original notice. The additional recording must ~~shall~~ be made by the officer personally or by someone acting in the presence of and under the direction of the officer. The party or deponent who designates another method ~~means~~ bears the cost of the additional record or transcript unless the court orders otherwise. Absent a stipulation of the parties, no other recordings of the testimony may be made.

(5) Interpreter Required; Payment; Certification. If the deponent is a person who is deaf, hard of hearing, or unable to communicate the English language as defined in Neb. Rev. Stat. § 25-2402, an interpreter must be used to interpret the questions and answers. Unless the parties stipulate or the court ~~upon~~ for good cause ~~shown~~ orders otherwise, the noticing party ~~shall~~ must arrange and pay for the interpreter. Unless the parties stipulate or the court for ~~upon~~ good cause ~~shown~~ orders otherwise, the interpreter must be a certified or provisionally certified interpreter; however, if the noticing party has made reasonably diligent efforts to obtain a certified or provisionary certified interpreter and none are available, the interpreter may be a registered interpreter. A certified interpreter, a provisionally certified interpreter, and a registered interpreter is one who, pursuant to Neb. Ct. R. § 6-702(A)-(C), is listed as such in the statewide register of interpreters published and maintained by the State Court Administrator.

(6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a ~~A~~ party may ~~in his or her notice and in a subpoena~~ name as the deponent a public or private corporation, ~~or~~ a partnership, an ~~or~~ association, a ~~or~~ governmental agency, or other entity and must describe with reasonable particularity the matters for ~~on which~~ examination ~~is requested~~. ~~In that event, the~~ The named organization ~~so named shall~~ must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf~~;~~, and it may set out ~~forth, for each person designated,~~ the matters on which ~~he or she~~ each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena ~~shall~~ must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify ~~make such a designation~~. The persons ~~so~~ designated must ~~shall~~ testify about information ~~as to matters~~ known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure ~~authorized in~~ allowed by these rules.

~~(7) The parties may stipulate in writing, or the court may upon motion order, that a deposition be taken by telephone or by other remote means. For the purposes of these rules, a deposition taken by telephone or by other remote means is taken at the place where the deponent is to appear to answer questions. Absent a court order or stipulation of the parties, the officer must be in the same location as the deponent.~~

(7~~8~~) Officer's Duties.

(A) Before the Deposition. Unless the parties stipulate otherwise, a deposition must be conducted before an officer identified by Rule 28 as a person before whom a deposition may be taken. The officer must begin the deposition with an on-the-record statement that includes: (i) the officer's name and business address; (ii) the date and~~,~~ time~~, and place~~ of the deposition; (iii) how the deposition is being taken and if the deposition is being taken in person, the place where it is being taken; (~~iii~~ iv) the deponent's name; (~~iv~~ v) the officer's administration of the oath or affirmation to the deponent; and (~~v~~ vi) the identity and location of all persons ~~present~~ attending the deposition. If the deposition is recorded stenographically, the officer may include the foregoing information in the transcript rather than make an on-the-record statement.

(B) Conducting the Deposition; Avoiding Distortion. If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(~~8~~7)(A)(i)-(~~iii~~ iv) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) After the Deposition. At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections.

(1) Examination and Cross-Examination. The examination ~~Examination~~ and cross-examination of a deponent ~~witnesses may~~ proceed as they would ~~permitted~~ at ~~the~~ trial under ~~the provisions of~~ the Nebraska

Evidence Rules, except Rules 103 and 615. The officer ~~before whom the deposition is to be taken shall~~ must put the deponent ~~witness~~ under oath and, if an interpreter is used, also put the interpreter under oath. The officer ~~shall~~ must ~~also personally, or by someone acting under his or her direction and in his or her presence,~~ record the testimony ~~of the witness~~ by the method designated under Rule 30(b)(4)(A). The testimony ~~shall~~ must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer. ~~in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.~~

(2) Objections. ~~All objections made~~ An objection at the time of the examination – whether to evidence, to a party's conduct, to the officer's ~~the~~ qualifications ~~of the officer taking the deposition~~, to the interpreter's qualifications ~~qualification of the interpreter~~, ~~or~~ to the manner of taking the deposition, ~~or to the evidence presented, or~~ to the conduct of any party, and or to any other aspect of the deposition – must ~~objection to the proceedings, shall~~ be noted on the record, but the examination still proceeds; the testimony is taken ~~by the officer upon the deposition~~. ~~Evidence objected to shall be taken~~ subject to any objection. ~~the objections. (2)~~ An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(2).

(3) Participating Through Written Questions. ~~In lieu~~ Instead of participating in the oral examination, a party ~~parties~~ may serve written questions in a sealed envelope on the party ~~taking~~ noticing the deposition, who must deliver ~~and he or she shall transmit~~ them to the officer. The officer must ask the deponent those questions~~, who shall propound them to the witness~~ and record the answers verbatim.

(d) Sanction; Motion to Terminate or Limit ~~Examination~~.

(1) Sanction. The court may impose an appropriate sanction – including reasonable expenses and attorney fees incurred by any party – on a person who impedes, delays, or frustrates the fair examination of the deponent.

(2) Motion to Terminate or Limit.

(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit the deposition on the ground that (1) it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party or (2) the interpreter is not rendering a reasonably complete and accurate interpretation or is repeatedly altering, omitting, or adding things, including explanations, to what is stated. The motion may be filed in the court in which the action is pending. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(d ~~c~~). If terminated, the deposition may be resumed only by order of the court in which the action is pending. ~~If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.~~

(C) Award of Expenses. ~~The provisions of~~ Rule 37(a)(5 ~~4~~) ~~apply~~ applies to the award of expenses incurred in relation to the motion.

(e) Review; Changes; Waiver; Motion to Suppress.

(1) On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which (a) to review the transcript or recording and (b) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them. The deponent may be allowed more or fewer than 30 days if the parties stipulate to or the court orders a different number of days. The officer must note in the certificate required by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the period specified above for review.

(2) All objections to the accuracy of the deposition, including objections to accuracy of the interpreter's interpretation of the questions or answers, are waived if a request for review is not made before the deposition is completed or, if a request for review is made, no changes are submitted to the officer in the time and manner required by ~~subdivision~~ subpart (1) of this rule and no motion is made pursuant to ~~subdivision~~ subpart (3) of this rule.

(3) If a request for review is made, the deponent or any party may move to suppress the deposition pursuant to Rule 32(d)(4) on the ground that the deponent was not allowed to review the transcript or recording as provided in ~~subdivision~~ subpart (1) of this rule or that the transcription or interpretation of the deposition is inherently inaccurate.

(f) Certification and Delivery by Officer; Exhibits; Copies of the Transcript or Recording; Notice of Delivery.

(1) Certification and Delivery. The officer ~~shall~~ must certify in writing ~~include in or attach to the deposition a certificate~~ that the deponent ~~witness~~ was duly sworn ~~by him or her~~ and that the deponent's ~~is an accurate record of the~~ testimony ~~of the witness~~. Unless ~~otherwise ordered by~~ the court orders otherwise, the officer ~~shall then~~ must promptly deliver the deposition to the party taking the deposition, who must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) Documents and Tangible Things.

(A) Originals and Copies. Documents and tangible things produced for inspection during the examination of the deponent ~~witness~~ must ~~shall~~, ~~upon the~~ on a party's request ~~of a party~~, be marked for identification and ~~annexed~~ attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person ~~and may be inspected and copied by any party, except that if the person producing the materials desires to retain them, he or she~~ may:

(~~A~~ i) offer copies to be marked, attached to the deposition, and then used as originals – after giving ~~for identification and annexed to the deposition and to serve thereafter as originals if he or she affords to~~ all parties a fair opportunity to verify the copies by comparing them to ~~comparison with~~ the originals; or

(~~B~~ ii) give all parties a fair ~~offer the originals to be marked for identification, after giving to each party an~~ opportunity to inspect and copy the originals after they are marked – ~~them,~~ in which event the ~~materials~~ originals may ~~then~~ be used ~~in the same manner~~ as if ~~annexed~~ attached to the deposition.

(~~3~~ B) Order Regarding Originals. Any party may move for an order that the originals be ~~annexed~~ attached to the deposition~~,~~ pending final disposition of the case.

(~~2~~ 3) Copies of the Transcript or Recording. Unless otherwise stipulated by the parties or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges ~~Upon payment of reasonable charges therefo~~r, the officer ~~shall~~ must furnish a copy of the transcript or recording to any party or to the deponent.

~~(3) The party taking the deposition shall give prompt notice to all other parties that it has been delivered by the officer before whom taken.~~

(g) Failure to Attend or to Serve Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

(h) Protective Orders. The deponent or any party may move at any time for an order pursuant to Rule 26(~~c~~ d) to limit the dissemination of the deposition, either in whole or in part, or to limit the persons who may have access to the deposition.

COMMENTS TO ~~RULE 30~~ § 6-330

~~30(b)(1) Because of the increasing number of Nebraskans who may have difficulty communicating in the English language, there is an increased likelihood that the deponent will need the assistance of an interpreter. It is important for the parties to work together to ensure that an interpreter is used when necessary. Rule 30(b)(1) (A) provides that if an interpreter will be used, the notice should state that and should also state the language that will be interpreted. If notice is silent about an interpreter but another party believes that one is necessary, then the other party should contact the noticing party. That way, both parties may avoid appearing for a deposition that would otherwise have to be canceled for lack of an interpreter. To facilitate parties working together, the rule requires the inclusion of an advisory statement in the notice.~~

It is less likely that the noticing party will know if nonparties require an interpreter, and it is also less likely that nonparties will know to contact the noticing party if they do. Therefore, it is especially important that a subpoena served on a nonparty include the advisory statement. If a subpoena will be served on a nonparty witness, a party may give the other parties written notice of the deposition by serving them with a copy of the subpoena, provided that the subpoena contains the information required by the rule. Alternatively, a party may give the other parties written notice by serving them with a separate document that contains the information required by the rule. If the party does so, the party may omit the advisory statement from the document because it will be contained in the subpoena served on the witness.

Parties sometimes attempt to circumvent the thirty-day period for responding to Rule 34 requests by serving a subpoena on the party. Rule 30(b)(1)(C) makes it clear that document subpoenas should only be served on nonparty deponents.

A deposition can only be used against a party who had notice of the deposition. See Rule 32(a). Sometimes it is not possible to serve a party with a deposition notice because the party's identity or whereabouts are unknown. That may occur in a quiet title action. Historically, publication has been the only method for giving notice. Rule 30(b)(1)(D) now allows the use of any other method reasonably calculated to give actual notice if the use of that method has been approved by the court. This is the standard for substitute service under Neb. Rev. Stat. § 25- 517.02(3).

30(b)(4) The rule previously provided that the notice had to state the means by which the testimony would be recorded but did not specify what those means were. The assumption was that the testimony would be recorded by stenographic means. Former Rule 30(b)(8) added a second option: videotape depositions. The rule as amended provides for three means: (1) stenographic, (2) audio, and (3) audiovisual. The term "audiovisual" is used because "videotape" refers to an outdated form of recording technology (magnetic tape).

The rules previously did not discuss whether the opposing party could designate an additional means of recording the deposition. Rule 30(b)(4)(B) now makes it clear that the opposing party may do so. In order to prevent different persons from preparing different records of the deposition, the rule provides that the additional recording must be prepared by the deposition officer (who is selected by the noticing party).

Although the rule allows the testimony to be recorded by nonstenographic means, parties need to bear in mind that, as a practical matter, they will need to have a transcript prepared if they plan to use the deposition to support or oppose a motion, including for example a motion for summary judgment. Parties also need to bear in mind that they should have an audio or audiovisual recording made if an interpreter is used because, as a practical matter, without a record of the questions and answers in the interpreted language, they will be unable to assert later that the interpreter's interpretation was not accurate.

30(b)(5) Ideally, the parties should use a certified or provisionally certified interpreter for a deposition. That is not always possible in Nebraska, however, because there are a limited number of certified and provisionally certified interpreters in some languages. The rule therefore tracks Neb. Ct. R. § 6-703 and allows the use of registered interpreters if the noticing party has made reasonably diligent efforts to obtain

a certified or provisionally certified interpreter and none are available. It is possible that no registered interpreters are reasonably available either. In that case, the parties need to agree on an interpreter or the noticing party needs to file a motion for a court order. Among the factors that a court may consider in deciding whether to grant a motion to vary from the rule's interpreter hierarchy are: availability, cost, and logistical difficulties of obtaining a certified, provisionally certified, or registered interpreter, the amount in controversy in the case, the significance of the testimony and the purpose for which it is sought (for example, steppingstone discovery as opposed to key evidence), and the competence and experience of the proposed interpreter.

30(b)(7) The rule has been amended to allow depositions to be taken by remote means other than telephone - for example, by video conferencing technology - but only pursuant to a stipulation or court order. The rule has also been amended to eliminate the uncertainty about whether the officer must be in the same physical location as the deponent. The rule as amended provides that they must be in the same location absent a court order or stipulation otherwise. One reason for having the officer and the deponent in the same location is to minimize the risk of improper behavior such as coaching of the witness or the surreptitious use of documents. There are other ways of minimizing the risk. For example, the parties may stipulate that a notary be present in the same location as the deponent and administer the oath to the deponent but the officer who is stenographically recording the deposition may be present in the same location as the person or attorney taking the deposition.

30(b)(8) The former rule governed videotape depositions and had special provisions that governed the review of such depositions. The provisions of Rule 30(e) now apply to the review of all depositions, regardless of how they were recorded. Rule 30(b)(8) as amended is substantially the same as the current version of Rule 30(b)(5) of the Federal Rules of Civil Procedure. The rule as amended sets out the deposition officer's duties at the beginning and end of the deposition. It also sets out the officer's duties during a deposition in which the testimony is recorded by audio or audiovisual means.

30(c) The rule has been divided into three subdivisions. The first addresses the order of examination and the officer's obligation to record all objections. It is substantially similar to former Rule 30(c). The major differences are the addition of a requirement that the interpreter be sworn and the inclusion of an objection to the interpreter's qualifications in the list of objections that must be recorded. The second subdivision is modeled on Rule 30(c)(2) of the Federal Rules of Civil Procedure and is designed to eliminate speaking objections that are made for the purpose of disrupting the questioning or suggesting how the deponent should answer a question. The third subdivision is taken from the last sentence of the former rule.

30(d) The rule has been amended to add a provision allowing a party to terminate a deposition if the interpreter's performance is so problematic that it undermines the usefulness of the deposition. It should be emphasized that a problem with how the interpreter handled a particular question or answer is insufficient to justify terminating a deposition. "'[I]nterpretation is a demanding and inexact art, and . . . the languages involved may not have precise equivalents for particular words or concepts.' Minor or isolated inaccuracies, omissions, interruptions, or other defects in translation are inevitable . . . ." *Tapia-Reyes v. Excel Corp.*, 281 Neb. 15, 27, 793 N.W.2d 319, 328 (2011). Repeated problems, however, may signal that the interpretation is so fundamentally flawed that it would be pointless for the party to continue

~~the deposition. 30(e) The rule has been amended to streamline the procedures for review and use of the deposition. Under the former rule, the deponent had a right to review unless the right was waived by deponent and the parties. There was no time limit on review except for videotape depositions, which had to be reviewed immediately. The rule as amended requires the deponent or party to invoke the right of review before the end of the deposition and gives the deponent or party thirty days to review after being notified that the transcript or recording is available. The parties may agree to or the court may order a different time. For example, a shorter time may be necessary when the deposition is taken a few days before trial. A signature is only required if the right to review was invoked and the deponent made changes to the testimony.~~

~~If the right to review is not invoked, or if invoked no changes are submitted to the officer in the time and manner required in subdivision (1) and no motion to suppress is filed pursuant to subdivision (3), then the transcript or recording of the deposition is deemed to be accurate. Subdivision (2) of the rule is designed to make it clear to the deponent and to the parties that failing to invoke the right to review has serious consequences. If the right to review is invoked, then the deponent has a duty to review the transcript or recording and make changes to correct any errors. If the deponent fails to do so, then the deponent cannot later seek to suppress the deposition on the ground that the transcription or interpretation was inaccurate. If the deponent invokes the right to review and determines that the transcription or interpretation is inherently inaccurate, however, the deponent may move to suppress the deposition instead of making changes. Even if the deponent makes changes, any other party who believes that the deposition is inherently inaccurate may move to suppress the deposition. The burden of proof is on the moving party.~~

~~30(f)(2) of the rule has been amended to require the officer to retain the stenographic notes of a deposition taken stenographically or a copy of the recoding of a deposition taken by another method. This requirement mirrors Rule 30(f)(3) of the Federal Rules of Civil Procedure. Retaining the notes or a copy is necessary because the officer must furnish a copy of the transcript or recording if a party or the deponent later requests and pays for one.~~

~~30(g) The former language of the rule has been replaced by the current language of Rule 30(g) of the Federal Rules of Civil Procedure. The new language is easier to read and makes no substantive changes.~~

~~30(h) This subdivision is new. As a result of the growth of electronic media, it is much easier today for parties to disseminate sensitive portions of depositions in an attempt to harass or oppress their adversaries. This subdivision serves as a reminder that courts may enter appropriate orders pursuant to Rule 26(c) to prevent parties from using the recording or transcription of a deposition for improper purposes.~~

[1] Although depositions can normally be taken without leave of court, leave is required in the situations described in subpart (a)(2). The 2024 Amendments added a provision requiring leave to depose persons who have been previously deposed. Requiring leave in that situation is appropriate because being deposed more than once can be burdensome for the deponent. A court order is not necessary, however, if all the parties and the deponent stipulate to the second deposition.

[2] The title of § 6-330 is "Depositions by oral examination." Despite the title of the rule, a deposition is not an oral examination as defined by statute because it is not testimony in the presence of the trier of fact. See Neb. Rev. Stat. § 25-1243 (defining "oral examination" as "an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness"). It is instead a document in the form of a transcript or recording. See Neb. Rev. Stat. § 25-1242 (defining deposition as "a written declaration under oath or a videotape taken under oath in accordance with procedures provided by law"). Because a deposition is not an oral examination as defined by statute, the statutory limitations on oral testimony by videoconferencing or telephone do not apply to depositions.

[3] The rule originally required a court order or stipulation to take a deposition by videoconferencing or telephone. The requirement was eliminated by the 2024 Amendments. Subpart (a)(3) now allows a deposition to be taken "in person, by videoconferencing, by telephone, or by a combination of these methods." The reference to "a combination of these methods" means that there can be hybrid depositions, with some participants attending in person and others attending by another method such as videoconferencing. Furthermore, parties may attend a deposition by a method different than the method stated in the notice, provided that they give the other parties reasonable notice.

[4] Subpart (a)(3) also allows depositions to be taken by other methods with a stipulation or court order. The provision gives the courts and parties flexibility to use new technologies that may emerge in the future.

[5] Subpart (b) specifies what must be included in a deposition notice. Among other things, the notice must contain information about the software that will be used if the deposition will be taken by videoconferencing and instructions on how to join the call if the deposition will be taken by telephone.

[6] The notice must also state the recording method. Subpart (b)(4) authorizes three methods: (1) stenographic, (2) audio, and (3) audiovisual. The deponent or another party may designate an additional recording method. In order to prevent different people from preparing different records of the deposition, subpart (b)(4)(B) provides that the additional recording must be prepared by the deposition officer (who is selected by the noticing party).

[7] Although the rule allows the testimony to be recorded by nonstenographic means, parties need to bear in mind that, as a practical matter, they will need to have a transcript prepared if they plan to use the deposition to support or oppose a motion, including, for example, a motion for summary judgment. Parties also need to bear in mind that they should have an audio or audiovisual recording made if an interpreter is used because, as a practical matter, without a record of the questions and answers in the interpreted language, they will be unable to assert later that the interpreter's interpretation was not accurate.

[8] Because of the increasing number of Nebraskans who may have difficulty communicating in the English language, there is an increased likelihood that the deponent will need the assistance of an interpreter. It is important for the parties to work together to ensure that an interpreter is used when necessary. Subpart (b)(1)(D) provides that if an interpreter will be used, the notice should state that and

should also state the language that will be interpreted. If notice is silent about an interpreter but another party believes that one is necessary, then the other party should contact the noticing party. That way, both parties may avoid appearing for a deposition that would otherwise have to be canceled for lack of an interpreter. To facilitate parties working together, the rule requires the inclusion of an advisory statement in the notice.

[9] It is less likely that the noticing party will know if nonparties require an interpreter, and it is also less likely that nonparties will know to contact the noticing party if they do. Therefore, it is especially important that a subpoena served on a nonparty include the advisory statement. If a subpoena will be served on a nonparty witness, a party may give the other parties written notice of the deposition by serving them with a copy of the subpoena, provided that the subpoena contains the information required by the rule. Alternatively, a party may give the other parties written notice by serving them with a separate document that contains the information required by the rule. If the party does so, the party may omit the advisory statement from the notice because it will be contained in the subpoena served on the witness.

[10] Ideally, the parties should use a certified or provisionally certified interpreter for a deposition. That is not always possible in Nebraska, however, because there are a limited number of certified and provisionally certified interpreters in some languages. The rule therefore allows the use of registered interpreters if the noticing party has made reasonably diligent efforts to obtain a certified or provisionally certified interpreter and none are available. It is possible that no registered interpreters are reasonably available either. In that case, the parties need to agree on an interpreter, or the noticing party needs to file a motion for a court order.

[11] Among the factors that a court may consider in deciding whether to grant a motion to vary from the rule's interpreter hierarchy are: the availability, cost, and logistical difficulties of obtaining a certified, provisionally certified, or registered interpreter, the amount in controversy in the case, the significance of the testimony and the purpose for which it is sought (for example, steppingstone discovery as opposed to key evidence), and the competence and experience of the proposed interpreter.

[12] A party may seek the production of documents in connection with a deposition by either a document request served pursuant to § 6-334 or a subpoena duces tecum served pursuant to Neb. Rev. Stat. § 25-1224. The response time for a document request is normally 30 days. See § 6-334(c)(2)(A). The response time for a subpoena duces tecum is no less than 14 days. See § 6-334(A)(d)(5). It is possible that a subpoena duces tecum could be served on a party deponent in an attempt to circumvent the longer response time in § 6-334. To eliminate that possibility, the 2024 Amendments added a new sentence in § 6-330(b)(2)(A) to make it clear that the response times in § 6-334 apply to parties served with a subpoena duces tecum.

[13] A deposition can only be used against a party who was not present or represented at the deposition if the party had notice of the deposition. See § 6-332(a)(1)(A). Sometimes it is not possible to serve a party with a deposition notice because the party's identity or whereabouts are unknown. That may occur in a quiet title action. Historically, publication was the only method for giving notice. Subpart (b)(3) now allows the use of any other method reasonably calculated to give actual notice if the use of that method

has been approved by the court. The standard stated in subpart (b)(3) is consistent with the standard for substitute service under Neb. Rev. Stat. § 25-517.02(3).

[14] Subpart (2) previously contained a provision that prohibited the use of a deposition against a party who made diligent but unsuccessful efforts to obtain a lawyer. The provision applied to depositions taken within 30 days of the service of the summons because the deponent was expected to leave the State. The 2024 Amendments moved the contents of provision to § 6-332(a)(5).

[15] Subpart (b)(6) governs depositions of organizations and, among other things, lists the types of organizations that may be deposed. The 2024 Amendments added "or other entity" at the end of the list to make it clear that organizations can be deposed regardless of their form. The 2024 Amendments also added a requirement that the deposing party and the deponent organization confer about the subjects of the deposition organization. Doing so may help the party to structure the deposition and also help the organization to identify the proper person(s) to testify on its behalf.

[16] The 2015 Amendments added a provision requiring the deposition officer to be in the same location as the deponent when the deposition was not taken in person. During the Covid-19 Pandemic, the officer and deponent were often in different locations without incident. Therefore, the requirement has been eliminated. The parties are free, however, to enter into a stipulation or to seek a court order regarding the officer's location for a particular deposition.

[17] Subpart (b)(7) specifies the officer's duties, which include stating on the record preliminary information such as the date and time of the deposition. If the deposition is recorded stenographically, the officer is not required to state the information orally. The officer can instead include the information in the transcript. The oath or affirmation, however, must be administered orally on the record.

[18] Subpart (c)(1) provides that the examination and cross-examination of the deponent proceed as they would at trial under the Nebraska Evidence Rules. The 2024 Amendments added two exceptions: Rule 103 and Rule 615. The reason for the Rule 103 exception is that a judge is usually not present at a deposition. The reason for the Rule 615 exception is to make it clear that persons who may be deposed in the future may not be excluded from deposition at the request of a party. If a party wants to exclude persons from the deposition, the party should file a motion for a protective order pursuant to § 6-326(d)(1)(E).

[19] Subpart (c)(2) governs objections. The 2015 Amendments added the requirement that the interpreter must be sworn and that an objection to the interpreter's qualifications must be recorded. The 2015 Amendments also add provisions on how objections must be stated and when a person may instruct the witness not to answer. Those provisions – which are modeled on Rule 30(c)(2) of the Federal Rules of Civil Procedure – are designed to eliminate speaking objections made for the purpose of disrupting the questioning or suggesting how the deponent should answer a question.

[20] The attorneys, the parties, and the deponent should behave in a professional and civil manner during a deposition. They should not use vulgar language, repeatedly interrupt each other, repeatedly make improper objections, or repeatedly give improper instructions not to answer. If a person engages in

misconduct that impedes, delays, or frustrates the fair examination of the deponent, then the court has the discretion to impose sanctions under subpart (d)(1). Those sanctions may be monetary (for example, reasonable expenses or attorney fees) or nonmonetary (for example, admonishing an attorney or requiring the attorney to attend a continuing legal education program), or both.

[21] Subpart (d)(2)(A) allows a party to terminate a deposition if the interpreter's performance is so problematic that it undermines the usefulness of the deposition. It should be emphasized that a problem with how the interpreter handled a particular question or answer is insufficient to justify terminating a deposition. "'[I]nterpretation is a demanding and inexact art, and . . . the languages involved may not have precise equivalents for particular words or concepts.' Minor or isolated inaccuracies, omissions, interruptions, or other defects in translation are inevitable . . . ." *Tapia-Reyes v. Excel Corp.*, 281 Neb. 15, 27, 793 N.W.2d 319, 328 (2011). Repeated problems, however, may signal that the interpretation is so fundamentally flawed that it would be pointless for the party to continue the deposition.

[22] Subpart (f) was amended in 2015 to streamline the procedures for review and use of the deposition. Under the prior version of the rule, the deponent had a right to review the deposition unless the right was waived by deponent and the parties. There was no time limit on review except for videotape depositions, which had to be reviewed immediately. The rule as amended requires the deponent or party to invoke the right of review before the end of the deposition and gives the deponent or party thirty days to review after being notified that the transcript or recording is available. The parties may agree or the court may order a different time. For example, a shorter time may be necessary when the deposition is taken a few days before trial. A signature is only required if (1) the deponent or a party invoked the right to review and (2) the deponent made changes to the testimony.

[23] Subpart (e)(2) is designed to make it clear to the deponent and to the parties that failing to invoke the right to review has serious consequences. The subpart provides that the transcript or recording of the deposition is deemed to be accurate if (1) the right to review was not invoked or (2) the right was invoked, no changes were submitted to the officer in the time and manner required by subpart (e)(1), and no motion to suppress was filed pursuant to subpart (e)(3).

[24] If the right to review is invoked, then the deponent has a duty to review the transcript or recording and make changes to correct any errors. If the deponent fails to do so, then the deponent cannot later seek to suppress the deposition on the ground that the transcription or interpretation was inaccurate. If the deponent invokes the right to review and determines that the transcription or interpretation is inherently inaccurate, however, the deponent may move to suppress the deposition instead of making changes. Even if the deponent makes changes, any other party who believes that the deposition is inherently inaccurate may move to suppress the deposition. The burden of proof is on the moving party.

[25] Subpart (f)(3) requires the officer to retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. This requirement mirrors Rule 30(f)(3) of the Federal Rules of Civil Procedure. Retaining the notes or a copy is necessary because the officer must furnish a copy of the transcript or recording if a party or the deponent later requests and pays for one.

[26] Subpart (f) previously contained a provision that required the deposing party to give notice to the other parties when the officer delivered the deposition. The provision was deleted in 2024 because the requirement is unnecessary.

[27] As a result of the growth of social media, it is much easier today for parties to disseminate sensitive portions of depositions in an attempt to harass or oppress their adversaries. Subpart (h) serves as a reminder that a court may enter a protective order pursuant to § 6-326(d)(1) to prevent parties from using the recording or transcription of a deposition for improper purposes.

§ 6-330(A). Interstate deposition and discovery.

(a) Definitions. In this rule:

(1) "Foreign jurisdiction" means a state other than this state.

(2) "Foreign subpoena" means a subpoena issued in a civil proceeding under authority of a court of record of a foreign jurisdiction.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(4) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(5) "Subpoena" means a document, however denominated, issued under authority of a court of record that ~~requires~~ commands a person to:

(A) testify at a deposition;

(B) produce and permit the party serving the subpoena to inspect, copy, test, or sample the following items that are within the scope of Rule 26(b) and ~~for inspection, copying, testing, or sampling designated books, papers, documents, tangible things, or electronically stored information~~ in the possession, custody, or control of the person~~; or~~;

(i) 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 information can be obtained either directly or, if necessary, after translation by the responding person into a reasonably usable form; or

(ii) any designated tangible things; or

(C) ~~allow~~ permit entry ~~upon~~ onto designated land or other property possessed or controlled by ~~that is in the possession or control of~~ the person when such entry is within the scope of Rule 26(b) so that the party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Issuance of Subpoena. To request issuance of a subpoena under this rule, a party must submit to the clerk of the district court for the county in which discovery is sought to be conducted a Request for the Issuance of a Nebraska Subpoena for a Proceeding in a Foreign Jurisdiction. The content of the request must be substantially the same as the content of the form in the Appendix to this rule, and shall include the name and address of the person on which the subpoena shall be served, and the method of service provided by Neb. Rev. Stat. §§ 25-1223(9), 25-1226(1), and/or 25-1228(2).

The party must attach to the request (1) a foreign subpoena for each person to be served and (2) a list of the names, addresses, telephone numbers, and email addresses of all counsel of record and self-represented parties in the proceeding to which the subpoena relates. The party must also pay to the clerk of the district court a fee of $75 for each subpoena issued. If the clerk re-issues a subpoena, an additional $75 fee ~~shall~~ must be paid.

The clerk ~~shall~~ must remit the fee to the State Treasurer for credit to the Nebraska Supreme Court's Counsel for Discipline Cash Fund not later than the 15th day of the month following the calendar month in which the fee was received.

When a party submits a foreign subpoena to a clerk of a district court in this state, the clerk, in accordance with the district court's procedure, ~~shall~~ must promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

A subpoena issued under this rule must:

(1) include as an attachment a copy of the list required by this subsection;

(2) accurately incorporate the time, place, and method of the discovery requested in the foreign subpoena; and

(3) if the subpoena commands the person to produce designated documents, electronically stored information, or tangible things, the subpoena must either accurately incorporate the commands from the foreign subpoena or attach the foreign subpoena and state that the person must produce the documents, information, or things designated in the attached foreign subpoena.

(c) Service of Subpoena. A deposition subpoena issued by a clerk of court under this rule must be served in compliance with Neb. Rev. Stat. § 25-1226(1) and the return made in compliance with § 25-1228(1). A subpoena for discovery from a nonparty without a deposition must be served and the return must be made in compliance with Rule 34(A)(d)(5)-(6)~~(a)(4)~~.

(d) Deposition, Production, and Entry Upon Land. The statutes and rules of this state, including the Nebraska Court Rules of Discovery in Civil Cases, apply to subpoenas issued and discovery conducted pursuant to this rule.

(e) Appearance, Certification and Acknowledgment.

(1) A request for the issuance of a subpoena or engaging in discovery pursuant to such a subpoena does not constitute an appearance in the courts of this state or the unauthorized practice of law in this state.

(2) By submitting a request for a subpoena, attorneys or self-represented parties certify that the foreign subpoena was properly issued under the laws or rules of the foreign jurisdiction. By submitting a request for a subpoena, attorneys who are not admitted to practice in Nebraska further certify that they are admitted to practice in the foreign jurisdiction in which the proceeding is pending and that they have not been disbarred or suspended from practice in any jurisdiction.

(3) By submitting a request for a subpoena, attorneys or self-represented parties acknowledge that the district court has jurisdiction to impose sanctions on them for false certifications made in obtaining the subpoena and for any conduct related to the subpoena that violates the Nebraska Court Rules of Discovery in Civil Cases.

(f) Motions. A motion for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under this rule must comply with the statutes and rules of this state and must be filed as a civil action in the district court for the county in which the discovery is to be conducted. Such a motion may be filed or opposed only by an attorney admitted to practice in this state or by a self-represented individual.

COMMENTS TO ~~RULE 30(A)~~ § 6-330(A)

~~[1] This rule is promulgated pursuant to the authority granted to the Supreme Court by § 25-1237 and is modeled on the Uniform Interstate Depositions and Discovery Act drafted by the National Conference of Commissioners on Uniform State Laws. The purpose of the rule is to provide a simple, uniform, and efficient procedure under which a party to a civil proceeding pending in a foreign jurisdiction can have a subpoena issued in Nebraska to obtain discovery for the foreign proceeding. For purposes of this rule, the term "foreign jurisdiction" means the courts of another state, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, and the territories of the United States. It does not include another country. Discovery for proceedings in other countries is governed by Rule 28(c).~~

~~[2] The act of the clerk of the district court in issuing the subpoena is administrative. In effect, the clerk reissues the foreign subpoena as a Nebraska subpoena and assigns the matter a number. The only documents that need to be presented to the clerk are the request, the foreign subpoena, a list of counsel and unrepresented parties, and the required fee. Although the rule does not require the requesting party to submit a draft Nebraska subpoena, the party may choose to do so in order to expedite the process.~~

~~[3] It is not the responsibility of the clerk to ensure that the foreign subpoena was properly issued under the laws or rules of the foreign jurisdiction. It is instead the responsibility of the requesting lawyer or selfrepresented party. The lawyer or self-represented party must certify in the request that the foreign subpoena was properly issued. A false certification may result in the imposition of sanctions under subsection (e) of this rule. Sanctions should not be imposed, however, if the foreign subpoena was improperly issued as a result of a reasonable, good faith mistake.~~

~~[4] A lawyer admitted in a foreign jurisdiction does not need to retain local counsel or be admitted pro hac vice in order to have the subpoena issued. The request for the issuance of the subpoena does not constitute the unauthorized practice of law in this state. The same is true of taking a deposition or obtaining other discovery pursuant to the subpoena. See Neb. Ct. R. of Prof. Cond. § 3-505.5(c)(2) ("[a] lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that . . . are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer . . . is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized"); Neb. Ct. R. of Prof. Cond. § 3-505.5(c)(2), Comment 10 (taking a deposition in Nebraska is reasonably related to a pending proceeding in another jurisdiction).~~

~~[5] During a deposition, lawyers may sometimes seek a telephonic ruling from the court on an objection or instruction not to answer. Lawyers may not do so during a deposition taken pursuant to this rule unless the lawyers are all admitted to practice before the court from which the ruling is sought.~~

~~[6] Nebraska law applies to discovery undertaken pursuant to this rule. That means that Nebraska's procedural, evidentiary, and conflicts law apply. Nebraska has a significant interest in protecting its residents from any unreasonable or unduly burdensome discovery requests when they become targets of discovery requests for actions pending in a foreign jurisdiction. This interest is best served by requiring that any discovery motions must be decided under the laws of Nebraska and that all motions that directly affect the person from whom discovery is sought must be filed in Nebraska.~~

~~[7] Motions that affect only the parties to the action can be made in the foreign jurisdiction. For example, any party can apply for an order in the foreign jurisdiction to bar the deposition of a Nebraska deponent on grounds of relevance, and that motion would be made and ruled on before the deposition subpoena is ever presented to the clerk of the district court in this state.~~

[1] The rule was promulgated pursuant to the authority granted to the Supreme Court by Neb. Rev. Stat. § 25-1237 and is modeled on the Uniform Interstate Depositions and Discovery Act drafted by the National Conference of Commissioners on Uniform State Laws. The purpose of the rule is to provide a simple, uniform, and efficient procedure under which a party to a civil proceeding pending in a foreign jurisdiction can have a subpoena issued in Nebraska to obtain discovery for the foreign proceeding. For purposes of this rule, the term "foreign jurisdiction" means the courts of another state, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, and the territories of the United States. It does not include another country.

[2] The act of the clerk of the district court in issuing the subpoena is administrative. In effect, the clerk reissues the foreign subpoena as a Nebraska subpoena and assigns the matter a number. The only documents that need to be presented to the clerk are the request, the foreign subpoena, a list of counsel and unrepresented parties, and the required fee. Although the rule does not require the requesting party to submit a draft Nebraska subpoena, the party may choose to do so in order to expedite the process.

[3] It is not the responsibility of the clerk to ensure that the foreign subpoena was properly issued under the laws or rules of the foreign jurisdiction. It is instead the responsibility of the requesting lawyer or self-represented party. The lawyer or self-represented party must certify in the request that the foreign subpoena was properly issued. A false certification may result in the imposition of sanctions under subpart (e) of this rule. Sanctions should not be imposed, however, if the foreign subpoena was improperly issued as a result of a reasonable, good faith mistake.

[4] A lawyer admitted in a foreign jurisdiction does not need to retain local counsel or be admitted pro hac vice in order to have the subpoena issued. The request for the issuance of the subpoena does not constitute the unauthorized practice of law in this state. The same is true of taking a deposition or obtaining other discovery pursuant to the subpoena. See Neb. Ct. R. of Prof. Cond. § 3-505.5(c)(2); Neb. Ct. R. of Prof. Cond. § 3-505.5(c)(2), Comment [10].

[5] During a deposition, lawyers may sometimes seek a telephonic ruling from the court on objections or instructions not to answer. Lawyers may not do so during a deposition taken pursuant to this rule unless the lawyers are all admitted to practice before the court from which the ruling is sought.

[6] Nebraska law applies to discovery undertaken pursuant to this rule. That means that Nebraska's procedural, evidentiary, and conflicts law apply. Nebraska has a significant interest in protecting its residents from any unreasonable or unduly burdensome discovery requests when they become targets of discovery requests for actions pending in a foreign jurisdiction. This interest is best served by requiring that any discovery motions be decided under the laws of Nebraska and that all motions that directly affect the person from whom discovery is sought must be filed in Nebraska.

[7] Motions that affect only the parties to the action can be made in the foreign jurisdiction. For example, any party can apply for an order in the foreign jurisdiction to bar the deposition of a Nebraska deponent on grounds of relevance. That motion should be made and ruled on before the deposition subpoena is ever presented to the clerk of the district court in this state.

§ 6-331. Depositions ~~upon~~ by written questions.

(a) ~~Serving Questions; Notice~~ When a Deposition May be Taken.

(1) Without Leave. ~~After commencement of the action, any~~ A party may, by written questions, depose ~~take the testimony of~~ any person, including a party, without leave of court except as provided by Rule 31(a)(2) ~~by deposition upon written questions~~. The deponent's attendance ~~of witnesses~~ may be compelled by a subpoena that contains the information specified by Rule 30(b)(1)(E). ~~The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.~~

(2) With Leave. A party must obtain leave of court if:

(A) the party is a plaintiff and seeks to serve questions within 30 days after service of the summons, unless

(i) the parties stipulate that the deposition may be taken; or

(ii) the defendant has served a deposition notice in the action; or

(B) the deponent has already been deposed in the case and the deponent and the parties do not stipulate that the deponent may be deposed again; or

(C) the deponent is confined in prison.

(3) Service; Required Notice. A party ~~desiring~~ who intends to depose a person by ~~take a deposition upon~~ written questions must ~~shall~~ serve the questions on ~~them upon~~ every other party, with a notice stating, if known, ~~(1) The~~ the deponent's name and address. ~~of the person who is to answer them, if known, and if~~ If the name is unknown ~~not known~~, the notice must provide a general description sufficient to identify the person ~~him or her~~ or the particular class or group to which ~~he or she~~ the person belongs. The notice must also state ~~, and (2) The~~ the name or descriptive title and the address of the officer before whom the deposition will ~~is to~~ be taken.

~~(3)~~ (4) Interpreter; Required Notice. If an interpreter will be used, the notice must ~~shall~~ also state that an interpreter will be used and state the language that will be interpreted or the type of interpretation (e.g., sign language). ~~The provisions of~~ Rule 30(b)(5) governs ~~govern~~ who may serve as an interpreter.

(5) Questions Directed to an Organization. A ~~deposition upon written questions may be taken of a~~ public or private corporation, ~~or~~ a partnership, an ~~or~~ association, ~~or~~ a governmental agency, or other entity may be deposed by written questions in accordance with ~~the provisions of~~ Rule 30(b)(6).

(6) Questions from Other Parties. Any questions to the person from other parties must be served on all parties as follows: cross questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with the cross-questions; and recross-questions, within 7 days after being served with redirect questions. ~~Within thirty days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within ten days after being served with cross questions, a party may serve redirect questions upon all other parties. Within ten days after being served with redirect questions, a party may serve recross questions upon all other parties.~~ The court may, for good cause ~~shown~~, lengthen ~~enlarge~~ or shorten these times ~~the time~~.

(b) Delivery to the Officer; Officer's Duties. ~~Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and~~

~~deliver the deposition, attaching thereto the copy of the notice and the questions received by him or her.~~ The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to:

(1) take the deponent's testimony in response to the questions;

(2) prepare and certify the deposition; and

(3) send it to the party, attaching a copy of the questions and of the notice.

(c) Notice of Completion. The party taking the deposition ~~shall give prompt notice to~~ must notify all other parties when it is completed ~~that it has been delivered by the officer before whom taken~~.

COMMENT TO ~~RULE 31~~ § 6-331

~~This rule substantially follows the federal rule. It also incorporates the provisions of Rule 30 on interpreters.~~

It is unclear how often depositions are taken by written questions. But there are situations in which some parties prefer to take depositions by written questions rather than by oral examination. Therefore, § 6-331 has been retained and kept current. In 2015, the rule was amended to add provisions on interpreters. In 2024, the rule was amended to add provisions on when leave is required, to broaden the scope of the provision on deposing organizations, and to shorten the time for serving questions.

§ 6-332. ~~Use of~~ Using depositions in court proceedings.

(a) ~~Use of~~ Using Depositions.

(1) In General. At a hearing or trial, all or ~~Any~~ part ~~or all~~ of a deposition~~, so far as admissible under the Nebraska Evidence Rules applied as though the witness were then present and testifying,~~ may be used against ~~any~~ a party on these conditions:

(A) the party ~~who~~ was present or represented at the taking of the deposition or ~~who~~ had reasonable notice of it; ~~thereof, in accordance with any of the following provisions:~~

(B) it is used to the extent it would be admissible under the Nebraska Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2)-(8).

~~(1)~~ (2) Any party may use a deposition ~~may be used by any party for the purpose of contradicting or impeaching~~ to contradict or impeach the testimony given by the ~~of~~ deponent as a witness, or for any purpose ~~permitted~~ allowed by the Nebraska Evidence Rules.

~~(2)~~ (3) Deposition of a Party, Agent, or Designee. An adverse party may use for any purpose the ~~The~~ deposition of a party or of anyone who, when deposed, ~~at the time of taking the deposition~~ was ~~an~~ the party's officer, director, ~~or~~ managing agent, or ~~a person designated~~ designee under Rule 30(b)(6) or Rule 31(a)(5) ~~to testify on behalf of a public or private corporation, partnership or association, or governmental agency which is a party may be used by an adverse party for any purpose~~.

~~(3)~~ (4) Unavailable Witness. A party may use for any purpose the ~~The~~ deposition of a witness, whether or not a party, ~~may be used by any party for any purpose~~ if the court finds:

(A) ~~That~~ that the witness is dead; ~~or~~

(B) ~~That~~ that the witness is ~~at a greater distance~~ more than one hundred miles from the place of hearing or trial ~~or hearing,~~ or is outside ~~out of~~ the state, or beyond the subpoena power of the court, unless it appears that the witness' absence ~~of the witness~~ was procured by the party offering the deposition; ~~or~~

(C) ~~That~~ that the witness ~~is unable to~~ cannot attend or testify because of age, illness, infirmity, or imprisonment; ~~or~~

(D) ~~That~~ that the party offering the deposition ~~has been unable to~~ could not procure the witness' attendance ~~of the witness~~ by subpoena; ~~or~~

(E) ~~That~~ that ~~such~~ exceptional circumstances ~~exist as to~~ make it desirable~~,~~ -- in the interest of justice and with due regard to the importance of ~~presenting the~~ live testimony ~~of witnesses orally~~ in open court~~,~~ -- , to ~~allow~~ permit the deposition to be used; or

(F) ~~Upon~~ on motion ~~application~~ and notice prior to the taking of the deposition, that circumstances ~~exist such as to~~ make it desirable~~,~~ -- in the interest of justice and with due regard to the importance of ~~presenting the~~ live testimony ~~of witnesses orally~~ in open court -- to ~~allow~~ permit the deposition to be used.

(5) Limitation on Use; Unavailable Deponent; Party Could Not Obtain an Attorney. A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) Using Part of a Deposition. ~~(4)~~ If a party offers in evidence only part of a deposition ~~is offered in evidence by a party~~, an adverse party may require ~~him or her~~ the offeror to introduce ~~any~~ other parts that ~~part which ought~~ in fairness ~~to~~ should be considered with the part introduced, and any party may itself introduce any other parts ~~relevant to the issues~~.

(7) Substituting a Party. Substituting a party ~~Substitution of parties~~ does not affect the right to use a deposition ~~depositions~~ previously taken~~;~~.

(8) Deposition Taken in an Earlier Action. A deposition lawfully taken in any federal- or state court-action may be used in a later~~; and when an action has been brought in any court of the United States or of any state and another~~ action involving the same subject matter ~~is afterward brought~~ between the same parties, or their representatives or successors in interest, to the same extent as if ~~all depositions lawfully taken in the former action may be used in the latter as if originally~~ taken in the later action ~~therefor~~. A deposition previously taken may also be used as ~~permitted~~ allowed by the Nebraska Evidence Rules.

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and 32(d)(3) ~~subdivision (d)(3) of this rule~~, an objection may be made at a hearing or ~~the~~ trial ~~or hearing~~ to ~~receiving in evidence~~ the admission of any deposition testimony ~~or part thereof for any reason which would require the exclusion of the evidence~~ that would be inadmissible if the witness were ~~then~~ present and testifying; or if the trial court directs, such objections may be heard and determined prior to trial.

(c) ~~(Not Used).~~ Transcript, Form of Presentation, and Notice of Use.

(1) Transcript. Unless the court orders otherwise, a party must:

(A) provide the court with a transcript of any deposition testimony the party offers, but may provide the court with the testimony in audio or audiovisual form as well; or

(B) if the deposition was not recorded stenographically, provide the court and the other parties with a transcript of the portions of the deposition requiring a ruling from the court.

(2) Form. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in audio or audiovisual form, if available, unless the court for good cause orders otherwise.

(3) Notice. A party who may offer a deposition in audio or audiovisual form for any purpose other than impeachment must give the other parties reasonable written notice before the hearing or trial and an opportunity to object to use of all or part of the deposition.

(d) Waiver of Objections ~~Effect of Errors and Irregularities in Deposition~~.

(1) ~~As to~~ To the Notice. An objection to an error or irregularity ~~All errors and irregularities~~ in ~~the~~ a deposition notice ~~for taking a deposition are~~ is waived unless ~~written objection is~~ promptly served ~~upon~~ in writing on the party giving the notice.

(2) To the Officer's Qualifications. An objection based on ~~As to Disqualification of Officer. Objection to taking a deposition because of~~ disqualification of the officer before whom ~~it~~ a deposition is to be taken is waived ~~unless made before the taking of~~ if not made:

(A) before the deposition begins; or

(B) promptly after the basis for ~~as soon thereafter as the~~ disqualification becomes known or~~, could be discovered~~ with reasonable diligence, could have been known.

(3) To the ~~As to~~ Taking of the Deposition.

(A) Objection to Competence or Relevance. An objection to a deponent's competence – or to the competence or relevance ~~Objections to the competency of a witness or to the competency or relevancy~~ of testimony – is ~~are~~ not waived by a failure to make ~~them~~ the objection before or during the ~~taking of the~~ deposition, unless the ground ~~of the objection~~ for it ~~is one which~~ might have been corrected ~~obviated or removed if presented~~ at that time. But if a deposition was recorded by audio or audiovisual means only, the objection is waived by the failure to make it to the court before the hearing or trial unless the court, for good cause, excuses the failure. ~~In a deposition recorded and preserved by nonstenographic means, such objections shall be made to the court before the trial or hearing, or such objections will be waived unless otherwise ordered by the court.~~

(B) Objection to an Error or Irregularity. An objection to an error or irregularity ~~Errors and irregularities occurring~~ at ~~the~~ an oral examination is waived if:

(i) it relates to ~~in~~ the manner of taking the deposition, ~~in~~ the form of a question ~~the questions~~ or answer ~~answers~~, ~~in~~ the oath or affirmation, a party's ~~or in the~~ conduct ~~of parties~~, ~~and errors of any kind which~~ or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition. ~~be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the depositions.~~

(C) Objection to a Written Question. An objection ~~Objections~~ to the form of a written question ~~questions submitted~~ under Rule 31 is ~~are~~ waived ~~unless~~ if not served in writing ~~upon~~ on the party ~~propounding them~~ submitting the question within the time ~~allowed~~ for serving responsive questions or, if the question is a recross-question, ~~the succeeding cross or other questions and~~ within 7 ~~ten~~ days after being served with it ~~service of the last questions authorized~~.

(4) As to Interpreting, Completing and Returning the Deposition. An objection to how the interpreter interpreted the questions or answers, how the officer transcribed the testimony, or how the officer prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition is waived unless a motion to suppress the deposition is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

COMMENTS TO ~~RULE 32~~ § 6-332

~~32(a)(3) creates an exception to the hearsay rule. In other words, a deposition does not have to satisfy the requirements of Neb. Rev. Stat. § 27-804(2)(a) to be admissible under this subdivision. See *Walton v. Patil*, 279 Neb. 974, 984, 783 N.W.2d 438, 446 (2010). Under subdivision (3)(B), the witness must be at least 100 miles away in order to use the deposition because Neb. Rev. Stat. § 25-1227 establishes 100 miles as the maximum distance a witness must ordinarily travel for a civil trial. Subdivision (3)(E) allows~~

~~use of a deposition under exceptional circumstances; under subdivision (3)(F) the court may authorize use of the deposition in the absence of exceptional circumstances if the application is made before the deposition is taken.~~

~~32(d) The rule includes an objection to interpretation as one that may be raised by a motion to suppress the deposition. The objection can only be raised if a request to review the deposition was made pursuant to Rule 30(e)(1). The deponent may correct alleged errors in interpretation by signing a statement listing the changes and the reasons for them pursuant to Rule 30(e)(1). The errors, however, may be so extensive that the deposition is inherently inaccurate. In that case, the deponent may file a motion to suppress the deposition in its entirety. See Rule 30(e)(3). So too may an opposing party. An opposing party may also file a motion to suppress the deposition in part on the ground that there were errors in interpreting a limited but material part of the deposition and those errors render that part inherently inaccurate. If the court suppresses a deposition in whole or in part, the court may order the deposition to be retaken in whole or in part.~~

~~It should be noted that the rule requires the motion to be filed promptly. A motion may be untimely if the party failed to act with reasonable diligence in obtaining a transcript or recording of the deposition or in reviewing the transcript or recording.~~

[1] The rule governs the use of depositions in court proceedings. The rule was amended in 2015 to address interpreters and was amended again in 2024 to address issues raised by depositions that are recorded by audio or audiovisual means.

[2] Subpart (a)(4) creates an exception to the hearsay rule. In other words, a deposition does not have to satisfy the requirements of Neb. Rev. Stat. § 27-804(2)(a) to be admissible under this subpart. See *Walton v. Patil*, 279 Neb. 974, 984 (2010). Under subpart (a)(4)(B), the witness must be at least 100 miles away in order to use the deposition because Neb. Rev. Stat. § 25-1227 establishes 100 miles as the maximum distance a witness must ordinarily travel for a civil trial. Subpart (a)(4)(E) allows use of a deposition under exceptional circumstances; under subpart (a)(3)(F), the court may authorize use of the deposition in the absence of exceptional circumstances if the application is made before the deposition is taken.

[3] Recording a deposition solely by audio or audiovisual means can reduce costs. Reducing costs is especially important for self-represented parties and parties represented pro bono. But the interests of the court become relevant when a party seeks to use the deposition at a hearing or trial. It is usually easier for a court to review a transcript rather than a recording. Subpart (c)(1)(B) accommodates the competing interests by requiring a party who took a deposition non-stenographically to provide the court and the other parties with "a transcript of the portions of the deposition requiring a ruling from the court." If there are objections on just a few pages of the deposition, then the party only needs to have a transcript prepared of those few pages. It should be noted that subpart (c)(1) requires a party to provide a transcript "[u]nless the court orders otherwise." The quoted language makes it clear that the court has the discretion to dispense with the transcript requirement if compliance would be unnecessary or especially onerous.

[4] Depositions that are recorded by stenographic means are sometimes recorded by audio or audiovisual means as well. If the deposition is used at trial, the lawyers may read part or all of the

deposition testimony at trial. But the reality is that jurors are more likely to pay attention to a recording of a deponent testifying than they are to lawyers reading the questions and answers. Subpart (c)(2) reflects that reality by requiring that a deposition recorded by audio or audiovisual means must be presented in audio or audiovisual form in a jury trial if any party requests that it be presented in that form. The requirement does not apply if deposition testimony is used for impeachment purposes, however, or if the court determines that there is good cause for not presenting the testimony in that form.

[5] Section 6-332(d)(3)(A) provides that if a deposition was recorded by audio or audiovisual means only, competency and relevance objections are waived unless they are made to the court before the hearing or trial. It makes sense to resolve competency and relevance objections beforehand – but a party needs to know beforehand that a deposition will be used so that it can raise its objections beforehand. Therefore, subpart (c)(3) provides that if a party that plans to use an audio or audiovisual deposition for any purpose other impeachment, the party must give the other parties reasonable written notice before the hearing or trial.

[6] One of the objections that can be raised by a motion to suppress is an objection to how the interpreter interpreted the questions or answers. The objection can be raised only if a request to review the deposition was made pursuant to § 6-330(e)(1). The deponent may correct alleged errors in interpretation by signing a statement listing the changes and the reasons for them. The errors, however, may be so extensive that the deposition is inherently inaccurate. In that case, the deponent or a party may file a motion to suppress the deposition in its entirety. See § 6-330(e)(3). A party may also file a motion to suppress the deposition in part on the grounds that there were errors in interpreting a limited but material part of the deposition and those errors render that part inherently inaccurate. If the court suppresses a deposition in whole or in part, the court may order the deposition to be retaken in whole or in part.

[7] Subpart (d)(4) provides that a motion to suppress must be promptly filed. A motion may be untimely if the party failed to act with reasonable diligence in obtaining a transcript or recording of the deposition or in reviewing the transcript or recording.

§ 6-333. Interrogatories to parties.

~~(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories 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 upon that party. Unless otherwise permitted by the court for good cause shown, no party shall serve upon any other party more than fifty interrogatories. Each question, subquestion, or subpart shall count as one interrogatory.~~

~~Each interrogatory shall be repeated and answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if~~

~~any, within thirty days after the service of the interrogatories, except that a defendant may serve answers or objections within forty-five days after service of the summons upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.~~

~~(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b) and the answers may be used to the extent permitted by the Nebraska Evidence Rules.~~

~~An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.~~

~~(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 as to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.~~

(a) In General.

(1) Number. Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 50 written interrogatories, including all discrete subparts. The court may grant leave to serve additional interrogatories for good cause shown.

(2) Scope. An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete or some other time.

(3) Time; Editable Format. Interrogatories may be served on the plaintiff after commencement of the action and on any other party with or after service of the summons on that party. Upon demand, the party served with the interrogatories must be given an electronic copy of the interrogatories in a readily editable format.

(b) Answers and Objections.

(1) Responding Party. The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, a governmental agency, or other entity, by any officer or agent, who must furnish the information available to the party.

(2) Time to Respond. The responding party must serve its answers and any objections within 30 days after being served with the interrogatories, except that a defending party may serve its answers and objections within 45 days after being served with the summons or 30 days after being served with the interrogatories, whichever is longer. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(3) Answering Each Interrogatory. Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) Objections. If a party objects to an interrogatory, the party must state the grounds for the objection and must also explain with specificity why the interrogatory is objectionable on those grounds. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) Form of Answer or Objection. The answering or objecting party must reproduce each interrogatory and then state the party's answer or objection to the interrogatory.

(6) Signature. The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) Use. An answer to an interrogatory may be used to the extent allowed by the Nebraska Evidence Rules.

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

COMMENTS TO ~~RULE 33~~ § 6-333

~~33(a) This subsection differs from the federal rules and former Neb. Rev. Stat. §§ 25-1267.37 and 25-1267.38 (Repealed 1982) by imposing a limit of 50 interrogatories upon any party, unless the court permits more for good cause shown. Because interrogatories are particularly subject to being abused or improperly used, this discovery device has been limited unless a party can show that the complexity of the case requires the use of additional interrogatories.~~

~~33(b) This subsection expands former Neb. Rev. Stat. § 25-1267.38 (Repealed 1982) and follows the federal rules by allowing interrogatories that involve opinions. This follows the federal rule by eliminating an unnecessary restriction on interrogatories. The overall limit on interrogatories and consequent elimination of extensive sets of interrogatories should minimize any chance for abuse.~~

~~33(c) This follows the federal rule; it is a procedure for handling discovery from voluminous records that is necessary for certain large cases. No Nebraska statutory section served as precedent for this subsection of the rules.~~

[1] Although interrogatories can be a helpful discovery method, they can also be abused. The rule therefore imposes a numerical limit on interrogatories. A party may not serve more than 50 interrogatories, including all discrete subparts, on another party unless the court orders or the parties stipulate otherwise. The rule does not specify how to count interrogatories. In applying the numerical limit imposed by Rule 33 of the Federal Rules of Civil Procedure, most federal courts have said that an interrogatory with subparts should be counted as one interrogatory if the "subparts are logically or factually subsumed within and necessarily related to the primary question." *Erfindergemeinschaft Uropep GbR v. Eli Lilly and Company*, 315 F.R.D. 191, 196 (E.D. Tex. 2016).

[2] The rule requires a party responding to an interrogatory to reproduce the interrogatory and then state its answer or objection. That is easier to do if the party is served with the interrogatories in a readily editable electronic format such as Word or WordPerfect. But parties are sometimes served with interrogatories in a paper format or in a non-readily editable electronic format such PDF. Subpart (a)(3) was added in 2024 to address the situation. The subpart requires the serving party to provide the responding party with an electronic copy of the interrogatories in a readily editable format if the responding party asks for such a copy.

[3] Although the 2024 Amendments made significant stylistic changes to the rule, they made very few substantive changes. One of the substantive changes was the addition of subpart (b)(4). The subpart requires an objecting party to state the grounds for its objection and to explain why the interrogatory is objectionable on those grounds. The purpose of the requirement is to eliminate what are often called "boilerplate objections" – in other words, objections that state objections in a conclusory way (for example, "burdensome, oppressive, and irrelevant") without explaining the specific reasons for the objection. Requiring parties to state the specific reasons for the objection may discourage the parties from making baseless objections and may also help them resolve discovery disputes informally by identifying the specific problems that the objecting party has with the interrogatory.

[4] Subpart (b)(4) also provides that an objection is waived if the party fails to make the objection in a timely manner. Treating such a failure as a waiver, however, may sometimes be unduly harsh. The rule therefore gives the court the discretion to excuse the failure if there is good cause for doing so.

§ 6-334. ~~Production of~~ Producing documents, electronically stored information, and tangible things ~~and entry upon,~~ or entering onto land, for ~~Inspections~~ inspection and other purposes.

(a) ~~Scope. Any~~ In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) ~~To~~ to produce and permit the requesting party or its representative ~~making the request, or someone acting on his or her behalf,~~ to inspect, copy, test, or sample the following items in the responding party's possession, custody, and control:

(A) 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 information can be obtained~~)~~ either directly or, if necessary, after translation ~~translated, if necessary,~~ by the responding party ~~respondent~~ into a reasonably usable form;~~,~~ or

(B) ~~to inspect and copy, test, or sample~~ any 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 ~~To~~ permit entry ~~upon~~ onto designated land or other property ~~in the possession or control of~~ possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample ~~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 on it. ~~thereon, within the scope of Rule 26(b).~~

(b) ~~Procedure~~ Time; Editable Format. The request may~~, without leave of court,~~ be served on ~~upon~~ the plaintiff after commencement of the action and on ~~upon~~ any other party with or after service of the summons ~~upon~~ on that party. Upon demand, the party served with the request must be given an electronic copy of the request in a readily editable format.

(c) Procedure.

(1) Contents of the Request. The request:

(A) must ~~shall set forth the items to be inspected either by individual item or by category, and~~ describe ~~each item and category~~ with reasonable particularity each item or category of items to be inspected;~~. The request shall~~

(B) must specify a reasonable time, place, and manner ~~of making~~ for the inspection and performing the related acts; and

(C) ~~The request~~ may specify the form or forms in which electronically stored information is to be produced.

(2) Reponses and Objections.

(A) Time to Respond. The party ~~upon~~ to whom the request is directed must respond in writing ~~served shall serve a written response~~ within 30 days after ~~the service of the request,~~ being served, except that a ~~defendant~~ defending party must respond ~~may serve a response~~ within 45 days after being served ~~service of~~ with the summons or 30 days after being served with the request, whichever is longer ~~upon that defendant~~. ~~The court may allow a~~ A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) Responding to Each Item. The responding party must reproduce each request and then state the party's response to the request. For ~~The response shall state, with respect to~~ each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.~~,~~ ~~unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, in which event the reasons for objection shall be stated.~~

(C) Objections. If a party objects to a request, the party must state the grounds for the objection and must also explain with specificity why the request is objectionable on those grounds. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(i) Withholding Materials. An objection must state whether any responsive materials are being withheld on the basis of that objection.

(ii) Partial Objection. An objection to part of a request must specify the part and produce or permit inspection of the rest. ~~If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts.~~

(D) Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a ~~If objection is made to the~~ requested form ~~or forms~~ for producing electronically stored information. If the responding party objects to a requested form ~~–~~, 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.~~

(E) Producing the Documents or Electronically Stored Information. Unless ~~the parties~~ otherwise stipulated or ordered by ~~agree, or~~ the court, these procedures apply to producing documents or electronically stored information ~~otherwise orders~~:

(~~1~~i) A ~~a~~ party ~~who~~ must produce ~~produces~~ documents ~~for inspection shall produce them~~ as they are kept in the usual course of business or ~~shall~~ must organize and label them to correspond ~~with~~ to the categories in the request;

(~~2~~ii) ~~if~~ If a request does not specify ~~the~~ a form ~~or forms~~ for producing electronically stored information, a ~~responding~~ party must produce it ~~the information~~ in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms ~~that are reasonably usable~~; and

(~~3~~iii) ~~a~~ A party need not produce the same electronically stored information in more than one form.

~~(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.~~

COMMENTS TO ~~RULE 34~~ § 6-334

~~This rule follows the federal rule and changes former Nebraska law, Neb. Rev. Stat. § 25-1267.39 (Repealed 1982), by allowing production by notice instead of by court order. Many such examinations can be handled without need of a motion and order, so the proposal eliminates unnecessary steps. Rule 37 still allows a party to seek an order if that step is necessary.~~

[1] A party responding to requests for production or entry must state for each request whether it objects to the request or will honor the request. The original version of the rule implied (but did not explicitly state) that the responding party must first reproduce the request and then state its objection or response. The 2024 Amendments made the requirement explicit by adding the following sentence in subpart (c)(2)(B): "The responding party must reproduce each request and then state the party's response to the request." As a result, the format for responding to interrogatories, requests for documents, and requests for admission is the same.

[2] It is easier to reproduce each request if the requests are served in an electronic format. Subpart (b) therefore requires the requesting party to provide the responding party with an electronic copy of the requests in a readily editable format if the responding party asks for such a copy. Comment [4] of the Comments on § 6-333 provides examples of what are and what are not readily editable formats.

[3] Section 6-334 was promulgated at a time when documents were in paper form and complying with the request meant physically collecting the documents and making them available for the requesting party to inspect so that the party could decide which ones to photocopy. Therefore, the rule required the responding party to serve a response stating that (1) the party objected to the request or (2) the party would make the requested documents available for inspection. But as electronic documents began replacing paper documents, responding parties began providing documents in electronic form rather than making them available for inspection in paper form. In 2024, the rule was amended to bring the rule into conformity with the practice by giving the responding party the option of stating that it will produce the documents instead of making them available for inspection. The option appears in subpart (c)(2)(B).

[4] Like a party objecting to interrogatories, a party objecting to a § 6-334 request must state the grounds for its objection and explain why the request is objectionable on those grounds. The requirement was added by the 2024 Amendments and appears in subpart (c)(2)(C). The reasons for the requirement are discussed in Comment [2] of the Comments on § 6-333.

[5] Subpart (c)(2)(C) also provides that an objection is waived if the party fails to make the objection in a timely manner. Treating such a failure as a waiver, however, may sometimes be unduly harsh. The rule therefore gives the court the discretion to excuse the failure if there is good cause for doing so.

[6] In the past, objecting parties have sometimes produced documents without specifically stating that they were withholding any documents on the basis of the objection. As a result, the requesting party might have believed that it received all the responsive documents when in fact it did not. To ensure that the requesting party knows whether any documents have been withheld, subpart (c)(2)(C)(i) now requires an objecting party to state whether any responsive materials are being withheld on the basis of the objection. The objecting party is not required to provide a detailed description of the documents; a simple statement that documents were withheld is sufficient to put the requesting party on notice that it may need to pursue the issue.

[7] The original version of the rule included a subpart that recognized the possibility of filing an independent action against a nonparty for production of documents or tangible things or for entry onto land. The subpart was deleted by the 2024 Amendments because parties no longer need to file an independent action to obtain discovery from nonparties. Parties can proceed under § 6-334(A) to obtain discovery from nonparties for actions pending in Nebraska and under § 6-330(A) for actions pending in other states.

~~**§ 6-334A. Discovery from a nonparty without a deposition.**~~

~~(a) Procedure.~~

~~(1) Scope. Any party may, by subpoena without a deposition:~~

~~(A) require the production for inspection, copying, testing, or sampling of designated books, papers, documents, tangible things, or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, and other data compilations from which information can be obtained) translated if necessary by the owner or custodian into reasonably usable form, that are in the possession, custody, or control of a person who is not a party and within the scope of Rule 26(b); or~~

~~(B) obtain entry upon designated land or other property within the scope of Rule 26(b) that is in the possession or control of a person who is not a party for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon.~~

~~(2) Notice. A party intending to serve a subpoena pursuant to this rule shall give notice in writing to every other party to the action at least 10 days before the subpoena will be issued. The notice shall state the name and address of the person who will be subpoenaed, the time and place for production or entry,~~

and that the subpoena will be issued on or after a stated date. A designation of the materials sought to be produced shall be attached to or included in the notice.

Such notice may be given by a party other than a plaintiff at any time. Such notice may not be given by a plaintiff until the time at which Rule 30(a) would permit a plaintiff to take a deposition.

(3) Issuance. A subpoena may be issued pursuant to this rule, either by a request to the clerk of the court or by an attorney authorized to do so by statute, at any time after all parties have been given the notice required by subsection (2). The subpoena shall identify all parties who were given notice that it would be issued and the date upon which each of them was given notice. A subpoena pursuant to this rule shall include or be accompanied by a copy of this rule.

(4) Time, manner, and return of service. A subpoena pursuant to this rule shall be served either personally by any person not interested in the action or by registered or certified mail not less than 10 days before the time specified for compliance. The person making personal service shall make a return showing the manner of service to the party for whom the subpoena was issued.

(b) Protection of Other Parties.

(1) Objection Before Issued. Before the subpoena is requested or issued any party may serve a written objection on the party who gave notice that it would be issued. The objection shall specifically identify any intended production or entry that is protected by an applicable privilege, that is not within the scope of discovery, or that would be unreasonably intrusive or oppressive to the party. No subpoena shall demand production of any material or entry upon any premises identified in the objection. If the objection specifically objects that the person served with the subpoena should not have the option to deliver or mail copies of documents or things directly to a party, the subpoena shall not be issued unless all parties to the lawsuit mutually agree on the method for delivery of the copies.

(2) Order. The party who gave notice that a subpoena would be issued may apply to the court in which the action is pending for an order with respect to any discovery for which another party has served a written objection. Upon hearing after notice to all parties the court may order that the subpoena be issued or not issued or that discovery proceed in a different manner, may enter any protective order authorized by Rule 26(c), and may award expenses as authorized by Rule 37(a)(4).

(3) Protective Order. After a subpoena has been issued any party may move for a protective order under Rule 26(c).

(c) Protection of the Person Served with a Subpoena.

(1) Avoiding Burden and Expense. A party or an attorney who obtains discovery pursuant to this rule shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court by 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 of the person subject to the subpoena and reasonable attorney fees.

(2) Responding to the Subpoena.

(A) A person served with a subpoena pursuant to this rule shall permit inspection, copying, testing, or sampling either where the documents or tangible things are regularly kept or at some other reasonable place designated by that person. If the subpoena states that the person served has an option to deliver or mail legible copies of documents or things instead of inspection, that person may condition the preparation of the copies on the advance payment of the reasonable cost of copying.

(B) A person served with a subpoena pursuant to this rule may, within 10 days after service of the subpoena, serve upon the party for whom the subpoena was issued a written objection to production of any or all of the designated materials or entry upon the premises. If objection is made, the party for whom the subpoena was issued shall not be entitled to production of the materials or entry upon premises except pursuant to an order of the court. If an objection has been made, the party for whom the subpoena was issued may, upon notice to all other parties and the person served with the subpoena, move at any time in the district court in the county in which the subpoena is served for an order to compel compliance with the subpoena. Such an order to compel production or to permit entry shall protect any person who is not a party or an officer of a party from significant expense resulting from complying with the command.

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

(A) fails to allow reasonable time for compliance,

(B) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(C) subjects a person to undue burden.

(d) Duties in Responding to Subpoena.

(1) Production. 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.

(2) Objection. When information subject to a subpoena is withheld on an objection that it is privileged, not within the scope of discovery, or otherwise protected from discovery, 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 party who requested the subpoena to contest the objection.

(e) Coordination.

~~(1) Copies. If the party for whom the subpoena was issued creates or obtains copies of documents or things, that party shall make available a duplicate of such copies at the request of any other party upon advance payment of the reasonable cost of making the copies.~~

~~(2) Inspection. If a notice of intent to serve a subpoena designates that the subpoena will require entry upon land or other property for the purposes permitted by subsection (a)(1)(B), any other party shall, upon request to the party who gave the notice, be named in the subpoena as also attending at the same time and place.~~

§ 6-334(A). Subpoenas commanding nonparties to produce documents, electronically stored information, and tangible things or to allow entry onto land, for inspection and other purposes.

(a) In General.

(1) Scope of Subpoena. A party may serve a subpoena that commands a person to produce and permit the party or its representative to do the following at a specified time and place:

(A) inspect, copy, test, or sample the following items that are within the scope of Rule 26(b) and in the person's possession, custody, or control:

(i) 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 information can be obtained either directly or, if necessary, after translation by the responding person into a reasonably usable form; or

(ii) any designated tangible things; or

(B) permit entry onto designated land or other property possessed or controlled by the person when such entry is within the scope of Rule 26(b) so that the party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(2) Option to Provide Copies. The subpoena may give the person the option of (A) producing documents or electronically stored information for inspection or (B) providing copies of the documents or information by the date specified in the subpoena. If the subpoena gives the person such an option, the person may condition preparation of the copies on advance payment of the reasonable cost of preparing the copies.

(3) Subpoena for Deposition and Documents. Pursuant to Neb. Rev. Stat. § 25-1224, the subpoena may command the person to appear and testify at a deposition at the time and place specified for production. Such a subpoena must comply with this rule and contain the information that the statutes and Rule 30(b)(1)(E) require for deposition subpoenas. It must also contain a statement of the method for recording the testimony.

(b) Prior Notice to Parties.

(1) A party who intends to serve a subpoena pursuant to this rule must serve a written notice on every other party at least 14 days before issuance of the subpoena. Leave of court or a stipulation of the parties is required only if a plaintiff seeks to serve the notice within 30 days after service of the summons and no defending party has served such a notice.

(2) The notice must state the name and address of the person to whom the subpoena will be directed, the date on or after which the subpoena will be issued, the time and place of the inspection or entry, and whether the person will be given the option of providing the party with copies of the designated documents or electronically stored information. The notice must also contain a designation of (i) the documents or electronically stored information to be produced or (ii) the land or other property to be entered.

(c) Objections; Request. Before the subpoena is issued, any party may serve a written objection to the subpoena on all the other parties, including the party who gave written notice of the intent to serve the subpoena. If the subpoena is for entry onto land, any party may request that it be named in the subpoena as also entering at the same time and place.

(1) Objection to Production or Entry. A party may object to one or more of the designations in the subpoena on the grounds that the designated production or entry is (i) protected by a privilege, in which case the party must identify the applicable privilege, (ii) not within the scope of Rule 26(b), or (iii) would be unreasonably intrusive or oppressive to the party. The objection must specify the designated production or entry to which the objection is directed and must also specify the grounds for the objection.

(2) Unless the party withdraws the objection or the court orders otherwise, a subpoena may not command the production of any items or the entry onto any land to which an objection has been made pursuant to subpart (1) of this rule.

(3) The party who intends to serve the subpoena may move for an order on the objection. The motion must be filed in the court where the action is pending and served on the other parties. The court may sustain or overrule the objection in whole or in part, order that discovery proceed in a different manner, or enter a protective order pursuant to Rule 26(d). The court may also award expenses as authorized in Rule 37(a)(5).

(d) Issuance; Contents; Form of Production; Service.

(1) Issuance. A subpoena may be issued pursuant to this rule by either the clerk of the court where the action is pending upon the request of a party or by an attorney on behalf of the court if the attorney is authorized to practice in the court.

(2) Contents. A subpoena issued pursuant to this rule must:

(A) state the name of the court from which it is issued, the title of the action, and the case number;

(B) command the person to whom it is directed to produce the designated documents, electronically stored information, or things or permit the designated entry;

(C) if for production, specify the time and place for the production or give the person the option of producing the designated documents or electronically stored information for inspection at the specified time and place or providing copies of them by the specified date;

(D) if for entry, specify the time and place for the designated entry and state the name of each party entering;

(E) state the name of each party who was given written notice that the subpoena would be issued and the date on which the party was given notice; and

(F) include this rule, either in the text of the subpoena or as an attachment to the subpoena.

(3) Form of Production. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(4) Reasonable Particularity. The designations in the subpoena must describe the documents, electronically stored information, or items with reasonable particularity.

(5) Service on the Person; Time; Return of Service. A subpoena issued pursuant to this rule must be served on the person to whom it is directed no less than 14 days before the time specified for production or entry. The subpoena may be served by any person who is authorized by Neb. Rev. Stat. § 25-1223(9) to serve a subpoena. Service must be made in the manner authorized by Neb. Rev. Stat. § 25-1226(1) for service of a deposition subpoena and the return of service must be made in the manner specified by Neb. Rev. Stat. § 25-1228(2).

(6) Service on the Other Parties. The party who serves a subpoena on the person pursuant to this rule must also serve a copy of the subpoena on the other parties no less than 14 days before the time specified for production or entry.

(7) Protective Order. After a subpoena has been issued, any party or the person served with a subpoena may move for a protective order pursuant to Rule 26(d).

(8) Avoiding Undue Burden or Expense. A party or an attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court by which the subpoena was issued must enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorney fees – on a party or attorney who fails to comply.

(e) Objections; Motions. If a person served with a subpoena believes that compliance with the subpoena should not be required in whole or in part, the person may serve an objection to the subpoena or file a motion to quash or modify the subpoena.

(1) Objection.

(A) Making an Objection. A person served with a subpoena may serve on the party serving the subpoena an objection to producing any or all of the designated items, to producing electronically stored information in the specified form or forms, or to allowing the designated entry. The objection must be in writing and served within 14 days after the subpoena was served. The party on whom the objection was served must promptly serve a copy of the objection on all the other parties to the action.

(B) Waiver of Objection. The objection must state the grounds for the objection and must also state with specificity why the subpoena is objectionable on those grounds. Any ground not stated in a timely objection is waived unless (i) the objection is based on a privilege or the work product protection or (ii) the court, for good cause, excuses the failure.

(C) Ruling on an Objection. If the person serves an objection, the person is not required to produce the objected-to items or to permit entry unless a court orders otherwise. The party serving the subpoena may file a motion in the court where the action is pending for an order overruling the objection and compelling compliance with the subpoena. An order compelling compliance must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(2) Motion to Quash. A person served with a subpoena may file a motion to quash or modify the subpoena. The motion must be filed in the court where the action is pending before the time specified for compliance or within 14 days after the subpoena was served, whichever is earlier, and must also be served on all the parties. The court must grant the motion to quash or modify if the subpoena:

(A) fails to allow a reasonable time for compliance;

(B) requires disclosure of privileged or other protected matter, and no exception or waiver applies; or

(C) subjects the person to undue burden.

(f) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information.

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the subpoena.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person must produce it in a form or forms in which it is ordinarily maintained or in a reasonably useable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person need not produce the same electronically stored information in more than one form.

(2) Claiming Privilege or Protection. When a person withholds subpoenaed information by claiming that the information is privileged or subject to protection as work product, the party must:

(A) expressly make the claim; and

(B) describe the nature of the documents, communications, or tangible not produced – and do so in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(g) Production of Privileged or Protected Documents. Rule 26(b)(5) applies to documents or electronically stored information produced in response to a subpoena.

(h) Duplicates. If the party who served the subpoena creates or obtains copies of any items from the person served with the subpoena, the party must make duplicate copies available to any other party who requests them and pays in advance the reasonable cost of making the duplicates.

COMMENTS TO ~~RULE 34A~~ § 6-334(A)

~~Authority to issue a subpoena pursuant to this rule is governed by Neb. Rev. Stat. § 25-1273. The procedure is similar to the practice for nonparty nondeposition discovery under Fed. R. Civ. P. 45, with certain topics such as the time of prior notice and coordination of the disclosure more specifically defined. This procedure is optional, so a party may elect to use a deposition or any other available discovery procedure instead.~~

[1] Section 6-334(A) specifies the procedures for obtaining documents and other tangible things from a nonparty as well as for entering onto land possessed or controlled by a nonparty. Most of the rule was promulgated pursuant to the authority granted to the Supreme Court by Neb. Rev. Stat. § 25-1273. The provisions on subpoenas duces tecum were promulgated pursuant to the authority granted to the Supreme Court by Neb. Rev. Stat. § 25-1224(2). The rule was substantially reorganized and rewritten in 2024 to make it more comprehensive and readable.

[2] Subpart (a)(3) provides that a subpoena duces tecum must comply with § 6-334(A). Because a subpoena duces tecum must comply with the rule, a party cannot circumvent the prior notice provisions of

subpart (b) by issuing a subpoena duces tecum instead of a document subpoena. Subpart (a)(3) also provides that a subpoena duces tecum must contain the interpreter statements required by § 6-330(b)(1)(E), the information required by Neb. Rev. Stat. § 25-1223(4), and a statement of the recording method.

[3] The 2024 Amendments incorporated the current statutory requirements for issuing and serving subpoenas. The Amendments also harmonized much of the wording and many of the procedures in §§ 6-334 and 6-334(A). Like § 6-334, § 6-334(A) as amended provides that the documents sought must be described with reasonable particularity (subpart (d)(4)), contains provisions on the form in which electronically stored information should be produced (subparts (d)(3) and (e)(1)(a)), specifies the information that must be provided when privileged or protected documents are withheld (subpart(f)(2)), and states that § 6-326(b)(5) applies when privileged or protected documents are inadvertently produced (subpart (g)).

[4] Although both rules give the recipient the option of producing copies of the documents instead of making the documents available for inspection and copying, they do so in different ways. Under § 6-334(A)(a)(2), the recipient has the option only if the subpoena gives the recipient the option. Under § 6-334, the recipient always has the option. See § 6-334(c)(2)(B). The reason for the difference is that a subpoena is a command from the court and a request is just that, a request. If the recipient of a subpoena has an option on how to comply, that option should be stated in the subpoena.

[5] The rule originally provided that if any party objected to the issuance of a subpoena that gave the recipient the option of producing the documents, the subpoena could not be issued until the parties agreed on the method for producing the documents. The provision was deleted by the 2024 Amendments.

[6] The 2024 Amendments reset most time periods of less 30 days in multiples of seven. The minimum time period for parties and subpoena recipients to serve objections is now 14 days rather than 10 days.

[7] Both § 6-334 and § 6-334(A) provide that objections are waived if they are not timely made. There are differences, however, because the response time for a subpoena is shorter than the response time for a request. Section 6-334(A)(e)(1)(A) provides that objections to a subpoena must be made in writing within 14 days after the subpoena is served. The failure to make a timely objection waives the objection unless (1) the court finds that there was good cause for the failure or (2) the objection is based on a privilege or the work product protection.

[8] Unlike objections based on relevance or burden, objections based on privileges and the work product protection are usually document-specific objections that require an actual review of the individual documents. Subpoena recipients may not be able to complete their review of the documents and provide the information required by subpart (f)(2) within 14 days.

[9] The judge presiding over a case is in the best position to rule on discovery motions in the case. Therefore, the rule requires that motions related to the issuance and enforcement of a subpoena must be filed in the court in which the action is pending. Those include motions for a ruling on an objection to the

issuance of a subpoena (subpart (b)(3)), motions to compel compliance with the subpoena (subpart (e)(1)(C)), and motions to quash or modify the subpoena (subpart (e)(2)).

§ 6-335. Physical and mental examinations ~~of persons~~.

(a) Order for Examination.

(1) In General. The court where the action is pending may order a party whose ~~When the~~ mental or physical condition – ~~(~~including ~~the~~ blood group~~)~~ – ~~of a party, or of a person in the custody or under the legal control of a party,~~ is in controversy~~, the court in which the action is pending may order the party~~ to submit to a physical or mental examination by one or more ~~physicians, or other persons~~ suitably licensed or certified examiners ~~under the laws to engage in a health profession, or to produce for examination the person in his or her custody or legal control~~. The court has the same authority to order a party to produce for examination a person who is in the party's custody or under the party's legal control.

(2) Motion and Notice; Contents of the Order. The order:

(A) may be made only on motion for good cause ~~shown~~ and on ~~upon~~ notice to all parties ~~the person to be examined~~; and ~~to all parties and shall~~

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as ~~and~~ the person or persons who will perform it ~~by whom it is to be made~~.

(b) Examiner's Report ~~of Examining Physician~~.

(1) Request by the Party or Person Examined. ~~If requested by the party against whom an order is made under subdivision (a) of this rule or the person examined, the party~~ The party who moved for ~~causing~~ the examination must, on request, ~~to be made shall~~ deliver to the requester ~~him or her~~ a copy of the examiner's ~~a detailed written~~ report ~~of the examining physician setting out his or her findings, including results of all tests made, diagnoses, and conclusions~~, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) Contents. The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) Request by the Moving Party. After delivering the reports, ~~delivery~~ the party who moved for ~~causing~~ the examination ~~shall be entitled upon~~ may request – and is entitled to receive – from the party against whom the examination order was issued ~~is made a~~ like reports ~~report~~ of all earlier or later examinations ~~any examination, previously or thereafter made,~~ of the same condition. But those reports need not be delivered by the party with custody or control of the person examined~~, unless, in the case of a report of examination of a person not a party,~~ if the party shows that ~~he or she is unable to~~ it could not obtain them ~~it~~.

(4) Failure to Deliver a Report. The court on motion may ~~make an~~ order – on just terms – that ~~against~~ a party ~~requiring delivery of a~~ deliver the report of an examination. If the report is not provided ~~on such terms as are just, and if a physician fails or refuses to make a report~~, the court may exclude ~~his or her~~ the examiner's testimony ~~if offered~~ at ~~the~~ trial.

~~(2) (Not used).~~

(5 ~~3~~) Scope. This ~~subdivision~~ subpart (b) applies also to an examination ~~examinations~~ made by the parties' agreement ~~of the parties~~, unless the agreement ~~expressly provides~~ states otherwise. This subpart ~~subdivision~~ does not preclude ~~discovery of a~~ obtaining an examiner's report ~~of an examining physician~~ or deposing an examiner under ~~the taking of a deposition of the physician in accordance with the provisions of any~~ other rules ~~rule~~.

COMMENTS TO ~~RULE 35~~ § 6-335

~~35(a) This rule follows the federal rule and expands former Neb. Rev. Stat. § 25-1267.40 (Repealed 1982). A person under the control of a party is now included in this rule. The court may order more than one examination. The health professions that require a license or certificate are defined in Neb. Rev. Stat. § 71-102.~~

~~35(b) This section follows the federal rules and establishes a useful procedure for exchange of medical reports. Subdivision (b)(2) of the federal rule is not used because the Nebraska Evidence Rules contain a direct waiver of the privilege. See Neb. Rev. Stat. § 27-504.~~

[1] The requirement that the examination be conducted by a suitably licensed or certified examiner mirrors the requirement in Rule 35 of the Federal Rules of Civil Procedure and gives the court the discretion to assess the examiner's credentials to ensure that the examiner has the expertise necessary to perform the proposed examination.

[2] The rule originally required that notice of a motion for an examination be given to all parties and to the person to be examined. The requirement of giving notice to the person to be examined was eliminated by the 2024 Amendments because it was unnecessary. The requirement of giving notice to all parties – including self-represented parties, parties represented by an attorney, and persons bringing claims as a representative (for example, a next friend) – ensures that the person to be examined will receive notice of the motion.

[3] Subpart (b) requires a party that receives a copy of the examiner's report to provide copies of any reports that the party may have on the same condition. Because those reports involve a condition that is an element of the party's claim or defense, those reports are not covered by the physician-patient privilege. See Neb. Rev. Stat. § 27-504(4)(c).

§ 6-336. Requests for admission.

(a) ~~Request for Admission~~ Scope and Procedure.

(1) Scope. A party may serve ~~upon~~ on any other party a written request to admit ~~for the admission~~, for purposes of the pending action only, ~~of~~ the truth of any matters within the scope of Rule 26(b) ~~set forth in the request that relate~~ relating to:

(A) facts, ~~statements or opinions of fact or of~~ the application of law to fact, or opinions about either; and

(B) ~~including~~ the genuineness of any described documents ~~described in the request~~.

(2) Form; Copy of a Document. Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy ~~Copies~~ of the document ~~documents shall be served with the request~~ unless it is, or has been, ~~they have been or are~~ otherwise furnished or made available for inspection and copying.

(3) When Served; Editable Format. ~~The request~~ Requests may~~, without leave of court,~~ be served on ~~upon~~ the plaintiff after commencement of the action and ~~upon~~ on any other party with or after service of the summons ~~upon~~ on that party. Upon demand, the party served with the requests must be given an electronic copy of the requests in a readily editable format. ~~Each matter of which an admission is requested shall be separately set forth by the party making the request, and shall be repeated by the responding party in the answer or objection thereto~~.

(4) Time to Respond; Effect of Not Responding. A ~~The~~ matter is admitted unless~~, within thirty days after service of the request, or within such shorter or longer time as the court may allow,~~ the party to whom the request is directed serves on ~~upon~~ the ~~party~~ requesting party ~~the admission~~ a written answer or objection addressed to the matter~~,~~ and signed by the party or its ~~by his or her~~ attorney:

(A) within 30 days after being served with the request;

(B) if the party is a defending party within 45 ~~, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five~~ days after being served with ~~service of~~ the summons ~~upon him or her.~~ or 30 days after being served with the request, whichever is longer; or

(C) the time stipulated to under Rule 29 or ordered by the court.

(5) Answer. If a matter is not admitted, the ~~objection is made, the reasons therefor shall be stated. The~~ answer ~~shall~~ must specifically deny it ~~the matter~~ or ~~set forth~~ state in detail ~~the reasons~~ why the answering party cannot truthfully admit or deny it ~~the matter~~. A denial ~~shall~~ must fairly respond to ~~meet~~ the substance of the matter; ~~requested admission,~~ and when good faith requires that a party qualify ~~his or her~~ an answer or deny only a part of the matter ~~of which an admission is requested~~, ~~he or she shall~~ the answer must specify the part admitted ~~so much of it as is true~~ and qualify or deny the rest ~~remainder~~. ~~An~~ The answering party may assert ~~not give~~ lack of knowledge or information ~~or knowledge~~ as a reason for ~~failure~~ failing to admit or deny only if the party states ~~unless he or she states~~ that ~~he or she~~ it has made

reasonable inquiry and that the information it knows ~~known~~ or can readily obtain ~~obtainable by him or her~~ is insufficient to enable it ~~him or her~~ to admit or deny.

(6) The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request ~~who considers that a matter of which an admission has been requested~~ presents a genuine issue for trial. ~~may not, on that ground alone, object to the request; he or she may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he or she cannot admit or deny it.~~

(7) Form of Answer or Objection. The answering or objecting party must reproduce each request and then state the party's answer or objection to the request.

(8) Motion Regarding the Sufficiency of an Answer or Objection. The requesting party ~~who has requested the admissions~~ may move to determine the sufficiency of an answer or objection ~~the answers or objections~~. Unless the court finds ~~determines that~~ an objection ~~is~~ justified, it must ~~shall~~ order that an answer be served. On finding ~~If the court determines~~ that an answer does not comply with ~~the requirements of~~ this rule, the court ~~it~~ may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until ~~, in lieu of these orders, determine that final disposition of the request be made at~~ a pretrial conference or ~~at~~ a specified ~~designated~~ time before ~~prior to~~ trial. ~~The provisions of~~ Rule 37(a)~~(4)~~(5) ~~apply~~ applies to an ~~the~~ award of expenses ~~incurred in relation to the motion~~.

(b) Effect of Admission; Withdrawing or Amending It. ~~Any~~ A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended ~~withdrawal or amendment of the admission~~. The court may permit withdrawal or amendment ~~when~~ if it promotes the presentation of the merits of the action ~~will be subserved thereby~~ and ~~the party who obtained the admission fails to satisfy~~ if the court is not persuaded that it would prejudice the requesting party ~~withdrawal or amendment will prejudice him or her~~ in maintaining ~~his or her~~ or defending the action ~~or defense~~ on the merits. ~~Any~~ An admission ~~made by a party~~ under this rule is ~~for the purpose of the pending action only and is~~ not an admission ~~by him or her~~ for any other purpose ~~nor may it~~ and cannot be used against the party ~~him or her~~ in any other proceeding.

COMMENTS TO ~~RULE 36~~ § 6-336

~~36(a) This section follows the federal rule and adds to former Neb. Rev. Stat. § 25-1267.41 (Repealed 1982) by providing a procedure for determining the sufficiency of answers or objections.~~

~~36(b) This section follows the federal rule, and includes language controlling the effect and withdrawal of admissions. The former law was Neb. Rev. Stat. § 25-1267.42 (Repealed 1982).~~

[1] Much of the rule is modeled on Federal Rule 36. There are minor differences, however, including when requests may be served and how the responding party must structure its responses.

[2] Unlike the rules governing interrogatories and document production requests, § 6-336 does not require the responding party to state its objections with specificity. The specificity requirement is

designed to help parties to resolve discovery disputes. Requests for admission, however, are a means of establishing facts rather than discovering them. Therefore, the rationale for the specificity requirement does not apply to them.

§ 6-337. Failure to make disclosures or to cooperate in discovery; sanctions.

(a) Motion for Order Compelling Disclosure or Discovery.

(1) In General. On ~~A party, upon reasonable~~ notice to other parties and all affected persons ~~affected thereby~~, a party may move ~~apply~~ for an order compelling disclosure or discovery. ~~as follows:~~ The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) ~~(1)~~ Appropriate Court. ~~An application~~ A motion for an order compelling disclosure or discovery must ~~to a party may~~ be made ~~to~~ in the court in which the action is pending~~, or alternatively, on matters relating to a deposition, to the district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the district court where the deposition is taken~~.

(3) Specific Motions ~~Motion~~.

(A) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(~~d~~c), any other party may move to compel disclosure and for appropriate sanctions.

(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production or inspection. The motion may be made if:

(i) ~~If~~ a deponent fails to answer a question asked ~~propounded or submitted~~ under Rule 30 or Rule 31; ~~, or~~

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(~~4~~5); ~~, or~~

(iii) a party fails to answer an interrogatory submitted under Rule 33; ~~,~~ or

(iv) ~~if~~ a party~~, in response to a request for inspection submitted under Rule 34,~~ fails to produce documents or fails to respond that inspection will be permitted – ~~as requested~~ or fails to permit inspection – as requested under Rule 34~~, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request~~.

(C) Related to a Deposition. When taking ~~a~~ an oral deposition ~~on oral examination~~, the party asking ~~proponent of~~ the question may complete or adjourn the examination before ~~he or she applies~~ moving for an order.

~~If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).~~

(4) ~~(3)~~ Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subpart ~~subdivision~~ (a), an evasive or incomplete disclosure, answer, or response ~~is to~~ must be treated as a failure to disclose, answer, or respond.

(5) ~~(4)~~ Payment ~~Award~~ of Expenses; Protective Orders ~~of Motion~~.

(A) If the Motion is Granted (or Disclosure or Discovery is Provided After Filing). If the motion is granted~~,~~ – or if the disclosure or requested discovery is provided after the motion was filed -- the court ~~shall~~ must, after giving an opportunity ~~for hearing~~ to be heard, require the party or deponent whose conduct necessitated the motion, ~~or~~ the party or attorney advising ~~such~~ that conduct, the attorney's law firm or employer, or some or all ~~or both~~ of them to pay ~~to the moving party~~ the movant's reasonable expenses incurred in ~~obtaining~~ making the ~~order~~ motion, including attorney fees. But~~, unless~~ the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection ~~finds that the opposition to the motion~~ was substantially justified; or ~~that~~

(iii) other circumstances make an award of expenses unjust.

(B) If the Motion is Denied. If the motion is denied, the court ~~shall~~ may issue any protective order authorized under Rule 26(d) and must, after giving an opportunity to be heard ~~for hearing~~, require the ~~moving party~~ movant, ~~or~~ the attorney ~~advising~~ filing the motion, the attorney's law firm or employer, or some or all ~~both~~ of them to pay to the party or deponent who opposed the motion ~~the~~ its reasonable expenses incurred in opposing the motion, including attorney fees.~~, unless~~ But the court must not order this payment if ~~finds that the making of~~ the motion was substantially justified or ~~that~~ other circumstances make an award of expenses unjust.

(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(d) and may, after giving an opportunity to be heard, apportion the reasonable expenses ~~incurred in relation to~~ for the motion ~~among the parties and persons in a just manner~~.

(b) Failure to Comply with a Court Order.

~~(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.~~

(1 ~~2~~) Sanctions. ~~by Court in Which Action Is Pending.~~ If a party or ~~an~~ a party's officer, director, or managing agent ~~of a party~~ – or a witness ~~person~~ designated under Rule 30(b)(6) or Rule 31(a)(~~4~~5) ~~31(a) to testify on behalf of a party~~ – fails to obey an order to provide or permit discovery, including an order made under Rule 35 or Rule 37(a) ~~subdivision (a) of this rule or Rule 35~~, the court in which the action is pending may issue further just ~~make such~~ orders. ~~in regard to the failure as are just, and among others~~ They may include the following:

(A) directing ~~An order~~ that the matters ~~regarding which~~ embraced in the order ~~was made~~ or ~~any~~ other designated facts ~~shall~~ be taken ~~to be~~ as established for the purposes of the action, as the prevailing ~~in accordance with the claim of the~~ party claims ~~obtaining the order~~;

(B) ~~An order refusing to allow~~ prohibiting the disobedient party from supporting or opposing ~~to support or oppose~~ designated claims or defenses, or ~~prohibiting him or her~~ from introducing designated matters in evidence;

(C) ~~An order~~ striking ~~out~~ pleadings in whole or in part; ~~or parts thereof, or~~

(D) staying further proceedings until the order is obeyed, ~~or~~

(E) dismissing the action or proceeding in whole or in ~~or any~~ part; ~~thereof, or~~

(F) rendering a default judgment ~~by default~~ against the disobedient party; or

~~(D)~~ (G) ~~In lieu of any of the foregoing orders or in addition thereto, an order~~ treating as ~~a~~ contempt of court the failure to obey any order ~~orders~~ except an order to submit to a physical or mental examination~~;~~.

(2) ~~(E) Where~~ For Not Producing a Person for Examination. If a party ~~has failed~~ fails to comply with an order under Rule 35(a) requiring ~~him or her~~ it to produce another for examination, the court may issue any of the ~~such~~ orders ~~as are~~ listed in ~~paragraphs (A), (B), and (C) of this subdivision~~ Rule 37(b)(1)(A)-(F), unless the disobedient party ~~failing to comply~~ shows that ~~he or she is unable to~~ it cannot produce ~~such~~ the other person ~~for examination~~.

(3) Payment of Expenses. Instead ~~In lieu~~ of or in addition to ~~any of~~ the ~~foregoing~~ orders above ~~or in addition thereto~~, the court ~~shall require~~ must order the disobedient party, ~~failing to obey the order or~~ the attorney advising ~~him or her~~ that party, the attorney's law firm or employer, or some or all of them ~~both~~ to pay the reasonable expenses, including attorney fees, caused by the failure, unless ~~the court finds that~~ the failure was substantially justified or ~~that~~ other circumstances make an award of expenses unjust.

(c) ~~Expenses on~~ Failure to Admit.

If a party fails to admit what is requested ~~the genuineness of any document or the truth of any matter as requested~~ under Rule 36~~,~~ and if the requesting party ~~requesting the admissions thereafter~~ later proves ~~the genuineness of the~~ a document to be genuine or ~~the truth of~~ the matter true, the requesting party may move ~~he or she may~~, within 30 days of so proving, ~~apply to the court for an order requiring~~ that the ~~other~~

party who failed to admit be ordered to pay ~~him or her~~ the reasonable expenses, including attorney fees, incurred in making that proof~~, including reasonable attorney fees~~. The court ~~shall make the~~ must so order unless ~~it finds that~~:

(1) the ~~The~~ request was held objectionable ~~pursuant to~~ under Rule 36(a); ~~, or~~

(2) the ~~The~~ admission sought was of no substantial importance; ~~, or~~

(3) the ~~The~~ party failing to admit had a reasonable ground to believe that ~~he or she~~ it might prevail on the matter; ~~,~~ or

(4) there ~~There~~ was other good reason for the failure to admit.

(d) Party's Failure ~~of Party~~ to Attend Its ~~at~~ Own Deposition, ~~or~~ Serve Answers to Interrogatories, ~~or~~ Respond to a Request for Inspection, Disclose, or Supplement an Earlier Response.

(1) In General.

(A) Motion; Grounds for Sanctions. The court in which the action is pending may, on motion, order sanctions if:

(i) ~~(1) If~~ a party or ~~an~~ a party's officer, director, or managing agent – ~~of a party~~ or a person designated under Rule 30(b)(6) or Rule 31(a)(4) – fails ~~to testify on behalf of a party fails (1) To appear before the officer who is to take his or her deposition~~, after being served with ~~a~~ proper notice, to appear for that person's deposition; or

(ii) ~~(2)~~ a party, after being properly served with ~~To serve answers or objections to~~ interrogatories ~~submitted~~ under Rule 33~~, after proper service of the interrogatories,~~ or ~~(3) To serve a written response to~~ a request for inspection ~~submitted~~ under Rule 34, fails to serve its answers, objections, or written response. ~~after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule.~~

(iii) a party fails to provide information or identify a witness as required by Rule 26(c) or (e).

(B) Certification. A motion for sanctions under subpart (ii) for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) Unacceptable Excuse for Failing to Act. A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(d).

(3) Types of Sanctions. Sanctions may include any of the orders listed in Rule 37(b)(1)(A)-(F). Instead of or ~~In lieu of any order or~~ in addition to these sanctions ~~thereto~~, the court ~~shall~~ must require the party failing to act~~,~~ ~~or~~ the attorney advising ~~him or her~~ that party, the attorney's law firm or employer, or some or all of them ~~both~~ to pay the reasonable expenses, including attorney fees, caused by the failure, unless ~~the court finds that~~ the failure was substantially justified or ~~that~~ other circumstances make an award of expenses unjust.

~~The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).~~

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

COMMENTS TO ~~RULE 37~~ § 6-337

~~37(a) This section follows the federal rule and changes former Nebraska law by including requests to produce as proper for a motion to compel discovery. The language on imposition of expenses for unjustified discovery demands or unjustified refusals to comply with discovery has been changed from former Nebraska law to reduce judicial reluctance to impose sanctions. The former Nebraska section was Neb. Rev. Stat. § 25-1267.43 (Repealed 1982).~~

~~37(b) This section follows the federal rule and former Nebraska law, and adds to former law an explicit statement that a failure to obey an order may be punished as a contempt of the court. The former Nebraska statute was Neb. Rev. Stat. § 25-1267.44 (Repealed 1982).~~

~~37(c) This section follows the federal rule and changes the former Nebraska law to make it clear that expenses include attorney fees and to more fully define the conditions under which costs shall not be imposed. The former Nebraska section Neb. Rev. Stat. § 25-1267.44(3) (Repealed 1982).~~

~~37(d) This section follows both the federal rule and former Nebraska law, adding a provision allowing sanctions for failure to respond to a demand to produce under Rule 34 because that procedure now operates without an initial court order. The former Nebraska statute was Neb. Rev. Stat. § 25-1267.44(4) (Repealed 1982).~~

[1] Some discovery disputes can be resolved informally by the parties working together. To encourage parties to work together, subpart (a)(1) requires a party to attempt to resolve a discovery dispute informally before filing a motion to compel. Subpart (d)(1)(B) imposes the same requirement on a party seeking sanctions for the failure to appear at a deposition or to respond to discovery requests.

[2] The judge presiding over a case is in the best position to rule on discovery motions. Therefore, all motions to compel – including those related to a deposition – must be filed in the court in which the action is pending.

[3] The original version of the rule did not allow a court to impose sanctions on a party that provided the requested discovery after a motion to compel was filed but before the motion was heard. Subpart (a)(5)(B) now allows a court to do so. The possibility of sanctions may discourage parties from engaging in brinkmanship by refusing to provide the requested discovery until the requesting party incurs the expense of preparing and filing a motion to compel.

[4] The original version of the rule did not expressly give courts the discretion to impose sanctions on an attorney's law firm or legal employer. The 2024 Amendments added provisions in Subparts (a), (b), and (d) to give courts the discretion to do so. Giving courts that discretion is appropriate because law firms and legal employers have an obligation to ensure that their attorneys conduct themselves in a professional and ethical manner. Furthermore, it is sometimes difficult to identify which attorneys are responsible for the conduct at issue. The attorney who signed a motion or objection may not be the attorney who decided that the motion should be filed or that the objection should be made. The term "legal employer" was included to make it clear that the rule covers in-house and government attorneys.

[5] Section 6-326(e) originally addressed when parties were required to supplement their discovery responses. The 2024 Amendments extended the requirement to cover expert witness disclosures. Sanctions for failing to supplement discovery responses and expert witness disclosures may now be imposed pursuant to subpart (d)(1)(A)(iii).

[6] The original version of § 6-337 did not expressly identify the types of sanctions that could be imposed for breaching the duty to supplement. The Supreme Court filled the gap by holding that sanctions could be imposed pursuant to § 6-337(d). See *Paulk v. Central Laboratory Associates, P.C.*, 262 Neb. 838, 848 (2001). Many of the reported cases on sanctions involved the failure to supplement discovery requests for information about expert witnesses and their testimony. As a result, there is a substantial body of case law that identifies the factors that courts should consider in deciding the appropriate sanction to impose for failing to provide information about expert witnesses and their testimony. That case law is relevant in determining the appropriate sanctions under subpart (d)(1)(A)(iii).

[7] The 2024 Amendments added subpart (e), which addresses sanctions for failing to preserve electronically stored information. The wording of the subpart is identical to the wording of Rule 37(e) of the Federal Rules of Civil Procedure. Therefore, federal cases interpreting Rule 37(e) are relevant in resolving issues that may arise under § 6-337(e). For the same reason, the Advisory Committee Notes on Federal Rule 37(e) – which are detailed and extensive – are also relevant.

[8] The rule specifies three requirements for imposing sanctions: (1) electronically stored information should have been preserved (2) but was lost because the party failed to take reasonable steps to preserve it, and (3) the information cannot be restored or replaced through additional discovery.

[9] The rule does not require parties to preserve every piece of electronically stored information. It instead requires parties to preserve electronically stored information that is relevant to anticipated or ongoing litigation. Litigation is anticipated when a reasonable person in the same circumstances would reasonably foresee litigation. Examples of events that may trigger the duty to preserve include, among others, sending or receiving a demand or a preservation letter or making or receiving threats of litigation.

[10] Whether a party took reasonable steps to preserve the information is a function of the circumstances, which include the party's sophistication and resources. The party's attorney (if the party is represented by an attorney) should educate the party about its preservation obligations. The attorney may also help the party comply with those obligations by issuing written instructions (often called "litigation holds") and overseeing the party's preservation efforts.

[11] Sanctions should not be imposed if the lost information can be restored or replaced through additional discovery. The question of whether the information can be restored or replaced turns on whether the same electronic information can be obtained from a different source, not on whether substitute information can be obtained through a different method of discovery such as a deposition.

[12] If the requirements for sanctions are met and the other party was prejudiced by the failure to preserve the information, the court may impose sanctions pursuant to subpart (e)(1). Those sanctions must be no greater than necessary to cure the prejudice. For example, if the party failed to preserve electronic records that were relevant to a particular issue, an appropriate sanction might be to preclude the party from offering evidence about that issue or to preclude the party from testifying about the contents of those records.

[13] Prejudice is presumed if the party acted with the intent to deprive the other party of the information. If the party acted with the requisite intent, the court may impose sanctions pursuant to subpart (e)(2). Circumstantial evidence is often important because direct evidence of intent is often absent. In determining the appropriate sanction to impose, the court may consider all the circumstances, including the importance of the information lost and the level of the party's culpability.