

“PHASING” vs. “BIFURCATING”

Even prior to the 2015 amendments, the rules required parties to state their views on “whether discovery should be conducted in phases or should be limited to or focused on particular issues” when they submitted their discovery plan. Rule 26(f)(3)(B). The concept of “phasing” discovery—limiting discovery as to one or more threshold matters before opening it up to all of the issues in the case—is familiar enough. For example, the defendant might raise an affirmative defense that is essentially unrelated to the merits of the plaintiff’s claims, but nevertheless cannot be adjudicated without some discovery: common examples are lack of personal jurisdiction, statute of limitations where discovery of the cause of action is at issue, or failure to exhaust administrative remedies. In such cases, resolving that defense before conducting discovery on all of the claims and defenses can benefit both parties. (If there’s a reasonable chance that the case will be dismissed on limitations grounds, for example, some plaintiffs would rather have that issue decided before incurring the time and expense of taking depositions, retaining expert witnesses, and responding to paper discovery as to all issues.)

In practice, however, proposals for phasing discovery are rare. Instead, at least in this district, a party trying to get a threshold issue decided up front tends to file a “motion to bifurcate” under Rule 42(b), which authorizes “a separate trial of one or more issues.” See also Fed. R. Civ. P. 16(c)(2)(M). While most judges probably read that rule to likewise authorize separate phases of discovery to correspond to the separate trials, a more appropriate—and simpler—avenue for pursuing that relief is to ask for it in the discovery plan as contemplated by Rule 26(f)(3)(B). This seems particularly appropriate in light of the overall objective of the 2015 amendments, which is to reduce expense and delay by getting both the parties and the court to assess discovery according to the particularized needs of the case at the earliest possible stage. But, again, phased discovery is not a new concept—just an underused one.