INTRODUCTION TO CIVIL DISCOVERY PRACTICE

IN THE

SOUTHERN DISTRICT OF ALABAMA

Civil Practice Subcommittee

Effective Date
May 13, 2019

TABLE OF CONTENTS

INTRODUCTION

Over the course of decades, various litigation lawyers from various specialties (with input from the federal bench) and representing various interests have from time to time developed recurring versions of this booklet which addresses local discovery practice. This booklet is not meant to serve as law or even as a set of binding rules; however, it is intended to be a general, informal guide developed over time about how the Federal Rules of Civil Procedure (themselves amended over time) are ordinarily interpreted and applied in this District both by civil practitioners and by the federal bench. Of course, the Court may and does vary its usual procedures in order to suit the needs of a particular case.

Discovery practice in this District follows the Federal Rules of Civil Procedure (hereinafter "Federal Rules"), as well as the Local Rules of the United States District Court for the Southern District of Alabama (hereinafter "Local Rules"). Neither these rules nor case law expressly covers each and every issue which may be encountered in the course of civil discovery practice. Many of these gaps have, however, been filled informally by lawyers and judges over a great many years in this District, causing the development of customs and usage in several recurring discovery situations.

We believe that this work may be of some use to all lawyers. As would be expected among those versed in the law, not all are in agreement with everything in this booklet or with the way certain aspects of discovery are handled. For purposes of refining these guidelines, versions of which have been published in this District for decades, these disagreements have been resolved and a majority position expressed herein reached through conference and communication. We therefore offer these guidelines for whatever help they may be.

The members of the Federal Practice Committee of the Mobile Bar Association who contributed their time, energy and expertise to this project are:

Mike Strasavich
Tom O'Hara
Matt Green
Celia Collins
Pemble DeLashmet
Christine Hart
Scott Stevens
Abby Richardson
Pete Mackey
Bill Lancaster
Jannea Rogers
Teeto Graham
Patricia Beyer
Ben Harris III
Forrest Latta
Tom Gaillard
Windy Bitzer
Magistrate Judge P. Bradley Murray

s/WILLIAM E. CASSADY
Magistrate Judge William E. Cassady

I. DISCOVERY IN GENERAL.

A. **Courtesy**. It is appropriate to note first that discovery in this District is normally practiced with a spirit of ordinary civil courtesy and honesty. Local lawyers in this District are justifiably proud of the normally courteous practice which has been traditionally followed in the Bar of the Southern District of Alabama.

Revisions to the Federal Rules made over the years, as well as the Local Rules and the Scheduling Orders used in this District, continue to encourage the informal, courteous, and direct resolution of issues between lawyers prior to involving the Court. For example, to facilitate orderly scheduling, an e-mail, phone call, or letter is customary before serving notices of deposition. Similarly, communication by counsel through a phone call or face-to-face meeting (i.e. in person, by Skype, video conference or the like) which allows for meaningful discussion and consideration of each side's position is required before filing a motion to compel discovery. The Court expects that all lawyers will attempt to resolve discovery disputes informally and in a courteous and professional manner.

In short, the Federal Rules anticipate and the Court expects that discovery will proceed largely without the involvement of the Court. In this District, the Court has found that many discovery disputes can be resolved informally if the parties will communicate prior to filing a motion and triggering Court involvement.

B. **Discovery Orders**. In each civil case in this Court, the district judge or magistrate judge will issue an initial scheduling order calling for the holding of a Rule 26(f) Planning Meeting and, after receiving the parties' report thereon, a Rule 16(b) Scheduling Order. All lawyers should be aware that there are some variations in these orders from judge to judge (and many times, from case to case), and each order should be thoroughly read and understood to ensure compliance with the requirements therein.

C. **Commencement of Discovery**. Federal Rule 26(d)(1) generally requires that no discovery be commenced until after the parties' Rule 26(f) Planning Meeting. An exception is provided in Federal Rule 26(d)(2) for service of requests for production, which may be served more than twenty-one (21) days after service of the Complaint. However, the time to answer such requests for production does not begin to run until the Rule 26(f) conference. The purpose of the "early service" requirement is to identify and to facilitate discussion and coordination of ESI or other production issues during the Rule 26(f) meeting. If exceptional circumstances warrant earlier discovery, the parties may seek leave of court by appropriate motion.

Absent agreement by the parties to the contrary, in a case which has been removed to this court, the court will not ordinarily enforce discovery which has been propounded in state court. However, as noted above, discovery propounded in state court prior to removal may inform the discussion at the Rule 26(f) Planning Meeting as concerns facilitating and coordinating ESI and other production issues.

D. **Initial Disclosures**. Federal Rule 26 generally defines the scope and the proper objects of discovery, including its initial phase. In particular, Federal Rule 26(a)(1) requires an initial disclosure of the core witnesses and documents supporting the claims and defenses asserted in the parties' respective pleadings, as well as information concerning available insurance coverage and claimed damages. Practitioners generally regard this initial disclosure as encompassing the evidentiary sources supporting the parties' "theories of relief" and "theories of defense," as if there were standing, Court-ordered interrogatories and requests for production based on the pleadings. The initial disclosure rules do not require completion of an exhaustive investigation prior to the disclosures, but they do require some undertaking by counsel to become familiar with the basic facts underpinning the matter.

While there are competing thoughts on the precise breadth of the initial disclosures, it is the practice in this District for counsel to contact and meet with opposing counsel pursuant to Rule 26(f) to discuss the nature of the case and the claims and defenses therein, as well as the discovery and scheduling required by the Federal Rules. Counsel should also attempt to reach a mutual understanding about the breadth of the initial disclosures and the scope of later supplementation thereof. If no mutual agreement can be reached on any of these matters, then counsel are expected to disclose and to fully describe any disputes in the Federal Rule 26(f) Report which is to be filed within fourteen (14) days after the meeting. The Federal Rule 26(f) Report may also include a request for a Federal Rule 16 conference with the magistrate judge prior to entry of a Scheduling Order. Initial disclosures must occur within 20 days after the Federal Rule 26(f) meeting under Federal Rule 26(a)(1)(C), though the Court in many cases in this District may set a different date for compliance with the initial disclosure requirements.

E. **Proportionality**. Amendments to the Federal Rules in recent years have reinvigorated the concept of "proportionality," the notion that the scope of discovery be determined through consideration of several factors set forth in Federal Rule 26(b)(1)(with such factors having been relocated from Federal Rule 26(b)(2)(C)(iii)). The lawyers and parties are expected to be familiar with and to consider proportionality factors in serving their discovery requests, in conferring with one another, and in addressing discovery disputes with the Court. Moreover, Federal Rule 1 now places the obligation upon the parties themselves the obligation to facilitate the "just speedy, and inexpensive determination" of every civil action.

F. **Continuing Obligation**. The Federal Rules expressly provide that in many instances a party is under a duty to supplement prior disclosures as well as answers and responses to discovery. See Federal Rule 26(e). Fairness and personal integrity may suggest a broader range

of circumstances. A party may not vary the provisions of the Federal Rules by placing supplementation language at the beginning of a discovery request or response. The obligation of counsel to supplement answers to interrogatories and requests for production relates directly to the specific items requested.

Typically, the Court's Rule 16(b) Scheduling Order in a given case will specify the deadlines for supplementation. Absent such a deadline, counsel should supplement their initial disclosure in strict compliance with Federal Rule 26(e)(1), with the phrase "in a timely manner" generally meaning in this District no longer than 30 days after a party learns of the supplementary material. The particulars of the discovery request to be supplemented, as well as the scheduling of other discovery obligations, may suggest a shorter time frame for supplementation.

G. **Preamble Matter in Discovery Requests**. Lengthy and complex preambles and definitions in discovery requests are discouraged, particularly where they operate to give unexpected breadth or surprising effect to the meaning of words which are otherwise reasonably clear.

H. **Reasonable Drafting and Reading**. Discovery requests should be drafted, read, and answered in a reasonable, common-sense manner.

I. **Stipulations**. Stipulations in accordance with Federal Rule 29 are encouraged and honored by the Court, unless the stipulation is contrary to a Court order.

J. **Timeliness of Discovery Responses; Sanctions**. The Federal Rules set out explicit time limits for responses to discovery requests. Counsel should answer discovery requests by these deadlines without awaiting a Court order. If a party cannot submit a timely response, counsel should first attempt to reach an agreement on an extension with opposing counsel. If such agreement is reached, counsel requesting the extension may file a motion for an extension of time,

indicating that the motion is "unopposed" or "by consent." If no agreement can be reached, counsel should move for an extension of time in which to answer, with opposing counsel refraining from filing a motion to compel pending a ruling on the extension request. Requests for a reasonable extension of time to answer discovery that do not otherwise interfere with case management, filing deadlines, or other scheduled discovery, will ordinarily be granted.

Because lawyers are expected to respond when the rules provide, Federal Rule 37(a)(5) provides that if a lawyer must go to Court to make a recalcitrant party answer, the moving lawyer may be awarded expenses and counsel fees spent in filing and arguing a motion to compel. Federal Rule 37 is enforced in this District strictly according to its tenor.

Once a Court order is issued compelling discovery, an unexcused failure to provide a timely response is treated by the Court with special gravity. Violation of a Court order is always serious and, as appropriate, may be the subject of the full range of sanctions available under Federal Rule 37, including but not limited to entry of judgment, an order with respect to facts or claims related to the discovery made the subject of the Court's Order, or some other appropriate and measured sanction.

K. **Discovery Cut-Off**. In its Rule 16(b) Scheduling Order, the Court will ordinarily set a discovery cut-off date. The cut-off date for discovery will precede the pre-trial conference by an ample period of time so as to allow for briefing and consideration of dispositive motions. The pre-trial conference ordinarily precedes the assigned trial date by three to six weeks.

Each judge applies the discovery cut-off date to mean that all discovery must be completed by that date. Thus, written discovery requests must be served at least thirty (30) days prior to the discovery cut-off date, and untimely discovery requests are subject to objection on that basis.

The parties may conduct discovery (primarily taking depositions) by agreement after the discovery cut-off; however, lawyers should be aware that if problems arise during such depositions (such as instructions not to answer questions or failure to produce documents at a deposition), the Court may refuse involvement because the depositions are being taken after the discovery cut-off and without the Court's permission. However, parties who agree to engage in discovery after the cut-off should do so in good faith and not use the passing of the cut-off as an excuse for obstructive behavior.

To ensure that the Court will hear and resolve discovery disputes after the discovery cut-off date, either party (preferably jointly) should file a motion with the Court and obtain the Court's approval to conduct discovery out of time. Such motion should indicate whether all parties agree to the additional discovery, and any effect that the additional discovery will have on existing deadlines. As a matter of practice, the Court disfavors discovery after the cut-off which would force changes in other pretrial deadlines.

Though the Court may occasionally allow discovery beyond the cut-off date upon motion, it is a serious mistake to expect such permission. When such permission is granted, it is normally based upon a showing of good cause for such extension (including due diligence pursuing discovery prior to the cut-off date), specifying the limited discovery needed, its purpose, and the time frame within which it can be completed. Motions to extend the discovery time are normally treated with special disfavor if filed only after the discovery cut-off date.

L. **Timeliness of Motion to Compel**. As noted above, before a motion to compel may be filed, the parties must confer about the dispute either by phone or at a face-to-face meeting (i.e. - in person, by Skype, video conference or the like) where a meaningful exchange can be had. If an agreement, in whole or in part, is reached as a result of the conference, counsel should confirm

the agreement in a writing with opposing counsel as soon as possible. For matters unresolved even after the conference, a motion to compel should be filed no later than eleven (11) days prior to the discovery cutoff.[1] If the motion to compel is filed less than eleven (11) days prior to the discovery cutoff date, it may be denied as untimely. In exceptional circumstances, and upon a showing of good cause, a party may ask for leave to file a motion to compel within the eleven (11) day time period prior to the discovery cutoff.

M. **Pretrial Disclosures**. The Federal Rules require the parties, at least thirty (30) days before trial, to exchange certain evidence which may be used at trial. (See Federal Rule 26(a)(3)). The Scheduling Orders used in this Court will frequently set a specific deadline for these disclosures, as will the detailed pretrial orders used by federal judges in this District. Where the trial judge uses such a detailed pretrial order, the judges in this District do not require duplicate compliance with the Federal Rule's pretrial disclosure deadline. Please note that individual judges may require the parties to disclose "impeachment evidence" prior to trial. Trial counsel should of course read carefully all pretrial orders.

N. **Invocation of Privilege or Work-Product Protection**. The Federal Rules require a party withholding discoverable information because of a privilege or work product to describe the information being withheld in the initial discovery response, providing at least the information specified in Federal Rule 26(b)(5) even without a specific question from opposing counsel. If the requesting party desires more information in order to assess the applicability of the privilege or protection, counsel for the parties should attempt to resolve the matter informally. If this fails, and

[1] The Scheduling Orders in common use in this District typically allow a party facing a Motion to Compel to file a response to said motion within eleven (11) days. Thus, once the parties are within ten (10) days of the discovery cut-off date, the Court is put to the task of deciding such a motion either on an expedited basis, or after said cut-off date.

the requesting party has a good faith belief that the privilege or protection does not apply or has been waived, the requesting party may demand a privilege log as to the withheld information which provides to the requesting party the following:

a. Description of the document.

b. Its date.

c. Name, address and employer of the author of the document, the person taking the statement, etc.

d. Subject of the document.

e. Persons to whom the document is addressed.

f. Persons indicated thereon as having received copies.

g. Name, address, job title and employer of any person known or believed to have received or seen the document or any copy or summary thereof.

h. Purpose for which the document was created and transmitted.

i. Degree of confidentiality with which it was treated at the time of its creation and transmission, and thereafter.

j. Any other facts relevant to the elements of the particular privilege asserted.

Where an objection is made at a deposition based upon privilege or work-product protection, a clear statement of the precise privilege relied upon should be made, though no recitation of facts supporting the existence of the privilege is required in the deposition. However, the attorney asking questions should be given wide latitude to question the witness about all collateral facts in order to develop information as to whether or not the privilege does apply. The Court ordinarily views a vague statement of privilege with disfavor as it is difficult for the attorney asking questions to know what facts to inquire about or which are pertinent to the issue of whether the privilege applies. Also, the Court looks with strong disfavor upon the conduct of an attorney who asserts privilege but then obstructs inquiry into pertinent collateral facts.

Affidavits used to support a claim of privilege, with respect either to documents or to questions asked at depositions, should be based on personal knowledge, set forth facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters asserted.

Any agreement among counsel to waive or to alter the contents of the privilege log is normally accepted, so long as it does not delay the progress of the case or otherwise interfere with Court management. In the very rare case in which disclosure of the information listed above would itself disclose the privileged information, documents may be produced *in camera* for the Court to determine whether the detailed information shown above must be furnished to opposing counsel. Documents should not be furnished *in camera* without prior Court approval.

II. INTERROGATORIES.

A. Number of Interrogatories. The Federal Rules at Rule 33(a)(1) limit the number of interrogatories to 25, absent contrary agreement of the parties or Order of this Court. This limit can be extended to a greater set number or waived entirely. Counsel should discuss the number of interrogatories requested at the Rule 26(f) Conference and include this in the Report of Parties' Planning Meeting, noting any differing views on the number of interrogatories. In drafting its Rule 16(b) Scheduling Order, the Court will typically give great weight to the agreement of counsel. A party may also later file a motion seeking leave to exceed the number of interrogatories set forth in the Scheduling Order and/or the Federal Rules. Of course, counsel should not use subparts to evade any limitation on the number of interrogatories.

If a party considers the number or breadth of interrogatories to be unduly burdensome in a particular case, that party should confer with the party requesting the discovery and try to reach an agreement. If after conferring in good faith the parties cannot reach agreement,

either party may seek an Order from the Court, either compelling responses or granting a protective order precluding any need to respond further.

In this District, the above obligation to confer in good faith is not satisfied by a letter demanding that the other party fully respond by a certain date or else the writer will file a motion to compel. Good faith requires actually conferring by speaking with opposing counsel and considering the other party's position. If the other party is non-responsive, the movant may in certain instances be excused from further attempts to confer. Counsel are cautioned that they should promptly respond to opposing counsel's request for a conference and not delay responding in the hope of avoiding the filing of a discovery motion and then, when such a motion is filed, protesting that the conference requirement has not been met.

B. **Form Interrogatories**. The indiscriminate use of "form" interrogatories is inappropriate. Interrogatories should be carefully reviewed to make certain that they are not irrelevant or meaningless in the context of an individual case.

C. **Reference to a Deposition or Document**. Since a party is entitled to discovery both by deposition and by interrogatories, it is ordinarily insufficient to answer an interrogatory by general reference to a deposition or document, such as "see deposition of James Smith" or "see insurance claim." There are a number of reasons for this. For example, a corporation may be required to give its official corporate response even though one of its high-ranking officers has been deposed, as the testimony of an officer may not necessarily represent the full corporate answer. Similarly, a reference to a single document may not necessarily be a full answer depending on the interrogatory posed, and the information in the document (unlike the interrogatory answer sought) is not ordinarily set forth under oath.

In rare circumstances, a corporation or partnership may appropriately answer a complex interrogatory by saying something such as "Acme Roofing Company adopts as its answer to this interrogatory the deposition testimony of James Smith, its Secretary, shown on pages 127-145 of the deposition transcript." In the equally rare circumstance where an individual party has already fully answered an interrogatory in the course of a prior deposition, the deposition answer may be adopted as the interrogatory answer. However, this practice must be used carefully and in good faith, since for purposes of discovery sanctions, "an evasive or incomplete disclosure, answer or response must be treated as a failure to disclose, answer or respond." Federal Rule 37(a)(4).

D. **"Each and Every" Question**. Interrogatories should be reasonably particularized. For example, an interrogatory such as "identify each and every document upon which you rely in support of your claim on Count Two" may well be objectionably broad in certain complex cases, though not in others. While there is no bright-line test, common sense, good faith, and the particular nature of the claims in the case, together with other factors such as the degree to which discovery has already progressed, usually suggest whether such a question is proper.

E. **Sworn Answers**. The Federal Rules require that interrogatories be answered in writing under oath. General disclaimers "reserving the right to make changes" or otherwise limiting or minimizing the effect of sworn interrogatory answers are not permissible.

F. **Federal Rule 33(d)**. Federal Rule 33(d) allows a party in very limited circumstances to produce documents in lieu of answering interrogatories. To avoid abuses of Federal Rule 33(d), the Court may enter a Federal Rule 33(d) Order which, while varying from case to case, usually contains some or all of the following terms among others:

1. The specification of documents to be produced shall be in sufficient detail to permit the interrogating party to locate and identify the records and to ascertain the answer as

readily as the party from whom discovery is sought. Specific references to which part(s) of the document is responsive should be made when applicable rather than reference to a document as a whole.

2. If the party responding to the interrogatory and invoking Federal Rule 33(d) is merely making documents available for inspection by the interrogating party, the following additional principles have application:

a. The producing party shall make its records available in a reasonable manner [i.e., with tables, chairs, lighting, air conditioning, etc.] during normal business hours approximating 8:00 a.m. to 5:00 p.m., Monday through Friday, absent other agreement of the parties. The producing party should provide the requesting party as much privacy as is practicable depending on the inspection location. If a private room is not otherwise in use, it should be made available. If no such accommodation exists, then the requesting party should be given as much privacy as is practicable without interfering with the normal business operations of the producing party.

b. The producing party shall designate one of its regular employees to be available to share information with the interrogating party on the nature and use of the records-retention system involved. That person shall be fully familiar with the records system. If a question arises about the records which the designated person cannot answer, the Court expects the producing party to act reasonably and cooperatively in locating someone who knows the answer.

c. The producing party shall make available any computerized information or summary thereof which it either has, or can compute by a relatively simple procedure (e.g., a little additional programming and computer time). A party's obligation to

undertake additional programming for the production of computer-stored information will be addressed by the Court on a case-by-case basis.

d. The producing party shall provide any relevant compilations, abstracts or summaries, either in its custody or reasonably obtainable by it, not prepared in anticipation of litigation. If the producing party has documents even arguably subject to this clause but which it declines to produce for some reason, it shall object on the record in some fashion and call the circumstances to the attention of the parties and, if necessary later, to the Court.

e. All of the actual clerical data-extraction work shall be done by the interrogating party, unless agreed to the contrary, or unless after actually beginning the effort it appears that the task could be performed more efficiently by the producing party. In that latter event, the interrogating party may approach the Court for reconsideration of the propriety of the Federal Rule 33(d) election. In other words, it behooves the producing party to make the document search as simple as possible, or the producing party may be required to answer the interrogatory in full.

3. If it appears likely that the full answer may not or will not be derived from the documents produced, a Federal Rule 33(d) Order may contain a clause deeming inadmissible that evidence covered by the scope of the interrogatory to the extent that any portion of the answer was not contained in the documents produced under the Federal Rule 33(d) election. Other provisions or sanctions may also be appropriate.

III. PRODUCTION OF DOCUMENTS, TANGIBLE THINGS, OR ELECTRONICALLY STORED INFORMATION.

A. **General**. When documents, tangible things, and electronically stored information (hereinafter "documents") are being produced, the following general guidelines, though varied to suit the needs of each case, are normally followed. In most situations, lawyers should be able to

reach agreement based upon considerations of reasonableness and convenience. As the Federal Rules and Local Rules endorse these same considerations, the Court strongly disfavors counsel or parties acting to the contrary.

B. Requests for Documents.

1. **Oral Requests**. The Federal Rules address formal document production made as part of initial disclosures or pursuant to a Rule 34 request. The Court recognizes that many lawyers produce or exchange documents upon informal request, often confirmed by letter or other communication. Naturally, a lawyer's word that he or she will produce a document, once given, is the lawyer's bond and should be timely kept. However, requests for production of documents ordinarily should not be made to deponents on the record at depositions and, if such a request is made, no adverse comment should be made on the record if the request is declined.

2. **Requests for "All Documents" and the Like.** A request for production of documents should be reasonably particularized. A request for "each and every document supporting your claim" may be objectionably broad in many cases, but will be evaluated by the Court under the particular circumstances of the case. If a producing party has a reasonably limited number of documents which can be identified in response to such request, then the request may not be considered overly broad. However, if the range of documents which might conceivably be within the scope of such a request is unreasonably large, or investigation of the matter would be unreasonably burdensome, then the request will generally be considered objectionable. Again, as in all discovery matters, the Court expects the lawyers and parties to use reason and common sense, and to comply with those obligations found in Federal Rule 26(g). Further, the Court expects counsel to be mindful of the proportionality factors set forth in Federal Rule 26(b)(1) and discussed supra.

In addition, Federal Rules 26(c), 37(a), and the Court's usual scheduling orders all expressly require that disputes about the scope of requested production be addressed in good faith by lawyers in a conference before discovery motions are filed.

3. **Objections**. Federal Rule 34(b)(2) requires that objections be stated with specificity, doing away with so-called "boilerplate objections." Objections must also state whether any responsive materials are being withheld on the basis of the objection, and if the objection is only to part of a request, the objection should specify this while a response is made to the remaining, non-objectionable portion of the request.

C. Procedures for Production or Inspection of Documents. When documents are produced, the following general guidelines, though varied to suit the needs of each case, are normally followed:

1. **Timing**. If a request for production is filed in connection with a deposition notice, lawyers are expected to cooperate in order to produce the documents within a reasonable time before the deposition in order to encourage cheaper, shorter, and more meaningful depositions. Although Rule 30(b)(2) of the Federal Rules provides that a party responding to a request for production at the time of a deposition normally has 30 days in which to respond, the Court expects parties to act reasonably. In practice, other time periods are routinely agreed to and, if not, the Court may be asked to shorten or to lengthen the time for compliance. Lawyers are expected to cooperate on such routine matters without Court intervention.

2. **Manner of Production**. Documents may be produced (1) for inspection and photocopying, (2) by providing photocopies, (3) by electronic scan, or (4) on an electronic storage device. Sometimes due to considerations of volume, parties use a third-party online service to upload and "deliver" documents produced. If documents are made available for inspection and

copying, all of the documents should be made available simultaneously, and the inspecting attorney can determine the order of reviewing the documents. While the inspection is in progress, the inspecting attorney shall have the right to review again any documents already examined during the inspection.

3. **Inspection**. The Court expects lawyers to work together and agree on how and where a production or inspection will take place. The request may as a matter of convenience suggest production at the office of either counsel; however, if the producing party has voluminous records to be made available for inspection, this is typically done at the office of counsel producing the documents or at a corporate venue.

Under Rule 34(b), the producing party has the option to produce the documents either as they are kept in the usual course of business, or labeled to correspond with the categories in the request. In either event, the producing party upon request ought to provide a reasonable informal explanation of recordkeeping procedures. The parties should use some means of listing, marking or indexing the documents produced so that they can be clearly identified and differentiated from previously produced documents. This may involve stamping (physically or electronically) each document with a sequential number, which is usually undertaken by the producing party and done in a way that does not materially interfere with the intended use of the document. Of course, originals of certain documents (e.g., promissory notes) should be listed rather than marked. A discovering party may take any reasonable measures to ensure that an accurate record is created of what was produced, when, and by whom. A responding party is expected to cooperate reasonably in this endeavor.

"Document dumps" or the production of voluminous records so as to obscure responses, for example, by producing documents without differentiations or designations of

responsive documents corresponding to the requested categories, are considered an abuse of the discovery process. A producing party may not use its cumbersome or disorganized filing system, even if the filing system reflects how the party keeps documents in the usual course of business, to make it more difficult for a requesting party to locate responsive documents. A party and/or lawyer engaging in these practices will be subject to the full range of sanctions available under the Federal Rules.

If a portion of a document is covered by a request, but another portion either is not or is privileged, the producing party is expected to first to seek cooperation in the reasonable redaction of non-discoverable matter, only approaching the Court on the matter in extraordinary situations. Simple honesty requires that the existence of a document requested, but determined to be protected or privileged, be pointed out.

Normal trappings of civilization which are reasonably available should be offered by the party producing the documents. While photocopies are often prepared by the producing party for the inspecting party as a matter of convenience or accommodation where a manageable number of documents are produced, the inspecting party has the right to see the originals and generally bears the responsibility for photocopying. The producing party may of course allow its personnel and copying equipment to be used with the understanding that the inspecting party will pay reasonable charges. If a particularly large quantity of documents is produced, it may be reasonable for the inspecting party to either furnish personnel who will make the copies on the producing party's equipment or, more frequently, to arrange for a third-party commercial copy service to assist using its personnel and equipment offsite. The producing party may obtain (at its expense) a set of the copies made by the inspecting party. The Court expects the parties to agree on a method of copying, as well as who is responsible for the expense of copying, without Court

intervention. However, producing counsel may seek a protective order shifting or sharing costs in limited circumstances where bearing the costs is unduly burdensome to the producing party.

Whether the inspecting party may inspect the documents again at a later date (after having completed the entire initial inspection) must be determined on a case-by-case basis.

D. Electronically Stored Information (ESI)[2]. These guidelines are intended to facilitate compliance with the provisions of Fed.R.Civ.P. 16, 26, 33, 34, 37, and 45, as amended, relating to the discovery of ESI. In the case of any asserted conflict between these guidelines and the above-referenced rules, the latter shall control.

1. **Early Attention to Electronic Discovery Issues**. Prior to the Federal Rule 26(f) conference, counsel should make a reasonable attempt to become knowledgeable about their clients' information management systems and their operation, including how information is stored and retrieved. In addition, counsel should make a reasonable attempt to determine where ESI is likely to be located, including backup, archival and legacy data (outdated formats or media), and preservation obligations.

2. **Duty to disclose**. Initial disclosures pursuant to Federal Rule 26(a)(1) must include any ESI that the disclosing party may use to support its claims or defenses (unless used solely for impeachment). Counsel should identify those individuals with knowledge of their clients' electronic information systems who can facilitate the location and identification of discoverable ESI prior to the Federal Rule 26(f) conference.

3. **Duty to notify**. A party seeking discovery of ESI should notify the opposing party of that fact and, if known at the time of the Federal Rule 26(f) conference, should identify as clearly as possible the categories of information that may be sought. Parties and counsel are reminded that, under Federal Rule 34, if the requesting party has not designated a form of production in its request, or if the responding party objects to the designated form, then the responding party must state in its written response the form it intends to use for producing ESI. It must be in the form in which it is ordinarily maintained or in a reasonably usable form or forms. For a discussion of "form of production," see Federal Rule 34(b) cmt. to 2006 amendments.

[2] This section of the guidelines are adapted from those promulgated by the United States District Court for the Middle District of Alabama, which are acknowledged and appreciated.

4. **Duty to meet and confer regarding ESI**. During the Federal Rule 26(f) conference, the parties should confer regarding the following matters:

(a) **ESI in general**. Counsel should be prepared generally to discuss the sources, types, formats, etc., of ESI it uses or has used in the past, as well as the anticipated volume and relevant corresponding time frames of ESI. Counsel should also attempt to agree on steps the parties will take to segregate and preserve ESI in order to avoid accusations of spoliation.

(b) **E-mail information**. Counsel should attempt to agree on the scope of e-mail discovery and e-mail search protocol.

(c) **Deleted information**. Counsel should attempt to agree on whether responsive deleted information still exists, the extent to which restoration of deleted information is needed, and who will bear the costs of restoration.

(d) **"Embedded data" and "metadata"**. "Embedded data" typically refers to draft language, editorial comments, and other deleted matter retained by computer programs. "Metadata" typically refers to information describing the history, tracking, or management of an electronic file. The parties should discuss at the Federal Rule 26(f) conference whether "embedded data" and "metadata" exist, whether it will be requested or should be produced, and how to handle determinations regarding attorney-client privilege or protection of trial preparation materials.

(e) **Back-up and archival data**. Counsel should attempt to agree on whether responsive back-up and archival data exists, the extent to which back-up and archival data is needed, and who will bear the cost of obtaining such data.

(f) **Format and media**. Counsel should attempt to agree on the format and media to be used in the production of ESI. Counsel should also discuss the benefits and need for native format versus imaged format.

(g) **Reasonably accessible information and costs**. The volume of and ability to search ESI means that most parties' discovery needs will be satisfied from reasonably accessible sources. Counsel should attempt to determine if any responsive ESI is not reasonably accessible, i.e., information that is only accessible by incurring undue burdens or costs. If the responding party is not searching or does not plan to search certain sources containing potentially responsive information, it should identify the category or type of

such information for each such source. If the requesting party intends to seek discovery of ESI from sources identified as not reasonably accessible, the parties should discuss: (1) the burdens and costs of accessing and retrieving the information, (2) the needs that may establish good cause for requiring production of all or part of the information, even if the information sought is not reasonably accessible, and (3) conditions on obtaining and producing this information such as scope, time, and allocation of cost.

(h) **Privileged or trial preparation materials**. Counsel should attempt to reach an agreement regarding what will happen in the event privileged or trial preparation materials are inadvertently disclosed. Pursuant to Federal Rule 26(5)(B), if the disclosing party inadvertently produces privileged or trial preparation materials, it must notify the requesting party of such disclosure. After the requesting party is so notified, it must return, sequester, or destroy all information and copies and may not use or disclose this information until the claim of privilege or protection as trial preparation materials is resolved. This rule has been described as the "clawback" rule, whereby materials that are disclosed without intent to waive privilege or protection are not waived and are returned to the responding party, so long as the responding party identifies the materials mistakenly produced. The parties may make other agreements as well including but not limited to the following features:

i. The parties may agree to a "quick peek," whereby the responding party provides certain requested materials for initial examination without waiving any privilege or protection.

ii. Whether the agreements made will bind third parties who are not parties to the agreements. In furtherance of this, the parties may ask the Court to incorporate such agreements into a Court order.

Counsel should be aware this rule merely establishes a procedure to minimize the effects of inadvertent disclosure and does not resolve the issue of whether such inadvertent disclosure waives the privilege. Ordinarily, an inadvertent disclosure will not operate as a waiver if (1) it is inadvertent, (2) the holder of the privilege or protection took reasonable steps to prevent the disclosure, and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule 26(b)(5)(B).

IV. SUBPOENAS FOR DOCUMENTS

A. **Service**. A subpoena for document production to a non-party must be served on all parties and must contain the language specified in Federal Rule 45(d) and (e). The Court treats such subpoenas as being subject to the discovery cut-off date, so the subpoenas must be served sufficiently in advance so as to allow production by the cut-off date. Because of the potential burden on the non-party, the parties should cooperate in ensuring that any document inspection and/or production is conducted with as little intrusion as possible on the business affairs of the non-party. If the respondent delivers documents to the party issuing the subpoena, notice of receipt should be given to all parties, and any requests for copies must be honored. A subpoena issued to an individual in accordance with Federal Rule 45 must be served via hand-delivery to the person named therein. If a subpoena is directed to a corporation or other business entity, service by either certified mail or by hand delivery shall be deemed sufficient if served upon a corporate officer or other agent authorized under Federal Rule 4 to accept service of process for said entity.

B. **Timing of Non-Party Subpoenas Seeking Documents**. Though the Federal Rules do not contain an express requirement for a minimum period of time between service of the subpoena for documents and compliance therewith, unless otherwise ordered by the Court for good cause shown, subpoenas should be served not later than fourteen (14) days before the date for compliance therewith that is required.

C. **Geographic Range of Subpoenas**. For purposes of the 100-mile limitation contained in Federal Rule 45, this Court is of the view that this mileage limitation should be measured in a straight line -- "as the crow flies" -- rather than by the surface route taken.

D. **Effect of Motions to Quash or Modify**. If a motion to quash or modify a subpoena is filed pursuant to Federal Rule 45(d)(3), the time for compliance with the subpoena shall be suspended until such time as the Court rules upon such motion; however, during the pendency of

the motion, the recipient of the subpoena must preserve any responsive evidence sought by the subpoena.

V. REQUESTS FOR ADMISSION.

Rule 36 is followed in this District in accordance with its terms and, in light of the serious consequences of an improper response (or worse, a failure to respond at all), every responding party should carefully re-read Federal Rule 36, which requires more of a response than many seem to believe. For example, an answering party may not give lack of information as a reason for failure to admit or deny a request unless the response states that a reasonable inquiry has been made and that the information known or readily obtainable is insufficient to enable one to admit or deny.

Further, if a party does not respond or object to a request for admission within thirty (30) days after service, the matter is automatically admitted. Such admission can only be withdrawn by a ruling of the Court upon a properly filed motion. Nothing herein should be taken as discouraging the usual courtesy expected from lawyer to lawyer, including agreements to reasonable extensions of time.

VI. DEPOSITIONS.

A. **Scheduling**. A lawyer is expected to make all reasonable efforts to accommodate the schedules of opposing lawyers whenever possible. In so doing, a lawyer scheduling a deposition can do so either by prior agreement with opposing counsel or by unilaterally noticing the deposition while indicating a willingness to be reasonable about any necessary rescheduling.

To the extent that the parties anticipate that disputes may arise over the sequence of depositions to be taken, the parties will be expected to have discussed this at the Rule 26 conference and to have presented any disagreements with respect to this to the magistrate judge in the Rule 26(f) Report for resolution. In conformity with the courtesy typically expected and

practiced in this district, the Court expects that such disagreements can almost always be worked out among counsel through conferencing and that the need for the Court to resolve such matters will be the exception, not the rule.

B. **Persons Who May Attend Depositions**. While more than one lawyer for each party may attend a deposition, only one lawyer for a party should question the witness or make objections, absent agreement to the contrary.

Each lawyer ordinarily may also be accompanied at the deposition by one representative of each client and, in technical depositions, by an expert. Business necessity may require that the corporate representative be substituted, but this practice should not be abused. Lawyers may also be accompanied by record custodians, paralegals, secretaries, law clerks, and the like.

Pursuant to Federal Rule 30(c)(1), the rule of sequestration of witnesses does not apply at depositions without a protective order pursuant to Federal Rule 26(c)(1)(E). Despite this Federal Rule, and as a matter of courtesy, counsel for either party planning to have witnesses attend a deposition as spectators should provide reasonable advance notice to opposing counsel in order to permit adequate time for the seeking of any appropriate protective order. Pursuant to Federal Rule 26, any motion requesting a protective order must certify that the parties have attempted to resolve the matter in good faith.

C. **The "Usual Stipulation"**. At the beginning of a deposition, the court reporter will typically ask the lawyers if they agree to the "usual stipulation." One can normally say "yes" without fear as the "usual stipulation" simply waives a number of deposition technicalities, such as notice of the deposition, signature, competence of the officer administering the oath, filing, notice of filing, and the like. If there is any question, the court reporter will read the stipulation

and allow the lawyers to make desired modifications. Lawyers are of course not required to agree to the usual stipulation, but most lawyers ordinarily do. There is no distinction in law between a deposition taken pursuant to the "usual stipulation" and a deposition taken "pursuant to the Federal Rules" in terms of the sufficiency of objections to questions asked, as an objection to the form of the question remains sufficient. (Federal Rule 32(b) and 32(d)(3)(A)).

D. **Objections at Depositions**. If a question is objectionable, a lawyer should simply object in the proper manner and allow the answer to be given subject to the objection, as required by Federal Rule 30(c). Further, Federal Rule 30(c)(2) provides that any objection during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. The comment to this rule further notes that depositions are frequently unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often used by lawyers to suggest how the deponent should respond to the question asked. Lawyers are reminded that objections should comply with all applicable rules.

1. **Objections to the Form of the Question**. Both Federal Rule 32(d)(3)(A) and the "usual stipulations" provide, among other things, that an objection to the form of a question is waived unless made in the deposition. Many lawyers make such objections (e.g. to leading questions) simply by stating "I object to the form of the question" or simply "object to the form." These shorthand renditions normally suffice as it is apparent that the objection is directed to a "leading" question or to an insufficient or inaccurate foundation. The questioning lawyer may ask the objecting lawyer to be more specific in stating the ground of objection so that the problem with the question, if any, can be understood and cured if possible.

2. **Instruction that a Witness Not Answer**. Occasionally in a deposition another lawyer may instruct their client not to answer that question. This practice is severely

circumscribed by Federal Rules 30(c)(2) and 30(d)(3), and typically permitted in only three circumstances: (1) to claim a privilege or protection against disclosure (e.g. work product), (2) to enforce a Court limitation on the scope or length of permissible discovery; or (3) to suspend a deposition in order to enable the presentation of a motion for protective order.

If an instruction not to answer is made, the lawyers should try to complete the remainder of the non-objectionable questions at the deposition before approaching the Court for a ruling on the propriety of the instruction, in case there are other objections that must be heard by the Court, and to allow the interrogating lawyer to ask such questions as may establish or defeat the circumstances of any privilege claimed. When available, the judges of this District will entertain telephone calls from lawyers in a deposition in an attempt to resolve such objections before a deposition concludes. However, this may not always be possible and in some instances, the Court and the parties may deem it best to first allow a transcript to be prepared and the issues presented and briefed by proper motion.

Lawyers should be aware that an instruction not to answer is disfavored by the Court. A lawyer who improperly uses such instruction runs the risk that the lawyer and/or the client will be subject to sanctions including substantial expense awards, the cost of reconvening the deposition (travel expenses, attorneys' fees, court reporter fees, witness fees, and the like), and any other relief available under the Federal Rules.

E. **Attorney-Deponent Conference During Deposition**. Except during normal breaks and for purposes of determining the existence of privilege or the like, normally at the request of the client, a deponent and his or her attorney should not confer during a deposition. The fact and duration of any such conference may be pointed out on the record and, in the event of abuse, the Court may enter an appropriate protective order and/or sanctions.

F. **Depositions by Telephone or Other Remote Means**. Telephone and other remote depositions may be taken pursuant to Federal Rule 30(b)(4) either by stipulation or by Court order. In either event, the parties should confer and agree upon the mechanical or technical procedures involved.

G. **Videotape Depositions**. Videotaped depositions may be taken pursuant to Federal Rule 30(b)(3) without leave of Court or agreement of opposing counsel. Videotaped depositions are a common practice in the Southern District, and procedures for such depositions are routinely agreed to by counsel. While Federal Rule 30(b)(3) provides that parties are not required to record depositions stenographically when recorded by videotape, a transcript is required if the deposition is offered as evidence at trial or on a dispositive motion under Federal Rule 56. Thus, it remains the common practice in this District for a stenographic recording to be made of any videotaped deposition. If the party noticing the videotaped deposition does not intend to also provide for a transcript to be made, then notice should be given to opposing counsel in advance so that opposing counsel may arrange for transcription if desired.

While the procedural details of a videotaped deposition may vary from case to case, such procedures usually include the following absent stipulation to the contrary:

1. The witness shall first be duly sworn on camera by an officer authorized to administer oaths, before whom the deposition is being taken.

2. If any objections are made, the objections shall be ruled upon by the Court on the basis of the stenographic transcript and, if any questions or answers are stricken by the Court, the videotape and sound recording must be edited so that it will conform in all respects to the Court's ruling.

3. The party noticing the videotape deposition shall arrange for the court reporter and videographer to cross-reference the stenographic transcript and video recording so as to allow the parties to conveniently correlate the videotape with the transcript for future editing purposes, both pre-trial and during trial.

4. The camera operator or person making the videotape recording shall certify the correctness and completeness of the recording both orally and visually at the conclusion of the deposition, just as would the stenographic reporter certifying a typed record of a deposition.

5. A log index shall be made by the camera operator or person making the videotape, to include the identity of the questioner (cross-referenced to the digital reading on the digital counter), a list of exhibits, and the names of all persons and parties present at the depositions.

6. Copies of the videotape recording shall be made at the expense of any party requesting them.

7. The party desiring to take the videotaped deposition shall arrange for and bear the expenses of recording the videotaped deposition, as well as of playing the videotaped deposition at trial.

8. The party desiring to stenographically record the videotaped deposition shall bear the usual expenses for the transcription of the stenographic record. Normally, this will be the same party desiring to take the videotape deposition and bearing the expenses therefor.

9. The party presenting the videotaped deposition at trial is responsible for the expeditious and efficient presentation of the testimony and is expected to ensure a) that it conforms in every respect possible to the usual procedure for the presentation of witnesses and b) that the videotape is edited to reflect any evidentiary rulings.

H. **Depositions of Experts**. Federal Rule 26(b)(4)(A) provides that a party may depose any person who has been identified as an expert whose opinions may be presented at trial. The timing of expert depositions is normally governed by the Scheduling Order.

Disclosure of reports from experts is required under Federal Rule 26(a)(2) at the times set forth in the Scheduling Order. Federal Rule 26(b)(4) provides that where a report from the expert is required, then the deposition shall not be conducted until after the report has been provided. As noted in this Court's Local Rules, this Court does not regularly consider a treating physician to be an expert from whom a written and signed report is required under Federal Rule 26(a)(2). See Local Rule 26(B)(1)(b). However, allowing treating physicians to testify as an expert without the requirement of producing a written and signed report does not relieve a party of the

burden of otherwise complying with the disclosure requirements for such witnesses that are listed in Federal Rule 26(a)(2)(C).

I. **Depositions of Doctors**. The deposition of a medical doctor should ordinarily be scheduled by agreement with the doctor, almost always at the doctor's office or hospital. If the circumstances require issuance of a subpoena (*duces tecum* or otherwise), the deposition should still be scheduled by agreement if possible. As a courtesy, the lawyer should, prior to or at the time of issuance of the subpoena, notify the doctor of the issuance of the subpoena, the time and place scheduled, what records (if any) have been subpoenaed and the general subject of examination. The attorneys should, prior to the deposition, reach an agreement on who is responsible for paying the costs of the doctor's deposition, with such costs ordinarily borne by the party noticing the deposition. There may be other costs or fees, however, on which the attorneys should seek to reach agreement prior to the deposition.

VII. CONCLUSION

These guides to discovery are already being followed by most lawyers practicing in this District. Where a question arises, however, attorneys should consult these guidelines for an answer rather than immediately filing a motion with the Court.