GUIDELINES TO CIVIL DISCOVERY PRACTICE IN THE MIDDLE DISTRICT OF ALABAMA

Effective February 9, 2015

THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF ALABAMA

IN RE: GUIDELINES TO CIVIL DISCOVERY PRACTICE IN THE MIDDLE DISTRICT OF ALABAMA) 2:15-mc-3695-WKW

ORDER

It is hereby ORDERED that the GUIDELINES TO CIVIL DISCOVERY PRACTICE IN THE MIDDLE DISTRICT OF ALABAMA are to be effective February 9, 2015. All previous Guidelines are hereby vacated.

DONE this 3rd day of February, 2015.

W. Keith Watkins
Chief United States District Judge

SUMMARY OF THE 2015 REVISIONS TO THE GUIDELINES TO CIVIL DISCOVERY PRACTICE IN THE MIDDLE DISTRICT OF ALABAMA

The 2015 updates to the Guidelines to Civil Discovery Practice in the Middle District of Alabama contain many organizational and stylistic changes. The updates also incorporate substantive changes made by the Federal Rules of Civil Procedure. Substantive changes specific to the Middle District have been made to address common issues and concerns. A summary of the substantive changes follows:

- I (A) Courtesy – Requires a telephone call or in person meeting addressing a discovery dispute before filing a motion to compel discovery. Also requires that the parties communicate either by telephone or at a face to face meeting (i.e. – in person, by Skype, video conference or the like) regarding discovery disputes.

- I (G) Timeliness of Discovery Responses; Sanctions – When responses cannot be timely served, parties should first attempt to reach an agreement, confirmed in writing. If no agreement is reached, then a motion for extension should be filed, and counsel should not file a motion to compel while it is pending. Extensions that do not interfere with case management will ordinarily be granted.

- I (H) Discovery Cutoff - The Court applies the discovery cutoff date to mean that discovery must be completed by that date. Discovery (primarily taking depositions) may be taken by agreement after the discovery cutoff, but the Court may refuse to resolve any disputes. The best practice is to file a Motion for Extension of Discovery before the discovery cutoff.

- I (J) (1) Invocation of Privilege or Work-Product Protection – A sample privilege log has been incorporated and attached as Appendix I.

- I (J) (2) Invocation of Privilege or Work-Product Protection – Sets out specific procedure to follow when a privilege is raised and there is an objection to the privilege.

- II (B) Persons Who May Attend Depositions - The rule of sequestration of witnesses does not apply at a deposition without a protective order. As a matter of courtesy, counsel planning to have spectator witnesses attend a deposition should provide advance notice to opposing counsel so that a protective order can be requested if needed.

- II (D)(2) Instruction that a Witness Not Answer – If an instruction not to answer is made, the lawyers should try to complete the remainder of the deposition before contacting the Court about the instruction, in case there are other objections that must be heard by the Court and to allow for a transcript to be prepared.

- II (D)(4) Telephone Calls to the Court – The Court does not normally accept telephone calls during a deposition about objections or disputes. Instead, the parties should finish the deposition, have the entire deposition transcribed, and file a motion regarding the dispute with the transcript attached.

- II (G)(8) Videotape Depositions - The party noticing the videotape deposition is the custodian of the videotape recording not the Clerk of Court.

- II (H) Depositions of Doctors – Ordinarily the fee for a doctor's deposition is paid for by the noticing party, but the parties should agree beforehand as to all fees and costs.

- III (C)(3) Manner of Production - Documents may be produced (1) for inspection and photocopying, (2) by providing photocopies, (3) by electronic scan, or (4) on disk. Regardless of the method used, the parties should list, mark or index the documents so that they can be clearly identified and differentiated from other documents produced.

- III (C)(3)(a)(2) Producing Documents at an Inspection – Records shall be made available in a reasonable manner with as much privacy as is practical.

- III (C)(3)(a)(3) Producing Documents at an Inspection – An employee of the producing party shall be available to answer questions about the nature of the record retention system at an inspection.

- III (C)(3)(a)(4) Producing Documents at an Inspection – The practice of "dumping" or producing large volumes of records without sufficient identification is an abuse of discovery and may subject a party and/or lawyer to sanctions.

- III (C)(3)(a)(5) Producing Documents at an Inspection - When a small number of documents are exchanged, a listing should be prepared by the producing lawyer. For a more voluminous production, a production log or chart identifying the documents may be appropriate.

- III (C)(3)(a)(6) Producing Documents at an Inspection – The parties are to agree on a method of copying as well as who is responsible for the expense. The

presumption is that photocopying in small productions is to be borne by the producing party. In larger situations costs may be shared or shifted.

- III (D Electronically Stored Information (ESI) – A new comprehensive guideline for ESI has been incorporated addressing the need to make decisions early in discovery, the duty to disclose and notify opposing counsel about ESI, as well as set forth discovery parameters and a plan for production of ESI. Relevant definitions and procedures regarding use of the data are also included.

- IV (A) Number of Interrogatories – The Federal Rules provide a limit on written interrogatories, but the parties may agree to waive the limits or extend them, or seek leave of court to do so.

- IV (E)(1) Rule 33(d) – When producing documents in lieu of answering interrogatories, a reference should be made to a specific part of the document rather than the document as a whole.

- IV (E)(2) Rule 33(d) – Documents produced in lieu of answering interrogatories shall be made available for inspection in a reasonable manner with as much privacy as practical.

GUIDELINES TO CIVIL DISCOVERY PRACTICE IN THE MIDDLE DISTRICT OF ALABAMA

INTRODUCTION

Discovery in this District is conducted according to the Federal Rules of Civil Procedure ("Federal Rules") and the Local Rules for the Middle District of Alabama ("Local Rules")[1]. The Court's Rule 16 Scheduling Order will also contain important discovery information. Neither the rules, the scheduling orders, nor the case law, expressly cover all aspects of discovery. Many of the gaps have been filled informally by trial lawyers and judges, and over the years in this District a custom and practice has developed in several recurring discovery situations. These Guidelines provide information about the local customs and practices used in this District.

I. DISCOVERY IN GENERAL

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

For example, an e-mail, telephone call, or letter is customary before serving a notice of deposition. Also, a telephone call or in person meeting addressing a discovery dispute is required before filing a motion to compel discovery. The Federal Rules anticipate that discovery will proceed without the intervention of the Court. This Court has found that many discovery disputes can be resolved informally if the parties will communicate prior to Court intervention. The Court requires that the parties communicate either by telephone 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.

B. Continuing Obligation. Counsel are reminded that the Federal Rules expressly provide that a party is under a duty to supplement prior responses, answers and/or disclosures (See Fed.R.Civ.P. 26(e)). Fairness and personal integrity may suggest a broader range of such circumstances.

C. 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 inappropriate effect to the meaning of words which are otherwise reasonably clear.

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[1] If a conflict should arise between application of the Federal Rules and the Local Rules, the Federal Rules are to govern.

D. Reasonable Drafting and Reading. Discovery requests should be drafted, read and answered in a reasonable, commonsense manner.

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

F. Commencement of Discovery. Federal Rule 26(d) requires that no discovery be commenced until after the parties' Rule 26(f) Planning Meeting, or when otherwise authorized by the Court or the Federal Rules. If exceptional circumstances warrant earlier discovery, the parties may seek permission by motion.

G. Timeliness of Discovery Responses; Sanctions. The Federal Rules set out explicit time limits for responses to discovery requests. Those are the dates by which a lawyer should answer; he or she should not await a Court order. If a lawyer cannot answer on time, he or she should first confer with opposing counsel and attempt to reach a mutually agreeable resolution. If an agreement is reached as a result of the conference, counsel for the party who initiated the conference should confirm the matter in writing with opposing counsel as soon as possible. If an agreement cannot be reached, then the lawyer should move for an extension of time in which to answer, and opposing counsel should refrain from filing a motion to compel pending a ruling on the motion for extension of time. Requests for extensions to answer discovery that do not interfere with case management, such as filing deadlines or other scheduled discovery, will ordinarily be granted.

Once a Court order is obtained compelling discovery, unexcused failure to provide a timely response is treated by the Court with the special gravity which it deserves; violation of a Court order is always serious and, where appropriate, may be the subject of the full range of sanctions available under Federal Rule 37.

H. Discovery Cutoff. The Court ordinarily sets a discovery cutoff in its Rule 16 scheduling order. Normally the cutoff date for discovery precedes the pre-trial conference, which is usually four to six weeks prior to the trial date. The judges apply the discovery cutoff date to mean that discovery must be completed by that date. Consequently, discovery requests should be served more than thirty days prior to the cutoff date. Untimely discovery requests are subject to objection on that basis.

The parties may conduct discovery (primarily taking depositions) by agreement after the discovery cutoff. If an agreement is reached to extend the discovery cutoff, the agreement should be confirmed in writing as soon as possible. Lawyers should be aware, however, that if problems arise during the depositions (such as instructions not to answer questions or failure to produce documents at the deposition) the Court may refuse to resolve disputes because the depositions are being taken after the discovery cutoff and without the Court's permission. Parties who agree to engage in discovery after the cutoff

should exercise good faith and should not use the passing of the cutoff as an excuse for obstructive behavior or other bad faith conduct.

To ensure that the Court will hear and resolve discovery disputes after the discovery cutoff, the parties should jointly file a motion with the Court and obtain the Court's approval to conduct the discovery out of time. The motion should indicate what effect, if any, the additional discovery will have on existing deadlines. As a matter of practice, the Court does not favor discovery after the cutoff that forces changes in other pretrial deadlines.

Even though the Court may occasionally allow additional discovery upon motion, such permission should not be expected. When allowed, an extension is normally made upon a showing of good cause (including due diligence in the pursuit of discovery prior to the cutoff date), specifying the additional discovery needed, its purpose, and the time in which it can be completed.

Motions for extension of discovery are normally treated with special disfavor if they are filed after the discovery cutoff date.

I. Timeliness of Motions to Compel. Before a motion to compel may be filed, the parties are required to confer about the matters concerning the dispute either by telephone 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 is reached as a result of the conference, counsel for the party who initiated the conference should confirm the matter in writing with opposing counsel as soon as possible. For any matters unresolved after the conference, a motion to compel should be filed no later than ten (10) days prior to the discovery cutoff. If the motion to compel is not filed more than ten (10) days prior to the discovery cutoff, 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 ten day time period prior to the discovery cutoff.

J. Invocation of Privilege or Work-Product Protection. In those situations in which a privilege or work-product protection is invoked, it should be invoked in the following manner:

1. An objection based upon privilege (as identified and described in a "privilege log"[2]) should identify the privilege relied upon, and comply with Federal Rule 26(b)(5)(A).

2. If an objection is made, the parties must first confer and attempt to resolve the issue informally. Additional information that would not destroy the privilege

[2] A sample privilege log has been provided in Appendix 1.

should be provided to opposing counsel. Supporting factual detail which should be provided, to the extent that it will not destroy the privilege asserted (see paragraph 5 below), is as follows:

a. For documents.
    i. Description of the document.
    ii. Its date.
    iii. Name, address and employer of the author of the document, or the person taking the statement or the like.
    iv. Subject of the document.
    v. Persons to whom the document is addressed.
    vi. Persons indicated thereon as having received copies.
    vii. 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.
    viii. Purpose for which the document was created and transmitted.
    ix. Degree of confidentiality with which it was treated at the time of its creation and transmission, and thereafter.
    x. Any other facts relevant to the elements of the particular privilege asserted.

b. For oral communications.
    i. Who made the communication.
    ii. Date it was made.
    iii. To whom it was made.
    iv. Who was present or was in hearing distance at the time it was made.
    v. Purpose of the communication.
    vi. Subject matter of the communication.
    vii. General circumstances regarding its confidentiality at the time it was made and thereafter.
    viii. Any other facts relevant to the element of the particular privilege asserted.

3. Where an objection is stated at a deposition based upon privilege or work-product protection, a clear statement of the precise privilege relied upon should be made. However, no recitation of facts supporting the existence of the privilege is required in the deposition. On the other hand, a person asking the question should be given wide latitude in questioning the witness about all collateral facts in an effort to develop information as to whether or not the privilege does apply. The Court ordinarily views a vague statement of privilege with disfavor, because that makes it difficult for the attorney asking the question to know what facts he should inquire about as being pertinent to the question of whether the privilege applies.

Also, the Court looks upon the conduct of an attorney who asserts privilege and then obstructs inquiry into pertinent collateral facts with strong disfavor.

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

5. In the very rare case in which disclosure of information listed above itself discloses the privileged information, the document may be produced *in camera* for the Court to determine whether the detailed information shown above must be furnished to opposing counsel. The document should not be furnished *in camera* without prior Court approval.

II. DEPOSITIONS

A. Scheduling. A lawyer is expected to accommodate the schedules of opposing lawyers. In doing so, he or she can either prearrange a deposition or notice the deposition while at the same time indicating a willingness to be reasonable about any necessary rescheduling.

B. Persons Who May Attend Depositions. Each lawyer may ordinarily be accompanied at the deposition by one representative of each client and, in technical depositions, an expert.

Business necessity may suggest that the corporate representative be substituted, but this practice should not be abused.

Lawyers may also be accompanied by custodians of records, paralegals, secretaries, and the like, even though they may be called as technical witnesses on such questions as chain of custody or the foundation for the business record rule.

Pursuant to Federal Rule 30(c)(1), the rule of sequestration of witnesses does not apply at a deposition without a protective order pursuant to Federal Rule 26(c)(1)(E). Despite this Federal Rule, as a matter of courtesy, counsel for either party planning to have witnesses attend a deposition as spectators pursuant to Federal Rule 30(c) should provide reasonable advance notice to the opposing counsel in order to permit adequate time to seek an 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.

While more than one lawyer for each party may attend, ordinarily only one should question the witness or make objections, absent contrary agreement.

C. "The Usual Stipulations". At the beginning of the deposition the court reporter will ask all of the lawyers if they agree to the "usual stipulations?" One can normally say "yes" without fear. "The usual stipulations" simply waive a number of deposition technicalities, such as notice of the deposition, signature, and 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 stipulations and allow the lawyers to make desired modifications. Of course lawyers are not required to agree to the usual stipulations, but most lawyers ordinarily do.

D. Deposition Objections. 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 Rule 30(c). Federal Rule 30(d)(1) provides that any objection during a deposition be stated concisely and in a non-argumentative and non-suggestive manner. The comment to this sentence further notes that depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often used by lawyers to suggest how the deponent should respond. Lawyers are reminded that objections should comply with all applicable rules.

1. **Objection to the Form of the Question.** Both Rule 32(d)(3)(B) and "the usual stipulations" provide, among other things, that an objection to the form of the 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." This has the usual benefits of shorthand renditions and normally suffices, because it is usually apparent that the objection is directed to "leading" or to an insufficient or inaccurate foundation.

   The interrogating lawyer may properly ask the objecting lawyer to be more specific in his objection so that the problem with the question, if any, can be understood and if possible cured, as the rule contemplates.

2. **Instruction That a Witness Not Answer.** Occasionally in a deposition another lawyer may say to his or her client, "I instruct you not to answer that question." Such a practice is severely circumscribed by Rules 30(c)(2) and 30(d)(3). 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 for a transcript to be prepared.

   The use of an instruction not to answer is disfavored by the Court. A lawyer who improperly instructs a witness not to answer runs a risk that the lawyer and/or the client will be subject to sanctions, including but not limited to substantial expense

awards, such as 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.

3. **Suggestive Objections.** Lawyers should not attempt to prompt answers by the use of suggestive or "coaching" objections. In the event of an abuse of this sort, upon motion, the Court may enter an appropriate protective order and/or sanctions.

4. **Telephone Calls to the Court.** The Court will not normally entertain telephone calls from the parties during a deposition about objections or disputes at the deposition. Telephone calls about discovery disputes are looked at with disfavor, and only in extraordinary circumstances will the Court accept a phone call regarding such a dispute. Instead, the parties should finish the deposition, have the entire deposition transcribed, and file a motion regarding the dispute with the transcript attached.

E. Attorney Deponent Conferences During Deposition. Except during normal breaks and for purposes of determining the existence of privilege or the like, a deponent and his attorney should not confer during a deposition. The fact and duration of the conference may be pointed out on the record and, in the event of abuse, upon motion the Court may enter an appropriate protective order and/or sanctions.

F. Depositions By Telephone and 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 agree to the mechanical procedures involved.

G. Videotape Depositions. Videotape depositions may be taken under the provisions of Rule 30(b)(2) without first having to obtain permission of the Court or agreement from other counsel.

While the procedural details of a videotape deposition may vary from case to case, the following procedures must be followed, absent any stipulation to the contrary:

1. The deposition of the witness may be recorded on videotape but the testimony of the witness must also be recorded by a certified stenographic reporter and transcribed in the usual manner.

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

3. 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 struck by

the Court, the videotape and sound recording must be edited to reflect the deletions so that they will conform in all respects to the Court's rulings.

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 parties requesting them.

7. The party desiring to take the videotape deposition shall bear the expenses of arranging for, and recording the videotape of the deposition, and shall bear the usual expenses with respect to a stenographic recordation of the testimony and the transcription of the stenographic record.

8. The party noticing the videotape deposition shall be the custodian of the original of the videotape recording, which shall be preserved intact by him or her; deletions shall only be made on a copy, with any such deletions or edits clearly marked or noted for the Court and opposing counsel.

9. The party presenting the videotape deposition at trial is responsible for bearing the cost of presenting the videotape as well as the expeditious and efficient presentation of the testimony and is expected to see that it conforms in every respect possible to the usual procedure for the presentation of witnesses.

H. 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 unless impossible. 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, and subpoenaed records (if any) and the general subject of examination. The lawyers should, prior to the deposition, reach an agreement as to who is responsible for paying the costs of doctor's deposition. Ordinarily, the attendance fee of the doctor is paid for by the party noticing the deposition. There may be other costs or fees, however, and the lawyers should reach an agreement about this prior to the deposition.

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

A. General. When documents, electronically stored information, and tangible things (hereinafter "documents") are being produced, the following general guidelines, though varied to suit the needs of each case, are normally followed. In most situations the lawyers should be able to reach agreement based upon considerations of reasonableness and convenience. Because both the Federal and Local Rules contemplate that lawyers and parties will act reasonably in carrying out the objectives of the Rules, the Court looks with strong disfavor on a lawyer or party who acts unreasonably to thwart these objectives.

B. Requests for Documents.

1. **Oral Requests for Documents.** The Federal Rules address formal document production in Federal Rule 26(a) (Initial Disclosures) and Federal Rule 34. In addition, as a practical matter many lawyers produce or exchange documents upon informal request, often confirmed by letter, e-mail or other digital communication. A lawyer's word that he or she will produce a document, once given, is his or her bond and should be timely kept.

   Requests for production of documents should not ordinarily be made on the record at depositions and, if 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" is objectionably broad in many cases, but will be evaluated by the Court according to the circumstances of the particular case. If a producing party has a reasonably limited number of documents which can be identified in response to such request, then the request is not 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. As in all discovery matters, the Court expects the use of reason and common sense, and expects compliance with Rule 26(g).

C. Production of Documents.

1. **Timing.** If a request for production is filed in connection with a deposition notice, lawyers are expected to cooperate to produce the documents within a reasonable

time before the deposition, 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 has the normal 30 or 33 days in which to respond, the Court naturally expects parties to act reasonably in that context. In practice, shorter periods are routinely agreed to, and if not, the Court may be asked to shorten the time. Lawyers are expected to cooperate on such routine matters without Court intervention.

2. **Inspection.** The Court expects the lawyers to work together and agree as to how and where a production will take place.

    a. **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 that are to be made available for inspection, this is typically done at the office of counsel producing the documents or a corporate venue. The Court expects lawyers to make reasonable accommodation to one another with respect to the place of production of documents.

    b. **Later Inspection.** 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.

3. **Manner of Production.** Documents may be produced (1) for inspection and photocopying, (2) by providing photocopies, (3) by electronic scan, or (4) on disk. If the 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 in which he or she looks at the documents. While the inspection is in progress, the inspecting attorney shall also have the right to review again any documents which he has already examined during the inspection.

    Under Rule 34(b), the producing party of course 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, if asked, ought to provide a reasonable informal explanation of record keeping procedures.

    The parties should use some means of listing, marking or indexing the documents which have been produced so that the documents can be clearly identified and so that previously produced documents can be differentiated from those which have not been produced. Identification or marking is typically done by the producing party and done in a manner 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.

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 first to seek cooperation in the reasonable excision or redaction of non-discovered or non-discoverable matter, only in extraordinary situations approaching the Court on the matter. Simple honesty of course requires that the existence of a requested but protected document be pointed out, not simply ignored.

a. **Producing Documents at an Inspection**

If the documents are produced by making them available for inspection, the following guidelines are to govern the production for inspection:

1. The specification of documents to be produced shall be in sufficient detail to permit the requesting party to locate and identify the records and to ascertain the answer as readily as could the party from whom the discovery is sought.

2. The producing party shall make its records available in a reasonable manner (i.e., with tables, chairs, lighting, air conditioning or heat if possible, and the like) during normal business hours, or in lieu of agreement on that, from 8:00 a.m. to 5:00 p.m., Monday through Friday. The producing party should ensure that the requesting party is given as much privacy as is practicable given the location of the inspection. For example, if there is a private room not otherwise being used, it should be made available. If there is no such accommodation, then the requesting party should be given as much privacy as is practicable without interfering with the normal business operations of the producing party.

3. The producing party shall designate one of its regular employees to be available to instruct the requesting party in the nature and use of the records retention system involved. That person shall be one who is fully familiar with the records system and, if a question arises concerning 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 to the question.

4. "Document dumps" or the practice of producing voluminous records so as to obscure responses, by producing documents without differentiations or designations of responsive documents so as to correspond 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.

5. Listing or Marking. The parties should use some means of listing or marking the documents which have been produced so that the documents can be clearly identified and so that previously produced documents can be differentiated from those which have not been produced. For a relatively few documents, a listing prepared by the producing attorney (which should be exchanged with opposing counsel) may be appropriate. For a more voluminous production, a production log or chart identifying the documents or document ranges responsive to the request prepared by the producing attorney may be appropriate. Identification or marking is typically done by the producing party and done in a manner 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 insure an accurate record of what was produced, on what date, from whom, and to whom. A responding party is expected to cooperate reasonably.

6. Copying. While photocopies are often prepared by the producing party for the inspecting party as a matter of convenience or accommodation, the inspecting party has the right to insist on seeing originals.

   The photocopying of documents will generally be the responsibility of the inspecting party, but the producing party must render reasonable assistance and cooperation. The Court expects the parties to agree on a method of photocopying, as well as who is responsible for the expense of photocopying, without Court intervention. For relatively small amounts of photocopying, the producing party typically bears the cost of photocopying. Although the costs of the document production, including copying, presumptively are borne by the producing party, counsel may (and often do) agree otherwise. Furthermore, producing counsel may move for a protective order that such costs be shifted or shared, in the limited circumstances in which bearing the costs is unduly burdensome to the producing party.

D. Electronically Stored Information (ESI)[3]. These guidelines[4] 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)(l) 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.

4. Duty to meet and confer regarding ESI. During the Federal Rule 26(f) conference, the parties should confer regarding the following matters:[5]

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[3] These guidelines are adapted from those promulgated by the United States District Court for the District of Oklahoma, which are acknowledged and appreciated.

[4] For definitions of terms used in these guidelines, see The Sedona Conference® Glossary: E-Discovery & Digital Information Management (Third Edition) at http://www. thesedonaconference.org.

[5] For a more detailed description of matters that may need to be discussed, see Craig Ball, *Ask the Right Questions© 2007, 2013,* as updated by the author from *Ask and Answer the Right Questions in EDD,* LAW TECHNOLOGY NEWS, Jan. 4, 2008 and reprinted in these Guidelines with permission at Appendix 2.

(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 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.

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

ii. The parties may also establish a "clawback agreement," 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.

iii. Other voluntary agreements should be considered as appropriate. The parties should be aware that there is an issue as to whether such agreements bind third parties who are not parties to the agreements.[6] The parties may consider asking the Court to incorporate the agreement into a Court order.

iv. Counsel should be aware this rule merely establishes a procedure to minimize the effects of inadvertent disclosure. It does not resolve the question of whether inadvertent disclosure causes waiver of the privilege. That question is resolved by the law of the jurisdiction involved.

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[6] For a detailed discussion on this issue, see Hon. John M. Facciola, *Sailing on Confused Seas: Privilege Waiver and the New Federal Rules of Civil Procedure,* 2006 Fed. Cts. L. Rev. 6 (Sept. 2006) at http://www.fclr.org/2006fedctslrev6.htm.

v. An inadvertent disclosure may 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. INTERROGATORIES

A. Number of Interrogatories. The Federal Rules provide for a limit on the number of written interrogatories, including sub-parts. The parties may agree to waive the limits or extend them to a set number, or a party may seek leave of Court to serve more than the number provided in the Federal Rules.

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. Sanctions may be imposed by the Court for serving form interrogatories where it reasonably appears that the questions are not relevant to any legitimate inquiry.

C. Reference to Deposition or Document. Because a party is entitled to discovery both by deposition and interrogatories (absent a Court order), it is ordinarily insufficient to answer an interrogatory by saying something 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, since the testimony of an officer may not necessarily represent the full corporate answer. Similarly, a reference to a single document is not necessarily a full answer, and the information in the document unlike the interrogatory answer is not ordinarily set forth under oath.

In rare circumstances it may be appropriate for a corporation or partnership to 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 rare circumstance in which an individual party has already fully answered an interrogatory question in the course of a previous deposition, the deposition may be adopted as the interrogatory answer. The practice must be used carefully and in good faith, however, since for purposes of discovery sanctions "an evasive or incomplete answer is to be treated as a failure to answer." Fed.R.Civ.P. 37(a)(3).

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 in Count Two" may well be objectionably broad in an

antitrust case, though it may not in a suit upon a note or one under the Truth in Lending Act.

While there is no bright line test, common sense, good faith, and Federal Rules 26(b) and 33(a)(2) usually suggest whether such a question is proper.

E. Rule 33(d). Federal Rule 33(d) allows a party in very limited circumstances to produce documents in lieu of answering interrogatories. To avoid several recurring abuses of Rule 33(d), the Court may enter a Rule 33(d) order which (though it may vary 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 could the party from whom discovery is sought. Specific references to which part(s) of the document is responsive, when applicable, should be made, rather than reference to a document as a whole.

2. The producing party shall make its records available in a reasonable manner (i.e., with tables, chairs, lighting, air conditioning or heat if possible, and the like) during the normal business hours, or in lieu of agreement on that, from 8:00 a.m. to 5:00 p.m., Monday through Friday. The producing party should ensure that the requesting party is given as much privacy as is practicable given the location of the inspection. For example, if there is a private room not otherwise being used, it should be made available. If there is no such accommodation, then the requesting party should be given as much privacy as is practicable without interfering with the normal business operations of the producing party.

3. The producing party shall designate one of its regular employees to be available to instruct the interrogating party in the nature and use of the records retention system involved. That person shall be one who is fully familiar with the records system and, if a question arises concerning 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 to the question.

4. 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).

5. 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 it has any documents even arguably subject to this

clause but which it declines to produce for some reason, it shall object on the record and call the circumstances to the attention of the parties and the Court.

6. 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 event, the interrogating party may approach the Court for reconsideration of the propriety of the 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 on reconsideration of the Rule 33(c) election.

V. REQUESTS FOR ADMISSIONS

Rule 36 of the Federal Rules is followed in this District in accordance with its terms and, in the light of the serious consequences of an improper response (or failure to respond), every responding party should carefully reread Rule 36, which requires more of a response than many lawyers or other courts seem to believe. For example, an answering party may not give lack of information as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny.

VI. 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.

[January 8, 2014]

APPENDIX I

XXX v. XXX
UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION
CIVIL ACTION NO: 2:13-CV-
PRIVILEGE LOG

BATES	DATE	DESCRIPTION	NOTES
		Production Dated March 19, 2013	
0003	01/07/13	Email from [Lawyer] to XXX cc: XXX; XXX re: XXX lawsuit Attachments	Attorney/Client Privileged
0018	12/28/12	Email from [Lawyer] to XXX cc: XXX re: RE: XXX	Attorney/Client Privileged
0020-0021	12/26/12	Email from [Lawyer] to XXX re: FW: BHAMLIB-#1240686.v.1 XXX EEOC_position_statement_or_response	Attorney/Client Privileged
0026	12/18/12	Email from XXX [Lawyer] cc: XXX; XXX; XXX RE: XXX EEOC charge	Attorney/Client Privileged
0029-0031	12/14/12	Correspondence from [Lawyer] to XXX re: FW: XXX EEOC Charge Attachments: Comment's from XXX employees when notified.docx	Attorney/Client Privileged
0032	12/03/12	Email from [Lawyer] to XXX; XXX re: FW: Files on XXX Attachments	Attorney/Client Privileged
0068 0069	12/03/12	Email from [Lawyer] to XXX; XXX re: FW: Draft of letter to XX 081412 Attachments: Draft of letter to XXX_081412.docx	Attorney/Client Work Product
0179-0180	12/04/12	Email from XXX to [Lawyer] re: FW: Job Quote	*Redacted* -Attorney/Client Privileged
0181-0182	12/04/12	Email from XXX to [Lawyer] re: FW: Deadline: 9/26/2012 Unfavorable Decision on XXX, ###-##-3506 Inhouse: SG73 Loc: unknown Unidentified	*Redacted* -Attorney/Client Privileged
0426-0427		XXX Interview	Attorney/Client Privileged
		Production Dated March 28, 2013	
3151	No Date	XXX Chronology	Attorney/Client Work Product
3164	08/01/12	Memo to File – XXX from XXX re: July 24, 2012 Meeting	*Redacted* -Attorney/Client Privileged
3193-3218	01/2013	Defendant's Answer in DRAFT	Attorney/Client Work Product

APPENDIX II

Ask the Right Questions

By Craig Ball

Sometimes it's as important to ask the right questions as it is to know the right answers, especially when it comes to nailing down sources of electronically stored information, preservation efforts and plans for production in the FRCP Rule 26(f) conferences, the so-called "meet and confer." I cynically describe Rule 26(f) "meet and confer" sessions as two lawyers who don't trust each other negotiating matters neither understand. In the unlikely event there's a face-to-face meeting, it's something of a drive-by event without substantive exchange of information. On the rare occasion that knowledgeable people attend, the lawyers often make it difficult to interact in a constructive way.

But, meet and confer is critically important, and the federal bench is deadly serious about it. Heavy boots have begun to meet recalcitrant behinds when Rule 26(f) encounters are dysfunctional or perfunctory. Enlightened judges see that meet and confers must evolve into candid, constructive mind melds if we are to take some of the sting and "gotcha" out of e-discovery. Meet and confer requires intense preparation built on a broad and deep gathering of detailed information about systems, applications, users, issues and actions. An hour or two of hard work should lie(sic) behind every minute of a Rule 26(f) conference. Forget "winging it" on charm or bluster, and forget, "We'll get back to you on that." Moreover, it's not a one-sided responsibility. Virtually everyone uses computers and holds some electronic evidence.

Here are 50 questions of the sort that should be hashed out in a Rule 26(f) conference. If you think asking them is challenging, think about what's required to furnish answers you can certify in Court. It's going to take considerable arm-twisting by the Courts to get lawyers and clients to do this much homework and master a new vocabulary, but, there is no other way.

These 50 aren't all the right questions for you to pose to your opponent, but there's a good chance many of them are ... and a likelihood you'll be in the hot seat facing them.

1. What are the issues in the case?
2. Who are the key players in the case?
3. Who are the persons most knowledgeable about ESI systems?
4. What events and intervals are relevant?
5. When did preservation duties and privileges attach?
6. What data are at greatest risk of alteration or destruction?

7. Are systems slated for replacement or disposal?
8. What steps have been or will be taken to preserve ESI?
9. What third parties hold information that must be preserved, and who will notify them?
10. What data require forensically sound preservation?
11. Are there unique chain-of-custody needs to be met?
12. What metadata are relevant, and how will it be preserved, extracted and produced?
13. What are the data retention policies and practices?
14. What are the backup practices, and what tape or other archives exist?
15. Are there legacy systems to be addressed?
16. How will we handle challenging ESI, like social media, phones, tablets and messaging?
17. Is there a preservation duty going forward, and how will it be met?
18. Is a preservation or protective order needed?
19. What e-mail applications are used currently and in the relevant past?
20. Are personal e-mail accounts and home computer systems involved?
21. What principal applications are used in the business, now and in the past?
22. What electronic formats are common, and in what anticipated volumes?
23. Is there a document or messaging archival system?
24. What relevant databases exist?
25. Will paper documents be scanned, at what resolution and with what OCR and metadata?
26. What search techniques will be used to identify responsive or privileged ESI?
27. If keyword searching is contemplated, can the parties agree on keywords?
28. Will an iterative process permitting supplementary keyword searches be pursued?
29. Will predictive coding and technology-assisted review be used, and in what manner?
30. How will the contents of databases be discovered? Queries? Export? Copies? Access?
31. How will de-duplication be handled, and will data be re-populated for production?
32. What forms of production are offered or sought?
33. What information will be produced in native and near-native forms?
34. Will single- or multi-page .tiffs, PDFs or other image formats be produced?
35. Will load files accompany production, and how will they be populated?
36. How will the parties approach file naming, unique identification and Bates numbering?
37. On what media will ESI be delivered? Optical disks? External drives? Via the Cloud?
38. How will we handle inadvertent production of privileged ESI? By FRE Rule 502 orders?
39. How will we protect trade secrets and other confidential information in the ESI?
40. Do regulatory prohibitions on disclosure or foreign privacy laws apply?
41. How will we handle authentication and use of ESI in proceedings?

42. What ESI will be claimed as not reasonably accessible, and on what bases?
43. Who will serve as liaisons or coordinators for each side on ESI issues?
44. Will technical assistants be permitted to communicate directly?
45. Is there a need for an e-discovery special master?
46. Can any costs be shared or shifted by agreement?
47. Can cost savings be realized using shared vendors, repositories or neutral experts?
48. How much time is required to identify, collect, process, review, redact and produce ESI?
49. How can production be structured to accommodate depositions and deadlines?
50. When is the next Rule 26(f) conference (because we need to do this more than once)?

For further guidance on meeting e-discovery duties, please see the many free articles published at craigball.com and posts at the blog ballinyourcourt.com.