

2024 Edition

DISCLOSURE AND DISCOVERY MANUAL
UNDER FEDERAL RULES OF CIVIL PROCEDURE

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I. INTRODUCTION

Since 1993, profound changes have evolved regarding discovery and case management rules and procedures in federal district courts. The changes were in the form of amendments to the Federal Rules of Civil Procedure (“FRCP”). In 2000, the final touches to the evolution of the current Rules occurred. The amendments were developed and passed by the United States Judicial Conference, the United States Supreme Court, and Congress.¹

There were two general themes that ran through the 2000 Disclosure and Discovery amendments. The first theme was to have national uniformity in the federal district courts.² Although the initial provisions in 1993 allowed an “opt out” on a district-by-district basis, the 2000 amendments eliminated the ability of the court to “opt out” of the disclosure provisions of Rule 26 by local rule or general order. Judges still have discretion to order variations in the disclosure and discovery practices on a case-by-case basis. The second theme was to control the cost of discovery. This was sought to be achieved by a reduction in the scope of both disclosure and attorney-controlled discovery in all cases, as well as a limit on the length and number of depositions. These themes have continued through the course of various amendments over the years.

The essence of the 1993 amendments to the FRCP was to divide discovery into two basic categories: (1) court-controlled discovery through initial, expert and pretrial disclosures; and (2) attorney-controlled discovery, through depositions, interrogatories, document requests, and request for admissions. The purpose of the 1993 amendments was clearly stated in Rule 1, which provides, “they shall be construed and administered to secure the just, speedy and inexpensive determination of every action.” The 1993 Advisory Committee Notes to Rule 1 state that the rules are to ensure that civil cases are “resolved not only fairly, but also without undue cost or delay.”

¹ The power of the Supreme Court to prescribe rules of procedure, and the role of Congress in their enactment, is set forth in the “Rules Enabling Act.” 28 U.S.C. § 2071, *et seq.*

² This was not a novel concept. The purpose for the Federal Rules, created in the 1940’s, was for uniform standard of procedure in the federal courts.

Effective December 1, 2006, another major development in discovery and disclosure took place. This was the enactment of amended rules dealing with electronically stored information. On December 1, 2015, the FRCP was again amended, focusing even further on electronically stored information, and specifically, on proportionality. The 2015 amendments also shortened the time to serve a complaint, and the time for the court to issue a case management order.

This 2024 Edition is an update to the 2023 edition. This edition is current through the December 1, 2023 amendments to the Federal Rules of Evidence and Civil Procedure.

II. TIMING AND SEQUENCE OF DISCOVERY

A. **Discovery is Stayed Until a Rule 26(f) conference Occurs.**

No discovery can occur before the Rule 26(f) conference, unless the case is excluded by the Rule itself, is stipulated otherwise, or unless the court so orders. Fed. R. Civ. P. 26(d). The parties can hold the conference at any time they choose, however the Rule 26(f) conference must be held at least 21 days before the court scheduled Rule 16(b) Scheduling Conference. [*See Section III.B., infra*]. As a result of the 2015 amendments, parties can now send Rule 34 document requests early, but responses are delayed post the Rule 26(f) conference. *See XVII. B., infra*.

B. **Excluded Cases are Exempt.**

The cases excluded in Rule 26(a)(1)(E) are exempt from this provision. [These are discussed in Section V.F.] This should serve as no surprise since, with the exception of the prisoner pro se cases, there is typically little discovery associated with the other categories of cases set forth in the exclusions in Rule 26(a)(1)(E).

C. **Obtaining Leave of Court for Pre-Rule 26(f) Discovery.**

1. The court may order discovery before a Rule 26(f) conference on a case-by-case basis. Any party in the case may seek leave of

court to take depositions before the Rule 26(f) conference. *See* Rule 30(a)(2)(A)(iii).

2. Relief from the discovery moratorium is likely to occur in the following circumstances:
 - a. Where some limited discovery is needed to address jurisdictional, venue or other issues in conjunction with a Rule 12 motion;
 - b. Where a deposition is urgent in connection with a temporary restraining order or preliminary injunction;
 - c. Where it is necessary to preserve testimony or other evidence; and,
 - d. Where limited discovery would facilitate early settlement.
3. The court also has discretion to allow discovery prior to the Rule 26(f) conference if other good cause can be established.
4. Issues regarding early discovery are typically handled by magistrate judges. In the Southern District of California, counsel must comply with Local Rule 26.1, the meet and confer requirement, in this regard. Under the 2015 amendments, the court, may order that before moving for an order relating to discovery, the movant must request a conference with the court. Rule 16(b)(3). Check your Case Management or Scheduling Order in this regard.
5. Rule 30(a)(2) requires the court to grant the request if it is consistent with the benefit versus burden approach set forth in Rule 26(b)(2)(C), which provides, “(iii) the burden or expense of proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.”

6. The party seeking expedited discovery in advance of a Rule 26(f) conference has the burden of showing good cause for the requested departure from the usual discovery procedures. *Pod-Ners, LLC v. Northern Feed & Bean of Lucerne, Ltd. Liability Co.*, 204 F.R.D. 675, 676 (D. Colo. 2002).
7. Preservation of evidence that might otherwise be lost would be a basis to allow for the taking of a deposition or the production of other information prior to the Rule 26(f) conference. *See* Fed. R. Civ. P. 27(a).

D. Expedited (Pre-Answer or Pre-Service) Discovery.

Sometimes, a party needs discovery shortly after the filing of the complaint. This includes --(but is not limited to) situations where evidence must be preserved or there is a need to seek a temporary restraining order or preliminary injunction. The expedited request can, and often does, precede an appearance by defendants and even service of the complaint. In those circumstances, a Rule 26(f) conference may not be practical or timely. As a result, the only realistic way to address relief of the Rule 26(d) discovery moratorium is by court order.

1. Historically, two different standards have been applied by the courts for determining when to allow a departure from the usual discovery procedures and timing. These are the preliminary injunction type analysis and the good cause standard. The preliminary injunction standard is certainly preempted by the 1993 and 2000 amendments to Rule 26, and specifically Rule 26(d)'s promulgation of a good cause standard for relief.
 - a. The preliminary-injunction type analysis required plaintiffs to satisfy a four-prong test akin to preliminary injunctive relief: [1] irreparable injury; [2] some probability of success on the merits; [3] some connection between expedited discovery and avoidance of irreparable injury; and [4] some evidence that injury will result without

expedited discovery looms greater than the injury the defendant will suffer if the expedited relief is granted. *Notaro v. Koch*, 95 F.R.D. 403, 405 (S.D.N.Y. 1982).

- b. Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party. Courts have recognized that good cause is frequently found in cases involving claims of infringement and unfair competition. *Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002) (citing *Benham Jewelry Corp. v. Aron Basha Corp.*, No. 97 CIV 3841 RWS, 1997 WL 639037, *20 (S.D.N.Y. Oct. 14, 1997)).
2. The Ninth Circuit has not addressed the propriety of the preliminary-injunctive type analysis; however, district courts within the circuit have rejected the preliminary-injunctive type analysis in favor of the more general good cause standard for permitting expedited discovery in advance of the Rule 26(f) conference. *Semitool*, 208 F.R.D. at 275; *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 614 (D. Ariz. 2001) (stating "[a]bsent credible authority to the contrary, the Court adopts a good cause standard"). With the 2000 amendments to Rule 26, the good cause standard clearly controls.
 3. Relief is typically sought by *ex parte* application.
 - a. In the Southern District of California, *ex parte* applications and orders are covered under Civ. L.R. 83.3.h.2. The application must include an affidavit or declaration with regard to notice, the reasons to dispense with notice, or attempts to provide notice without success. Additional chambers requirements may also be applicable given the assigned judge.
 - b. After service of the *ex parte* application, opposing counsel will ordinarily be given an opportunity to respond. If more time is needed, opposing counsel should confer with

movant's counsel and then the Court's law clerk to modify the schedule where good cause can be shown.

- c. After receipt, moving and opposing *ex parte* papers will be reviewed and a decision made with or without a hearing. If the court requires a hearing, the parties will be contacted to set a date and time.

E. Discovery Cut-off Dates.

1. Under Rule 16(b), the court is required to issue a scheduling order that limits the time of, among other things, the completion of discovery. Fed. R. Civ. P. 16(b)(3). The schedule is not to be modified except for good cause and by leave of court. Fed. R. Civ. P. 16(b)(4).
2. "Completed" means that all discovery under Rules 30-36 of the FRCP, and discovery subpoenas under Rule 45, must be initiated a sufficient period of time in advance of the cut-off date, so that the discovery may be completed by the cut-off date, taking into account the times for service, notice and response as set forth in the FRCP. *Integra Lifesciences I, Ltd. v. Merck KGaA, et al.*, 190 F.R.D. 563 (S.D. Cal. 1999).
3. Note also, that some judges require motions to compel discovery be brought within a certain time period following either the failure to respond to discovery or the provision of a response from which a dispute arises. Counsel should check the scheduling order for the case, as well as the local rules, very carefully. If the judge has set a time limit to bring the motion, or complete the discovery, counsel cannot agree to change that deadline without a court order. *See* Fed. R. Civ. P. 29.
4. Under Rule 16(b)(4), a case management schedule may be modified only for good cause and with the judge's consent. The Committee Notes to Rule 16(b) state the court may modify the schedule on a showing of good cause, "if it cannot reasonably be

met despite the diligence of the party seeking the extension.” If the party seeking modification “‘was not diligent,’ the inquiry should end and the motion to modify should not be granted”. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992); *Zivkovic v. So. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002).

III. RULE 26(f) CONFERENCE

A. **Mandatory Unless Excluded by the Rule or Court Order.**

A Rule 26(f) conference is mandatory in all cases unless the case is excluded under Rule 26(a)(1)(E)³ or by court order on a particularized showing that the conference would not be beneficial or would otherwise be burdensome. The court can also require a conference in a case otherwise excluded under Rule 26(a)(1)(E).

Considering the cost-effective benefits of the initial disclosure provision, the court is likely to carefully construe and limit circumstances which will allow exceptions or exclusions. A particularized showing that the conference would not be beneficial or would otherwise be burdensome is the standard provided by the Rule. This requires a case-by-case analysis where the parties feel that the exclusion should be applied. In the Southern District of California, the only clear instance where exclusion, at least on a temporary basis, may be warranted, is where the case is very close to settlement following the Early Neutral Evaluation Conference. In that circumstance exclusion from the efforts and burden of disclosure makes sense in light of the settlement prospects.

B. **Timing of the Rule 26(f) Conference.**

1. The Rule 26(f) conference must be held at least 21 days before the Rule 16(b) scheduling conference. In the Southern District of California, the Scheduling Conference is typically called the

³ See Section V.F. below for a list of the types of cases excluded under Rule 26(a)(1)(E).

“Case Management Conference.” The Case Management Conference is currently set between 30 to 60 days after the Early Neutral Evaluation Conference [Local Civil Rule 16.1.c.2], although some judges will hold the Case Management Conference at the same time as the Early Neutral Evaluation Conference. Once again, carefully review all orders issued by the court. It may also be helpful to consult the Judges’ Chambers Rules in this regard.⁴ Case by case exceptions of the timing are frequent. The timing of the Rule 26(f) conference and the Case Management Conference will be discussed at the Early Neutral Evaluation Conference. (*See Chapter XXI, infra*).

2. The court can reduce the time between the Rule 26(f) conference and the Rule 16(b) Case Management Conference to less than 21 days by order.
3. Nothing prevents the parties, on their own initiative, from convening the Rule 26(f) conference earlier than prescribed by the Rule.
4. The Southern District of California has adopted Patent Local Rules. The rules took effect April 3, 2006. Patent L.R. 2.1.a impacts the timing of the Rule 26(f) conference. It requires the Rule 26(f) conference “no later than twenty-one (21) days before the [Early Neutral Evaluation Conference.]”

C. Who Must Participate.

The attorneys of record and all unrepresented parties must participate in the Rule 26(f) conference.

D. Format of the Conference.

1. Before the 2000 amendments, the 26(f) conference was referred to as a “meeting.” There is no longer a “meeting” required under

⁴ www.casd.uscourts.gov

the Rule. This means that the conference does not need to be in person; rather, the parties may confer telephonically.

2. A court may order that the conference take place in person where that would appear to be of significant benefit. This is likely a topic to be discussed at the Early Neutral Evaluation Conference with the assigned magistrate judge for cases in the Southern District of California. Premises liability cases or Americans with Disabilities Act Title III cases regarding public access barriers are ideal types of cases for in-person Rule 26(f) conferences between the parties and counsel at the site that is the subject of the action.

E. What Must Be Discussed.

1. The timing, the form, or the requirements for the Rule 26(a) initial disclosures.
2. Subjects on which discovery may be needed, when discovery should be complete, and in what order discovery should proceed, as well as any other related issues:
 - a. A common issue of importance is the creation of a Stipulated Protective Order for privileged or proprietary material so that disclosure and discovery can proceed without undue delay. Note, parties may mark items as “confidential” under a stipulated protective order to expedite discovery. The public’s right of access or the true protection afforded the material will be the subject of a greater analysis. In this regard, *see* Section XXII.H.
 - b. In patent cases, discussion should include the identity of the claims, products, devices, methods, etc. in dispute to promote the quality and thoroughness of the required disclosures and help with the planning for discovery. Consideration should also be given to the likely timing for claims interpretation hearings [*Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996)], dispositive

motions, or other likely deadlines for the case. These timing considerations should be included in the parties' joint discovery plan.

- c. The Southern District's Patent Local Rules include directives for case proceedings and set various deadlines specific to this type of litigation. As to the Rule 26(f) conference, Patent L.R. 2.1.b adds topics to the Rule 26(f) conference agenda.
- d. In class action cases, discussion should include the timing of the motion for class certification, as well as any necessary discovery in that regard. Many courts will limit discovery to class certification issues prior to the class certification hearing and determination and schedule the case accordingly. Counsel should confer in their meeting about their positions regarding the need to proceed in that fashion, or the need to address discovery more broadly in the early going. Where the court prefers a more limited scope in the early stages of the case, a well thought out plan to broaden discovery, and the reasons, therefore, will need to be presented.
- e. Issues of law that should be resolved early in the case schedule.
- f. Issues under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), needing determination pre-trial. Note, a growing number of courts will set a deadline for the determination of *Daubert* issues well before the trial. In the Southern District of California, this is the case in patent litigation under Patent Local Rule 2.1.a.4. Many of the judges employ the rule in their non-patent cases as well, and this will be reflected in the case management or other scheduling orders. Counsel should check with the judge's law clerk to be sure if there is any doubt in their minds. *Daubert* motions are not appropriate as in limine motions

in the eyes of most judges. As an example, *see* Chambers Rules of Judge Battaglia, Civil Pretrial Procedures, H.(4).⁵

3. Any changes the parties desire in the limitations on discovery (*i.e.*, 10 depositions per side) imposed by the Fed. R. Civ. P. discovery rules.
4. The matters for examination of Rule 30(b)(6) witnesses of organization parties. This is now a requirement of Rule 30(b)(6), and early attention to the matters of inquiry should help avoid overly long or ambiguously worded lists for examination and inadequately prepared witnesses.
5. The formulation of a specific joint discovery plan to be lodged with the court.
6. Issues regarding disclosure and discovery of electronically stored information are important to address at this early stage. These issues should include search terms or methods; the form of production; preservation of electronically stored information; review of electronically stored information for privilege; electronically stored information that is not reasonably accessible; and, the assertion of privilege after production and any agreement regarding protecting rights to assert the attorney/client privilege are circumstances of inadvertent disclosure. This “agenda” is required under Rule 26. (*See Chapter X., infra*).
7. Although key word searching has been the accepted standard, the approach has become overly costly and is inefficient with the large increase in ESI that we continue to amass. Where used, search terms are of particular importance. Crafted too narrowly, they will yield little; too broadly, they will yield far more than desired, or appropriate.

⁵ Available at www.casd.uscourts.gov

8. Technology assisted review (“TAR”), also known as “predictive coding,” is a technique that has received judicial acceptance as a legitimate search methodology. *DaSilva Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012). The process starts with training software with a “seed set,” which is a sample of documents pulled from the full population of documents needing review. Then, reviewers code each document as responsive or non-responsive and input this data into the predictive coding software. With time, the software is trained to make better decisions in determining responsiveness of documents.

9. Courts have addressed issues arising from predictive coding methods. In *Winfield v. City of New York*, No. 15-cv-05236, WL 5664852 (S.D.N.Y. Nov. 27, 2017), plaintiffs contended defendant’s TAR model over-designated documents in the seed set as non-responsive. As such, the program labeled several responsive documents as non-responsive. Plaintiffs sought to bar defendant from continuing to use TAR. After reviewing defendant’s TAR process *in camera*, the court held “the City’s training and review processes and protocols present[ed] no basis for finding that the City engaged in gross negligence in connection with ESI discovery – far from it.” *Id.* While the court found nothing “inherently defective” with the TAR process, evidence of “human error” justified an order compelling defendant to provide plaintiffs with a random sample of 300 non-privileged documents from the population of documents the TAR process marked as non-responsive. *Id.* The court found that this

random sample set would increase transparency and was reasonable given the volume of documents. *Id.*

10. Since search technology has become closer to approximating human reasoning, predictive coding or other computer assistive review technology is important to consider. It provides a potential advantage of a proportionate way of managing a case and is touted by some to be more accurate. However, bear in mind that the use of TAR, or similar advanced search methodologies, requires

someone with sufficient experience and understanding of the technology to obtain adequate results. In *In re Domestic Airline Travel Antitrust Litig.*, No. 15-1404, 2018 WL 4441507 (D.D.C. Sept. 13, 2018), a “deficient TAR process” yielded 3.5 million documents, with only 600,000 of them being responsive to plaintiff’s request. The court held plaintiffs’ “demonstrated good cause to warrant an extension of deadlines [for document review] in this case based upon Plaintiffs’ demonstration of diligence and a showing of nominal prejudice to the Defendants[.]” *Id.*, at *7.

- 11, No matter which method a party uses to search, collect, and review ESI, it must be defensible as a reasonable method if there is a challenge. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 262 (D. Md. 2008).

IV. THE JOINT DISCOVERY PLAN

A. Timing for Submission.

1. A joint discovery plan must be prepared and submitted to the court within 14 days following the Rule 26(f) conference. Fed. R. Civ. P. 26(f)(2). The court can order the discovery plan to be orally presented at the Case Management Conference upon an appropriate application made within the 14-day period.
2. The court may shorten the due date for the submission of a discovery plan, if necessary, for overall case management or scheduling needs. The discovery plans are not filed, but are lodged in the case, and should be lodged directly with the judge managing the case. In the Southern District of California, that is the assigned magistrate judge.

B. Scope of the Plan.

1. The discovery plan needs to address the discovery that will be sought by each party and the time by which it will be completed.

It should also discuss the designation and a disclosure of the expert material and reports.

- a. The parties should also discuss and report their positions regarding the deadlines for amending the pleadings or adding parties, the last date for filing dispositive motions and their estimates of timing for setting the final pretrial conference and trial.
- b. In patent cases, the likely timing contemplated for claim construction hearings [See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996)]; and dispositive motions (*i.e.*, summary judgment) should be included in the joint discovery plan. The other issues required under any local rule (*e.g.*, the Patent Local Rules for the Southern District of California) must also be discussed.
- c. In class action cases, the timing for the contemplated class certification motion should be discussed as well as any necessary discovery on that issue.
- d. In cases involving discovery of computer-based information or data, counsel should address the protocols or procedures for this discovery as part of the discovery plan.
- e. The extent to which issues under *Daubert* are known and will require resolution.
- f. The need for and any issues associated with protective orders with regard to proprietary information should be indicated.
- g. The handling of electronically stored information and the method for protection of the attorney client privilege in circumstances of inadvertent disclosure. (*See Section X.G., infra*).

2. A sample of a discovery plan form can be found on the website of the United States District Court, Northern District of Illinois.⁶
3. Disagreements concerning the plan or differing estimates over timing should be noted in the joint discovery plan for later resolution by the court at the Rule 16(b) Case Management Conference.

C. Scheduling Considerations.

1. As a general consideration, all discovery should be completed in advance of the motion filing cutoff dates.
2. In patent cases, *Markman* issues usually need to be resolved in advance of dispositive motions, since claims interpretation must be done before many dispositive motions can be decided. Under the Southern District of California's Patent Local Rules, the claim construction hearing is set within nine (9) months of the defendant's first appearance. Patent L.R. 2.1.a.2. In a 2013 amendment of the Patent Local Rules, the Southern District of California has directed that motions with regard to all *Daubert* issues, in all patent cases, be heard by the dispositive motion cutoff deadline. Patent L.R. 2.1.a.4. In other words, these cannot wait until the time for motions in limine. This ultimately makes sense because the testimony of expert witnesses often bears upon issues involved in a motion for summary judgment. Trial judge preferences and policies in this regard will obviously also control. The assigned magistrate judge will discuss these with counsel as part of the schedule process.
3. The Rule 16(d) Final Pretrial Conference is set 60 to 90 days after the motion filing cutoff. This allows time for a ruling on motions heard before the pretrial filings and disclosures associated with the Final Pretrial Conference, Local Civil Rule 16.1.f.2.,3.,6.,9, and Fed. R. Civ. P. 26(a)(3) must be made. The preferences or policies of the trial judge control these matters.

⁶ Available at: <https://www.ilnd.uscourts.gov/assets/documents/forms/public/form35.htm>

V. RULE 26(a)(1) INITIAL DISCLOSURES

A. Initial Disclosures [Rule 26(a)(1)(A-D)].

1. A party must provide the other parties with the names of witnesses and copies of the documents it may use to support its claims or defenses (unless solely for impeachment⁷), a computation for and supporting documentation for damages, and applicable insurance agreements:
 - a. Witnesses are defined as “each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses . . .” (emphasis added);
 - b. The former rule provided for the disclosure of information that was “relevant to disputed facts alleged with particularity in the pleadings.” (Emphasis added.) This language has been abandoned, thus narrowing the disclosure obligation from subject matter (i.e., relevant to) to supportive of claims and defenses;
 - c. The Committee Note provides, “[the term] ‘use’ includes any use at a pretrial conference, to support a motion, or at trial. The disclosure obligation is also triggered by intended use in discovery, apart from use to respond to a discovery request; use of a document to question a witness during a deposition is a common example.”;
 - d. A party is not obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use⁸;

⁷ The rationale for excluding impeachment materials is that disclosure would substantially impair their impeachment value. *Denty v. CSX Transp., Inc.*, 168 F.R.D. 549 (E.D.N.C. 1996).

⁸ Prior to the 2000 amendments, the scope of disclosure included favorable and unfavorable information.

- e. The application to “claims and defenses” requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claims, or defenses of another party. “It thereby bolsters the requirements of Rule 11(b)(4), which authorizes denials ‘warranted on the evidence,’ and disclosure should include the identity of any witness or document that the disclosing party may use to support such denials.” *See* Committee Note to Rule 26;
 - f. Although no authority or express direction is set forth in the Rule, expert information would not typically be within the scope of initial disclosure. A separate process for expert disclosure exists under Rule 26(a)(2), contemplated to be at a time when discovery is underway, and there is a more complete basis for experts to form their opinions. Were experts to be included in the initial disclosure process, the Rule would clearly state so. This interpretation is consistent with the “plain meaning” rule of the “canons” of statutory construction. *See Smith v. United States*, 508 U.S. 223, 228 (1993).
2. A party must disclose information “reasonably available” at the time.
- a. “Reasonably available” needs to be considered with reference to Rule 26 (g)(1). Disclosures must be signed by the attorney or party certifying, among other things, that the disclosures were formed after a “reasonable inquiry.”
 - b. Under Rule 26(g)(1), the “reasonable inquiry” is described in the 1993 Committee Note as something “reasonable under the circumstances.”
 - c. In *City of Rockford v. Mallinckrodt ARD Inc.*, 326 F.R.D. 489 (N.D. Ill. 2018), a case involving breach of contract, racketeering, and antitrust violations, the parties agreed upon a discovery plan, including a keyword searching plan. The parties proposed different protocols in the event the

requesting party believed certain documents were not included in the production. The requesting party proposed a random sample be taken of the null set (i.e. documents not returned as responsive by the search process), while the producing party proposed a “meet and confer” in such case. The court ruled the null set is reasonable under Rule 26(g) and proportionate under Rule 26(b).

3. The requirement to disclose “damage calculations” is also qualified by the “reasonably available” concept. There are a variety of cases where the damage calculations are incomplete, and likely dependent on information in the possession of others or subject to further evaluation and further discovery. The 1993 Committee Note states that the disclosure obligation applies to matters reasonably available, and not privileged or protected as work product.

B. Timing and Format of Disclosures.

1. Disclosures must occur within 14 days after the Rule 26(f) conference, unless the date is changed by stipulation or court order.
2. The disclosure must be in writing, signed and served, unless otherwise ordered by the court. No particular format is specified in the Rule; however, the written disclosure should specifically address the items specified in Rule 26(a)(1)(A-D). Disclosures are filed only if ordered by the court. *See* Fed. R. Civ. P. 5(d).⁹
3. Disclosures must be signed by an attorney of record or an unrepresented party. The Rule states the signature of the attorney or party constitutes a “certification” that “to the best of the person’s knowledge, information, and belief formed after a

⁹ Rule 5(d) indicates the disclosures under Rule 26(a)(1) or (2) are not filed until they are used in a proceeding or ordered filed by the court. Rule 5(d) also reflects similar treatment for “discovery requests,” which are defined as depositions, interrogatories, requests for documents or to permit entry upon land, and requests for admission.

reasonable inquiry with respect to a disclosure, it is complete and correct as of the time it is made.” Fed. R. Civ. P. 26 (g)(1)(A).

C. Parties Added After the 26(f) Conference.

1. Parties added after the Rule 26(f) conference must make their disclosures within 30 days of their service or joinder in the action. The 1993 amendments did not address later added parties. In the 2000 amendments, that circumstance is cured by setting a disclosure date as indicated.
2. Although not directly specified in the Rule, parties should provide copies of the disclosures and materials previously disclosed to the new party, and some discussion concerning the discovery plan or court ordered dates or deadlines should occur to see if modifications of dates and deadlines should be sought.

D. Altering the Disclosure Process by Stipulation.

1. The disclosure process may be altered by stipulation of the parties or court order. *See* Fed. R. Civ. P. 26(a)(1).
2. This is consistent with Rule 29 which provides that by stipulation, parties can modify procedures governing discovery.
 - a. Note, however, that Rule 29 states that stipulations extending the time limits in Rules 33, 34 and 36 require court approval. The 1970 Committee Note to Rule 29 also provides that any such stipulation modifying the procedures governing or limiting discovery may be superseded by a court order.
 - b. Note further that parties may not unilaterally extend a court set discovery deadline. The better practice is to seek an extension from the court. *Northwest Airlines, Inc. v. American Airlines, Inc.*, 870 F. Supp. 1499 (D. Minn.

1994). Local rules also have an impact in these circumstances. In the Southern District of California, stipulations are only binding on the court when approved by a judge. *See* United States District Court for the Southern District of California, Local Civil Rule 7.2.a.

E. Objections to Initial Disclosure.

1. At the Rule 26(f) conference, a party may object that the initial disclosure requirement is inappropriate under the circumstances of the case.
2. The objections must be stated in the Rule 26(f) discovery plan that is lodged with the court. *See* however, item 4 below concerning practice in the Southern District of California.
3. The court rules on the objections and determines what, if anything, must be disclosed, as well as the timing, at the Rule 16(b) Case Management Conference.
4. In the Southern District of California, counsel should be prepared to discuss any anticipated objections at the Early Neutral Evaluation Conference. The magistrate judge will resolve the issue at that time. (*See* Chapter XX., *infra*).
5. Other than cases presumptively excluded [*See* Rule 26(a)(1)(B)], circumstances where objections to disclosure will be sustained are narrowly construed.
6. The fact that an investigation is not complete does not excuse a party's obligation to disclose. *See* Rule 26(a)(1)(E).
7. The fact that a party challenges the other party's disclosure does not excuse a party's obligation to disclose. *Id.*

F. Cases Excluded from Initial Disclosure [Rule 26(a)(1)(B)].

The Rule specifically excludes nine types of cases from the initial disclosure provisions. These cases are **NOT** exempt from the other provisions of Rule 26(a)(2) or (a)(3) or the amendments with regard to discovery. These actions have been excluded based upon their nature, which is specifically described by the following categories:¹⁰

1. Actions to review administrative records;
2. Forfeiture actions;
3. Habeas Corpus proceedings;
4. Prisoner pro se cases;
5. Actions to enforce/quash administrative summons or subpoena;
6. U.S. cases to recover benefit payments;
7. Student loan collection cases;
8. A proceeding ancillary to proceedings in other courts; and,
9. Actions to enforce an arbitration award.

G. Bankruptcy Cases.

Application of the Civil Rules to Bankruptcy Proceedings is determined by the Bankruptcy Rules. In the Southern District of California, *See* Bankruptcy Local Rule 7016. New subdivision 26(a)(1)(E), item (vii) “Excluding A Proceeding Ancillary To Proceedings In Other Courts,” does not refer to bankruptcy proceedings. [*See* Committee Note to Rule 26(a)(1)(E)].

¹⁰ According to statistics of the Administrative Office of the courts, these categories presently comprise approximately one third of all cases in the federal system.

VI. DUTY TO SUPPLEMENT DISCLOSURES

Rule 26(e)(1) imposes a duty on a person who has made a disclosure under Rule 26(a) to supplement or correct the disclosure or response to include information thereafter acquired. Now that Rule 26 is applicable in all cases, the duty to supplement is equally applicable in all cases where initial disclosures are required. Sanctions for failure to supplement are severe. *See Section XX, infra.*

A. When Are Supplements Required?

The duty to supplement disclosures does not require a party to supplement disclosures automatically. The duty is imposed only where a party makes a disclosure under Rule 26(a) **and** when the party is ordered by the court **or**, “if the party learns that in some material respect the disclosure or response is incomplete or incorrect[.]”

B. To Whom Does the Duty Extend?

The duty is applicable either where the party or the party’s attorney learns of the corrective information. *See Committee Note to Rule 26(e)(1).*

C. Required Timing of Supplementation.

The Rule requires supplementation at “appropriate intervals.” The Committee Notes also provide that a “special promptness” is required as a trial date approaches. Neither “appropriate intervals” or “special promptness” are defined by the Rule or the Committee Note. These will be evaluated on a case by case basis.

D. Satisfying the Duty to Supplement.

The duty to supplement is satisfied when the additional or corrective information has been otherwise made known during the discovery process or in writing. Rule 26(e)(1). A careful practitioner should make sure a writing or formal supplementation or correction is made rather than rely on the argument that the additional or corrective information has been otherwise made available

during the discovery process because severe sanctions can be imposed for a failure to supplement a disclosure.

E. Sanctions for Failing to Supplement Initial Disclosures.

Sanctions are severe and can include exclusion of the material or information that a party has failed to disclose under this Rule. *See Chapter XX, infra*, regarding sanctions.

VII. RULE 26 (a)(2) EXPERT DISCLOSURE

A. Disclosure of Expert Testimony.

1. The historic practice of expert designation and disclosure varied by judge and by district under the former provisions allowing “opt out” of the disclosure and discovery rules. Depending upon the trial judge, or the assessment of the magistrate judge at the Case Management Conference, a variety of expert disclosure/discovery plans were utilized. Many trial judges had a preferred method for the handling of these issues. These methods ranged from full Rule 26 compliance, to a designation program similar to California Code of Civil Procedure § 2034. Given that the current rules mandate national uniformity, the Rule 26(a)(2) requirements are now the general practice rather than the exception.
2. As indicated, the Rule mandates disclosure of the expert materials, and does not allow for an “opt out” by local rule or general order. The court, may, on a case-by-case basis, alter these requirements in the interest of justice.
3. These disclosures apply to any evidence presented under the following Federal Rule of Evidence (“FRE”) provisions:
 - a. FRE 702, testimony by experts;
 - b. FRE 703, bases of opinion testimony by experts; and,

- c. FRE 705, opinion on ultimate issues.
4. Compliance with Rule 26(a)(2) is a condition precedent to the use of expert testimony at trial. *ABB Air Preheater, Inc. v. Regenerative Env'tl. Equip. Co., Inc.*, 167 F.R.D. 668, 671 (D.N.J. 1996).

B. Disclosure Requirements.

There are essentially three aspects of the expert disclosure requirements of Rule 26. These are:

1. To disclose the identity of any person who may be used at trial to present evidence under FRE 702, 703 or 705;
 - a. The disclosure would include those experts retained, those specially employed to provide expert testimony, and the proverbial “other” experts [Fed. R. Civ. P. 26(a)(2)(B)];
 - b. This “other” category would include an employee with particular knowledge to lend expertise in a given case, while it would not be their normal duty to provide expert testimony as part of their employment. This “other” category would also include treating doctors where medical condition is an issue, even if the testimony is limited to historical care and treatment of the patient. *Peck v. Hudson City Sch. Dist.*, 100 F. Supp. 2d. 118, 121 (N.D.N.Y. 2000). For more on “treating doctors,” see Section G below;
 - c. Rule 26(a)(2)(A) addresses both the designation of experts and the disclosure of expert information in a simultaneous context. Many judges favor setting a designation process in advance of the disclosure of the reports, opinions and materials. In this way, each side is equally prepared as to the type of experts involved in the case, and can make more meaningful use of the time for preparation of the case.

Other judges will have the designations and the disclosure simultaneously;

- d. Where designation and disclosure are simultaneous, surprises can occur where an unforeseen or unanticipated area of expert testimony is introduced into the case. This can prolong the progress of the case as one side or the other seeks leave to supplement their designations and disclosures to meet their adversaries' case;
 - e. Counsel may propose their preferences for the sequencing of the expert process in the Joint Discovery Plan; and
 - f. Disclosure of consultants who are not expected to testify at trial is not required. *In Re Cendant Corp. Secur. Litig.*, 343 F.3d 658-65 (3d Cir. 2003); *Constr. Indus. Serv. Corp. v. Hanover Ins. Co.*, 206 F.R.D. 43 (E.D.N.Y. 2001).
2. The party advocating the expert testimony is obligated to make the identified experts available to testify at a deposition [Fed. R. Civ. P. 26(b)(4)]. Note, that the deposition of an expert may only be conducted after the disclosure is provided. *Id*; and
 3. To produce written reports and other materials [Fed. R. Civ. P. 26(a)(2)(B)]:
 - a. The details of the information to be disclosed are set forth in Section C. below.
 - b. The production of written reports is required of expert witnesses who were “retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony.”
 - c. The Advisory Committee Notes are specific; the only classes of experts that need to generate reports are those that are “retained” or those that are “specially employed to

provide expert testimony” or an employee “whose duties as the party’s employee regularly involve giving expert testimony.” The requirement of a written report may, however, be imposed upon additional persons by the Court. Fed. R. Civ. P. 26(a)(2)(B). A number of courts have found this desirable. *Minnesota Min. & Mauf. Co. v. Signtech USA, Ltd.* 177 F.R.D. 459, 461 (D. Minn. 1998), but, note that other courts have declined to order a report under the plain language of the Rule. *See Duluth Lighthouse for the Blind v. C. B. Bretting Manuf. Co.*, 199 F.R.D. 320, 324 (D. Minn. 2000).

- d. Due to a “tension” between courts and to prevent courts from reaching varying conclusions, an amendment to Rule 26(a)(2), took effect on December 1, 2010 adding a new provision (c) as follows:

(c) Witnesses Who Do Not Provide a Written Report;

Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

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

So, while no formal report is required for these “other” experts, there must be a disclosure of the subject matter of the expert testimony and a summary of the expected facts and opinions as part of the 26(a)(2)(A) disclosure for these witnesses. Note, it is the party, not the expert, that is responsible for providing these details.

4. Expert reports are required under Rule 26(a)(2)(B) to eliminate unfair surprise to an opposing party and conserve resources. *Reed v. Binder*, 165 F.R.D. 424, 429 (D.N.J. 1996).

C. What Specific Information Must Be Disclosed.

The Rule requires the disclosure of a written report with all supporting materials as well as:

1. A “complete” statement of all opinions to be expressed and the basis and reasons therefor;
2. The “facts or data considered by the witness in forming [the opinions];”¹¹
 - a. The Advisory Committee Notes to the 1993 amendments, which added the above quoted language to Rule 26, clarifies the original intent of the disclosure requirement:

“The [expert] report is to disclose the data and other information considered by the expert Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions-- whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.”.

¹¹ This is the language effective December 1, 2010. The provision previously read, “the data or other information considered by the witness in forming the opinions.” The term “other information” was dropped in 2010, and the scope of the report limited to simply facts or data considered. The clear intent of the 1993 amendments to Rule 26 was to eliminate any arguments that materials furnished to their experts were to be protected from disclosure. *See* Advisory Committee Notes to 1993 amendments. This expansive view was underscored by a change in the pre-1993 rule that referred to data and other information “relied upon” to “considered.” With experience, it became clear that the more expansive view in 1993 added to, not only confusion, but to the expense associated with expert discovery. Hence, the 2010 amendment to create a narrower universe.

- b. The 1993 amendments changed the wording of the prior Rule from “relied upon” to “considered.” In *Karn v. Ingersoll-Rand*, 168 F.R.D. 633 (N.D. Ind. 1996), the court held that the Advisory Committee clearly intended to broaden the scope of disclosure by rejecting the previous term “relied upon” and using, instead, the term “considered”.
- c. Thus, as a consequence of the 1993 amendments, disclosure simply included all documents that were provided to and reviewed by the expert. The party requesting discovery no longer bore the burden of demonstrating that the expert actually relied on the document. "A number of courts and commentators who have considered the effect of the 1993 amendments and Advisory Note to Rule 26(a)(2)(B) have concluded that where a lawyer gives work product to an expert who considers it in forming opinions which he or she will be testifying to at trial, this information is no longer privileged and must be disclosed." *Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 305 (W.D. Va. 1998) (citing 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* §2016.2, at 250 (1994) ("At least with respect to experts who testify at trial, the disclosure requirement of Rule 26(a)(2), adopted in 1993, was intended to predetermine further discussion and mandate disclosure despite [the work product] privilege."); *see also B.C.F. Oil Ref., Inc. v. Consol. Edison*, 171 F.R.D. 57, 66 (S.D.N.Y. 1997); *Karn*, 168 F.R.D. at 633. The court, in *Lamonds*, continued: "[a] construction of Rule 26 establishing a bright line rule that permits an opposing party to discover work product materials where an attorney provides work product to a retained expert who will consider that information in the development of her opinions is not only consistent with the 1993 amendment and Advisory Note, but is also consistent with the important policies underlying the work product doctrine

and the Federal Rules of Civil Procedure." *Lamonds*, 180 F.R.D. at 305.

- d. With the 2010 amendment, this is all changed, of course. The Rules now refer to a more narrowly defined universe of information through the terms "data" and "facts." This amendment is part and parcel of an effort to increase protection of work product materials. Under the 2010 amendments, discovery of drafts of expert disclosure statements or reports and with three exceptions, noted below, communications between expert witnesses and counsel regardless of form (oral, written, electronic or otherwise) are protected from disclosure.
 - e. Rule 26(b)(4)(B) protects the drafts of any report or disclosure. Rule 26(b)(4)(C), addresses the work product protection for communications between the party's attorney and the expert witness. The three exceptions which require disclosure of this material are: (1) communications regarding compensation; (2) identification of any facts or data considered by the expert in forming the opinions; and (3) the identification of any assumptions relied upon by the expert in forming the opinions.
3. Any exhibits to be used as a summary of or support for the opinions;
 4. The qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years;
 5. The compensation to be paid for the study and testimony;
 6. A list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years; and

7. “The test of a report is whether it is sufficiently complete, detailed and in compliance with the Rules so that surprise is eliminated, unnecessary depositions are avoided, and costs are reduced.” *Reed v. Binder*, 165 F.R.D. 424, 429 (D.N.J. 1996).

D. Rebuttal Reports.

1. Rebuttal reports are intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C). They are more limited than the “affirmative” expert reports required by the Rule. A rebuttal report that exceeds the scope of the Rule is subject to exclusion. *Peals v. Terre Haute Police Dep’t*, 535 F.3d 621, 630 (7th Cir. 2008); *Wong v. Regents of Univ. of Calif.*, 410 F.3d 1052, 1060-61 (9th Cir. 2005).
2. The phrase “same subject matter” should be read narrowly because a broad reading that “encompass[es] any possible topic that *relates* to the subject matter at issue [] will blur the distinction between ‘affirmative expert’ and ‘rebuttal expert.’” *Vu v. McNeil-PPC, Inc.*, 09-cv-1656, 2010 WL 2179882, at *3 (C.D. Cal. May 7, 2010).
3. The FRCP essentially defines a rebuttal expert as one who presents “evidence [] intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C)[.]” Fed. R. Civ. P. 26(a)(2)(D)(ii); *see also Peals*, F.3d at 630. (“The proper function of rebuttal evidence is to contradict, impeach or defuse the impact of the evidence offered by an adverse party.”).
4. The rebuttal report is not an invitation to bring in new opinions or other experts to present the same opinions provided previously by a parties’ initial experts. *Stephenson v. Wyeth LLC.*, 04-2312-CM, 2011 WL 4900039, at *1 (D. Kan. Oct. 14, 2011); *Kruger v. Wyeth, Inc.*, 03-cv-2496-JAH-MDD, 2012 WL3637276, at *4 (S.D. Cal. Aug. 22, 2012); *Lloyd’s Acceptance Corp. v. Affiliated*

FM Ins. Co., 05-cv-1934-DDN, 2013 WL 4776277 (E.D. Mo. Sept. 6, 2013).

E. Timing of Disclosure.

1. Unless otherwise directed by the court, principal information must be disclosed at least 90 days before trial. Fed. R. Civ. P. 26(a)(2)(C). In the Southern District of California, the magistrate judges will impose a schedule relating the disclosure to the pretrial conference, rather than trial. This is due to the local practice of many judges who assign trial dates at the Final Pretrial Conference and sometimes very shortly thereafter.
2. Unless otherwise directed by the court, contradictory/rebuttal information must be disclosed 30 days after a principal disclosure. Rule 26(a)(2)(D)(ii).

F. Exclusions to Disclosure of Expert Testimony.

1. The cases excluded under Rule 26(a)(1)(B) from initial disclosure are **not** exempt from the expert disclosure of Rule 26(a)(2) by the wording of the Rule.
2. Are there logical exceptions?
 - a. The nine categories of cases excluded from other parts of the Rule might logically be excluded with regard to expert testimony. With the exception of certain prisoner pro se cases, the other eight enumerated case types would not typically use expert witnesses. In those cases where an expert is necessary, the magistrate judge, at the Rule 16(b) Case Management Conference, will impose an appropriate expert disclosure schedule.
 - b. The court may, on a case-by-case basis, exclude other cases from the disclosure requirements where particular

circumstances justify the relief as being in the best interest of judicial economy or the furtherance of justice.

G. Treating Doctors.

1. Treating doctors are considered experts under Rule 26(a)(2)(A) and must be designated if they are to be called as witnesses.
2. Where the treating doctor is testifying based solely upon their own diagnosis and treatment, they are neither “retained or specially employed” [(See Rule 26(a)(2)(B)]. This may include their opinion on causation, diagnosis, prognosis, or the extent of disability. (*Sprague v. Liberty Mut. Ins. Co.*, 177 F.R.D. 78 (D.N.H. 1998). As a result, they are not required to produce a report under Rule 26(a)(2)(B). See 1993 Committee Note to Rule 26(a)(2); *Martin v. CSX Transp., Inc.*, 215 F.R.D. 554 (S.D. Ind. 2003). It is important to note that under the 2010 amendment, the party proponent for the treating doctor must submit a summary. None of this eliminates the requirement to provide a report under Rule 35, from a physical or mental examination of a party. See Chapter XVIII, *infra*.
3. Despite the normal exception to the report requirement, the court may require a written report upon treating doctors in its discretion. Fed. R. Civ. P. 26(a)(2)(B).
4. A report is required where the treating doctor is specially retained to testify **beyond** the facts made known during the course and care of treatment. See *Ordon v. Karpie*, 223 F.R.D. 33, 36 (D. Conn. 2004) (plaintiff’s treating doctor was subject to the report requirement because he was provided facts beyond the scope of those made known during the patient’s care to be able to form an opinion on causation).

H. De-Designation of Experts.

1. A party may de-designate or re-designate someone who has been designated as an expert witness in a case. This will prevent opposing parties from discovering the expert's opinions, unless, of course, the disclosure of the reports and perhaps a deposition have occurred. *Ross v. Burlington N. R.R. Co.*, 136 F.R.D. 638 (N.D. Ill. 1991), or a party can establish "exceptional circumstances"¹² under Rule 26(b)(4)(D)(ii). *Spearman Industries v. St. Paul Fire and Marine*, 128 F. Supp. 2d 1148 (N.D. Ill. 2001)
2. De-designating or re-designating an expert will not shield the materials provided to the expert, including those covered by the work product privilege, from discovery. *CP Kelco, U.S., Inc. v. Pharmacia Corp.*, 213 F.R.D. 176 (D. Del. 2003). That discovery, however, will still be limited by the 2010 amendments to Rule 26(b)(4)(D) in this regard.
3. A party is not free to invoke an already waived privilege simply by changing the designation of an expert from "testifying" to "non-testifying." Fed. R. Civ. P. Rule 26(b)(4)(A, B); *CP Kelco*, 213 F.R.D. at 178 (changing the designation of witness from testifying to non-testifying expert cannot undo the waiver of the privilege which occurred when defendants provided the documents to the expert).

I. Calling the Other Sides Expert.

1. Where a party designates an expert and the expert reports have been disclosed, and the expert is later de-designated, can another party call the expert at trial in their case in chief? The short answer

¹² Exceptional circumstances may exist where 1) the object or condition in issue is destroyed or has deteriorated after the non-testifying expert (the consultant) observes it but before the moving party's expert has had an opportunity to observe it, or 2) there are no other available experts in the same field or subject matter. *Spearman Indus. v. St Paul Fire & Marine Ins. Co.*, 128 F. Supp. 2d. 1148, 1151 (N.D. Ill. 2001).

is yes. District courts have applied different approaches in these circumstances and there appears to be no controlling Ninth Circuit authority.

2. Some district courts have found that the balancing test of Federal Rule of Evidence 403 applies. *See Hous. Auth. of the City of Los Angeles v. PCC Tech. Indus., Inc.*, No. CV 11-1626 FMO (CWx), 2015 WL 13757602, at *6 (C.D. Cal. Apr. 28, 2015); *Morris v. Mitsubishi Motors N. Am., Inc.*, No: CV-08-0396-RMP, 2011 WL 13228438, at *2–3 (E.D. Wash. Mar. 28, 2011); *House v. Combined Ins. Co. of Am.*, 168 F.R.D. 236, 249 (N.D. Iowa 1996); *Brigham Young Univ. v. Pfizer, Inc.*, Nos. 2:12-mc-143 TS BCW, 5:12-cv-041, 2012 WL 1029304, at *5 (D. Utah Mar. 26, 2012); *Ferguson v. Michael Foods, Inc.*, 189 F.R.D. 408 (D. Minn. 1999); *Agron v. Trustees of Colum. Univ.*, 176 F.R.D. 445, 450 (S.D. N.Y. 1997).

3. Moreover, a leading treatise states:

Once a party has designated an expert witness as someone who will testify at trial, the later withdrawal of that designation may neither prevent the deposition of that witness by the opposing party nor the expert's testimony at trial. Furthermore, if a party is deemed to have waived the privilege as to documents provided to its named expert, that party may not avoid production of those documents under Rule 26(b)(4)(A) by later changing the designation of that expert from “testifying” to “non-testifying” expert. 6 Moore’s Federal Practice § 26.80[1][a](3d ed.); see *CP Kelco U.S. Inc. v. Pharmacia Corp.*, 213 F.R.D. 176 (D. Del. 2003).

4. Other courts have held that such a decision is “committed to the sound discretion of the district court” and reviewed for abuse of discretion. *See Peterson v. Willie*, 81 F.3d 1033, 1037–38 n.4 (11th Cir. 1996). Yet other courts have applied the “exceptional circumstances” test under Rule 26. *See FMC Corp. v. Vendo Co.*, 196 F. Supp. 2d 1023, 1046–48 (E.D. Cal. 2002) (applying both the “exceptional circumstances” test under Rule 26 and the

balancing test of Rule 403). Finally, other courts have held that such testimony is permissible based on the structure of Rule 26, which distinguishes between the protections afforded to testifying and consulting experts. *See S.E.C. v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009).

5. Ultimately, courts take a number of viewpoints on the applicable standard. What is clear is that “There is no per se Rule prohibiting a party from calling the opposing party’s expert in their case in chief. *In re Taco Bell Wage & Hour Actions*, No. 1-07-cv-01314 SAB, 2016 WL 815634, at *3 (E.D. Cal. Mar. 2, 2016).
6. In situations where courts have allowed the calling of an opponent’s expert witness at trial, many courts order that the party cannot tell the jury that the other side originally retained the expert. In those instances, the courts have concluded the information too prejudicial, in that the jury might conclude the other party had something to hide by not calling its expert itself. *Peterson v. Willie*, 81 F.3d 1033, 1037-38 (11th Cir. 1996); *Brigham Young Univ. v. Pfizer, Inc.*, Nos. 2:12-mc-143 TS BCW, 5:12-cv-041, 2012 WL 1029304, at *5 (D. Utah Mar. 26, 2012); Other courts disagree. *See, Kerns v. Pro-foam of S. Ala. Inc.*, 572 F. Supp. 2d 1303, 1310 (S.D. Ala. 2007).

J. Duty to Supplement Expert Disclosures.

Rule 26(e)(1) imposes a duty to supplement expert disclosures made pursuant to Rule 26(a)(2)(B) by the time of the pretrial disclosures required by Rule 26(a)(3). **The duty extends to both the information contained in the expert’s report and expert’s deposition, as well as any additions or changes to this information.** *See S. States Rack and Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592 (4th Cir. 2003). If litigant fails to supplement expert’s report and deposition testimony, whether in bad faith or intentional disregard, the court may exclude any new expert opinion. *Id.* at 596. Sanctions are severe. *See* discussion regarding sanctions in Section XX, *infra*.

K. Limits to the Scope of Testimony.

1. General Rule. The testimony of an expert witness is generally limited to the pre-trial report, and any appropriate and timely supplements. Rule 37(c)(1). *Licciardi v. TIG Ins. Grp.*, 140 F.3d 357 (1st Cir. 1998). Otherwise, the opponent is without notice or opportunity to prepare to address the testimony. Where the expert has also been deposed, many courts consider their deposition as a supplement to the pretrial report. Counsel are best advised to not rely on this and should formally communicate to their adversary at, or immediately after, the conclusion of the deposition that the deposition has supplemented that expert's report.
2. Exceptions. The court may allow an expert to testify beyond the scope of the report where there is an absence of prejudice or surprise or there is an opportunity to cure the potential for prejudice. In addition, an absence of bad faith or willfulness will weigh on the analysis. *Hurley v. Atl. City Police Dep't.*, 174 F.3d 95 (3d Cir. 1999).

L. Admission of the Expert Report.

1. Rules 702 and 703 permit admission of expert testimony that are not opinions contained in documents prepared out of court. *Engbretsen v. Fairchild Aircraft Corp.* 21 F.3d 721, 728-29 (6th Cir. 1994). The expert report is rarely, if ever, admitted into evidence because it is needlessly cumulative under FRE 403.
2. Admission of expert reports are likely prejudicial because during deliberation, the jury might place more weight on written summaries than on its collective recollection of the actual testimony. *State, Dep't of Roads v. Whitlock*, 262 Neb. 615 (2001). Also, the report is likely to contain inadmissible, irrelevant or prejudicial information or opinions, which may have been stricken by the court in pretrial or trial rulings. Finally, the expert report is also inadmissible hearsay and not admissible

under FRE 703. *Westfed Holdings Inc. v United States*, 55 Fed. Cl. 544, 569 (2003).

M. Dealing With *Daubert* Issues.

1. In General.

- a. All expert witnesses face scrutiny by the trial court under FRE 702, *Daubert*¹³, and its progeny. The scrutiny is the court’s general gatekeeping duty to ensure that the proffered expert testimony “both rests on a reliable foundation and is relevant to the task at hand” as a condition of admissibility. *Daubert*, 509 U.S. at 597.
- b. The proponent of the evidence must prove its admissibility by a preponderance of proof. *Id.* at 593 n.10. *See also*, Advisory Committee Notes, 2023. This is a preliminary finding under FRE 104(b) made by the court.
- c. After an expert’s opinions are established as admissible to the judge’s satisfaction, the fact finder decides how much weight to give to the testimony. *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010). A district court should not make credibility determinations that are reserved for the jury. *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807 (9th Cir. 2014). As noted by the Advisory Committee, the propounding party does not have to demonstrate that the expert testimony is correct, only that it is more likely than not that their testimony is reliable. Advisory Committee Notes, 2023.

¹³ *Daubert* originated in the District Court for the Southern District of California as Civ. Nos. 84-2013 G (IEG) and 84-2929 G (IEG). It was a personal injury case seeking damages for birth injuries allegedly sustained as a result of the mother’s ingestion of the defendant’s anti-nausea drug during pregnancy. District Judge Earl B. Gilliam granted summary judgment for the defendant upon finding the plaintiff’s expert opinions were inadmissible due to a lack of epidemiological studies to support their opinions.

- d. Counsel should carefully consider this admissibility requirement in selecting an expert for designation and in preparation for deposing the opponent's experts. Care in these regards should help ensure your expert passes a *Daubert* analysis and could also help in excluding your opponent's expert!

2. Scientific, Technical, and Other Specialized Knowledge.

- a. While *Daubert* dealt with scientific evidence (pharmaceutical injury), the gatekeeping obligation applies to all testimony based on "technical" and "other specialized" knowledge as well. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). This is consistent with the breadth of FRE 702.
- b. FRE 702 provides that expert testimony is admissible if "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. To this, the Supreme Court has added that expert testimony under FRE 702 must be both relevant and reliable. *Id.* at 589.

3. Relevance.

- a. Relevancy simply requires that the evidence "logically advance a material aspect of the party's case." *Cooper v. Brown*, 510 F.3d. 870, 942 (9th Cir. 2007).
- b. Expert opinion testimony, specifically, is relevant if "the knowledge underlying it has a valid connection to the pertinent inquiry." *U.S. v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006).

4. Reliability.

- a. The issue of reliability is whether an expert's testimony has a "reliable basis in the knowledge and experience of [the relevant] discipline." *Kumho Tire Co.*, 526 U.S. at 149.
- b. "The test is not with the correctness of the expert's conclusions but the soundness of his methodology." *U.S. v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1189 (9th Cir. 2019) (internal quotations omitted). "
- c. District courts have broad discretion in how to test an expert's reliability and whether the expert's testimony is reliable. *Id.*
- d. A 2023 Amendment to FRE 702 added an additional requirement that, "the expert has reliably applied the principles and methods to the facts of the case." FRE 702(d).

5. A General Guide for Consideration.

- a. As a guide for assessing the scientific validity of expert testimony, the Supreme Court provided the following non-exhaustive list of factors that courts may consider:
 - i. whether the theory or technique is generally accepted within a relevant scientific community;
 - ii. whether the theory or technique has been subjected to peer review and publication;
 - iii. the known or potential rate of error; and
 - iv. whether the theory or technique can be tested.

Daubert, 509 U.S. at 593–94; *see also Kumho Tire Co.*, 526 U.S. 137. Note, the Supreme Court cautioned “[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test.” *Daubert*, 509 U.S. at 593.

- b. The 2000 Advisory Committee Notes to FRE 702 suggest other benchmarks for gauging expert reliability, including:
 - i. Whether the testimony relates to “matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying”;
 - ii. “Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion”;
 - iii. “Whether the expert has adequately accounted for obvious alternative explanations”;
 - iv. “Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting”; and
 - v. “Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.”

Fed. R. Evid. 702 Advisory Committee Notes (2000 amendments); *see also Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813 (7th Cir. 2010).

6. The Ninth Circuit's View.

- a. The Ninth Circuit also has indicated that independent research, rather than research conducted for the purposes of litigation, carries with it the indicia of reliability. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (“*Daubert II*”).
- b. Using independent, pre-existing research “provides objective proof that the research comports with the dictates of good science” and is less likely “to have been biased toward a particular conclusion by the promise of remuneration.” *Id.*
- c. If the testimony is *not* based on “pre-litigation” research or if the expert's research has not been subjected to peer review, then the expert must explain precisely how he went about reaching his conclusions and point to some objective source (*e.g.*, a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like) to show that he has followed the scientific method as it is practiced by (at least) a recognized minority of scientists in his field. *Id.* at 1318–19 (citing *United States v. Rincon*, 28 F.3d 921, 924 (9th Cir. 1994)); see also *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 597 (9th Cir. 1996).
- d. In *Wendell v. GlaxoSmithKline, LLC*, 858 F.3d 1227 (9th Cir. 2017), a case involving the death of a man from a rare form of cancer, the lower court determined the expert witness' opinions were developed for litigation, not based on independent research, and did not satisfy standards for peer-reviewed journals. As a result, the trial court found the testimony unreliable under *Daubert* and thus inadmissible under FRE 702. The Ninth Circuit reversed, holding the trial court examined the *Daubert* consideration too narrowly and “was wrong to put so

much weight on the fact that the experts' opinions were not developed independently of litigation and had not been published." *Id.* at 1235. "[T]he interests of justice favor leaving difficult issues in the hands of the jury and relying on the safeguards of the adversary system – [v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof – to attack[] shaky but admissible evidence." *Id.* at 1237 (internal quotations omitted).

7. Timing.

- a. Anytime the expert opinion is offered for admission. While this clearly means at trial, *Daubert* issues arise in a host of proceedings pre-trial, including motions for summary judgment (Fed. R. Civ. P. 56), and motions for class certification (Fed. R. Civ. P. 23). *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011).
- b. Before the expert evidence is admitted, the court must consider its preliminary determination on admissibility under *Daubert* and, of course, FRE 104(a), which is the court's duty to determine the qualifications of a person to be a witness. *See Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457 (9th Cir. 2014); *see also Ruvalcaba-Garcia*, 923 F.3d at 1189.
- d. In civil cases, *Daubert* issues are typically adjudicated well before trial. Indeed, many judges will set a pretrial cutoff date in the case scheduling order, and often *Daubert* motions will share the same cutoff as summary judgment motions. Counsel should carefully check all case scheduling/case management orders in their cases. When in doubt, check with your trial judge's law clerk.

- d. Class Certification Stage.
 - i. When an expert's report or testimony is critical to class certification, the district court must conclusively rule on any challenges to the expert's qualifications or submissions prior to ruling on the class certification motion. *Am. Honda Motor Co.*, 600 F.3d at 815-16 (plaintiff's submission to demonstrate the predominance of common issues under Rule 26(b)(3) relied on an expert engineering report challenged by the defense as "unreliable").
 - ii. The district court must perform a "full *Daubert* analysis before certifying the class." *Id.* This is part of the rigorous analysis otherwise required in resolving a class action certification motion. *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147 (1982); *Dukes v. Wal-Mart Stores, Inc.* 603 F.3d 571 (9th Cir. 2010).
 - iii. Note, that the "full *Daubert* analysis" results in a determination of admissibility, *e.g.*, relevance and reliability, as discussed above.

8. The *Daubert* "Hearing."

- a. While we commonly discuss *Daubert* "hearings," it is important to note that the Supreme Court did not mandate the form that the inquiry into reliability and relevance must take. *United States v. Alatorre*, 222 F.3d 1098, 1102 (9th Cir. 2000) (District Court did not abuse its discretion when it denied defendant's request for a pre-trial *Daubert* hearing of the government's drug value expert prior to trial of a drug importation case. The court allowed the defense counsel to *voir dire* the expert in front of the jury and stated that if the expert's testimony raised any concerns, further

questioning outside of the jury's presence would be permitted); *see also Barabin*, 740 F.3d 457.

- b. “The trial court must have the same kind of latitude in deciding *how* to test an expert’s reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability[.]” *Kumho Tire Co.*, 526 U.S. at 152.
- c. In *United States v. Jawara*, 474 F.3d. 565 (9th Cir. 2007), the district judge denied a request for a pre-trial *Daubert* hearing and admitted a forensic document examiner’s testimony after reviewing briefs and other materials relating to an in limine motion and argument by both counsel. The Court of Appeals was critical of the district judge’s failure to explicitly find reliability. However, the Court of Appeals found the “implicit finding” of reliability was harmless error in light of the record of the expert witnesses’ qualifications, experience and the value of the testimony to the jury. *Id.* at 583.
- d. The proponent of the evidence must prove its admissibility by a preponderance of proof. *Daubert*, 509 U.S. at 597. *See also*, Advisory Committee Notes, 2023. This is a preliminary finding under FRE 104(b) made by the court.

9. Failure to Make a *Daubert* Determination.

- a. FRE 702 “clearly contemplates *some* degree of regulation of the subjects and theories about which an expert may testify.” *Daubert*, 509 U.S. at 589 (emphasis in original).
- b. A court abuses its discretion when it fails to hold a *Daubert* hearing or otherwise preliminarily fails to determine the relevance and reliability of expert testimony. *Barabin*, 740 F.3d at 460 (overruling *Mukhtar v. Cal. State Univ. Hayward*, 299 F.3d 1053 (9th Cir. 2002) in this regard).

- c. Courts do not have “discretion to abandon the gatekeeping function” altogether and may not delegate this issue to the jury. *See Ruvalcaba-Garcia*, 923 F.3d 1183 (the district court abused its discretion when it failed to make any findings regarding reliability of expert testimony and instead delegated that issue to the jury).
- d. The reviewing court has authority to make *Daubert* findings based on the record established by the district court. *Barabin*, 740 F.3d at 467.

VIII. RULE 26(a)(3) – PRETRIAL DISCLOSURES.

A. **Pretrial Disclosure [Rule 26(a)(3)].**

Former Local Civil Rule 16.1.f.10.c required a pretrial meeting of counsel, seven calendar days before trial. This rule was superseded by the 30-day period specified in Rule 26(a)(3). Because the proposed amendments prevent a local rule or general order from altering the deadlines and schedule of the provisions of Rule 26, the new 30-day rule will apply unless otherwise directed by the court. Current Local Civil Rule 16.1.9. still specifies other duties of counsel regarding the preparation for trial and must be followed.

B. **Required Disclosures.**

1. Rule 26(a)(3) requires disclosure of witnesses, documents and deposition transcripts a party expects to call/use at trial (other than solely for impeachment); and
2. These disclosures must be made at least 30 days before trial, unless otherwise directed by the court.

C. **Form.**

The disclosures must be made in writing, signed and served upon opposing counsel. Fed. R. Civ. P. 26(a)(4).

D. Objections to Evidence.

1. Written objections to the pretrial disclosures, if any, are due 14 days after the pretrial disclosure. The court may alter the timing for objections. A party must promptly *file* a list disclosing:
 - a. Any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B); and,
 - b. Any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii) (*i.e.*, exhibits).
2. Objections not set forth [except those pursuant to Rules 402 (relevance) and 403 (prejudice, confusion or waste of time)] are waived unless excused by court for good cause; Fed. R. Civ. P. 26(a)(3)(B); *Phillips v. Morbark, Inc.*, 519 F. Supp. 2d, 591, 596 (D.S.C. June 19, 2007); *Lorraine v. Markel Am. Inc. Co.*, 241 F.R.D. 534, 553 (D. Md. May 4, 2007) (authenticity objections are waived if not raised within 14 days).
3. This rule cannot be changed by a local rule or general order, but a judge can alter the timing in a given case.

E. Application in the Southern District of California.

1. In general, trial dates are not set in the Southern District of California until the Final Pretrial Conference. This is due to the high volume of criminal cases, which dominate the calendar. At the time of the Final Pretrial Conference, trial can proceed very quickly depending upon openings in the trial judge's calendar.

Therefore, it is impractical and inefficient to wait until this stage to address the pretrial disclosure requirements of Rule 26.

2. The interests of the parties and the court are best served in the Southern District of California by tying the Rule 26(a)(3) disclosures to the Final Pretrial Conference date.
3. The general scenario will be as follows:
 - a. The duty to make the pretrial disclosure will occur approximately 21 days before the Final Pretrial Conference. This would be contemporaneous with the filing of the Memorandum of Contentions of Fact and Law (Local Civil Rule 16.1.f.2.a). Note, that not all judges require the Memorandum of Contentions of Fact and Law. Whether or not it is required should be discussed with the court at the scheduling conference;
 - b. Any objections to pretrial disclosures would be due 14 days thereafter, which is approximately seven (7) days prior to the Final Pretrial Conference. This would be contemporaneous with the duty to lodge the Joint Pretrial Conference Order with the court. (*See* Local Civil Rule 16.1.f.6.a.) Since the Joint Pretrial Conference Order requires the listing of exhibits and objections, the timing is both practical and logical.
 - c. The court may then rule on the objections in limine or at another setting.

IX. RULE 26(b)(1) – SCOPE OF DISCOVERY

A. **Scope of Discovery is Narrow.**

1. The Evolution of Rule 26(b)(1).
 - a. Since the 1993 initial implementation of the rules on disclosure and discovery, the scope of discovery has been

steadily narrowing.¹⁴ This was prompted by the theme of controlling cost of discovery. Discovery, as a rule, takes too long and costs too much. This has been exacerbated by the phenomenon of e-discovery. The “digital universe” is doubling in size every two years, and by 2020 will reach 44 trillion gigabytes. EMC2 Digital Universe with Research & Analysis by IDC, *The Digital Universe of Opportunities: Rich Data and the Increasing Value of the Internet of Things*, Executive Summary (2014).¹⁵

- b. Originally, discovery was allowed on any matter relevant to the subject matter of the pending action. The information itself did not need to be admissible if it appeared reasonably calculated to lead to the discovery of admissible evidence.¹⁶
- c. This standard was narrowed by the 2000 amendments to the Rules by changing the scope from “subject matter” based discovery to “related to claim or defense” based. Once again, the information itself need not be admissible if it appeared reasonably calculated to lead to the discovery

¹⁴ The Federal Rules sought to address the scope of discovery since 1970 with the amendment that courts had broad power to limit discovery even if within the scope of the Rule. *See* 1970 Committee Notes. By 1980, the drafters sought to address “abuse of discovery” and urged that abuse can be prevented by intervention by the courts. *See* 1980 Committee Notes. By 1983, the drafters noted that, “Excessive discovery and evasion and resistance to reasonable discovery requests pose significant problems.” *See* 1983 Committee Notes. Early court intervention was once again stressed, and the forerunner of Rule 26 (b)(2)(C) was created. By 1993, the more aggressive approach and discovery restrictions have become status quo.

¹⁵ <https://www.emc.com/leadership/digital-universe/2014iview/executive-summary.htm>

¹⁶ The 1993 Rule read that “parties may obtain discovery regarding any matter, not privileged, which is **relevant to the subject matter involved in the pending action**, whether it relates to a claim or a defense of the party seeking discovery or to the claim or defense of any other party. . . **the information sought need not be admissible** at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” (Emphasis added).

of admissible evidence. However, the information sought had to be “relevant.”¹⁷

2. The Current Rule.

- a. As of December 1, 2015, the familiar phrase “reasonably calculated to lead to the discovery of admissible evidence” was replaced by the concept of proportionality with the intent of further narrowing discovery. The new Rule reads:

(b) Discovery Scope and Limits.

- (1) *Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Also eliminated is the provision for subject matter discovery on a showing of good cause. The Rules Committee found it had been rarely invoked in practice and was thus unnecessary. The Committee stated that, the new standard “proportional discovery

¹⁷ The 2000 rule allowed discovery “regarding any matter, not privileged, that is **relevant to the claim or defense of any party . . . relevant information need not be admissible** at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” (Emphasis added).

relevant to any party's claim or defense suffices[.]”
See Committee Note to Rule 26.

- b. There was never a precise dividing line between information that is relevant to claims and defenses and information that is relevant only to the subject matter of the action. As stated in the 2000 Committee Note to subdivision (b)(1), “[a] variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in the given action.” Stated examples in this regard include:
 - i. Other incidents of the same type;
 - ii. Other incidents involving the same product;
 - iii. Information about organizational arrangements or filing systems (including computers or other electronic data); and,
 - iv. Information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses.

This type of information may still be discoverable under the relevant and proportional analysis now in place.

3. It Still Must be Relevant.

Non-admissible information must itself be relevant to be properly discoverable. This amendment was prompted by the Committee's concern that the “reasonably calculated to lead to the discovery of admissible evidence” standard of the current rule “might swallow any other limitation on the scope of discovery.” *See* Committee Note to Rule 26(b)(1). Courts have held that “reasonably calculated” means “any possibility.” *Morse/Diesel, Inc. v. Fid. & Deposit Co. of Maryland*, 122 F.R.D. 447, 449 (S.D.N.Y. 1988).

4. Assessing Proportionality.

- a. Proportionality is not a new concept, but one that is refocused and reemphasized by its placement in Rule 23(b)(1). In his 2015 Year-End Report on the Federal Judiciary, Chief Justice John Roberts noted the changes to Rule 26 “may not look like a big deal at first glance, but they are” and emphasized the need to impose “reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.”¹⁸
- b. The parties and the court have a collective responsibility to consider proportionality, and a party may not refuse discovery simply by making a boilerplate objection that the discovery is not proportional. *See* 2015 Advisory Committee Notes; *see also Salazar v. McDonald’s Corp.*, 14-cv-02096-RS-MEJ, 2016 WL 736213, at *2 (N.D. Cal. Feb. 25, 2016) (“[t]he revised rule places a shared responsibility on all the parties to consider the factors bearing on proportionality before propounding discovery requests, issuing responses and objections, or raising discovery disputes before the courts.”).
- c. The Rule itself lays out 6 factors to consider in assessing whether the discovery is proportional to the needs of the case. These are:
 - i. The importance of the issues at stake in the litigation;
 - ii. The amount in controversy;
 - iii. The parties’ relative access to relevant information;
 - iv. The parties’ resources;
 - v. The importance of the discovery in resolving the issues; and

¹⁸ Available at <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>

- vi. Whether the burden or expense of the proposed discovery outweighs the likely benefit.
- d. “Applying the six proportionality factors depends on the informed judgment of the parties and the judge, analyzing the facts and circumstances of each case. The weight or importance of any factor varies depending on the facts and circumstances of each case.” *Discovery Proportionality Guidelines and Practice*, 99 *Judicature*, No. 3, Winter 2015, at 47, 53.
- e. The first factor, “considering the importance of the issues at stake in the action,” ranks ahead of consideration of the “amount in controversy.” This premise dates back to the 1983 amendments, where the Rules’ drafters noted that this is measured in, “philosophic, social or institutional terms.” This recognized that “many cases in public policy spheres, such as employment practices, free speech, and other matters may have importance beyond the monetary amount involved.” *See* the 1983 Committee Note.
- f. The amount in controversy is a significant factor. In *Vesta Corp. v. Amdocs Mgmt.*, 14-cv-01142-HZ, 2017 U.S. Dist. LEXIS 25898 (D. Or. Feb. 21, 2017), the plaintiff sought over \$100 million in damages in a breach of contract and misappropriation of trade secrets case. There, the plaintiff alleged it shared a confidential source code with the defendant during potential acquisition discussions. Plaintiff filed a motion to compel discovery of the defendant’s source code, which would reveal the extent to which the defendants incorporated the plaintiff’s trade secrets in its own product. The court found that discovery of defendant’s source code was proportional to the needs of the case considering the amount in controversy and justified by the parties’ resources.

- g. With respect to the parties' relative access to relevant information, "information asymmetry" is recognized as a recurring issue; that is, one party may have very little discoverable information while the other party may have vast amounts of it that is readily retrievable. The Rules drafters note, "In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so." See 2015 Advisory Committee Notes.
- h. The parties' resources are seemingly less significant than the other factors. In *Goes Int' AB v. Dodur Ltd.*, No. 14-cv-05666-LB, U.S. Dist. LEXIS 4999 (N.D. Cal. Jan. 12, 2017), the court found the plaintiff's discovery request was not an excessive burden despite the fact that defendant was located in China with limited resources. The court held "the defendant's financial wherewithal is not decisive." By comparison, however, in *Elkharwily v. Franciscan Health System*, 15-cv-05579-RJB, 2016 WL 4061575 (W.D. Wash. July 29, 2016), the court ordered defendant to facilitate plaintiff's access to discovery at plaintiff's own expense because it would be an undue burden to defendant. There, defendant objected to production of archived emails because it did not implement an archiving system. In order to produce such documents, defendant would need to retrieve, restore, and review backup tapes, which would require 1,400 hours and \$157,500 in costs. The court acknowledged this was an undue burden and cost to defendant. However, because the emails were otherwise discoverable under Rule 26(b)(1), the court permitted plaintiff access to discovery at plaintiff's own expense.
- i. Courts have been heeding Justice Roberts' common sense approach to assessing proportionality. See e.g. *McArthur v. The Rock Woodfired Pizza & Spirits*, 318 F.R.D. 136 (W.D. Wash. Dec. 1, 2016) (denying request for company-wide financial information as disproportionate given the plaintiff's allegations focused on her personal work

environment at one business location); *see also Roberts v. Clark Cty. School Dist.*, 15-cv-00388-JAD-PAL, 312 F.R.D. 594 (D. Nev. Jan. 11, 2016) (production of a school police officer’s medical files outlining his transgender transition was “grossly out of proportion” to his emotional distress claim against the school).

5. Privacy as a Limit on Proportionality.

Several courts have been weighing another, unenumerated factor in the proportionality analysis – privacy. *See Pertile v. General Motors, LLC*, 15-cv-00518, 2016 WL 1059450, at *2–*5 (D. Colo. Mar. 17, 2016) (finding defendant’s confidentiality concerns outweighed plaintiff’s need for the otherwise relevant information); *see also Hensen v. Turn, Inc.*, 15-cv-0497, 2018 WL 5281629 (N.D. Cal. Oct. 22, 2018) (holding privacy concerns outweighed the defendant’s interest in obtaining complete web browsing history on the plaintiff’s mobile devices).

B. Subject Matter Discovery.

The former “relevant to the subject matter” for good cause, has been specifically eliminated as noted above.

C. Standardization.

The 2000 amendments removed the court’s authority to deviate from the Rule by local rule or general order. This was another step in attempting to achieve national uniformity in federal discovery.

X. ELECTRONIC DISCOVERY

In August 2004, the Judicial Conference Committee on Rules of Practice and Procedure published proposed amendments to Civil Rules 16, 26, 33, 34, 37 and 45 to deal with the distinctive features and issues associated with electronic discovery.

The amendments were approved by the United States Supreme Court and took effect on December 1, 2006.

As reported by the Civil Rules Advisory Committee in its May 17, 2004 Report (revised August 3, 2004), Page 5, the amendments addressed 5 areas:

1. Early attention to issues relating to the form of production, preservation of electronically stored information (“ESI”), and review of ESI for privilege;
2. Discovery of ESI that is not reasonably accessible;
3. The assertion of privilege after production;
4. The application of Rules 33 and 34 to ESI; and,
5. A limit on sanctions under Rule 37 for the loss of ESI because of routine operation of computer systems.

It is important to remember that unless discovery in a specific case dictates otherwise, use of the term “documents” always includes ESI. *See* 2006 Committee Note to Rule 26(a).

A. Attorney’s Duty of Competence.

1. On June 30, 2015, the State Bar of California issued its formal opinion addressing an attorney’s ethical duties in the handling of discovery of electronically stored information. The Bar states:

“Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information (ESI).” California State Bar Formal Op. No. 2015-193.
2. Lacking that required competence, the Bar notes that the attorney has 3 choices:

- a. Acquire that level of knowledge;
 - b. Associate with or consult with someone who does; or
 - c. Decline the representation.
3. Ethical duties exist with respect to ESI. In *HM Elecs., Inc. v. R.F. Techs, Inc.*, No. 12-cv-2884-BAS-MDD, 2015 WL 4714908 (S. D. Cal. Aug. 7, 2015), the magistrate judge recommended severe sanctions against the defendants’ attorneys for failing to communicate to their clients the duty to preserve evidence where (1) the attorneys never issued a litigation hold letter to the defendants; (2) the attorneys never advised defendants on the proper methodology for searching; (3) the lead counsel never learned the infrastructure of the defendants’ electronically stored information; and (4) to the extent that the lead counsel delegated preservation and litigation hold duties to his employees, he failed to supervise them to ensure compliance.

Other ethical duties related to ESI exist, of course, but this threshold requirement should be paramount in every attorney’s mind. For more a detailed discussion on ethical concerns with respect to social media preservation and spoliation, *see* [Section E.3.](#) below.

B. Early Attention to ESI.

The concept of early attention to ESI is addressed in two ways in the Rules. First, Rule 16 states that the court may include provisions for disclosure or discovery of ESI, as well as the parties’ agreement, if any, for protection against waiver of privilege in the Rule 16(b) Scheduling Order. Fed. R. Civ. P. 16(b)(3). This ensures the court’s early attention.

Second, Rule 26(f) requires parties to discuss any issues relating to preserving discoverable ESI at the Rule 26(f) conference. This is the opportune time to discuss issues related to back up tapes, archival data, legacy data, or de-duplication of data, as well as the preservation of relevant data (*e.g.*, emails) going forward. The parties must also develop a discovery plan that

covers any other issues relating to disclosure or discovery of ESI, including the form or forms in which it should be produced, search terms or search methods, and whether the parties have agreed to or require the court to enter an order protecting their right to assert privilege after inadvertent production of privileged information. Fed. R. Civ. P. 26(f). (*See also* Section XII.G. concerning preservation orders in general).

One issue that needs particular attention is the protocol for computer data searches, including search terms or search methods. This is true in a general sense, but also as it relates to any deleted information which might be occupying “unallocated space” waiting to be overwritten. A court addressed this issue in *Antioch Co. v. Scrap-Book Borders, Inc.*, 21 F.R.D. 645 (D. Minn. 2002)¹⁹, which is a good reference point in this regard.²⁰ In addition to “an allocated space,” ESI also encompasses a computer’s slack space, temporary internet files, metadata, browser history, and internet signature. This type of ephemeral data can be highly relevant and is very fragile and difficult to collect and preserve.

It should be noted that many courts have local rules, general orders, standing orders, case management plans, guidelines, Form 26(f) reports, instructions and orders, as well as protocols and default protocols in place. Careful consideration of your local requirements is extremely important.

¹⁹ The *Antioch* court determined the parties could deal with the requested disclosure of current data. As to unallocated space, however, it had the computer forensic expert selected by the plaintiff review a “forensic copy” of defendant’s data on a confidential basis. A list of key, relevant data was provided to the defendant and the court. The defendant then used the filtered data to respond to the plaintiff’s document requests.

²⁰ In a case in the Southern District of California, the court took a different approach requiring the joint experts to develop a search protocol for the “mirror image,” and then proceed to jointly search and review any information recovered. To the extent possible, the defendant’s expert was allowed to identify privileged and non-relevant information within the unallocated disk space. A privilege log was created therefrom and provided to the plaintiff. Only the remaining, non-privileged, relevant information in the unallocated disk space was made available to the plaintiff for review. The court then dealt with the issues with regard to privilege or excluded material thereafter. *See* CASD, Case No. 05-cv-0063 W (AJB), Docket No. 24, available online at www.casd.uscourts.gov.

The Rules clearly contemplate the initial disclosure of ESI as part of the parties' obligations under Rule 26 by adding "ESI" to Rule 26(a)(1)(A)(ii). The courts had held that was the case even before the 2006 amendments. *Bills v. Kennecott Corp.*, 108 F.R.D. 459 (D. Utah 1985); *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050 (S.D. Cal. 1999); *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002). Fed. R. Civ. P. 26(f)(3)(c) places ESI on the agenda for the Rule 26(f) conference by adding, "any issues about disclosure, discovery, or preservation of electronically stored information" So even if you are not seeking your opponents' ESI, you may be disclosing ESI under Fed. R. Civ. P. 26(a).

C. Defining the Universe.

1. What is ESI?

ESI is defined as any "information that is stored in a medium from which it can be retrieved and examined." 2006 Advisory Committee Note to Rule 34(a). The definition is purposely flexible recognizing that technology will evolve into many, as yet unimagined, means for information creation, transmission, and storage. Courts have included ephemeral or transient data in this definition. The principal cases in this area are *Columbia Pictures Industries v. Bunnell*, 06-cv-1093-FMC-JCX, 2007 WL 2080419 (C.D. Cal. May 29, 2007); *Paramount Pictures Corp., v. Replay TV, et al.*, 01-cv-358-FMC, 2002 WL 32151632 (C.D. Cal. May 30, 2002); and *Convolve Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004). These are very fact specific cases and seem to revolve around three key points. The first is whether the ephemeral or transient data is captured in the normal business operations of the party; next, the extent to which the information has been requested; and, probably the most key factor, what efforts, cost, and relevance are associated with the collection of the data.

2. When is ESI Not Reasonably Accessible?

- a. In an attempt to define the scope and the breadth of the discovery of ESI, and recognizing the difficulty in locating, retrieving, and providing discovery of some ESI, the Rules

Committee amended Rule 26(b)(2)(B) to provide that “[a] party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost.” This is commonly referred to as a “two-tiered system.” The burden of establishing “not reasonably accessible”, and therefore being in the “second tier”, is firmly on the party from whom the discovery is sought. *Id.* On a motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify conditions for such discovery. Fed. R. Civ. P. 26(b)(2)(B). These “conditions” will likely involve consideration of cost shifting.

- b. No definition of “reasonably accessible” is set forth in Rule 26(b)(2)(B). The Committee explains, in the Note to subdivision (b)(2), that it is simply “not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing [ESI].” The Committee Note goes on to state that whether information is “reasonably accessible” “depends on the circumstances of each case.” One factor may be whether a party routinely uses the information as “active data” and the degree to which technological developments remove obstacles to using some ESI.
- c. Some examples constituting “inaccessible” information is reflected in the Note and include:
 - i. Information stored solely for disaster-recovery purposes which is expensive and/or difficult to use for other purposes;
 - ii. Information that is “legacy” data retained in obsolete systems which is no longer used and may be costly and burdensome to restore and retrieve; and

- iii. Information that may have been deleted in a way that makes it inaccessible without resort to expensive and uncertain forensic techniques even though technically capable of retrieval through extraordinary efforts.
- d. A party's duty to respond to this discovery is stated in the Committee Note to subdivision 26(b)(2) as "produce [ESI] that is relevant, not privileged and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery." The Committee goes on to state that the responding party must "identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources."
- e. As noted previously, the burden of establishing that the discovery is not "reasonably accessible" is on the responding party. In a discovery dispute where the appropriate showing is made, the burden then shifts, and the requesting party has the burden to show that it has a need for the discovery that outweighs the burdens and costs of locating, retrieving, and producing the information. In trying to establish a focus on what is "reasonable," the balancing test under Rule 26(b)(2)(C) is the likely source.²¹
- f. Where there is a dispute, either challenging whether something is not reasonably accessible, or to establish good

²¹ The 2006 Advisory Committee Note to Rule 26(b)(2) provides the following seven (7) factors: (1) specificity of request; (2) quantity of information available from other and more easily accessible sources; (3) failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) likelihood of finding relevant, responsive information not available from more easily accessed sources; (5) predictions as to importance and usefulness of additional information; (6) importance of issues at stake in litigation; and (7) parties' resources.

cause, it may be necessary for the requesting party to conduct discovery. Data sampling, system inspection, depositions, along with vendor quotes or affidavits, can be very useful in resolving the dispute regarding not reasonably accessible or good cause. In the end, production can always be conditioned with limits on the amount, type or source of information required to be accessed and produced or payment by the requesting party of part or all of the reasonable costs of obtaining the information from the sources that are not reasonably accessible.

D. Search Terms and *Victor Stanley, Inc. v. Creative Pipe, Inc.*

1. Search terms are critical. Without an appropriately developed search protocol, far too little or far too much information will be gleaned from the vast ocean of data involved in a given case. The implications of a poorly designed search also take on a significant role in dealing with the waiver of privilege through inadvertent disclosure (*see Section G.* below). As the court stated in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 256-57 (D. Md. 2008), “all keyword searches are not created equal.” While decided before the passage of FRE 502 (in September 2008), the *Victor Stanley* court applied a balancing approach (ultimately codified) to determine whether an inadvertent disclosure resulted in a waiver of attorney-client privileged information.
2. The *Victor Stanley* court balanced the following factors to determine whether inadvertent production of attorney-client privileged materials waives the privilege: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the number of inadvertent disclosures; (3) the extent of the disclosures; (4) any delay in measures taken to rectify the disclosure; and (5) overriding interests in justice.
3. The court’s reasoning provides a good five-point “protocol” for determining reasonableness of the precautions taken to prevent inadvertent disclosure. The *Victor Stanley* court determined the

party involved had not carried the burden of proving reasonable precautions because they failed to provide the following:

- a. Information regarding the key words used for the search;
- b. The rationale for the selection of key words;
- c. The qualifications of the individuals who created the search to design an effective and reliable search and information retrieval method;
- d. Whether the search relied on simple key words or more sophisticated methodology such as Boolean proximity operators; and
- e. Whether the defendants had analyzed the results of the search to assess its reliability, task, appropriateness, and quality of implementation.

We can draw from this that the care going forward in selecting search terms includes the careful consideration of the qualifications of the individuals who design the search methodology, quality assurance testing once the methodology has been implemented, and an expectation that a party can be called upon to explain and defend its chosen methodology in future proceedings. This is not something that can often be left to lawyers alone, but would involve a team approach with appropriate technology experts or consultants, litigation counsel, and in house IP personnel, to name a few.

4. The custodian of records is usually not the individual to design the search methodology. As the court noted “most custodians cannot be trusted to run effective searches because designing legally sufficient electronic searches in the discovery [] context[] is not part of their daily responsibilities.” *Nat’l Day Laborer Org. Network v. U.S. Immigration & Customs Enf’t Agency*, 877 F.

Supp. 2d 87, 108 (S.D.N.Y. 2012). The same can be said for most lawyers. *Id.* at 109.

E. Social Media in Discovery.

1. Scope.

- a. FRCP 26 applies to social media discovery. Proportionality and relevance play a significant role in determining the appropriate scope of social media discovery.
- b. In *United States ex rel Reaster v. Dopps Chiropractic Clinic, LLC*, 1453-EFM-KGG, 2017 WL 957436, at *1–*2 (D. Kan. Mar. 13, 2017), the court held “While information on social networking sites is not entitled to special protection, discovery requests seeking this information should be tailored so as not to constitute the proverbial fishing expedition in the hope that there might be something of relevance in the respondent’s social media presence.”
- c. In *Gordon v. T.G.R. Logistics, Inc.*, 321 F.R.D. 401 (D. Wyo. 2017), a physical and emotional injury claim resulting from a car accident, the court denied defendant’s request for plaintiff’s entire Facebook history and instead, limited the scope to Facebook posts that relate to the car accident and her resulting injuries and any other posts relating to other events that could reasonably be expected to result in emotional distress.

2. Preservation and Spoliation.

- a. Social media, including Facebook, Myspace, LinkedIn, Instagram, Twitter, and the like, is used pre-litigation by parties and attorneys in a variety of ways. As such, social media needs to be included in document preservation

demands to the other side and in document preservation memos to clients.

- b. Attorneys must be aware and advise clients of their obligation to retain relevant information in litigation contained on social media. Adverse inference instructions and discovery abuse sanctions may be appropriate for failure to preserve such information. *See Gatto v. United Air Lines Inc.*, 2013 WL 1285285 (D.N.J. Mar. 25, 2013); *see also Painter v. Atwood*, 912 F. Supp. 2d 962 (D. Nev. 2012); *see also Nutrition Distrib., LLC v. PEP Research*, 16-cv-2328-WQH-BLM, 2018 WL 3769162 (S. D. Cal. Dec. 4, 2018). Adverse inference sanctions are now limited to cases where the court finds that a party acted with the intent to deprive another party of the use of the information in the litigation. This is due to the December 1, 2015 amendment to Rule 37(e). *See* Chapter X.H. in this regard.

- c. In *Gatto*, the court ruled that a plaintiff's deletion of his Facebook account amounted to destruction of evidence, entitling the defendant to an instruction at trial that the jury may draw an adverse inference against the plaintiff for failing to preserve his account and intentionally destroying evidence. Similarly, in *Painter*, the court granted an adverse inference instruction against a plaintiff for intentionally deleting Facebook comments relevant to defendants' claim. In *Nutrition Distrib.*, the court issued a permissive adverse inference instruction for the defendant's failure to preserve social media posts from Facebook and Twitter and implying he destroyed posts after the duty to preserve attached when he testified at his deposition that "[I]f I want to delete every single post on my Facebook page, I have the right to do so."

3. Ethical Concerns.

- a. Preservation of information contained on social media is also an ethical duty of counsel. *See Lester v. Allied Concrete Company*, Nos. CL08-150, CL09-223, 2011 WL 8956003 (Va. Cir. Ct. Sept. 1, 2011); *Lester v. Allied Concrete Co.*, Nos. CL08-150, CL09-223, 2011 WL 8956003 (Va. Cir. Ct. Sept. 1, 2011). In *Lester*, an attorney instructed his assistant to tell his client to remove a photograph from a social media website. Finding that the lawyer had violated the Rules of Professional Conduct, the court sanctioned the attorney with a fine of \$540,000.
- b. Attorneys must also be aware that their own social media use may violate other ethical duties. For instance, “friending” a represented party on Facebook violates former California Rules of Professional Conduct 2-100 (now C.R.P.C. 4.2). Additionally, a lawyer may not “friend” nor direct a third party to “friend” a party to the lawsuit in pending litigation in order to gain information not publicly available. *New York State Bar Ass’n, Comm. on Prof’l Ethics, Opinion 843* (Sept. 10, 2010).
- c. The American Bar Association stated, “Unless limited by law or court order, a lawyer may review a juror’s or potential juror’s Internet presence . . . but a lawyer may not communicate directly or through another with a juror or potential juror.” Further, “A lawyer may not, either personally or through another, send an access request to a juror’s electronic social media.” ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 466 (2014) (citing Model Rules of Prof’l Conduct R. 3.5(b)).

4. Privacy Concerns.

- a. Although case law is evolving, it is becoming clear that anyone posting photos or information to a public site has

no reasonable expectation to privacy. See *Romano v. Steelcase, Inc.*, 907 N.Y.S. 2d. 650 (Sept. 21, 2010); *Zimmerman v. Weis Markets*, 09-cv-1535, 2011 WL 2065410 (Pa. Ct. Common Pleas, May 19, 2011); *Davenport v. State Farm Mutual Automobile Insur. Co.*, 11-cv-632-J-JBT, 2012 WL 555759 (M.D. Flor. Feb. 21, 2012) ("Generally, social networking site content is neither privileged nor protected by any right of privacy").

- b. In *Romano*, the defense contended that plaintiff placed certain information in the public portions of her Facebook and Myspace accounts that were inconsistent with her claims in a personal injury lawsuit. Based thereon, the court granted the defense access to the private portions of plaintiff's social networking sites. The court stated there was a reasonable likelihood that the private portions contained further evidence that was material and relevant to the defense of the action.
- c. In the Ninth Circuit, the Nevada district court followed the reasoning of *Romano* in *Thompson v. Autoliv ASP, Inc.*, 09-cv-01375-PMP-VCF, 2012 WL 2342928 (D. Nev. Jun. 20, 2012). The defense in *Thompson* obtained wall posts and photographs from the plaintiff's public Facebook profile that they contended provided evidence of the plaintiff's post-accident social activities, mental state, relationship history, living arrangements, and rehabilitative process. Once again, the court found that the material on plaintiff's social networking site was relevant to the facts in issue in the case. It can be surmised, as a general rule, that if a public profile contains information inconsistent with a party's claims, a court will likely allow the opponent the opportunity to explore information from the private profile.
- d. As to the issue of the privilege of material posted as "private," and accessible by a selected group of recipients, but not available for viewing by the general public on a social networking site, the court in *Tompkins v. Detroit*

Metropolitan Airport, 278 F.R.D. 387 (E.D. Mich. Jan. 18, 2012), held it is not protected by common law or civil law notions of privacy. *Id.* at 388. However, the court also limited the potential for parties to engage in generalized fishing expeditions by stating that, consistent with Rule 26(b), a threshold showing must be made that the requested information is reasonably calculated to lead to the discovery of admissible evidence.

- i. Following this reasoning, the court in *Howell v. Buckeye Ranch, Inc.*, 11-cv-1014, 2012 WL 5265170 (S.D. Ohio Oct. 1, 2012), found that the defendants' request for the username and password to the plaintiff's social media site was overbroad because it would give the defendants access to "all the information in the private sections of [plaintiff's] social media accounts - relevant and irrelevant alike." In *Brown v. Ferguson*, 15-cv-0083-ERW, 2017 WL 386544, at *1–*2 (E.D. Mo. Jan. 27, 2017), the court rejected disclosure of social media passwords as constituting unfettered access.
- ii. Compare, however, in an employee's Title VII action against her employer for sexual harassment, the court found it appropriate to permit broad discovery of the employee's social networking site content relevant to her mental and emotional health. *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 435 (S.D. Ind. 2010). The court permitted discovery of any of the employee's posts that "could reasonably be expected to produce a significant emotion, feeling, or mental state." *Id.* at 436. Similarly, the court found that third party communications to the employee would be discoverable if they provided contextual support. *But see Schubart v. Horizon Wind Energy, LLC*, 11-cv-1446, 2012 WL 6155844 (C.D. Ill. Dec. 11, 2012) (denying as "overly broad" defendant's discovery

request seeking all information related to plaintiff’s mental state, without any limitations as to time or connection to the events in the case).

- iii. Other decisions are grounded in similar reasoning. *See, e.g., Forman v. Henkin*, 93 N.E.3d 882 (N.Y. 2018) (rejecting plaintiff’s suggestion that disclosure of social media materials necessarily constitutes an unjustified invasion of privacy because “when a party commences an action, affirmatively placing a mental or physical condition in issue, certain privacy interests relating to relevant medical records—including the physician-patient privilege—are waived.”)

5. “Tagged” Pictures.

- a. The case law is somewhat conflicting on the issue of privilege of "tagged" pictures.²² In *Simply Storage*, the court found that pictures posted on a third party's profile in which a claimant is "merely tagged" are less likely to be relevant. 270 F.R.D. at 436. However, in *Davenport*, a case in which the plaintiff’s physical condition and “quality of life” were at issue, the court ordered the plaintiff to produce all photographs depicting her taken after the date of the accident and posted on a social networking site regardless of who posted them. 2012 WL 555759, at *2. The court further held that once the plaintiff was tagged in the picture, it was in the plaintiff’s "possession, custody, or control." *Id.* n. 4 (citing Fed. R. Civ. P. 34(a)(1)).

²² “‘Tagging’ is the process by which a third party posts a picture and links people in the picture to their profiles so that the picture will appear in the profiles of the person who ‘tagged’ the people in the picture, as well as on the profiles of the people who were identified in the picture.” *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 436 n. 3 (S.D. Ind. 2010).

- b. The assumption is that one can "un-tag" himself from a picture once he has been tagged. This is consistent with Facebook's privacy policy, which states that all posting is done at one's own risk. *See Romano v. Steelcase, Inc.*, 907 N.Y.S. 2d 650, 656 (N.Y. Sup. Ct. 2010); *see also Higgins v. Koch Dev. Corp.*, 11-cv-81-RLY-WGH, 2013 WL 3366278 (S.D. Ind. Jul. 5, 2013)²³ (finding that non-parties limited any expectation of privacy they had when they tagged plaintiffs).

6. The Stored Communications Act.

- a. The Stored Communications Act (SCA) 18 U.S.C. §§ 2701-2712, addresses voluntary and compelled disclosure of "stored wire and electronic communications and transactional records" held by third-party internet service providers (ISPs).
- b. Section 2701 of the SCA provides criminal penalties for anyone who "intentionally accesses without authorization a facility through which an electronic communication service is provided; or intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system[.]"
- c. Section 2702 of the SCA targets two types of online service: (1) electronic communication services; and (2) remote computing services. The statute defines an electronic communication service as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510 (2002).

²³ The *Higgins* case came from the Southern District of Indiana three years after *Simply Storage* was decided in the same district. Although these cases seem to conflict on the issue of tagging pictures, it should be noted that they were decided by different judges—*Higgins* by Magistrate Judge William Hussmann, and *Simply Storage* by Magistrate Judge Debra McVicker Lynch.

A remote computing service is defined as "the provision to the public of computer storage or processing services by means of an electronic communications system." *Id.*

- d. Section 2702 of the SCA describes conditions under which a public ISP can voluntarily disclose customer communications or records. In general, ISPs are forbidden to "divulge to any person or entity the contents of any communication which is carried or maintained on that service." However, ISPs are allowed to share "non-content" information, such as log data and the name and email address of the recipient, with anyone other than a governmental entity. In addition, ISPs that do not offer services to the public, such as businesses and universities, can freely disclose content and non-content information. An ISP can disclose the contents of a subscriber's communications authorized by that subscriber.

- e. A district court in California found that private messaging services provided on Facebook and Myspace are protected from civil subpoena power by the SCA. *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 990 (C.D. Cal. 2010). The SCA distinguishes between providers of electronic communication services (ECS) and remote computing services (RCS). In *Crispin*, the court held that Facebook and Myspace operated as ECS providers in relation to private messages, and as RCS providers in relation to wall postings and comments. It further found that because the private messages exchanged on these sites are not readily available to the public, they are not subject to civil subpoena under the SCA. The court remanded as to the issue of wall postings and comments to develop a fuller evidentiary record on the plaintiff's privacy settings. This suggests that courts may decide on a case-by-case basis whether wall postings and comments are subject to civil subpoena.

- f. Overall, although parties may not access private messages on Facebook and Myspace by civil subpoena, they may still seek these items through the general discovery process. *See Mackelprang v. Fidelity Nat'l Title Agency of Nevada, Inc.*, 06-cv-00788-JCM, 2007 WL 119149 (D. Nev. Jan. 9, 2007) (denying motion to compel private communications on Myspace account without a showing of more than suspicion or speculation as to what information might be contained in such messages).

F. Interrogatories, Document Requests, and Subpoenas for ESI.

1. Interrogatories and ESI.

- a. As to interrogatories, Rule 33(d) includes provisions regarding ESI, which would allow “a responding party to substitute access to documents or [ESI] for an answer only if the burden of deriving the answer will be substantially the same for either party.” *See* Committee Note to Rule 33(d). The Rule has historically provided the option to produce business records, of course, but now, through the 2006 amendments, it specifically addresses ESI. Rule 33 still requires the party served with the interrogatory to “specify” the records, and the “specification must be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.” The Committee Note to Rule 33 characterizes this duty as follows: “must ensure that the interrogating party can locate and identify it.”
- b. Rule 33(d) affords the requesting party the opportunity to “examine, audit or inspect” as well as make compilations, abstracts or summaries of the identified data. As a result, and notably, when a party invokes Rule 33(d), they may “be required to provide direct access to its electronic information system, but only if that is necessary to afford

the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory.” *Id.* Faced with this issue of “direct access,” a responding party may decide it is more prudent to provide the answer itself, rather than utilize the provisions of Rule 33(d). A search of a party’s active files should certainly be discouraged in any case. The issues of changed data, or lost data, as well as questions of privacy or privilege, are extreme. Utilizing a forensic copy of the enumerated files may be a good alternative to allow the “sampling” without the attendant risks.

2. Document Requests and ESI.

- a. Concerning requests for production of documents, Rule 34(a) also includes ESI relative to a party’s request to “inspect, copy, test, or sample . . . documents or [ESI].”²⁴ The Note to Rule 34 states the Rule was amended to confirm that discovery of ESI stands on “equal footing” with discovery of “paper documents.” The 2006 Committee Note states that, “[t]he change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined.” *See* 2006 Committee Note to Rule 34(a).
- b. The 2006 Committee Note also provides some practical information for addressing Rule 34 discovery. These are as follows:
 - i The term “documents” should be understood to encompass, and the response should include, ESI information unless a clear distinction is drawn between ESI and other type of documents;

²⁴ Changes to Rule 24(a) in 1970 made it clear that “records” included electronically prepared and stored information.

- ii Rule 34 is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments;
 - iii The Rule's requirement that the producing party "translate" stored information into usable form does not contemplate translating from one human language to another;
- c. Like Rule 33(d), Rule 34(a)(1)(A) provides that a party may request an opportunity to test or sample material sought under the rule in addition to inspecting and copying it. This may be of particular value with ESI considering its nature and volume. The standard notions of burden and intrusiveness may be raised pursuant to Rules 26(b)(2) and 26(c) and in opposition to such a request. *See* Committee Note to Fed. R. Civ. P. 34(a).
 - d. Rule 34(b) was also changed in 2006 with respect to procedure. This subsection now provides that the request may specify the form or forms in which ESI is to be produced. The responding party is entitled to object to the requested form in the response to the request. If no form is specified in the request, then the responding party must state the form or forms it intends to use when responding. *See* Fed. R. Civ. P. 34(b)(2)(D).
 - e. Unless requested or otherwise ordered, a responding party must produce any requested ESI in the form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable. Finally, a party need only produce ESI in one form per Rule 34(b)(iii).
 - f. The form or format of the data is a significant question in every case. There are a variety of formats. For purposes of this brief discussion, let's focus simply on two: native and image.

- i. Native format is the form in which the data is stored in the usual course of business. For example, for Microsoft Word documents, the native format would be .doc or .docx files. Native format is the “default” manner for production under the literal reading of the Rules. Fed. R. Civ. P. 34(b)(2)(E)(i).
- ii. Native format has the ability to allow you to fully explore metadata²⁵, formulas, spread sheets, audio and video files. The limitations to native format include the inability to search the attachments to emails in the data, effectively redact information, bates number documents, or do a single search across all data. Also, the data is changeable and changed by working with it.
- iii. Image format is essentially a picture of the document.²⁶ It is much simpler to search, review, organize, redact, bates number, or search all from one interface. On the downside, it presents metadata limitations (although some image programs have searchable text formats), and it is also more expensive to produce. Ultimately, however, the data is generally unchangeable, which could be important for admission at a later trial.
- iv. It is important to understand what it is you want to do with the data. Are you seeking a database, that is, the raw information from which you can determine the formulas used, run the spreadsheets enclosed, or develop other information analysis? Do you need to

²⁵ Metadata is data providing information about the data, such as, date of creation, author, changes made, and dates of transmission. It’s “hidden” in a paper or screen image, but available digitally.

²⁶ There are a variety of image format programs available, with PDF and TIFF being two of the most common.

exhaustively search the metadata for all documents in the database? Or, do you really just need a picture of the documents, with some limited metadata search capability, but perhaps a more usable format to use? These are the questions you need to ask so that the right answer will come to you, for your case.

v. In the end, you should consider different formats for different things. It may be that for emails, image format will do fine²⁷. If you need human resources data or spreadsheet information, go with the native format. If a picture that allows you to view emails and their attachments with some metadata involved is what you are looking for, then image format with searchable text attributes would be the thing for you. You can easily, and with proper planning, request a mixture of formats for varying data. As stated, while the Rules limit the producing parties' obligation to no more than one format [Rule 34(b)(2)(E)(iii)], that is specific as to certain data. It does not mean that you cannot obtain certain things in native format and others in an image format.

g. Through the 2015 amendments to Rule 34, important changes were made regarding responses and objections.

i. Under Rule 34 (b)(2)(B), a party may now produce copies of documents or ESI instead of permitting inspection. This new section reads:

The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must

²⁷ Note that image formats do carry some costs and shortcomings. These should be considered in your discovery planning in consultation with your ESI consultant or team.

then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

- ii. In addition, objections, must be stated “with specificity” [Rule 34(b)(2)(B)], and must state ***whether any responsive materials are being withheld on the basis of that objection.*** An objection to part of a request must specify the part and permit inspection of the rest. Fed. R. Civ. P. 34(b)(2)(C).
- iii. The 2015 Committee Note points out that this will alleviate confusion when objections are stated but documents are otherwise produced, leaving the requesting party uncertain whether responsive information has been withheld on the basis of the objections. The Committee Note also qualifies the nature and content of the “statement” concerning whether documents are being withheld, by providing that “the producing party does not need to provide a detailed description or log of all documents withheld.” Of course, documents withheld on the basis of privilege will still require a privilege log. Fed. R. Civ. P. 26(b)(5).

3. Subpoenas and ESI.

Rule 45 has been conformed to Rule 34 in this area. Obviously, ESI is specifically included throughout Rule 45. In addition, the following conforming changes were made:

- a. The testing or sampling language from Rule 34(a) was inserted into Rule 45(a)(1)(D);
- b. The subpoena can specify the form of production, similar to Rule 34(b). Where a subpoena does not specify the

format, the responding party will be required to produce the information in the form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable consistent with Rule 34(b)(2)(E)(ii);

- c. The “reasonably accessible” limits as to scope and breadth of Rule 26(b)(2)(B) are repeated in Rule 45(e)(1)(D); and,
- d. Privilege is dealt with under the same “status quo” concept (discussed below) set forth in Rule 26(b)(5). The same Rule 26(b)(5) provision has also been inserted into Rule 45 in subsection (e)(2).

Note, it is important to remember that Rule 45 has a territorial limitation of 100 miles (Rule 45(c)) of where the person resides, is employed, or regularly transacts business. The Rule applies equally to remote testimony or subpoena compliance. *In re John Kirkland, et al., v. USBC, Los Angeles*, 2023 WL 4777937 (9th Cir. July 23, 2023). Note as well, that this Rule does not limit the discretion of the court under Rule 43 to allow remote testimony “for good cause in compelling circumstances and with appropriate safeguards.” Simply, the party’s nor the court can compel remote testimony.

G. Handling Privilege Under the Rules.²⁸

With thousands upon thousands of bytes in a computer (including data, metadata, unallocated space awaiting to be overwritten, etc.), it is not always, if ever, feasible to fully search ESI for privilege. In the 2006 amendments to Rule 26(b)(5), the Committee Note stated “the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of [ESI] and the difficulty in ensuring that all information to be produced has in fact been reviewed.”

²⁸ While this discussion is in the context of ESI, the concepts, rules, and procedures equally apply to privilege issues concerning all discovery.

1. The Procedural Rule.

Rule 26(b)(5) provides that if information is produced that is subject to a claim of privilege or protection as trial preparation material, (1) the party making the claim may notify any party that received the information of the claim and its basis; (2) the party notified must promptly return, sequester, or destroy the specified information and any copies it has; (3) the receiving party is otherwise restricted from use or disclosure of the information until the claim of protection is resolved; (4) the receiving party must take reasonable steps to retrieve any information that was disclosed prior to notification; and (5) the receiving party may promptly present the information to the court under seal for a determination of the claim. “The goal is to preserve the status quo until the court can consider the questions of privilege and protection of work product.”²⁹

2. The Substantive Effect.

Notably, the 2006 Committee Note states “Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production.” The issue of waiver is left to the courts to decide. The impact of Rule 26(b)(5)(B) is to provide a procedure for “presenting and addressing these issues,” nothing more. In 2008, Congress provided some help in dealing with the waiver issue by passing FRE 502 (more on that below). FRE 502 works well in a procedural sense with Rule 26(b)(5)(B).

3. The Need for Specificity.

The Committee Note to Rule 26(b)(5) describes that the notice and claim for the basis of privilege must be as “specific” as possible. This is to allow the receiving party to decide whether to

²⁹ Kenneth Withers, *We’ve Moved the Two Tiers and Filled in the Safe Harbor*, 52 FED. LAWYER 50, 53 (2005)

challenge the claim and determine whether the claimed privilege or protection applies in the first place or is otherwise waived. Unless the notice is sufficiently detailed, the receiving party will be hampered in its attempt to decide its course of action.

4. Waiver of Privilege [FRE 502].

- a. Passed in September 2008, this Rule deals with waiver of privilege, both intentional and inadvertent. As an Act of Congress, this Rule has a binding effect upon the state courts, as well.
- b. If a disclosure of privileged information is intentional, it operates as a subject matter waiver, unless fairness would dictate otherwise.
- c. If the disclosure of the privileged information was inadvertent (unintentional), there is no waiver:
 - i. if the privilege holder took reasonable precautions to prevent disclosure; and
 - ii. took reasonably prompt measures to rectify the error.

This Rule does not define “reasonable” but prior case law is instructive. See the discussion of *Victor Stanley v. Creative Pipe*, Section X.D., above.

- d. In concert with Rule 26(b)(5), and the duty upon the recipient of inadvertently disclosed privileged information, the information may have a fair chance of protection.
- e. Other key provisions to FRE 502 are:
 - i. Where the disclosure occurs first at the federal level, federal law applies, but where the disclosure occurs at the state level, and the issue of waiver then arises

in federal court, the court will apply whichever law (federal or state) is most protective against waiver.

- ii. A non-waiver order by a federal court is binding on parties and non-parties alike in both state and federal court.
- iii. Non-waiver agreements between parties in a federal proceeding are only binding on non-parties if incorporated into a court order.

5. Case Law Approaches to Waiver Before FRE 502.

- a. There was a wide range of approaches employed by courts regarding waiver by inadvertent disclosure. “There is no consensus . . . as to the effect of inadvertent disclosures of confidential communications.” *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993). The courts have dealt with the issue in a variety of ways. These ranged from a strict liability approach such that any disclosure forfeited the privilege; a subjective intent approach, so that only a deliberate disclosure forfeited the privilege; and, a balancing test in which the court considered all relevant circumstances. *U. S. ex rel. Bagley v. TRW, Inc.*, 204 F.R.D. 170, 176 (C.D. Cal. 2001).
- b. Where courts used the “balancing” approach, a number of factors were considered in determining whether to excuse a waiver as “inadvertent.” These included: (1) reasonableness of the precautions taken to prevent the disclosure in the first place; (2) the time that has passed since the disclosure; (3) the volume of discovery involved (which can be particularly extensive with ESI); (4) the amount of information disclosed; and (5) whether justice would be better served by relieving the party of its mistake. *Id.* at 177.

- c. As to the timing, potential prejudice to the entity receiving the documents and the impact upon the case schedule need to be considered. Timeliness is certainly urged, and reliance upon the traditional notions of a “seasonable” advice, borrowing from the terminology associated with supplementation of disclosure and discovery, may have been unwise.
- d. However, the time involved and the extent to which a party had relied upon the documents is extremely critical. Where a party relied upon the information in formulating or refining claims or defenses, or had used the information against the producing party, the privilege may indeed be lost. *See Bowles v. Nat’l Ass’n of Home Builders*, 224 F.R.D. 246 (D.D.C. 2004).
- e. This history is more than academically interesting. It may guide the court in examining the “reasonableness of precautions” or what is “reasonably prompt” in a given case under FRE 502.

6. Applicability to Subpoenas.

The provisions of Rule 26(b)(5) regarding the handling of privileged information applies equally to subpoenas and are included in Rule 45(e)(2)(B). FRE 502 would similarly apply.

H. Sanctions and ESI.

Under Rule 37, there are specific rules regarding sanctions related to the failure to make disclosure or cooperate in discovery regarding ESI. *See Chapter XX* regarding the failure to disclose or cooperate. Specific to the failure to preserve ESI, a new rule emerged with the December 1, 2015 amendment to Rule 37(e).

1. The Old Rule 37(e).

To put the new rule in perspective, a brief mention of the old rule is helpful. This evolution also notes the commitment of the courts to strive to meet the aspirations stated in Rule 1.

- a. The 2006 amendments to Rule 37(e) provided, “absent exceptional circumstances,”³⁰ where ESI is destroyed in the routine “good faith” use of an electronic information system, the parties are exempt from sanctions “under these rules.” Fed. R. Civ. P. 37(e). This was dubbed the “safe harbor” for avoidance of sanctions for the loss (failure to preserve) of ESI. *See*, footnote 26 for further discussion of the limits of this “safe harbor.”
- b. The term “good faith” was not specifically defined either. The Committee Note did state that “good faith” means “that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue to destroy specific stored information that it is required to preserve.”
- c. The Committee Note to subdivision (f) defined “routine operation” as follows, “the ‘routine operation’ of computer systems includes the alteration and overriding of information, often without the operator’s specific direction or awareness, a feature with no direct counterpart in hard-copied documents. Such features are essential to the operation of electronic information systems.” It continues that “good faith and the routine operation of an information system may involve a party’s intervention to modify or

³⁰ These terms were not defined in the Rule. The Committee Note provided that “in some circumstances the court should provide remedies to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important information.”

suspend certain features of that routine operation to prevent the loss of information if that information is subject to a preservation obligation.” In other words, once on notice of litigation or anticipated litigation, you need to take action to prevent the loss “or future loss” of data through routine computer functions. Inaction may well preclude a “good faith” finding and result in sanctions under these rules.³¹

2. The New Rule 37(e).

- a. Noting the inadequacy of the prior rule in addressing serious problems from the exponential growth in the volume of ESI, a new rule was formulated. The matter of volume was found to resort in over preservation of data at significant cost. There was also a problem with courts adopting various standards and remedies, based on state spoliation law, that needed to be harmonized into a uniform federal rule for the federal courts.
- b. Note, the new Rule 37(e) only applies to ESI – not other forms of discovery.
- c. To quote the Committee, this new rule “authorizes and specifies measures a court may employ if information that should have been preserved is lost and specifies the findings necessary to justify these measures.” Committee Note to Rule 37(e). These measures are proportionate to the specific circumstances in a given case.
- d. Under the new Rule, sanctions are available “if electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost

³¹ While described as a “safe harbor” by some, the “protection” is limited to violation under the rules. A violation of court orders, or the court through its inherent powers, may still be the basis for sanctions including a spoliation inference. *See Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991); *Dillon v. Nissan Motor Co. Ltd.*, 986 F.2d 263, 267 (8th Cir. 1993); *Unigard Sec. Ins. Co. v. Lakewood Eng’g and Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992).

because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery[.]” Fed. R. Civ. P. 37(e).

3. What Are Reasonable Steps?

- a. The 2015 Committee Notes make the wise observation that only reasonable steps, and not perfection, are sufficient. The Notes go on to set out some practical guideposts as set forth below.
- b. In evaluating reasonableness, courts should be sensitive to:
 - i. The party’s sophistication with litigation;
 - ii. Whether the information was outside of the party’s control;
 - iii. Extraordinary occurrences including a flooded computer room, “cloud” service failure, software attacks, etc.;
 - iv. Party resources; and
 - v. Proportionality to the needs of the case or issues in dispute.
- c. In *GN Netcom, Inc. v. Plantronics, Inc.*, 12-cv-1318-LPS, 2016 WL 3792833 (D. Del. July 12, 2016), the court found a high-ranking officer deleted thousands of emails and ordered others to do the same. Despite other steps taken to preserve documents, the court found the executive’s intentional spoliation could not be deemed to constitute acting “reasonably” in preserving documents. The court held the company’s “reliance on [other preservation] actions to excuse the intentional, destructive

behavior” of the senior executive “requires a ‘perverse interpretation’ of Rule 37(e), one which would set a dangerous precedent for future spoliators.” The court imposed severe sanctions, including an adverse inference jury instruction and monetary sanctions for fees and costs, and a punitive sanction of \$3 million.

- d. In *Matthew Enter., Inc. v. Chrysler Group, LLC*, 13-cv-04236-BLF, 2016 WL 2957133 (N.D. Cal. May 23, 2016), the plaintiff, after its duty to preserve was triggered, allowed all email communications to be deleted when it changed email vendors and failed to notify its customer communications vendors to suspend its auto-delete function. The *Matthew* court found the plaintiff failed to take reasonable steps to preserve discoverable information and the defendant was prejudiced as a result. However, the court did not impose sanctions because the intent to deprive was not established.

4. Sanctions Pursuant to Rule 37(e)

- a. Severe sanctions are permissible where a court finds a party acted with the **intent to deprive** another party of the information. If the “intent to deprive” standard is met, a court may:
 - i. presume that the lost information was unfavorable to the party;
 - ii. instruct the jury that it may or must presume the information was unfavorable to the party; or
 - iii. dismiss the action or enter a default judgment. These severe levels of sanctions should be utilized cautiously and proportionately so that “the remedy

should fit the wrong.” Rule 37(e) 2015 Committee Note.

- b. Courts have been faithfully adhering to this degree of caution by awarding severe sanctions only where the responding party destroyed evidence with intent to deprive. *See Organik Kimya, San ve Tic. A.S. v. Int’l Trade Comm’n*, 848 F.3d 994 (Fed. Cir. 2017) (severe sanctions imposed where plaintiffs intentionally began overwriting laptops to delete an estimated hundreds of thousands of relevant files); *see also Basra v. Ecklund Logistics, Inc.*, 16-cv-832017, WL 1207482, at *1 (D. Neb. Mar. 31, 2017) (sanction of an adverse jury instruction for spoliation of evidence was not warranted because plaintiffs failed to establish defendant had intentionally destroyed evidence); *see also First Fin. Sec. Inc. v. Freedom Equity Grp., LLC*, 15-cv-1893-HRL, 2016 WL 5870218 (N.D. Cal. Oct. 7, 2016) (adverse inference jury instruction warranted because defendant deleted relevant text messages with intent to deprive).
- c. As another example, prior to the 2015 amendment, the court in *Nuvasive, Inc. v. Madsen Med., Inc.*, 13-cv-2077 BTM-RBB, 2016 WL 305096 (S.D. Cal. Jan. 26, 2016) granted an adverse inference jury sanction even after finding plaintiff had not acted with the intent to deprive the defendant of text messages. After the 2015 amendment, plaintiff in *Nuvasive* moved to vacate the previous order. The court granted the motion, holding an adverse inference instruction is impermissible under the amended rule absent intent to deprive. Similarly, in *SEC v. CKB168 Holdings, Ltd.*, No. 13-5584 (E.D.N.Y. Sept. 28, 2016), the court adopted a report and recommendation that was modified in light of the amended rule to recommend denial of a motion for sanctions requesting an adverse inference instruction.
- d. Courts can infer intent to deprive from a party’s conduct. In *Ala. Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730

(N.D. Ala. 2017), the court held that a party may be found to have acted with an intent to deprive within the meaning of Rule 37(e)(2) where “(1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator.”

- e. Several courts have inferred intent circumstantially based upon actions, timing, or litigation conduct. *See Ronnie Van Zant, Inc. v. Pyle*, 270 F. Supp. 3d 656, 670–71 (S.D.N.Y. 2017), rev’d in part and vacated in part on other grounds (intent requirement satisfied where a party preserved certain ESI but failed to preserve other ESI); *see also Moody v. CSX Transportation, Inc.*, 271 F. Supp. 3d 410 (W.D.N.Y. 2017) (defendants’ actions presented sufficient circumstantial evidence from which to infer that they intended to deprive relevant data because they knew they had a duty to preserve, allowed the original data on the event recorder to be overwritten, and destroyed or recycled a laptop without ever confirming that the data had been preserved in another repository); *see also Lexpath Techs. Holdings, Inc. v. Welch*, 2016 WL 4544344 (D.N.J. Aug. 30, 2016) (finding an intent to deprive because defendant deleted responsive documents a few days after plaintiff sent a cease-and-desist letter that was “especially telling”); *see also GN Netcom, Inc. v. Plantronics, Inc.*, 2016 WL 3792833 (defendant’s conduct in litigation email deletion issue was relevant in finding an intent to deprive).
- f. However, courts are unlikely to find an intent to deprive where spoliation occurs because of routine deletion policy without evidence of selective deletion. *See Lokai Holdings LLC v. Twin Tiger USA, LLC*, No. 15-cv-9363 (ALC) (DF),

2018 WL 1512055 (S.D.N.Y. Mar. 12, 2018); *see also Porter v. City of San Francisco*, 16-cv-03771 (N.D. Cal. Sept. 05, 2018).

- g. Moreover, being negligent and irresponsible is insufficient to prove intent. *See Jackson v. Haynes & Haynes*, 16-cv-01297 (N.D. Ala. Jul. 26, 2017); *see also Basta v. Ecklund Logistics, Inc.*, 16-cv-832017 (D. Neb. Mar. 31, 2017); *see also Worldpay, US, Inc. v. Haydon*, 17-cv-4179 (N.D. Ill. Nov. 14, 2018).

- h. Even if a party had acted with intent, if no **actual prejudice** is shown, many courts are refusing to impose sanctions. *See Erhart v. Bofl Holding, Inc.*, 15-cv-02287-BAS-NLS, 2016 WL 5110453 (S.D. Cal. Sept. 21, 2016) (sanctions are inappropriate regardless of whether plaintiff failed to preserve relevant data with intent to deprive because defendant had not suffered any meaningful prejudice); *see HCC Ins. Holdings, Inc. v. Flowers*, No. 1:15-cv-3262-WSD, 2017 WL 393732, at *2-*4 (N.D. Ga. Jan. 30, 2017) (although defendants' conduct of running computer cleaning programs after a court ordered production of the defendant's laptop was "troubling, and in breach of [their] duty to preserve," spoliation sanctions were not warranted because the presence of any relevant trade secrets was merely speculative); *see also Eshelman v. Puma Biotechnology, Inc.*, 16-cv-18-D, 2017 WL 2483800, at *5 (E.D. N.C. June 7, 2017) (defendant's failure to preserve internet web browser and search histories did not warrant sanctions because "other avenues of discovery [were] likely to reveal information about the searches performed"); *see also First Fin. Sec. Inc.*, 2016 WL 5870218, at *7 (adverse inference jury instruction warranted for defendant's failure to comply with court-ordered production of native-format data that resulted in substantial prejudice to the plaintiff).

- i. Where sanctions *are* imposed, the remedy should be **no greater than necessary to cure the prejudice**. *See Edleson v. Cheung*, 13-cv-5870-JLL-JAD, 2017 WL 150241, at *1–*4 (D.N.J. Jan. 12, 2017) (where the defendant deleted key emails from his computer, court held plaintiff had “failed to demonstrate that he ha[d] suffered a degree of prejudice that merit[ed] the imposition of a default judgment against [the] defendant” but adopted the “more appropriate sanction [and] instruct[ed] the jury that it [could] presume the information was unfavorable to [the] defendant”).

5. Sanctions Pursuant to Inherent Authority

- a. While the 2015 amendment to Rule 37(e) did not address whether courts retain their inherent authority to impose sanctions for preservation failures, the Committee Note stated the new rule forecloses, by design, reliance on inherent authority or state law to determine when these types of measures should be used.
- b. Some judges heeded this advice and declined requests to rely on inherent authority for spoliation sanctions. *See FiTeq Inc. v. Venture Corp.*, 13-cv-01946-BLF, 2016 WL 1701794 (N.D. Cal. Apr. 28, 2016) (declining to rely on inherent authority to impose spoliation sanctions); *see also Matthew Enter., Inc. v. Chrysler Group, LLC*, 13-cv-04236-BLF, 2016 WL 2957133 (N.D. Cal. May 23, 2016).
- c. However, some judges continued to fall back on, or acknowledge the continued existence of, inherent authority. *See Cat 3 LLC v. Black Lineage Inc.*, 164 F. Supp. 3d 488 (S.D.N.Y. 2016) (imposing sanctions pursuant to its inherent authority); *see also Hsueh v. New York State Dept. of Financial Servs.*, 15-civ.-3401-PAC, 2017 WL 1194706, at *4, *6 (S.D.N.Y. Mar. 31, 2017) (granting an adverse inference sanction for spoliation and

explaining “[b]ecause Rule 37(e) does not apply, the Court may rely on its inherent power to control litigation in imposing spoliation sanctions”);

- d. In *Crossfit, Inc. v. Nat’l. Strength & Conditioning Ass’n*, No. 14-cv-1191 JLS-KSC, (S.D. Cal. May 26, 2017), an unfair competition suit, the plaintiff moved for terminating sanctions, or, in the alternative, issue, evidentiary, and monetary sanctions because defendant withheld evidence in bad faith. There, Judge Sammartino indicated that Rule 37 “authorizes the district court, in its discretion, to impose a wide range of sanctions” and that district courts have inherent power to “impose sanctions including, where appropriate, default or dismissal. The court discussed a five-part test (set forth in *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1031, 1096 (9th Cir. 2007) to determine whether a case-dispositive sanction is appropriate, which are:
 - i. the public’s interest in expeditious resolution of litigation;
 - ii. the court’s need to manage its dockets;
 - iii. the risk of prejudice to the party seeking sanctions;
 - iv. the public policy favoring disposition of cases on their merits; and
 - v. the availability of less drastic sanctions.

Ultimately, the court concluded there was “ample evidence of willfulness, bad faith, or fault” and “nearly every factor weighs in favor of terminating sanctions” that was “well within [the court’s] direction” to impose. *Id.* However, because “less drastic sanctions” were available, the court imposed the lesser sanctions. These included substantial issue sanctions, five permissive adverse inference jury instructions, and an order granting plaintiff

leave to amend its complaint, reopen discovery, and an award for fees for bringing the motion.

- e. In *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017), the Supreme Court weighed on the existence and limits of inherent authority to impose sanctions for discovery misconduct. There, plaintiffs sought sanctions for discovery fraud. The lower court relied on its inherent authority to impose sanctions reasoning that no statute or rule “enabled it to reach all of the offending behavior.” While the Supreme Court did not directly discuss amended Rule 37(e), it did confirm federal courts possess inherent authority to impose sanctions “for conduct which abuses the judicial process,” but limited the sanctions to those that are compensatory – not punitive – and must have been “causally related to the sanctioned party’s misconduct.” Accordingly, the Supreme Court unanimously reversed and remanded the \$2.7 million in attorney’s fees as improperly punitive.

6. Spoliation.

The loss of information can impair a party’s ability to prove its case, and in certain circumstances, can lead to a “spoliation³² inference,” with grave consequences. The inference is, of course, that the destroyed evidence would have been unfavorable to the position of the offending party. *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 218 (1st Cir. 1982). In *Nation-Wide*, the court stated “[t]he evidentiary rationale [for the spoliation inference] is nothing more than the common sense observation that a party who has notice that a document is relevant

³² Spoliation refers to the destruction or material alteration of evidence or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation. *Sylvestri v. GM Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). The elements to establish spoliation are: (1) a duty to preserve the evidence; (2) destruction with a culpable state of mind; and (3) that the evidence was relevant. *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 430 (S.D.N.Y. 2004) (“*Zubulake V*”), citing cases.

to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document.” *Id.* at 218. The court has authority, as part of its inherent power and under the FRCP, to sanction parties in appropriate cases for spoliation of evidence. *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 267 (8th Cir. 1993); *Unigard Sec.*, 982 F.2d at 368.

7. Good Faith and Professionalism.

Good faith and professionalism are required to avoid adverse implications from a discovery violation. “For the current ‘good faith’ discovery system to function in the electronic age, attorneys, and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents.” *Qualcomm v. Broadcom*, CASD Case No. 05cv1958 B (BLM), Docket No. 718, at 17-18. This is available anytime through the court’s Pacer system at www.casd.uscourts.gov.

I. Self-Authenticating ESI.

FRE 902 governs evidence that is “self-authenticating,” meaning evidence that does not require any extrinsic evidence of authenticity in order to be admissible in trial. On December 1, 2017, the FRE was amended to allow easier authentication from electronic sources. The amendments to Rules 902(13) and (14) allow parties to authenticate ESI without the need to offer any foundation-related testimony.

1. FRE 902(13)

Specifically, FRE 902(13) now provides for the self-authenticating of: “A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the

certification requirements of Rule 902(1) or (12). The proponent must also meet the notice requirements of Rule 902(11).

2. FRE 902(14)

FRE 902(14) now provides for the self-authenticating of: “Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).”

These rules would require the proponent of the ESI, in advance of trial, to provide certification by a qualified person establishing the authenticity of the evidence. If the opposing party does not timely object to the certification, then no authenticating witness is required at trial.

XI. PRIVILEGE IN GENERAL

The concepts, rules and procedures discussed in the previous section on handling privilege regarding ESI, apply equally to all types of discovery material. Those sections should be considered in conjunction with this section.

A. **The Background.**

A privilege furnishes a ground for exclusion or prevents disclosure of information. The rules regarding privilege reflect certain policies for exclusion and generally concern themselves with confidential relationships (*e.g.*, attorney-client). Privilege has its roots in common law and is embodied in general in the FRCP and FRE. The common law, and the Federal Rules provide the basis, mode, and manner for the exercise of privilege in general. The substantive law of the state where the district court sits applies a wide range of privilege issues in diversity cases.

A thorough analysis of privilege law is beyond the scope of this manual. What follows is the basic rules and concepts applicable in all instances, despite the particular privilege in issue.

B. The Basic Rules and Concepts.

1. The Common Law.

a. Federal Question Cases.

Except as otherwise provided by federal law, privilege in federal question cases is governed by the federal common law. Fed. R. Evid. 501. The Supreme Court has held that because of the federal court's expansive view of discovery, privileges are to be "strictly construed." *Univ. of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 189 (1990).

b. Diversity Cases.

In civil actions in state court where state law supplies the rule of decision on a claim or defense, privilege issues must be determined in accordance with state law. Fed. R. Evid. 501; *see also Erie Railroad Co. v. Thompkins*, 304 U.S. 64 (1938).

2. Federal Rules of Civil Procedure.

a. Rule 26.

Rule 26 is the centerpiece of the disclosure and discovery rules. As regards privilege, it limits the scope of discovery to non-privileged matters [Fed. R. Civ. P. 26(b)(1)]; incorporates the attorney work-product privilege and provides for when it can be compelled and otherwise how it should be protected [Fed. R. Civ. P. 26(b)(3)]; protects communications between a party's attorney and expert

witnesses [Fed. R. Civ. P. 26(b)(4)(B and C)]; protects work-product with regard to consultants, and the limited basis upon which that information might be disclosed [Fed. R. Civ. P. 26(4)(D)]; and the procedure to follow when withholding information on the basis of privilege and what to do if privileged information is disclosed [Fed. R. Civ. P. 26(b)(5)(A and B)].

b. Rule 30.

As regards depositions, this Rule deals with privilege in 30(c)(2) by describing the requirement for the lodgment of an objection at the time of the deposition, and on providing one of the limited bases upon which a person may instruct a deponent not to answer. For more on this, *see* Section XIV.D.

c. Rules 33 and 34.

These Rules regarding interrogatories and document production requests set out the requirement for a timely objection by the responding party. *See* Fed. R. Civ. P. 33(b)(4) and 34(b)(2)(B and C).

3. Waiver of Privilege [FRE 502].

This Rule deals with the waiver of privilege, both intentional and inadvertent. In concert with Rule 26(b)(5), the Federal Rules in this regard will control. For a more detailed discussion of FRE 502, *See* Section X.G.4.

4. Refreshing Recollection [FRE 612].

A privileged document shown to a witness in preparation for a deposition loses its privileged status. In *Adidas Am., Inc. v. TRB Acquisitions, LLC*, 15-cv-2113-SI, 2018 WL 4849312 (D. Or.

Oct. 5, 2018), a witness reviewed contents of a privileged email in preparation for a Rule 30(b)(6) deposition. FRE 612 provides that when a witness uses a writing to refresh her memory before testifying, “an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness’s testimony.” Fed. R. Evid. 612. The court held the entire privileged emails could be entered into evidence, shown to other witnesses, and used for the questioning of other witnesses.

5. Common-Interest Exception

Disclosure to a third-party destroys the privilege unless the third party shared a legally sufficient common interest in the legal matter at issue. This common-interest exception applies when: “(1) the communication is made by separate parties in the course of a matter of common interest; (2) the communication is designed to further that effort; and (3) the privilege has not been waived.” *U.S. v. Bergonzi*, 216 F.R.D. 487, 499 (N.D. Cal. 2003). The privilege must arise from attempts to create and further a common defense strategy. Some courts have held that both parties to the communication must be represented by counsel for the common-interest exception to apply. *See Regents of University of California v. Affymetrix, Inc.* 2018 WL 3032846 (S. D. Cal. June 19, 2018) (ordering production of an email after finding the email was not protected by the common-interest privilege because the sender was not represented by counsel).

6. More on Waiver.

a. In General.

The discussion in Section X.F. should be consulted in connection with this issue. By viewing the description of the Federal Rules listed above, and the material in Section X.F., diligence needs to be exercised by counsel at each

step of disclosure and discovery (from a timely objection through the use of a privilege log) to maintain the privilege.

b. Privileges are Narrowly Construed.

Privileges are narrowly construed in the federal courts, and privileges are not absolute. *See, United States v. Bryan*, 339 U.S. 323 (1950). The reason for the narrow view is that the attorney-client privilege (more so than the attorney work-product privilege and other privileges) keeps relevant information out of discovery in a given case. As the Supreme Court has said, “exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.” *United States v. Nixon*, 418 U.S. 683, 710 (1974).

c. The “No Selective Waiver Rule” in the Ninth Circuit.

In *Diversified Indus. Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977), the court created the selective waiver theory in ruling that a plaintiff’s materials subpoenaed by the SEC in a “separate and non-public” SEC investigation affected only a “limited waiver of privilege.” Consequently, those same materials retained the protection of the attorney-client privilege for the purpose of civil litigation. In 2012, the Ninth Circuit Court of Appeals ruled in *In re Pac. Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012) that a party may not selectively waive the attorney-client privilege by voluntarily producing privileged materials to the government while maintaining the privilege in civil litigation. This ruling is consistent with nine other circuits who have ruled on the matters since the *Diversified* case. In its ruling, the court found the parties voluntarily produced the documents pursuant to the subpoena, and the subpoena, itself, was insufficient to show compulsion, and therefore, a basis to withstand waiver. The court also held the attorney-client privilege was waived for all purposes

and eliminated the prospect to cure the waiver by a “post hoc” confidentiality agreement. While some courts have left unanswered the question of whether selective waiver can occur where there is a confidentiality agreement, the Ninth Circuit has made it clear it would not. The court emphasized that allowing selective waiver would “unmoor” the attorney-client privilege from its underlying justification. *Id.* at 1128.

XII. PRESERVATION OF EVIDENCE

A. **The Duty.**

1. While the duty to preserve evidence applies to all evidence, issues regarding ESI are particularly acute and troublesome. As a result, preservation of evidence concepts is discussed here in the context of ESI. The concepts apply, of course, to all types of evidence.
2. ESI is prolific in our lives. It exists in our computers, computer peripherals (like printers and fax machines), PDA’s, pagers, wireless (cell) telephones, smart phones, and mobile computing devices. Social media is part of the ESI universe, and a growing part of disclosure and discovery in litigation. See Section X.E. ESI also resides in storage on hard drives, backup tapes or removable drives, thumb drives, video game consoles, CD’s, DVD’s, and so forth. Besides the obvious, there is a great deal of hidden data in the forms of “metadata”³³, system data, and deleted data.³⁴

³³ “Metadata” is information imbedded in an electronic file. It is specific as to the file itself, including the date of creation, the author, and historical information. It is generally automatically created by the software being used and is rarely visible.

³⁴ Deleted data are not really “gone.” While the name of the file is removed from the operating systems tracking file, the data itself remains intact until it is overwritten or explicitly erased by some other method. Computer systems overwrite “deleted data” that remains on the system as a normal function. Overwriting does not necessarily eliminate all portions of a deleted document.

3. ESI is also easily altered or destroyed (from routine deletion in ordinary use of computer systems and established data retention policies to inadvertent or intentional means). Therefore, preservation is a critical concern. Case law clearly provides litigants have a duty to preserve evidence which is known, or reasonably should be known, to be relevant to the action. *Baliotis v. McNeil*, 870 F. Supp. 1285 (M.D. Pa. 1994). In fact, the duty to preserve extends to that period before litigation when “a party reasonably should know the evidence may be relevant to anticipated litigation.” *E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 588 (D. Minn. 2005).

B. Scope of the Duty.

1. “A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter.” *Zubulake v. UBS Warburg, Inc.*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (“*Zubulake IV*”)³⁵. This duty does not extend to keeping every document possessed by a party, but rather any document within the classic definition of Fed. R. Civ. P. 26(b)(1) relative to the scope of discovery in federal cases. That is, what a party knows, or reasonably should know, is relevant to any claim or defense in the action, or is reasonably calculated to lead to the discovery of admissible evidence. To that, case law adds information that is reasonably likely to be requested during discovery, or is the subject of a pending discovery request. *Wm. T. Thompson v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984); *Danis v. USN Commc’ns, Inc.*, 98 C 7482, 2000 WL 1694325 (N.D. Ill. Oct. 20, 2000).

Fragments may remain. Experts can recover this information. *See Arista Records, Inc. v. Sakfield Holding Co.*, 314 F. Supp. 2d 27, 34 (D.D.C. 2004).

³⁵ This is one of five decisions related to discovery from the *Zubulake* case.

2. This duty includes backup or archival tapes that would provide information about deleted data. *Antioch Co. v. Scrapbook Holders, Inc.*, 210 F.R.D. 645, 652 (D. Minn. 2002).
3. The duty applies to any information which has some “semi-permanent” existence. *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004).
4. In *Nacco Materials Handling Grp. v. Lilly Co.*, 278 F.R.D. 395, 407 (W.D. Tenn. 2011), the court held the defendant’s duty to preserve evidence in its computers regarding its employee’s authorized access to a company’s secured server began the day the defendant was served with the complaint, which is the earliest date when the party had reason to anticipate litigation. *See also Section X.H.*

C. Preservation Considerations.

ESI is subject to automatic deletion, overwriting or purge functions through the routine operation of computer systems, as well as through the established record retention policies of companies and individuals. As a result, litigants need to implement a preservation plan to preserve ESI related to litigation to avoid the loss of data and the resulting consequences such losses could interject into the litigation. The court in *Zubulake IV*, discussed this issue as follows:

The scope of a party’s preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a “litigation hold” to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (*e.g.*, those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company’s policy. On the other hand, if backup tapes are accessible (*i.e.*, actively

used for information retrieval), then such tapes would likely be subject to the litigation hold.

220 F.R.D. at 218. The “litigation hold” applies to paper documents as well. *Id.* In *Zubulake IV*, the court discussed the litigation hold in greater detail. Noting that “a party’s discovery obligations do not end with the implementation of a “litigation hold” – to the contrary, that is only the beginning.” *Id.* at 432.

Courts have been issuing severe sanctions for failure to issue litigation holds. *See Stinson v. City of New York*, 10 Civ. 4228 (RWS), 2016 WL 54684 (S.D.N.Y. Jan. 5, 2016) (awarding an adverse inference jury instruction for failure to issue a litigation hold on relevant text message for the first three years of litigation and enforce the hold once it was in place); *see also Brown v. Reinke, et al.*, 12-cv-00262-BLW, 2016 WL 107926 (D. Id. Jan. 8, 2016) (ordering defense counsel to pay plaintiff’s attorney’s fees after defendant failed to send a litigation hold for five months after an incident involving a heart attack suffered by a prisoner); *see also Franklin v. Howard Brown Health Center*, 17-cv-8376, 2018 WL 4784668 (N.D. Ill. Oct. 4, 2018) (finding sanctions are warranted because defendant “bollixed its litigation hold . . . to a staggering degree and at every turn.”).

In *United States v. HVI Cat Canyon, Inc.*, 11-cv-05097-FMO (PLAx) (C. D. Cal. Apr. 20, 2017), the defendant filed a motion seeking sanctions for plaintiff’s failure to issue and confirm litigation holds that led to the spoliation of evidence. There, the district court found the State of California did, in fact, spoliating evidence and ordered it to pay \$956,784 in attorney fees in bringing its sanctions motion. The court denied California’s request to reduce the amount of fees because California failed to disclose its spoliation for more than a year and reducing fees would effectively punish the defendant for uncovering the spoliation.

Analysis of these cases should encourage parties and its’ counsel to take this duty seriously. Among other things, make sure to provide written instructions to clients regarding the requirement to preserve, including a direction to place a litigation hold to prevent deletion, and communicate the potential consequences for failure to do so. It is also good practice to require

acknowledgment of the legal hold by each recipient and to continuously monitor the clients' compliance.

D. Counsel's Duty to Ensure Preservation

It is *not* sufficient to notify all employees of a litigation hold. "Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched." *Zubulake v. UBS Warburg, Inc.*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) ("*Zubulake V*").

Once sources of relevant information are identified, the producing party *and* counsel are under a duty to retain that information. Once the documents are produced, Rule 26 creates a "duty to supplement" those responses. As noted by the Advisory Committee, "Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information."

E. The ESI Rules.

The Federal Rules address preservation in only limited respects. First, the parties are required to discuss any issues relating to the preservation of discoverable information at the Rule 26(f) conference. *See* Fed. R. Civ. P. 26(f). Next, and as discussed in greater detail below, discovery of ESI that is not "reasonably accessible" is initially exempt from the responding party's production obligation. Fed. R. Civ. P. 26(b)(2). However, as it relates to preservation, the Committee Note to this Rule states:

A party's identification of sources of [ESI] as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case.

By design, the Rules do not define the scope of the duty to preserve the data in the first place. The Committee states “[a] preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case.” *See* Committee Note to Rule 37(e). Even the procedural framework adopted in 2015 continues to note that the duty to preserve is one of common law duty, and that the 2015 amendment to Rule 37(e) does not attempt to create a new duty to preserve. *Id.* The duty and its scope are left to the case law, some of which is stated above.

The Rule’s drafters and courts acknowledge “perfection in preserving all relevant electronically stored information is often impossible.” *Id.*

F. Preservation Plans.

In planning to bring litigation, or in the earliest stages of planning a defense, document preservation needs to head the “to do” list for parties. By the time of the Rule 26(f) conference, where a discussion of ESI is required under Rule 26(f), it may be too late to capture or preserve the data essential to the case. That data could be lost to a routine schedule of purging or alteration.³⁶ Every time a file is opened, information about the file changes. As a result, a “forensic” byte by byte copy (sometimes called a mirror image) of the target data made at the first opportunity may be the best offensive or defensive weapon a party may have. The copy should also be “write protected” to avoid alteration during its review. Frozen in time, this mirror image is a snapshot that will help comply with disclosure and discovery obligations by meeting the preservation obligation, as well as establish a basis for authenticity for later admission of ESI at trial. The court in *Zubulake IV* offered some guidance on management of ESI. There, the court stated:

For example, a litigant could choose to retain all then-existing backup tapes for the relevant personnel (if such tapes store data by individual or the contents can be identified in good faith and through a reasonable effort), and to catalog any later-created documents in a separate electronic file. That, along with a mirror-image of the

³⁶ Computers automatically recycle space, reuse memory space, overwrite, back up, change file locations, record logins, etc.

computer system taken at the time the duty to preserve attaches (to preserve documents in the state they existed at the time), creates a complete set of relevant documents. Presumably there are a multitude of other ways to achieve the same result. *Zubulake IV*, 220 F.R.D. at 218.

G. The Preservation Order.

Counsel needs to pursue a preservation order by stipulation, or where agreement cannot be reached, by court order. The Federal Rules do not address, in any detail, the standards for such an order. In the Committee Note to Rule 26(f), the need to discuss the preservation issue at the 26(f) conference is noted. The dynamic nature of ESI and the complications associated with preservation obligations are also discussed. The Note points out that the parties should pay “particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities.” It is finally noted that “[c]omplete or broad cessation of a party’s routine computer operations could paralyze the party’s activities.” The Committee Note cites to the *Manual for Complex Litigation* (4th § 11.422) in this regard. As to the court’s role, the Committee Note goes on to state:

The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. *Ex parte* preservation orders should issue only in exceptional circumstances.

With regard to standards for preservation orders, case law is evolving. However, this issue was addressed in two cases, *Pueblo of Laguna v. U.S.*, 60 Fed. Cl. 133 (2004) and *Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429 (W.D. Pa. 2004). These cases move the jurisprudence in this area toward a balancing test. Earlier case law suggested that the standard for issuance of a preservation order be equivalent to a showing necessary for preliminary injunctive relief. See *Humble Oil and Refining Co. v. Harang*, 262 F. Supp. 39 (E.D. La. 1966). *Pueblo of Laguna* and *Capricorn*

have some differences in these regards. The cases, and this developing area of law, are fully examined in *Preservation of Documents in The Electronic Age - What Should Courts Do?*, 2005 Fed. CTS. L. Rev. 5.³⁷ In this article, the author, John Carroll (a former magistrate judge), suggests that the Interim Order Regarding Preservation appearing in Section 40.25 of the *Manual for Complex Litigation* is a good starting place for the court and counsel. As Judge Carroll suggests this is not simply a preservation order, but “a multifaceted order which merits attention.”

XIII. DUTY TO SUPPLEMENT DISCOVERY RESPONSES

A. When The Duty Arises.

Rule 26(e) requires a party to amend a prior discovery response under the following two circumstances:

1. If the responding party obtains new information; or,
2. If the party learns that the response is incomplete or incorrect in some material respect.

Unless one of the two above situations exist, supplementation is not required. This Rule was first promulgated in the 1993 amendments to Rule 26 and was unchanged by the 2000 amendments.

B. Timing for Supplementation.

1. The Rule requires a party to make timely amendments. The associated case law refers to “seasonably” amending. The definition of what is “seasonable” is left to the “sound discretion of the trial judge.” *Phil Crowley Steel Corp. v. Macomber, Inc.*, 601 F.2d 342, 345 (8th Cir. 1979). The 1993 Committee Note to Rule 26(e) states:

³⁷ Available at www.fclr.org/articles/2005_fedctslrev5.htm

Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches.

2. The Rule makes no distinction between information acquired prior to or after the conclusion of discovery in a case. In other words, the duty to supplement discovery extends beyond any court-ordered discovery cutoff. One court has ruled that to make such a distinction, “could pose a serious risk of unfairness to the discovering party, since documents created or acquired after discovery but before trial might entirely undercut the gist of earlier discovery responses[.]” *Pizza Pub. Co., Ltd., v. Tricon Glob. Rest., Inc.*, No. 99 Civ. 12056 BSJ-MHD, 2000 WL 1457010 (S.D.N.Y. Sept. 29, 2000).

C. Scope of the Duty to Supplement Discovery.

1. The scope of the duty to supplement discovery is specific to interrogatories, requests for production, and requests for admissions.
2. The Rule makes no reference to depositions. The 1993 Committee Note to Rule 26(e) state that this Rule does not “ordinarily” apply to deposition testimony. In the absence of a specific court order, it is doubtful that the “duty to supplement” automatically applies in each case. Of course, failing to amend an incomplete or incorrect deposition transcript does leave a witness open to impeachment at trial.
3. It is important to note the distinction between the duty to supplement discovery and the duty to supplement expert disclosures with regard to depositions. While there is no duty to supplement deposition discovery, you are required to supplement the depositions of expert witnesses under the expert disclosure provisions. *See Section VII.J, supra.*

D. Sanctions for Failing to Supplement.

When the 1993 amendments to Rule 37(c) were added, a remedy under Rule 37 for a violation of the duty to supplement discovery responses pursuant to Rule 26(e)(2) was omitted. This omission has been corrected in the current form of the Rule. Therefore, a failure to make a timely amendment to discovery responses can lead to the exclusion of the undisclosed information at trial. *See Chapter XX, infra*, for a full discussion of Rule 37.

XIV. DEPOSITIONS UPON ORAL EXAMINATION

A. Adequate Notice.

Adequate notice must be “reasonable” under Rule 30(b)(1). Since a party may seek a protective order under Rule 32(a)(5)(A) within 14 days of notice to prevent a deposition from proceeding, a 14-day notice is, by implication, general guidance for what is “reasonable”. However, particular facts and circumstances may warrant a longer period. Note that where documents are requested from a party, 30 days’ notice is required. Fed. R. Civ. P. 30(b)(2) and 34(b)(2)(A).

B. The 1 Day of 7 Hours Limit.

The amendments to Rule 30 create a presumptive limit of 1 day of 7 hours for a deposition [*See* Fed. R. Civ. P. 30(d)(1)];

C. Extending the Limit.

The 1 day of 7 hours limit may be extended by stipulation or court order in the following circumstances:

1. If needed for a fair examination;
 - a. The Committee Note to Rule 30 provides the following illustrative examples of where the time could be extended to allow a fair examination:

- i. Where an interpreter is needed;
 - ii. Where the questions relate to events that took place over a long period of time;
 - iii. Cases involving voluminous documents;
 - iv. Multi-party cases (although the Committee directs that “duplicative questioning should be avoided and parties with similar interests should strive to designate one lawyer to question about areas of common interest.”);
 - v. Deposition is of an expert witness; and,
 - vi. Where questions are asked by deponent’s counsel.
2. If deponent, other person, or circumstances impede or delay the examination.

Sanctions are available for any conduct or circumstance that impedes or delays the examination. Fed. R. Civ. Pro. 30(d)(2). One obvious sanction would allow a party to exceed the presumptive time limit for the deposition.

D. Counting Time.

The 1 day of 7 hours limitation contemplates reasonable breaks during the day for lunch and other reasons, and the only time to be counted is the time occupied by the actual deposition. Therefore, only “real time” on the record counts for the 7-hour limit. *See* Committee Note to Rule 30.

E. Restrictions on Instructions Not to Answer.

Restrictions on instructions not to answer are extended to any “person” as opposed to the former, more limited, “party.” Instructions not to answer are still limited to circumstances where it is necessary:

1. To preserve a privilege;
2. To enforce a limitation directed by the court; or
3. To present a motion under Rule 30(c)(2) (bad faith, etc.).

F. Applicability of Objections.

1. Objections are applicable to “a question or any other issue.” This would include the deposition officers’ qualifications or any other aspect of the deposition. This is a change from the previous form of the Rule which limited objections solely to “evidence.” The Committee Note indicates that this change was made to avoid disputes over what is evidence. Fed. R. Civ. P. 30(c)(1).
2. The Rule has other limitations regarding objections and conduct. These are more fully discussed hereinafter in Section XV.C.

G. Who May Attend.

Rule 30(c)(1) states that the examination and cross-examination of a deponent is to proceed as they would at trial under the FRE. Excepted from this, however, are FRE 103 and 615. FRE 103 relates to rulings on evidence, which is left for the judge at trial. FRE 615 relates to the exclusion of witnesses.

This change was incorporated into the Rule in 1993 to address a recurring problem as to whether other potential deponents could attend a deposition. Courts at the time disagreed; some courts held witnesses should be excluded under FRE 615 while others held witnesses could attend unless excluded by an order under Rule 26(c)(5) (currently, Rule 26(c)(1)). Under the current Rule, witnesses are not automatically excluded from a deposition simply by the request of a party. However, exclusion could be ordered for good cause under Rule 26(c)(1). As stated in the Committee Notes, if exclusion is ordered, what the excluded witnesses should be precluded from reading or otherwise being informed about should be considered.

H. Handling the Transcript.

The transcript is not to be filed automatically; rather, it must be sent to the attorney who arranged for the transcript. The transcript can be filed pursuant to Rule 5(d).

I. The 10 Per Side Limit.

Each “side” (“plaintiffs,” “defendants,” or “third party defendants”) is limited to 10 depositions, absent a court order. Note, unlike other discovery rules, there is no provision permitting parties to agree amongst themselves to waive this limit. Leave of court must be obtained. Fed. R. Civ. Pro. 30(a)(2)(A):

1. The aim of this provision is to assure judicial review under the standards stated in Rule 26(b)(2) before any side can take more than 10 depositions. (1993 Committee Note to Rule 30);
2. The Committee Note to the 1993 amendments indicates that the parties on any “side” are expected to confer and agree as to which depositions are most needed. If disputes cannot be resolved, the court will resolve the matter. As discussed below, the court can grant leave where appropriate;
3. Rule 30(a)(2) requires courts grant leave to take additional depositions when consistent with the principles of Rule 26(b)(1) and (2). Rule 26(b)(2)(C) sets out a benefit versus burden analysis. The Committee Note to Rule 26 also states that in some cases, the 10 per side limit should be reduced in accordance with those same principles;
4. Circumstances supporting leave for additional depositions can, by analogy, be borrowed from the Committee Note examples related to extending the 7-hour deposition limit. These would include multi-party cases, expert intensive cases, complex cases or issues, and issues dealing with events occurring over a long period of time. In patent cases, the court might consider the depositions of

multiple inventors as a single deposition for purposes of the Rule, just like the treatment afforded to Rule 30(b)(6) depositions;

5. A Rule 30(b)(6) deposition is treated as a single deposition for the 10-deposition limit even though more than 1 person is designated to testify. (*See* 1993 Committee Note to Rule 30(a)(2)(A));
6. The 10-deposition limit includes Rule 31 depositions upon written questions. (Rule 30(a)(2)(A)).

J. Depositions of an Organization.

Rule 30(b)(6) governs organizational depositions. In 1970, Congress amended Rule 30(b)(6) to place the burden on the organizational entity to designate the appropriate representative(s) to testify on its behalf. The Rule attempts to reduce difficulties encountered by the requesting party in determining whether an employee was a “managing agent,” occurrences of individual officers or agents disclaiming knowledge of facts clearly known by some other officer or agent, and therefore the organization, and unnecessary depositions of employees with no knowledge of the topic at issue. *See* Fed. R. Civ. P. 30(b)(6) Advisory Committee Note. Until 2020, the Rule contained three basic requirements: (1) the deposing party must describe the subjects to be covered with reasonable particularity; (2) the organization responding must designate one or more representatives to testify; and (3) the representatives must testify to matters that are known or reasonably available to the organization.

In a 2020 Amendment, the Rule added a fourth requirement. Now, “Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination.” The amendment was in response to problems that emerged in some cases including overly long or ambiguously worded lists of matters for examination and inadequately prepared witnesses. *See*, Fed. R. Civ. P. 30(b)(6) 2020 Advisory Committee Note. The amendment was noted to facilitate “collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).” *Id.* Counsel might do well to raise this issue at the Rule 26(f) planning conference. *See*, Section III in this Manual.

Depositions allowed under Rule 30(b)(6) supplement, rather than replace, depositions of the officer or managing agent of a corporate party allowed under Rule 30(a)(1). See *Rosenruist-Gestao E Servicos LDA v. Virgin Enters. Ltd.*, 511 F.3d 437, 444–45 (4th Cir. 2007).

1. Reasonable Particularity Required.

The party requesting a deposition under Rule 30(b)(6) must state the subjects of the intended inquiry with reasonable particularity to facilitate the responding party’s selection and preparation of the most suitable deponent. See *Dwelly v. Yamaha Motor Corp.*, 214 F.R.D. 537, 540 (D. Minn. 2003) (“the Rule only operates effectively when the requesting party specifically designates the topics for deposition”); *Murphy v. Kmart Corp.*, 255 F.R.D. 497, 505–18 (D.S.D. 2009) (finding the plaintiff did not meet the “reasonable particularity” standard because the inquiry “covers a tremendous amount of information that may be completely irrelevant”); *Brown v. W. Corp.*, 287 F.R.D. 494, 504 (D. Neb. 2012) (finding the plaintiff did not meet the standard where the inquiry encompassed all company emails and instant messaging). The court determines what is “reasonable particularity” on a case-by-case basis depending upon the information the deposing party seeks.

2. Deposing Nonparty Organizations.

By its plain language, Rule 30(b)(6) applies to nonparty organizations. Importantly, the subpoena must advise the nonparty of its duty to designate one or more representatives to testify. Note as well, the requirement that the parties confer in good faith about the matters for examination applies as described above.

3. Deponent Organization's Duty.

The testimony of a Rule 30(b)(6) designee represents the knowledge of the organization, not of the individual deponent. In a proper Rule 30(b)(6) deposition, “there is no distinction between the corporate representative and the corporation.” *Rosenruist-Gestao E Servicos LDA v. Virgin Enters. Ltd.*, 511 F.3d 437, 445 (4th Cir. 2007) (quoting *Sprint Commc'ns. Co. v. Theglobe.com*, 236 F.R.D. 524, 527 (D. Kan. 2006)). Thus, an organization has “a duty to make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them to fully and unequivocally answer questions about the designated subject matter.” *Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D. Kan. 1999). In producing representatives for deposition, the organization must educate and prepare them to give “complete, knowledgeable and binding answers.” *Nevada Power Co. v. Monsanto Co.*, 891 F. Supp. 1406, 1418 (D. Nev. 1995).

- a. The affirmative duty to prepare a Rule 30(b)(6) designee goes beyond matters personally known to the witness or to matters in which the designated witness was personally involved. *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 338, 343 (N.D. Ill. 1995). The duty encompasses all information “known or reasonably available to the organization.” Fed. R. Civ. P. 30(b)(6); *Sanofi-Aventis v. Sandoz, Inc.*, 272 F.R.D. 391, 393 (D.N.J. 2011). The court determines what information is “known or reasonably available” by a fact-specific analysis. See *Coryn Group II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 239 (D. Md. 2010).
- b. Information “known or reasonably available to the organization” may include information held by corporate affiliates, including both direct subsidiaries and parent and sister companies. *Sanofi-Aventis v. Sandoz, Inc.*, 272 F.R.D. 391, 394 (D.N.J. 2011) (collecting cases).

- c. The Rule 30(b)(6) designee presents the organization's position on the topic. The designee testifies about both the facts within the organization's knowledge and its subjective beliefs and opinions. *Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 21 (E.D. Pa. 1986).
- d. The designee's testimony is binding on the entity because they are the representative of the named deponent. *Harris v. New Jersey*, 259 F.R.D. 89, 92 (D.N.J. 2007). If a corporation states it has no knowledge or position about a subject within the scope of the deposition notice and reasonably available to it, the corporation cannot argue something to the contrary at the summary judgment stage or trial without presenting evidence explaining the reasons for the change. *United States v. Taylor*, 166 F.R.D. 356, 362-63 (M.D. N.C. 1996); *QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 698 (S.D. Fla. 2012) (precluding trial testimony on topics for which the defendant failed to provide 30(b)(6) testimony).
- e. The fact that an organization no longer has a person with knowledge on the designated topics does not relieve the organization of the duty to prepare a Rule 30(b)(6) designee. The corporation must still prepare the designee to testify on matters that are reasonably available, whether from documents, past employees, or other sources. *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006).
- f. Sanctions may be imposed on a party who fails to properly prepare its Rule 30(b)(6) designee. *United States v. Taylor*, 166 F.R.D. 356, 363 (M.D. N.C. 1996).

4. Designating Multiple Deponents.

The deponent organization must designate more than one designee if necessary to respond to each of the relevant areas of

inquiry specified by the deposing party. *Great Am. Ins. Co. of N.Y. v. Vegas Constr. Co.*, 251 F.R.D. 534, 538–39 (D. Nev. 2008). If the deponent organization designates a witness that it believed in good faith could answer each of the relevant inquiries, but the witness fails to do so at the deposition, then the deponent organization must designate an additional knowledgeable designee. *Starlight Int’l, Inc. v. Herlihy*, 186 F.R.D. 626, 638 (D. Kan. 1999).

5. California Counterpart to Rule 30(b)(6).

The California counterpart to Rule 30(b)(6) is California Code of Civil Procedure § 2025.230. The primary difference between the two is that the California statute requires an organization to designate the person “most qualified to testify on its behalf,” whereas Rule 30(b)(6) allows an organization to designate anyone who consents to testify so long as they are knowledgeable on the subject matters requested. *See Benton v. Telecom Network Specialists, Inc.*, 220 Cal. App. 4th 701, 709 (2013) (interpreting Cal. Civ. Proc. Code § 2025.230 to require a person “most knowledgeable” about the designated subject matter); *F.C.C. v. Mizuho Medy Co.*, 257 F.R.D. 679, 681 (S.D. Cal. 2009) (interpreting Rule 30(b)(6) to only require a person “knowledgeable” about the designated subject matter).

6. Scope of the Deposition.

A split of authority exists as to whether Rule 30(b)(6) requires a party to confine the scope of deposition to subjects identified by the deposition notice. In *Paparelli v. Prudential Ins. Co.*, the court held that Rule 30(b)(6) limits the deposing party’s examination to the subjects identified by the deposition notice. 108 F.R.D. 727, 729-30 (D. Mass. 1985) (stating the party conducting examination “must confine the examination to the matters stated ‘with reasonable particularity’ which are contained in the Notice of Deposition”). However, “every court which has addressed this issue since *Paparelli* has taken a different view.” *Am. Gen. Life*

Ins. Co. v. Billard, No. C10-1012, 2010 WL 4367052, at *4 (N.D. Iowa Oct. 28, 2010).

The majority rule holds that Rule 30(b)(6) depositions are only limited by the broad relevance and privilege provisions of Fed. R. Civ. P. 26(b). *See Id.* (collecting cases); *Overseas Private Inv. Corp. v. Mandelbaum*, 185 F.R.D. 67, 68 (D.D.C. 1999) (holding that a Rule 30(b)(6) designee can be questioned outside the scope of the deposition notice, but only to the extent allowed under Rule 26(b)(1)). The majority rule reasons that limiting the scope of the deposition to only the matters on notice ignores the liberal discovery requirements and would frustrate the objectives of discovery when a deposing party seeks information relevant to the subject matter of the pending litigation that was not specified. *See Detoy v. City and Cty. of San Francisco*, 196 F.R.D. 362, 367 (N.D. Cal. 2000).

Answers regarding matters not clearly noticed do not bind the organization because the organization would not have been able to properly prepare the designee on its position. *See Detoy*, 196 F.R.D. at 366–67. Counsel should note on the record any such answers and request the trial judge to add jury instructions that “such answers were merely the answers or opinions of individual fact witnesses, not admissions of the party.” *Id.* at 367.

7. Location of the Deposition.

Courts have broad discretion to determine the appropriate location for the deposition and condition the deposition upon payment of expenses. *See Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242, 1248 (9th Cir. 1981). Usually, courts follow one of two general presumptions depending on if the organization being deposed is the plaintiff or defendant in the action.

- a. For plaintiff organizations, the court presumes that the plaintiff organization may be deposed in the judicial district where the action was brought because “the plaintiff, in

selecting the forum, has effectively consented to participation in legal proceedings there.” *In re Outsidewall Tire Litig.*, 267 F.R.D. 466, 471 (E.D. Va. 2010). However, upon a showing of serious financial hardship, a plaintiff may overcome the presumption that it is reasonable to take the plaintiff’s deposition in the district where the action was brought. *See, e.g., Newman v. Metro. Pier & Exposition Auth.*, 962 F.2d 589, 591–92 (7th Cir. 1992).

- b. For defendant organizations, the court presumes that the defendant organization may be deposed at the corporation’s principal place of business. *See Salter v. Upjohn Co.*, 593 F.2d 649, 651–52 (5th Cir. 1979) (noting that a deposition under Rule 30(b)(6) should take place at the defendant corporation’s principal place of business absent “peculiar circumstances”); *Thomas v. Int’l Bus. Machs.*, 48 F.3d 478, 483 (10th Cir. 1995) (holding the normal procedure is to depose a corporate officer at the corporation’s principal place of business, not the judicial district where the action was brought).
- c. The general presumptions regarding both plaintiff organizations and defendant organizations may be overcome by weighing a number of factors, including: (1) “location of counsel for the parties in the forum district;” (2) “the number of corporate representatives a party is seeking to depose;” (3) “the likelihood of significant discovery disputes arising which would necessitate resolution by the forum court;” (4) “whether the persons sought to be deposed often engage in travel for business purposes;” and (5) “equities with regard to the nature of the claim and the parties’ relationship.” *Armsey v. Medshares Mgmt. Servs., Inc.*, 184 F.R.D. 569, 571 (W.D. Va. 1998) (citing *Resolution Trust Corp. v. Worldwide Ins. Mgmt. Corp.*, 147 F.R.D. 125, 127 (N.D. Tex. 1992)); *Plateria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. de C.V.*, 292 F.R.D. 19, 22–25 (D.D.C. 2013) (weighing the

same five factors). The factors are not all-inclusive, and the court is free to consider the equities of the particular situation. *Leist v. Union Oil Co. of Cal.*, 82 F.R.D. 203, 204 (E.D. Wis. 1979).

- d. If one of the parties is a foreign national, courts may also consider whether the foreign nation's laws create legal impediments to holding the deposition there and whether the deposition has the potential to be an affront to the foreign nation's sovereignty. *See, e.g., In re Honda Am. Motor Co. Inc. Dealership Relations Litig.*, 168 F.R.D. 535, 540 (D. Md. 1996) (examining legal impediments); *McKesson Corp. v. Islamic Republic of Iran*, 185 F.R.D. 70, 81 (D.D.C. 1999) (examining potential issues about sovereignty).

K. APEX Deponents.

Parties are generally allowed to depose "any person." *See* Fed. R. Civ. P. 30(a).

Under Rule 26(c)(1), "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" Fed. R. Civ. P. 26(c)(1). This includes the courts ability to forbid a deposition or limit its scope. *See* Fed. R. Civ. P. 26 (c)(1)(A).

"Apex" depositions are depositions of high-level corporate officers. These depositions are sometimes requested as a harassment tactic and courts have responded with the creation of a standard approach to allow, forbid, or limit the deposition. The mere fact that the high ranking official, or apex deponent, has a busy schedule is not a basis for foreclosing the otherwise proper discovery. *See CBS, Inc. v. Ahern*, 102 F.R.D. 820, 822 (S.D. N.Y. 1984).

The party seeking to prevent the deposition carries the heavy burden of showing why the deposition of the apex deponent should be denied. *Celerity, Inc. v. Ultra Clean Holding, Inc.*, C 05-4374 MMC (JL), 2007 WL 205067, at

*3 (N.D. Cal. Jan. 25, 2007). Courts have distinguished between apex depositions of high-ranking officials of a single-hierarchy corporate structure from high-ranking officials of large, multinational or complex corporate structure. *See Apple Inc. v. Samsung Elecs. Co., Ltd*, 282 F.RD. 259, 263 (N.D. Cal. 2012).

1. Application to a Single-Hierarchy Corporate Structure.

In deciding whether to allow an apex deposition, courts often consider: (1) whether the high-level deponent has unique, non-cumulative, superior knowledge of the facts at issue; and (2) whether there are other, less burdensome discovery methods. *Id.*

a. Unique, non-cumulative knowledge.

A corporate official who has unique or superior personal knowledge of discoverable information is subject to deposition under the general scope of discovery. *Liberty Mut. Ins. Co. v. Superior Ct.*, 10 Cal. App. 4th 1282, 1289 (1992). A claimed lack of knowledge, by itself, is insufficient to preclude a deposition. *WebSideStory, Inc. v. NetRatings, Inc.*, 06-cv-408-WQH-AJB, 2007 WL 1120567, at *2 (S.D. Cal. Apr. 6, 2007).

b. Less burdensome discovery methods.

Courts generally refuse to allow the deposition of an apex deponent before the depositions of lower-level employees with more intimate knowledge of the case. *See First Nat. Mortg. Co. v. Fed. Realty Inv. Tr.*, No. C03-02013 RMW (RS), 2007 WL 4170548, at *2 (N.D. Cal. Nov. 19, 2007) (allowing depositions of high level employees after depositions of lower level employees suggested they may have at least some relevant personal knowledge); *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, No. C 03-5340 JF (RS), 2006 WL 2578277, at *3 (N.D. Cal. Sept. 6, 2006) (allowing deposition of corporate founder only after

learning from 30(b)(6) witness that he may have relevant first-hand information); *Salter*, 593 F.2d at 651 (granting protective order for executive where plaintiff failed to first depose lower level employees).

2. **Application to Large, Multi-National, or Complex Corporate Structure.**

The process of weighing factors is more involved when the apex deponent is a high-ranking official of a large, multi-national, or complex corporate structure. The initial burden is on the party seeking the apex deposition to “demonstrate that each ‘apex’ witness is so entitled to that designation[.]” *Apple*, 282 F.RD. at 263. Then, the burden shifts to the party seeking to prevent the apex deposition to address the two-prong test of unique first-hand knowledge and less intrusive discovery methods. *See id.* In *Apple*, the court looked at the two steps as a sort of “sliding scale.” *Id.* The court held that the closer the deponent was to an apex position, or “peak,” and the less direct the knowledge held by the person, the more likely the court is to grant protection of the apex deponent. *Id.* The court should take all the factors of “apex-ness,” unique knowledge, and less intrusive discovery methods into consideration when determining whether the deponent is afforded the protection of the apex doctrine. *Id.*

XV. TAKING A DEPOSITION IN 7 HOURS

A. **Advance Planning.**

It is necessary to thoroughly plan for the deposition to complete it within the prescribed time. Being organized and prepared will allow better utilization of the available time.

B. Produce Documents/Exhibits in Advance for Review.

1. The Committee Note to Rule 30 recommends that where voluminous documents are involved, a deposing party should send the documents to the deponent in advance of the hearing to allow preparation. Where the deponent fails to read the documents in advance, thereby prolonging the proceeding, a court could consider that as a reason for extending the time limit for completion of the deposition. For strategic reasons, you might want to present certain documents at the deposition itself. However, in general, it will save time by sending those out in advance in most instances.
2. In cases where documents have been requested of the witness under Rule 30(b)(5) or Rule 45, but not produced, further justification for extended examination exists following production of the items.
3. Remember, Rule 34 requires a 30-day notice. Under Rule 45, only “reasonable” notice is required. Counsel should proceed under Rule 34 in dealing with a party. Use of Rule 45 against a party is not favored.
4. While Rule 30(b)(5) allows the notice to a party deponent to be accompanied by a Rule 34 request for production of documents, it may be advisable to seek the production of documents from the party in advance to avoid losing time while the deposing party reviews the documents at the deposition proceeding. Remember, the clock is running!

C. Adhere to Rule 30 Limitations.

Following the rules and the limitations for depositions are important in utilizing the presumptive time for the depositions. The FRCP provides guidance on appropriate objections and conduct at deposition proceedings. Following these should improve the prospects for meeting the presumptive deadline:

1. Rule 30(c) provides that the examination “of a deponent proceed[s] as permitted at trial under the Federal Rules of Evidence[.]” This means that counsel should refrain from interjecting comments and statements. That would be inappropriate. Rule 30(c) also provides that if objections are made, testimony is taken subject to the objection;
2. Rule 30(d)(1) prohibits “argumentative” or “suggestive” objections and limits instructions not to answer.
3. Rule 32(d)(3)(A) provides “objection[s] to a deponent’s competence – or the competence, relevance, or materiality of testimony – is not waived by failure to make the objection before or during the taking of the deposition, unless the ground for it might have been corrected at that time.” Rule 32(d)(3)(B) goes on to state that “[a]n objection to an error or irregularity is waived if: (i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party’s conduct, or other matters that might have been corrected at that time; and (ii) it is not timely made during the deposition.”
 - a. Therefore, all objections to competency, relevancy, or materiality are preserved and are unnecessary during the deposition. Only those objections to questions that can be corrected need to be made.
 - b. The following challenges to the form of the question must be made:
 - i. leading or suggestive;
 - ii. compound;
 - iii. assumes facts not in evidence;
 - iv. calls for narration;

- v. ambiguous or uncertain;
 - vi. calls for speculation or conjecture; or,
 - vii. is argumentative.
- c. An objection that the answer is not responsive to the question and a motion to strike also should be made since they fall into categories that can be corrected if properly objected to during the deposition.
- d. Counsel should be careful regarding this waiver rule and seek to cure the “alleged” problem with the question or answer during the deposition. If the question is likely compound, then break it up. If it is leading or suggestive, re-phrase the question in a more open form, etc. This is important. It is not unusual for these issues to be raised at trial. Where the objection is lodged at the time of the deposition, but not cured, the court is likely to sustain the objection and prevent the use of the testimony. This can be particularly harmful where the deposition is of an unavailable third-party witness at the time of trial! Where counsel has had the foresight to cure, the prohibition to use has been removed.
- e. In addition, grounds of privilege are waived unless a specific objection to disclosure is made at the deposition. *Baxter Travenol Laboratories, Inc. v. Abbott Laboratories*, 117 F.R.D. 119 (N.D. Ill. 1987).
- f. Instructions not to answer are limited to circumstances where it is necessary:
- 1. To preserve a privilege;
 - 2. To enforce a limitation directed by the court;

3. Or to present a motion under Rule 30(c)(2) (bad faith, etc.).

Following these, and the other rules, will enhance the available time for the appropriate inquiry during the deposition, as well as the ability to use depositions effectively at trial.

D. Seek a “Clifton Order.”

1. Where counsel cannot contain themselves to the limitations of Rules 30 and 32, respectively, a party can seek a “Clifton Order.” A Clifton Order places a substantial limitation on the conduct of the participants at a deposition. Based upon the case of *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993), the case confirms the court’s authority to curb lawyer misconduct at depositions through a variety of restrictions.

2. The court in *Hall v. Clifton* noted:

The underlying purpose of a deposition is to find out what a witness saw, heard or did - what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness’s own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to a deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness’s words to mold a legally convenient record Rather, a lawyer must accept the facts as they develop. *Id.* at 528.

3. A “Clifton Order” sometimes used in the Southern District of California provides as follows:

This court has conferred with counsel concerning discovery matters at this court's direction. This court is aware of the hotly contested nature of these proceedings and, in order to ensure the speedy, just, and inexpensive resolution of this case, the court deems it appropriate to direct those remaining depositions be conducted per the following guidelines:

- a. At the beginning of the deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness' own counsel, for clarifications, definitions, or explanations of any words, questions, or documents presented during the deposition. The witness shall abide by these instructions;
- b. All objections, except those which would be waived if not made at the deposition under Rule 32(d)(3)(B), and those necessary to assert a privilege, to enforce a limitation on evidence directed by the court, or to present a motion pursuant to Rule 30(d), shall be preserved. Therefore, those objections need not and shall not be made during depositions;
- c. Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question claiming the answer is protected by a privilege or a limitation on evidence directed by the court;
- d. Counsel shall not make objections or statements which might suggest an answer to a witness. Counsels' statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more;
- e. Counsel and their witness-clients shall not engage in private, off-the-record conferences during

depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege;

- f. Any conferences which occur pursuant to, or in violation of, guideline e. are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what;
 - g. Any conferences which occur pursuant to, or in violation of, guideline e. shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall also be noted on the record;
 - h. Deposing counsel shall provide to the witness' counsel a copy of all documents shown to the witness during the deposition. The copies shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and witness' counsel do not have the right to discuss documents privately before the witness answers questions about them;
 - i. Depositions shall otherwise be conducted in compliance with the FRCP and the FRE.
4. Rule 30(d) also confirms the authority of the court to impose limits on the conduct of the deposition.

Of course, variations, modifications, or changes in the manner or scope of a "Clifton Order" can be imposed given the circumstances of a particular case. One area that causes some concern, and has been criticized in one reported case, surrounds paragraphs 5, 6, and 7 of the form Clifton Order. In *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614 (D. Nev. 1998), the court asserted that such orders interfered with the deponent's right to counsel. The court otherwise embraced the *Hall* decision and levied its criticism to the impact of paragraphs e., f. and g., above, circumstances where attorneys "do

not demand a break in the questions, or demand a conference between questions and answers[.]” *Id.* at 24.

XVI. USE OF DEPOSITIONS AT TRIAL

While depositions are principally a discovery device, like other discovery devices, they are also frequently used at trial to refresh recollection and in several other ways. It is important to understand the rules and requirements for use of depositions at trial, and the way they may be used, before the deposition is taken. This understanding will help counsel plan accordingly, and proceed carefully, to maximize the potential uses.

A. In General.

1. Depositions, and their use at trial, are covered by Rules 30 and 32 of the FRCP. These differ in many respects from state court rules, so be sure to proceed consistent with the correct controlling principles.
2. Objections, Instructions Not to Answer, and Protecting the Record.

To be able to use a deposition, it must be taken consistent with the applicable rules, and in a way that is useful and able to overcome objections to its contents. This means a clear record! Rules and some observations to accomplish predicates follow:

- a. Rule 30(c) provides that the examination “of a deponent proceed[s] as they would at trial under the Federal Rules of Evidence[.]” This means that counsel should refrain from interjecting comments and statements. That would be inappropriate. Rule 30(c) also provides that if objections are made, testimony is taken subject to the objection.
- b. Rule 30(d)(1) prohibits “argumentative” or “suggestive” objections and also limits instructions not to answer.

- c. Rule 32(d)(3)(A) provides “objection[s] to a deponent’s competence – or the competence, relevance, or materiality of testimony – is not waived by failure to make the objection before or during the taking of the deposition, unless the ground for it might have been corrected at that time.” Rule 32(d)(3)(B) goes on to state that “[a]n objection to an error or irregularity is waived if: (i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party’s conduct, or other matters that might have been corrected at that time; and (ii) it is not timely made during the deposition.”
- i. Therefore, all objections to competency, relevancy, or materiality are preserved and are unnecessary during the deposition. Only those objections to questions that can be corrected need to be made.
- ii. The following challenges to the form of the question must be made:
- leading or suggestive;
 - compound;
 - assumes facts not in evidence;
 - calls for narration;
 - ambiguous or uncertain;
 - calls for speculation or conjecture; or,
 - is argumentative.

- d. An objection that the answer is not responsive to the question and a motion to strike also should be made since they fall into the categories of items that can be corrected if properly objected to during the deposition.
- e. Counsel should be careful regarding this waiver rule and seek to cure the “alleged” problem with the question or answer during the deposition. If the question is likely compound, then break it up. If it is leading or suggestive, rephrase the question in a more open form, etc. This is important. It is not unusual for these issues to be raised at trial. Where the objection is lodged at the time of the deposition, but not cured, the court is likely to sustain the objection and prevent the use of the testimony. This can be particularly harmful where the deposition is of an unavailable third-party witness at the time of trial! Where counsel has had the foresight to cure, the prohibition to use has been removed.
- f. In addition, grounds of privilege are waived unless a specific objection to disclosure is made at the deposition. *Baxter Travenol Labs v. Abbott Labs*, 117 F.R.D. 119 (N.D. Ill. 1987).
- g. Instructions not to answer are limited to circumstances where it is necessary:
 - 1. To preserve a privilege;
 - 2. To enforce a limitation directed by the court;
 - 3. Or to present a motion under Rule 30(c)(2) (bad faith, etc.).

Following these, and the other rules, will enhance the ability to use depositions and use them effectively at trial.

B. Use of Adverse Parties' (and their agents') Depositions Against Them.

1. The deposition of an adverse party, or an adverse party's officer, director or managing agent, or Rule 30(b)(6) designee, can be used for any purpose at trial (both for impeachment *and* as substantive evidence). Fed. R. Civ. P. 32(a)(3).
2. **NOTE:** A party must designate the witnesses whose testimonies will be presented by deposition, unless it is presented solely for impeachment under Rule 26(a)(3)(A). This is part of the pretrial disclosures required in every federal case. The pretrial designation date will be set as part of the case scheduling order. If no such date has been set, then the designation must be made at least 30 days before trial. A failure to disclose this information could result in exclusion of the evidence. Fed. R. Civ. P. 37(c)(1).
3. In addition, many judges require parties to submit “[a] list of all deposition transcripts by page and line, or videotape depositions by section that will be offered at trial”, as part of the Final Pretrial Order in a case. Civ. L.R. 16.1.f.6. A failure to list this information can result in exclusion of the evidence as a violation of the court's order.

C. Use of Third-Party Depositions Against an Adversary.

1. Depositions of other witnesses taken in the matter can be used against a party at trial for certain purposes, provided the party had adequate notice of the deposition. *See Section XIV.A.* in this regard.
2. Impeachment. Fed. R. Civ. P. 32(a)(2); *see* FRE 607 (defining impeachment as an attack “on the witness's credibility.”)
3. Unavailability per Rule 32(a)(4), described as the witness being dead; more than one hundred miles from the place of trial; unable to testify due to age, illness, infirmity or imprisonment; unable to

be procured by subpoena; or upon a showing of exceptional circumstances.

4. As otherwise allowed by the FRE [*e.g.*, refreshing recollection (FRE 612); recorded recollection (FRE 613); hearsay exceptions (FRE 803 or 804); or prior statements under (FRE 801(d)(1) and (2))].
5. Adequate notice must be “reasonable” under Rule 30(b)(1). Since a party may seek a protective order under Rule 32(a)(5)(A) within 14 days of notice to prevent a deposition from proceeding, a 14-day notice is, by implication, general guidance for what is “reasonable.” However, particular facts and circumstances may warrant a longer period. Note that where documents are requested from a party, 30 days’ notice is required. Fed. R. Civ. P. 30(b)(2) and 34(b)(2)(A).

D. Impeachment by Prior Inconsistent Statement.

When we seek to impeach a witness, we are attacking the credibility of that witness. Fed. R. Evid. 607. In the context of using depositions, the most common attack is the prior inconsistent statement. *See*, FRE 613 generally in this regard. The full range of impeachment topics are not dealt with in this manual.

1. Statement at trial must be truly inconsistent with deposition testimony.
 - a. Trial testimony must be in direct contradiction with deposition testimony. *U.S. v. Thompson*, 708 F.2d 1294 (8th Cir. 1983). But, it need not be in plain terms, and can be inconsistent if taken as a whole it “affords some indication” that the facts are different from those testified to by the witness at trial. *U.S. v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988); *U.S. v. Castro-Ayon*, 537 F.2d 1055 (9th Cir. 1976) (allowing inconsistent statements from trials, hearings, and other proceedings while defining

“other proceedings” broadly). Trial judges must retain a high degree of flexibility in deciding the exact point at which a prior statement is sufficiently inconsistent with a witness's trial testimony to permit its use in evidence. *U.S. v. Morgan*, 555 F.2d 238, 242 (9th Cir. 1977).

- b. The burden is on the proponent to demonstrate inconsistency. *Evanston Bank v. Brink's, Inc.*, 853 F.2d 512 (7th Cir. 1988).
- c. Note, trial judges have broad discretion in determining whether testimony is “inconsistent.” “[E]vasive answers, inability to recall, silence, or changes of position” can constitute an “inconsistent statement.” *U.S. v. Russell*, 712 F.2d 1256, 1258 (8th Cir. 1983).
- d. What about “I don’t remember?”
 - i. A claim of “amnesia” was found by a court to be pretense under FRE 104³⁸; accordingly, the prior inconsistent statement was allowed to be read to the jury. *U.S. v. Di Caro*, 772 F.2d 1314 (7th Cir. 1985).
 - ii. A “selective memory” was found “feigned” by a court (FRE 104 again) and therefore, a prior inconsistent statement was allowed. *U.S. v. Bingham*, 812 F.2d 943 (5th Cir. 1987).
 - iii. Note, some courts, including courts in the Ninth Circuit, do not distinguish between genuine and feigned loss of memory, holding loss of memory by itself renders earlier testimony admissible as a prior inconsistent statement. *Russell*, 712 F.2d 1256; *Felix v. Mayle*, 379 F.3d 612 (9th Cir. 2004), *rev'd on other grounds*, 545 U.S. 644 (2005).

³⁸ FRE 104 imposes a duty on the court to decide any preliminary question about whether evidence is admissible.

- iv. In loss of memory situations, you may want to first show the witness the transcript to attempt to refresh recollection. If not “refreshed,” then proceed under FRE 803(5), “Recorded Recollection.” These may be helpful alternatives where you may not be able to establish inconsistency easily.
2. The typical procedure is to recommit a witness to deposition; show transcript excerpt to witness and opposing counsel.
 - a. Note, however, FRE 613 has eliminated the old requirement of showing or disclosing the substance of the deposition (inconsistent statement) to the witness before using it or asking about it.
 - b. Note, also, if the statement is something other than a deposition, opposing counsel is entitled to see it on request. With depositions, the court and counsel will want the page and line location in the deposition provided before any reading.
3. Read/play the excerpt into the record.
4. The nonparty witness must be given an opportunity to explain or deny the inconsistency and be subject to cross examination. Fed. R. Evid. 613(b). Note this is in contrast to a deposition of a party. See, FRE. 801(d)(2).
5. Make sure the point you are impeaching on is significant. Don’t nitpick and don’t attempt to impeach on collateral or irrelevant matters. It will not be allowed! *Calhoun v. Ramsey*, 408 F.3d 375 (7th Cir. 2005). For impeachment purposes, a matter is “collateral” if it could not be introduced into evidence for any purpose other than impeachment. *Simmons Inc. v. Pinkerton’s Inc.*, 762 F.2d 591 (7th Cir. 1985). So, limit impeachments to material that is relevant (Rule 401), non-trivial, and contradictory of any material given on direct. *Walder v. U.S.*, 347 U.S. 62 (1945).

E. Rule of Completeness/Continuation [Rule 32(a)(6) and FRE 106].

1. When part of a writing or recorded statement is introduced into evidence, “an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced[.]” Fed. R. Civ. P. 32(a)(6); *see also* Fed. R. Evid. 106.
2. The purpose of the rule of completeness is to avoid the offering party from creating a misleading impression by taking matters out of context.

F. Depositions Taken in Other Actions.

While depositions taken in other actions are normally hearsay, there are circumstances and exceptions that will allow their use.

1. Depositions in another action involving the *same* subject matter between the *same* parties or their representatives or successors in interest. Fed. R. Civ. P. 32(a)(8).
2. Former testimony given under oath in another proceeding where: (a) the witness is unavailable; and (b) the party against whom the testimony is being offered, or its predecessor in interest, had an opportunity and similar motive to examine the witness in the other proceeding. Fed. R. Evid. 804(b)(1). *Hub v. Sun Valley Co.*, 682 F.2d 776 (9th Cir. 1982).
3. Statements against interest of an unavailable witness where supported by corroborating circumstances that clearly indicate its trustworthiness. Fed. R. Evid. 804(b)(3).
4. Prior statement of a witness subject to examination at trial where: (a) the prior statement is inconsistent with testimony at trial; (b) the prior statement is consistent with trial testimony and offered to rebut a charge of fabrication; or (c) the prior statement involves identification of a person after perceiving him. Fed. R. Evid. 801(d)(1).

5. Admission by a party opponent/agent/co-conspirator. Fed. R. Evid. 801(d)(2).
6. Other exclusions/ exceptions to the hearsay rule. Fed. R. Evid. 801–804.

G. Non-Stenographic Form of Transcript [Rule 32(c)].

1. Must provide the court with stenographic transcript as well.
2. If video exists, any party can insist that deposition testimony used for any purpose other than impeachment be presented by video, unless the court orders otherwise.

H. Use of 30(b)(6) Deposition at Trial.

A Rule 30(b)(6) deposition may be used “for any purpose” at trial. Fed. R. Civ. P. 32(a)(3). The deposition may be used for both substantive evidence and impeachment purposes. *Jamsport Ent., LLC v. Paradama Prods., Inc.*, 02-C-2298, 2005 WL 14917, at *4 (N.D. Ill. Jan. 3, 2005).

1. The majority rule holds that a Rule 30(b)(6) deposition may be read into evidence regardless of whether the deponent is available to testify. *Fey v. Walston & Co., Inc.*, 493 F.2d 1036, 1046 (7th Cir. 1974); *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 308 (5th Cir. 1978); *Est. of Thompson v. Kawasaki Heavy Indus., Ltd.*, 291 F.R.D. 297, 305–08 (N.D. Iowa 2013) (collecting cases). However, some district courts have been reluctant to allow a party to read the deposition into evidence “if the witness is available to testify at trial, and such exclusion is usually deemed harmless error.” *Brazos River*, 469 F.3d at 434.
2. Rule 32(a)(3) also provides a hearsay exception for the Rule 30(b)(6) deposition itself. *See Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 914–15 (9th Cir. 2008). However, a party may not use the Rule 30(b)(6) deposition to introduce matters that

are hearsay without a hearsay exception. *See Est. of Thompson*, 291 F.R.D. at 305-08 (citing *Brazos River*, 469 F.3d at 434)).

3. Note that a Rule 30(b)(6) witness who was also examined as a percipient witness in the same deposition presents particular problems at trial. As noted above, this “dual purpose witness,” does not bind the corporation regarding matters not clearly set out in the 30(b)(6) notice. *See Detoy*, 196 F.R.D. at 366–67. As a result, counsel needs to exercise care in identifying which answers are of the corporation and which are of the witness individually. In addition, the use of the “dual purpose witness” may not meet the hearsay objection of Rule 32(a)(3)!
4. The problems highlighted concerning the “dual purpose witness,” are most easily solved where counsel take care to identify the fact witness testimony as such, and therefore not an admission of the entity, at the time of the deposition. That will clarify the record for the court at trial regarding any dispute that arises. As to the witness testifying at trial, consider having the witness testify once as the corporate representative (with the court explaining the corporate representative role) and a second time as a fact witness. That should keep things straight.
5. Finally, note that the Rule 30(b)(6) deposition notice cannot be used to compel an organizational party to produce a designee to testify at trial! Counsel have tried and summarily failed. *Hill v. Natl. R.R. Passenger Corp.*, CIV. A. 88-5277, 1989 WL 87621 (E.D. La. July 28, 1989); *Dopson-Troutt v. Novartis Pharm. Corp.*, 295 F.R.D. 536 (M.D. Fla. 2013).

XVII. INTERROGATORIES, DOCUMENT REQUESTS AND REQUESTS FOR ADMISSIONS

The provisions of Rules 33 (Interrogatories), 34 (Document Requests), and 36 (Requests for Admissions) were unchanged by the evolving amendments from 1993 to 2000. The amendments to Rule 26 during those years, however, impacted these other Rules and these forms of discovery in several ways: the timing, the scope, and

the inability of courts to impose local limits by general order or local rule. The 2006 amendments concerning ESI did directly impact these forms of discovery. The impact is fully explained in Section X.F. The impact upon these forms of discovery and other observations are set forth below. Common issues associated with responses are also addressed.

A. Rule 33. Interrogatories.

1. In general:

- a. 25 question limit exists;
- b. Local limits (*i.e.*, Southern District of California Civil Local Rule 33.1) are abrogated;
- c. Interrogatories may not be served before the time specified in Rule 26(d); and
- d. Like all disclosures and discovery requests, interrogatories' responses and objections must be signed by an attorney of record or by an unrepresented party. Fed. R. Civ. P. 26(g)(1). The signing certifies, to the best of the signor's knowledge, information, and belief formed after a reasonable inquiry, that the request, response, or objection is:
 - i. Consistent with the Federal Rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law;
 - ii. Not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and,
 - iii. Neither unreasonable, nor unduly burdensome or expensive, considering the needs of the case, prior

discovery in the case, the amount in controversy, and the importance of the issues at stake in the action. Fed. R. Civ. P. 26(g)(1)(B)(i-iii).

- e. There is no duty for other parties to act on any unsigned disclosure, request, response, or objection, and the court must strike these following notices to the proponent. Fed. R. Civ. P. 26 (g)(2).
- f. Sanctions may be imposed for violation of this Rule. Fed. R. Civ. P. 26(g)(3). *See Branhaven, LLC v. BeefTek, Inc.*, 288 F.R.D. 386 (D. Md. 2013).

2. Responses:

- a. Rule 33(b) states that answers and objections to interrogatories must be answered “separately and fully in writing under oath”, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable. Fed. R. Civ. P. 33(b)(1). Note, that the signing requirement of Rule 26(g) applies. *See Section XVII.A.1.d*, above;
- b. This Rule further requires that all grounds for an objection to an interrogatory be stated with specificity. Any ground not stated in a timely objection is deemed waived unless the party's failure to object is excused by the court for good cause. Fed. R. Civ. P. 33(b)(4). The Rule requires that answers be responsive, full, complete and non-invasive. Insofar as practical, answers should be complete within themselves. Material outside of the answers and addendum ordinarily should not be incorporated by reference. *Pilling v. General Motors Corp.*, 45 F.R.D. 366, 369 (D. Utah 1968);

- c. However, if information from another answer is incorporated in a particular answer, references to such information should be specific rather than general. *Id.*;
- d. A party is under a duty to supplement their responses to interrogatories if they learn that in some material respect the response is incomplete or incorrect or if ordered by the court. *See Chapter XIII* in this regard;

3. Producing Business Records as an Option:

- a. To facilitate discovery and reduce the burden and expense, Rule 33(d) provides the responding party with the option to produce records kept in the normal course of business in response to interrogatories. When Rule 33(d) is invoked, however, the response to the interrogatory must specify the relevant documents in sufficient detail to permit the interrogating party to locate and identify the records from which the answer can be obtained;
- b. The 2006 amendments to Rule 33(d) allow “a responding party to substitute access to documents or [ESI] for an answer only if the burden of deriving the answer will be substantially the same for either party.” *See Committee Note to 33(d) and Section X.F.1*;
- c. The Advisory Committee Notes to the 1980 amendments make it clear that it is the responding party’s duty to specify, by category and location, the records from which answers to the interrogatories can be derived. The Notes state “directing the interrogating party to a mass of business records or by offering to make all of their records available . . . are an abuse of the option.” However, in order to rely on reference to documents, the responding party must first satisfy a number of prerequisites in order to justify shifting the burden of locating the responsive information to the requesting party:

- i. First, the producing party must show that review of the documents will reveal answers to the interrogatories. In other words, the producing party must show that the named documents contain all of the information required by the interrogatory. *Olsen v. Kmart Corp.*, 175 F.R.D. 560, 564 (D. Kan. 1997). To satisfy this inquiry, the producing party must adequately and precisely specify, for each interrogatory, the actual documents where the information will be found. Document dumps or vague references to documents do not suffice. *Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Inv. Corp.*, 711 F.2d 902 (9th Cir. 1983) (Interrogatory responses which stated that answers could be found in partnership books of accounts, bank account records, computer printouts, ledgers, and other documents were insufficient because they failed to specify particular records from which answers could be obtained.); *Capacchione v. Charlotte-Mecklenburg Sch.*, 182 F.R.D. 486 (W.D.N.C. 1998) (defendant's referenced files located amongst 200 boxes sends plaintiff on a "fruitless and diversionary fishing expedition with no clear direction"); *In re Bilzerian*, 190 B.R. 964 (Bankr. M.D. Fla. 1995) (answers to interrogatories referring to 28 boxes of documents were insufficient). As such, the respondent is required to answer proper interrogatories and may not assume that a response stating that an answer may (or may not) be found in respondent's records accompanied by an offer to permit access and inspection will suffice;
- ii. The second requirement imposed on the producing party is to demonstrate that answering the interrogatory in the traditional manner would impose a significant burden upon it;

- iii. The third prerequisite to application of Rule 33(d) is that the burden of compiling the information be substantially the same for the inquiring and the responding parties. This means, at a minimum, that the responding party is representing that it would have to glean the information from the designated records. In situations where the responding party has already culled the requested information from its records as part of its trial preparation or for other reasons, it would indicate that it would be substantially more burdensome for the inquiring party to compile the information. The effort need not be precisely equal, and the inquiring party cannot deprive its opponent of the Rule 33(d) option by simply pointing out that any party is likely to be less burdened by culling its own records. Instead, the court must balance several factors, including costs of research, nature of the records, and the familiarity of the interrogating party with the records. Familiarity may make such a difference as to be determinative. *Al Barnett & Sons, Inc v. Outboard Marine Corp.*, 611 F.2d 32, 35 (3d Cir. 1979) (Since many of the records were hand written and apparently difficult to read and the responding party was more familiar with the bookkeeping organization of the records, the court found the responding party would be less burdened in locating the information than the inquiring party). If the burden is not substantially greater for the interrogating party, the fact that it is a heavy burden does not take away the option provided under Rule 33(d) to refer to records rather than compile the answer. Ultimately, the determination of whether the relative burdens justify invocation of the option is for the court to decide and should be upheld on appeal unless clearly erroneous. *Id.*;
- iv. The final prerequisite is that the responding party must specify which records contain the information

sought by the interrogatory. As the Advisory Committee explained in connection with the 1980 amendment, parties “have occasionally responded by directing the interrogating party to a mass of business records or by offering to make all of their records available for inspection.” Rule 33 Advisory Committee Notes, 85 F.R.D. 521, 531 (1980). A simple offer to produce unspecified materials is not a sufficient designation to satisfy the requirements of Rule 33(d), nor is broad statement that the information sought is ascertainable generally from documents that have been made available for inspection. The responding party will be required to state specifically, and precisely identify, which documents will provide the information to be elicited. *Budget Rent-A-Car of Mo., Inc. v. Hertz Corp.*, 55 F.R.D. 354, 357 (W.D. Mo. 1972).

B. Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.

1. In general:
 - a. Before the 2015 amendments, the Rules prohibited any discovery until after the Rule 26(f) conference.
 - b. Under the 2015 amendment to Rule 26(d)(2), Rule 34 requests are permitted as early as 21 days after service of the summons and complaint.
 - c. Note, however, a response to the Rule 34 request is not required before the Rule 26(f) conference; rather, the response is due 30 days after the Rule 26(f) conference. The amendment was designed to encourage focused discussion of discovery needs at the 26(f) conference.

- d. Like all disclosures and discovery requests, every response or objection must be signed by an attorney of record or by an unrepresented party. Fed. R. Civ. P. 26(g)(1). The signing certifies, to the best of the signor's knowledge, information, and belief formed after a reasonable inquiry, that the request, response or objection is:
 - i. Consistent with the FRCP and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law;
 - ii. Not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and,
 - iii. Neither unreasonable, nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action. Fed. R. Civ. P. 26(g)(1)(B)(i-iii).
- e. There is no duty for other parties to act on any unsigned disclosure, request, response, or objection, and the court must strike these following notice to the proponent. Fed. R. Civ. P. 26 (g)(2).
- f. Sanctions may be imposed for violation of this Rule. Fed. R. Civ. P. 26(g)(3).
- g. The amendments are silent on whether local limits may be imposed by general order or local rule. Amendments to 26(b)(2) prevent courts from placing limits upon the number of depositions or interrogatories by general order or local rule, but no mention of Rule 34 discovery is made. As a practical matter, no local limits exist in the Southern District of California, so this distinction is of no practical significance. The court may limit the number under Rule 26 on a case-by-case basis.

2. Responses:

- a. The purpose of Rule 34 is to make relevant, nonprivileged documents and objects in the possession of one party available to the other, thus eliminating strategic surprise and permitting issues to be simplified and the trial to be expedited. This Rule is to be construed liberally rather than narrowly and allows any party to request production of documents and things from any other party.
- b. The response to a request for production must state, with respect to each item or category, that inspection will be permitted unless an objection is made. Fed. R. Civ. P. Rule 34(b)(2)(B). Objections must be made with specificity for the grounds of objection, and a party may state that it will produce copies of documents or ESI instead of permitting inspection. *Id.* The production must be completed no later than the time for inspection specified in the request or another “reasonable time specified in the response.” *Id.*
- c. Objections must also state whether any responsive materials are being withheld on the basis of the objection. The Committee Note provides that a detailed description or log of all documents withheld is not required. What is required is a description to facilitate an informed discussion. Note, also, that if documents are withheld under privilege, then a detailed privilege log is required. *See*, Section 3, below.
- d. Failure to file objections within the time allowed for responding to a request under Fed. R. Civ. P. 34(b)(2)(A) results in the waiver of such objections. The mere fact that compliance with a production request may be costly or time-consuming is not a sufficient objection. *Rockaway Pix Theatre, Inc. v. Metro-Goldwyn-Mayer, Inc.*, 36 F.R.D. 15 (E.D.N.Y. 1964).

- e. Production of documents under Rule 34 requires the producing party to either organize and label the documents according to the categories in the request or to produce the documents as they are kept in the usual course of business. The purpose of this requirement is to produce documents in a form usable to the requesting party. *Montania v. Aetna Casualty & Surety Co.*, 153 F.R.D. 620 (N.D. Ill. 1994) (granting the defendant's motion to compel a further response to its request for production that specifically indicates what documents are responsive after plaintiff produced more than 17,000 pages of documents).

- f. With the 2006 amendments to Rule 34, ESI is squarely within the contours of the Rule and subject to production. The Committee Note to Rule 34 provides some practical information. See Chapter X. The Rule also allows a party to test or sample material sought under the Rule in addition to inspecting and copying it. *Id.*

- g. Alternatively, a responding party may object to producing the requested documents if:
 - i. the requests are burdensome and overbroad. *Nugget Hydroelectric, LP v. P. Gas and Elec. Co.*, 981 F.2d 429 (9th Cir. 1992), *cert. denied* 113 S. Ct. 2336 (1993);

 - ii. there are other, less burdensome methods available to the discovering party to obtain the documents sought, *Barr Rubber Products Co., v. Sun Rubber Co.*, 425 F.2d 1114 (2d Cir. 1970), *cert. denied* 400 U.S. 878 (1970);

 - iii. it has already searched for materials responsive to the discovering party's request without result and a second search would be duplicative and wasteful, *In re Agent Orange Prod. Liab. Litig.*, 98 F.R.D. 522 (E.D.N.Y. 1983); or

- iv. it is privileged. Fed. R. Civ. P. 26(b)(1) and (b)(5).
- h. Rule 34(b)(2)(B) provides that the request for production may specify the form or forms in which the ESI is to be produced. This is subject to the responding party's objection. Where no form is specified, the responding party has to state the form or forms it intends to use in providing the data. *See* Section X.F.2.
- i. A party is under a duty to supplement their responses to discovery under Rule 34 if ordered by the court or if they learn that in some material respect the response is incomplete or incorrect. *See* Chapter XIII in this regard.
- j. Note, the signing requirement of Rule 26(g) applies. *See* Section XVII.A.1.d, above.

3. The Privilege Log:

- a. When a party withholds responsive by claiming that it is privileged or otherwise protected from discovery, the party must promptly prepare and provide a privilege log that is sufficiently detailed and informative to justify the privilege. Fed. R. Civ. P. 26(b)(5).
- b. Rule 26(b)(5) provides that a party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim. Fed. R. Civ. P. 26(b)(5).
- c. A privilege should be asserted within 30 days of a request for production. Fed. R. Civ. P. 34(b)(2)(A).
- d. Privilege logs concerning ESI present many logistical problems. While most privilege logs are prepared

document-by-document, this approach can cause disproportionately higher costs when ESI is involved due to the sheer volume of documents. As such, some courts have allowed a categorical logging approach, which permits the holder of withheld documents to provide summaries of the documents by category. *S.E.C. v. Nacchio*, 05-cv-00480-MSK-CBS, 2007 WL 21966, at *9–10 (D. Colo. Jan. 25, 2007) (categorical logging is appropriate where a document-by-document listing would be unduly burdensome, and the additional log would be of no material benefit to the discovering party in assessing whether the privilege claim is well-grounded). The categories can correspond to certain subject matter, type of information, or even persons. Using categories and sampling for accuracy can reduce both time and cost when dealing with a mass of information, while also offering sufficient level of detail about the privilege being asserted.

- e. The Ninth Circuit has rejected a per se rule that the failure to produce a log within 30 days results in waiver of the privilege. *See Burlington N. & Santa Fe Ry Co. v. U.S. Dist. Ct. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005). Instead, the court held that a district court should engage in the following “holistic reasonableness” analysis:

[U]sing the 30-day period as a default guideline, a district court should make a case-by-case determination, taking into account the following factors: the degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged (where providing particulars typically contained in a privilege log is presumptively sufficient and boilerplate objections are presumptively insufficient); the timeliness of the objection and accompanying

information about the withheld documents (where service within 30 days, as a default guideline, is sufficient); the magnitude of the document production; and other particular circumstances of the litigation that make responding to discovery unusually easy . . . or unusually hard.” *Id.* at 1149.

The Ninth Circuit further explained that the intent of the “holistic reasonableness” analysis is “to forestall needless waste of time and resources, as well as tactical manipulation of federal rules and the discovery process.” *Id.*

The Burlington court upheld the finding of a waiver, based on the following factors: the privilege log was produced five months after the time limit for production under Rule 34; the log was not sufficient in that, *inter alia*, it did not specify the withheld documents which correlated with certain discovery requests; no “mitigating circumstances” were present; and the party withholding documents was a “sophisticated corporate litigant” that had previously produced many of the documents at issue in a prior lawsuit so that it was “hard to justify” a timely response was not possible or would have been unduly burdensome. *Id.* at 1149–50.

C. Rule 36. Requests for Admissions.

1. Requests for admissions may not be served before the time specified in Rule 26(d).
2. A failure to respond to a Request for Admissions within thirty (30) days after service will result in the matter being admitted.

3. If a matter is not admitted, the answer must specifically deny it, or state in detail why the answering party cannot truthfully admit or deny it.
4. The admission under Rule 36 is conclusively established unless the court permits the admission to be withdrawn. To withdraw the admission, a party must show that the modification is necessary to prevent “manifest injustice.” Fed. R. Civ. P. 36(b) incorporating by reference Fed. R. Civ. P. 16(e).
5. A party is under a duty to supplement its responses to discovery under Rule 36 if it learns that in some material respect the response is incomplete or incorrect or if ordered by the court.
6. Local limits by a general order or local rule are allowed under Fed. R. Civ. P. 26(b)(2). *See* Local Civil Rule 36.1.a (25 request limit).

XVIII. RULE 35 REQUEST FOR PHYSICAL OR MENTAL EXAMINATION OF A PARTY

The 1991 amendments expanded the scope of Rule 35, authorizing the court to order examinations not only by licensed physicians, psychiatrists, and clinical psychologists, but also by any “suitably licensed or certified examiner.” Rule 35(a)(1). This amendment allowed other experts who may be well-qualified (such as dentists, occupational therapists, and vocational rehabilitation experts) to contribute valuable and pertinent information towards the disposition of a lawsuit. *See Olcott v. LaFiandra*, 793 F. Supp. 487 (D. Vt. 1992). The court still retains discretion on whether to certify a proposed expert as an examiner.

A. Examination Order [Rule 35(a)].

1. The court may order a party whose mental or physical condition is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner.

2. The court may also order a party to produce for examination a person in its custody or under its legal control.
3. The order may only be made on motion for good cause.
4. Notice must be given to all parties and to the person to be examined.
5. The order must specify the time, place, manner, conditions, scope of the examination, and who will perform it.

B. Examiner's Report [Rule 35(b)].

1. The movant must, on request, deliver to the party against whom the examination order was issued or to the person examined a copy of the examiner's report together with all reports of early examination of the same condition.
2. Reports must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and results of any tests.
3. After delivering the requested reports, the movant is entitled to receive, upon request, like reports of all other examinations of the same condition, subject to the ability of the party receiving the request to obtain the requested reports.
4. By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege concerning testimony on the examinations of the same condition.
5. The foregoing rules, pertaining to the examiner's report, also apply to examinations made by agreement of the parties, unless the agreement states otherwise.

C. Good Cause.

The good cause requirement is satisfied by a showing that a party's current physical or mental condition is in controversy. *Simpson v. University of Colorado*, 220 F.R.D. 354 (D. Colo. 2004); *Coca-Cola Bottling Co. of Puerto Rico v. Negron Torres*, 255 F.2d 149 (1st Cir. 1958).

D. Choice of Physician.

1. As a general rule, movant may select the examiner. Although movant has no absolute right to select the examiner, the movant's selection is presumed acceptable, unless the party to be examined has a "valid objection." *Looney v. Nat'l R.R. Passenger Corp.*, 142 F.R.D. 264 (D. Mass. 1992); *Great W. Life Assur. Co. v. Levithan*, 153 F.R.D. 74 (E.D. Pa. 1994).
2. Examples of a valid objection include instances where there is a business, social, or attorney-client relationship between the physician and attorney. *Duncan v. Upjohn Co.*, 155 F.R.D. 23, 26 (D. Conn. 1994). *Main v. Tony L. Sheston-Luxor Cab Co.*, 89 N.W.2d 865 (Iowa 1958) (physician was also a client of defendant's attorney); *Adkins v. Eitel*, 206 N.E.2d 573 (Ohio App. 5th Dist. 1965) (attorney refused four times to answer questions regarding business relationship with proposed physician).
3. An objection that the examiner is biased will not defeat movant's selection; such concern speaks to credibility, not admissibility. *Duncan v. Upjohn Co.*, 155 F.R.D. 23 (D. Conn. 1994); *Powell v. United States*, 149 F.R.D. 122 (E.D. Va. 1993).
4. If movant fails to select a valid examiner, the court may designate one. *Pierce v. Brovig*, 16 F.R.D. 569 (S.D.N.Y. 1954).

E. Failure to Deliver Examination Report.

1. The court may exclude the examiner's testimony at trial pursuant to Rule 35(b)(2).
2. The court may impose other sanctions under Rule 37.

F. Number of Exams.

1. While there is no limit, examinations may be performed only at the court's discretion. *Shirsat v. Mut. Pharm. Co., Inc.*, 169 F.R.D. 68 (E.D. Pa. 1996). But a high showing of good cause is generally required for additional examinations. *Furlong v. Circle Line Statute of Liberty Ferry, Inc.*, 902 F. Supp. 65 (S.D.N.Y. 1995); *Vopelak v. Williams*, 42 F.R.D. 387 (N.D. Ohio 1967).
2. The court may order multiple examinations of different types concurrently. *Marshall v. Peters*, 31 F.R.D. 238 (S.D. Ohio 1962).
3. The court may order subsequent or repeat examinations where a previous examination was incomplete or limited in scope, or where a significant amount of time has lapsed since a prior examination or a change has been reported in the party's condition. *Stewart v. Burlington N. R. Co.*, 173 F.R.D. 254 (D. Minn. 1995); *Galieti v. State Farm Mut. Auto. Ins. Co.*, 154 F.R.D. 262 (D. Colo. 1994); *Lewis v. Neighbors Const. Co.*, 49 F.R.D. 308 (W.D. Mo. 1969).

G. Persons Present.

1. Rule 35 is silent on who may attend a court ordered examination. As a result, that determination is left to the court's discretion. *Tarte v. U.S.*, 249 F.R.D. 856 (S.D. Fla. 2008).
2. Courts will generally demand a showing of good cause by the examinee as to why a third-party observer should be allowed.

Factors a court will typically consider include the effect the third-party observer may have on contamination of the examination, and the possibility that an examiner may abuse its discretion in the absence of a third-party observer. Additionally, when the requested third-party observer is a family member or friend of the examinee, the extent to which the observer might put an overly anxious examinee at ease is also considered. *Hertenstein v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 620 (D. Kan. 1999); William S. Wyatt and Richard A. Bales, *The Presence of Third Parties at Rule 35 Examinations*, 71 Temp. L. Rev, 103, 129 (1998).

3. Psychiatric Examinations.

- a. Generally, no other person apart from the examiner and the examinee (and possibly the examiner's staff) may be present at a psychiatric examination, as it would contaminate the examination. This includes the examinee's attorneys, experts, family members and friends, as well as any recording devices. *Tarte*, 249 F.R.D. at 859; *Ragge v. MCA/Universal Studios*, 165 F.R.D. 605, 609–10 (C.D. Cal. 1995).
- b. A possible exception exists where the examinee's attorney may be present when the examinee faces criminal charges and there is a concern for protection of the examinee's Fifth Amendment rights. *Marsch v. Rensselaer County*, 218 F.R.D. 367 (N.D.N.Y. 2003).

4. Medical Examinations.

- a. Generally, the examinee's attorney may not be present. *E.E.O.C. v. Grief Bros. Corp.*, 218 F.R.D. 59 (W.D.N.Y. 2003).
- b. The examinee's own physician may be permitted to attend, at the court's discretion, if the examinee so desires. *Compare Warrick v. Brode*, 46 F.R.D. 427 (D.C. Del.

1969) with *Sanden v. Mayo Clinic*, 495 F.2d 221 (8th Cir. 1974).

- c. Although courts may be more lenient in allowing a family member or friend to silently observe a physical examination, as opposed to a psychiatric examination, case law on the subject remains sparse. See *Hertenstein v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 620 (D. Kan. 1999); William S. Wyatt and Richard A. Bales, *The Presence of Third Parties at Rule 35 Examinations*, 71 Temp. L. Rev, 103, 129 (1998).

H. Examiner's Testimony at Trial.

1. The majority view sees the Rule 35 examiner as an "expert employed only for trial preparation," and not for testifying at trial, under Rule 26(b)(4)(B). As such, a court will typically only allow an examinee to depose or call a Rule 35 examiner as a witness on a showing of "exceptional circumstances." *Lehan v. Ambassador Programs, Inc.*, 190 F.R.D. 670 (E.D. Wash. 2000); *Carroll v. Praxair, Inc.*, 05-0307, 2007 WL 437697 (W.D. La. Feb. 7, 2007).
2. Of course, most Rule 35 exams arise in the context of developing expert testimony for trial. These experts typically will testify and are subject to the disclosure and discovery obligations under Rules 26 and 30.
3. Under the minority view, an examinee is entitled to depose a Rule 35 examiner by submitting to the invasion of privacy intrinsic in a court ordered examination. *Crowe v. Nivison*, 145 F.R.D. 657 (D. Md. 1993).
4. Additionally, the examined party may subpoena the examiner, but only for testimony regarding the preparation of the report and the facts and opinions contained therein. The subpoenaing party is responsible for any customary expert fees in this situation.

Fitzpatrick v. Holiday Inns, Inc., 507 F. Supp. 979 (E.D. Pa. 1981). Some courts vary on this issue. While *Fitzpatrick* considered calling the Rule 35 examiner essentially an “entitlement” for having submitted to the invasion of privacy associated with the exam, other courts leave the matter to the discretion of the court on a balancing test. *House v. Combined Ins. Co. of Am.* 168 F.R.D. 236 (N.D. Iowa 1996). Still others use an “exceptional circumstance” test. *Lehan*, 190 F.R.D. 670.

I. Autopsies.

Examination by autopsy is still within the ambit of “physical examination” under Rule 35. If decedent’s physical condition is in controversy, the court may, on a showing of good case, order an autopsy after considering other less invasive methods of examination. *In re Certain Asbestos Cases*, 113 F.R.D. 612 (N.D. Tex. 1986).

XIX. RULE 45 SUBPOENA PRACTICE.

Rule 45 was largely ignored by the amendments starting in 1993 and thereafter, until the enactment of the 2006 amendments regarding ESI. With amendments effective December 1, 2013, this Rule has taken on a new approach. While often utilized as a trial device, this is a discovery device and is essentially aimed at non-parties. *Integra Life Sciences*, 190 F.R.D. at 556. The uses of subpoenas to compel a deposition of, or documents from, a third party are widely known.

A. Issuance and Enforcement.

1. Under the former version of Rule 45, and because third party discovery often is out of district (if not out of state), the most frequent disputes surrounded which court should issue the subpoena and often which court would enforce, quash, or compel

compliance. The Rule now resolves these points in a cogent manner.³⁹

2. The issuing court is the court for the district where the case is filed. Fed. R. Civ. P. 45(a)(2). As a result, counsel no longer need to travel to a foreign district to utilize the process there.
3. The party or attorney responsible for issuing and serving the subpoena must take reasonable steps to avoid imposing an undue burden or expense on the person subpoenaed. Fed. R. Civ. P. 45(c).
4. The court to quash, enforce, or compel compliance of the subpoena will be the court where compliance is required. If it is a hearing or trial, it will be the issuing court, but for out of district compliance for depositions or document production, the place of compliance is the foreign district. Fed. R. Civ. P. 45(c)(3)(A).
5. Note, it is possible for a non-party to consent to jurisdiction where the underlying action is pending by voluntarily appearing in that district. *See Favale v. Roman Catholic Diocese of Bridgeport*, 233 F.R.D. 243 (D. Conn. 2005).

The full text of the amendments can be reviewed at www.uscourts.gov under the heading “Current Rules of Practice & Procedure.”

B. Service and Notice.

1. As of December 1, 2013, a subpoena issued in federal court may be served nationwide. This change was needed to give the intended effect to the standardization of practice in this regard.
2. Although the interpretation that Rule 45(b)(1) requires personal service of a subpoena is still considered the majority view, there

³⁹ Under the “old rule,” the issuing court was the court where the hearing or trial was to be held and for depositions, production of documents or inspection of premises the place where compliance was required.

is a growing minority which also recognizes alternative service (e.g., U.S. Mail, FedEx, etc.) as valid. *See Hall v. Sullivan*, 229 F.R.D. 501, 504 (D. Md. 2005); *In re Falcon Air Exp., Inc.*, 06-11877-BKC-AJC, 2008 WL 2038799 (Bankr. S.D. Fla. May 8, 2008).

- a. The minority view is that the language of Rule 45(b)(1), that “[s]erving a subpoena requires delivering a copy to the named person,” contrasts with Rule 4(e)(2)(A), which provides for “delivering a copy of the summons and of the complaint to the individual *personally*” (emphasis added).
 - b. “Courts are more inclined to grant such alternative service where the servicing party has provided sufficient evidence of its earlier diligence in attempting to effectuate personal service.” *Fujikura Ltd. V. Finisar Corp.*, No. 15-MC-80110-HRL (JSC), 2015 WL 5782351, at *5 (N.D. Cal. Oct. 5, 2015).
 - c. In *Maple Leaf Adventures Corp. v. Jet Tern Marine Co. Ltd.*, 15-cv-02504-AJB-BGS, 2016 WL 3063956 (S.D. Cal. Mar. 11, 2016), the plaintiff sought permission to serve a deposition subpoena by alternative means after attempting personal service on the defendant on at least 18 different occasions. The plaintiff had also contacted the defendant’s counsel, who informed the plaintiff he was instructed not to accept service on behalf of his client. The court agreed that the Federal Rules should not be “construed as a shield for a witness who is purposefully attempted to evade service.” *Id.* (quoting *Toni Brattin & Co. v. Mosaic Int’l, LLC*, 15-mc-80090-MEJ, 2015 WL 1844056, at *3 (N.D. Cal. Apr. 9, 2015)). Accordingly, the court held alternative means was appropriate under the circumstances.
3. Notice must be given generally. If the subpoena commands production of documents, ESI, tangible things, or the inspection of premises before trial, then before it is served on the person to

whom it is directed, notice must be served on each party. Fed. R. Civ. P. 45(a)(4).

C. The Place of Compliance Rule 45(c)(1) & (2).

1. For hearing, trial, or deposition, within 100 miles from the place where the person resides, is employed, or regularly transacts business in person OR within the state the person is employed or regularly transacts business in person, if:
 - a. if person is a party or party's officer; or
 - b. the person is commanded to attend a trial and not incur substantial expense.
2. For production, at a place reasonably convenient to the person commanded to produce. Note: Don't forget the mandate of Rule 45 (c) – take reasonable steps to avoid imposing an undue burden or expense on the person subpoenaed.
3. For inspection, at the premises.

D. Transfer of Motions to the “Home” Court.

1. Where compliance is required, the court can transfer substantive related motions to the district where the case is pending with the consent of the person subpoenaed or on a finding of “exceptional circumstances.”
2. No precise definition of “exceptional circumstances” is given, and the Advisory Committee Notes state that it is not feasible to do so. The concept is summed up in the Advisory Committee Notes as a balance between “avoiding burdens on local nonparties subject to subpoenas” and “avoid[ing] disrupting the issuing court's management of the underlying litigation[.]” Examples stated in the Notes are:

- a. Issues that have already been presented to the issuing court or significantly bear on management of the underlying action;
 - b. A risk of inconsistent rulings on subpoenas issued in multiple districts; or
 - c. Issues presented with the subpoena overlap with the merits.
3. The proponent of the transfer bears the burden, and the court can raise the issue *sua sponte*. The Rule contemplates that transfers will be truly rare events.
 4. An attorney for the person subpoenaed may file papers and appear as an officer of the issuing court for purposes related to the enforcement hearing.
 5. The Notes suggest that the issuing court can re-transfer the matter for future proceedings back to the court where compliance is required after the resolution of any specific matters.

E. Scope of Discovery.

1. In general, there is no prohibition on discovery from non-parties to a lawsuit. *See Truswal Sys. Corp. v. Hydro-Air Engr., Inc.*, 813 F.2d 1207, 1210 (Fed. Cir. 1987). Rule 45 governs discovery of non-parties by subpoena. *See Fed. R. Civ. P. 45*. A non-party witness is subject to the same scope of discovery under Rule 45 as a party is under Rule 34. *See Fed. R. Civ. P. 45* (Advisory Committee Note to the 1970 amendments). A party seeking to quash a subpoena *duces tecum*⁴⁰ bears a heavy burden compared to a party seeking only limited protection. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 669 F.2d 620, 623 (10th Cir. 1982).

⁴⁰ *Duces tecum* is a summons to produce evidence for a trial.

2. “A district court whose only connection with a case is supervision of discovery ancillary to an action in another district should be especially hesitant to pass judgment on what constitutes relevant evidence thereunder. Where relevance is in doubt . . . the court should be permissive.” *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 681 (N.D. Cal. 2006) (quoting *Truswal*, 813 F.2d at 1211–12). However, a court must limit the extent or frequency of discovery if it finds that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii). 3. Protection is also offered in some cases under Rule 45(c)(3)(B)(ii). The purpose of that Rule is to protect the intellectual property of a non-party witness by giving them an opportunity to bargain for the value of their services. *Klay v. All Defendants*, 425 F.3d 977 (11th Cir. 2005) (citing Fed. R. Civ. P. 45(c)(3)(B)(ii) Advisory Committee Note 1991).

F. Electronically Stored Information.

All of the ESI amendments have been incorporated into Rule 45 and must be considered when a production of “documents” is sought. See Chapter X.

G. Sanctions.

1. Rule 45(g) provides the court where compliance is held, where discovery is taken, or where an issue is transferred with the power to hold a person in contempt.
2. Rule 37(b) provides sanctioning authority to the court where compliance is held, where discovery is taken, or where an issue is transferred with the power to hold a person in contempt.

XX. RULE 37(c) FAILURE TO DISCLOSE; FALSE OR MISLEADING DISCLOSURE; REFUSAL TO ADMIT

A. Evidence is Excluded for Failure to Disclose or Supplement.

Failure to disclose or supplement a disclosure under Rule 26(a) (initial disclosure) or Rule 26(e)(1) (supplementation of disclosures) is subject to the sanction that the undisclosed materials will be excluded at trial. In fact, the Rule establishes exclusion as an automatic or self-executing sanction eliminating the need for a motion in this regard. These provisions to Rule 26 were added in the 1993 amendments. Before the 2000 amendments, except in situations where compliance with Rule 26(a) had been specifically ordered in the case, these rules were inapplicable in most cases in the Southern District of California. This was a result of the district's "opting out" of the use of the Rule 26 disclosure provisions in all its cases. As a result, supplementing disclosures was a rare occurrence. The duty to supplement discovery under Rule 26(e)(2) has been in force and effect, however, since 1993. However, as described below, it was not subject to this automatic or self-executing sanction as it is now.

B. Failure to Amend Discovery Will Carry Equal Sanctions.

When the 1993 amendments to Rule 37(c) were added, a remedy under Rule 37 for a violation of the duty to supplement discovery responses pursuant to Rule 26(e)(2) was omitted. As a result, sanctions for violation of the duty to supplement discovery responses remained within the sound discretion of the

court.⁴¹ This omission has been corrected in the current form of the Rule. Therefore, a failure to make a timely amendment to discovery responses can lead to the exclusion of the undisclosed information at trial.

C. Relief Based Upon Substantial Justification or Harmless Failure.

Rule 37(c)(1) states “[i]f a party fails to provide information or identify a witness as required by 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was **substantially justified** or is **harmless**.” (*emphasis added*.) The terms “substantially justified” and “harmless” are retained from the 1993 amendments. The only change made in 2000 was explicit language adding the failure to comply with Rule 26(e)(2) as a ground for sanctions.

1. The Committee Note to the 1993 amendments states that the automatic sanction is limited to violations “without substantial justification,” coupled with the exception for violations that are “harmless” in order to avoid unduly harsh penalties. The Notes go on to describe a variety of situations including “the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness, a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures.” Making a case for substantial justification should

⁴¹ *Heinz v. Joy Mfg. Co.*, 850 F.2d 1146 (6th Cir. 1988); *Phil Crowley Steel Corp. v. Macomber, Inc.*, 601 F.2d 342 (8th Cir. 1979). Evidence relating to new matter not disclosed as required by Rule 26(e) was excluded on occasion. In determining whether evidence not revealed in discovery supplementation should be excluded, courts historically consider a number of factors: (1) the importance of the evidence to the propounding party’s case; (2) the prejudice to the opposing party if evidence is admitted; (3) the inability to cure the prejudice to the opposing party if evidence is admitted; (4) the lack of any explanation for the failure to supplement or amend the discovery response; and (5) the inability of the objecting party to develop a response to evidence not revealed during discovery. *Johnson v. H.K. Webster, Inc.*, 775 F.2d 1 (1st Cir. 1985); *Texas A&M Research Foundation v. Magna Transp. Inc.*, 338 F.3d 394 (5th Cir. 2003). Examination of these factors may remain appropriate if the court determines that case terminating sanctions should be imposed in lieu of the exclusion of evidence or where the court bases its decision to exclude evidence upon the provisions of Rule 37(b)(2) for failure to comply with a court order to provide discovery. *Wendt v. Host Int’l*, 125 F.3d 806, 814 (9th Cir. 1997); *Yeti by Molly, Ltd. V. Deckers*, 259 F.3d 1101, 1106 (9th Cir. 2001).

be interpreted with the inadvertent or excusable neglect type of circumstances described by the Advisory Committee.

2. Prior to the 1993 amendments, exclusion of evidence was considered an extreme sanction. *Outley v. City of New York*, 837 F.2d 587 (2d Cir. 1988). It is clear, however, that the self-executing, automatic exclusion requirement imposed by Rule 37(c)(1) is intended to “provide [] a strong inducement for disclosure of material[.]” Fed. R. Civ. P. 37 Advisory Committee Note (1993). Therefore, there is no requirement that the court find that the failure to disclose was willful or in bad faith. *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). This is true even when the exclusion sanction will result in a litigant’s entire cause of action or defense being precluded. *Id.*; see also *Ortiz-Lopez v. Sociedad Espanola*, 248 F.3d 29, 35 (1st Cir. 2001). Furthermore, the burden is upon the party facing sanctions to show that the failure to disclose was substantially justified or harmless. *Yeti by Molly*, 259 F.3d at 1107.

3. When the party recognizes they have missed a critical deadline, the earlier that a motion for relief can be brought, the better the prospects for relief. This is because the question of whether the failure was “harmless” is directly tied to the timing of the case. Where the motion for relief is brought close to or during trial, issues regarding prejudice, cure, and diligence abound. The issue of whether relief should be granted is dispositive in nature. As such, it is outside the general pretrial jurisdiction of the magistrate judge to decide, unless the parties have consented to the magistrate judge’s dispositive jurisdiction under 28 U.S.C. § 636(c). Magistrate judges can impose sanctions in any case assigned to them. Issues of evidence preclusion, however, like dismissal, are dispositive matters. *Grimes v. City and Cty. of San Francisco*, 951 F.3d 236 (9th Cir. 1991); *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458 (10th Cir. 1988); *Retired Chicago Police Ass’n. v. City of Chicago*, 76 F.3d 856 (7th Cir. 1991) (*cert. denied* 519 U.S. 932 (1996)). While a magistrate judge can hear

the matter and make a report and recommendation concerning the issue, this is a disfavored practice in the Southern District of California. If the parties want the magistrate judge to consider the issue of preclusion, they would need to consent to the magistrate judge's jurisdiction in that regard, and the consent would need to be approved by the assigned district judge.

D. Full Scope of Sanctions.

Under the provisions of Rule 37(c)(1), beyond exclusion of the information at trial, the court can also require the non-disclosing party to pay reasonable expenses, including attorney's fees, caused by the failure. In addition, or in lieu of the exclusion sanction, the court may impose any of the sanctions authorized by Rule 37(b)(2)(A), (B), or (C) and may inform the jury of the failure to make the required disclosure or discovery amendment.

E. Sanctions and ESI.

The December 2015 changes to Rule 37(e) instituted specific rules in dealing with the destruction of ESI. This issue is discussed in greater detail in Section X.H.

F. Spoliation.

Spoliation refers to the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). The elements to establish spoliation are: (1) a duty to preserve the evidence; (2) destruction with a culpable state of mind; and (3) that the evidence was relevant. *Zubulake v. UBS Warburg, Inc.*, 229 F.R.D. 422, 430 (S.D.N.Y. 2004) ("*Zubulake V*") (citing cases). Intentional or willful destruction by itself is sufficient to demonstrate relevance. *Id.*

XXI. EARLY NEUTRAL EVALUATION AND CASE MANAGEMENT CONFERENCE PROCEEDINGS

A. Timing of Early Neutral Evaluation Conferences.

1. In the Southern District of California, Local Civil Rule 16.1.c requires an Early Neutral Evaluation Conference within 45 days of the filing of an answer, except in patent cases where the conference is set within 60 days. *See* Patent L.R.2.1.a. Counsel and parties are required to appear before the magistrate judge supervising the pretrial management of the case for the conference.
2. These conferences are critical in the court's case management process and have a significant impact on early resolution. Statistics from the Clerk of the Southern District of California have demonstrated that 24 percent of all cases proceeding to an Early Neutral Evaluation in 1998 settled prior to a Case Management Conference. For 1999, 38% of Early Neutral Evaluation bound cases settled with or after the conference and before a Case Management Conference was convened. A 2009 statistical review confirms that percentage remains steady.

B. Timing of Case Management Conferences.

1. The court must schedule a Case Management Conference within 90 days of a defendant being served or within 60 days of a defendant's first appearance.⁴² Fed. R. Civ. P. 16(b) This timing is subject to extension in the court's discretion. Case Management Conferences are also required to follow within 30 days of the Early Neutral Evaluation Conference or 60 days after the Early Neutral Evaluation if arbitration or mediation is ordered.

⁴² Prior to December 1, 2015, Rule 16(b) required the Conference with 90 days of the filing of an appearance of a defendant and before 90 days after the filing of a complaint. To preserve the integrity of the Early Neutral Evaluation Conference, Local Rule 16.1 was amended to state good cause to delay these dates when the early settlement process is underway.

Local Civil Rule 16.1.c.2.a. and b. Again, the court, in its discretion, can extend this time.

2. In many cases, the Case Management Conference is conducted at the conclusion of the Early Neutral Evaluation Conference when early settlement is not likely. However, a Case Management Conference will not occur at the Early Neutral Evaluation Conference unless compliance with Rule 26(a)(1) initial disclosure is excused by court order or the parties have already conducted their Rule 26(f) conference.

C. Expanded Scope of the Early Neutral Evaluation Conference.

1. In addition to the promulgated purposes for the Early Neutral Evaluation Conference, the amendments to Rule 26 have expanded the agenda for the Early Neutral Evaluation Conference. The magistrate judges of the Southern District of California believe that the Early Neutral Evaluation Conference will be an opportune time to help the parties coordinate their compliance with Rule 26 disclosures and the Rule 26(f) conference. The authority of the court to address these issues at the Early Neutral Evaluation Conference is contained in Federal Rule 16(a) and (c)(6).
2. Counsel must be prepared to discuss the following at the Early Neutral Evaluation Conference:
 - a. Setting the Rule 26(f) conference;
 - b. Objections to initial disclosure provisions of Rule 26;
 - c. Format of the Rule 26 conference (*i.e.*, in person or telephonic);
 - d. The scheduling of the initial disclosure date;
 - e. The filing date for a discovery plan; and,

- f. The date for the Case Management Conference.
3. This agenda is ordered as part of the order setting the Early Neutral Evaluation Conference.
 4. The parties can expect to leave the Early Neutral Evaluation Conference with Rule 26 compliance dates or deadlines. The timing of the typical case required by Rules 16(b) and 26, respectively, will generally lead to the setting of the following dates:
 - a. A Rule 26(f) conference no more than 24 days following the Early Neutral Evaluation Conference;
 - b. Disclosure deadline in the filing of a discovery plan within 14 days of the Rule 26(f) meeting, and,
 - c. A Case Management Conference 21 days following the Rule 26(f) conference (45 days after the Early Neutral Evaluation Conference).

Added together, the time from the filing of the first answer through the Case Management Conference will total 90 days. Within that time, Rule 26(a) initial disclosure compliance will be achieved. The Rule 26 compliance dates and deadlines are consistent with the Southern District's plan for reducing costs and delay, as set forth in Local Civil Rule 16.5.⁴³

D. Scope of the Case Management Conference.

The agenda for the Case Management Conference has expanded over time from merely the setting of final dates and deadlines to include the following:

⁴³ Local Civil Rule 16.5.c requires early trial dates, and sets a goal for setting the majority of non-complex cases for trial within 18 months from the filing of the complaint.

- a. Review of the joint discovery plan submitted by the parties (*See* The Joint Discovery Plan, Chapter IV);
- b. The resolution of any issues regarding deposition time limits or the number of depositions per side in the case;
- c. Provisions for the preservation and discovery of ESI, including the form or forms in which it should be provided. Rule 16(b)(3)(B);
- d. The parties' agreement, if any, for protection against a waiver of privilege (FRE 502). *Id.*

XXII. RESOLVING DISCOVERY DISPUTES IN THE SOUTHERN DISTRICT OF CALIFORNIA

A. Magistrate Judge Jurisdiction.

Discovery disputes are handled by magistrate judges pursuant to Local Civil Rule 72.1.b., Fed. R. Civ. P. 72(a) and 28 U.S.C. § 636(b)(1)(A). Discovery rulings are appealable to the district judge assigned to the case. Any objections to the magistrate judge's orders must be filed within fourteen (14) days of service of the order. A failure to object within this time will waive any right to appeal the order to the Court of Appeals after the disposition of the case is final in the district court. Fed. R. Civ. P. 72(a); *McKeever v. Block*, 932 F.2d 795 (9th Cir. 1991). The standard of review is whether the magistrate judge's order is clearly erroneous or contrary to law. *Id.* (See, J, below.)

B. Procedures.

The procedures and practices vary from judge to judge. Magistrate judges have wide discretion in approaching the resolution of discovery disputes. This would include varying all or part of the formal briefing requirements for motions under Local Civil Rule 7.1.f. *See* Local Civil Rule 26.1.e. Practices vary from informal discovery conferences (including

telephonic conferences, with or without informal letter briefs) to formal motions. While formal motions may proceed on typical time lines (*See* Local Civil Rule 7.1.e), shortened briefing schedules are often used. Counsel should contact the judge’s law clerk for guidance on the particular procedure to be used in that court.

C. Meet and Confer Requirement.

All judges require counsel’s compliance with Local Civil Rule 26.1.a. “The Court will entertain no motion pursuant to Rules 26 through 37, Fed. R. Civ. P., unless counsel will have previously met and conferred concerning all disputed issues.” *Id.* “If counsel have offices in the same county, they are to meet in person. If counsel have offices in different counties, they are to confer by telephone. Under no circumstances may the parties satisfy the meet and confer requirement by exchanging written correspondence.” *Id.* (emphasis added). A certificate of compliance regarding the meet and confer must be filed by the moving party concerning the dispute. Local Civil Rule 26.1.b.

D. Joint Statements.

Many magistrate judges in the Southern District of California require a joint statement of parties in connection with resolving discovery disputes. This is sometimes in lieu of, or in addition to, any briefing. Counsel should consult the court’s website at www.casd.uscourts.gov to review the rules of the various magistrate judges in this regard. Many of these will include the following:

1. The exact wording of the document or things requested to be produced or the exact wording of the interrogatory or request for admission asked;
2. The exact response to the request by the responding party;
3. A statement by the propounding party as to why the documents should be produced or why the interrogatory or request for admission should be answered; and

4. A precise statement by the responding party as to the basis for all objections and/or claims of privilege, including the legal basis for all privileges.

As noted, judges vary in their practices, and this is a topic to raise with the judge's law clerk when seeking a hearing date on a discovery issue. Be mindful, however, of ethical considerations when making an *ex parte* contact of this type. These communications must be limited to routine matters of case management (*e.g.*, getting a hearing date) and not discussion on the merits of any substantive issues. *See* The ABA Model Code of Judicial Conduct, ABA Model Rule 2.9.

E. Depositions.

Disputes regarding depositions, by their nature and due to the expense involved, often need immediate action. If a discovery dispute arises during the deposition, counsel may contact the court for assistance. The judge is not necessarily going to be able to handle the issue during the call. However, attempts will be made to resolve the issue before the deposition is concluded. In the interest of time and efficiency, counsel should proceed with the deposition on other topics and matters in the interim.

Counsel should attempt to confer and resolve the issues first. Counsel should also be mindful of, and adhere to, the rules applicable to depositions. *See* Chapter XIV.

F. Ex Parte Practice.

Unlike practice in many state courts, the Southern District of California does not set regular *ex parte* hearing days or hours. Where appropriate, *ex parte* applications may be made at any time after the first contacting the court's law clerk. *See* Civ. L.R. 83.3.h generally in this regard.

Most judges follow a similar procedure, and these are often specified in chamber's rules. For example, Judge Battaglia's chamber's rules require "[b]efore filing an *ex parte* motion, counsel must contact the opposing party

to meet and confer regarding the subject of the *ex parte* motion. All *ex parte* motions will be accompanied by a declaration from counsel documenting: (1) efforts to contact opposing counsel; (2) counsel's meet and confer efforts; and (3) opposing counsel's position regarding the *ex parte* motion. Any *ex parte* motion filed with the Court must be served on opposing counsel via facsimile, electronic mail with return receipt requested, or overnight mail. After service of the *ex parte* motion, opposing counsel will ordinarily be given until 5:00 p.m. on the next business day to respond. If more time is needed, opposing counsel must call the law clerk to modify the schedule. *Ex parte* motions that are not opposed, will be considered unopposed and *may* be granted on that ground. After receipt, moving and opposing *ex parte* papers will be reviewed and a decision will be made without a hearing. If the Court requires a hearing, the parties will be contacted to set a date and time." Chamber's rules for the various judges can be found on the court's web site, www.casd.uscourts.gov, under the "Rules" tab.

G. Motions to Compel.

Judges have varying practices in handling motions to compel. Counsel should check local rules or chambers rules for the procedure. While many motions to compel will require a formal briefing and hearing schedule, many can be resolved in short order through a discovery conference or other abbreviated mechanisms. The key in succeeding on a motion to compel is, of course, completing the meet and confer obligation under Rule 26 first. If you haven't fully discharged the meet and confer obligation, you cannot succeed, and your application will be rejected out of hand. A proper meet and confer obligation also resolves issues informally, or at least narrows the issues for adjudication. This is the most efficient and expeditious use of your time.

H. Motions for Protective Orders to Seal Documents.

Courts have long recognized the need to balance the public's right to access of court documents with the privacy needs of litigants. Virtually every case has some proprietary, private or sensitive information where the issue is raised. This occurs typically in discovery, as well as in pleadings, evidence

and sometimes testimony. These matters are dealt with in three discrete parts: first, docketed motions for protective orders; stipulated protective orders [*See Section H(5)* below]; and sealing orders (*See Section I.* below).

1. Court’s Authority.

- a. The federal court has both inherent and specific rule-based authority to grant protective orders. Fed. R. Civ. P 26(c) discusses protective or confidentiality orders in the context of discovery. There is no national procedural rule or general statute for sealing criminal or civil documents. However, courts have inherent authority over all files and records filed with the court and power to grant orders of confidentiality over materials not in the court file. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984).
- b. In *Seattle Times*, the court noted that, “we have no question as to the court’s jurisdiction to [enter protective orders] under the inherent ‘equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices[.]’” *Id.* at 35. “In the absence of procedural rules specifically covering a situation, a court may, pursuant to its inherent power . . . fashion a rule not inconsistent with the Federal Rules.” *Franquez v. United States*, 604 F.2d 1239, 1244– 45 (9th Cir. 1979).

2. Standard of Review.

- a. Fed. R. Civ. P. 26(c)(1) specifically provides, “[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]” In exercising its authority, the court may totally limit certain inquiry and discovery [26(c)(1)(A)] limit the terms, conditions, or methods used [26(c)(1)(B)- (D)]; order that trade secret or other confidential research, development or commercial information not be revealed or revealed in a designated way

(i.e., under seal) [26(c)(1)(G)]; or that documents or information be filed in a sealed envelope to be opened as directed by the court [26(c)(1)(H)].

- b. Beyond the specific constraints of Rule 26(c), courts using their inherent authority have prevented disclosure of many types of information. *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206 (9th Cir. 2002). The *Phillips* court notes and cites to examples of cases involving a variety of different classifications of information including attorney client communications, medical and psychiatric records, federal grand jury records, and confidential settlement agreements, to name a few. *Id.* at 1211.

3. The Public's Right to Access.

- a. The public's right of access springs from three basic sources. The first is the common law right recognized by case law and based upon the openness of our democratic process. As one court has noted, "[w]hat happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records." *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000).
- b. This common law right creates a strong presumption in favor of access which can be overcome only by showing sufficiently important countervailing interests. *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). Courts will look to the "public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets." *Hagestad*, 49 F.3d at 1434. Massachusetts Supreme Court Justice Oliver Wendell Holmes explained that public access to civil judicial proceedings was "of vast

importance” because of “the security which publicity gives for the proper administration of justice.” *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

- c. As noted above, the federal common law right of access does not apply to documents filed under seal for good cause shown. *United States v. Corbitt*, 879 F.2d 224 (7th Cir. 1989). In these circumstances, a court has found sufficiently important countervailing interests.
- d. The second source of the public’s access right is the First Amendment. As it applies to criminal cases, the press and public cannot be excluded from a criminal proceeding without a showing that the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest. *Globe Newspaper Co. v. Superior Court of County for Norfolk Cty.*, 457 U.S. 596, 607 (1982). With respect to discovery materials in civil cases, a different standard applies. Specifically, upon a showing of good cause, the court has discretion to issue a protective order forbidding disclosure of material acquired in discovery. *McCarthy v. Barnett Bank of Polk County*, 8769 F. 2d 89, 91 (11th Cir. 1989). The burden of showing good cause falls on the party seeking the protection. *Id.*
- e. This right, unlike the common law right of access, is limited to documents in the public record. If the information is not part of the public record, there is no First Amendment right to access. *Seattle Times Co.*, 467 U.S. 20. In a practical sense, there is little distinction between the common law right of access and the First Amendment rights of access in civil cases. The court must carefully balance the respective interests in either case and the same standard of good cause applies to both. Often, courts resolve issues on the common law analysis without ever reaching the First Amendment issue. The First Amendment right takes on a greater role in criminal cases where the higher standard against disclosure applies.

- f. Finally, the discovery rules themselves provide a source of the public nature of discovery. Under Rule 26, there are limited circumstances and situations where files, materials, or information can be sealed or limited in use. The case law has addressed the presumptively public nature of pretrial discovery. *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999).

4. Showing Good Cause.

- a. The party or person seeking the protective order bears the burden of “good cause.” They must make a clear showing of a particular and specific need for the order. The “need” is typically a showing of the harm or prejudice that would follow disclosure. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).
- b. Courts have said that, “[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test[.]” *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992). Embarrassing or only slightly harmful is not a sufficient basis for protection. *Ericson v. Ford Motor Co.*, 107 F.R.D. 92 (E.D. Ark. 1985). Fed. R. Civ. P 26(C) lays the basic groundwork on this issue.
- c. However, even if good cause exists, the court must balance the interests in allowing discovery against the relative burdens to the parties and nonparties (*i.e.*, the public). The party seeking disclosure has the burden to show that the information sought is relevant and necessary for discovery in the litigation. *In re Remington Arms Co*, 952 F.2d 1029 (8th Cir. 1991); *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 669 F.2d 620 (10th Cir. 1982). As to the public, the court must balance the potential harm to the litigants’ interests against the public’s right to

access to court files. Any protective order must be narrowly drawn to reflect that balance. *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943 (7th Cir. 1999).

- d. The court does not necessarily have to determine good cause on a document-by-document basis. There needs to be at least some properly demarcated category of legitimately confidential information. *Id.* at 946. The Ninth Circuit has generally followed the Seventh Circuit approach. *Hagestad*, 49 F.3d at 1434; *Valley Broad. Co. v. U.S. Dist. Ct. for Dist. Of Nevada*, 798 F.2d 1289 (9th Cir. 1986).
- e. Factors that may be relevant include: whether disclosure will violate any privacy interests; whether the information sought is for a legitimate purpose or for an improper purpose; whether there is a threat of particularly serious embarrassment to a party or person; whether the information is important to public health and safety; whether the sharing of information among litigants would promote fairness and efficiency; whether person benefitting from confidentiality order is a public entity or official; and whether the case involves issues important to the public. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994). On the other hand, if a case involves private litigants and concerns matters of little legitimate public interest, that may weigh in favor of granting or maintaining an order of confidentiality. *Id.* at 788. These factors are neither mandatory nor exhaustive. *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476 (3d Cir. 1995).
- f. Another significant factor is the judiciary's strong feelings favoring disclosure of information to meet the needs of the parties in pending litigation. *Olympic Refining Co. v. Carter*, 332 F.2d 260, 264–65 (9th Cir. 1964) (*cert denied*, 379 U.S. 900 (1964)). This strong interest in disclosure and the public nature of litigation matters has led to a general policy of disfavor toward sealing orders.

- g. In the area of trade secrets, case law has provided other useful factors for courts to consider. Many of these were set out by the court in *United States v. Int'l Bus. Machines Corp.* 82 F.R.D. 183 (S.D.N.Y. 1979). These include:
 - i. The extent to which the information is known outside the party's business;
 - ii. The extent to which it is known by employees or others involved in the business;
 - iii. The extent of measures taken by a party to guard the secrecy of the information;
 - iv. The value of the information to the party or to the party's competitors;
 - v. The amount of effort or money expended by the party in developing the information; and,
 - vi. The ease or difficulty with which the information could be properly acquired or duplicated by others.

5. Stipulated Protective Orders.

- a. Even where parties or other persons agree to a protective order, their stipulation carries the same "good cause" burden. *Gray v. First Winthrop Corp.*, 133 F.R.D. 39 (N.D. Cal. 1990); *Makar-Wellbon v. Sony Elecs., Inc.*, 187 F.R.D. 576 (E.D. Wis. 1999).; *Phillips*, 307 F.3d 1206. A court may not "rubber stamp a stipulation to seal the record" under federal procedural rules. *In re Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 184 F. Supp. 2d 1353, 1363 (N.D. Ga. 2002). This is true even regarding the somewhat standard "umbrella" or "blanket" styled protective orders, which categorically (rather than on a

document specific basis) protect certain records from disclosure. To be accepted, the umbrella or blanket styled order needs to have some properly demarcated category of legitimately confidential information. *Citizens First Nat'l Bank of Princeton*, 178 F.3d at 946. The *Citizens* court noted specifically that:

There is no objection to an order that allows the parties to keep their trade secrets (or some other properly demarcated category of legitimately confidential information) out of the public record, provided the judge (1) satisfies himself that the parties know what a trade secret is and are acting in good faith in deciding which parts of the record are trade secrets and (2) makes explicit that either party and any interested member of the public can challenge the secreting of particular documents. *Citizens First Nat'l Bank of Princeton*, 178 F.3d at 946.

- b. The reason in this regard is fairly simple: the public's right of access, discussed further below, is affected. "The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it)." Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 492 (1991). *See also Pansy*, 23 F.3d at 551.
- c. There is great utility to "umbrella" or "blanket" styled protective orders. These documents allow cases to proceed expeditiously, especially where thousands of documents are involved. The *Citizens* court also noted the excessive burden and impact a document-by-document review would have on district judges and magistrate judges. That same burden and a significant expense would also be levied on the parties and their counsel if this flexible tool were not

utilized. The threshold findings allow the parties to proceed while the ultimate issue of the public's access rights is preserved.

- d. This approach guided the court in the case of *Cook Inc. v. Bos. Sci. Corp.*, 206 F.R.D. 244 (S.D. Ind. 2001). In a case where a manufacturer of a medical device sued a competitor for alleged copyright infringement, the parties sought a protective order but disagreed as to a specific definition of trade secrets. The court found the parties had two paths – either agree to an appropriate definition of trade secrets, or list discrete categories of documents by subject matter with supporting arguments showing that the category qualifies as protectable information and the specific competitive harm that was threatened.
- e. Blanket and umbrella orders are inherently subject to challenge since they are issued without the document-by-document particularized showing. *San Jose Mercury News*, 187 F.3d at 1103. Where, however, a court grants a protective order having determined good cause to protect particular information from being disclosed, the federal common law right of access does not apply to documents filed under seal for good cause shown. *Corbitt*, 879 F.2d 224. Applying a strong presumption of public access to the documents sealed after review by the court would “surely undermine, and possibly eviscerate, the broad power of the district court to fashion protective orders.” *Phillips*, 307 F.3d at 1213. So, while a court may grant a stipulated protective order that appears reasonable on its face, without a showing of good cause, the parties should not have any confidence that the order will not be set aside in the future as counsel experienced in *Citizens First Nat'l Bank of Princeton*, 178 F.3d 943, *Cook Inc.*, 206 F.R.D. 244, and *Phillips*, 307 F.3d 1206.

6. Getting the Stipulated Order Filed.

- a. Based on the foregoing, the basic approach to getting a stipulated protective order filed in a civil case is hopefully clear. The proposed protective order must set out the good cause showing, and where voluminous documents are involved, some properly demarcated category of legitimately confidential information must be identified. From there, the proposed protective order needs to be submitted to the judge assigned to the case for review. In the Southern District of California, this would be accomplished by a joint motion. The proposed protective order should be attached.
- b. Essentially, the proposed protective order needs to provide the court the ability to make two findings: (i) whether valid grounds exist for issuance of the order (*i.e.*, trade secret information); and (ii) that the litigant's interest in confidentiality outweighs the public's interest in access. *Chicago Tribune Co. v Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1313 (11th Cir. 2001).
- c. Stipulated protective orders in the Southern District of California must include a provision requiring advance approval by the judge hearing the case (or in Judge Moskowitz' cases, the assigned magistrate judge) before documents can be filed under seal. Appropriate language would be similar to the following:

“Nothing shall be filed under seal with the court, and the court shall not be required to take any action, without separate prior order by the Judge before whom the hearing or proceeding will take place, after application by the affected party with appropriate notice to opposing counsel.”

Where this provision is omitted, the reviewing magistrate judge will either return the proposed protective order for revision along these lines or issue an amendment entered by separate order, either way creating a delay in ultimate entry of the order.

- d. One recurring problem in dealing with protective orders is a dispute arising at the end of the case over the complete return of the confidential documents and any copies made. To avoid the dispute, or help the court address the situation, a helpful provision for the order is as follows:

The party receiving “Confidential”
or “Confidential for Attorneys”
only material shall handle copies of
said material as follows:

- 1 Any copies of the confidential material or portion thereof shall be recorded in a copy log;
- 2 Each such copy shall be identified in the copy log by:
 - i. a copy number;
 - ii. the date the copy was made; and
 - iii. the person to whom the copy was provided.
- 3 Each such copy shall be physically marked with the document number and copy number. The copy log shall be provided to the producing party upon the return and/or at the time of destruction of the confidential

materials pursuant to the Stipulated Protective Order.

While a provision like this will not resolve the issue entirely, it will help. The copy log can provide some level of comfort that the protective order has been complied with. Absent something like this, the efforts to reconstruct the history of copies and transmissions is an arduous task.

7. **Sunset Provisions.**

Counsel often include provisions for the court to continue to exercise jurisdiction over the subject of the protective order long after the final disposition of the case. The judges in the Southern District of California are reluctant to leave the file subject to reopening over an extended period of time. In most instances, a judge will insert a period of one to two years to allow the parties to conclude their affairs. Counsel should discuss resolving this issue at the time of the negotiation of the stipulated protective order and consider the court's position in this regard. *See* Subsection 8.g., below.

8. **Settlement Agreements.**

- a. Confidential settlement agreements are ordinarily private documents that do not have to be disclosed. If the information is not part of the public record, there is no First Amendment right to access. *Seattle Times Co.*, 467 U.S. 20. However, where a "confidential" agreement makes its way into the court file, it is subject to disclosure. *Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002). In addition, when parties to a confidential settlement agreement ask a court to interpret or enforce their agreement, the contract enters the record and thus becomes available to the court (and therefore the public). *Herrnreiter v. Chicago Housing Auth.*, 281 F.3d 634 (7th Cir. 2002). *In Bank of America*,

the court held that "the court's approval of a settlement or action on a motion are matters which the public has the right to know about and evaluate." *Bank of America Nat'l Trust v. Hotel Rittenhouse Associates*, 800 F.2d 339, 344 (3d Cir. 1986).

- b. What brings the settlement agreement into the public record is the subject of several court decisions. In *Pansy*, the court held that even though the court briefly reviewed the settlement agreement, ordered it dismissed and entered a "confidentiality order," the settlement was not a "judicial record" since the settlement agreement was not on file with the court, nor had it been interpreted or enforced by the court. *Pansy*, 23 F.3d 772 (citing *Enprotech Corp. v. Renda*, 983 F.2d 17 (3rd Cir. 1993)). In *Enprotech*, the district court specifically retained jurisdiction over the settlement agreement until its expiration so that it could enforce its terms. However, *Enprotech's* settlement agreement had remained completely confidential, had never been filed with the district court, and had never been interpreted or ordered enforced by the district court. Just because the court signed "so ordered" on the parties' stipulation of dismissal and noted their compliance with the terms and conditions of *Enprotech's* confidential settlement agreement, the agreement is not part of the record. *Enprotech Corp.*, 983 F.2d at 21.
- c. The issue of sealing specifically arises when the parties request that a settlement be placed "on the record." As the case law cited has stated, this action becomes a matter of public record. Where the parties indicate that the settlement is "confidential," they are required to meet the same "good cause" showing and the same analysis and findings by the court must be made before the record can be sealed. The district court should not rely on the general interest in encouraging settlement to enter a confidentiality order, but should require a particularized showing of the need for confidentiality in reaching settlement. *Pansy*, 23 F.3d 772.

Public policy limitations will apply when continuing danger to the public from products or practices exist or a public official or other public interest is involved.

- d. Since private documents do not generally need to be disclosed, counsel should consider whether they can satisfy their burden to gain a sealed record or would rather rely on the private agreement. Where the settlement is not made part of the record, the “confidentiality” provision is still subject to the standard protective order analysis set forth above *if* someone seeks the information prospectively. In this context, however, many of the reasons supporting the public’s right to know about public records and discovery materials may be outweighed by other considerations.
- e. Certainly, confidential settlements can be a benefit to society, since the fact of confidentiality itself may, in some circumstances, facilitate the settlement itself. Interests in keeping settlement amounts confidential to avoid encouraging nuisance claims or potential harassment of the party receiving compensation are all laudable goals. Each case must be reviewed on its particular interest, however, and the public’s right to know must be considered. It’s one thing to buy one’s peace and quite another to buy another’s silence. The public has a strong interest in not allowing parties to conceal information that is of legitimate public concern. *Kalinauskas v. Wong*, 151 F.R.D. 363, 365 (D. Nev. 1993). This concern is more pressing as additional individuals are harmed by identical or similar action. *Id.* at 366. Public policy limitations will always apply and will present a formidable basis for disclosure when a continuing danger to the health or well-being of the public from products, practices, or misconduct exists or the information is of legitimate public concern.
- f. Even where sealed by the court, information may later become available by subpoena to a grand jury since the public importance of the investigative function of

government typically outweighs the interest supporting the granting of the protective order. *In Re Grand Jury*, 286 F.3d 153 (3d Cir. 2002).

- g. If later enforcement of the settlement is a concern, the parties can ensure continuing jurisdiction in the federal court by following the standards set in *Kokkenen*:

If the parties *wish* to provide for the court's enforcement of a dismissal-producing settlement agreement, they can seek to do so. When the dismissal is pursuant to [Federal Rule of Civil Procedure 41(a)(2), which specifies that the action "shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper," the parties' compliance with the terms of the settlement contract (or the court's "retention of jurisdiction" over the settlement contract) may, in the court's discretion, be one of the terms set forth in the order.

Kokkenen v. Guardian Life Ins. Co., 511 U.S. 375, 381 (1994).

- h. It is important to consider the time continuing jurisdiction is required. Very few judges will accept continuing jurisdiction forever. If there are executory terms of the settlement agreement that provide for a specific period for compliance, then the term of continuing jurisdiction should be keyed to that time period. If, on the other hand, the issues in the settlement include an injunction or some other term that may require continued jurisdiction for an indefinite time period, best practice would be to state that

in the request for the entry of dismissal to avoid its rejection and further work in connection with closing the case.

I. Sealing Orders.

1. Despite the presumptive right of public access to court records based upon common law and First Amendment grounds,⁴⁴ courts may deny access in order to protect sensitive, personal, or confidential information.⁴⁵ The court may seal documents to protect sensitive information, however, the documents to be filed under seal will be limited by the court to ***only those documents, or portions thereof, necessary to protect such sensitive information.*** See *3B Med., Inc. v. Resmed Corp.*, 16-cv-02050-AJB-JMA, WL 6818953 (S.D. Cal. Oct. 11, 2016) (exhibits concerning product pricing and pricing estimates, sales strategies, contract negotiation, and company forecasts – but not emails regarding general business discussions – satisfied the “good cause” standard warranting seal)
2. Parties seeking a sealing order must provide the court with: (1) a specific description of particular documents, or categories of documents, they need to protect; and (2) affidavits showing good cause to protect those documents from disclosure. Where good cause is shown for a protective order, the court must balance the potential harm to the moving party’s interests against the public’s

⁴⁴ See *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 597 (1978); *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 603 (1982); *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002).

⁴⁵ Although courts may be more likely to order the protection of the information listed in Rule 26(c)(7) of the FRCP, courts have consistently prevented disclosure of many types of information, such as letters protected under attorney-client privilege which revealed the weaknesses in a party's position and was inadvertently sent to the opposing side [*see KL Group v. Case, Kay, and Lynch*, 829 F.2d 909, 917–19 (9th Cir.1987)]; medical and psychiatric records confidential under state law [*see Pearson v. Miller*, 211 F.3d 57, 62–64 (3d Cir. 2000)]; and federal and grand jury secrecy provisions [*see Krause v. Rhodes*, 671 F.2d 212, 216 (6th Cir. 1982)]. Most significantly, courts have granted protective orders to protect confidential settlement agreements. See *Hasbrouck v. BankAmerica Housing Serv.*, 187 F.R.D. 453, 455 (N.D.N.Y. 1999); *Kalinauskas v. Wong*, 151 F.R.D. 363, 365–67 (D. Nev. 1993).

right to access the court files. Any protective order must be narrowly drawn to reflect that balance. Any member of the public may challenge the sealing of any particular document. See *Citizens First Nat'l Bank of Princeton*, 178 F.3d at 944–45.

J. Appealing a Magistrate Judge's Discovery Order.

1. Timing for Objections.

- a. A party may file written objections to a magistrate judge's order within 14 days after being served with a copy. Fed. R. Civ. P. 72(a).
- b. Counsel should note that with electronic filing, service is immediate. See, e.g., Civ.L.R. 5.4.c. and d.
- c. A party may not assign as error a defect in the order not timely objected to. Fed. R. Civ. P. 72(a).

2. Standard of Review.

- a. A district judge must consider objections that are timely filed. *Id.*
- b. Discovery orders are ordinarily considered non-dispositive because they do not have the effect of dismissing a cause of action, a claim or a defense, affect the issuance of an injunction, or have some other conclusive consequence. *Maisonville v. F2 Am., Inc.*, 902 F.2d 746, 748 (9th Cir. 1990). Due to discovery motions' non-dispositive nature, decisions by a magistrate judge regarding the scope and nature of discovery are "afforded broad discretion, which will be overruled only if abused." *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 446 (C.D. Cal. 2007).
- c. For non-dispositive matters, like the majority of discovery rulings, the district judge in a case must modify or set aside

any part of the order that is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); *Grimes*, 951 F.2d at 240. The “clearly erroneous” standard applies to factual findings. *Brigham Young Univ. Pfizer, Inc.*, 06-cv-890-TS-BCW, 2010 WL 3855347, at *2 (D. Utah Sept. 29, 2010). In order for a district court to overturn a magistrate judge’s decision as clearly erroneous, the court must be left with a “definite and firm conviction that a mistake has been committed.” *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

- e. “Under the ‘contrary to law’ standard, the district court conducts a plenary review of the magistrate judge’s purely legal determinations, setting aside the magistrate judge’s order only if it applied an incorrect legal standard.” *Williams v. Vail Resorts Dev. Co.*, 02-cv-16-J, 2003 WL 25768656, at *2 (D. Wyo. Nov. 14, 2004).
- f. Note, that any matter considered "dispositive" is reviewed on a de novo standard. 28 U.S.C. § 636 (b)(1)(B) and Fed. R. Civ. P. 72(b).

3. Discovery Issues Warranting Interlocutory Appeal.

Although discovery orders are generally not immediately appealable to the circuit court, there are four limited circumstances in which parties can seek immediate appellate review of a magistrate judge's discovery order.

- a. The Collateral Order Doctrine.
 - i. The collateral order doctrine permits appeals from "a small class" of interlocutory orders. *See* 29 U.S.C. § 1291. Appealable collateral orders are those which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too

important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

- ii. The Ninth Circuit has clarified that to be appealable, an interlocutory order must satisfy three requirements: "(1) it must be conclusive; (2) it must resolve an important question separate from the merits; and (3) it must be effectively unreviewable on appeal from a final judgment." *Osband v. Woodford*, 290 F.3d 1036, 1039 (9th Cir. 2002) (quoting *Wharton v. Calderon*, 127 F.3d 1201 (9th Cir. 1997)) (The district court's denial to reconsider a magistrate judge's order allowing discovery of materials otherwise protected by evidentiary privileges, but subject to a protective order limiting the use of those materials, was an appealable collateral order).

b. Discretionary Certification of an Interlocutory Appeal.

- i. A district court can certify an order for interlocutory appeal if: (1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b). The appellate court may, in its discretion, permit an appeal to be taken from such order. *Id.* In *Transamerica Computer Co., Inc. v. Int'l Bus. Machines Corp.*, 573 F.2d 646 (9th Cir. 1978), certification of interlocutory appeal was appropriate where there was dispute as to whether appellee, because of its inadvertent production of documents in accelerated discovery proceedings in a prior unrelated suit, had waived its right to claim the same

documents were privileged and therefore not discoverable in the present suit.

ii. Application to the appellate court must be made within ten days of the entry of the order. *See* 28 U.S.C. § 1292(b). Additionally, an application for an appeal will not stay proceedings in the district court unless the district judge, appellate court, or a judge thereof, shall order otherwise. *Id.*

c. Petition for Writ of Mandamus.

i. Mandamus is a drastic remedy that is only appropriate in extraordinary circumstances. *See Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654 (9th Cir. 1977). Factors bearing on whether a writ should issue include: (1) "[t]he party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he or she desires;" (2) "[t]he petitioner will be damaged or prejudiced in a way not correctable on appeal;" (3) "[t]he district court's order is clearly erroneous as a matter of law;" (4) "[t]he district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules;" and (5) "[t]he district court's order raises new and important problems, or issues of law of first impression." *Id.* at 654–55.⁴⁶

ii. The 9th Circuit occasionally grants writ review for discovery orders, particularly those involving claims of privilege. *In Admiral Ins. Co. v. U.S. Dist. Court for Dist. Of Arizona*, 881 F.2d 1486 (9th Cir. 1989), the court granted a writ of mandamus vacating the

⁴⁶ Satisfaction of all five *Bauman* factors is not required. *See Valley Broadcasting Co. V. U.S. Dist. Ct.*, 789 F.2d 1289 n.3 (9th Cir. 1986). Additionally, it is the petitioner's burden to show that his right to writ relief is "clear and indisputable." *Calderon v. U.S. Dist. Ct.*, 103 F.3d 909, 913 (9th Cir. 1999).

district court's order to compel statements otherwise protected by the attorney-client privilege based on an "unavailability" exception.

- d. Refusal to Comply with a Discovery Order and the Appeal of a Subsequent Contempt Order.
 - i. To obtain appellate review for a discovery order in this circumstance, a party must first refuse to comply with the order, be held in contempt, and then challenge the validity of the discovery order by seeking appellate review of the contempt order. *See In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847 (9th Cir. 1991), *United States v. Ryan*, 402 U.S. 530 (1971) (The district court's denial of a motion to quash a subpoena was an interlocutory decree over which the appellate court had no jurisdiction over an appeal, to obtain appellate review the party would have to first refuse compliance with the order and then be held in contempt).⁴⁷
 - ii. Immediate appeal is only available for contempt orders that "can be characterized as criminal punishment." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 130 (2009). "Criminal" contempt is meant to punish the contemnor's disobedience, as opposed to civil contempt which is to coerce a future act. *See Int'l Union v. Bagwell*, 512 U.S. 821, 844 (1994).

⁴⁷ An exception to this rule is that a discovery order directed to a third party can be immediately appealed when it is unlikely that the third party would defy the order and place him or herself in contempt of court. *See Pearlman v. United States*, 247 U.S. 7 (1918).

XXIII. ADMISSION OF EVIDENCE IN COURT

In disclosure and discovery practice, counsel need to be mindful of developing the information to facilitate admission “into evidence” by the court. The evidence you have collected through investigation and discovery will have little value if you cannot admit it in court. So, while you are in a deposition, for instance, address possible issues of authentication or other matters that bear on admissibility in real time. Authenticity of documents/information is easily done when the author or custodian of information is being deposed.

For our purposes references to “documents”, “electronically stored information” or “tangible items” may be referred to as “information,” or “documents” interchangeably, consistent with the 2006 Advisory Committee Note to Rule 26(a).

What follows are reminders of the approach to admitting evidence you can follow, and specifically some of the tools available to you. Also set out are some traps for the unwary that will preclude evidence from being offered.

A. In General.

1. Evidence is not solely a “trial” matter. Admission of evidence is a necessity in many pretrial proceedings as well.
2. “It is well established that unsworn, unauthenticated documents cannot be considered on a motion for summary judgment.” *Orsi v. Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993).
3. FRCivP 56(e) “requires that a proper foundation be laid for evidence considered on summary judgment.” Proper foundation means the “exhibits could be admitted into evidence.” *Bias v. Moynihan*, 508 F.3d 1212, 1224 (9th Cir. 2007).
4. When it comes to Electronically Stored Information (Evidence): It’s Just Evidence! All the same rules apply. There are no special words or phrases required.

5. Don't forget pre-trial disclosure and discovery obligations in addition to the Rules of Evidence! Failure to produce, disclose, or supplement evidence jeopardizes admission. *See*, Rule 37(c) regarding Initial/Expert and Pretrial Disclosures [26(a)(1) (2) and (3)] and discovery responses [26(e)].

B. Evidence 101.

1. In a nutshell, the rules of evidence are designed to allow only relevant evidence, which is trustworthy or reliable, to be admitted in a proceeding. As formulaic as the rules may seem, this is the basic concept. All the rules and exceptions revolve around, in particular, on the reliability or trustworthy prongs. A case in point, *See*, Rule 803, the "Residual Exception."
2. The pathway to admission is a series of steps you must navigate. These can be described as:
 - a. Step 1: Is the information relevant? Rules 401 and 402. What is relevant will be dictated by the claims and demands of the parties as stated in the pleadings.
 - b. Step 2: Can the information be authenticated (laying the foundation). *See*, Rule 901(a).
 - c. Step 3: Is the information hearsay, and if so, is there an exception? Here, *See* Rules 801(d), 803, 804 and 807.
 - d. Step 4: Is the information subject to a privilege or does prejudice outweigh relevance? *See*, Rules 104 and 403.
3. Of these steps, authentication and hearsay objections typically offer the most problems for the litigator and will be more fully discussed here.

C. Authentication in General.

1. Rule 901 requires that that all evidence must be authenticated. “The proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” FRE 901(a).
2. The process of authentication is often referred to as “laying a foundation.” The objection to a “lack of foundation” simply means that you have failed to ask a necessary predicate question(s) of the witness. You need preliminary questions to demonstrate the witness’ knowledge of facts or familiarity with the evidence to establish that it is what the proponent purports it to be.
3. The bar for establishing authenticity is not particularly high. *U.S. v. Tank*, 200 F.3d 627 (9th Cir. 2000): prima facie showing of authenticity is “evidence sufficient to allow a reasonable juror to find” in favor of authenticity or identification. *U.S. v. Gagliardi*, 506 F.3d 140 (2d Cir. 2007); *Lexington Ins. Co. v. W. Pa. Hosp.*, 423 F.3d 318 (3d Cir. 2005).
4. Lawyers often argue the weight, but it is not the weight of the evidence but its authenticity that is in question at the admissibility stage. *U.S. v. Ortiz*, 776 F.3d 1042 (9th Cir. 2015): courts may admit “evidence that meets the minimum requirements for authentication” under the FRE and let opposing counsel “argue that the jury should give the evidence minimal weight.”
5. In a general sense, the foundational requirement for a witness is knowledge; for documents, electronically stored information and real evidence (the gun, the drugs, the product) it is identity; for demonstrative evidence it is clarification; and, for expert evidence it is helpfulness to the jury for scientific/technical material, by a witness who must be qualified, reasonable and reliable.

D. Rules 901 and 902- Common Tools of Authentication.

1. Rule 901(b)(1)-(10) provide a nonexclusive list of extrinsic evidence that satisfies the authentication requirement when dealing with some categories of information:
 - a. FRE 901(b)(1): a witness with personal knowledge of the item.
 - b. FRE 901(b)(2): a nonexpert witness comparison (e.g. handwriting).
 - c. FRE 901(b)(3): an expert witness comparison (hash values and meta data).
 - d. FRE 901(b)(4): distinctive characteristics, like appearance, contents, substance. *Compare U.S. v. Vayner*, 769 F.3d 125 (2d Cir. 2014) and *U.S. v. Hassan*, 742 F.3d 104 (4th Cir. 2014) Reply Doctrine: *U.S. v. Reilly*, 33 F.3d 1396 (3d Cir. 1994); *U.S. v. Frantz*, 2004 WL 5642909 (C.D. Cal. 2004) “The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.” FRE 901(b)(4).
 - e. FRE 901(b)(7): public records recorded or filed in a public office.
 - f. FRE 901(b)(8): Ancient documents or data compilation, at least 20 years, with no suspicion of authenticity, and in a likely place
 - g. FRE 901(b)(9): evidence describing a process or system and showing it produces an accurate result.

2. FRE 902: self-authenticating documents that require no extrinsic evidence of authenticity in order to be admitted:
 - a. Domestic Public Documents signed and sealed.
 - b. Domestic Public Documents that are certified.
 - c. Foreign Public Documents.
 - d. Certified Copies of Public Records.
 - e. Official Publications by a public authority.
 - f. Newspapers and Periodicals, et seq.
3. “Business Records” (FRE 803(6)), Certified Foreign Records, Certified Electronic Process or system records, and Certified Data Copied from an Electronic Device, Storage Medium or File can be “authenticated under FRE 902(11)-(14) with:
 - a. certification by the custodian of records, and
 - b. reasonable written notice to the adversary, before the hearing or trial, of the intent to offer the information and an opportunity to inspect the certificate and information.
 - c. If the adverse party objects, then traditional means of authentication need to be used.
 - d. This Rule only addresses the authenticity requirement. All other evidentiary issues and factual issues concerning the data (e.g., relevance, hearsay) may be raised.

E. FRE 201: Judicial Notice.

1. Judicial Notice of facts not subject to reasonable dispute can serve to authenticate information. FRE 201,
2. The facts must be generally known in the jurisdiction and accurately and readily determinable from sources whose

accuracy cannot be questioned. FRE 201. Commonly used examples include universal calendars, U.S. Weather information including sunrise/sunset.

3. *See, Liberty Media Holdings LLC v. Vinigay.com*, 2011 WL 7430062 (D. Ariz. 2011) (ARIN website shows IP owners location in real time used to establish location of a party for jurisdictional issue). But *See Weinoffer v. Davie Shoring, Incorporated*, 23 F.4th 579 (5th Cir. 2022) (Where a website or electronic source is concerned, here the “Wayback Machine,” testimony by a witness with direct knowledge of the source information of terms of a contract, stating that the exhibit fairly and fully reproduces them, may be enough to authenticate it, but without the witness authentication may fail).
4. The “Wayback Machine” could have been authenticated but was not in *Weinoffer*. The Wayback Machine's “Using the Wayback Machine” webpage instructs users on how to request affidavits to authenticate Wayback Machine pages as “certified records for use in legal proceedings.” See Internet Archive, Using the Wayback Machine, <http://help.archive.org/hc/en-us/articles/360004651732-Using-The-Wayback-Machine>

F. FRE 1002, 1003: Best Evidence Rules.

1. Writings, recordings, and photographs are still subject to the Best Evidence Rules.
2. With electronically stored information, particularly, you may need something more than authentication. *Note, U.S. v. Bennett*, 363 F.3d 947 (9th Cir. 2004) (GPS location requires the GPS or a printout). The rule does apply when a witness seeks to testify about the contents of a writing, recording or photograph without producing the physical item itself-particularly when the witness was not privy to the events those contents describe.

G. [FRCP 16: Stipulation Re Authenticity.](#)

1. Counsel may (and in most instances should) reach stipulations on authenticity as part of pretrial matters (Rule 16 Case Management Orders) or as part of the Final Pretrial Conference Order. Stipulations on admissibility are also encouraged where it is clear the evidence will be admitted.
2. Many judges will order counsel to confer and reach agreement where they can simplify trial proceedings, avoid unnecessary witnesses and therein save time and expense.

H. [FRCP 36: Requests for Admission.](#)

1. Requests for Admission are useful in gaining admissions of fact and the genuineness (authenticity) of documents, including data or other electronically stored information. As to authenticating documents, it is an underutilized tool.
2. The request must be separately stated for each document, and a copy accompanying the request, or you must make the document available are required.
3. Contracts, bills, emails, webpages are all ideally suited for this option to authenticate this information.

I. [FRCP 26\(a\)\(3\): Pretrial Disclosure/14 days to object.](#)

1. Parties are required to disclose trial witness identification, deposition testimony they intend to present, and an identification of each document or exhibit they intend to offer or may offer at trial.

2. As the Rule relates to “documents” or other exhibits specificity is required. The identification must be “separate” for each item, this is important. If you simply identify the “employee file” you may not benefit from the rule’s admissibility feature. Most judges will ask for minimization to the exact pages or range of pages.
3. Following the disclose, your opponent has 14 days to object, together with the grounds. Rule 26(a)(3)(B). The failure to object waives all objections except under Federal Rule or Evidence 402 and 403. *Id.* This is a formidable tool if used correctly!

J. Hearsay.

1. Hearsay Evidence is considered unreliable, and is inadmissible unless the Federal Rules, a federal statute or the Supreme Court prescribes rules otherwise. FRE 802. Along with Relevance (FRE 410-403) and authentication, the Rule against Hearsay frequently raised in objecting to evidence.
2. Hearsay is defined as “a person’s oral assertion, written assertion, or nonverbal conduct.” FRE 801(a) and was made out of court but offered in court for the truth of the matter asserted. FRE 801(b).
3. In our technological world machines are not persons and there read outs are non-statement type evidence. If it’s made by the machine “made” by a machine or instrument (e.g. fax header) it’s not excludable as hearsay. *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004); *U.S. v. Lamons*, 532 F.3d 1251 (11th Cir. 2008); *U.S. v. Hamilton*, 413 F.3d 1138 (10th Cir. 2005); *U.S. v. Khorozian*, 333 F.3d 498 (3d Cir. 2003).
4. As a rule of thumb, the “hearsay” analysis of any document should start with these 5 questions:

- a. Is the evidence a “statement” by a person?
 - b. Did a “declarant” or “witness in court” make the statement?c. Is the statement offered to prove the truth of its contents (“the purpose”)?
 - c. Is the statement non-hearsay under FRE 801(d)(1)?
 - d. Is the statement covered by an exception in FRE 803, 804 or 807?
5. If “the purpose” is not to prove the truth of the statement contents, not excludable as hearsay. Many examples exist, including an email admitted showing witnesses knew each other) *U.S. v. Siddiqui*, 235 F.3d 1318 (11th Cir. 2000); *Stevens v. Moore Business Forms, Inc.*, 18 F.3d 1443 (9th Cir. 1994) or where you have a signed contract or emails between lawyers re the formation of a contract (the “legally operative agreement) *Stuart v. UNUM Life Ins. Co.*, 217 F.3d 1145 (9th Cir. 2000); *Kepner-Tegue Inc. v. Leadership Software*, 12 F.3d 527, 540 (5th Cir. 1994). Also, of course, FRE 801(d)(2): Statements of a party opponent. *Sea-Land Service, Inc. v. Lozen Intern., LLC*, 285 F.3d 808, 821 (9th Cir. 2002) (admitting email signed by party opponent); *U.S. v. Hunter*, 266 Fed.Appx. 619 (9th Cir. 2008) (admitting text messages) and the declarant-witnesses prior inconsistent statement.
6. Of course, there is a whole universe of hearsay exceptions that may apply. None of which are mutually exclusive. A few follows.
- a. Present sense impression, excited utterance, mental state or physical condition. FRE 803(1), (2), (3).
 - b. FRE 803(6): business records. *Compare, Monotype Corp. PLC v. Int’l Typeface Corp.*, 43 F.3d 443 (9th Cir. 1994) (email is “far less of a systematic business activity) with *Ionian Corp. v. Country Mut. Ins. Co.*, 2011 WL 6070442 (D. Or. 2011); *Volterra Semiconductor Corp. v.*

Primarion, Inc., 2011 WL 4079223 (N.D. Cal. 2011) (admitting email as a business record). But watch out for 805 the “hearsay within hearsay” issue. All parts of the business record must conform to the rule or fit in under some other exception.

- c. FRE 803(8) and (17): public records and market reports & commercial publications. Note these are focused on somewhat limited data by their precise terms. Public Record information is limited to office activities and matters observed while under a legal duty to report, or legally authorized investigation, where market reports focus on market quotations, lists, directories or compilations generally relied upon by the public.