

Committee on Civil Justice Reform

Meeting Agenda

Monday, April 18, 2016

10:00 AM to 2:00 PM

State Courts Building * 1501 West Washington * Conference Room 119 * Phoenix, AZ

Conference call-in number: (602) 452-3288 Access code: 6252

[WebEx Link](#)

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Item no. 1	Call to Order Introductory comments	<i>Mr. Bivens</i>
Item no. 2	Approval of March 15, 2016, meeting minutes <input type="checkbox"/> Formal Action Requested	<i>Mr. Bivens</i>
Item no. 3	Presentations by work groups with discussion on topics presented: <ul style="list-style-type: none">• Arbitration Reforms (Judge Harrington)• Discovery Related Reforms (Jodi Feuerhelm)	<i>All</i>
	Brief lunch break	
Item no. 3 continued	Presentations by work groups with discussion on topics presented: <ul style="list-style-type: none">• Case Management Reforms (Andrew Jacobs)• Court Operations Reforms (Roopali Desai)	<i>All</i>
Item no. 4	Roadmap <ul style="list-style-type: none">• Future committee meeting dates (on Tuesdays: May 17, June 14, July 19, August 23, September 13)	<i>Mr. Bivens</i>
Item no. 5	Call to the Public Adjourn	<i>Mr. Bivens</i>

The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order.

There will be a lunch break about midway through the meeting.

Please contact Jennifer Albright at (602) 452-3453 or Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Julie Graber at (602) 452-3250. Please make requests as early as possible to allow time to arrange accommodations.

Committee on Civil Justice Reform
State Courts Building, Phoenix
Meeting Minutes: March 15, 2016

Members attending: Don Bivens (Chair), Ray Billotte, Hon. Dawn Bergin, Krista Carman, Roopali Desai, Jodi Feuerhelm, Glenn Hamer, Hon. Charles Harrington, Andrew Jacobs by his proxy Sara Agne, Dinita James, Michael Jeanes, William Klain, Michael O'Connor, Hon. Peter Swann, Geoffrey Trachtenberg, Hon. Patricia Trebesch, Steven Twist, David Weinzweig

Absent: Hon. Robert Brutinel, Hon. Jeffrey Bergin, Colin Campbell, Tim Hogan, Jack Jewett, Stephen Montoya, Mark Rogers, Hon. Timothy Thomason

Guests: Hon. Lawrence Winthrop, Amy Wood, Jim Price, Brittany Kauffman (by telephone), Shelley Spacek Miller (by telephone), Christine Martin

Staff: Jennifer Albright, Mark Meltzer, Theresa Barrett, Julie Graber

1. Call to order; approval of meeting minutes; preliminary remarks. The Chair called the meeting to order at 10:04 a.m. He welcomed Sara Agne as proxy for Andrew Jacobs and greeted Ms. Kauffman and Ms. Miller, who were personally present at the first meeting and who were appearing at today's meeting by telephone. The Chair advised that subsequent to the first meeting, Ms. Albright attended the Fourth Civil Justice Reform Summit, a two-day conference hosted by the Institute for the Advancement of the American Legal System ("IAALS"). The Chair then asked the members to review draft minutes of the February 16, 2016 committee meeting. A member then made the following motion:

Motion: To approve the draft February 16, 2016 meeting minutes. Seconded and passed unanimously. **CJRC-002**

The Chair announced that today's meeting would begin with three presentations, followed by workgroup breakout sessions. He then asked Amy Wood, manager of the Caseflow Management Unit of the Administrative Office of the Courts ("AOC"), to present on time standards.

2. Presentation on time standards. Ms. Wood advised that the concept of time standards for case processing surfaced several decades ago, initially in criminal cases but later expanded to other case types. The National Center for State Courts ("NCSC") prepared model time standards in 2011, and encouraged their adoption by individual states. A 2012 Supreme Court Administrative Order established a Steering Committee on Arizona Case Processing Standards. Justice Brutinel serves as chair of that committee. After public comment and extensive study of applicable statutes and rules, the committee to date has recommended provisional time standards for nineteen case types. Implementation of civil time standards occurred in 2014. Ms. Wood stressed that time standards are aspirational as well as achievable. The standards should complement but

not override the just resolution of cases. They should set realistic expectations for attorneys and the public about the length of time required for case resolution.

Civil cases generally fall within three tiers established by the NCSC. The first tier includes “easily resolvable cases.” Defaults and dismissals, for example, are in the first tier. The second tier generally contains cases in which one or two issues require judicial resolution. The third tier is for complex cases and cases that proceed all the way to trial. The standards require courts to collect data to measure the time from the filing of an initial complaint to its ultimate disposition. Some delays, such as a bankruptcy filing or the filing of a special action, are beyond the control of a trial court, and the time computations exclude those delays. Arizona’s standards require the resolution of 60% of civil cases within 180 days, 90% within 365 days, and 96% within 540 days. The remaining 4% are outliers that can require more than 540 days, such as complex cases. Ms. Wood said that initial reports from 2013 indicated that Arizona civil courts met the time standards for the first tier of cases, and were very close in tiers two and three.

Time standards have several benefits. The most significant is that they will allow individual courts to assess how they compare against other courts. Standards also should help individual courts identify bottlenecks in their case processing. They will assist courts in flagging and then clearing older cases, and closing cases that might remain open solely because of omitted data. Questions and comments from the members followed.

- Can we compare Arizona’s superior court time standards results with those from other jurisdictions? Ms. Wood responded that comparisons might be complicated because Arizona has a large volume of justice court civil cases that some other states would process as tier one cases in a court of general jurisdiction.
- One member had concerns about the uniform entry of data, and whether judges, judicial assistants, or clerks enter data codes. Ms. Wood advised that the AOC has business requirements that have been shared with all courts to ensure that everyone is counting in the same way. The AOC provides training for courts using the AOC’s case management system (“CMS”), but courts with their own CMS, notably Maricopa and Pima counties, must conduct their own training.
- Maricopa County is the fifth largest trial court in the country yet it has a relatively small bench, so judges have large caseloads, and this should be a consideration in evaluating case processing time.
- Motions to extend time as well as cases in an arbitration track may expand the time required to process cases. A case continued for trial because of “double-booking” a trial date also may require more time to disposition.
- Ms. Wood noted that some circumstances may be within the court’s institutional control (for example, a court could hire more staff, or change its business practices) whereas others are not (for example, certain cases are subject to the Servicemember’s Civil Relief Act).
- A majority of civil cases are resolved without court involvement.

- Judges in Maricopa and Yavapai counties currently receive monthly reports on the status of their caseloads.
- One member believes it would be useful if this committee had data on the size of caseloads and the number or percentage of those cases that are in an arbitration track. The Chair advised that staff is attempting to obtain that data.

The Chair thanked Ms. Wood for her presentation. Before starting the next presentation, the Chair invited Judge Dawn Bergin to provide an update on Maricopa County's specialty civil courts. Judge Bergin then announced the recent assignment of a fourth judge to the pilot commercial court. Two of the three complex civil litigation court judges will not be available in the future (one because of retirement and another is rotating to a different calendar), and their complex caseloads will be assigned to and divided among the commercial court judges. The superior court has not yet determined whether those commercial court judges will continue to have the customary 3-year assignment to commercial court, or if they will have a 5-year assignment previously accorded to the complex judges. One member commented that the court should dispense with judicial rotations. Judge Bergin explained that in Maricopa County, rotations are necessary because of the stress of family court assignments on judges. However, she also noted the advantage of juvenile court judges having assignments extending for the life of a juvenile case because there are benefits when judges stay with a particular family's case over a period of several years. The Chair invited the members to consider judicial rotations during workgroup discussions. He then introduced the next presenter, Jim Price, e-filing project manager for the AOC's Information Technology Division.

3. Presentation on court technology. Mr. Price offered a perspective on the current state of Arizona court technology, and possible future developments. He began by discussing the use of technology in areas encompassed within the "DAART" acronym: Discovery, Assembly, Analysis, Reasoning, and Taking Action. Mr. Price proceeded to discuss metadata, and reminded the members that every court filing includes metadata as well as data content. Filers feed metadata and data into a vendor's e-filing portal, which is ingested by a court's case management system. Arizona TurboCourt uses a questionnaire process to obtain data, particularly from self-represented litigants who may need their information structured within a particular form. However, the questionnaire process is too time-consuming for attorneys who file documents frequently and simply want a more direct way to upload their case information. Some attorneys also want to do "batch filings," for example, collection attorneys who are filing multiple applications for default. The AOC is considering a multi-vendor support model to promote competition and innovation in electronic filing. Law firms would then have a choice of e-filing vendors. E-filing is available in Maricopa and Pima counties. Mr. Price said that Yavapai County's superior court is currently serving as a pilot for a new Arizona e-filing product, "e-Universa," which is capable of supporting a multi-vendor model.

New court technology products also include e-Bench and e-Access. e-Bench allows a judge to efficiently access and search data, and issue orders electronically. This reduces processing time, and judges who have used it like this functionality. e-Access allows attorneys and the public to access court information online. Attorneys can currently access documents in a case in which they have appeared, but they would like to be able to access documents in any other case, and this is under development. e-Access is destined to become a self-supporting, fee-based service, and it would be subject to the filters and privacy requirements of Supreme Court Rule 123. Another contemplated project is e-Notification, which would enable courts to automatically notify parties of any changes in the status of their cases. The Chair asked if there were questions or comments.

- A judge member remarked that the e-filing system does not send certain documents, such as routine complaints, directly to a judge. The system routes subsequent filings to the judicial assistants, not to the judges, and because of this process and the volume of documents that a judicial assistant receives, a judge may not see a document immediately after filing.
- Mr. Jeanes mentioned that Maricopa County has internal standards that require document processing within one business day. He added that he supports the multi-vendor model. He said that an e-filing vendor is analogous to an envelope that contains a paper document. As long as the e-filing vendor meets ordinary business requirements, the clerk's focus is on the contents of an electronic filing, just as his focus is on the contents of a physically delivered envelop.
- Another member commented that the federal court's electronic filing system seems to process court orders more quickly than our state court. Mr. Jeanes said that the speed with which a superior court clerk processes an order depends on the time the clerk receives it from a judge. Most orders are processed overnight following receipt. A judge member believes that the federal court's electronic system automatically generates a number of its orders, whereas the superior court produces orders individually and only after consideration by a judge.
- Mr. Jeanes also mentioned that his clerk staff has a 40% rate of turnover. This is primarily because of salary limits imposed by the clerk's budget. Moreover, the clerk's office could benefit from improved technology if it had additional financial resources. A judge member noted that notwithstanding their comparatively low case volumes, Arizona appellate courts could also gain efficiencies from technology improvements.
- Another judge member commented that a significant number of e-filers submit proposed orders in PDF format rather than in Word. This can cause delays because proposed orders often require revisions, and PDF documents are not modifiable. A member noted that federal courts accept proposed orders in PDF, and some filers may not be aware of a different requirement for Word submissions in state court. The judge member recommended that the superior court's website include a list of tips for proper e-filing. The judge would expand the list to include such items as when judges set oral arguments on motions. For example, some

judges always set summary judgment motions for argument, but rarely schedule argument for Rule 12 motions. The members discussed striking the appropriate balance between uniformity and autonomy in judicial practices.

- A third judge member suggested a need for training judges on how to efficiently process documents, such as proposed orders. The judge believes there is currently a lack of practical training on this subject.
- A member expressed concern with bulk sales of court documents, especially when the documents include impertinent or inaccurate information at the time of their release. Another member had a similar concern with sales of documents that might contain sensitive data, as specified in Rule 5(f).

The Chair thanked Mr. Price and then introduced Judge Lawrence Winthrop, Court of Appeals, Division One, chair of Arizona's Commission on Access to Justice ("Commission.").

4. Access to Justice Commission. The Chief Justice established the Commission in 2014 in furtherance of the equal access to justice goals of his strategic agenda. (A majority of states now have similar commissions.) Arizona's Commission includes judges, lawyers, and other stakeholders statewide. Judge Winthrop described three specific circumstances that motivated the creation of Arizona's Commission.

(a) *The poverty rate in Arizona:* Although the national poverty rate has stabilized, the poverty rate in Arizona continues to grow. The current Arizona rate is 21%, which equates to 1.2 million Arizonans at poverty level. Most of these are family members rather than people generally perceived as homeless individuals. Some of those at poverty level have jobs, but their income is meager. Regardless, they have legal issues similar to those faced by others, particularly in the areas of domestic relations, consumer debt, and housing, and they cannot afford counsel. These individuals qualify for free civil legal aid; however, the demand for those services far exceeds the resources available to our civil legal aid agencies.

(b) *Reductions in funding:* There are two revenue streams for civil legal aid organizations. One of them is Congressional funding, but this is subject to political considerations and funding levels are unpredictable. The other is Arizona's IOLTA (interest on lawyers' trust accounts), but IOLTA revenue has plummeted during the past several years, from about \$200,000 a month in 2009 to about \$40,000 month currently, as interest rates have been artificially depressed.

(c) *Increase in self-represented litigants:* Because the number of individuals at the poverty level who are eligible for legal aid has increased, while funding has fallen, the proportion of people who actually receive free legal assistance has dropped significantly. About one in three eligible individuals obtain assistance, but the majority does not. In addition, a substantial proportion of Arizona's middle class is ineligible for legal aid, yet

these people cannot afford the cost of an attorney. Those factors have caused a significant increase in the number of self-represented litigants (“SRLs”) in Arizona courts. In about 80% of domestic relations cases in every county, one or both parties are self-represented. Tenants in eviction cases rarely appear with legal counsel.

Judge Winthrop discussed some of the Commission’s recommendations for responding to these circumstances, including the following, as approved by the Arizona Judicial Council:

- A “court navigator” program in Maricopa County trains and supervises undergraduates from Arizona State University in assisting SRLs in family court. SRLs frequently do not understand court procedures or expectations in terms of pleadings and proof, and generally are ill equipped to effectively deal with the adversary process. Navigators can clarify their expectations, as well as educate them on court procedures, help them prepare their own court documents, and assist them in navigating the process. Funding from AmeriCorps will sustain the program for the next three years.
- Other non-attorney assistants also may be helpful for SRLs. Although Arizona already certifies legal document preparers (“CLDP”), most SRLs cannot afford CLDP services. Washington State has begun certifying limited law license technicians to assist primarily in family court cases, and the Arizona Commission, along with several other states, is monitoring developments and waiting for data from that program.
- To increase the amount of legal information available to the public, Coconino County is hosting a statewide virtual legal information website. The website will include simplified forms and instructions, will regularly host webinars, and provide links to “how-to” videos. It also will provide links to other Arizona court and legal aid/legal information websites.
- The Commission has adopted the work of Commissioner Dean Christoffel and the Pima County Superior Court’s “Simpli Fi Lex” initiative as it relates to simplified instructions for navigating family court forms, and has expanded the concept by creating simplified instructions and uniform notices and forms for eviction actions.
- Every Arizonan may not live close to a courthouse, but most reside in or near a community with a public library. Through the Law4AZ project, public librarians in each county are trained to assist their patrons in accessing relevant legal information. Additionally, the community libraries have agreed to host regular weekend and evening legal clinics staffed by volunteer attorneys.
- Courts could also utilize technology to benefit SRLs. Remote appearances by phone or video conference could benefit SRLs who might otherwise need to spend considerable time traveling to a courthouse.
- The Commission has updated the Supreme Court’s legal information versus legal advice question and response handbook, which should facilitate court clerks

providing more over-the-counter information to SRLs. It is anticipated that dedicated training on this subject, and in assisting SRLs, will be provided in the coming months to judicial officers and court staff.

- The Commission believes there should be a more reliable and predictable funding model for legal aid agencies; however, this would likely require legislative action. Arizona currently offers an income tax credit for donations to qualifying charitable organizations, including those who provide legal aid to the poor. The Commission has launched a sustained campaign to publicize this tax credit, and those efforts have resulted in a significant increase in tax credit donations. Pending legislation would double the amounts of the available credit and leverage those contributions.

Judge Winthrop added that the American Bar Association has been a useful resource for the Commission. Chairs of similar commissions from other jurisdictions have been meeting annually and engaging in regular regional phone conferences. A member noted that family courts previously had early disposition conciliators. He suggested that similar mediation services in debt and housing cases also might promote efficient and just resolution of these high volume civil cases. Judge Winthrop said the suggestion merited further consideration, but he cautioned that funding for civil conciliators might not be available. He concluded by encouraging the Civil Justice Reform Committee's recommendations to enhance citizens' access to justice, particularly in the area of consumer debt, which would be consistent with the objectives of the Commission.

5. Establishment of workgroups. The Chair had distributed a memo on March 9 that assigned each committee member to a workgroup. Each workgroup would discuss and make recommendations to the full committee on particular subject areas. At today's meeting, the Chair advised that in addition to their assigned workgroup, members also could attend other groups. The Chair attempted to compose each workgroup with a diversity of viewpoints. Workgroups may meet by telephone, and no minutes are required, but the Chair would like each workgroup coordinator to present initial suggestions to the full committee at the April meeting. The committee then recessed for about an hour while the workgroups briefly met. The committee then reconvened, and each workgroup identified a variety of preliminary topics and issues, including the following:

Workgroup 1 (Compulsory arbitration reforms): There are differing views about whether to keep the current process or replace it. Should arbitrators be knowledgeable in the subject matter at issue? If there was no compulsory arbitration, what would replace it? What would be the design of a replacement process? Should there be a higher number of jury trials? How should courts deal with contractual arbitration provisions?

Workgroup 2 (Case management reform): How could the courts more broadly apply effective case management techniques of the pilot commercial court? What case management training would benefit judges? Should attorneys have a mandatory continuing legal education requirement to learn of this committee's eventual case management recommendations?

Workgroup 3 (Court operation reforms): How should courts find the resources needed for technology improvements and competitive staff salaries? Are there additional education needs for judges? Should there be consistency in document flow? What should the courts do, if anything, about judicial rotation?

Workgroup 4 (Civil discovery reform): The workgroup should review the Civil Rules Task Force recommended versions of Rules 11 and 45, and rules concerning experts and electronically stored information.

6. Roadmap; call to the public; adjourn. The Chair suggested moving the next meeting date from Tuesday, April 12, to Monday, April 18. Staff will notice the meeting for April 18 unless several members advise Ms. Albright of their unavailability on that date.

There was no response to a call to the public. The meeting adjourned at 1:22 p.m.

CJRC

Compulsory Arbitration Work Group

April 2016

ISSUES DISCUSSED

- Jettison compulsory arbitration altogether and replace with fast-track trials?
- Keep compulsory arbitration with minor modifications?
- Keep compulsory arbitration with major modifications?

Statistics

Pima County 2015

Median Arbitration Award	\$15,204.00
Arbitration Cases Filed	793
Awards	220*
Appeals Filed	73
Appeals Set for Trial	32
Trials (jury and bench)	5*

Statistics

Maricopa County 2015

Arbitration Cases Filed	14,624
Awards	1,135 (2014*)
Appeals Filed	329
Trials (jury and bench)	32*

Fast Track Trial and Arbitration combo

- Arbitration (cases \$20,000 or less)
 - Appeals to fast-track trial
- Fast-track trial (cases \$20,000-\$65,000)
 - 2 month abatement vs.4 months
 - 20 days to answer - one extension for good cause
 - Limited discovery
 - Expert reports vs. Expert depositions
 - Pay for your own experts at trial (no Rule 68 sanctions)
 - Shorten response and reply times for dispositive motions
 - Two day jury trial – six jurors

Hearing officer and fast-track trial Combo

- Professional Hearing Officer instead of
Conscripted Arbitrators
 - Plaintiff can opt for arbitration with hearing officer
or fast-track trial
 - Plaintiff cannot appeal arbitration
 - Defendant can appeal arbitration to fast-track trial

April 18, 2016 CJRC: Discovery, Etc. Work Group Discussion Topics

I. ESI

A. The Problem

1. Expense and burden on parties:
 - a. Preservation expense;
 - b. Collection expense (multiple sources; multiple custodians; hard-to-get-to sources);
 - c. Review expense (relevance/privilege);
 - d. Production expense (database hosting, etc.).

B. Pending AZ Proposals (Civil Rules Task Force Petition).

Pending Task Force proposals address ESI discovery, expressly adopting a proportionality/appropriateness limitation and providing for cost-shifting or sharing; requiring parties to confer about ESI at the beginning of the case, and adopting an expedited motion procedure for resolving disputes over ESI:

1. *“Proportionality/appropriateness” limitation and explicit reference to cost-shifting or sharing.* Proposed new Rule 16(a)(3): Court must manage a civil action in light of objective to ensure that discovery is appropriate, in light of “importance of the issues at stake, the amount in controversy, the burden or expense imposed by the discovery, and the parties’ resources.” *See also* proposed Rule 26(b)(1)(B) (similar language); proposed Rule 16(d) (court may order limits on the disclosure of ESI, including the form of production and [new language]: “if appropriate, the sharing or shifting of costs incurred by the parties in producing the information”); proposed Rule 26(b)(2) (a party need not provide discovery of ESI from sources that are not reasonably accessible due to undue burden or expense; court may order disclosure considering limits of 26(b)(1)(B) [i.e., appropriate to needs of case]; court may impose limits [e.g., cost shifting]). (*See Attachment #1 for copies of selective Task Force rule proposals*).
2. *Duty on Parties to Confer about ESI; short-form motion procedure for resolving disputes.* Proposed 26.1(b)(2) stages ESI disclosure [40 days after initial disclosure unless parties agree otherwise], imposes duty to confer before production about requirements and limits; form; and cost shifting; requires “single joint motion” for presentation of disputes about ESI.
3. *Proposed Rule 37(g) clarifies preservation obligation and standards for imposing sanctions for a failure to preserve.*

- a. Duty to preserve—identifies triggers
- b. Defines “reasonable steps to preserve”
- c. Limits on sanctions (requires intent for terminating or other severe sanctions; otherwise, requires prejudice and measures “no greater than necessary to cure the prejudice”)

C. What Have Other States/Courts Done?

- 1. A number of states have adopted rules requiring the parties to have an early “meet and confer” to iron out the scope of ESI production; and require that topics relating to ESI production be addressed in the initial case management order. Arizona’s pending proposal is more comprehensive than what other states have done by rule to date.
- 2. A number of courts (state and federal) have published detailed “guidelines” (to supplement their rules), governing the disclosure and production of ESI. (See attachments 2 through 6 for examples of guidelines).

D. Work Group Ideas for Committee Input

- 1. The work group discussed possible rule amendments to address the burden and cost of ESI discovery:
 - a. We discussed the idea of “safe harbors” that would provide more certainty to parties regarding what must be preserved, and what does not have to be preserved. Currently, parties to litigation/threatened litigation may be over-preserving, at significant expense, due to concern about the risk of spoliation sanctions. Clear guidelines or “safe harbors” would help provide certainty and reduce expense.
 - b. We discussed staging ESI production in litigation so that sources that are more readily accessible, or more likely to result in relevant information, are searched and produced first.
 - (i) Often, a handful of key custodians/sources have/contain 90% of the relevant information. The last 10% is incremental/more expensive and may become moot if the case can be resolved based on the 90%.
 - c. Rule 26.1(b)(2) could be modified to include more specific duties to confer on topics such as the identity of custodians and search terms/parameters. (E.g., Colorado’s rule).
 - d. The work group supports adopting a safe harbor by rule for privileged documents inadvertently produced as part of an electronic production. It is expensive to conduct a privilege review of a large

electronic production; parties are concerned about waiver. The Task Force’s proposed rule contains claw-back procedures, but doesn’t address whether the inadvertent production results in a waiver, which would be governed by case law.

- e. The cost of producing a detailed privilege log, particularly for voluminous ESI productions, can be significant. The work group discussed the idea of limiting what must be logged on a document-by-document basis and, e.g., allowing some categories of documents to be logged by general category or excluded from logs altogether. The concern is that this approach would limit an opposing party’s ability to test the log to identify information that has been improperly withheld.
2. We discussed developing detailed guidelines to supplement the rules and provide practitioners with additional guidance, similar to the guidelines cited below that have been adopted by other courts. Another option is to recommend the formation of a separate committee/task force to develop more detailed guidelines.
 - a. Nassau County Guidelines for Discovery of Electronically Stored Information (attachment #2)
 - b. United States District Court for the District of Kansas: “Guidelines for Cases Involving Electronically Stored Information.” (attachment #3)
 - c. United States District Court, Northern District of California: “Guidelines for the Discovery of Electronically Stored Information.” (attachment #4)
 - d. California Litigation Section’s “E-Discovery Pocket Guide” (attachment #5)
 - e. United States District Court for the District of Colorado: Guidelines Addressing the Discovery of Electronically Stored Information. (attachment #6)
 3. Mandatory CLE on ESI discovery?
 4. **Other Ideas?**

II. LIMITATIONS ON EXPERTS

To address the burden and expense of experts, the work group explored a number of ideas, including:

A. Disallowing Discovery of Expert Drafts.

1. The work group discussed possible adoption of the federal rule provisions that limit the discovery of draft expert reports and communications between counsel and experts. This topic was debated a number of years ago within the Civil Practice & Procedure Committee, and there was not a consensus to adopt such a rule at that time. Among other things, some members felt that discovery of drafts helped keep the process honest and that differences between an expert's report drafts are useful for purposes of cross-examination. Other members felt that these benefits were outweighed by the expense associated with the discovery of drafts.
 - a. At least some members of the work group favor adopting the federal approach as a way to help lessen the expense of expert discovery. This would be an easy rule change to implement as it would track existing Federal Rule of Civil Procedure 26(b)(4)(B) and (C).
 - b. We would like to take a straw vote of the Committee on this issue.

B. Modifying Arizona's Rule re: Expert Reports and Depositions.

The work group considered a number of possible changes to Arizona's rules on expert disclosures and depositions as a way to reduce expense. We would like input from the Committee on these various approaches, which include:

1. The work group favors adopting more robust disclosure requirements that would include, in addition to the topics now required: (i) identification of matters in which a retained expert has testified over the past [X—Utah requires four] years; (ii) a list of all the expert's publications over the past [x—Utah requires 10] years; and (iii) the compensation to be paid to the expert (including any difference between the amount charged to the party and the amount charged to other parties for deposition time). Currently, these items are not required and parties spend time fighting about them and/or consuming deposition time on these topics. Up-front disclosures will help reduce expense and disputes.
2. The work group discussed the approach taken in Utah (see below), which requires a party to elect either a deposition or a report, but not both. The work group did not favor this approach.
 - a. Utah: Requires more robust initial disclosures than AZ (including list of publications and past testimony); following initial, more robust disclosures, opposing parties can elect further discovery by deposition or by report. Rule specifies that an expert may not testify regarding any matter not fairly disclosed by the report. [attachment #7]

3. The work group discussed whether Arizona’s rules should be modified to require an expert report in some or all cases, as is required by the federal rules. The work group did not favor adopting a report requirement in all cases, however, we did discuss whether the rules should distinguish between different types of experts and require reports or more detailed disclosures for, e.g., scientific experts.
 - a. As background, the Task Force decided not to adopt the federal rule requirement of a report, or similar, more robust disclosure requirements, based on a concern about undue expense in the types of smaller matters that comprise the bulk of cases in state court. Instead, the Task Force draft proposes to add a new provision in Rule 16(d)(4) that the court *may* consider “whether the parties should be required to provide signed reports from retained or specially employed experts.”
4. The work group discussed a couple of issues relating to expert witness fees:
 - a. Should we consider a rule allowing a prevailing party to recover expert witness fees (pros and cons)?
 - b. Should we consider a rule change to address the case of *Sanchez v. Gama*, 310 P.3d 1 (Ariz. App. 2013)? This case held that treating physicians need only be paid expert witness fees by the opposing party for that portion of their deposition testimony that is “expert” in nature, and not for testimony that is percipient in nature. Practitioners in the area believe it would be helpful, and would reduce expense and disputes over the payment of experts in such cases, if the rules provided that treating physicians must be compensated as expert witnesses for their time spent in deposition.

III. RULE 11

The work group discussed the status of pending petitions to amend Rule 11, and comments submitted by the Chamber of Commerce to those proposed amendments (the Chamber’s comments and proposed revisions appear at attachment #8). We would like direction from the Committee on how it would like to proceed regarding possible modifications to Rule 11, in light of the pending petition and comments.

A. Task Force and State Bar’s Pending Rule 11 Petitions.

1. The Task Force has a pending Petition to modify Rule 11 that incorporates aspects of federal rule 11, along with an Arizona-specific “meet and confer” procedure. The Task Force draft was modeled after a pending State Bar Petition; the primary thrust of the petition was to reduce meritless/abusive Rule 11 sanctions motions and threats, which often are embedded in other filings. [See attachment #1 for Task Force draft]

B. Pending Comments and Status

1. The Pima County Bar Association filed a comment advocating that the sanctions provision be softened to provide that a court “may” award sanctions for a Rule 11 violation, rather than “must” award sanctions, as the Task Force draft currently provides. The CPPC recently endorsed this recommendation of the PCBA.
2. The Chamber of Commerce also filed a comment, advocating mandatory sanctions, along with a number of other recommended changes to “provide even more robust protection” against meritless litigation. The State Bar filed a response to the Chamber’s comment.
3. The Supreme Court will consider the Task Force draft, the Pima County Bar Association’s comment, the Chamber’s comment, and the State Bar’s response(s), in the pending rules cycle (in August).

IV. ABBREVIATED DISCOVERY MOTION PROCEDURE.

The work group favors modifying the rules to require a uniform mandatory abbreviated discovery motion procedure, similar to what has been adopted in Utah. We would like Committee input.

A. Task Force Proposal.

1. Task Force’s Proposed Rule 7.1(c)(3)—retains current rule’s permissive provision re: summary motions: “The court may provide by local rule or order for the submission and determination of motions without oral argument based on the filing of brief written statements setting forth reasons in support or opposition to a motion.”
 - a. Rule 16(c) (Task Force) adds language that the scheduling order “also may direct that a party must request a conference with the court before filing a discovery or disclosure motion.”
2. Other states have a mandatory short-form procedure for discovery disputes—Utah has mandatory procedure requiring written statement of no more than 4 pages; 7 day response time; limitation on attachments.

V. OTHER PROCEDURES TO FACILITATE EARLY RESOLUTION

A. Mandatory Mediation/Settlement Conferences.

The work group favors modifying the rules to require mediation before a private mediator or settlement judge, at some specified point in the case.

1. Under Rule 16.1, mediation/settlement conferences are not mandatory (“at any party’s request or on its own,” the court may hold one or more pretrial settlement conferences).

2. New York has adopted a pilot program for mandatory mediation that must take place relatively early in the discovery process.

B. Other Procedures for Expedited Rulings on Important Issues.

1. The work group discussed procedures to facilitate early decisions on important issues that may, as a practical matter, be case dispositive (but are not appropriate for summary judgment); or that could significantly impact the parties' respective settlement evaluations. Often these types of issues are raised later in the case through motions in limine, and the court may not be inclined to address them until shortly before trial.
 - a. One idea is to add a provision to Rule 16 requiring the parties to identify issues that they believe fall into this category on which they request early/expedited rulings by the court. (This could be coupled with a new procedure for summary motion practice).

VI. ODDS AND ENDS

A. Rule 30

1. Several work group members felt that we should consider a rule that would allow videotaping of depositions by means other than using a third-party videographer. E.g., should parties be able to use their cell phones to record depositions? This would clearly reduce expense; on the other hand, if parties are allowed to record depositions on their cell phones, etc., it may lead to disputes about the quality and reliability of recordings. We would like Committee input on whether we should further explore this idea.

B. Rule 45—third party document subpoenas

1. The work group favors amendments to Rule 45 to require a third party document subpoena to first be served on other parties, with a short (five-day) objection window, before the subpoena can be issued or served on a third party. (Note that parties already have to consent to third-party depositions, which helps limit unnecessary depositions; but the rules do not have any such safeguards on third-party document subpoenas).

C. Rule 35(a).

1. The work group discussed amending Rule 35 so that it does not require a court order to videotape the examination of a person under Rule 35. Practitioners in this area report that these motions are burdensome on the parties and on the court, and that videotaping should be allowed as a matter of course except in the rare case. A new rule could make such videotaping presumptively permissible, yet still allow a party to move for a protective order in the rare case where special considerations weigh against videotaping of the examination.

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Attachment 1

**Clean Copy of Task Force's Proposed Revisions to
Rules 11, 16, 16.1, 26, 26.1, 37 and 45**

Rule 11. Signing Pleadings, Motions, and Other Documents; Representations to the Court; Sanctions; Assisting Filing by Self-Represented Person

(a) Signature.

(1) **Generally.** Every pleading, written motion, and other document filed with the court or served must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The document must state the signer's address, email address, and telephone number. The court must strike an unsigned document unless the omission is promptly corrected after being called to the filer's attention.

(2) **Electronic Filings.** A person may sign an electronically filed document by placing the symbol "/s/" on the signature line above the person's name. An electronic signature has the same force and effect as a signature on a document that is not filed electronically. The court may treat a document that was filed using a person's electronic filing registration information as a filing that was made or authorized by that person.

(3) **Filings by Multiple Parties.** A person filing a document containing more than one place for a signature—such as a stipulation—may sign on behalf of another party only if the person has actual authority to do so. The person may indicate such authority either by attaching a document confirming that authority and containing the signatures of the other persons who have authority to consent for such parties, or, after obtaining a party's consent, by inserting "/s/ [the other party's or person's name] with permission" as any non-filing party's signature.

(b) Representations to the Court. By signing a pleading, motion, or other document, the attorney or party certifies that to the best of the person's knowledge, information, and belief formed after reasonable inquiry:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) Generally. If a pleading, motion, or other document is signed in violation of this rule, the court—on motion or on its own—must impose on the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney’s fee.

(2) Consultation. Before filing a motion for sanctions under this rule, the moving party must:

(A) attempt to resolve the matter by good faith consultation as provided in Rule 7.1(h); and

(B) if the matter is not satisfactorily resolved by consultation, serve the opposing party with written notice of the specific conduct that allegedly violates Rule 11(b). If the opposing party does not withdraw or appropriately correct the alleged violation(s) within 10 days after the written notice is served, the moving party may file a motion under Rule 11(c)(3).

(3) Motion for Sanctions. A motion for sanctions under this rule must:

(A) be made separately from any other motion;

(B) describe the specific conduct that allegedly violates Rule 11(b);

(C) be accompanied by a Rule 7.1(h) good faith consultation certificate; and

(D) attach a copy of the written notice provided to the opposing party under Rule 11(c)(2)(B).

(d) Assisting Filing by Self-Represented Person. An attorney may help draft a pleading, motion, or other document filed by an otherwise self-represented person, and the attorney need not sign that pleading, motion, or other document. In providing such drafting assistance, the attorney may rely on the otherwise self-represented person’s representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which case the attorney must make an independent reasonable inquiry into the facts.

Rule 16. Scheduling and Management of Actions

(a) Objectives. In accordance with Rule 1, the court must manage a civil action with the following objectives:

- (1) expediting a just disposition of the action;
- (2) establishing early and continuing control so that the action will not be protracted because of lack of management;
- (3) ensuring that discovery is appropriate to the needs of the action, considering the importance of the discovery in resolving the issues and achieving a just resolution of the action on the merits, the importance of the issues at stake, the amount in controversy, the burden or expense imposed by the discovery, and the parties' resources;
- (4) discouraging wasteful, expensive, and duplicative pretrial activities;
- (5) improving the quality of case resolution through more thorough and timely preparation;
- (6) facilitating the appropriate use of alternative dispute resolution;
- (7) conserving parties' resources;
- (8) managing the court's calendar to eliminate unnecessary trial settings and continuances; and
- (9) adhering to applicable standards for timely resolution of civil actions.

(b) Joint Report and Proposed Scheduling Order.

(1) Applicability. This Rule 16(b) applies to all civil actions except:

- (A) medical malpractice actions;
- (B) actions subject to compulsory arbitration under Rule 72(b);
- (C) actions designated complex under Rule 8(h); and
- (D) actions seeking the following relief:
 - (i) change of name;
 - (ii) forcible entry and detainer;
 - (iii) enforcement, domestication, transcript, or renewal of a judgment;
 - (iv) an order pertaining to a subpoena sought under Rule 45.1(e)(2);
 - (v) restoration of civil rights;
 - (vi) injunction against harassment or workplace harassment;
 - (vii) delayed birth certificate;
 - (viii) amendment of birth certificate or marriage license;

- (ix) civil forfeiture;
 - (x) distribution of excess proceeds;
 - (xi) review of a decision of an agency or a court of limited jurisdiction; and
 - (xii) declarations of factual innocence under Rule 57.1 or factual improper party status under Rule 57.2.
- (2) **Conference of the Parties.** No later than 60 days after any defendant has filed an answer to the complaint or 180 days after the action commences—whichever occurs first—the parties must confer regarding the subjects set forth in Rule 16(d).
- (3) **Filing of Joint Report and Proposed Scheduling Order.** No later than 14 days after the parties confer under Rule 16(b)(2), they must file a Joint Report and a Proposed Scheduling Order with the court stating—to the extent practicable—their positions on the subjects set forth in Rule 16(d) and proposing a Scheduling Order that specifies deadlines for the following by calendar date, month, and year:
- (A) serving initial disclosures under Rule 26.1 if they have not already been served;
 - (B) identifying areas of expert testimony;
 - (C) identifying and disclosing expert witnesses and their opinions under Rule 26.1(a)(6);
 - (D) propounding written discovery;
 - (E) disclosing nonexpert witnesses;
 - (F) completing depositions;
 - (G) completing all discovery other than depositions;
 - (H) final supplementation of Rule 26.1 disclosures;
 - (I) holding a Rule 16.1 settlement conference or private mediation;
 - (J) filing dispositive motions;
 - (K) a proposed trial date; and
 - (L) the anticipated number of days for trial.
- (4) **Requirements of Joint Report and Proposed Scheduling Order.** Unless the court orders otherwise for good cause, the parties' Proposed Scheduling Order must set the deadlines for completing discovery and for holding a Rule 16.1 settlement conference or private mediation to occur no more than 15 months after the action commenced. The Joint Report must certify that the parties conferred regarding the subjects set forth in Rule 16(d). The attorneys of record and all unrepresented parties that have appeared in the action are jointly responsible for arranging and participating in the conference, for attempting in good faith to agree on a

Proposed Scheduling Order, and for filing the Joint Report and the Proposed Scheduling Order with the court.

- (5) **Forms.** The parties must file the Joint Report and the Proposed Scheduling Order using the forms approved by the Supreme Court and set forth in Rule 84, Forms 11 through 13.
- (A) **Expedited.** The parties must use Forms 11(a) and (b) (Expedited Case) when all of the following factors apply:
- (i) every party, except any defaulted parties, has filed an answer;
 - (ii) there are no third-party claims;
 - (iii) the parties intend to have no more than one expert per side; and
 - (iv) each party intends to call no more than 4 lay witnesses at trial.
- (B) **Standard.** The parties must use Forms 12(a) and (b) (Standard Case) if the action is ineligible for management as an Expedited Case or Complex Case.
- (C) **Complex.** The parties must use Forms 13(a) and (b) (Complex Case) if the factors enumerated in Rule 8(h)(2) apply, regardless of whether the court has designated the action as complex.
- (6) **Case Designation.** On any party's request, the court may designate an action as expedited, standard, or complex. The court should endeavor to conduct trial in expedited actions within 12 months after the action commenced.

(c) Scheduling Orders.

- (1) **Timing.** The court must issue a Scheduling Order as soon as practicable either after receiving the parties' Joint Report and Proposed Scheduling Order under Rule 16(b) or after holding a Scheduling Conference.
- (2) **Contents.** The Scheduling Order must include calendar deadlines specifying the month, date, and year for each of the items included in the Proposed Scheduling Order submitted under Rule 16(b). The Scheduling Order must also set either: (A) a trial date; or (B) a date for a Trial-Setting Conference under Rule 16(f) at which a trial date may be set. Absent leave of court, no trial may be set unless the parties certify that they engaged in a settlement conference or private mediation, or that they will do so by a date certain approved by the court. The Scheduling Order also may direct that a party must request a conference with the court before filing a discovery or disclosure motion. It also may address other appropriate matters.
- (3) **Modification of Dates Established by Scheduling Order.** The parties may modify the dates established in a Scheduling Order that govern court filings or hearings only by court order for good cause. Once a trial date is set, the parties may modify that date only under Rule 38.1.

(d) Scheduling Conferences in Non-Medical Malpractice Actions. Except in medical malpractice actions, on a party's written request the court must—or on its own the court may—set a Scheduling Conference. At any Scheduling Conference under this Rule 16(d), the court may:

- (1) determine what additional disclosures, discovery and related activities will be undertaken and establish a schedule for those activities;
- (2) discuss which form of Joint Report and Scheduling Order is appropriate under Rule 16(b)(3);
- (3) determine whether the court should enter orders addressing one or more of the following:
 - (A) setting forth any requirements or limits for the disclosure or discovery of electronically stored information, including the form or forms in which the electronically stored information should be produced and, if appropriate, the sharing or shifting of costs incurred by the parties in producing the information;
 - (B) setting forth any measures the parties must take to preserve discoverable documents or electronically stored information; and
 - (C) adopting any agreements the parties reach for asserting claims of privilege or of protection for work-product materials after production;
- (4) determine a schedule for disclosing expert witnesses and whether the parties should be required to provide signed reports from retained or specially employed experts setting forth a complete statement of all opinions, the basis and reasons for the opinions, and the facts or data considered by the expert in forming the opinions;
- (5) determine the number of expert witnesses or designate expert witnesses as set forth in Rule 26(b)(4)(D);
- (6) determine a date for disclosing nonexpert witnesses and the order of their disclosure;
- (7) determine a deadline for filing dispositive motions;
- (8) resolve any discovery disputes;
- (9) eliminate nonmeritorious claims or defenses;
- (10) permit amendment of the pleadings;
- (11) assist in identifying those issues of fact that are still contested;
- (12) obtain stipulations for the foundation or admissibility of evidence;
- (13) determine the desirability of special procedures for managing the action;
- (14) consider alternative dispute resolution and determine a deadline for the parties to participate in a settlement conference or private mediation;

- (15) determine whether any time limits or procedures set forth in these rules or local rules should be modified or suspended;
 - (16) determine whether the parties have complied with Rule 26.1;
 - (17) determine a date for filing the Joint Pretrial Statement required by Rule 16(g);
 - (18) set a trial date and determine the anticipated number of days needed for trial;
 - (19) discuss any time limits on trial proceedings, juror notebooks, brief pre-voir dire opening statements, and preliminary jury instructions, and the effective management of documents and exhibits;
 - (20) determine how a verbatim record of future proceedings in the action will be made; and
 - (21) discuss other matters and enter other orders that the court deems appropriate.
- (e) **Scheduling and Subject Matter at Comprehensive Pretrial Conferences in Medical Malpractice Actions.** This Rule 16(e) applies in medical malpractice actions. Within 5 days after receiving answers or motions from all served defendants, a plaintiff must notify the court so that it can set a Comprehensive Pretrial Conference. Within 60 days after receiving the notice, the court must conduct a Comprehensive Pretrial Conference. At that conference, the court and the parties must:
- (1) determine the additional disclosures, discovery, and related activities to be undertaken and a schedule for those activities. The schedule must include the depositions to be taken, any medical examination that a defendant desires to be made of a plaintiff, and the additional documents, electronically stored information, and other materials to be exchanged. Except on the parties' stipulation or on motion showing good cause, only those depositions specifically authorized in the conference may be taken. On any defendant's request, the court must require an authorization to allow the parties to obtain copies of records previously produced under Rule 26.2(a)(2) or records ordered to be produced by the court. If records are obtained under such authorization, the party obtaining the records must furnish—at its sole expense—complete copies to all other parties;
 - (2) determine a schedule for disclosing standard-of-care and causation expert witnesses. Unless good cause is shown, such disclosure must be simultaneous and be made within 30 to 90 days after the Comprehensive Pretrial Conference, depending on the number and complexity of the issues. Unless good cause is shown, no motion for summary judgment based on the lack of expert testimony may be filed until after the date set for the simultaneous disclosure of expert witnesses;
 - (3) determine the order of and dates for disclosing all other expert and nonexpert witnesses. The deadlines for disclosing all witnesses, expert and nonexpert, must be at least 45 days before the close of discovery. Unless extraordinary

circumstances are shown, the court must preclude any untimely disclosed witness from testifying at trial;

- (4) determine the number of expert witnesses or designate expert witnesses as set forth in Rule 26(b)(4)(D);
- (5) determine whether additional nonuniform interrogatories and/or requests for admission or production are necessary and, if so, the number permitted;
- (6) resolve any discovery disputes;
- (7) discuss alternative dispute resolution, including mediation, and binding and nonbinding arbitration;
- (8) assure compliance with A.R.S. § 12-570;
- (9) set a date for a mandatory settlement conference;
- (10) set a date for filing the Joint Pretrial Statement required by Rule 16(g);
- (11) set a trial date and determine the anticipated number of days needed for trial;
- (12) determine how a verbatim record of future proceedings in the action will be made; and
- (13) discuss other matters and enter other orders that the court deems appropriate.

(f) Trial-Setting Conference.

- (1) **Generally.** If the court has not already set a trial date in a Scheduling Order or otherwise, the court must hold a Trial-Setting Conference—as set by the Scheduling Order—for the purpose of setting a trial date. The Conference must be attended in person—or telephonically, as permitted by the court—by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties. If a trial date is not set at the Trial-Setting Conference, the court must schedule another Trial-Setting Conference as soon as practicable for the setting of a trial date.
- (2) **Subject Matter.** In addition to setting a trial date, the court may discuss at the Trial-Setting Conference:
 - (A) the status of discovery and any dispositive motions that have been or will be filed;
 - (B) a date for holding a Trial Management Conference under Rule 16(g);
 - (C) imposing time limits on trial proceedings;
 - (D) using juror questionnaires;
 - (E) using juror notebooks;
 - (F) giving brief pre-voir dire opening statements and preliminary jury instructions;
 - (G) effective management of documents and exhibits; and

(H) other matters that the court deems appropriate.

(g) Joint Pretrial Statement; Trial Management Conference.

- (1) ***Preparation of Joint Pretrial Statement.*** Counsel or the unrepresented parties who will try the action and who are authorized to make binding stipulations must confer and prepare a written Joint Pretrial Statement, signed by each counsel or unrepresented party. The parties must file the Joint Pretrial Statement no later than 10 days before the date of the Trial Management Conference, or if no conference is scheduled, no later than 10 days before trial. A plaintiff must deliver its part of the Joint Pretrial Statement to all other parties no later than 20 days before the date the Statement must be filed. All other parties must deliver their part of the Joint Pretrial Statement to all other parties no later than 15 days before the date the Statement must be filed.
- (2) ***Contents of Joint Pretrial Statement.*** The parties must prepare the Joint Pretrial Statement as a single document containing the following:
 - (A) stipulations of material fact and applicable law;
 - (B) contested issues of fact and law that the parties agree are material or applicable;
 - (C) a separate statement by each party of other issues of fact and law that the party believes are material;
 - (D) a list of witnesses each party intends to call to testify at trial, identifying those witnesses whose testimony will be presented solely by deposition. Each party must list any objection to a witness and the basis for that objection. Unless the court orders otherwise for good cause, no witness may testify at trial other than those listed;
 - (E) each party's final list of exhibits to be used at trial for any purpose, including impeachment. Each party must list any objection to an exhibit and the basis for that objection. Unless the court orders otherwise for good cause, no exhibit may be used at trial other than those listed. The parties should identify any exhibits that they stipulate can be admitted into evidence, with such stipulations being subject to court approval;
 - (F) a statement by each party identifying any proposed deposition summaries or designating parts of any deposition testimony to be offered by that party at trial, other than for impeachment purposes. The parties must designate deposition testimony by transcript page and line numbers. The parties must file with the Joint Pretrial Statement a copy of any proposed deposition summary and the written transcript of designated deposition testimony. Each party must list any objection to the proposed deposition summaries and designated deposition testimony and the basis for that objection. Unless the court orders otherwise for good cause, no deposition testimony may be used at trial other than that

designated or counter-designated in the Joint Pretrial Statement or that used solely for impeachment purposes;

(G) a brief statement of the case to be read to the jury during voir dire. If the parties cannot agree on this statement, then each party must submit a separate statement for the court's consideration;

(H) requested technical equipment;

(I) requested interpreters;

(J) if the trial is to a jury, the number of jurors and alternates, whether the alternates may deliberate, and the number of jurors required to reach a verdict;

(K) whether any party is invoking Arizona Rule of Evidence 615 regarding the exclusion of witnesses from the courtroom;

(L) a brief description of settlement efforts; and

(M) how a verbatim record of the trial will be made.

(3) ***Delivery of Exhibits.*** A plaintiff must deliver copies of all its exhibits to all other parties no later than 10 days before the date the Joint Pretrial Statement must be filed. All other parties must deliver copies of all their exhibits to all other parties no later than 5 days before the date the Joint Pretrial Statement must be filed. Any exhibit that cannot be reproduced must be made available for inspection to all other parties on or before these deadlines.

(4) ***Additional Documents to File if Trial Is to a Jury.*** If the trial is to a jury, the parties must—on the same day they file the Joint Pretrial Statement—file: (A) an agreed-on set of jury instructions, verdict forms, and voir dire questions; and (B) any additional jury instructions, verdict forms, and voir dire questions requested, but not agreed on.

(5) ***Juror Notebooks.*** A party intending to submit a notebook to the jurors must serve a copy of the notebook on all other parties no later than 5 days before the Trial Management Conference, or, if no Conference is scheduled, no later than 5 days before the trial.

(6) ***Trial Memoranda.*** A party must file any trial memorandum no later than 5 days before the Trial Management Conference, or, if no Conference is scheduled, no later than 5 days before the trial.

(7) ***Trial Management Conference.*** Any Trial Management Conference scheduled by the court should be held as close to the time of trial as is reasonable under the circumstances. The Conference must be attended by at least one of the attorneys who will conduct the trial for each of the parties and by all unrepresented parties.

(8) ***Modifications.*** Rule 16(g)'s provisions may be modified by court order.

(h) Pretrial Orders. After any conference held under this rule, the court must enter an order reciting the action taken. This order controls the later course of the action unless modified by a later court order. The order entered after a Trial Management Conference under Rule 16(g) may be modified only to prevent manifest injustice.

(i) Sanctions.

(1) Generally. Except on a showing of good cause, the court—on motion or on its own—must enter such orders as are just, including, among others, any of the orders in Rule 37(b)(2)(A)(ii) through (vii), if a party or attorney:

(A) fails to obey a scheduling or pretrial order or fails to meet the deadlines set in the order;

(B) fails to appear at a Scheduling Conference, Comprehensive Pretrial Conference, Trial-Setting Conference, or Trial Management Conference;

(C) is substantially unprepared to participate in a Scheduling Conference, Comprehensive Pretrial Conference, Trial-Setting Conference, or Trial Management Conference;

(D) fails to participate in good faith in a Scheduling Conference, Comprehensive Pretrial Conference, Trial-Setting Conference, or Trial Management Conference; or

(E) fails to participate in good faith in the preparation of a Joint Report and Proposed Scheduling Order or a Joint Pretrial Statement.

(2) Award of Expenses. Unless the court finds the conduct substantially justified or that other circumstances make an award of expenses unjust, the court must—in addition to or in place of any other sanction—require the party, the attorney representing the party, or both, to pay:

(A) another party's reasonable expenses, including attorney's fees, incurred as a result of the conduct;

(B) an assessment to the clerk; or

(C) both.

(3) Trial Date. The fact that a trial date has not been set does not preclude sanctions under this rule, including the sanction of excluding from evidence untimely disclosed information.

(j) Alternative Dispute Resolution. On motion—or on its own after consulting with the parties—the court may direct the parties to submit the dispute that is the subject matter of the action to an alternative dispute resolution program created or authorized by appropriate local court rules.

(k) Time Limits. The court may impose reasonable time limits on trial proceedings.

State Bar Committee Note
2008 Amendment to Rule 16(d)
[Formerly Rule 16(b)]

[Rule 16(d) (formerly Rule 16(b))] was amended to clarify that a court has the power under Rule 16 to enter orders governing the disclosure and discovery of electronically stored information, the preservation of discoverable documents and electronically stored information, and the enforcement of party agreements regarding post-production assertions of privilege or work product protection. Because these issues typically arise at the beginning of a case, a court need not wait until the parties are ready to address other issues under Rule 16[d] before holding a hearing under this Rule on these and related subjects.

Orders regarding the disclosure or discovery of electronically stored information may specify the forms and manner in which such information shall be produced. The court also may enter orders limiting (or imposing conditions upon) the disclosure of such information, and may take into account the relative accessibility of the electronically stored information at issue, the costs and burdens on parties in making such information available, the probative value of such information, and the amount of damages (or the type of relief) at issue in the case. *See* CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION 5 (approved August 2006) (noting that in determining discovery issues relating to electronically stored information, a court should consider these factors, among others).

Document retention and preservation issues are especially likely to arise with electronically stored information because the “ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information.” Fed. R. Civ. P. 26(f), Advisory Committee Notes on 2006 Amendment. A court has the power under this Rule to incorporate into an order any agreement the parties might reach regarding preservation issues or, absent an agreement, to enter an order in appropriate circumstances imposing such requirements and limitations. In considering such an order, a court should take into account not only the need to preserve potentially relevant evidence, but also any adverse effects such an order may have on a party’s on-going activities and computer operations. A preservation order entered over objections should be narrowly tailored to address specific evidentiary needs in a case, and *ex parte* preservation orders should issue only in exceptional circumstances. *Cf. id.* (stating that preservation orders should be narrowly tailored where objections are made and cautioning against “blanket” or *ex parte* preservation orders); CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION 10 (approved August 2006) (“When issuing an order to preserve electronically stored information, a judge should carefully tailor the order so that it is no broader than necessary to safeguard the information in question.”).

If the amount of documents and electronic data to be disclosed is voluminous, an agreement among the parties minimizing the risks associated with the inadvertent production of privileged or otherwise protected material may be helpful in lessening discovery costs and expediting the litigation. As with its counterpart in the Federal Rules of Civil Procedure, this Rule does not provide the court with authority to enter such an order without party agreement, or limit the court's authority to act on motions to resolve privilege issues. *Cf.* Fed. R. Civ. P. 16(b), Advisory Committee Notes on 2006 Amendment (clarifying the rule's scope).

Comment

2014 Amendment to Rule 16(c)

A primary goal of civil case management is the creation of public confidence in a predictable court calendar. Courts should avoid overlapping trial settings that necessitate continuances when the court is unable to hold a trial on the date scheduled. Continuances of scheduled trial dates impose unnecessary costs and inconvenience when counsel, parties, witnesses, and courts are required to engage in redundant preparation. Although early trial settings may be appropriate, a court should employ a case management system that ensures it will be in a position to conduct each trial on the date it has been set.

Comment

2017 Amendment to Rule 16(a)

Federal Rule of Civil Procedure 26(b)(1) was amended effective December 1, 2015, to expressly use the word "proportional" in describing the scope of discovery. Arizona Rules of Civil Procedure 16(a) and 26(b)(1)(B) have not been amended to incorporate use of the word "proportional," but instead Rule 16(a)(3) uses the word "appropriate." This was done to avoid any possible misreading of the rules that might place undue emphasis on any one factor (e.g., the amount in controversy). No single factor is intended to be dispositive in all cases, but rather the factors should be considered together in determining the appropriateness of given discovery in an action. While the language of "proportional" versus "appropriate" differs, the factors under Federal Rule of Civil Procedure 26(b)(1) for reaching that determination are similar to those under amended Arizona Rules of Civil Procedure 16(a)(3) and 26(b)(1)(B).

Rule 16.1. Settlement Conferences

(a) Generally. At any party's request or on its own, a court may hold one or more pretrial settlement conferences unless the action is a lower court appeal or is subject to compulsory arbitration under Rule 72. A pretrial settlement conference must be held in a medical malpractice action.

(b) Deadlines and Scheduling.

(1) *Timing.*

(A) In a medical malpractice action, the court must schedule and conduct a settlement conference no earlier than 4 months after the Rule 16(e) conference and no later than 30 days before trial.

(B) In all other actions, the Scheduling Order sets the deadline for a settlement conference, unless the court orders otherwise.

(2) *Scheduling and Planning.* The order setting a settlement conference should include the date, time, and place of the conference, the deadline by which settlement conference memoranda must be submitted, and other matters the court deems appropriate. An order setting a settlement conference may not be modified except by court order for good cause.

(c) Settlement Conference Memoranda.

(1) *Requirement and Timing.* Each party must submit a settlement conference memorandum to the court at least 5 days before the settlement conference.

(2) *Method of Submission.*

(A) In a medical malpractice action, a settlement conference memorandum must be filed and served on all other parties participating in the conference.

(B) In all other actions, a settlement conference memorandum must not be filed. Instead, it must be delivered under seal to the judge assigned to the action. Unless the court orders otherwise, the memorandum does not need to be served on the other parties.

(3) *Contents.* Each settlement conference memorandum must provide:

(A) a general description of the claims, defenses, and issues in the action, and the party's position on each claim, defense, and issue;

(B) a general description of the evidence that that the party anticipates presenting at trial;

(C) a summary of any settlement negotiations that have already occurred;

(D) the party's assessment of the likely outcome if the action proceeds to trial; and

(E) any other information that might be helpful in settling the action.

(4) Admissibility. No part of any settlement conference memorandum is admissible in evidence.

- (d) Attendance.** Every party and its counsel must attend a settlement conference unless specifically excused by the court for good cause. Additionally, each party must have a representative present who has actual authority to enter into a binding settlement agreement. All participants must appear in person unless the parties agree or the court orders otherwise.
- (e) Confidentiality.** The court may order that discussions between the court and a party or the party's counsel during a settlement conference be treated confidentially and not be revealed to others.
- (f) Transfer.** On motion or on its own, the court may transfer a settlement conference to another court division that is willing to conduct the conference.
- (g) Ex Parte Communications.** The court, with the consent of the parties participating in the conference, may engage in ex parte communications if the court believes it might facilitate the action's settlement.
- (h) Sanctions.** A court may enter any of the sanctions provided in Rule 16(i) if a party or its counsel is substantially unprepared to participate in a settlement conference or fails to participate in the conference in good faith.

Rule 26. General Provisions Governing Discovery

(a) Discovery Methods. A party may obtain discovery by any of the following methods:

- (1) depositions by oral examination or written questions under Rules 30 and 31, respectively;
- (2) written interrogatories under Rule 33;
- (3) requests for production of documents or things or permission to enter onto land or other property for inspection and other purposes, under Rule 34;
- (4) physical and mental examinations under Rule 35;
- (5) requests for admission under Rule 36; and
- (6) subpoenas for production of documentary evidence or for inspection of premises under Rule 45(c).

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

(1) Generally.

(A) Scope. Parties may obtain discovery regarding any nonprivileged matter that is relevant to the subject matter of the pending action, including matters relevant to: (i) the claim or defense of any party; (ii) the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things; and (iii) the identity and location of persons having knowledge of any discoverable matter. If the information appears reasonably calculated to lead to the discovery of admissible evidence, it is not a ground for objection that the information, though relevant, would be inadmissible at trial.

(B) Limits on Discovery. Discovery is impermissible if it: (i) is unreasonably cumulative or duplicative; (ii) can be obtained from another source that is more convenient, less burdensome, or less expensive; (iii) seeks information that the party has had ample opportunity to obtain; or (iv) is unduly burdensome or expensive given the needs of the action, the importance of the discovery in resolving the issues and achieving a just resolution of the action on the merits, the importance of the issues at stake, the amount in controversy, and the parties' resources.

(2) Specific Limits on Discovery of Electronically Stored Information. A party need not provide discovery or disclosure of electronically stored information from sources that the party shows are not reasonably accessible because of undue burden or expense. If a party makes that showing, the court may nonetheless order disclosure or discovery from such sources if the requesting party shows good cause, considering the limits of Rule 26(b)(1)(B). The court may specify conditions for the disclosure or discovery.

(3) Work Product and Witness Statements.

(A) Documents and Tangible Things Prepared in Anticipation of Litigation or for Trial. Ordinarily, a party may not discover documents and tangible things that another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) prepared in anticipation of litigation or for trial. But, subject to Rule 26(b)(4)(B), a party may discover those materials if:

- (i)** the materials are otherwise discoverable under Rule 26(b)(1); and
- (ii)** the party shows that it has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure of Opinion Work Product. If the court orders discovery of materials under Rule 26(b)(3)(A), it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Discovery of Own Statement. On request and without the showing required under Rule 26(b)(3)(A), any party or other person may obtain his or her own previous statement about the action or its subject matter. If the request is refused, the party or other person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A statement discoverable under this rule is either:

- (i)** a written statement that the party or other person signed or otherwise adopted or approved; or
- (ii)** a contemporaneous stenographic, video, audio, or other recording—or a transcription of it—that recites substantially verbatim the party's or other person's oral statement.

(4) Expert Discovery.

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been disclosed as an expert witness under Rule 26.1(a)(6).

(B) Expert Employed Only for Trial Preparation. Ordinarily, a party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial. A party may discover such facts or opinions only:

- (i)** as provided in Rule 35(d); or
- (ii)** on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

- (i)** pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B), including the time the expert spends testifying in a deposition; and
- (ii)** for discovery under Rule 26(b)(4)(B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions, including—in the court's discretion—the time the expert reasonably spends preparing for deposition.

(D) Number of Experts Per Issue.

(i) Generally. Unless the parties agree or the court orders otherwise for good cause, each side is presumptively entitled to call only one retained or specially employed expert to testify on an issue. When there are multiple parties on a side and those parties cannot agree on which expert to call on an issue, the court may designate the expert to be called or, for good cause, allow more than one expert to be called.

(ii) Standard-of-Care Experts in Medical Malpractice Actions. Notwithstanding the limits of Rule 26(b)(4)(D)(i), a defendant in a medical malpractice action may—in addition to that defendant's standard-of-care expert witness—testify on the issue of that defendant's standard of care. In such an instance, the court is not required to allow the plaintiff an additional expert witness on the issue of the standard of care.

(5) Notice of Nonparty at Fault. No later than 150 days after filing its answer, a party must serve on all other parties—and should file with the court—a notice disclosing any person: (A) not currently or formerly named as a party in the action; and (B) whom the party alleges was wholly or partly at fault under A.R.S. § 12-2506(B). The notice must disclose the identity and location of the nonparty allegedly at fault, and the facts supporting the allegation of fault. A party who has served a notice of nonparty at fault must supplement or correct its notice if it learns that the notice was or has become materially incomplete or incorrect and if the additional or corrective information has not otherwise been disclosed to the other parties through the discovery process or in writing. A party must supplement or correct its notice of nonparty at fault under this rule in a timely manner, but in no event more than 30 days after it learns that the notice is materially incomplete or incorrect. The trier of fact may not allocate any percentage of fault to a nonparty who is not disclosed in accordance with this rule except on stipulation of all the parties or on motion showing good cause, reasonable diligence, and lack of unfair prejudice to all other parties.

(6) Claims of Privilege or Protection of Work-Product Materials.

- (A) Information, Documents, or Electronically Stored Information Withheld.** When a party withholds information, a document, or electronically stored information in response to a written discovery request on the claim that it is privileged or subject to protection as work product, the party must promptly identify in writing the information, document, or electronically stored information withheld and describe the nature of that information, document, or electronically stored information in a manner that—without revealing information that is itself privileged or protected—will enable other parties to assess the claim.
- (B) Inadvertent Production.** If a party contends that a document or electronically stored information subject to a claim of privilege or of protection as work-product material has been inadvertently produced in discovery, the party making the claim may notify any party who received the document or electronically stored information of the claim and the basis for it. After being notified, a party: (i) must promptly return, sequester, or destroy the specified document or electronically stored information and any copies it has; (ii) must not use or disclose the document or electronically stored information until the claim is resolved; (iii) must take reasonable steps to retrieve the document or electronically stored information if the party disclosed it before being notified; and (iv) may promptly present the document or electronically stored information to the court under seal for a determination of the claim. The producing party must preserve the document or electronically stored information until the claim is resolved.

(c) Protective Orders.

- (1) Generally.** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or alternatively, on matters relating to a deposition, the court in the county where the deposition will be taken. Subject to Rule 26(c)(4), the court may, for good cause, enter an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
- (A)** forbidding the discovery;
 - (B)** specifying terms and conditions, including time and place, for the discovery;
 - (C)** prescribing a discovery method other than the one selected by the party seeking discovery;
 - (D)** forbidding inquiry into certain matters, or limiting the scope of discovery to certain matters;
 - (E)** designating the persons who may be present while the discovery is conducted;
 - (F)** requiring that a deposition be sealed and opened only on court order;

- (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
- (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.
- (2) **Ordering Discovery.** If a motion for a protective order is wholly or partly denied, the court may, on terms that are just, order that any party or person provide or permit discovery.
- (3) **Awarding Expenses.** Rule 37(a)(5) applies to the award of expenses on a motion for a protective order.
- (4) **Confidentiality Orders.**
- (A) *Burden of Proof.* Before the court may enter an order that limits a party or person from disclosing information or materials produced in the action to a person who is not a party to the action and before the court may deny an intervenor's request for access to such discovery materials: (i) the party seeking confidentiality must show why a confidentiality order should be entered or continued; and (ii) the party or intervenor opposing confidentiality must show why a confidentiality order should be denied in whole or in part, modified, or vacated. The burden of showing good cause for an order remains with the party seeking confidentiality.
- (B) *Findings of Fact.* When ruling on a motion for a confidentiality order, the court must make findings of fact concerning any relevant factors, including but not limited to: (i) any party's or person's need to maintain the confidentiality of such information or materials; (ii) any nonparty's or intervenor's need to obtain access to such information or materials; and (iii) any possible risk to the public health, safety, or financial welfare to which such information or materials may relate or reveal. No such findings of fact are needed if the parties have stipulated to such an order or if a motion to intervene and to obtain access to materials subject to a confidentiality order is unopposed. A party moving for entry of a confidentiality order must submit with its motion a proposed order containing proposed findings of fact.
- (C) *Least Restrictive Means.* An order restricting release of information or materials to nonparties or intervenors must use the least restrictive means necessary to maintain any needed confidentiality.
- (d) **Sequence of Discovery.** Unless the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice, or for other good cause:
- (1) methods of discovery may be used in any sequence; and
- (2) discovery by one party does not require any other party to delay its discovery.

- (e) Supplementing and Correcting Discovery Responses.** A party who has responded to an interrogatory, request for production, or request for admission must supplement or correct its response if it learns that the response was or has become materially incomplete or incorrect and if the additional or corrective information has not otherwise been disclosed to the other parties during the discovery process or in writing. A party must supplement or correct a discovery response under this rule in a timely manner, but in no event more than 30 days after it learns that the response is materially incomplete or incorrect.
- (f) Sanctions.** The court may impose an appropriate sanction—including any order under Rule 16(i)—against a party or attorney who has engaged in unreasonable, groundless, abusive, or obstructionist conduct in connection with discovery.
- (g) Discovery and Disclosure Motions.** Any discovery or disclosure motion must attach a good faith consultation certificate complying with Rule 7.1(h).

State Bar Committee Note

1984 Amendments to Rule 26(a) and (b)

The 1984 amendments to Rule 26 are aimed at preventing both excess discovery and evasion of reasonable discovery devices. Deletion of “the frequency of use” from Rule 26(a) is intended to deal directly with the problems of duplicative and needless discovery. This change and others in Rule 26(b) should encourage judges to identify instances of unnecessary discovery and to limit the use of the various discovery devices accordingly.

New standards are added in Rule 26(b)(1) which courts will use in deciding whether to limit the frequency or extent of use of the various discovery methods. Subdivision (i) is intended to reduce redundancy in discovery and require counsel to be sensitive to the comparative costs of different methods of securing information. Subdivision (ii) also seeks to minimize repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition, document request, or set of interrogatories. Subdivision (iii) addresses the problem of discovery that is disproportionate to the individual lawsuit as measured by various factors, e.g., its nature and complexity, the importance of the issues at stake, the financial position of the parties, etc. These standards must be applied in an even-handed manner to prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether affluent or financially weak.

Acknowledging that discovery cannot always be self-regulating, the Rule contemplates earlier and greater judicial involvement in the discovery process. The court may act on motion or its own initiative.

Committee Comment
1991 Amendment to Rule 26(b)(4)

The amendment to Rule 26(b)(4) must be read in conjunction with the amendment to [former Rule 43(g)]. The purpose of these two rules is to avoid unnecessary costs inherent in the retention of multiple independent expert witnesses. The words “independent expert” in this rule refer to a person who will offer opinion evidence who is retained for testimonial purposes and who is not a witness to the facts giving rise to the action. As used in this rule, the word “presumptively” is intended to mean that an additional expert on an issue can be used only upon a showing of good cause. Where an issue cuts across several professional disciplines, the court should be liberal in allowing expansion of the limitation upon experts established in the rule.

[Former Rule 43(g)] is intended to reinforce Rule 403 of the Arizona Rules of Evidence which gives the court discretion to exclude relevant evidence which represents ... “needless presentation of cumulative evidence.” By use of the word “shall” in [former Rule 43(g)] it is the intent of the Committee to strongly urge trial judges to exclude testimony from independent experts on both sides which is cumulative except in those circumstances where the cause of justice requires.

There is no intent to preclude witnesses who in addition to their opinion testimony are factual witnesses. Under [former Rule 43(g)], however, the court would exclude an independent expert witness whose opinion would simply duplicate that of the factual expert witness, except for good cause shown.

This amendment to Rule 26(b)(4) in combination with [former Rule 43(g)] and [Rules 16(d)(5) and 16(e)(4) (formerly Rule 16(c)(3))] is intended to discourage the unnecessary retention of multiple independent expert witnesses and the discovery costs associated with listing multiple cumulative independent experts as witnesses. The Committee does not intend any change in the present rule regarding specially retained experts.

State Bar Committee Note
2000 Amendments to Rule 26(b) and (c)

As part of the effort to consolidate formerly separate sets of procedural rules into either the Arizona Rules of Civil Procedure or the Rules of the Arizona Supreme Court, the Uniform Rules of Practice of the Superior Court were effectively transferred to one or the other of those existing sets of Rules. The provisions of former Rule V(a) of the Uniform Rules of Practice of the Superior Court, which required the filing, in certain counties, of a list of witnesses and exhibits as a predicate for submitting a Motion to Set and Certificate of Readiness, however, were not retained in that process. The Committee was of the view that this requirement had been rendered obsolete by the provisions of Rule 26.1, which requires the voluntary and seasonable disclosure of, *inter alia*, the identities of trial witnesses and exhibits. This necessitated the amendment of Rule 26(b)(5) to eliminate the

former reference to Rule V(a) and to substitute in its place a reference to new Rule 38.1(b)(2) of the Arizona Rules of Civil Procedure.

Rule 26(b)(4) was amended to incorporate, as a new separate paragraph, the provisions of former Rule 1(D)(4) of the Uniform Rules of Practice for Medical Malpractice Cases. The Comment to that former Rule had observed that, if a medical malpractice case involved issues of nursing care, anesthesia, and general surgery, the plaintiff should be entitled to three standard-of-care experts and, similarly, if the hospital employed the nurse, anesthesiologist and surgeon and was the sole defendant, it would also be entitled to three standard-of-care experts. The addition of the phrase “except upon a showing of good cause” merely incorporates the standards of former Rule 43(g), which addressed the same subject and was abrogated as unnecessary. Finally, the provisions of Rule 26(e) were amended to reflect prior amendments to Rules 26.1 and 37 which require the disclosure of such information by no later than sixty (60) days prior to trial, without leave of court.

Comment

2002 Amendment to Rule 26(c)

The amendment to Rule 26(c) does not limit the discretion of trial judges to issue confidentiality orders in the appropriate case. Trial judges should look to federal case law to determine what factors, including the three listed in the rule, should be weighed in deciding whether to grant or modify a confidentiality order where parties contest the need for such an order. Trial judges also should look to federal case law to determine whether to permit nonparties to intervene and obtain access to information protected by such orders.

Rule 26.1. Prompt Disclosure of Information

(a) Duty to Disclose; Disclosure Categories. Within the times set forth in Rule 26.1(d) or in a Scheduling Order or Case Management Order, each party must disclose in writing and serve on all other parties a disclosure statement setting forth:

- (1) the factual basis of each of the disclosing party's claims or defenses;
- (2) the legal theory on which each of the disclosing party's claims or defenses is based, including—if necessary for a reasonable understanding of the claim or defense—citations to relevant legal authorities;
- (3) the name, address, and telephone number of each witness whom the disclosing party expects to call at trial, and a description of the substance—and not merely the subject matter—of the testimony sufficient to fairly inform the other parties of each witness' expected testimony;
- (4) the name and address of each person whom the disclosing party believes may have knowledge or information relevant to the subject matter of the action, and a fair description of the nature of the knowledge or information each such person is believed to possess;
- (5) the name and address of each person who has given a statement—as defined in Rule 26(b)(3)(C)(i) and (ii)—relevant to the subject matter of the action, and the custodian of each of those statements;
- (6) the name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the expert's qualifications, and the name and address of the custodian of copies of any reports prepared by the expert;
- (7) a computation and measure of each category of damages alleged by the disclosing party, the documents or testimony on which such computation and measure are based, and the name, address, and telephone number of each witness whom the disclosing party expects to call at trial to testify on damages;
- (8) the existence, location, custodian, and general description of any tangible evidence, documents, or electronically stored information that the disclosing party plans to use at trial, including any material to be used for impeachment;
- (9) the existence, location, custodian, and general description of any tangible evidence, documents, or electronically stored information that may be relevant to the subject matter of the action; and
- (10) for any insurance policy, indemnity agreement, or suretyship agreement under which another person may be liable to satisfy part or all of a judgment entered in the action or to indemnify or reimburse for payments made to satisfy the

judgment: (A) a copy—or if no copy is available, the existence and substance—of the insurance policy, indemnity agreement, or suretyship agreement; (B) a copy—or if no copy is available, the existence and basis—of any disclaimer, limitation, or denial of coverage or reservation of rights under the insurance policy, indemnity agreement, or suretyship agreement; and (C) the remaining dollar limits of coverage under the insurance policy, indemnity agreement, or suretyship agreement. A party need only supplement its disclosure regarding the remaining dollar limits of coverage upon another party's written request made within 30 days before a settlement conference or mediation or within 30 days before trial. Within 10 days after such a request is served, a party must supplement its disclosure of the remaining dollar limits of coverage. For purposes of this rule, an insurance policy means a contract of or agreement for or effecting insurance, or the certificate memorializing it—by whatever name it is called—and includes all clauses, riders, endorsements, and papers attached to, or a part of, it, but does not include an application for insurance. Information concerning an insurance policy, indemnity agreement, or suretyship agreement is not admissible in evidence merely because it is disclosed under this rule.

(b) Disclosure of Hard-Copy Documents and Electronically Stored Information.

(1) *Hard-Copy Documents.* Subject to the limits of Rule 26(b)(1)(B) or other good cause for not doing so, a party must serve with its disclosure a copy of any documents existing in hard copy that it has identified under Rule 26.1(a)(8), (9), and (10). If a party withholds any such hard-copy document from production, it must in its disclosure identify the document along with the name, telephone number, and address of the document's custodian. A party who produces hard-copy documents for inspection must produce them as they are kept in the usual course of business.

(2) *Electronically Stored Information.*

(A) *Duty to Confer.* When the existence of electronically stored information is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, including:

- (i)** requirements and limits on the disclosure and production of electronically stored information;
- (ii)** the form in which the information will be produced; and
- (iii)** if appropriate, sharing or shifting of costs incurred by the parties for disclosing and producing the information.

(B) *Resolution of Disputes.* If the parties are unable to satisfactorily resolve any dispute regarding electronically stored information and seek a resolution from the court, they must present the dispute in a single joint motion. The joint motion must include the parties' positions and the separate certification from all counsel required under Rule 26(g).

(C) *Production of Electronically Stored Information.* Unless the parties agree or the court orders otherwise, within 40 days after serving its initial disclosure statement, a party must produce the electronically stored information identified under Rule 26.1(a)(8) and (9). Absent good cause, no party need produce the same electronically stored information in more than one form.

(D) *Presumptive Form of Production.* Unless the parties agree or the court orders otherwise, a party must produce electronically stored information in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the electronically stored information in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the producing party.

(E) *Limits on Disclosure of Electronically Stored Information.* Rule 26(b)(2) applies to the disclosure of electronically stored information.

(c) Purpose; Scope.

(1) *Purpose.* The purpose of the disclosure requirements of this Rule 26.1 is to ensure that all parties are fairly informed of the facts, legal theories, witnesses, documents, and other information relevant to the action.

(2) *Scope.* A party must include in its disclosures information and data in its possession, custody, and control as well as that which it can ascertain, learn, or acquire by reasonable inquiry and investigation.

(d) Time for Disclosure; Continuing Duty.

(1) *Initial Disclosures.* Unless the parties agree or the court orders otherwise, a party seeking affirmative relief must serve its initial disclosure of information under Rule 26.1(a) as fully as then reasonably possible no later than 40 days after the filing of the first responsive pleading to the complaint, counterclaim, crossclaim, or third-party complaint that sets forth the party's claim for affirmative relief. Unless the parties agree or the court orders otherwise, a party filing a responsive pleading must serve its initial disclosure of information under Rule 26.1(a) as fully as then reasonably possible no later than 40 days after it files its responsive pleading.

(2) *Additional or Amended Disclosures.* The duty of disclosure prescribed in Rule 26.1(a) is a continuing duty, and each party must serve additional or amended disclosures when new or additional information is discovered or revealed. A party must serve such additional or amended disclosures in a timely manner, but in no event more than 30 days after the information is revealed to or discovered by the disclosing party. If a party obtains or discovers information that it knows or reasonably should know is relevant to a hearing or deposition scheduled to occur in less than 30 days, the party must disclose such information reasonably in advance of the hearing or deposition. If the information is disclosed in a written

discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental disclosure statement. A party seeking to use information that it first disclosed later than the deadline set in a Scheduling Order or Case Management Order—or in the absence of such a deadline, later than 60 days before trial—must obtain leave of court to extend the time for disclosure as provided in Rule 37(c)(4) or (5).

(e) Signature Under Oath. Each disclosure must be in writing and signed under oath by the disclosing party.

(f) Claims of Privilege or Protection of Work-Product Materials.

(1) Information Withheld. When a party withholds information, a document, or electronically stored information from disclosure on a claim that it is privileged or subject to protection as work product, the party must promptly comply with Rule 26(b)(6)(A).

(2) Inadvertent Production. If a party contends that a document or electronically stored information subject to a claim of privilege or protection as work-product material has been inadvertently disclosed, the producing and receiving parties must comply with Rule 26(b)(6)(B).

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for Order Compelling Disclosure or Discovery.

(1) **Generally.** A party may move for an order compelling disclosure or discovery. The party must serve the motion on all other parties and affected persons and must attach a good faith consultation certificate complying with Rule 7.1(h).

(2) **Appropriate Court.** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court in the county where the discovery is or will be taken.

(3) Specific Motions.

(A) **To Compel Disclosure.** If a party fails to make a disclosure required by Rule 26.1, any other party may move to compel disclosure and for appropriate sanctions.

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

(i) a deponent fails to answer a question asked under Rule 30 or 31;

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

(iii) a party fails to answer an interrogatory served under Rule 33;

(iv) a party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34; or

(v) a person fails to produce materials requested in a subpoena served under Rule 45.

(C) **Related to a Deposition.** When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order to compel an answer.

(4) **Evasive or Incomplete Disclosure, Answer, or Response.** For purposes of this rule, the court may treat an evasive or incomplete disclosure, answer, or response as a failure to disclose, answer, or respond.

(5) Payment of Expenses; Protective Orders.

(A) **If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).** If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court may, after giving an opportunity to be heard, require the party or person whose conduct necessitated the motion, the party or attorney advising that conduct, or both, to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court may not order this payment if:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both, to pay the party or person who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court may not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may—after giving an opportunity to be heard—apportion the reasonable expenses, including attorney's fees, for the motion.

(b) Failure to Comply with a Court Order.

(1) *Sanctions by the Court in the County Where the Deposition Is Taken.* If the court in the county where the deposition is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) *Sanctions by the Court Where the Action Is Pending.*

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(b)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 35 or 37(a), the court where the action is pending may enter further just orders. They may include the following:

- (i) directing that the matters described in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment, in whole or in part, against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i) through (vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court may order the disobedient party, the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Timely Disclose; Inaccurate or Incomplete Disclosure; Disclosure After Deadline or During Trial.

(1) *Failure to Timely Disclose.* Unless the court orders otherwise for good cause, a party who fails to timely disclose information, a witness, or a document required by Rule 26.1 may not, unless such failure is harmless, use the information, witness, or document as evidence at trial, at a hearing, or with respect to a motion.

(2) *Inaccurate or Incomplete Disclosure.* On motion, the court may order a party or attorney who makes a disclosure under Rule 26.1 that the party or attorney knew or should have known was inaccurate or incomplete to reimburse the opposing party for the reasonable cost, including attorney's fees, of any investigation or discovery caused by the inaccurate or incomplete disclosure.

(3) *Other Available Sanctions.* In addition to or instead of the sanctions under Rule 37(c)(1) and (2), the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i) through (vi).

(4) *Use of Information, Witness, or Document Disclosed After Scheduling Order or Case Management Order Deadline or Later Than 60 Days Before Trial.* A party seeking to use information, a witness, or a document that it first disclosed later than the deadline set in a Scheduling Order or a Case Management Order, or—in the absence of such a deadline—60 days before trial, must obtain leave of court by motion. The motion must be supported by affidavit and must show that:

(A) the information, witness, or document would be allowed under the standards of Rule 37(c)(1); and

- (B) the party disclosed the information, witness, or document as soon as practicable after its discovery.
- (5) ***Use of Information, Witness, or Document Disclosed During Trial.*** A party seeking to use information, a witness, or a document that it first disclosed during trial must obtain leave of court by motion. The motion must be supported by affidavit and must show that:
- (A) the party, acting with due diligence, could not have earlier discovered and disclosed the information, witness, or document; and
- (B) the party disclosed the information, witness, or document immediately upon its discovery.
- (d) **Failure to Timely Disclose Unfavorable Information.** If a party or attorney knowingly fails to make a timely disclosure of damaging or unfavorable information required under Rule 26.1, the court may impose serious sanctions, up to and including dismissal of the action—or rendering of a default judgment—in whole or in part.
- (e) **Expenses on Failure to Admit.** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves the matter true—including the genuineness of a document—the requesting party may move that the non-admitting party pay the reasonable expenses, including attorney’s fees, incurred in making that proof. The court must so order unless:
- (1) the request was held objectionable under Rule 36(a);
- (2) the admission sought was of no substantial importance;
- (3) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
- (4) there was other good reason for the failure to admit.
- (f) **Party’s Failure to Attend Its Own Deposition or to Respond to Interrogatories or Requests for Production.**
- (1) **Generally.**
- (A) ***Motion; Grounds for Sanctions.*** The court where the action is pending may, on motion, order sanctions if:
- (i) a party or a party’s officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(b)(4)—fails, after being served with proper notice, to appear for his or her deposition; or
- (ii) a party—after being properly served with interrogatories under Rule 33 or requests for production under Rule 34—fails to serve its answers, objections, or written response.
- (B) ***Certification.*** A motion for sanctions for failing to answer or respond must attach a good faith consultation certificate complying with Rule 7.1(h).

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

(3) **Types of Sanctions.** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i) through (vi). Instead of or in addition to these sanctions, the court may require the party failing to act, the attorney advising that party, or both, to pay the reasonable expenses—including attorney’s fees—caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(g) Failure to Preserve Electronically Stored Information.

(1) Duty to Preserve.

(A) **Generally.** A party or person has a duty to take reasonable steps to preserve electronically stored information relevant to an action once it commences the action, once it learns that it is a party to the action, or once it reasonably anticipates the action’s commencement, whichever occurs first. A court order or statute also may impose a duty to preserve certain information.

(B) **Reasonable Anticipation.** A person reasonably anticipates an action’s commencement if:

- (i) it knows or reasonably should know that it is likely to be a defendant in a specific action; or
- (ii) it seriously contemplates commencing an action or takes specific steps to do so.

(C) **Reasonable Steps to Preserve.**

- (i) A party must take reasonable steps to prevent the routine operation of an electronic information system or policy from destroying information that should be preserved.
- (ii) Factors that a court should consider in determining whether a party took reasonable steps to preserve relevant electronically stored information include the nature of the issues raised in the action or anticipated action, the information’s probative value, the accessibility of the information, the difficulty in preserving the information, whether the information was lost as a result of the good-faith routine operation of an electronic information system, the timeliness of the party’s actions, and the relative burdens and costs of a preservation effort in light of the importance of the issues at stake, the parties’ resources and technical sophistication, and the amount in controversy.

(2) Remedies and Sanctions. If electronically stored information that should have been preserved is lost because a party—either before or after an action’s commencement—failed to take reasonable steps to preserve it, a court may order additional discovery to restore or replace it, including, if appropriate, an order under Rule 26(b)(2). If the information cannot be restored or replaced through additional discovery, the court:

- (A)** upon finding prejudice to another party from the loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (B)** only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation, 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)** upon also finding prejudice to another party, dismiss the action or enter a default judgment.

Rule 45. Subpoena

(a) Generally.

(1) Requirements—Generally. Every subpoena must:

- (A)** state the name of the Arizona court from which it issued;
- (B)** state the title of the action, the name of the court in which it is pending, and its civil action number;
- (C)** command each person to whom it is directed to do the following at a specified time and place:
 - (i)** attend and testify at a deposition, hearing, or trial;
 - (ii)** produce and permit inspection, copying, testing, or sampling of designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or
 - (iii)** permit the inspection of premises; and
- (D)** be substantially in the form set forth in Rule 84, Form 9.

(2) Issuance by Clerk. The clerk must issue a signed but otherwise blank subpoena to a party requesting it. That party must complete the subpoena before service. The State Bar of Arizona may also issue signed subpoenas on behalf of the clerk through an online subpoena issuance service approved by the Supreme Court.

(b) Subpoena for Deposition, Hearing, or Trial; Duties; Objections.

(1) Issuing Court. A subpoena commanding attendance at a hearing or trial must issue from the superior court in the county where the hearing or trial is to be held. Except as otherwise provided in Rule 45.1, a subpoena commanding attendance at a deposition must issue from the superior court in the county where the action is pending.

(2) Combining or Separating a Command to Produce or to Permit Inspection. A command to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena.

(3) Place of Appearance.

(A) Trial Subpoena. Subject to Rule 45(e)(2)(B)(iii), a subpoena commanding attendance at a trial may require the subpoenaed person to travel from anywhere within the state.

(B) Deposition or Hearing Subpoena. A subpoena commanding a person who is neither a party nor a party's officer to attend a deposition or hearing may not require the subpoenaed person to travel to a place other than:

- (i) the county where the person resides or transacts business in person;
- (ii) the county where the person is served with a subpoena, or within 40 miles from the place of service; or
- (iii) such other convenient place fixed by a court order.

(4) ***Command to Attend a Deposition—Notice of Recording Method.*** A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(5) ***Objections; Appearance Required.*** Objections to a subpoena commanding attendance at a deposition, hearing, or trial, must be made by timely motion under Rule 45(e)(2). Unless excused from doing so by the party or attorney serving a subpoena, by a court order, or by any other provision of this Rule 45, a person who is properly served with a subpoena must attend and testify at the date, time, and place specified in the subpoena.

(c) Subpoena to Produce Materials or to Permit Inspection; Duties; Objections.

(1) ***Issuing Court.*** If separate from a subpoena commanding attendance at a deposition, hearing, or trial, a subpoena commanding a person to produce designated documents, electronically stored information, or tangible things, or to permit the inspection of premises, must issue from the superior court in the county where the production or inspection is to be made.

(2) Electronically Stored Information.

(A) ***Specifying the Form for Electronically Stored Information.*** A subpoena may specify the form or forms in which electronically stored information is to be produced.

(B) ***Form for Electronically Stored Information Not Specified.*** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the responding person.

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

(D) ***Inaccessible Electronically Stored Information.*** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or expense. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or expense. If that showing is made, the court may nonetheless

order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(1)(B) and (b)(2). The court may specify conditions for the discovery.

(3) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless the subpoena also commands attendance at a deposition, hearing, or trial.

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

(5) Objections.

(A) Form and Time for Objection.

(i) A person commanded to produce documents, electronically stored information, or tangible things, or to permit inspection, may serve a written objection to producing, inspecting, copying, testing, or sampling any or all of the materials; to inspecting the premises; or to producing electronically stored information in the form or forms requested or from sources that are not reasonably accessible because of undue burden or expense. The objection must state the basis for the objection, and must include the name, address, and telephone number of the person, or the person's attorney, serving the objection.

(ii) The objection must be served on the party or attorney serving the subpoena before the time specified for compliance or within 14 days after the subpoena is served, whichever is earlier.

(iii) A person served with a subpoena that combines a command to produce materials or to permit inspection, with a command to attend a deposition, hearing, or trial, may object to any part of the subpoena. A person objecting to the part of a combined subpoena that commands attendance at a deposition, hearing, or trial must attend and testify at the date, time, and place specified in the subpoena, unless excused as provided in Rule 45(b)(5).

(B) Procedure After Objecting.

(i) A person objecting to a subpoena to produce materials or to permit inspection need not comply with those parts of the subpoena that are the subject of the objection, unless ordered to do so by the issuing court.

(ii) The party serving the subpoena may move under Rule 37(a) to compel compliance with the subpoena. The motion must comply with Rule 37(a)(1), and must be served on the subpoenaed person and all other parties under Rule 5(c).

- (iii) Any order to compel entered by the court must protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance.

(C) Claiming Privilege or Protection.

- (i) A person withholding subpoenaed information under a claim that it is privileged or subject to protection as work-product material must promptly comply with Rule 26(b)(6)(A).
- (ii) If information produced in response to a subpoena is subject to a claim of privilege or of protection as work-product material, the person making the claim and the receiving parties must comply with Rule 26(b)(6)(A) or, if applicable, Rule 26(b)(6)(B).

- (6) Production to Other Parties.** Unless otherwise stipulated by the parties or ordered by the court, a party receiving documents, electronically stored information, or tangible things in response to a subpoena must promptly make such materials available to all other parties for inspection and copying, along with any other disclosures required by Rule 26.1.

(d) Service.

- (1) General Requirements; Tendering Fees.** A subpoena may be served by any person who is not a party and is at least 18 years old. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering to that person the fees for one day's attendance and the mileage allowed by law.
- (2) Exceptions to Tendering Fees.** Fees and mileage need not be tendered when the subpoena commands attendance at a trial or hearing or is issued on behalf of the State of Arizona or any of its officers or agencies.
- (3) Service on Other Parties.** A copy of every subpoena and any proof of service must be served on every other party in accordance with Rule 5(c).
- (4) Service Within the State.** A subpoena may be served anywhere within the state.
- (5) Proof of Service.** Proof of service may not be filed except as allowed by Rule 5.1(c)(2)(A). Any such filing must be with the court clerk for the county where the action is pending and must include the server's certificate stating the date and manner of service and the names of the persons served.

(e) Protecting a Person Subject to a Subpoena; Motion to Quash or Modify.

- (1) Avoiding Undue Burden or Expense; Sanctions.** A party or an attorney responsible for serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and may impose an appropriate sanction—which may

include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Quashing or Modifying a Subpoena.*

- (A) *When Required.*** On timely motion, the court in the county where the case is pending or from which a subpoena was issued must quash or modify a subpoena if it:
- (i)** fails to allow a reasonable time to comply;
 - (ii)** requires a person who is neither a party nor a party's officer to travel to a location other than the places specified in Rule 45(b)(3)(B);
 - (iii)** requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
 - (iv)** subjects a person to undue burden.
- (B) *When Permitted.*** On timely motion, the superior court in the county where the case is pending or from which a subpoena was issued may quash or modify a subpoena if:
- (i)** it requires disclosing a trade secret or other confidential research, development, or commercial information;
 - (ii)** it requires disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party;
 - (iii)** it requires a person who is neither a party nor a party's officer to incur substantial travel expense; or
 - (iv)** justice so requires.
- (C) *Specifying Conditions as an Alternative.*** In the circumstances described in Rule 45(e)(2)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions, including any conditions and limits set forth in Rule 26(c), as the court deems appropriate:
- (i)** if the party or attorney serving the subpoena shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship; and
 - (ii)** if the person's travel expenses or the expenses resulting from the production are at issue, the party or attorney serving the subpoena assures that the subpoenaed person will be reasonably compensated for those expenses.
- (D) *Time for Motion.*** A motion to quash or modify a subpoena must be filed before the time specified for compliance or within 14 days after the subpoena is served, whichever is earlier.

- (E) *Service of Motion.* Any motion to quash or modify a subpoena must be served on the party or the attorney serving the subpoena. The party or attorney who served the subpoena must serve a copy of any such motion on all other parties.
- (f) **Contempt.** The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it. A failure to obey must be excused if the subpoena purports to require a person who is neither a party nor a party's officer to attend or produce at a location other than the places specified in Rule 45(b)(3)(B).

Comment

2017 Amendment

A.R.S. § 12-351 also addresses recoverable costs in connection with the production of documents in response to a subpoena. Additional costs are allowed under Rule 45(d)(1) for a subpoena that compels testimony. The court may specify additional conditions on the production of electronically stored information to guard against undue burden or expense, as allowed by Rule 45(c)(2)(D).

Attachment 2

**Commercial Division, Nassau County
Guidelines for Discovery of
Electronically Stored Information (“ESI”)¹**

The purpose of these Guidelines for Discovery of ESI (the “Guidelines”) is to:

- *Provide efficient discovery of ESI in civil cases;*
- *Encourage the early assessment and discussion of the costs of preserving, retrieving, reviewing and producing ESI given the nature of the litigation and the amount in controversy;*
- *Facilitate an early evaluation of the significance of and/or need for ESI in light of the parties’ claims or defenses;*
- *Assist parties in resolving disputes regarding ESI informally and without Court supervision or intervention whenever possible;*
- *Encourage meaningful discussions and cooperation between parties prior to the Preliminary Conference; and*
- *Ensure a productive Preliminary Conference by, among other things, identifying terms and issues that will be addressed at the Preliminary Conference and/or in the Preliminary Conference Stipulation and Order.*

The Guidelines are intended to be practical suggestions concerning discovery of ESI; they are not intended to be a checklist.

Counsel are encouraged to review the Guidelines at or before the commencement of proceedings.

I. DEFINITIONS

- A. As used herein, “ESI” includes, but is not limited to, e-mails and attachments, voice mail, instant messaging and other electronic communications, word processing documents, text files, hard drives, spreadsheets, graphics, audio and video files, databases, calendars, telephone logs, transaction logs, Internet usage files, offline storage or information stored on removable media, information contained on laptops or other portable devices and network access information and backup materials, Native Files and the corresponding Metadata which is ordinarily maintained.
- B. As used herein, the term “Metadata” means: (i) information embedded in a Native File that is not ordinarily viewable or printable from the application that generated,

¹ These guidelines, which have been prepared in consultation with members of the bar familiar with current issues and trends in litigation involving ESI, are designed to help practitioners identify at the early stage of a dispute the type and nature of electronically stored information that parties may deem appropriate to preserve and/or produce in litigation -- in preparation for a Preliminary Conference under the Commercial Division Uniform Rules. These guidelines substantially rely upon the Suggested Protocol for Discovery of ESI developed by a joint bar-court committee consisting of Chief Magistrate Judge Paul W. Grimm of the United States District Court for the District of Maryland, members of the bar of that court and technical consultants, a copy of which can be found at: www.mdd.uscourts.gov/news/news/ESIProtocol.pdf.

edited, or modified such Native File; and (ii) information generated automatically by the operation of a computer or other information technology system when a Native File is created, modified, transmitted, deleted, sent, received or otherwise manipulated by a user of such system. Metadata is a subset of ESI.

- C. As used herein, the term “Native File(s)” means ESI in the electronic format of the application in which such ESI was created, viewed and/or modified. Native Files are a subset of ESI.
- D. As used herein, the term “Load File” means a file that relates to a set of scanned or electronic images or electronically processed files that indicate where individual pages or files belong together as documents, including attachments, and where each document begins and ends. A Load File may also contain data relevant to the individual documents, such as Metadata, coded data, text, and the like. Load Files must be obtained and provided in prearranged formats to ensure transfer of accurate and usable images and data.²
- E. As used herein, the term “Static Image(s)” means a representation of ESI produced by converting a Native File into a standard image format capable of being viewed and printed on standard litigation support software. The most common forms of Static Images used in litigation are ESI provided in either Tagged Image File Format (TIFF, or .TIF files) or Portable Document Format (PDF). If Load Files were created in the process of converting Native Files to Static Images, or if Load Files may be created without undue burden or cost, Load Files are typically produced together with Static Images.

II. PRELIMINARY CONFERENCE

- A. Prior to the Preliminary Conference, counsel for the parties should:
 - 1. review and jointly complete the Preliminary Conference Stipulation and Order, and be familiar with its requirements;
 - 2. meet and confer in a good faith effort to identify matters concerning ESI not in contention, resolve disputed questions without need for court intervention and identify issues requiring court approval or intervention, in compliance with Rule 8 of the Uniform Commercial Division Rules; and
 - 3. prepare a written plan/stipulation for the preservation, collection, review and production of ESI, including without limitation, data and tangible things, if any, reasonably anticipated to be subject to discovery in the action, as set forth in the Preliminary Conference Stipulation and Order.

² The definition of “Load Files” is taken from materials promulgated by the Sedona Conference, whose writings on ESI have had a substantial influence on the development of the law and practices concerning ESI nationwide. Practitioners may find other materials promulgated by the Sedona Conference useful in determining how best to address the challenges their clients face relating to ESI.

B. Counsel are advised to confer regarding at least the following topics, including and beyond those set forth in Commercial Division Rule 8(b) related to ESI prior to the Preliminary Conference:

1. implementing litigation holds;
 - a. Courts have held that ESI should be preserved when litigation is reasonably foreseeable. Accordingly, counsel should anticipate that parties and/or the Court will likely expect litigation hold(s) to be in place upon commencement of the action, and no later than the date of the Preliminary Conference. Moreover, counsel should be mindful that some courts have imposed duties upon counsel to take reasonable steps to monitor their clients' implementation of litigation holds and revise or supplement the litigation holds as may be appropriate.
 - b. Counsel should discuss the scope of each party's litigation hold, including: the categories of potentially discoverable ESI to be segregated and preserved; the claims and defenses as to which ESI is relevant; identification of "key persons" and likely witnesses; the relevant time period for the litigation hold; the types and locations of ESI; how relevant ESI should be preserved; the location and form of maintaining ESI subject to the litigation hold; instructions to be contained in a litigation hold notice regarding preservation of ESI subject to the litigation hold; and whether an "e-discovery" liaison is required for each party.
2. each party's document or record retention policies; and
3. their respective clients' current and relevant past ESI and policies regarding ESI, if any, and become reasonably familiar with same; or alternatively, identify a person familiar with the client's electronic systems who can participate in the Preliminary Conference. Such persons are invited to attend the Preliminary Conference.

C. At the Preliminary Conference, counsel shall be prepared to discuss:

1. all matters concerning ESI as to which there is disagreement between the parties;
2. the anticipated scope of requests for, and objections to, production of ESI;
3. the form of production of ESI and, specifically, but without limitation, whether all ESI will be produced in a single format, or multiple formats, and whether those formats will be Native File, Static Image, and/or other searchable or non-searchable formats;

4. identification, in reasonable detail, of ESI that is or is not reasonably accessible without undue burden or cost, the methods of storing and retrieving ESI that is not reasonably accessible, and the anticipated costs and efforts involved in retrieving such ESI;
5. methods of identifying pages or segments of ESI produced in discovery (i.e. Bates-stamping);
6. the method and manner of redacting information from ESI if only part of the ESI is discoverable, and the exchange of redaction logs;
7. relevant ESI custodians, including such person(s)' name, title and job responsibilities;
8. cost-sharing or cost-shifting, if applicable, for the preservation, retrieval, review and/or production of ESI, including any litigation support database (e.g. Concordance; Summation; etc.);
9. search methodologies or protocols for retrieving or reviewing ESI. For example, some counsel currently use: key word searches, concept searches, "fuzzy search models", probabilistic search models and clustering searches; agreement(s) on search terms; limitations on the fields or document types to be searched; limitations regarding whether back up, archival, legacy or deleted ESI is to be searched; and sampling to develop an objective basis on which to evaluate the likelihood and cost of obtaining responsive ESI;³
10. preliminary depositions of information systems personnel, and limits on the scope of such depositions;
11. the need for two-tier or staged discovery of ESI (e.g., an initial search of a key custodian's documents, or a key time-period, only; followed by a broader or different search if necessary). The two-tiered approach is intended to be used when ESI can initially be produced in a manner that is more cost-effective, while reserving the right to request or to oppose additional more comprehensive production in a later stage or stages;
12. the need for any protective orders or confidentiality orders;
13. the need for certified forensic specialists and/or experts to assist with the search for and production of ESI;
14. the protocols to be observed when preparing logs of documents withheld from production, in whole or in part, based on an assertion of (1) attorney client privilege, (2) work product doctrine and/or (3) any other basis for

³ Sampling refers to a process by which subsets of ESI are identified and searched for the purpose of developing a factual basis on which to estimate the cost of collecting, reviewing and producing ESI. Examples of ESI samples include, but are not limited to, identified subsets of (1) "key" custodians, (2) sources of ESI and (3) time periods.

withholding an otherwise responsive document from production; and

15. whether the parties must make reasonable efforts to maintain the data as Native Files in a manner that preserves the integrity of the files, including but not limited to, the contents of the file and the Metadata related to the file, including the file's creation date and time.

D. Parties are encouraged to exchange information regarding ESI prior to the Preliminary Conference, including but not limited to information regarding network design, types of databases, ESI document retention policies, organizational charts for information systems personnel and inaccessible ESI.

III. FORM OF PRODUCTION OF ESI

A. ESI shall be produced in the form in which it is ordinarily maintained or in reasonably usable format. The parties shall agree on the format of production prior to the Preliminary Conference.

B. A Producing Party is not required to produce the same ESI in more than one format. However, the parties may agree that ESI will be produced in one format initially (i.e. TIFF format or Static Images) and that some or all of the same ESI will be produced in another format (i.e. with certain Metadata) upon request, if such data is necessary to support the parties' claims or defenses.

C. The Producing Party may not reformat, scrub or alter the ESI to intentionally downgrade the usability of the data.

IV. REASONABLY ACCESSIBLE

A. As the term is used herein, ESI is not to be deemed "inaccessible" based solely on its source or type of storage media. Inaccessibility is based on the burden and expense of recovering and producing the ESI and the relative need for the data.

B. No party should object to the discovery of ESI on the basis that it is not reasonably accessible because of undue burden or cost unless the objection has been stated with reasonable particularity, and not in conclusory or boilerplate language. Wherever the term "reasonably accessible" is used in these Guidelines, the party asserting that ESI is not reasonably accessible should be prepared to specify facts that support its contention, including submitting an appropriate and detailed analysis in the form of an affidavit.

V. COSTS

A. On the issue of whether the Requesting or Producing Party bears the cost of producing ESI, and cost-shifting/cost-sharing, the law in New York is still developing.

B. Several courts in the Commercial Division have addressed the issue, and counsel should consider and be guided by such case law, including but not limited to:

- **Finkelman v. Klaus**, 17 Misc. 3d 1138(A), 856 N.Y.S.2d 23 (N.Y. Sup. Ct., Nassau Co. Nov. 28, 2007) (Bucaria, J.).
- **Delta Financial Corp. v. Morrison**, 13 Misc.3d 604, 819 N.Y.S.2d 908 (N.Y. Sup. Ct., Nassau Co. Aug. 17, 2006) (Warshawsky, J.).
- **Weiller v. New York Life Ins. Co.**, 6 Misc.3d 1038(A), 800 N.Y.S.2d 359 (N.Y. Sup. Ct., N.Y. Co. Mar. 16, 2005) (Cahn, J.).
- **Lipco Elec. Corp. v. ASG Consulting Corp.**, 4 Misc.3d 1019(A), 798 N.Y.S.2d 345 (N.Y. Sup. Ct., Nassau Co. Aug. 18, 2004) (Austin, J.).

See also:

- **Waltzer v. Tradescape & Co., L.L.C.**, 31 A.D.3d 302, 819 N.Y.S.2d 38 (1st Dep't 2006).
- **Etzion v. Etzion**, 7 Misc. 3d 940, 796 N.Y.S.2d 844 (N.Y. Sup. Ct., Nassau Co. 2005) (Stack, J.).

VI. PRIVILEGE

Inadvertent or unintentional production of ESI containing information that is subject to the attorney-client privilege, work product protection, or other generally-recognized privilege shall not be deemed a waiver in whole or in part of such privilege if, after learning of such disclosure, the Producing Party promptly gives notice either in writing, or later confirmed in writing, to the Receiving Party or Parties that such information was inadvertently produced and requests that the Receiving Party return the original data. Absent a challenge under this paragraph or during the pendency of any such challenge, or contemplated challenge, the Receiving Party or Parties shall sequester or return all such material, including copies, except as may be necessary to bring a challenge before the Court, to the Producing Party promptly upon receipt of the written notice and request for return. The parties are encouraged to seek an order of the Court to further clarify the protections to be given to inadvertently disclosed privileged materials. Counsel are also reminded of their obligations under Rule 4.4(b) of the New York Rules of Professional Conduct concerning their receipt of documents that appear to have been inadvertently sent to them.

VII. SANCTIONS

- A. Sanctions may be imposed against a party and/or its counsel when ESI is demanded, withheld or destroyed in bad faith or with gross negligence, including but not limited to the penalties permitted pursuant to Rule 12 of the Rules of the Commercial Division of the Supreme Court.
- B. Sanctions may also be imposed if a party fails to maintain and preserve ESI, as provided in paragraph 12(c) of the Preliminary Conference Stipulation and Order.

Attachment 3

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**GUIDELINES FOR CASES INVOLVING ELECTRONICALLY STORED
INFORMATION [ESI]**

These guidelines are intended to facilitate compliance with the provisions of Fed. R. Civ. P. 1, 16, 26, 33, 34, 37, and 45 relating to the discovery of electronically stored information (“ESI”) and the current applicable case law. In the case of any asserted conflict between these guidelines and either the referenced rules or applicable case law, the latter should control.

INTRODUCTION

1. Purpose

The purpose of these guidelines is to facilitate the just, speedy, and inexpensive resolution of disputes involving ESI, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention. Parties should consider proportionality, now an express component of the scope of discoverable evidence. *See* Fed. R. Civ. P. 26(b)(1); *see also* 26(g)(1)(B)(iii).

2. Principle of Cooperation

An attorney’s representation of a client is improved by conducting discovery in a cooperative manner. The failure of counsel or the parties in litigation to cooperate in facilitating and reasonably limiting discovery requests and responses increases litigation costs and contributes to the risk of sanctions. For a more complete discussion of this principle, please review the Sedona Conference Cooperation Proclamation,¹ generally endorsed by the District, and “*Cooperation—What Is It and Why Do It?*” by David J. Waxse.²

DEFINITIONS

3. General

To avoid misunderstandings about terms, all parties should consult the most current edition of The Sedona Conference® Glossary³ and “The Grossman-Cormack Glossary of Technology-Assisted Review.”⁴ In addition, references in these guidelines to counsel include parties who are not represented by counsel.

4. Form of Production

¹ <http://www.thesedonaconference.org/dltForm?did=proclamation.pdf>.

² David J. Waxse, *Cooperation—What Is It and Why Do It?*, 18 Rich. J.L. & Tech. 8 (2012) at <http://jolt.richmond.edu/v18i3/article8.pdf>.

³ <https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Glossary>.

⁴ Federal Courts Law Review, Vol. 7, Issue 1 (2013).

Parties and counsel should recognize the distinction between format and media. Format, the internal structure of the data, suggests the software needed to create and open the file (i.e., an Excel spreadsheet, a Word document, a PDF file). Media refers to the hardware containing the file (i.e., a flash drive or disc).

Electronic documents have an associated file structure defined by the original creating application. This file structure is referred to as the “native format” of the document.⁵ Native format refers to the document’s internal structure at the time of the creation. In general, a file maintained in native format includes any metadata embedded inside the document that would otherwise be lost by conversion to another format or hard copy. In contrast, a “static format,” such as a .PDF or .TIF, creates an image of the document as it originally appeared in native format but usually without retaining any metadata. Counsel need to be clear as to what they want and what they are producing.

Counsel should know the format of the file and, if counsel does not know how to read the file format, should consult with an expert as necessary to determine the software programs required to read the file format.

5. **Meta and Embedded Data**

“Metadata” typically refers to information describing the history, tracking, or management of an electronic file. Some forms of metadata are maintained by the system to describe the file’s author, dates of creation and modification, location on the drive, and filename. Other examples of metadata include spreadsheet formulas, database structures, and other details, which in a given context, could prove critical to understanding the information contained in the file. “Embedded data” typically refers to draft language, editorial comments, and other deleted or linked matter retained by computer programs.

Metadata and embedded data may contain privileged or protected information. Litigants should be aware of metadata and embedded data when reviewing documents but should refrain from “scrubbing” either metadata or embedded data without cause or agreement of adverse parties.

PRIOR TO THE FILING OF LITIGATION

6. **Identification of Potential Parties and Issues**

When there is a reasonable anticipation of litigation or when litigation is imminent,⁶ efforts should be made to identify potential parties and their counsel to such litigation to facilitate early cooperation in the preservation and exchange of ESI that may be relevant to a potential claim or defense and proportional to the needs of the case. To comply with Rule 26(b)(1), counsel should consider determining the issues that will likely arise in the litigation. As soon as practicable and without waiting for a court order, counsel should discuss with opposing counsel which issues are actually in dispute and which can be

⁵ <http://www.thesedonaconference.org/dltForm?did=glossary2010.pdf>.

⁶ The Tenth Circuit has not yet addressed the relevant standard on when parties should take action regarding ESI prior to litigation being initiated but has said action should have been taken when litigation is “imminent” in the general litigation context. Judges in the District of Kansas have used both that standard and the standard of when litigation is “reasonably anticipated” in the context of litigation involving ESI.

resolved by agreement. Agreement that an issue is not disputed can reduce discovery costs.

7. **Identification of Electronically Stored Information**

In anticipation of litigation, counsel should become knowledgeable about their client's information management systems and its operation, including how information is stored and retrieved. Counsel also should consider determining whether discoverable ESI is being stored by third parties, for example, in cloud-storage facilities or social media. In addition, counsel should make a reasonable attempt to review their client's relevant and/or discoverable ESI to ascertain the contents, including backup, archival, and legacy data (outdated formats or media).

8. **Preservation**

In general, electronic files are usually preserved in native format with metadata intact.

Every party either reasonably anticipating litigation or believing litigation is imminent⁷ must take reasonable steps to preserve relevant ESI within the party's possession, custody, or control.⁸ Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues immediately, and should continue to address them as the case progresses and their understanding of the issues and the facts improves. If opposing parties and counsel can be identified, efforts should be made to reach agreement on preservation issues. The parties and counsel should consider the following:

- (a) the categories of potentially discoverable information to be segregated and preserved;
- (b) the "key persons" and likely witnesses and persons with knowledge regarding relevant events;
- (c) the relevant time period for the litigation hold;
- (d) the nature of specific types of ESI, including email and attachments, word processing documents, spreadsheets, graphics and presentation documents, images, text files, hard drives, databases, instant messages, transaction logs, audio and video files, voicemail, Internet data, computer logs, text messages, backup materials, or native files, and how it should be preserved; and
- (e) data maintained by third parties, including data stored in social media and cloud servers. Because of the dynamic nature of social media, preservation of this data may require the use of additional tools and expertise.

⁷ *Ibid.*, p. 2.

⁸ Counsel should become aware of the current Tenth Circuit law defining "possession, custody and control."

INITIATION OF LITIGATION

9. Narrowing the Issues

After litigation has begun, counsel should attempt to narrow the issues early in the litigation process by review of the pleadings and consultation with opposing counsel. Through discussion, counsel should identify the material factual issues that will require discovery. Counsel should engage with opposing counsel in a respectful, reasonable, and good-faith manner, with due regard to the mandate of Rule 1 that the rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” In addition, counsel should comply with their professional and ethical obligations including candor to the court and opposing counsel. Note that the issues discussed will need to be revisited throughout the litigation.

10. E-Discovery Liaison

To promote communication and cooperation between the parties, each party to a case with significant e-discovery issues may designate an e-discovery liaison for purposes of assisting counsel, meeting, conferring, and attending court hearings on the subject. Regardless of whether the liaison is an attorney (in-house or outside counsel), a third-party consultant, or an employee of the party, he or she should be:

- familiar with the party’s electronic information systems and capabilities in order to explain these systems and answer relevant questions;
- knowledgeable about the technical aspects of e-discovery, including the storage, organization, and format issues relating to ESI; and
- prepared to participate in e-discovery dispute resolutions.

The attorneys of record are responsible for compliance with e-discovery requests and, if necessary, for obtaining a protective order to maintain confidentiality while facilitating open communication and the sharing of technical information. However, the liaison should be responsible for organizing each party’s e-discovery efforts to insure consistency and thoroughness and, generally, to facilitate the e-discovery process.

AT THE RULE 26(f) CONFERENCES

11. General

At the Rule 26(f) conference or prior to the conference if possible, a party seeking discovery of ESI should notify the opposing party of that fact immediately, and, if known at that time, should identify as clearly as possible the categories of information that may be sought. Parties and counsel are reminded that, under Rule 34, if the requesting party has not designated a form of production in its request, or if the responding party objects

to the designated form, the responding party must state the form it intends to use for producing ESI. In cases with substantial ESI issues, counsel should assume that this discussion will be an ongoing process and not a one-time meeting.⁹

12. Reasonably Accessible Information and Costs

a. The volume of, and ability to search, ESI means that most parties' discovery needs will be satisfied from reasonably accessible sources. Counsel should attempt to determine if any responsive ESI is not reasonably accessible, i.e., information that is only accessible by incurring undue burdens or costs. If the responding party is not searching or does not plan to search sources containing potentially responsive information that is not reasonably accessible, it must identify the category or type of such information. If the requesting party intends to seek discovery of ESI from sources identified as not reasonably accessible, the parties should discuss: (1) the burden and cost of accessing and retrieving the information, (2) the needs that may establish good cause for requiring production of all or part of the information, even if the information sought is not reasonably accessible, and (3) conditions on obtaining and producing this information such as scope, time, and allocation of cost.

b. Absent a contrary showing of good cause, the parties should generally presume that the producing party will bear all costs for reasonably accessible ESI. The parties should generally presume that there will be cost sharing or cost shifting for ESI that is not reasonably accessible.

13. Creation of a Shared Database and Use of a Single Search Protocol

In appropriate cases, counsel may want to attempt to agree on the construction of a shared database, accessible and searchable by both parties. In such cases, they should consider both hiring a neutral vendor and/or using a single search protocol with a goal of minimizing the costs of discovery for both sides.¹⁰

14. Removing Duplicated Data and De-NISTing

Counsel should discuss the elimination of duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians, also known as vertical and horizontal views of ESI.

In addition, counsel should discuss the de-NISTing of files which is the use of an automated filter program that screens files against the NIST list of computer file types to separate those generated by a system and those generated by a user. [NIST (National Institute of Standards and Technology) is a federal agency that works with industry to develop technology measurements and standards.] NIST developed a hash database of

⁹ For a more detailed description of matters that may need to be discussed, see Craig Ball, *Ask and Answer to Right Questions in EDD*, LAW TECHNOLOGY NEWS, Jan. 4, 2008, reprinted in these Guidelines with permission at Appendix 1.

¹⁰ Vice Chancellor Travis Laster recently ordered, *sua sponte*, counsel to retain a single discovery vendor to be used by both sides and to conduct document review with the assistance of predictive coding. *EORHB, Inc., v. HOA Holdings, LLC*, C.A. No. 7409-VCL (Del. Ch. Oct. 15, 2012). Vice Chancellor Laster later modified these requirements. *See EORHB, Inc. v HOA Holdings, LLC*, No. CIV.A. 7409-VCL, 2013 WL 1960621, at *1 (Del. Ch. May 6, 2013).

computer files to identify files that are system generated and generally accepted to have no substantive value in most cases.¹¹

15. **Search Methodologies**

If counsel intend to employ technology assisted review¹² (TAR) to locate relevant ESI and privileged information, counsel should attempt to reach agreement about the method of searching or the search protocol. TAR is a process for prioritizing or coding a collection of documents using a computerized system that harnesses human judgments of one or more subject matter expert(s) on a smaller set of documents and then extrapolates those judgments to the remaining document collection.¹³

If word searches are to be used, the words, terms, and phrases to be searched should be determined with the assistance of the respective e-discovery liaisons, who are charged with familiarity with the parties' respective systems. In addition, any attempt to use word searches should be based on words that have been tested against a randomly-selected sample of the data being searched.

Counsel also should attempt to reach agreement as to the timing and conditions of any searches, which may become necessary in the normal course of discovery. To minimize the expense, counsel may consider limiting the scope of the electronic search (e.g., time frames, fields, document types) and sampling techniques to make the search more effective.

16. **E-Mail**

Counsel should attempt to agree on the scope of e-mail discovery and e-mail search protocol. The scope of e-mail discovery may require determining whether the unit for production should focus on the immediately relevant e-mail or the entire string that contains the relevant e-mail. In addition, counsel should focus on the privilege log ramifications of selecting a particular unit of production.¹⁴

17. **Deleted Information**

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

18. **Meta and Embedded Data**

Counsel should discuss whether "embedded data" and "metadata" exist, whether it will be requested or should be produced, and how to handle determinations regarding privilege or protection of trial preparation materials.

¹¹ <http://www.thesedonaconference.org/dltForm?did=glossary2010.pdf>.

¹² The Grossman-Cormack Glossary of Technology-Assisted Review.

¹³ There is no current agreement on what to call the searches that are performed with the assistance of technology. Some currently used other terms include: (CAR) computer assisted review, predictive coding, concept search, contextual search, boolean search, fuzzy search and others.

¹⁴ *In re Universal Service Fund Telephone Billing Practices Litig.*, 232 F.R.D. 669, 674 (D. Kan. 2005).

Attachment 4

April 11, 2016

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California District Court Issues New ESI Guidelines

◀ Page 1 2 ▶

Stephanie A. "Tess" Blair

Scott A. Milner

eData Practice

Morgan, Lewis & Bockius LLP

Sunday, December 9, 2012

The trend toward increased judicial involvement in eDiscovery to lower litigation costs and promote cooperation among litigants takes another leap forward in the Northern District of California.

The U.S. District Court for the Northern District of California recently set the tone in its district for cooperative, efficient, and proportionate eDiscovery by introducing a new package of guidance materials.^[1] Included in the guidance materials is the court's "Guidelines for the Discovery of Electronically Stored Information" (Guidelines),^[2] which has the following overriding goals:

- Handling discovery of Electronically Stored Information (ESI) "consistently with Fed. R. Civ. P. 1 to 'secure the just, speedy, and inexpensive determination of every action or proceeding'"
- Promoting "when ripe, the early resolution of disputes regarding the discovery of ESI **without** [c]ourt intervention" (Emphasis added)

Given these stated goals, and the fact that Northern District of California judges will likely refer to the Guidelines and their related materials when resolving discovery disputes, litigants in this district should familiarize themselves with all aspects of the Guidelines, and leverage them in negotiating a proportional and cost-effective discovery plan.

California District Court Issues New ESI Guidelines

Purpose of the Guidelines

The purpose of the Guidelines is to "encourage reasonable electronic discovery with the goal of limiting the cost, burden and time spent," while, at the same time, ensuring proper preservation of evidence and fair adjudication. The district court expressly stated that it expects cooperation among the parties on ESI discovery issues and that such cooperation is not considered a compromise of an attorney's duty to zealously represent his or her clients. Information should be exchanged at the earliest possible stages of litigation, including during the parties' Federal Rules of Civil Procedure (FRCP) Rule 26(f) "meet and confer" conference, and the proportionality standards set forth in FRCP 26(b)(2)(C) and 26(g)(1)(B)(iii) should be applied to each element and stage of the discovery plan. Discovery requests and responses should be "reasonably targeted, clear, and as specific as practicable."

In addition to the Guidelines, the court published the following documents:

- "ESI checklist for use during the Rule 26(f) meet and confer process"
- "Model Stipulated Order Re: the Discovery of Electronically Stored Information," which includes a designation of an ESI discovery liaison for each party
- An updated Standing Order for All Judges in the district, which added paragraphs six and eight requiring that the parties include in their joint case management statement (i) a certification that they have reviewed the Guidelines and conferred under FRCP 26(f) and in accordance with the Guidelines and (ii) a brief report on whether the parties have considered entering into a stipulated eDiscovery order

Requirements and Guidance Provided by the Guidelines

The Guidelines provide new standards for the preservation of ESI, including the following requirements:

- Parties should discuss preservation at the outset of the case, or earlier if possible, and continue the discussions periodically.
- Proportionality standards of the FRCP are applied to preservation.
- A preservation letter is not required by parties to notify an opposing party of its preservation obligation, but if it is used, it must be detailed and not overbroad.
- Parties should meet and confer to resolve disputes on preservation and, if that fails, raise the issue promptly with the court.
- Parties should discuss ESI from sources that are not reasonably accessible as well as identify data from sources that could contain relevant information but that should not be preserved due to proportionality concerns.

Additionally, the district court recommended that parties discuss the following at FRCP 26(f) meet-and-confer conferences:

- Source and scope of ESI, including date ranges, identity, and number of potential custodians
- Difficulties related to preservation
- Discovery phasing, so relevant information is likely to be produced first
- Need for protective orders
- Inadvertent production of privileged information and privilege waivers
- Methods and technology for searching for relevant information, including the use of sampling methods, to reduce costs and increase efficiency
- Agreements for truncated or limited privilege logs
- Opportunities to share expenses, e.g., litigation document repositories

United States District Court
Northern District of California

GUIDELINES FOR THE DISCOVERY OF
ELECTRONICALLY STORED INFORMATION

GENERAL GUIDELINES

Guideline 1.01 (Purpose)

Discoverable information today is mainly electronic. The discovery of electronically stored information (ESI) provides many benefits such as the ability to search, organize, and target the ESI using the text and associated data. At the same time, the Court is aware that the discovery of ESI is a potential source of cost, burden, and delay.

These Guidelines should guide the parties as they engage in electronic discovery. The purpose of these Guidelines is to encourage reasonable electronic discovery with the goal of limiting the cost, burden and time spent, while ensuring that information subject to discovery is preserved and produced to allow for fair adjudication of the merits. At all times, the discovery of ESI should be handled by the parties consistently with Fed. R. Civ. P. 1 to "secure the just, speedy, and inexpensive determination of every action and proceeding."

These Guidelines also promote, when ripe, the early resolution of disputes regarding the discovery of ESI without Court intervention.

Guideline 1.02 (Cooperation)

The Court expects cooperation on issues relating to the preservation, collection, search, review, and production of ESI. The Court notes that an attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. Cooperation in reasonably limiting ESI discovery requests on the one hand, and in reasonably responding to ESI discovery requests on the other hand, tends to reduce litigation costs and delay. The Court emphasizes the particular importance of cooperative exchanges of information at the earliest possible stage of discovery, including during the parties' Fed. R. Civ. P. 26(f) conference.

Guideline 1.03 (Discovery Proportionality)

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) should be applied to the discovery plan and its elements, including the preservation, collection, search, review, and production of ESI. To assure reasonableness and proportionality in discovery, parties should consider factors that include 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. To further the application of the proportionality standard, discovery requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

ESI DISCOVERY GUIDELINES Guideline 2.01 (Preservation)

- a) At the outset of a case, or sooner if feasible, counsel for the parties should discuss preservation. Such discussions should continue to occur periodically as the case and issues evolve.
- b) In determining what ESI to preserve, parties should apply the proportionality standard referenced in Guideline 1.03. The parties should strive to define a scope of preservation that is proportionate and reasonable and not disproportionately broad, expensive, or burdensome.

- c) Parties are not required to use preservation letters to notify an opposing party of the preservation obligation, but if a party does so, the Court discourages the use of overbroad preservation letters. Instead, if a party prepares a preservation letter, the letter should provide as much detail as possible, such as the names of parties, a description of claims, potential witnesses, the relevant time period, sources of ESI the party knows or believes are likely to contain relevant information, and any other information that might assist the responding party in determining what information to preserve.
- d) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel should meet and confer and fully discuss the reasonableness and proportionality of the preservation. If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.
- e) The parties should discuss what ESI from sources that are not reasonably accessible will be preserved, but not searched, reviewed, or produced. As well as discussing ESI sources that are not reasonably accessible, the parties should consider identifying data from sources that (1) the parties believe could contain relevant information but (2) determine, under the proportionality factors, should not be preserved.

Guideline 2.02 (Rule 26(f) Meet and Confer)

At the required Rule 26(f) meet and confer conference, when a case involves electronic discovery, the topics that the parties should consider discussing include: 1) preservation; 2) systems that contain discoverable ESI; 3) search and production; 4) phasing of discovery; 5) protective orders; and 6) opportunities to reduce costs and increase efficiency. In order to be meaningful, the meet and confer should be as sufficiently detailed on these topics as is appropriate in light of the specific claims and defenses at issue in the case. Some or all of the following details may be useful to discuss, especially in cases where the discovery of ESI is likely to be a significant cost or burden:

- a) The sources, scope and type of ESI that has been and will be preserved --considering the needs of the case and other proportionality factors-- including date ranges, identity and number of potential custodians, and other details that help clarify the scope of preservation;
- b) Any difficulties related to preservation;
- c) Search and production of ESI, such as any planned methods to identify discoverable ESI and filter out ESI that is not subject to discovery, or whether ESI stored in a database can be produced by querying the database and producing discoverable information in a report or an exportable electronic file;
- d) The phasing of discovery so that discovery occurs first from sources most likely to contain relevant and discoverable information and is postponed or avoided from sources less likely to contain relevant and discoverable information;
- e) The potential need for a protective order and any procedures to which the parties might agree for handling inadvertent production of privileged information and other privilege waiver issues pursuant to Fed. R. Evid. 502(d) or (e), including a Rule 502(d) Order;
- f) Opportunities to reduce costs and increase efficiency and speed, such as by conferring about the methods and technology used for searching ESI to help identify the relevant information and sampling methods to validate the search for relevant information, using agreements for truncated or limited privilege logs, or by sharing expenses like those related to litigation document repositories.

The Court encourages the parties to address any agreements or disagreements related to the above matters in the joint case management statement required by Civil Local Rule 16-9.

Guideline 2.03 (Cooperation and Informal Discovery Regarding ESI)

The Court strongly encourages an informal discussion about the discovery of ESI (rather than deposition) at the earliest reasonable stage of the discovery process. Counsel, or others knowledgeable about the parties' electronic systems, including how potentially relevant data is stored and retrieved, should be involved or made available as necessary. Such a discussion will help the parties be more efficient in framing and responding to ESI discovery issues, reduce costs, and assist the parties and the Court in the event of a dispute involving ESI issues.

Guideline 2.04 (Disputes Regarding ESI Issues)

Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the earliest possible opportunity, such as at the initial Case Management Conference. If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process, the Court may require additional meet and confer discussions, if appropriate.

Guideline 2.05 (E-Discovery Liaison(s))

In most cases, the meet and confer process will be aided by participation of e-discovery liaisons as defined in this Guideline. If a dispute arises that involves the technical aspects of e-discovery, each party shall designate an e-discovery liaison who will be knowledgeable about and responsible for discussing their respective ESI. An e-discovery liaison will be, or have access to those who are, knowledgeable about the location, nature, accessibility, format, collection, searching, and production of ESI in the matter. Regardless of whether the e-discovery liaison is an attorney (in-house or outside counsel), an employee of the party, or a third party consultant, the e-discovery liaison should:

- a) Be prepared to participate in e-discovery dispute resolution to limit the need for Court intervention;
- b) Be knowledgeable about the party's e-discovery efforts;
- c) Be familiar with, or gain knowledge about, the party's electronic systems and capabilities in order to explain those systems and answer related questions; and
- d) Be familiar with, or gain knowledge about, the technical aspects of e-discovery in the matter, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

EDUCATION GUIDELINES

Guideline 3.01 (Judicial Expectations of Counsel)

It is expected that counsel for the parties, including all counsel who have appeared, as well as all others responsible for making representations to the Court or opposing counsel (whether or not they make an appearance), will be familiar with the following in each litigation matter:

- a) The electronic discovery provisions of the Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, and Federal Rule of Evidence 502;
- b) The Advisory Committee Report on the 2015 Amendments to the Federal Rules of Civil Procedure, available at www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2014; and
- c) These Guidelines and this Court's *Checklist for Rule 26(f) Meet and Confer Regarding ESI and Stipulated E-Discovery Order for Standard Litigation*.

United States District Court
Northern District of California

CHECKLIST FOR RULE 26(f) MEET AND CONFER
REGARDING ELECTRONICALLY STORED INFORMATION

In cases where the discovery of electronically stored information (“ESI”) is likely to be a significant cost or burden, the Court encourages the parties to engage in on-going meet and confer discussions and use the following Checklist to guide those discussions. These discussions should be framed in the context of the specific claims and defenses involved. The usefulness of particular topics on the checklist, and the timing of discussion about these topics, may depend on the nature and complexity of the matter.

I. Preservation

- The ranges of creation or receipt dates for any ESI to be preserved.
- The description of data from sources that are not reasonably accessible and that will not be reviewed for responsiveness or produced, but that will be preserved pursuant to Federal Rule of Civil Procedure 26(b)(2)(B).
- The description of data from sources that (a) the party believes could contain relevant information but (b) has determined, under the proportionality factors, is not discoverable and should not be preserved.
- Whether or not to continue any interdiction of any document destruction program, such as ongoing erasures of e-mails, voicemails, and other electronically-recorded material.
- The names and/or general job titles or descriptions of custodians for whom ESI will be preserved (e.g., “HR head,” “scientist,” “marketing manager,” etc.).
- The number of custodians for whom ESI will be preserved.
- The list of systems, if any, that contain ESI not associated with individual custodians and that will be preserved, such as enterprise databases.
- Any disputes related to scope or manner of preservation.

II. Liaison

- The identity of each party’s e-discovery liaison.

III. Informal Discovery About Location and Types of Systems

- Identification of systems from which discovery will be prioritized (e.g., email, finance, HR systems).
- Description of systems in which potentially discoverable information is stored.
- Location of systems in which potentially discoverable information is stored.
- How potentially discoverable information is stored.
- How discoverable information can be collected from systems and media in which it is stored.

IV. Proportionality and Costs

- The amount and nature of the claims being made by either party.
- The nature and scope of burdens associated with the proposed preservation and discovery of ESI.
- The likely benefit of the proposed discovery.
- Costs that the parties will share to reduce overall discovery expenses, such as the use of a common electronic discovery vendor or a shared document repository, or other cost-saving measures.

- Limits on the scope of preservation or other cost-saving measures.
- Whether there is relevant ESI that will not be preserved pursuant to Fed. R. Civ. P. 26(b)(1), requiring discovery to be proportionate to the needs of the case.

V. Search

- The search method(s), including specific words or phrases or other methodology, that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery.
- The quality control method(s) the producing party will use to evaluate whether a production is missing relevant ESI or contains substantial amounts of irrelevant ESI.

VI. Phasing

- Whether it is appropriate to conduct discovery of ESI in phases.
- Sources of ESI most likely to contain discoverable information and that will be included in the first phases of Fed. R. Civ. P. 34 document discovery.
- Sources of ESI less likely to contain discoverable information from which discovery will be postponed or avoided.
- Custodians (by name or role) most likely to have discoverable information and whose ESI will be included in the first phases of document discovery.
- Custodians (by name or role) less likely to have discoverable information and from whom discovery of ESI will be postponed or avoided.
- The time period during which discoverable information was most likely to have been created or received.

VII. Production

- The formats in which structured ESI (database, collaboration sites, etc.) will be produced.
- The formats in which unstructured ESI (email, presentations, word processing, etc.) will be produced.
- The extent, if any, to which metadata will be produced and the fields of metadata to be produced.
- The production format(s) that ensure(s) that any inherent searchability of ESI is not degraded when produced.

VIII. Privilege

- How any production of privileged or work product protected information will be handled.
- Whether the parties can agree upon alternative ways to identify documents withheld on the grounds of privilege or work product to reduce the burdens of such identification.
- Whether the parties will enter into a Fed. R. Evid. 502(d) Stipulation and Order that addresses inadvertent or agreed production.

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

Case Number: C xx-xxxx

[MODEL] STIPULATED ORDER RE:
DISCOVERY OF ELECTRONICALLY
STORED INFORMATION FOR
STANDARD LITIGATION

Plaintiff(s),

vs.

Defendant(s).

1. PURPOSE

This Order will govern discovery of electronically stored information (“ESI”) in this case as a supplement to the Federal Rules of Civil Procedure, this Court’s Guidelines for the Discovery of Electronically Stored Information, and any other applicable orders and rules.

2. COOPERATION

The parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the matter consistent with this Court’s Guidelines for the Discovery of ESI.

3. LIAISON

The parties have identified liaisons to each other who are and will be knowledgeable about and responsible for discussing their respective ESI. Each e-discovery liaison will be, or have access to those who are, knowledgeable about the technical aspects of e-discovery, including the location, nature, accessibility, format, collection, search methodologies, and production of ESI in this matter. The parties will rely on the liaisons, as needed, to confer about ESI and to help resolve disputes without court intervention.

1 **4. PRESERVATION**

2 The parties have discussed their preservation obligations and needs and agree that
3 preservation of potentially relevant ESI will be reasonable and proportionate. To reduce the
4 costs and burdens of preservation and to ensure proper ESI is preserved, the parties agree that:

- 5 a) Only ESI created or received between _____ and _____ will be preserved;
- 6 b) The parties have exchanged a list of the types of ESI they believe should be
7 preserved and the custodians, or general job titles or descriptions of custodians, for
8 whom they believe ESI should be preserved, e.g., “HR head,” “scientist,” and
9 “marketing manager.” The parties shall add or remove custodians as reasonably
10 necessary;
- 11 c) The parties have agreed/will agree on the number of custodians per party for whom
12 ESI will be preserved;
- 13 d) These data sources are not reasonably accessible because of undue burden or cost
14 pursuant to Fed. R. Civ. P. 26(b)(2)(B) and ESI from these sources will be
15 preserved but not searched, reviewed, or produced: [e.g., backup media of [named]
16 system, systems no longer in use that cannot be accessed];
- 17 e) Among the sources of data the parties agree are not reasonably accessible, the
18 parties agree not to preserve the following: [e.g., backup media created before
19 _____, digital voicemail, instant messaging, automatically saved versions of
20 documents];
- 21 f) In addition to the agreements above, the parties agree data from these sources (a)
22 could contain relevant information but (b) under the proportionality factors, should
23 not be preserved: _____.

24 **5. SEARCH**

25 The parties agree that in responding to an initial Fed. R. Civ. P. 34 request, or earlier if
26 appropriate, they will meet and confer about methods to search ESI in order to identify ESI
27 that is subject to production in discovery and filter out ESI that is not subject to discovery.

28 **6. PRODUCTION FORMATS**

 The parties agree to produce documents in PDF, TIFF, native and/or paper or
a combination thereof (check all that apply)] file formats. If particular documents warrant a
different format, the parties will cooperate to arrange for the mutually acceptable production of
such documents. The parties agree not to degrade the searchability of documents as part of the
document production process.

1 **7. PHASING**

2 When a party propounds discovery requests pursuant to Fed. R. Civ. P. 34, the parties
3 agree to phase the production of ESI and the initial production will be from the following
4 sources and custodians: _____.

5 Following the initial production, the parties will continue to prioritize the order of subsequent
6 productions.

7 **8. DOCUMENTS PROTECTED FROM DISCOVERY**

- 8 a) Pursuant to Fed. R. Evid. 502(d), the production of a privileged or work-product-
9 protected document, whether inadvertent or otherwise, is not a waiver of privilege
10 or protection from discovery in this case or in any other federal or state proceeding.
11 For example, the mere production of privileged or work-product-protected
12 documents in this case as part of a mass production is not itself a waiver in this case
13 or in any other federal or state proceeding.
- 14 b) The parties have agreed upon a "quick peek" process pursuant to Fed. R. Civ. P.
15 26(b)(5) and reserve rights to assert privilege as follows _____
16 _____.
- 17 c) Communications involving trial counsel that post-date the filing of the complaint
18 need not be placed on a privilege log. Communications may be identified on a
19 privilege log by category, rather than individually, if appropriate.

20 **9. MODIFICATION**

21 This Stipulated Order may be modified by a Stipulated Order of the parties or by the
22 Court for good cause shown.

23 **IT IS SO STIPULATED**, through Counsel of Record.

24 Dated: _____
25 Counsel for Plaintiff

26 Dated: _____
27 Counsel for Defendant

28 **IT IS ORDERED** that the forgoing Agreement is approved.

Dated: _____
UNITED STATES DISTRICT/MAGISTRATE JUDGE

Attachment 5

RESOURCES

Some of the best resources are free or inexpensive and available on the Web. There is an abundance of CLE programs available from the Sections of the State Bar and other CLE providers. E-discovery is a team effort and relationships with non-lawyers will be invaluable. Your client, office assistant, or IT department is a resource.

Websites

<http://CaliforniaDiscovery.findlaw.com>
<https://extranet1.klgates.com/ediscovery/>
<http://www.discoveryresources.org/events-seminars/webcasts-podcasts/>

Articles & Key Cases

"E-Discovery Basics" *California Litigation: The Journal of the Litigation Section, State Bar of California*, August 2005
Dodge, Warren & Peters Ins. Services v. Riley (2003), 105 Cal.App.4th 1414 [preservation order & forensic exam of electronic storage media]
Toshiba America Electronics Components, Inc. v. Superior Court (Lexar Media, Inc.)(2004), 124 Cal.App.4th 762 [cost shifting]
Zubulake v. UBS, 229 F.R.D. 422 (S.D.N.Y. 2004) [1 of 5 opinions in most famous e-discovery case]

Glossaries & Explanations

<http://Wikipedia.org>
<http://www.theseonaconference.org>
<http://whatis.techtarget.com>

California Discovery Act & Rules of Court

C.C.P. Sections 2031, 2016, 1985 et seq., 1985.3-.6
C.R.C. Rules 3.724-3.728 [case management of discovery: meet & confer, statement, conference, & order]

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LITIGATION SECTION

State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

E-Discovery Pocket Guide

WHAT EVERY LITIGATOR MUST KNOW



The *LITIGATION SECTION*
of the State Bar of California provides your

E-Discovery Pocket Guide

WHAT EVERY CALIFORNIA LITIGATOR MUST KNOW

- *Potential issue in each case*
- *Lawyers cannot ignore it*
- *Clients and judges expect e-competence*

RISKS of ignoring e-discovery

- Ignore vital evidence
- Sanctions / Spoliation
- Malpractice
- Discipline

BENEFITS

- Competence & results
- Ethical & professional duties
- Efficiency & cost reduction
- Client attraction & retention

LITIGATION SECTION
STATE BAR OF CALIFORNIA

E-DISCOVERY BASICS FOR EVERY LITIGATOR

Basic Knowledge

Do you have a working knowledge of the following concepts that today's litigators must understand?

- Metadata, RAM, computer logs
- Native format, TIFF, PDF
- Fields, queries, & relational databases
- Preservation duties, letters, and orders
- Spoliation & its remedies
- Backup tapes, data archives and storage
- Keyword, contextual and concept search
- Hard drive, server, flash memory
- Computer and network forensics
- Spreadsheet formulas
- Forensic copy
- ESI: electronically stored information
- Records management

Tips & Guidelines

- Most data, information and "documents" is created, used, transmitted, stored, saved and discovered in electronic form
- Understand how e-data differs from paper
- Tech changes: update your knowledge
- Apply basic discovery concepts and rules to e-data; reconsider clichés in e-data context
- Know your client's e-data system, practice & policy
- Address e-discovery duties with client immediately
- Evaluate all issues for e-data evidentiary sources
- Integrate e-data in all discovery inquiries & plans
- Understand e-data before you negotiate or make representations, assertions, or commitments to your client, opponent, or the court
- Evaluate & address e-data issues and problems with adversary & court ASAP
- Use e-data expert early; a good expert can be your mentor and your best evidence

- Use e-data, technology and discovery referees to achieve cost effective discovery
- Approach meet & confer and case management conferences with knowledge, expert assistance and a clear strategy
- Take corporate depositions early to understand opponents system and sources of information and to plan future discovery

Client Discussion Topics

- Assembly & supervision of discovery team
- Allocation of discovery duties: party / others
- Retention of expert assistance: types, need, selection, use, costs, credibility
- ESI data map: locate discoverable data
- Document retention, storage, and destruction policies, records and practices
- Preservation obligation (dates, subject matter, participants, hardware, data archives, software)
- Litigation hold: duty to preserve / stop destruction
- Preservation duty: compliance, monitoring, enforcement, supervision, review, modification and suspension; feasible response to opponent's demand or motion
- Duty of reasonable search and production
- New sources of e-data to preserve & search
- Forms of production of different information
- Legally defensible preservation & search
- Review process (relevancy, privilege, responsive)
- Costs & use of technology for review
- Cost of retrieval, processing, maintenance, review
- Cost shifting / allocation
- Spoliation and discovery sanctions
- Necessity of a Protective Order to preserve opponents' discoverable evidence
- Privilege Issues: waiver by inadvertent production & crime-fraud exception

Meet and Confer Topics

- Preservation duty, scope, costs & order
- Scope of search & production (metadata, back-ups, digital storage, related 3d party records, ISPs, web hosting services, GPS records, IP addresses, mobile phones, log data, flash drives and i-pods, surveillance tapes, voice mail, access logs, RAM, embedded data, telephone records and recordings...)
- Voluntary mutual production & depositions
- Shared data depository (concept organization)
- Simultaneous or phased production
- Relative value of specific data in electronic form
- Form of production (Native / TIFF / PDF)
- Cost allocation: preservation, search, production
- Forensic inspection of drives and servers
- Database queries, keyword and concept searches
- Privilege ID & log / Quick Peek / Clawback
- Inadvertent production as waiver of privilege
- Judicial intervention and assistance: telephonic contact, informal guidance, status conferences
- Discovery referee: scope, authority, review
- Notice to & duties of related non-parties & agents
- Admissibility of e-data
- Access to adversary's database, servers or hard drive; use and instruction of neutral expert to protect confidentiality
- Discovery of preservation efforts or instructions
- Presentation of issues to court at case management conference: C.R.C. Rules, CM statement

Case Management

- Present issues to court and obtain orders
- Selecting and using a discovery referee
- Strategy for conference with judge
- Strategy in drafting case management order
- Informal court contact & dispute resolution
- Periodic discovery status conferences

Attachment 6

**UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLORADO**

**GUIDELINES
ADDRESSING THE DISCOVERY OF
ELECTRONICALLY STORED INFORMATION**

PREFACE

The purpose of these Guidelines is to address concerns that have been raised by attorneys practicing in the United States District Court for the District of Colorado with respect to discovery of electronically stored information (“ESI”). The phrase “electronic discovery” or “e-discovery” encompasses the process of identifying, preserving, collecting, reviewing, and producing ESI in connection with pending or reasonably anticipated litigation.

E-discovery is universal. “From the largest corporations to the smallest families, people are using computers to cut costs, improve production, enhance communication, store countless data and improve capabilities in every aspect of human and technological development.” *Bills v. Kennecott Corp.*, 105 F.R.D. 459, 462 (D. Utah 1985). “[B]ecause we live in a society which emphasizes both computer technology and litigation, the mix of computers and lawsuits is ever increasing.” *Id.*

The prevalence of ESI and its associated impact on the civil litigation process have become all too apparent. “The discovery of [ESI] has become vital in most civil litigation – virtually all business information and much private information can be found only in ESI. At the same time, the costs of gathering, reviewing, and producing ESI have reached staggering proportions.” Hon. James C. Francis IV, *Foreword* to Anne Kershaw and Joe Howie, *Judges’ Guide to Cost Effective E-Discovery*, at i (2010).

In response to the complexities presented by electronic discovery, the United States District Court for the District of Colorado convened an Electronic Discovery Committee in 2012 to survey attorneys practicing in the District to determine whether guidelines or local rules would be beneficial.

Judge William J. Martínez chaired the Committee, which included Magistrate Judge Craig B. Shaffer and a number of highly experienced attorneys representing a cross-section of practices, including governmental counsel, corporate in-house counsel, large firm and solo practitioners, and plaintiff and defense attorneys, each with expertise litigating matters involving electronic discovery. In the fall of 2012, the Committee worked with the Corona Institute to develop, conduct, and analyze a comprehensive survey of practitioners in the District concerning their experiences with ESI. Nearly 2,000 responses were received.

The survey results confirmed that electronic discovery is a concern for lawyers practicing in our District, as it is in many other jurisdictions. An overwhelming majority of respondents, 90.8%, requested that the court assist practitioners in our District with e-discovery by adopting some form of procedures or rules for ESI-intensive cases. Specifically, 43.8% of respondents

Monday, September 01, 2014

requested guidelines to assist counsel, 34.6% requested a model order that would mandate procedures or required topics of conferral, and 12.4% requested binding local rules.

Accordingly, the Committee appointed a Sub-Committee to draft proposed Guidelines for consideration and review by the full Committee. The Sub-Committee, chaired by Joy Woller, worked diligently over the course of a year to analyze the survey results and orders, rules, and other pilot projects from around the country concerning e-discovery. The resulting Guidelines reflect exhaustive analysis and rigorous debate and compromise, undertaken in the spirit of providing constructive and even-handed guidance for attorneys in all types of practices.

For assistance in understanding and implementing these Guidelines, counsel and unrepresented parties are encouraged to consult the reference materials identified throughout and at the end of these Guidelines. References to counsel below also include and apply to unrepresented parties.

Monday, September 01, 2014

Electronic Discovery Guidelines Committee Roster

Judge William Martínez

Magistrate Judge Craig Shaffer

John Chanin
Lindquist & Vennum LLP

Stanton Dodge
EVP and General Counsel
DISH Network L.L.C.

Rita Kittle
Supervisory Trial Attorney
United States Equal Employment Opportunity Commission

Lino S. Lipinsky de Orlov
McKenna Long & Aldridge LLP

Kimberlie Ryan
Ryan Law Firm, LLC

Joy Woller
Lewis Roca Rothgerber LLP

Drafting Sub-Committee

Chair, Joy Woller
Members: Stanton Dodge, Rita Kittle, Kimberlie Ryan

GUIDELINE 1

PARTIES AND THEIR COUNSEL SHARE RESPONSIBILITY FOR SECURING THE JUST, SPEEDY, AND INEXPENSIVE DETERMINATION OF EVERY ACTION AND PROCEEDING.

Commentary 1.1: Scope of E-Discovery Guidelines and Obligations of Counsel.

These Guidelines are intended to facilitate compliance with the Federal Rules of Civil Procedure and, more specifically, to assist the court, counsel, and parties in securing the objectives underlying Fed. R. Civ. P. 1. In the case of any conflict between these Guidelines and either the Federal Rules of Civil Procedure or the Local Rules of the United States District Court for the District of Colorado, the Federal and Local Rules shall control. Counsel should be familiar with these Guidelines and the attached Meet-and-Confer Checklist for the Rule 26(f) Meet-and-Confer process regarding ESI. Finally, counsel and parties must adhere to the Practice Standards pertaining to discovery in general, and to e-discovery in particular, adopted by the judicial officer(s) presiding over the action.

Commentary 1.2: Counsel Should Be Aware of the Benefits and Risks Associated with Relevant Technologies in the Civil Litigation Context.

The constantly changing nature of information management and technology places increased responsibility on counsel to stay abreast of the benefits and risks associated with those technologies in the civil litigation context. Although counsel are not expected to be technological experts, they must be familiar with the Federal Rules of Civil Procedure, Federal Rule of Evidence 502, and the case law interpreting those Rules, particularly as they apply to or govern the discovery of ESI.¹

Commentary 1.3: Cooperation.

These Guidelines are premised on the belief that an attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. Constructive, mutually beneficial engagement with opposing counsel has the potential to reduce the costs of litigation and avoid delay, thereby facilitating the just, speedy, and inexpensive determination of cases. Cooperation in reasonably limiting ESI discovery requests, and in reasonably responding to those requests, may reduce litigation costs and delay. These Guidelines also acknowledge the particular importance of cooperative exchanges of information, including ESI, at all stages of the litigation process.

¹See The Report of the Civil Rules Advisory Committee on the 2006 Amendments to the Federal Rules of Civil Procedure, available at: uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf

Commentary 1.4: Standards of Reasonableness and Proportionality.

While a party's e-discovery responsibilities are not measured by a standard of perfection, the Federal Rules of Civil Procedure do require parties and their counsel to act in good faith and to undertake reasonable efforts to identify and to produce relevant and responsive, non-privileged ESI in the client's possession, custody, or control. This "reasonableness" standard is a defining characteristic of these Guidelines. The Federal Rules of Civil Procedure also seek to guard against redundant and disproportionate discovery. While proportionality factors must be weighed and tailored to the particular circumstances of each case and may require adjustment as the pretrial process progresses, counsel and parties are expected to cooperate in developing and then proposing a discovery plan that incorporates the proportionality principles in Fed. R. Civ. P. 26(b)(2)(C)(iii) and Fed. R. Civ. P. 26(g)(1)(B)(iii). To further the application of the proportionality standard, requests for production of ESI, and related responses and objections, should be reasonably targeted and as specific as practicable.

GUIDELINE 2

E-DISCOVERY REQUIRES COUNSEL AND THEIR CLIENTS TO BE PROACTIVE AND TO ADDRESS ESI IN A TIMELY AND THOUGHTFUL MANNER.

Commentary 2.1: Understand How Your Client Generates, Maintains, and Retains or Disposes of ESI.

Counsel should be knowledgeable about relevant ESI in their client's possession, custody, or control, including how such information is generated, maintained, retained, and disposed. Where litigation is reasonably anticipated or pending, counsel and parties should undertake reasonable efforts to determine whether discoverable information is likely to exist in backup, archival, or legacy data, and should be prepared to identify those sources or types of ESI that are not reasonably accessible because of undue burden or expense, pursuant to Fed. R. Civ. P. 26(b)(2)(B).

Commentary 2.2: A Party Must Take Reasonable Steps to Meet Its Preservation Obligations.

Generally, an individual or organization must take reasonable steps to identify and to preserve relevant data in its possession, custody, or control once litigation is pending or is reasonably anticipated. In determining the scope of a party's preservation obligation, factors to consider include, but are not limited to:

- (a) the claims, defenses, and relevant facts in dispute;
- (b) relevant time frames, geographic locations, and individuals;
- (c) the types of data that may be relevant to the claims and defenses and the current repositories and custodians of that data;

- (d) whether legacy, archived, or offline data sources are reasonably likely to contain relevant, non-duplicative information;
- (e) whether there are third-party sources that have relevant information that falls within the preservation obligation and, if so, what actions should be taken to preserve that data;
- (f) whether any automatic or routine document retention or destruction policies should be suspended or modified; and
- (g) the circumstances and information known or reasonably available to counsel and the parties at the time the preservation efforts at issue are or were undertaken.

Parties and counsel should recognize that the scope of their preservation obligations may change as the case proceeds and the disputed issues, claims, and defenses come into sharper focus. Ultimately, a party's preservation efforts are measured by a standard of reasonableness.

Commentary 2.3: All Parties Should Address Preservation Issues in a Timely and Reasonable Manner.

Over-preservation of ESI has the potential to unreasonably increase the time and expense of litigation. Counsel are encouraged to confer with opposing counsel on the scope of preservation at the earliest possible time and in as much detail as possible. Preservation requests to an opposing party should be reasonably related to the actual or anticipated claims and defenses, and should provide the recipient with sufficient information to allow informed decisions about the scope of the preservation obligation (e.g., the relevant time period and identification of potential custodians of ESI and sources of ESI that are likely to contain relevant information). The presence or absence of a preservation request, however, does not alter a party's common law, statutory, regulatory, or other duty to preserve relevant information.

Commentary 2.4: Counsel Should Take Reasonable Steps to Prepare for the Fed. R. Civ. P. 26(f) Conference.

Rule 26(f) of the Federal Rules of Civil Procedure contemplates that parties and their counsel will participate in good faith in developing and submitting a discovery plan that is consistent with the claims and defenses in the action and the objectives underlying Fed. R. Civ. P. 1. In preparing for the Fed. R. Civ. P. 26(f) conference, counsel should understand, to the extent possible, the facts of the case and the objectives of discovery.

Commentary 2.5: Counsel Are Encouraged to Confer Regarding ESI at the Earliest Possible Stages of Litigation.

The Fed. R. Civ. P. 26(f) conference may be more efficient and productive if counsel confer in advance and have similar expectations as to the parameters of discovery and the extent to which ESI may impact the pretrial process. For example, counsel may be aware of certain types or sources of data in the opposing party's possession that will be relevant to the claims and defenses in the case. Neither side is disadvantaged by providing opposing counsel with that information in advance of the Fed. R. Civ. P. 26(f) conference. As another example, the Fed. R.

Civ. P. 26(f) conference typically takes place weeks, if not months, after the start of the litigation and long after a party's duty to preserve ESI was triggered. A litigation hold that was implemented in advance of litigation may be over- or under-inclusive in light of the factual allegations and claims actually asserted in the Complaint. Counsel should not wait until the Fed. R. Civ. P. 26(f) conference to confer regarding the scope of preservation in light of the particular needs of the case. As a further example, counsel may not want to wait to confer until the Fed. R. Civ. P. 26(f) conference regarding a preservation request received from an opposing party that the receiving party believes would entail unreasonable preservation steps. As described further in Commentary 2.2, good faith conferral and reasonable requests are expected.

GUIDELINE 3

COUNSEL AND PARTIES SHOULD APPROACH THE FED. R. CIV. P. 26(f) CONFERENCE AS A CRITICAL STEP IN THE E-DISCOVERY PROCESS.

Commentary 3.1: If Counsel Act Reasonably and in Good Faith, the Meet-and-Confer Process Should Result In a Scheduling Order That Reduces the Costs of E-Discovery and the Potential For Time-Consuming Disputes.

Although Fed. R. Civ. P. 26(f) identifies several topics for discussion, the overarching objective is to produce a scheduling order that reflects the claims and defenses actually at issue and discovery that is proportionate and reasonably tailored to the specific circumstances of the parties and the case. Counsel should recognize that, in cases involving complex facts or substantial amounts of ESI, multiple meet-and-confer sessions may be necessary before a discovery plan is submitted to the court, and that continuing dialogue may be helpful throughout the pretrial process as the parties become more familiar with the particular ESI challenges of their clients or the case.

Commentary 3.2: Counsel Should Make Reasonable Efforts to Reach Agreement on the Scope of Preservation Obligations.

Counsel should discuss the scope, sources, and types of ESI that have been and will be preserved in light of the claims and defenses in the case and other proportionality factors. Just as importantly, counsel should make reasonable efforts to reach agreement on those types and sources of ESI that are not subject to a preservation obligation or may be withdrawn from a litigation hold. The goal of these discussions should not be to extract some tactical advantage, but rather to clarify the scope of preservation and thereby minimize the potential for expensive and distracting motion practice. Any agreements regarding preservation should be incorporated in a proposed scheduling order, and any preservation disputes should be addressed at the Fed. R. Civ. P. 16 scheduling conference.

Commentary 3.3: Counsel Should Identify Likely Sources of Relevant ESI.

At the Fed. R. Civ. P. 26(f) conference, counsel should be prepared to identify likely sources of relevant ESI and provide basic information about their client's system architecture and protocols. In order to facilitate discovery and save costs for both sides, counsel should consider:

- (a) the types of data in the parties' possession, custody, or control that may be relevant to the issues in dispute and whether discoverable ESI exists in non-traditional forms (e.g., text messages, social media, cloud-based ESI, etc.) or alternatively, whether a party expects to request such ESI;
- (b) the estimated volume of relevant ESI in the parties' possession;
- (c) current locations and custodians of relevant data;
- (d) whether ESI stored in a database may be relevant and whether that data can be produced by querying the database and producing discoverable information in a report or an exportable electronic file; and
- (e) whether "embedded data" and "metadata" will be requested or should be produced (e.g., are the metadata relevant to the case or otherwise helpful to make review more efficient and less costly).

The Meet-and-Confer Checklist provides further detail and subjects for discussion.

Commentary 3.4: Counsel Should Discuss Alternative Methods for Collecting, Filtering and Reviewing ESI.

The goal of all counsel should be to collect, review, and produce relevant and responsive non-privileged materials from a larger universe of ESI using reliable methodologies that provide a quality result at costs that are reasonable and proportionate to the litigation. A search methodology need not be perfect, or even the best available, but it should be reasonable under the circumstances. A reasonable methodology may include steps to reduce the volume of data by removing ESI that is duplicative, cumulative, or not reasonably likely to contain information within the scope of discovery. Among other things, counsel should consider:

- (a) reaching agreement on the volume of discovery that will be collected and processed;
- (b) reaching agreement on methods to de-duplicate the data collected prior to review;
- (c) whether early case assessment tools and procedures can be used to focus the search or to assist in further refining a search protocol;
- (d) reaching agreement on a reasonable set of search terms, if key word searching is the selected methodology;

- (e) to what extent or under what circumstances the requesting party may propose additional search terms or seek to expand the scope of the review and production;
- (f) the usefulness and applicability of technology-assisted review (e.g. predictive coding);
- (g) what quality assurance procedures can be implemented to verify the accuracy of the chosen search parameters; and
- (h) enlisting the assistance of a neutral or requesting the appointment of a master to assist the parties in developing a reasonable search methodology.

Cooperation and transparency at the beginning of the litigation may minimize motion practice and disputes about e-discovery.

Commentary 3.5: Counsel Should Discuss the Form or Forms In Which ESI Will Be Produced.

As a general proposition, ESI should be produced in the form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. *See* Fed. R. Civ. P. 34(b)(2)(E)(ii). Form of production may depend on the type of ESI requested, whether a party timely requested a particular form of production, and whether the producing party objected to the requested form of production. Counsel should recognize, however, that different forms of production may be appropriate for different data sources and should be aware of the limitations inherent in each form of production (e.g., the inability to permanently affix or “burn in” Bates numbers to some native format files). To the extent a party is seeking metadata, counsel should discuss what metadata fields the producing party generally should be expected to provide (e.g., date, time, senders, receivers, etc.), and whether certain types or fields of metadata will be presumptively beyond the scope of discovery. Some production formats that counsel may consider include:

- (a) native file format;
- (b) single or multi-page static images (TIFF or PDF) images with Bates labels;
- (c) static images, as referenced in Commentary 3.5(b) above, with an accompanying load file containing extracted metadata fields (e.g., Author, To, From, and CC);
- (d) initial-page static images together with links to native files for spreadsheets;
- (e) scanned images with optical character reader (OCR) files; and
- (f) a format specific to the review application to be used by the reviewing party.

These examples are illustrative only. Reaching agreement on forms of production may reduce the costs for production and the potential for court-ordered re-production later in the discovery process.

Commentary 3.6: Counsel Should Be Prepared to Discuss Sources of ESI That Are “Not Reasonably Accessible” Under Fed. R. Civ. P. 26(b)(2)(B).

In general, the volume of and ability to search ESI means that most parties’ discovery needs will be satisfied from reasonably accessible data. Counsel should attempt to determine whether responsive ESI is not reasonably accessible, i.e., information that is accessible only by incurring undue burdens or costs. Whether data are not reasonably accessible due to undue burden or cost will depend on the facts of the case and may include:

- (a) “deleted,” “slack,” “fragmented,” or “unallocated” data on hard drives;
- (b) random access memory (RAM) or other ephemeral data;
- (c) online access data such as temporary Internet files, history, cache, cookies, etc.;
- (d) data in metadata fields that are frequently updated automatically, such as last-opened dates;
- (e) backup data that are substantially duplicative of data that are more accessible elsewhere; and
- (f) other forms of ESI, the preservation of which requires extraordinary affirmative measures and/or disproportionate cost to preserve.

If the requesting party intends to seek discovery of ESI from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, and conditions on obtaining and producing this information, such as scope, time, and allocation of cost.

Commentary 3.7: Counsel Should Discuss How the Timing of Discovery May Facilitate the Objectives of Fed. R. Civ. P. 1.

In complex cases or in cases involving substantial amounts of ESI, the cost of e-discovery can be prohibitive, particularly if that discovery encompasses more than the actual claims and defenses in the case. Counsel can achieve cost savings and efficiencies by phasing discovery so that, to the extent possible, discovery is sought first from sources most likely to contain relevant and discoverable information and at a reasonable cost. Counsel should also consider sampling as a way to control costs and to avoid unnecessary or duplicative discovery. Staged, phased, or sample-based discovery could also be combined with cost-shifting or cost-sharing agreements, particularly in the case of ESI production involving inaccessible sources pursuant to Fed. R. Civ. P. 26(b)(2)(B).

GUIDELINE 4

E-DISCOVERY IS AN ITERATIVE PROCESS THAT REQUIRES ONGOING DISCUSSION AND COOPERATION BETWEEN PARTIES AND COUNSEL THROUGHOUT THE PRETRIAL PROCESS.

Commentary 4.1: Parties May Reduce or Eliminate Motion Practice By Conducting Discovery in a Transparent and Cooperative Manner.

While counsel is expected to be an advocate for his or her client, a cooperative and transparent approach to discovery may achieve significant savings in time and money without any resulting harm to a party's litigation position. Counsel should not discount the strategic advantages that may be gained through disclosure to or agreement with the opposing party. A party who freely discloses information may avoid "discovery about discovery" or may be better positioned to argue that discovery costs should be shifted under Fed. R. Civ. P. 26(b)(2)(B) or 26(c), or that "circumstances make an award of expenses unjust" under Fed. R. Civ. P. 37(a)(5). Transparency, of course, does not require a party to divulge information that is otherwise protected by the attorney-client privilege or the work-product doctrine.

Commentary 4.2: E-Discovery Disputes, Whenever Possible, Should Be Resolved Through Informal Mechanisms, Such as Consultation Between the Parties, Enlisting the Assistance of Qualified Neutrals, or Informal Conferences with the Court.

While a party's e-discovery efforts should be reasonable under the circumstances and not held to a standard of perfection, discovery disputes may arise, particularly in cases involving substantial amounts of ESI. In most instances, informal dispute resolution is preferable to premature motion practice. For example, motions challenging a producing party's preferred search methodology may be premature before an adequate factual record has been developed. Such motions may turn on abstract arguments and "expert" testimony that does not materially advance the litigation or move the case toward a just and inexpensive determination. Even if informal dispute resolution measures are unsuccessful, they may narrow the range of disputes or clarify the record for subsequent motion practice, thereby saving the parties time and expense.

GUIDELINE 5

PRIVILEGE ISSUES SHOULD BE ADDRESSED EARLY IN THE LITIGATION TO AVOID UNNECESSARY DISPUTES AND EXPENSE.

Commentary 5.1: Privilege Logs Should Facilitate Discovery, Not Generate Additional Disputes.

The volume of ESI places increased pressure on counsel and their clients to identify and describe privileged material, and can substantially add to the cost of any privilege review. To control these escalating costs, counsel should attempt to reach agreement early in the litigation on what information will be provided for each document or category of documents included on

the privilege log. Counsel should confer in good faith in an effort to identify types of documents (e.g., e-mail strings, e-mail attachments, duplicates, or near-duplicates, communication between counsel and a client after litigation commences) that need not be logged on a document-by-document basis pursuant to Fed. R. Civ. P. 26(b)(5)(A) or at all, if the parties so agree. The end-result should be a more useful log for a narrowly defined range of documents, thereby minimizing the need for judicial intervention.

Commentary 5.2: Counsel Should Attempt to Agree on a Procedure to Address the Inadvertent Production of Privileged Materials and Work Product.

Counsel should attempt to agree on procedures governing the inadvertent disclosure of privileged or trial preparation materials. For example, the parties may enter into a “claw back” agreement providing that if privileged or protected materials are disclosed, the privilege or protection is not waived and the disclosed materials will be returned to the responding party. Alternately, the parties may agree to provide a “quick peek” whereby the responding party provides certain requested materials for initial examination without waiving any privilege or work product protection. Given the potential to compromise privileged or confidential information, counsel should obtain the client’s fully informed consent before accepting a quick-peek agreement.

Commentary 5.3: The Parties Should Consider the Protections Afforded By Fed. R. Evid. 502.

Rule 502(b) of the Federal Rules of Evidence requires only that a party undertake “reasonable steps” to avoid disclosure of privileged information or work product. The parties should balance the cost to review voluminous ESI for privilege against the potentially harmful consequences of inadvertent disclosure. Counsel can reduce these costs and risks by agreeing to an appropriate privilege review process and memorializing that agreement in the proposed Scheduling Order pursuant to Fed. R. Evid. 502(d). Counsel also should consider agreeing (and memorializing in a court order) that:

- (a) certain categories of materials are presumed not to be privileged and can be produced without a privilege review, subject to a non-waiver agreement;
- (b) certain materials are presumed to be privileged and need not be included on a privilege log unless the requesting party shows good cause;
- (c) some types of materials will be reviewed individually for privilege, while other categories may be reviewed through a sampling process; or
- (d) privilege reviews may be conducted in stages, with some documents being produced and logged first, while other materials are produced or included on the privilege log at a later time or only if necessary.

ATTACHMENTS

- Meet-and-Confer Checklist

REFERENCE MATERIALS

The following reference materials are provided to assist counsel and parties in understanding and implementing these Guidelines and for persons who wish to learn more about e-discovery. The court does not adopt or take a substantive position as to these publications.

- Outlines and checklists:
 - The Sedona Conference® "Jumpstart Outline": Questions to Ask Your Client (Mar. 2011).
- Glossaries:
 - Craig Ball, *Geek Speak – A Lawyer’s Guide to the Language of Data Storage and Networking*, <http://www.craigball.com/GeekSpeak.pdf> (2009);
 - Barbara J. Rothstein, Ronald J. Hedges, and Elizabeth C. Wiggins, *Managing Discovery of Electronic Information: A Pocket Guide for Judges* (2d ed.), Federal Judicial Center (2012), [http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d_eb.pdf/\\$file/eldscpkt2d_eb.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d_eb.pdf/$file/eldscpkt2d_eb.pdf) (last visited Sep. 1, 2014); and
 - The Sedona Conference® *Glossary: E-Discovery & Digital Information Management* (4th ed.) (Apr. 2014).
- Further publications and commentary by The Sedona Conference®:
 - The Sedona Conference® *Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery* (Dec. 2013);
 - The Sedona Conference® *Cooperation Proclamation*, (Jul. 2008);
 - The Sedona Conference® *Cooperation Proclamation Guidance for Litigators & In-House Counsel* (Mar. 2011); and
 - The Sedona Conference® *Cooperation Proclamation: Resources for the Judiciary* (Oct. 2012).

The Sedona Conference publications cited in these Guidelines are available at: <https://thesedonaconference.org/publications#ediscovery> (last visited Sep. 1, 2014).

- Additional reference material:

Monday, September 01, 2014

- Craig Ball, *Beyond Data about Data: The Litigator's Guide to Metadata* (2011) <http://www.craigball.com/metadataguide2011.pdf> (last visited Sep. 1, 2014);
- The Electronic Discovery Reference Model (v3.0)(2014), available at <http://www.edrm.net/resources/guides/edrm-framework-guides> (last visited Sep. 1, 2014); and
- Anne Kershaw and Joe Howie, *Judges' Guide to Cost-Effective E-Discovery* with foreword by Hon. James C. Francis IV (2010) http://www.discoverypilot.com/sites/default/files/JUDGES%20GUIDE-fnl_PDF3v2.pdf.

The Committee would like to give recognition to the United States District Court for the Northern District of California and the Seventh Circuit Electronic Discovery Pilot Program Committee for their work in the area of e-discovery, which provided a foundation for the work done by this Committee.

19. **Data Possessed by Third Parties**

Counsel should attempt to agree on an approach to ESI stored by third parties. This includes files stored on a cloud server and social networking data on services such as Facebook, Twitter, and Instagram.

20. **Format and Media**

The parties have discretion to determine production format and should cooperate in good faith to promote efficiencies. Reasonable requests for production of particular documents in native format with metadata intact should be considered.

21. **Identifying Information**

Because identifying information may not be placed on ESI as easily as bates stamping paper documents, methods of identifying pages or segments of ESI produced in discovery should be discussed.¹⁵ Counsel is encouraged to discuss the use of a digital notary, hash value indices, or other similar methods for producing native files.

22. **Priorities and Sequencing**

Counsel should attempt to reach an agreement on the sequence of processing data for review and production. Some criteria to consider include ease of access or collection, sources of data, date ranges, file types, and keyword matches.

23. **Privilege**

Counsel should attempt to reach an agreement regarding what will happen in the event of inadvertent disclosure of privileged or trial preparation materials¹⁶ If the disclosing party inadvertently produces privileged or trial preparation materials, it must notify the requesting party of such disclosure. After the requesting party is notified, it must return, sequester, or destroy all information and copies and may not use or disclose this information until the claim of privilege or protection as trial preparation materials is resolved.

- A. To accelerate the discovery process, the parties may establish a “clawback agreement,” whereby materials that are disclosed without intent to waive privilege or protection are not waived and are returned to the responding party, so long as the responding party identifies the materials mistakenly produced. Counsel should be aware of the requirements of Federal Rule of Evidence 502(d) to protect against waivers of privilege in other settings.
- B. The parties may agree to provide a “quick peek,” whereby the responding party provides certain requested materials for initial examination without waiving any privilege or protection.

¹⁵ For a viable electronic alternative to bates stamps, see Ralph C. Losey, *HASH: The New Bates Stamp*, 12 J. Tech. L. & Pol’y 1 (2007).

¹⁶ In addition, counsel should comply with current rules and case law on the requirement of creating privilege logs.

Other voluntary agreements should be considered as appropriate. Counsel should be aware that there is an issue of whether such agreements bind third parties who are not parties to the agreements. Counsel are encouraged to seek an order from the Court pursuant to Rule 502(d). However, the Court may enter a clawback arrangement for good cause even if there is no agreement. In that case, third parties may be bound but only pursuant to the court order.¹⁷

DISCOVERY PROCESS

24. Timing

Counsel should attempt to agree on the timing and sequencing of e-discovery. In general, e-discovery should proceed in the following order.

(a) Mandatory Disclosure

Disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) must include any ESI that the disclosing party may use to support its claims or defenses (unless used solely for impeachment). To determine what information must be disclosed pursuant to this rule, counsel should review, with their clients, the client's ESI files, including current, back-up, archival, and legacy computer files. Counsel should be aware that documents in paper form may have been generated by the client's information system; thus, there may be ESI related to that paper document. If any party intends to disclose ESI, counsel should identify those individuals with knowledge of their client's electronic information systems who can facilitate the location and identification of discoverable ESI prior to the Rule 26(f) conference.

(b) Search of Reasonably Accessible Information

After receiving requests for production under Federal Rule Civil Procedure 34, the parties shall search their ESI, other than that identified as not reasonably accessible due to undue burden and/or substantial cost, and produce responsive information in accordance with Rule 26(b).

(c) Search of Unreasonably Accessible Information

Electronic searches of information identified as not reasonably accessible should not be conducted until the initial search has been completed, and then only by agreement of the parties or pursuant to a court order. Requests for electronically stored information that is not reasonably accessible must be narrowly focused with good cause supporting the request. *See* Fed. R. Civ. P. 26(b)(2) advisory committee's note to 2006 amendment (good cause factors).

(d) Requests for On-Site Inspections

¹⁷ *See Rajala v. McGuire Woods, LLP*, No. 08-2638-CM-DJW, 2010 WL 2949582 (D. Kan. July 22, 2010).

Requests for on-site inspections of electronic media under Federal Rule of Civil Procedure 34(b) should be reviewed to determine if good cause and specific need have been demonstrated.

25. **Discovery Concerning Preservation and Collection Efforts**

Discovery concerning the preservation and collection efforts of another party, if used unadvisedly, can contribute to unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matters. Routine discovery into such matters is therefore strongly discouraged and may be in violation of Rule 26(g)'s requirement that discovery be "neither unreasonable nor unduly burdensome or expensive." Prior to initiating any such discovery, counsel shall confer with counsel for the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Discovery into such matters may be compelled only on a showing of good cause considering these aforementioned factors. However, deponents who provide testimony on the merits are not exempt from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

26. **Duty to Meet and Confer When Requesting ESI from Non-Parties (Fed. R. Civ. P. 45)**

Counsel issuing requests for ESI from non-parties should attempt to informally meet and confer with the non-party (or counsel, if represented). During this meeting, counsel should discuss the same issues regarding ESI requests that they would with opposing counsel as set forth in Paragraph 11 above.

December 1, 2015

APPENDIX 1

Ask and Answer the Right Questions in EDD

Craig Ball

Law Technology News

January 4, 2008

Sometimes it's more important to ask the right questions than to know the right answers, especially when it comes to nailing down sources of electronically stored information, preservation efforts and plans for production in the FRCP Rule 26(f) conference, the so-called "meet and confer."

The federal bench is deadly serious about meet and confers, and heavy boots have begun to meet recalcitrant behinds when Rule 26(f) encounters are perfunctory, drive-by events. Enlightened judges see that meet and confers must evolve into candid, constructive mind melds if we are to take some of the sting and "gotcha" out of e-discovery. Meet and confer requires intense preparation built on a broad and deep gathering of detailed information about systems, applications, users, issues and actions. An hour or two of hard work should lie behind every minute of a Rule 26(f) conference. Forget "winging it" on charm or bluster and forget "We'll get back to you on that."

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

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

1. What are the issues in the case?
2. Who are the key players in the case?
3. Who are the persons most knowledgeable about ESI systems?
4. What events and intervals are relevant?
5. When did preservation duties and privileges attach?
6. What data are at greatest risk of alteration or destruction?
7. Are systems slated for replacement or disposal?
8. What steps have been or will be taken to preserve ESI?
9. What third parties hold information that must be preserved, and who will notify them?
10. What data require forensically sound preservation?
11. Are there unique chain-of-custody needs to be met?
12. What metadata are relevant, and how will it be preserved, extracted and produced?
13. What are the data retention policies and practices?
14. What are the backup practices, and what tape archives exist?
15. Are there legacy systems to be addressed?

16. How will the parties handle voice mail, instant messaging and other challenging ESI?
17. Is there a preservation duty going forward, and how will it be met?
18. Is a preservation or protective order needed?
19. What e-mail applications are used currently and in the relevant past?
20. Are personal e-mail accounts and computer systems involved?
21. What principal applications are used in the business, now and in the past?
22. What electronic formats are common, and in what anticipated volumes?
23. Is there a document or messaging archival system?
24. What relevant databases exist?
25. Will paper documents be scanned, and if so, at what resolution and with what OCR and metadata?
26. What search techniques will be used to identify responsive or privileged ESI?
27. If keyword searching is contemplated, can the parties agree on keywords?
28. Can supplementary keyword searches be pursued?
29. How will the contents of databases be discovered? Queries? Export? Copies? Access?
30. How will de-duplication be handled, and will data be re-populated for production?
31. What forms of production are offered or sought?
32. Will single- or multipage .tiffs, PDFs or other image formats be produced?
33. Will load files accompany document images, and how will they be populated?
34. How will the parties approach file naming, unique identification and Bates numbering?
35. Will there be a need for native file production? Quasi-native production?
36. On what media will ESI be delivered? Optical disks? External drives? FTP?
37. How will we handle inadvertent production of privileged ESI?
38. How will we protect trade secrets and other confidential information in the ESI?
39. Do regulatory prohibitions on disclosure, foreign privacy laws or export restrictions apply?
40. How do we resolve questions about printouts before their use in deposition or at trial?
41. How will we handle authentication of native ESI used in deposition or trial?
42. What ESI will be claimed as not reasonably accessible, and on what bases?
43. Who will serve as liaisons or coordinators for each side on ESI issues?
44. Will technical assistants be permitted to communicate directly?
45. Is there a need for an e-discovery special master?
46. Can any costs be shared or shifted by agreement?
47. Can cost savings be realized using shared vendors, repositories or neutral experts?
48. How much time is required to identify, collect, process, review, redact and produce ESI?
49. How can production be structured to accommodate depositions and deadlines?
50. When is the next Rule 26(f) conference (because we need to do this more than once)?

Attachment 7

1 **Rule 26. General provisions governing disclosure and discovery.**

2 **(a) Disclosure.** This rule applies unless changed or supplemented by a rule governing disclosure and
3 discovery in a practice area.

4 **(a)(1) Initial disclosures.** Except in cases exempt under paragraph (a)(3), a party shall, without
5 waiting for a discovery request, serve on the other parties:

6 (a)(1)(A) the name and, if known, the address and telephone number of:

7 (a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or
8 defenses, unless solely for impeachment, identifying the subjects of the information; and

9 (a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an
10 adverse party, a summary of the expected testimony;

11 (a)(1)(B) a copy of all documents, data compilations, electronically stored information, and
12 tangible things in the possession or control of the party that the party may offer in its case-in-
13 chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and
14 must be disclosed in accordance with paragraph (a)(5);

15 (a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or
16 evidentiary material on which such computation is based, including materials about the nature
17 and extent of injuries suffered;

18 (a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all
19 of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

20 (a)(1)(E) a copy of all documents to which a party refers in its pleadings.

21 **(a)(2) Timing of initial disclosures.** The disclosures required by paragraph (a)(1) shall be
22 served on the other parties:

23 (a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and

24 (a)(2)(B) by the defendant within 42 days after filing of the first answer to the complaint or
25 within 28 days after that defendant's appearance, whichever is later.

26 **(a)(3) Exemptions.**

27 (a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements
28 of paragraph (a)(1) do not apply to actions:

29 (a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of
30 an administrative agency;

31 (a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

32 (a)(3)(A)(iii) to enforce an arbitration award;

33 (a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination
34 of Water Rights.

35 (a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are
36 subject to discovery under paragraph (b).

37 **(a)(4) Expert testimony.**

38 **(a)(4)(A) Disclosure of expert testimony.** A party shall, without waiting for a discovery
39 request, serve on the other parties the following information regarding any person who may be
40 used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is
41 retained or specially employed to provide expert testimony in the case or whose duties as an
42 employee of the party regularly involve giving expert testimony: (i) the expert's name and
43 qualifications, including a list of all publications authored within the preceding 10 years, and a list
44 of any other cases in which the expert has testified as an expert at trial or by deposition within the
45 preceding four years, (ii) a brief summary of the opinions to which the witness is expected to
46 testify, (iii) all data and other information that will be relied upon by the witness in forming those
47 opinions, and (iv) the compensation to be paid for the witness's study and testimony.

48 **(a)(4)(B) Limits on expert discovery.** Further discovery may be obtained from an expert
49 witness either by deposition or by written report. A deposition shall not exceed four hours and the
50 party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the
51 deposition. A report shall be signed by the expert and shall contain a complete statement of all
52 opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not
53 testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party
54 offering the expert shall pay the costs for the report.

55 **(a)(4)(C) Timing for expert discovery.**

56 (a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert
57 testimony is offered shall serve on the other parties the information required by paragraph
58 (a)(4)(A) within seven days after the close of fact discovery. Within seven days thereafter, the
59 party opposing the expert may serve notice electing either a deposition of the expert pursuant
60 to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The
61 deposition shall occur, or the report shall be served on the other parties, within 28 days after
62 the election is served on the other parties. If no election is served on the other parties, then
63 no further discovery of the expert shall be permitted.

64 (a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which
65 expert testimony is offered shall serve on the other parties the information required by
66 paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election
67 under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the
68 expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party
69 opposing the expert may serve notice electing either a deposition of the expert pursuant to
70 paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The
71 deposition shall occur, or the report shall be served on the other parties, within 28 days after
72 the election is served on the other parties. If no election is served on the other parties, then
73 no further discovery of the expert shall be permitted.

74 (a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate
75 rebuttal expert witnesses it shall serve on the other parties the information required by
76 paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election
77 under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the
78 expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party
79 opposing the expert may serve notice electing either a deposition of the expert pursuant to
80 paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The
81 deposition shall occur, or the report shall be served on the other parties, within 28 days after
82 the election is served on the other parties. If no election is served on the other parties, then
83 no further discovery of the expert shall be permitted.

84 **(a)(4)(D) Multiparty actions.** In multiparty actions, all parties opposing the expert must agree
85 on either a report or a deposition. If all parties opposing the expert do not agree, then further
86 discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and
87 Rule 30.

88 **(a)(4)(E) Summary of non-retained expert testimony.** If a party intends to present
89 evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an
90 expert witness who is retained or specially employed to provide testimony in the case or a person
91 whose duties as an employee of the party regularly involve giving expert testimony, that party
92 must serve on the other parties a written summary of the facts and opinions to which the witness
93 is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A
94 deposition of such a witness may not exceed four hours.

95 **(a)(5) Pretrial disclosures.**

96 (a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

97 (a)(5)(A)(i) the name and, if not previously provided, the address and telephone number
98 of each witness, unless solely for impeachment, separately identifying witnesses the party will
99 call and witnesses the party may call;

100 (a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by
101 transcript of a deposition and a copy of the transcript with the proposed testimony
102 designated; and

103 (a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative
104 exhibits, unless solely for impeachment, separately identifying those which the party will offer
105 and those which the party may offer.

106 (a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least
107 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations
108 of deposition testimony, objections and grounds for the objections to the use of a deposition and
109 to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules
110 of Evidence, objections not listed are waived unless excused by the court for good cause.

111 **(b) Discovery scope.**

112 **(b)(1) In general.** Parties may discover any matter, not privileged, which is relevant to the claim
113 or defense of any party if the discovery satisfies the standards of proportionality set forth below.
114 Privileged matters that are not discoverable or admissible in any proceeding of any kind or character
115 include all information in any form provided during and created specifically as part of a request for an
116 investigation, the investigation, findings, or conclusions of peer review, care review, or quality
117 assurance processes of any organization of health care providers as defined in the Utah Health Care
118 Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to
119 improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or
120 professional conduct of any health care provider.

121 **(b)(2) Proportionality.** Discovery and discovery requests are proportional if:

122 (b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in
123 controversy, the complexity of the case, the parties' resources, the importance of the issues, and
124 the importance of the discovery in resolving the issues;

125 (b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

126 (b)(2)(C) the discovery is consistent with the overall case management and will further the
127 just, speedy and inexpensive determination of the case;

128 (b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

129 (b)(2)(E) the information cannot be obtained from another source that is more convenient,
130 less burdensome or less expensive; and

131 (b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the
132 information by discovery or otherwise, taking into account the parties' relative access to the
133 information.

134 **(b)(3) Burden.** The party seeking discovery always has the burden of showing proportionality and
135 relevance. To ensure proportionality, the court may enter orders under Rule 37.

136 **(b)(4) Electronically stored information.** A party claiming that electronically stored information
137 is not reasonably accessible because of undue burden or cost shall describe the source of the
138 electronically stored information, the nature and extent of the burden, the nature of the information not
139 provided, and any other information that will enable other parties to evaluate the claim.

140 **(b)(5) Trial preparation materials.** A party may obtain otherwise discoverable documents and
141 tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that
142 other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or
143 agent) only upon a showing that the party seeking discovery has substantial need of the materials
144 and that the party is unable without undue hardship to obtain substantially equivalent materials by
145 other means. In ordering discovery of such materials, the court shall protect against disclosure of the
146 mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of
147 a party.

Attachment 8

John Mangum, Co-Chair, Legal, Regulatory, and Financial Services Committee
Steve Twist, Co-Chair, Legal, Regulatory, and Financial Services Committee
Glenn Hamer, President and C.E.O.
Arizona Chamber of Commerce and Industry
3200 N. Central Avenue
Suite 1125
Phoenix, AZ 85012
602-248-9172
ghamer@azchamber.com
015777 (inactive)

The Arizona Chamber of Commerce and Industry (“Arizona Chamber”) respectfully submits this Comment to supplement the language proposed by Petition R-15-0004 as amendments to Rule 11 of the Arizona Rules of Civil Procedure. The Arizona Chamber is a nonpartisan, nonprofit organization that is the leading statewide advocate for the Arizona business community. Our diverse membership employs 250,000 Arizonans in all business sectors from manufacturing to services and includes small, medium, and large employers. We are committed to advancing Arizona’s competitive position in the global economy by advocating free-market policies that stimulate economic growth, and protecting businesses from unnecessary and cumbersome legal and regulatory burdens.

The Arizona Chamber has closely followed the work of the Task Force on the Arizona Rules of Civil Procedure (“Task Force”) and its review of Rule 11. The Arizona Chamber has also completed an independent review of Rule 11 with a variety of stakeholders from the legal and business communities in Arizona and nationwide. The attached supplemental language proposed by this Comment incorporates some of the changes under review by the Task Force, along with changes suggested during the Arizona Chamber’s review.

Material changes include:

- (1) requiring signers of documents served or filed with the court to make an independent reasonable inquiry into the facts of representations made by others, if the signer has reason to believe those representations were false or materially insufficient (proposed 11(b)(5));
- (2) joining other states, including Nebraska, Oklahoma, Pennsylvania and Texas, in imposing mandatory sanctions for violations of Rule 11, along with a heightened standard of review for exceptions to mandatory dismissal sanctions where appropriate (proposed 11(c)(1)); and
- (3) including the “independent reasonable inquiry into the facts” requirement in the verification provisions of Rule 11 (proposed 11(e)(1)).

The Arizona Chamber urges the Commission to adopt the recommendations included in this Comment, arrived at after considered discussion and research into Rule 11 abuses and various possible solutions. While the State Bar’s petition is a positive step toward curbing abusive Rule 11 practices, the Chamber’s Comment includes additional changes that will provide even more robust protection. Indeed, the Chamber’s proposed revisions to Rule 11 ensure truthfulness in

representations made to the court, fairly enforce the sanctions provisions of Rule 11, and protect not only businesses but all Arizonans from the untoward effects of frivolous litigation.

Proposed Amendments to Arizona's Rule 11

Rule 11. Signing of Pleadings Documents; Sanctions.

Rule 11(a). Signing of pleadings, motions and other papers; sanctions Documents.

~~Every pleading, motion, and other paper of a party represented by an attorney shall be document served or filed with the court must be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A name or by a party personally if the party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and unrepresented. The document must state the party's signer's address, email address. Except when otherwise specifically provided by, and telephone number. Unless a rule or statute, pleadings specifically states otherwise, documents need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath court must be overcome by the testimony of two witnesses strike an unsigned document unless the omission is promptly corrected after being called to the attorney's or of one witness sustained by corroborating circumstances is abolished. The signature of party's attention.~~

Rule 11(b). Representations to the Court and in other Documents.

~~By signing a document, an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; certifies that to the best of the signer's signer's knowledge, information, and belief formed after reasonable inquiry:~~

~~(1) it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed not being presented for any improper purpose, such as to harass or to cause unnecessary delay, or needlessly needlessly increase in the cost of litigation. If a pleading, motion;~~

~~(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;~~

~~(3) the factual contentions have evidentiary support or other paper is not signed, it shall be stricken unless it is signed promptly after, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery;~~

~~(4) the omission is called to the attention of the pleader or movant. If a pleading, motion denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a belief or a lack of information; and~~

(5) that if the signer had reason to believe representations made by others and contained in the document were false or materially insufficient, the signer has made an independent reasonable inquiry into the facts.

Rule 11(c). ~~other paper~~Sanctions.

(1) **Generally.** If a document is signed in violation of this rule, the court, ~~upon~~ ~~upon~~ motion or ~~upon~~ its own initiative, shall, must impose ~~upon~~ the person who signed it, a represented party, or both, an appropriate sanction, which ~~may~~ ~~must~~ include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the ~~pleading~~ document, including a reasonable ~~attorney's~~ attorney's fee, and must include, as applicable, a dismissal of the document, or dismissal of the count or counts that violate this rule, unless the court sets forth on the record findings of fact, supported by clear and convincing evidence, that show a manifest injustice would result. On appeal, the court's findings are reviewed *de novo*.

(2) **Consultation.** Before filing a motion for sanctions under this rule, the moving party must:

(A) attempt to resolve the matter by in-person or telephonic consultation with the opposing party; and

(B) if the matter is not satisfactorily resolved by consultation, serve the opposing party with written notice of the specific conduct that allegedly violates Rule 11(b). If the opposing party does not withdraw or appropriately correct the alleged violation(s) within 10 days after the written notice is served, the moving party may file a motion under Rule 11(c)(3).

(3) **Motion for Sanctions.** A motion for sanctions must:

(A) be made separately from any other motion;

(B) must describe the specific conduct that allegedly violates Rule 11(b);

(C) be accompanied by a separate statement of moving counsel certifying that, after in-person or telephonic consultation and good faith efforts to do so, the parties have been unable to satisfactorily resolve the matter; and

(D) attach a copy of the written notice provided to the opposing party under Rule 11(a)(2)(B).

Rule 11(d). Assisting Filing by Self-Represented Person.

An attorney may help to draft a ~~pleading, motion or~~ document filed by an otherwise self-represented person, and the attorney need not sign that ~~pleading, motion, or~~ document. In

providing such drafting assistance, the attorney may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney ~~shall~~must make an independent reasonable inquiry into the facts.

Rule 11(b). Verification of pleading generally. Verified Pleadings.

(1) Generally. When in a civil action a pleading is required to be verified by the affidavit of ~~the~~ party, or ~~when in a civil action~~if an affidavit is required or permitted to be filed, the pleading may be verified, or the affidavit made, by the party or by a person acquainted with the facts after independent reasonable inquiry into them, for and on behalf of such party.

(2)

Rule 11(c). Verification of pleading when equitable relief demanded

~~When equitable relief is demanded, and the~~**Demanding Equitable Relief.** If a party demanding such relief makes oath that the allegations of the complaint, counterclaim, cross-claim, or third-party claim are true in substance and in fact, equitable relief files a verified pleading, then the responsive pleading of the opposite party shall must also be under oath, unless the oath is waived in the pleading to which the responsive pleading is filed verified, and each material allegation not denied under oath ~~shall be taken as confessed~~is deemed admitted.

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3 **Proposed Amendments to Arizona's Rule 11**

4 **Rule 11. Signing of pleadings, motions and other papers; sanctions Documents;**
5 **Sanctions.**

6
7 **Rule 11(a). Signing of pleadings, motions and other papers Documents.**

8 Every pleading, motion, and other paper of a party represented by an attorney shall be
9 document served or filed with the court must be signed by at least one attorney of record in the
10 attorney's individual name, whose address shall be stated. A name— or by a party personally if
11 the party who is not represented by an attorney shall sign the party's pleading, motion, or other
12 paper and unrepresented. The document must state the party's signer's address, email address.
13 Except when otherwise specifically provided by, and telephone number. Unless a rule or statute,
14 pleadings specifically states otherwise, documents need not be verified or accompanied by
15 affidavit. If a pleading, motion or other paper is not signed, it must be stricken The court must
16 strike an unsigned document unless it is signed promptly after the omission is promptly corrected
17 after being called to the attorney's or party's attention of the pleader or movant.

18
19 **Rule 11(b). Representations to the court Court and in other papers Documents.**

20 ~~The signature of~~ By signing a document, an attorney or party constitutes a certificate by
21 the signer that the signer has read the pleading, motion, or other paper; certifies that to the best of
22 the signer's knowledge, information, and belief formed after reasonable inquiry:

23 (1) it is not being presented for any improper purpose, such as to harass, cause
24 unnecessary delay, or needlessly increase the cost of litigation;

25 (2) the claims, defenses, and other legal contentions are warranted by existing law or by a
nonfrivolous argument for extending, modifying, or reversing existing law or for establishing
new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will
likely have evidentiary support after a reasonable opportunity for further investigation or
discovery; ~~and~~

(4) the denials of factual contentions are warranted on the evidence or, if specifically so
identified, are reasonably based on a belief or a lack of information; and

(5) that if the signer had reason to believe representations made by others and contained
in the document were false or materially insufficient, the signer has made an independent

1 reasonable inquiry into the facts.

2
3 **Rule 11(c). Sanctions.**

4 (1) Generally. If a ~~pleading, motion or other paper~~ document is signed in violation of this
5 rule, the court, ~~upon~~ motion or ~~upon~~ its own initiative, must impose ~~upon~~ the person who
6 signed it, a represented party, or both, an appropriate sanction, which ~~may~~ must include an order
7 to pay to the other party or parties the amount of the reasonable expenses incurred because of the
8 filing of the ~~pleading, including a reasonable attorney's fee~~ document, including a reasonable
9 attorney's fee, and must include, as applicable, a dismissal of the document, or dismissal of the
10 count or counts that violate this rule, unless the court sets forth on the record findings of fact,
11 supported by clear and convincing evidence, that show a manifest injustice would result. On
12 appeal, the court's findings are reviewed de novo.

13 (2) ~~A motion for sanctions must be made separately from any other motion and must~~
14 ~~describe the specific conduct that allegedly violates Rule 11(b). A request for sanctions shall not~~
15 ~~be made in any other pleading, motion or other paper filed with the court.~~

16 (3) Consultation. Before filing a motion for sanctions under this ~~Rule~~ rule, the moving
17 party must:

18 (A) ~~Attempt~~ attempt to resolve the matter by in-person or telephonic consultation
19 with the opposing party; and

20 (B) ~~If~~ if the matter is not satisfactorily resolved by ~~telephonic~~ consultation,
21 serve the opposing party with written notice of the specific conduct that allegedly violates Rule
22 11(b). ~~If the opposing party does not withdraw or appropriately correct the alleged violation(s)~~
23 ~~within 10 days after being served with the written notice~~ is served, the moving party may file a
24 motion under Rule 11(c)(2)-3).

25 (4) — 3) Motion for Sanctions. A motion for sanctions ~~under this~~ must:

(A) be made separately from any other motion;

(B) must describe the specific conduct that allegedly violates Rule ~~will not be~~
~~considered unless it is~~ 11(b);

(C) be accompanied by a separate statement of moving counsel certifying that,
after in-person or telephonic consultation and good faith efforts to do so, the parties have
been unable to satisfactorily ~~resolve~~ resolved the matter; ~~and attaching a copy of the~~
~~written notice provided under subpart (B).~~

(D) attach a copy of the written notice provided to the opposing party under Rule
11(a)(2)(B).

1 **Rule 11(d). ~~Assisting filing~~Filing by self-represented person~~Self-Represented Person.~~**

2 An attorney may help to draft a ~~pleading, motion or~~ document filed by an otherwise self-
3 represented person, and the attorney need not sign that ~~pleading, motion, or~~ document. In
4 providing such drafting assistance, the attorney may rely on the otherwise self-represented
5 person's representation of facts, unless the attorney has reason to believe that such
6 representations are false or materially insufficient, in which instance the attorney ~~shall~~must make
7 an independent reasonable inquiry into the facts.

8 **Rule 11(e). ~~Verification of pleading generally~~Verified Pleadings.**

9 **(1) Generally.** When in a civil action a pleading is required to be verified by ~~the~~ affidavit
10 of ~~the~~ party, or ~~when in a civil action~~if an affidavit is required or permitted to be filed, the
11 pleading may be verified, or the affidavit made, by the party or by a person acquainted with the
12 facts after independent reasonable inquiry into them, for and on behalf of such party.

13 **Rule 11(f). ~~Verification of pleading when equitable relief demanded~~**

14 **(2) When equitable relief is demanded, and the*Demanding Equitable Relief.*** If a party
15 demanding such relief makes oath that the allegations of the complaint, counterclaim, cross-
16 claim, or third party claim are true in substance and in fact, equitable relief files a verified
17 pleading, then the responsive pleading of the opposite party ~~shall~~must also be under oath, unless
18 the oath is waived in the pleading to which the responsive pleading is filedverified, and each
19 material allegation not denied under oath ~~shall be taken as confessed~~is deemed admitted.

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Proposed Amendments to Arizona's Rule 11

Rule 11. Signing of Documents; Sanctions.

Rule 11(a). Signing of Documents.

Every document served or filed with the court must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The document must state the signer's address, email address, and telephone number. Unless a rule or statute specifically states otherwise, documents need not be verified or accompanied by affidavit. The court must strike an unsigned document unless the omission is promptly corrected after being called to the attorney's or party's attention.

Rule 11(b). Representations to the Court and in other Documents.

By signing a document, an attorney or party certifies that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery;

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a belief or a lack of information; and

(5) that if the signer had reason to believe representations made by others and contained in the document were false or materially insufficient, the signer has made an independent reasonable inquiry into the facts.

Rule 11(c). Sanctions.

(1) **Generally.** If a document is signed in violation of this rule, the court, on motion or on its own, must impose on the person who signed it, a represented party, or both, an appropriate sanction, which must include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable

attorney's fee, and must include, as applicable, a dismissal of the document, or dismissal of the count or counts that violate this rule, unless the court sets forth on the record findings of fact, supported by clear and convincing evidence, that show a manifest injustice would result. On appeal, the court's findings are reviewed *de novo*.

(2) Consultation. Before filing a motion for sanctions under this rule, the moving party must:

(A) attempt to resolve the matter by in-person or telephonic consultation with the opposing party; and

(B) if the matter is not satisfactorily resolved by consultation, serve the opposing party with written notice of the specific conduct that allegedly violates Rule 11(b). If the opposing party does not withdraw or appropriately correct the alleged violation(s) within 10 days after the written notice is served, the moving party may file a motion under Rule 11(c)(3).

(3) Motion for Sanctions. A motion for sanctions must:

(A) be made separately from any other motion;

(B) must describe the specific conduct that allegedly violates Rule 11(b);

(C) be accompanied by a separate statement of moving counsel certifying that, after in-person or telephonic consultation and good faith efforts to do so, the parties have been unable to satisfactorily resolve the matter; and

(D) attach a copy of the written notice provided to the opposing party under Rule 11(a)(2)(B).

Rule 11(d). Assisting Filing by Self-Represented Person.

An attorney may help draft a document filed by an otherwise self-represented person, and the attorney need not sign that document. In providing such drafting assistance, the attorney may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney must make an independent reasonable inquiry into the facts.

Rule 11(e). Verified Pleadings.

(1) Generally. When in a civil action a pleading is required to be verified by affidavit of a party, or if an affidavit is required or permitted to be filed, the pleading may be verified, or the affidavit made, by the party or by a person acquainted with the facts after independent reasonable inquiry into them, for and on behalf of such party.

(2) *When Demanding Equitable Relief.* If a party demanding equitable relief files a verified pleading, then the responsive pleading must also be verified, and each material allegation not denied under oath is deemed admitted.

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