Consumer Track

Discovery: It's a Whole New Ballgame

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1. Hypothetical

Judge Mary Ann Whipple
United States Bankruptcy Court
For the Northern District of Ohio, Western Division

Hypothetical: Once Upon a Time…

You just filed a messy Chapter 7 case on June 10, 2015. Debtor lists 4 bank accounts at 4 different financial institutions on Schedule A/B. Debtor also lists an interest in a business called Speedy Trucking LLC and values his 100% membership interest at zero on his Schedule A/B.

Before the meeting of creditors, one of Debtor's disgruntled relatives (and a creditor) called the Trustee and reported that Debtor's non-filing spouse is actually a front for the same business now being run by Debtor under the new name Super Speedy Trucking LLC. Nothing about Super Speedy Trucking is disclosed. Debtor maintains an active USDOT number to drive heavy commercial vehicles, while his spouse does not. On Schedule I he lists his employment as construction and his spouse's as homemaker.

Prior to the meeting of creditors, the Trustee sends you a long e-mail asking for turnover of the following, among other things:

1. All bank statements for the two years preceding filing for the four accounts.
2. Copy of the Operating Agreements, secretary of state formation records, any UCC-1s and mortgage records, an inventory of assets with current values and liabilities, balance sheets, P & Ls, copies of the general ledgers, the 2013 and 2014 tax returns and all attachments for both Speedy Trucking LLC and Super Speedy Trucking LLC.
3. The deed, mortgage documents, including the application, and a copy of a mortgage statement evidencing the balance owed on certain real estate not listed in the petition titled in the name of Debtor's father-in-law.
4. A copy of all cancelled checks payable to a local high school and its athletic department for the past 4 years.
5. Four years of all credit card statements for both Debtor and his non-filing spouse.
6. Debtor's divorce decree and separation agreement from a former spouse in 2010.
7. Information and documents regarding a personal injury claim scheduled with a value of "unknown."

After the meeting of creditors, the Trustee sends another e-mail asking for turnover of the following:

1. Turnover of $3,500 allegedly received by Debtor the day after the Chapter 7 filing.
2. Turnover of 2015 tax returns and any non-exempt refunds of 162/365 for tax year 2015.
3. Information about how Debtor's 2014 tax refunds were spent, as well as information and supporting documents with respect to a receivable shown on Schedule A/B.
4. Information about the source of bank deposits made on June 15, 2015, and June 25, 2015.
5. An explanation of disposition of property awarded to Debtor in the divorce and information concerning any life insurance policy owned by Debtor as required by the divorce decree and turnover of the cash value thereof.
6. The non-exempt balance on Debtor's unscheduled pre-paid Net Spend card in the amount of $1,750.

The Trustee has not received all of this stuff. On the deadline for objecting to discharge she files a motion for turnover of all the documents and information and a motion to extend the deadline to file an objection.

2. Trustee's Duties and Creditor's Rights versus Individual Debtor's Duties with Respect to Documents and Information.

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V. More Case Law: What is Proper Discovery in Bankruptcy—An Examination of Bankruptcy Rules and Other Federal Rules of Civil Procedure

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TRUSTEE'S DUTIES AND CREDITOR'S RIGHTS VERSUS INDIVIDUAL DEBTOR'S DUTIES WITH RESPECT TO DOCUMENTS AND INFORMATION

I. CHAPTER 7 TRUSTEE'S DUTIES NECESSITATING DOCUMENTS AND INFORMATION

DUTY	SOURCE
"[C]ollect and reduce to money the property of the estate"	11 U.S.C. § 704(a)(1)
"[C]lose such estate as expeditiously as is compatible with the best interests of the parties in interest"	11 U.S.C § 704(a)(1)
"[I]nvestigate the financial affairs of the debtor"	11 U.S.C. § 704(a)(4)
"[I]f a purpose would be served...examine proofs of claim and object to...any claim that is improper"	11 U.S.C. § 704(a)(5)
"[I]f advisable, oppose the discharge of the debtor"	11 U.S.C. § 704(a)(6)
"[U]nless court orders otherwise, furnish such information concerning the estate and...administration as is requested by a party in interest"	11 U.S.C. § 704(a)(7)
"[I]f...a claim for a domestic support obligation, ...provide the applicable notice" to DSO creditor	11 U.S.C. § 704(a)(10)
Keep records of administration and make reports	Bankruptcy Rule 2015
File claims if creditors fail to do so	Bankruptcy Rule 3004
Prosecute or enter an appearance and defend any pending action by or against debtor, and commence any action on behalf of the estate	Bankruptcy Rule 6009

II. INDIVIDUAL DEBTOR'S DUTIES IN CHAPTER 7 CASES RELATING TO DOCUMENTS AND INFORMATION

DUTY	SOURCE
"[C]ooperate with the trustee as necessary to enable the trustee to perform the trustee's duties"	11 U.S.C. § 521(a)(3) Bankruptcy Rule 4002(a)(4)
"[S]urrender to the trustee all property of the estate and any recorded information, including books, documents, records and papers relating to property of the estate"	11 U.S.C. § 521(a)(4)
Submit to trustee most recently filed tax returns, not later than 7 days before 341 meeting	11 U.S.C. § 521(e)(2)(A) Bankruptcy Rule 4002(b)(3)
At request of a creditor, provide copy of most recently filed tax return or transcript at same time as provided to trustee	11 U.S.C. § 521(e)(2)(C) Bankruptcy Rule 4002(b)(4)
At 341 meeting, make following documents available to trustee or provide statement documentation does not exist or is not in debtor's possession: evidence of current income; statements for deposit and investment accounts for the time period that includes date of filing petition	Bankruptcy Rule 4002(b)(2)
At 341 meeting, documentation of claimed monthly expenses if required by § 707(b)(2)(A) or (B)	Bankruptcy Rule 4002(b)(2)(C)
Attend and submit to examination at time ordered by court	Bankruptcy Rule 4002(a)(1)
If property schedules not filed, inform trustee immediately as to location of real property in which debtor has an interest	Bankruptcy Rule 4002(a)(3)

DUTY	SOURCE
If property schedules not filed, inform trustee immediately of every person holding money or property subject to debtor's withdrawal or order	Bankruptcy Rule 4002(a)(3)
Documents to be provided to trustee (neatly arranged) at 341 meeting if in debtor's possession or readily available: documents for one year pre-petition to support Schedules I and J; copies of life insurance policies owned by debtor or on debtor's life; keys to non-exempt buildings and vehicles; divorce judgments and property settlement agreements; documents establishing amount of joint debts; DSO holder information; any other specific documents requested by trustee in writing at least seven days before 341 meeting	E.D. Mich. Local Bankruptcy Rule 2003-2(a) (Appendix A) *See also* similar local rules such as S.D. Ohio Local Bankruptcy Rule 4002-1(a)(1)-(16); W.D. Mich. Local Bankruptcy Rule 1007-2(f)(1)-(9); S.D. Ill. Local Bankruptcy Rule 1007-1[directing parties to website location for different trustee's document requirements]. (Appendix A)
If debtor owns a business, provide the trustee at least 7 days before the 341 meeting business financial statements and tax returns for past three years and bank statements for past six months	E.D. Mich. Local Bankruptcy Rule 2003-2(b) (Appendix A)

III. PROCEDURAL TOOLS FOR OBTAINING DOCUMENTS AND INFORMATION FROM DEBTORS AND OTHERS

SOURCE	PROCEDURE	STANDARDS AND LIMITS
Bankruptcy Rule 2004(a) N.D. Ill. Local Bankruptcy Rule 2004-1 (Appendix A)	Court may order examination of any entity on motion of any party in interest	1. Requires court order 2. Scope of examination may relate to: (a) acts, conduct, property or liabilities of debtor; (b) any matter that may affect estate administration; or (c) debtor's right to discharge. 3. Debtor not entitled to mileage or witness fee 4. Non-debtor entities entitled to mileage and witness fees to be tendered before attendance 5. Generally not proper procedure after an adversary proceeding has been filed
Bankruptcy Rule 2004(c)	Witness attendance and production of documents at examination may be compelled through subpoena under Bankruptcy Rule 9016 incorporating Federal Rule of Civil Procedure 45	Attorney may issue and sign a subpoena if admitted to practice in the issuing court

SOURCE	PROCEDURE	STANDARDS AND LIMITS
Bankruptcy Rule 2005	Court may compel debtor to be brought before the court by the US Marshal without delay on motion supported by affidavit of any party in interest, and may be taken into custody on certain conditions when outside district	Affidavit must show: (a) examination necessary for estate administration and reasonable cause to believe debtor has left principal residence or place of business to avoid examination; (b) debtor has evaded service of subpoena; or (c) debtor has willfully disobeyed a subpoena or order to attend for examination
Discovery under Federal Rules of Civil Procedure 30 (depositions); 31(depositions on written questions); 33 (interrogatories); 34 (production of documents; and 36 (request for admissions)	Applicable under Bankruptcy Rules 7030, 7031, 7033, 7034 and 7036, when adversary proceedings are pending, or under Rule 9014(c) in Contested Matters	Limited by permissible scope of discovery under Federal Rule of Civil Procedure 26 (amended eff. 12/1/15) as applicable under Bankruptcy Rule 7026 and subject to sanctions (sometimes mandatory) for non-compliance under Federal Rule of Civil Procedure 37 (amended eff. 12/1/15) as applicable under Bankruptcy Rule 7037

SOURCE	PROCEDURE	STANDARDS AND LIMITS
Bankruptcy Rule 9016, incorporating Federal Rule of Civil Procedure 45 for issuance of subpoenas, both to obtain documents and ESI and to compel witness attendance	Applicable both under discovery rules and Bankruptcy Rule 2004	Fees for witness mileage and attendance required, unless subpoena issued on behalf of USA Geographic limitations Subject to being quashed due to: undue burden and expense; failure to allow reasonable time to comply; compliance requires appearance outside proper geographical limits; privilege
11 U.S.C. § 542(e)	"Subject to any applicable privilege, after notice and hearing, the court may order an attorney, accountant or other person that holds recorded information, including books, documents, records, and papers..to turnover or disclose such recorded information to the trustee."	1. Requires a court order after notice and opportunity for hearing 2. Scope: documents and information "relating to debtor's property or financial affairs" 3. Appropriately used as to debtors 4. Person must have information in his, her or its possession, custody or control

SOURCE	PROCEDURE	STANDARDS AND LIMITS
11 U.S.C. § 727(a)(3)	Objection to individual debtor's discharge for bad acts relating to recorded information, books, records and papers from which financial or business transactions might be ascertained	1. Requires commencement of adversary proceeding and filing of complaint under Bankruptcy Rule 7001 2. Time limit on commencement under Bankruptcy Rule 4004(a), which may be extended on motion for cause filed before deadline has expired
11 U.S.C § 727(a)(4)(D)	Objection to individual debtor's discharge for withholding from a trustee entitled to possession of any recorded information, including books, documents, records and papers relating to the debtor's property or financial affairs	1. Requires commencement of adversary proceeding and filing of complaint under Bankruptcy Rule 7001 2. Time limit on commencement under Bankruptcy Rule 4004(a), which may be extended on motion for cause filed before deadline has expired
11 U.S.C. § 727(a)(5)	Objection to individual debtor's discharge for debtor's failure to satisfactorily explain any loss or deficiency of assets to meet debtor's liabilities	1. Requires commencement of adversary proceeding and filing of complaint under Bankruptcy Rule 7001 2. Time limit on commencement under Bankruptcy Rule 4004(a), which may be extended on motion for cause filed before deadline has expired

SOURCE	PROCEDURE	STANDARDS AND LIMITS
11 U.S.C. § 727(a)(6)	Objection to individual debtor's discharge for failure and refusal: (a) to obey any lawful order of the court, other than an order to respond to a material question or to testify; (b) to testify on grounds of self-incrimination after immunity granted; (c) to testify on a ground other than a properly invoked privilege against self-incrimination	1. Requires commencement of adversary proceeding and filing of complaint under Bankruptcy Rule 7001 2. Time limit on commencement under Bankruptcy Rule 4004(a), which may be extended on motion for cause filed before deadline has expired
11 U.S.C. § 727(a)(7)	Objection to individual debtor's discharge for similar bad acts committed within one year before the petition or during the case in connection with another case, such as a spouse's or related business's case	1. Requires commencement of adversary proceeding and filing of complaint under Bankruptcy Rule 7001 2. Time limit on commencement under Bankruptcy Rule 4004(a), which may be extended on motion for cause filed before deadline has expired
11 U.S.C. § 727(d)	Revocation of debtor's discharge for certain acts, including under (a)(6) and obtaining property of the estate and not reporting, delivering and surrendering it to the trustee	1. Requires commencement of adversary proceeding and filing of complaint under Bankruptcy Rule 7001 2. Time limits on commencement under 11 U.S.C. § 727(e)

IV. CASE LAW: BALANCING TRUSTEE'S AND DEBTOR'S RESPECTIVE DUTIES REGARDING DOCUMENTS AND INFORMATION

Given a trustee's broad duties and the robust procedural tools at hand for enforcing them, particularly the threat of an action to deny or revoke an individual debtor's discharge, one issue that arises for debtor's counsel is whether there are any limits on the trustee's demands for documents and information.

One case that addresses several of the issues that arise in demanding production of information and documents from debtors is *Angell v. Williams (In re Williams)*, Bankruptcy No. 08-02284-8-JRL, Adv. No. 08-00188-8-AP, 2009 Bankr. LEXIS 1600, 2009 WL 1609389 (Bankr. E.D.N.C. June 8, 2009). The procedural context of the decision arises in a trustee's objection to debtors' discharges.

Before the trustee filed his discharge complaint, debtors attended the meeting of creditors and provided the trustee with wage and earnings statements and their most recently filed tax returns. In response to an additional request by the trustee at the meeting, debtors provided checking and retirement account statements, a list of real estate transfers, information about debtor husband's construction business, an appraisal of their residence and information about claims against them.

The trustee also conducted a Rule 2004 examination of debtor husband before he filed the complaint, after which debtors responded a week later to new requests from the trustee for more documents and information, including more bank statements, corporate records for the business, accounting statements for rental properties, lists of furniture in rental properties and 529 Account statements. A week after that, the trustee demanded and debtors produced yet more information, including boxes of documents about the construction business.

After the complaint was filed, the trustee served debtors with a broad "first" request for production of documents, including a request for documents regarding the financial condition and status of each and every business entity owned by debtors. This document request in the adversary proceeding prompted debtors to file a motion for a protective order against the existing and any future discovery demands from the now plaintiff- trustee. The bankruptcy court agreed with debtors that the trustee's requests in light of the substantial documents already produced were unreasonably broad, and failed to specify what information the trustee was seeking from debtors that had not already been furnished by them. The court characterized the requests as unreasonably cumulative

and unjustifiably burdensome. The trustee was, however, given leave to restate his requests to comply with the discovery rules.

The trustee issued a subpoena to a lawyer that had previously represented debtors. The lawyer sought to quash the subpoenas on the grounds of confidentiality (not privilege) based on his duties under the North Carolina Rules of Professional Conduct, which mirror the Model Rules. North Carolina RPC 1.6(b)(1) provides that "a lawyer may reveal information protected from disclosure...to comply with the Rules of Professional conduct, the law or court order..." The bankruptcy court found that "a subpoena is a court order which immunizes [the lawyer] from his duty to maintain confidentiality with respect to documents related to his former clients." The court therefore compelled the lawyer to produce the requested documents to the trustee.

The trustee also issued subpoenas to the debtors' respective mothers for bank statements. They objected, asserting that the cost of obtaining them from banks would be in the $1,000 to $2,000 range. The court determined that the costs of producing the records sought from the mothers should be borne by the estate and not by the mothers.

One important takeaway from the *Williams* case is that the seemingly limitless scope of discovery under Rule 2004, which is often characterized as a permissible fishing expedition, *see In re Duratech Industries, Inc*, 241 B.R. 291 (Bankr. E.D.N.Y. 1999)("Without any compunction or embarrassment, bankruptcy lawyers and judges readily acknowledge that Rule 2004 examinations often turn into fishing expeditions."), gives way to the narrower limits of the specific adversary discovery rules, including cost-shifting, after a complaint has been filed.

In the case *In re Davis*, No. 07-33986-H3-7, 2008 Bankr. LEXIS 200, 2008 WL 220121 (Bankr. S.D. Tex. Jan. 24, 2008), the trustee conducted a Rule 2004 examination of debtor, after which he requested documents including four years of records for numerous businesses in which debtor held an interest. The trustee filed a motion to compel production after he alleged that debtor did not fully comply with the request. Debtor testified at the hearing (less than credibly in the judge's view) that he had access to some but not all of the records sought by the trustee, as a third party had taken some of the records. Debtor also testified that he had provided all of the documents to which he had access.

The court required debtor to produce "after diligent search and request of entities to which he has access" all documents responsive to the trustee's request, and then file a statement under 28

U.S.C. § 1746 ("Unsworn declaration under penalty of perjury"), also signed by debtor's counsel of record, stating that debtor conducted a diligent search and made request of all entities to which he had access, that he produced all documents he could obtain, and that as to any documents not produced, the reason for which the document was unavailable. This common sense resolution by the court will protect both debtor and the trustee in the performance of their respective duties. Because the trustee had conducted discovery "informally" pursuant to a local rule, the court declined to award the trustee sanctions.

The case *In re Royce Homes, LP*, No. 09-32467-H4-7, 2009 Bankr. LEXIS 2986, *2-3 (Bankr. S.D. Tex. Sept. 22, 2009) is a business case. But it offers some insight on the scope of a debtor's duties in responding to a trustee's requests for information and documents. The trustee filed a motion to compel the representative of debtor to turnover documents and information. The representative made the familiar argument that he had already turned over what had been requested. Indeed voluminous documents had been turned over to the trustee. But the trustee complained that only a small amount of them were relevant to debtor's financial condition. In turn debtor's representative argued that it was the trustee's duty to go through the records and figure out what was relevant to the debtor's financial condition. Balancing the respective duties of both the trustee and the debtor, the bankruptcy court disagreed, as follows, and noted specifically the trustee's duty to efficiently and effectively administer the estate.

> It is not enough to simply give the Trustee access to piles of documents and force him to sort through the information. 'It is well settled that a [trustee] should not be required to drag information from a reluctant and uncooperative debtor. Because of the extraordinary relief offered under the Bankruptcy Code delay and avoidance tactics are inconsistent with, and offensive to, its purpose and spirit.' (citations omitted). Further, this Court holds that the Debtor has a duty to create corporate charts showing the various entities associated with the Debtor, as doing so comports with the Bankruptcy Code's requirement of cooperation between a debtor and a trustee.

Similarly, in *Gold v. Guttman (In re Guttman)*, 237 B.R. 643, 650 (Bankr. E.D. Mich 1999), the bankruptcy court held that it was the debtor's duty to take the necessary steps to obtain documents requested by the trustee and turn them over, not to send the trustee off in search of them. In *Gold*, debtor's failure to properly respond to the trustee's requests for documents resulted in

denial of his discharge under, among other provisions, § 727(a)(4)(D).

The case *In re Auld*, 543 B.R. 676 (Bankr. D. Utah 2015), on the other hand, illustrates risks to the trustee if debtor discovery is not promptly and diligently pursued. The opinion also addresses the interplay between §§ 521 and 542, and Rule 2004. The procedural context of the case is the bankruptcy court's ruling on, and denial of, the trustee's motion to extend time to file a complaint objecting to discharge.

Debtor turned over various books and records to the trustee at the meeting of creditors, at which the trustee also demanded in writing the turnover of additional documents and information. The next day the trustee requested additional documents and information by e-mail to debtor's counsel, as well as turnover of certain funds including the estate's portion of a tax refund. Some documents were turned over, after which the trustee made an e-mail request for more documents.

On the day the discharge complaint deadline expired, the trustee filed a motion seeking an extension to file a complaint. The motion also asked the court to order turnover of certain funds, as well as a number of documents and some information. Citing § 521, the court determined that while some of the requested documents were subject to turnover under §§ 521 and 542, "requests for explanations and information are more suitably the subject of a Rule 2004 examination." The court further held, as follows, that a turnover motion must establish a debtor's ability to comply with the requested order:

> Accordingly, before issuing a turnover order, this Court must be satisfied that the property the Trustee demands is property of the bankruptcy estate, and that the Debtor has possession, custody or control of the property sufficient to enable him to comply with the order. Similarly, the Court must be satisfied that the recorded information the Trustee has requested relates to the property of the estate or the Debtor's financial affairs, and that the Debtor has possession, custody or control of the recorded information sufficient to enable him to comply with the order.

Moreover, the court held, the "request must also describe with particularity the property or documents to be turned over."

The court then addressed the trustee's eight separate requests for turnover, all of which were rejected on various grounds. Infirmities in the trustee's requests identified by the court included a lack of clarity and specificity, no showing that debtor had the requested property and

no showing that the requested documents, property and information were even property of the estate. The court reiterated that "explanations" and "information" are not properly sought by a motion for turnover, and held that a request for a court order for turnover of tax returns that have not yet been prepared and do not exist is premature.

Lastly, the court refused to extend the deadline for filing a complaint to deny discharge because the trustee had not shown cause to do so. The court noted that the trustee had sixty days from the meeting of creditors to conduct his investigation and there was no assertion that debtor had failed to cooperate with him. Under the circumstances, the trustee's statement that he simply needed more time was not cause to extend the filing deadline.

More recently, in connection with a complaint to deny discharge and for turnover of property, a trustee also sought an award of damages on behalf of the estate. The basis for the complaint was that debtor failed to cooperate and comply with her duties under § 521. The trustee alleged that debtor failed to file a statement of anticipated changes in income, interfered with the trustee's attempt to show her residence to potential buyers and failed to surrender personal property. The bankruptcy court held that the trustee did not have a private right of action for damages based on the debtor's conduct, declining to imply one under the familiar four factors set forth in the Supreme Court's 1975 decision in *Cort v. Ash*. As the Bankruptcy Code contains other remedies for a debtor's lack of cooperation and bad acts, specifically a denial of discharge, the court found that none of the four *Cort* factors were present to show "even the slightest hint that Congress intended to create a private right of action in favor of a trustee" when a debtor fails to perform her duties. *Miller v. Mathis (In re Mathis)*, Case No. 14-57325, Adv. Pro. No. 15-5001-PJS, –B.R.–, 2016 Bankr. LEXIS 1714, 2016 WL 1569329 (Bankr. E.D. Mich. Apr. 18, 2016).

V. MORE CASE LAW: WHAT IS PROPER DISCOVERY IN BANKRUPTCY- AN EXAMINATION OF BANKRUPTCY RULES AND OTHER FEDERAL RULES OF CIVIL PROCEDURE

a. Rule 2004

Generally speaking, Rule 2004 has an incredibly broad scope and can exceed the scope of discovery under the Federal Rules of Civil Procedure. Rule 2004 is meant to "allow the court to gain a clear picture of the condition and whereabouts of the bankrupt's estate." *Secs. Investor Prot. Corp. v. Bernard L. Madoff Secs. LLC*, 60 Bankr. Ct. Dec. 57, *2 (Bankr. S.D.N.Y. 2014). In the *Madoff Securities* case, the party seeking a Rule 2004 examination wanted to seek discovery for collateral litigation pending in Florida to show their claims were non-derivative. *Madoff Secs.*, 60 Bankr. Ct. Dec. 57 at *3. Ultimately, the Court denied the application for Rule 2004 examination because the party failed to show cause. *Id.*

There are some limits to the expansive scope of Rule 2004:

1. Examining matters that have no relationship to the debtor's affairs or administration of the estate. *See In re Johns-Manville Corp.*, 42 B.R. 362, 364 (S.D.N.Y. 1984)

2. Improper to use Rule 2004 to obtain information for use in an unrelated case or pending matter in another tribunal. *See In re Coffee Cupboard, Inc.* 128 B.R. 509, 516 (Bankr. E.D.N.Y. 1991); *Synder v. Soc'y Bank*, 181 B.R. 40, 42 (S.D. Tex. 1994).

The bankruptcy court can grant a motion for Rule 2004 examination *ex parte*, but then the party to be examined may oppose the examination by filing a motion to quash. *Crowley v. Burke,* No. 3:13-cv-219-RCJ-VPC, 2013 WL 6284170, *9 (D. Nev. Dec. 4, 2013) citing to *In re Dinubilo*, 177 B.R. 932, 943 (E.D. Cal. 1993). Once a motion to quash is filed, the examining party bears the burden of proof to show good cause exists for seeking discovery. *Id.* Good cause

is proven if the discovery is "necessary to establish the claim of the party seeking the examination" or denial of the request causes "undue hardship or injustice." *Id.*

b. Federal Rules of Civil Procedure, Rule 27(a)

Rule 27(a) allows a party to file a petition to perpetuate testimony in a District Court "where any expected adverse party resides regarding 'any matter cognizable in a United States court.'" *Madoff Secs.*, 60 Bankr. Ct. Dec. 57 at *4. Federal Bankruptcy Rule 7027 extends Rule 27 to adversary proceedings in bankruptcy court. This seemingly limitless ability to require a party to testify is limited by the following: "there must be a showing and determination by the court that the anticipated adversary proceeding is within the bankruptcy jurisdiction of the court where it is to be brought." *Id.* citing to 10 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* § 7027.02 at 7027-3 (16th ed. 2014). The key for a bankruptcy court or debtor's counsel facing a petition pursuant to Rule 27(a) is to analyze whether the bankruptcy court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334(b). If the bankruptcy court does not have subject matter jurisdiction over the proceeding prompting a Rule 27(a) petition, then the court lacks authority to grant the motion to perpetuate testimony for that case.

c. Federal Rules of Civil Procedure, Rule 27(b)

Contrary to its companion Rule 27(a), Rule 27(b) is not so easily thwarted by an analysis of subject matter jurisdiction. Rule 27(b) "authorizes the Court in which a judgment has been rendered to permit a party to perpetuate testimony if an appeal has or may be taken and the testimony would be used 'in the event of further proceedings in that court.'" *Madoff Secs.*, 60 Bankr. Ct. Dec. 57 at *5 citing to Fed. R. Civ. P. 27(b)(1). To oppose a motion under this rule, debtor's counsel would need to show that there is no reason to take testimony if the matter returned to the original court on remand. In other words, the issues remaining in the case are issues of law and there is no dispute of fact requiring witness testimony.

d. Protective Orders- Federal Rule of Civil Procedure 26(c) versus Bankruptcy Rule 9018

Understanding the different standards that apply in the rules for granting a protective order (Bankruptcy Rule 9018 versus Fed. R. Civ. P. 26(c)) is important for any debtor's counsel that might try to seek limits on the scope of discovery. *See also Crowley*, 2013 WL 6284170 at *2. Bankruptcy Rule 9018 applies to only three types of information: (1) trade secret or confidential research, development, or commercial information, (2) scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) governmental matters that are made confidential by statute or regulation. To receive a protective order under this Rule, the information sought must fit within one of the three categories.

Pursuant to Rule 26(c), a party may move the court for a protective order in the action where the case is pending, or in the case of a deposition of an out of state deponent, in the district court where the deposition will be taken. *See In re Mittco, Inc.*, 44 B.R. 35, 38 (Bankr. E.D. Wis. 1984). Important practice tip: A motion made under Rule 26(c) must include a certification that the movant "has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." Fed. R. Civ. P. 26(c)(1). The party must show "good cause" for entry of a protective order that would protect the party from "annoyance, embarrassment, oppression, or undue burden or expense." *Id.* Rule 26(c) provides suggested examples of the different types of relief and requests that the movant may make. With the new Rules of Civil Procedure and expansion of ESI, it would be wise for debtor's counsel to assess discovery early in the case and plan appropriately for a protective order, if one is needed.

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3. Electronically Stored Information (ESI) Discovery in Consumer Debtor Cases and Why Consumer Debtor's Lawyers, Trustees and Creditors Care About It.

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ELECTRONICALLY STORED INFORMATION (ESI) DISCOVERY IN CONSUMER DEBTOR CASES AND WHY CONSUMER DEBTOR'S LAWYERS, TRUSTEES AND CREDITORS CARE ABOUT IT

Discovery of Electronically Stored Information (ESI) is an important and evolving aspect of discovery in our ever-increasing world of electronic and digital documents and communications. ESI encompasses all information that is stored electronically. The rules governing this type of discovery, hereinafter referred to as "e-discovery", are an extension of the rules that have always governed discovery. However, as there are now more ways to communicate and more ways to save information, responding to a request for production of ESI seems to have taken on extremely large, and in some instances, enormous proportions. In today's world, e-discovery is not limited to information sought from large corporate entities or in cases outside of Bankruptcy Court. When one considers how many ways individuals store documents and communicate, ESI is brought squarely into the consumer debtor context. While there are not a large number of published cases in the bankruptcy context, it is clear that the rules that govern general civil litigation in the Federal Courts should be taken into consideration in the consumer bankruptcy context. These rules do not exist in a vacuum. They are brought into play at various phases of a bankruptcy case.

I. What are the types of ESI that can impact a consumer debtor case and what is the Debtor's responsibility for preservation of ESI?

A. Types of ESI.

The following list is intended as a starting point for consideration of the various types of ESI an average individual may have or utilize in their daily life.

- Text messages
- Social media posting/social networks
- Email accounts

- Photo storage sites
- On line banking records
- Electronic storage of personal documents
- On line access to payroll information, retirement accounts, insurance policies

ESI can be stored on a variety of devices, including:

- Cell phones/smart phones
- Work computers
- Home computers
- Tablets/I-pads
- External storage on things such as external hard drives, flash drives, USB devices
- Cloud storage
- Smart TVs
- Other mobile and electronic devices
-

Thus, anywhere that a debtor stores information, and any information that is appropriate for discovery in the particular context of the case, is subject to production.

B. Debtor's responsibility.

Arguably, a debtor's responsibility for preserving ESI begins the minute a debtor contemplates filing a bankruptcy. At that time, the debtor needs to consider all of the documents that will support the information needed for the Bankruptcy Schedules and Statement of Financial Affairs, and should, with the assistance of counsel, consider what information the bankruptcy trustee, in either a chapter 7 or chapter 13 case, will require, and what creditor issues may arise in the case, including any possible objections to discharge of debt. Further, in a chapter 7 context, it is appropriate to consider 11 U.S.C. §727(a)(3).[1]

In the Eastern District of Michigan, LBR 2003-2 lists "Debtor's Documents at the Meeting of Creditors". See Appendix A. E.D.M. LBR 2003-2 does not specifically reference ESI, but if the requested documents are not provided, and are unable to be provided, it is possible

[1] Hereinafter, references to the Bankruptcy Code will be referenced as "§__".

that this could trigger an action under §727(a)(3), which would then result in a contested matter, which will bring the rules governing ESI into play.

A trustee or creditor may request a BR 2004 exam of the debtor. Fed. R. Bankr. P. 2004[2] does not specifically incorporate the procedural rules governing ESI, but in consideration of the possible outcomes of a BR 2004 exam, it would be prudent to make sure that the relevant ESI is preserved.

Thus, while in the preliminary phases of a bankruptcy case it appears that there are no specific rules addressing ESI, debtors and their counsel will be well served to consider the requirements for preservation and production of ESI in their initial meeting and when complying with a trustee's or creditor's request for production of information and documents. (Failure to preserve ESI is known as spoliation. There can be significant consequences if ESI is not preserved in a timely and useful manner.[3])

C. Contested Matter; Creditor's Responsibility.

In the event the debtor is a party to a contested matter in the bankruptcy case, in accordance with BR 9014(c), the Rules under Part 7 of the Bankruptcy Rules apply. SectionIV, below, sets forth the text of the Rules that address ESI.

At this point, it is not only the debtor who has responsibility for ESI, but also any counterparty to the contested matter. Thus, if a creditor initiates an objection to discharge of debt under §523, for example, the creditor will also have responsibility for preservation and production of ESI. At the time that a creditor, or the creditor with the assistance of counsel, determines that it is appropriate to bring an action against a debtor, a litigation hold of all ESI should be put in place.

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[2] Hereinafter, citations to the Federal Rules of Bankruptcy Procedure will be referenced as "BR".
[3] The intent of these materials is to provide an overview. Therefore, I have not included a survey of the cases that address spoliation.

D. What needs to be produced and how does "proportionality" fit into this?

Fed. R. Civ. P. 26(b)[4] sets forth the scope and limits of discovery, including e-discovery. There are 6 factors which are to be considered to determine proportionality:

i. the importance of the issues at stake in the action,
ii. the amount in controversy,
iii. the parties' relative access to relevant information,
iv. the parties' resources,
v. the importance of the discovery in resolving the issues,
vi. whether the burden or expense of the proposed discovery outweighs its likely benefit.

The determination of what is "proportional" will need to be made on a case-by-case basis. It appears, however, that one of the effects of Rule 26 should be the removal of extensive and costly discovery as a means of burdening the opposing side with expensive discovery in order to run up the costs of litigation in order to gain a litigation advantage.

E. How does one know what should be preserved and produced?

1. Model Orders

A number of courts have proposed Model Orders regarding e-discovery. The U.S. District Court for the Eastern District of Michigan has a the Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information (the "Checklist") on its website, along with its Model Order Relating to the Discovery of Electronically Stored Information. The United States District Court for the Northern District of California has a [Model] Stipulated Order Re: Discovery of Electronically Stored Information for Standard Litigation and the same Checklist, along with Guidelines. (See Appendix B, Items 7 and 1.) The Checklist provides the following general categories to be addressed in a Rule 26(f) Meet and Confer and specific considerations under each area.

[4] Hereinafter, citations to the Federal Rules of Civil Procedure will be referenced as "Rule".

a. Preservation.
b. Liaison.
c. Informal Discovery About Location and Types of Systems
d. Proportionality and Costs
e. Search
f. Phasing
g. Production
h. Privilege

Courts are now dealing with e-discovery in their Rule 26(f) reports, although the e-discovery considerations are not necessarily very detailed in the form reports and require the parties to expand on their procedures. Attached as Appendix B are copies of some of the proposed Model Orders and formats for 26(f) reports. I have done my best to attach Model Orders from jurisdictions within the "Central States" constituencies. I have also attached some other Model Orders and discovery considerations that I found interesting and helpful. See, for example, from the United States District Court for the District of Delaware the Default Standard for Discovery, Including Discovery of Electronically Stored Information ("ESI").

II. Recent Cases that address discovery disputes.

The following 2 cases demonstrate what can occur if discovery issues are not handled properly before seeking court intervention.

A. *In re: Kenneth Wayne Auld*, 543 BR 676 (Bankr. D. Utah 2015). This case involved the chapter 7 trustee's request to the debtor to provide certain documents and for turnover of certain funds. The trustee brought a Motion to Extend Deadline for Filing Complaints Concerning the Debtor's Discharge and Motion for Turnover Order Pursuant to §521 and §542 of the Bankruptcy Code (the "Motion"). The court denied the Motion, determining that the Motion did not establish that the Debtor had the ability to comply with the turnover requests regarding either the documents of funds, and that the Motion was premature, as the

trustee had not utilized other means, such as BR 2004(c) or other appropriate discovery methods prior to seeking court intervention. The court summarized its ruling as follows:

> To obtain an order to turn over property or recorded information, the Trustee is required to show not only that the property to be turned over is property of the bankruptcy estate and the recorded information relates to property of the estate, but also that the property and recorded information are in the Debtor's possession or under his control at the time the turnover motion was filed. The request must also describe with particularity the property or documents to be turned over. Because the Trustee has not availed himself of the procedural methods of discovery, nor been specific in his requests in this Motion, his request for judicial intervention is premature. For the foregoing reasons, the Trustee's motion for an order directing turnover will be denied.
>
> The Trustee has also failed to clearly identify a lack of cooperation by the Debtor or refusal to respond to any formal discovery request, and so the Trustee has failed to plead sufficient cause to extend the deadline for objecting to the Debtor's discharge. Therefore, the Court will deny the Trustee's motion to extend the deadline for filing complaints concerning the debtor's discharge.

534 BR at 685.

B. *In re: Modern Plastics Corporation, et al, v. Thomas R. Tibble , et al*, Case No. 09-00651, U.S. Bankruptcy Court, Western District of Michigan, 2015 Bankr. LEXIS 2525 (Decided July 23, 2015). This case addresses the issue of aggressive pursuit of discovery against non-parties. This particular matter came before the court on Plaintiff's Motion to Compel Non-Parties to Comply with Subpoenas and the non-parties' Motion for Protective Order. Judge Dales started his Opinion as follows:

> This Memorandum of Decision and Order addresses a costly discovery dispute between New Products Corp. (the "Plaintiff" or "New Products") and seven non-parties upon whom New Products served subpoenas *duces tecum*. The court lays blame for this dispute squarely on the shoulders of Plaintiff's counsel who flouted the duty he owed to the Recipients to avoid saddling them with undue burden and expense, then stubbornly exacerbated the problem by multiplying proceedings. (footnote omitted)
>
> 2015 Bankr. LEXIS 2525 p. 1.

Judge Dales addressed a number of factors in his determination that the subpoenas were unduly burdensome. Among the factors were: The extensive time period for which information was

sought; the breadth of the information sought; that the targets of the subpoenas were non-parties; that Plaintiff's counsel must have known that the subpoena (to Bank of America) requested information that was "highly regulated and highly sensitive to customer privacy issues"; that the subpoena (to Dickinson Wright) would "necessitate a review for privileged communications and work product"; and that the return date for information was an unreasonably short amount of time. The Judge granted the Protective Order, noting that Rule 26(c)(3) incorporates Rule 37(a)(5).[5] The Judge further referenced the efforts of Dickinson Wright to resolve the dispute before seeking the court's assistance. The court determined that it was likewise required to shift costs of compliance with the subpoenas to Plaintiff under Rule 45(d).[6] The court assessed costs against Plaintiff's counsel and Plaintiff, jointly and severally, in favor of the non-parties to reimburse the non-parties for (i) costs in the amount of $104,770.00 incurred by the non-parties for a third party vendor who compiled and reviewed the ESI for production in response to the subpoenas and (ii) costs of counsel for one of the non-parties in the amount of $61,417.50.

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[5] Rule 37(a)(5) provides: (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 must, after giving an opportunity to be heard, require the party or deponent 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 must 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.

[6] Rule 45(d) provides, in pertinent part: (d) PROTECTING A PERSON SUBJECT TO A SUBPOENA; ENFORCEMENT.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

While this case may seem extreme, the costs of dealing with the production of ESI, particularly when there are multiple sources of stored information, possible duplications and when it may contain confidential or otherwise protected information, can be very high.

III. Best Practices

The Business Law Section of the American Bar Association published its Best Practices Report on Electronic Discovery (ESI) Issues in Bankruptcy Cases in the August 2013 issue of The Business Lawyer, Volume 68, No. 4. This Report contains an excellent survey of proposed Best Practices for all aspects of bankruptcy practice, including representation of (i) debtors and creditors in Chapters 7, 13 and 11, (ii) parties in adversary proceedings, and (iii) claimants in Chapter 7, 13 and 11 cases.

IV. Overview of the Rules of Bankruptcy Procedure that affect ESI. The following Rules of Bankruptcy Procedure include references to e-discovery.

A. BR 7026 incorporates Rule 26, "Duty to Disclose. General Provisions Governing Discovery".

> (b) **DISCOVERY SCOPE AND LIMITS**.
>
> (1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.
>
> (2) *Limitations on Frequency and Extent.*
>
> (A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.
>
> (B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of

undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. 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)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) *Trial Preparation: Materials.*

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

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has 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.* If the court orders discovery of those materials, 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) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

. . .

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) **PROTECTIVE ORDERS**.

(1) *In General.* 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 as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue 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 disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or 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 disclosure or 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 just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

…

(f) **CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.**

…

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

B. BR 7033 incorporates Rule 33, "Interrogatories to Parties". Under Rule 33(d),

(d) **OPTION TO PRODUCE BUSINESS RECORDS**. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

C. BR 7034 incorporates Rule 34, "Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes".

(a) **IN GENERAL**. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

…

(b) **PROCEDURE**.

(1) *Contents of the Request.* The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) *Responses and Objections.*

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) **NONPARTIES**. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

D. BR 7037 incorporates Rule 37, "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions".

(a) **MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY**.

(1) *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(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 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(a), 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. This motion may be made 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(a)(4);

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

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

(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.

(4) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated 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 must, after giving an opportunity to be heard, require the party or deponent 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 must 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 must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must 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 for the motion.

…

(e) **FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION**. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

E. BR 9014, "Contested Matters". In particular, note BR 9014(c):

(c) **APPLICATION OF PART VII RULES**. Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028–7037, 7041, 7042, 7052, 7054–7056, 7064, 7069, and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

F. BR 9016 incorporates Rule 45 "Subpoena" which provides, in pertinent part:

(a) **IN GENERAL**.

(1) *Form and Contents.*

(A) *Requirements—In General.* Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d) and (e).

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

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* 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. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce; Included Obligations.* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials.

(2) *Issuing Court.* A subpoena must issue from the court where the action is pending.

(3) *Issued by Whom.* The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court.

(4) *Notice to Other Parties Before Service.* If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.

…

(c) **PLACE OF COMPLIANCE**.

. . .

(2) *For Other Discovery.* A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) **PROTECTING A PERSON SUBJECT TO A SUBPOENA; ENFORCEMENT**.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *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 also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(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.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) 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.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) **DUTIES IN RESPONDING TO A SUBPOENA**.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

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

(B) *Form for Producing 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 a reasonably usable form or forms.

(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 cost. 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 cost. 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)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

…

(g) **CONTEMPT**. The court for the district where compliance is required — and also, after a motion is transferred, 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.

G. BR 2004, "Examination".

(a) **EXAMINATION ON MOTION**. On motion of any party in interest, the court may order the examination of any entity.

(b) **SCOPE OF EXAMINATION**. The examination of an entity under this rule or of the debtor under §343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or

offered therefor, and any other matter relevant to the case or to the formulation of a plan.

(c) **COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS**. The attendance of an entity for examination and for the production of documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is admitted to practice in that court or in the court in which the case is pending.

(d) TIME AND PLACE OF EXAMINATION OF DEBTOR. The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending.

(e) MILEAGE. An entity other than a debtor shall not be required to attend as a witness unless lawful mileage and witness fee for one day's attendance shall be first tendered. If the debtor resides more than 100 miles from the place of examination when required to appear for an examination under this rule, the mileage allowed by law to a witness shall be tendered for any distance more than 100 miles from the debtor's residence at the date of the filing of the first petition commencing a case under the Code or the residence at the time the debtor is required to appear for the examination, whichever is the lesser.

4. Recent Changes to the FRCP and Commentary

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Recent Changes to the FRCP

I. The Basics ... Why were the rules amended?

1.1. New rules recognize the exponential growth of ESI.

1.1.1 There are more devices connected to the Internet (phones, tablets) than there are people on the planet! Sources of discoverable material now include: Mobile devices (texts, voicemail); Social media (Facebook, Twitter, LinkedIn, Instagram); Internal corporate chat tools; Cloud repositories (Dropbox, Google Drive)

1.2. Important changes to the rules to the scope of discovery

II. New rules addressing the timing, sequencing and scope of discovery

III. The importance of proportionality has been magnified

IV. Changes in how to respond to discovery

V. Changes to rules related to spoliation of ESI

VI. "Corrective measures" for loss of ESI – how applied

1.3. Changes to the rules that were rejected

1.3.1 New presumptive limits to discovery were rejected:

> Changes to Rules 30, 31, 33, and 36 were rejected after outcry in the public comments. Rule changes had proposed limiting the number of depositions to 5 (from 10), time for depositions to 6 hours (from 6), number of interrogatories to 15 (from 25), the number of requests for admission to 25 (from unlimited).

II. New rules address timing, sequencing and scope of discovery to expedite the initial stages of litigation.

2.1. Earlier and more active case management –

2.1.1 No more e-mail conferences – The provision for consulting at a scheduling conference by "telephone, mail, or other means" is deleted.

2.1.2 Committee Comment: A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means.

2.2. Shorter time before scheduling conference

2.2.1 The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared.

2.3. Rule 26(d) Timing and Sequence of Discovery.

2.3.1 *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

2.3.2 Rule 26(d)(2)(A). Early Rule 34 Requests. Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered: to that party by any other party, and by that party to any plaintiff or to any other party that has been served. (B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

(a) Committee note: Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference.

2.3.3 Delivery does not count as service – Committee Comments notes that:

The requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

2.4. Rules 16(b)(3)(B)(iii) and 26(f)(3)(C)

2.4.1 16(b)(3)(B) *Permitted Contents.* The scheduling order may provide for disclosure, discovery, or preservation of electronically stored information

2.4.2 26(f)(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on: ... (C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced

III. The importance of proportionality has been magnified

3.1. Rule 26(b)(1) - Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

3.2. Rule 26 Committee Comment –

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections. Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations. Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule adds: "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed

> information about another party's information systems and other information resources. (emphasis added)

3.3. Examples of what is discoverable replaced with proportionality standard. *See* the Committee Note

> The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense.

3.4. "Reasonably calculated to lead to the discovery of admissible evidence"

> *3.4.1* Committee Note.
>
> The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the "reasonably calculated" phrase to define the scope of discovery "might swallow any other limitation on the scope of discovery." The 2000 amendments sought to prevent such misuse by adding the word "Relevant" at the beginning of the sentence, making clear that "'relevant' means within the scope of discovery as defined in this subdivision
>
> The "reasonably calculated" phrase has continued to create problems, however, and is removed by these amendments.
>
> It is replaced by the direct statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

3.4.2 Courts construing the new rules have noted that proportionality in discovery under the Federal Rules is nothing new.

3.4.3 Old Rule 26(b)(2)(C)(iii) was clear that a court could limit discovery when burden outweighed benefit, and old Rule 26(g)(1)(B)(iii) was

clear that a lawyer was obligated to certify that discovery served was not unduly burdensome. New Rule 26(b)(1), implemented by the December 1, 2015 amendments, simply takes the factors explicit or implicit in these old requirements to fix the scope of all discovery demands in the first instance.

3.4.4 Recent case recognize that new rules merely reflect the way it should have been in the past.

(a) *In Gilead Scis., Inc. v. Merck & Co.,* No. 5:13-cv-04057-BLF, 2016 U.S. Dist. LEXIS 5616, at *4 (N.D. Cal. Jan. 13, 2016), the court observed:

"What will change—hopefully—is mindset. No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence. **In fact, the old language to that effect is gone.** Instead, a party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case. (emphasis added). See also Dao v. Liberty Life Assur. Co., No. 14-cv-04749-SI (EDL), 2016 U.S. Dist. LEXIS 28268, at *8 (N.D. Cal. Feb. 23, 2016) ("The Rules Committee has made clear in its Notes on the 2015 Amendments that "[t]he present amendment restores the proportionality factors to their original place in defining the scope of discovery" and "reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses or objections. Courts are applying the amendments retroactively.")

(b) *In Kissing Camels Surgery Center v. Centura Health Corporation,* 12-cv-03012-WJM-NYW 2016 WL 277721 (D. Colo. Jan. 22, 2016) Court examined both sides' requests to produce after Defendant asked Plaintiff to go through its produced documents and identify which were responsive to Defendant's requests. The court found both sides' requests contrary to the intent of the amended rules. Defendant's requests were "omnibus" and "improper on their face," lacking specificity and using boilerplate terms such as "including, without limitation." Plaintiff's requests were no better, also using boilerplate and lacking specificity. Court particularly criticized the production of 1 terabyte of information (millions of pages) without providing any guidance as to where responsive documents could be found.

IV. Tools for responding to discovery

4.1. New e-discovery tools

> Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available. Committee Note to Rule 26.

4.2. Shifting expenses for costs of discovery now explicitly recognized. Rule 26(c)(1)(B)

4.2.1 A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending ... including one or more of the following: (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery.

4.2.2 Committee Note

> Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

4.3. Changes to how to object to discovery

4.3.1 26(b)(2) Responses and Objections. ...

> (a) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

4.3.2 Changes to Rule 34(b)(2)(B): Boilerplate

(a) Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection.

(b) Committee Note Explains

An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters "withheld" anything beyond the scope of the search specified in the objection.

(c) Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. The response to the request must state that copies will be produced. The production must be completed either by the time for inspection specified in the request or by another reasonable time specifically identified in the response. When it is necessary to make the production in stages the response should specify the beginning and end dates of the production.

4.3.3 Rule 34(b)(2)(C)

(a) Text: An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

(b) Committee Note

Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the

requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. ***The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection.*** An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been "withheld."

V. Changes to rules related to spoliation and adoption of a national ESI Spoliation Standard

5.1. Rule 37(e) Failure To Preserve Electronically Stored Information.

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: presume that the lost information was unfavorable to the party; instruct the jury that it may or must presume the information was unfavorable to the party; or dismiss the action or enter a default judgment.

5.2. Old Rule 37(e) was inadequate.

5.2.1 Committee Note:

"Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. (Committee Note)

These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for Federal Rules Of Civil Procedure 39 spoliation if state law applies in a case and authorizes the claim. (Committee Note)

It applies only when such information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.

The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable.

Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

New rule is based based on common law duty to preserve.

In applying the rule, a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

5.2.2 So what about per se duty to preserve based on a statute or regulation?

(a) The court should be sensitive ... to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other

> preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case. (Committee Note)

VI. Corrective measures for failure to preserve ESI under Rule 37(e)(1). – How applied:

6.1. There are consequences for failing to preserve. But consequences only arise when "a party failed to take reasonable steps to preserve the information, information was lost as a result, and the information could not be restored or replaced by additional discovery.

6.2. In addition, a court may resort to (e)(1) measures only '***upon finding prejudice*** to another party from loss of the information.' An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation." (Committee Note, emphasis added)

6.2.1 A court should only apply measures no greater than necessary to cure the prejudice.

> Once a finding of prejudice is made, the court is authorized to employ measures "no greater than necessary to cure the prejudice." The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures; the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's discretion. (Committee Note)

6.2.2 Severest consequences of losing information are reserved for intentional loss to deprive the other side of information.

> 37(e)(2) **only upon finding that** the party acted with the intent to deprive another party of the information's use in the litigation may: presume that the lost information was unfavorable to the party; instruct the jury that it may or must presume the information was unfavorable to the party; or dismiss the action or enter a default judgment.

6.2.3 Committee Note on Subdivision (e)(2)

> It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, **but to limit the most severe measures to instances of intentional loss or destruction.** (emphasis added)

6.2.4 The Committee was concerned about guidelines for exercising the severest measures.

> Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.

6.3. One example - *Marten Transp., Ltd. v. Plattform Adver., Inc.*, No. 14-cv-02464-JWL- TJJ, 2016 U.S. Dist. LEXIS 15098, at *31 (D. Kan. Feb. 8, 2016)

> The Court will not use a "perfection" standard or hindsight in determining the scope of Plaintiff's duty to preserve ESI. As noted above, Plaintiff did take reasonable steps to preserve relevant information when it preserved Vinck's email and other ESI in Fall 2013. The case involved only Plaintiff's claims alleging Defendant's unauthorized use of Plaintiff's trademarks and not that Plaintiff improperly accessed Defendant's website. Prior to June 2015, Plaintiff had no knowledge or information from which it should have known that Vinck's internet history would become relevant in the case.

6.3.1 New ESI spoliation standard may also be retroactive - , but allowed evidence of spoliation to be introduced at trial.

> In *Nuvasive, Inc. v. Madsen Medical, Inc.*, No. 13-cv-2077 BTM(RBB) 2016 WL 305096 (SD Cal. Jan. 26, 2016), the court

ordered sanctions for spoliation and awarded a permissive adverse inference instruction after finding that Plaintiff unintentionally failed to preserve text messages. After amendment to Rule 37(e), court reconsidered, vacated its sanctions due to lack of intentional spoliation, denied adverse inference.

6.3.2 There is no a potential divergence in the Second Circuit and other jurisdictions between spoliation of paper records and ESI?

Now, under Rule 37(e) (and as applied to electronic evidence only), a Court may not issue an adverse inference instruction unless the Court finds "that the party acted with the intent to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e)(2). Therefore, the Court may issue an adverse inference instruction with regard to the tangible evidence (i.e. the bank statements and daily activity reports) on a finding that Plaintiff acted negligently, but may not issue an adverse inference with regard to the electronic evidence (i.e. the emails) unless the Court finds that Plaintiff acted with intent to deprive Defendants of that information. *Best Payphones, Inc. v. City of New York*, No. 1-CV-3934 (JG) (VMS), 2016 U.S. Dist. LEXIS 25655, at *18 (E.D.N.Y. Feb. 26, 2016).

APPENDIX A

1. Eastern District of Michigan, Local Bankruptcy Rule 2003-2
2. Southern District of Ohio, Local Bankruptcy Rule 4002-1(a)
3. Western District of Michigan, Local Bankruptcy Rule 1007-2(f)
4. Southern District of Illinois, Local Bankruptcy Rule 1007-1(A)
5. Northern District of Illinois, Local Bankruptcy Rule 2004-1

Eastern District of Michigan Local Bankruptcy Rule 2003-2

Rule 2003-2 Debtor's Documents at the Meeting of Creditors

(a) In a case under chapter 7, 12 or 13, or in an individual case under chapter 11, to the extent they are in the debtor's possession or are readily available, the debtor must have available at the meeting of creditors, neatly arranged, all of the following:

(1) documents for one year pre-petition to support all entries on schedule I, other than previously provided payment advices and tax returns;

(2) documents for one year pre-petition to support all entries on schedule J, including canceled checks, paid bills or other proof of expenses;

(3) copies of life insurance policies either owned by the debtor or insuring the debtor's life;

(4) keys to non-exempt buildings and vehicles;

(5) divorce judgments and property settlement agreements;

(6) documents establishing the scheduled amounts of joint debts, if the debtor claims an entireties exemption;

(7) the name, address and telephone number of each holder of a domestic support obligation; and

(8) any other specific document requested by the trustee relating to the schedules or statement of financial affairs, if requested in writing at least seven days before the first meeting of creditors.

(b) In a case under chapter 7, 12 or in an individual case under chapter 11, to the extent they are in the debtor's possession or are readily available, the debtor must provide to the trustee or, in a chapter 11 case to the United States trustee, no later than seven days prior to the meeting of creditors, neatly arranged, all of the following:

(1) certificate of title (originals if available, otherwise copies) for currently owned titled assets, including vehicles, boats and mobile homes (regardless of when acquired);

(2) a current statement from each secured creditor stating the amount owed;

(3) originals of bank books, check registers, other financial accounts, bonds, stock certificates and bank, brokerage and credit card statements for one year pre-petition;

(4) copies of leases, recorded mortgages, recorded and unrecorded deeds and recorded land contracts for the time period six years pre-petition;

(5) current property tax statements;

(6) asset appraisals;

(7) casualty insurance policies; and

(8) if the debtor owns a business, business financial statements and business tax returns for the past three years, and business bank statements for the past six months.

(c) In a case under chapter 13, to the extent they are in the debtor's possession or are readily available, the debtor must provide to the trustee no later than 14 days prior to the meeting of creditors, neatly arranged, all of the following:

(1) tax returns for the last two years pre-petition;

(2) payment advices or other proof of current income for the 60 days pre-petition;

(3) proof of all income for one year pre-petition stated on schedule I, including year to date profit and loss statements if the debtor is self employed or engaged in business;

(4) if the debtor owns a business, business financial statements and business tax returns for the past three years, and business bank statements for the past six months; and

(5) any other specific document requested in writing by the trustee relating to the schedules or statement of financial affairs.

Southern District of Ohio, Local Bankruptcy Rule 4002-1(a)

4002–1 DEBTOR — DUTIES

(a) Documentation to be Brought to § 341 Meeting by Debtor. Each debtor shall bring to the § 341 meeting either the following documentation or a statement why such documentation is not applicable or available. This rule is not applicable to a chapter 11 business debtor who has made other arrangements with the United States trustee.

(1) A picture identification issued by a governmental unit, or other personal identifying information that establishes the debtor's identity.

(2) Evidence of social security number(s) or tax identification number(s).

(3) Evidence of current income, such as the most recent payment advice or paystub.

(4) Copies of all original and duplicate certificates of title including, but not limited to, automobiles, boats, motorcycles, trailers, and mobile homes.

(5) Copies of any personal property leases, including motor vehicle leases.

(6) Title documents to all real estate in which the debtor has an interest, including deeds, registered land certificates of title, land contracts, or leases.

(7) Closing statements for any interest in real estate sold or conveyed by the debtor within the year preceding the petition filing date.

(8) Evidence of the value of real estate in which the debtor has an interest (county auditor appraisal or independent appraisal, if available).

(9) Copies of all mortgages and liens upon real estate in which the debtor has an interest showing all recording information, and details of all certificates of judgment, including the name of the judgment creditor, date of filing, judgment docket number, page and amount.

(10) All life insurance policies owned by the debtor, and evidence of the cash surrender value and the beneficiary.

(11) Copies of the United States, state, and local income tax returns, including any amendments, of the debtor and of any business entities wholly owned by the debtor, for the three (3) years preceding the petition filing date, including the most recently filed tax return.

(12) Statements for each of the debtor's depository and investment accounts, including checking, savings, and money market accounts, mutual funds and brokerage accounts for the time period that includes the petition filing date.

(13) Copies of any separation agreements or decrees of dissolution or divorce entered into or granted during the twelve (12) months prior to the petition filing date.

(14) All documents evidencing the debtor's interest in any retirement account, including plans established under 26 U.S.C. § 401(k) or 26 U.S.C. § 403(b), including individual retirement accounts, account statements, summary plan descriptions and qualification letters from the IRS. For individual retirement accounts, an accounting of all contributions to the account since its inception.

(15) Copies of security agreements, and financing statements.

(16) Copies of stock certificates, bonds, credit union accounts, and other evidence of investments or savings.

Western District of Michigan Local Bankruptcy Rule 1007-2(f)

LBR 1007-2: ADDITIONAL REQUIRED DOCUMENTS

***

(f) **Documentation Required by Trustees** - In every individual chapter 7 and 13 case, the debtor must submit the following documents to the trustee at least 7 days before the date first set for the meeting of creditors. The trustee may adjourn the meeting of creditors or file a motion to dismiss if the documents are not provided by the required deadline.

(1) Copies of all payment advices or other evidence of payment received by the debtor from any employer within 60 days of the date of filing. This documentation must be provided to the trustee instead of being filed with the Court as prescribed by 11 U.S.C.§ 521(a)(1)(B)(iv);

(2) Copies of the federal and state income-tax returns, together with all W-2s, for the most recent tax year ending immediately before the commencement of the case, or a debtor's certification explaining why those tax returns are not available. This documentation must be provided to the trustee instead of being filed with the Court as prescribed by 11 U.S.C. E 521(e)(2);

(3) For each financial account held by the debtor, copies of account statements or transaction histories that reflect the account's activity for the 90 days immediately preceding the commencement of the case;

(4) Copies of all certificates of title issued with respect to personal property owned by the debtor as of the commencement of the case;

(5) Copies of all recorded deeds and mortgages (if any) and the current year's SEV for all real property in which the debtor holds an interest as of the commencement of the case;

(6) The declarations pages of all insurance policies that provide coverage for any real or personal property owned by the debtor as of the commencement of the case;

(7) An account statement showing the current value of all IRAs, 401(k)s, pensions, or similar retirement or investment accounts held by the debtor as of the commencement of the case;

(8) If the debtor has been divorced within the last 10 years, a complete copy of the judgment of divorce and all related agreements; and

(9) If the debtor is required to pay a Domestic Support Obligation, written documentation showing:

(A) the name, address, and telephone number of the Domestic Support Obligation recipient; and

(B) the name, address, and telephone number of any Friend of the Court or similar out-of-state agency; and the case or account number used by the agency in the Domestic Support Obligation matter.

The foregoing list is not exclusive and the trustee may require the debtor to provide additional documentation. Similarly, a debtor's compliance with this Rule does not excuse the debtor from his or her obligation to continue cooperating with the trustee as required by 11 U.S.C. E 521(a)(3).

Southern District of Illinois Bankruptcy Court Local Bankruptcy Rule 1007-1A

L.R. 1007-1 – Required Information and Documentation for Case Trustees.
A. **Information to be Served on Trustee.** For a list of the specific information and documents required by each Trustee, as well as whether the Trustee requires electronic or paper submission, consult the Court's website at www.ilsb.uscourts.gov.

Northern District of Illinois Local Bankruptcy Rule 2004-1, eff. April 1, 2016

RULE 2004-1 RULE 2004 EXAMINATIONS

A motion to take a Fed. R. Bankr. P. 2004 examination must be served on all parties entitled to notice, including the person or entity to be examined.

APPENDIX B

1. United States District Court, Northern District of California
   a. Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information
   b. [Model] Stipulated Order Re: Discovery of Electronically Stored Information for Standard Litigation

2. United States District Court for the District of Delaware
   a. Default Standard for Discovery, Including Discovery of Electronically Stored Information ("ESI")

3. United States District Court for the Northern District of Illinois, Eastern Division
   a. Standing Order Relating to the Discovery of Electronically Stored Information

4. United States District Court for the Northern District of Indiana
   a. Report of Parties' Planning Meeting

5. United States District Court for the Southern District of Indiana
   a. ESI Supplement to Case Management Plan

6. United States Bankruptcy Court Eastern District of Michigan
   a. Notice of Change in Local Form for Report of Parties' Rule 26(f) Conference
   b. Report of Parties' Rule 26(f) Conference

7. United States District Court for the Eastern District of Michigan
   a. Model Order Relating to the Discovery of Electronically Stored Information
   b. Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information

8. United States District Court for the District of Nebraska
   a. Rule 26(f) Report

9. United States District Court for the Northern District of Ohio
   a. Default Standard for Discovery of Electronically Stored Information ("E-Discovery")

10. United States District Court for the Southern District of Ohio, Eastern Division
    a. Rule 26(f) Report of the Parties

11. United States District Court for the Southern District of Ohio, Western Division at Dayton
    a. Rule 26(f) Report of the Parties

12. United States District Court for the Middle District of Tennessee
    a. Default Standard for Discovery of Electronically Stored Information ("E-Discovery")—Administrative Order

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.

Revised December 1, 2015

- ❒ 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 searchablility 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.

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.

Updated December 1, 2015

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

Plaintiff(s), vs. Defendant(s).	Case Number: C xx-xxxx [MODEL] STIPULATED ORDER RE: DISCOVERY OF ELECTRONICALLY STORED INFORMATION FOR STANDARD LITIGATION

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.

4. PRESERVATION

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

a) Only ESI created or received between _____ and _____ will be preserved;

b) The parties have exchanged a list of the types of ESI they believe should be preserved and the custodians, or general job titles or descriptions of custodians, for whom they believe ESI should be preserved, e.g., "HR head," "scientist," and "marketing manager." The parties shall add or remove custodians as reasonably necessary;

c) The parties have agreed/will agree on the number of custodians per party for whom ESI will be preserved;

d) These data sources are not reasonably accessible because of undue burden or cost pursuant to Fed. R. Civ. P. 26(b)(2)(B) and ESI from these sources will be preserved but not searched, reviewed, or produced: [e.g., backup media of [named] system, systems no longer in use that cannot be accessed];

e) Among the sources of data the parties agree are not reasonably accessible, the parties agree not to preserve the following: [e.g., backup media created before _____, digital voicemail, instant messaging, automatically saved versions of documents];

f) In addition to the agreements above, the parties agree data from these sources (a) could contain relevant information but (b) under the proportionality factors, should not be preserved: _____.

5. SEARCH

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

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.

7. PHASING

When a party propounds discovery requests pursuant to Fed. R. Civ. P. 34, the parties agree to phase the production of ESI and the initial production will be from the following sources and custodians: _____. Following the initial production, the parties will continue to prioritize the order of subsequent productions.

8. DOCUMENTS PROTECTED FROM DISCOVERY

a) Pursuant to Fed. R. Evid. 502(d), the production of a privileged or work-product-protected document, whether inadvertent or otherwise, is not a waiver of privilege or protection from discovery in this case or in any other federal or state proceeding. For example, the mere production of privileged or work-product-protected documents in this case as part of a mass production is not itself a waiver in this case or in any other federal or state proceeding.

b) The parties have agreed upon a "quick peek" process pursuant to Fed. R. Civ. P. 26(b)(5) and reserve rights to assert privilege as follows _____ _____.

c) Communications involving trial counsel that post-date the filing of the complaint need not be placed on a privilege log. Communications may be identified on a privilege log by category, rather than individually, if appropriate.

9. MODIFICATION

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

IT IS SO STIPULATED, through Counsel of Record.

Dated: _____

Counsel for Plaintiff

Dated: _____

Counsel for Defendant

IT IS ORDERED that the forgoing Agreement is approved.

Dated: _____

UNITED STATES DISTRICT/MAGISTRATE JUDGE

Delaware

DEFAULT STANDARD FOR DISCOVERY, INCLUDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION ("ESI")

1. **General Provisions**

a. **Cooperation.** Parties are expected to reach agreements cooperatively on how to conduct discovery under Fed. R. Civ. P. 26-36. In the event that the parties are unable to agree on the parameters and/or timing of discovery, the following default standards shall apply until further order of the Court or the parties reach agreement.

b. **Proportionality.** Parties are expected to use reasonable, good faith and proportional efforts to preserve, identify and produce relevant information.[1] This includes identifying appropriate limits to discovery, including limits on custodians, identification of relevant subject matter, time periods for discovery and other parameters to limit and guide preservation and discovery issues.

c. **Preservation of Discoverable Information.** A party has a common law obligation to take reasonable and proportional steps to preserve discoverable information in the party's possession, custody or control.

(i) Absent a showing of good cause by the requesting party, the parties shall not be required to modify, on a going-forward basis, the procedures used by them in the ordinary course of business to back up and archive data; provided, however, that the parties shall preserve the non-duplicative discoverable information currently in their possession, custody or control.

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[1]Information can originate in any form, including ESI and paper, and is not limited to information created or stored electronically.

(ii) Absent a showing of good cause by the requesting party, the categories of ESI identified in Schedule A attached hereto need not be preserved.

d. **Privilege.**

(i) The parties are to confer on the nature and scope of privilege logs for the case, including whether categories of information may be excluded from any logging requirements and whether alternatives to document-by-document logs can be exchanged.

(ii) With respect to information generated after the filing of the complaint, parties are not required to include any such information in privilege logs.

(iii) Activities undertaken in compliance with the duty to preserve information are protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

(iv) Parties shall confer on an appropriate non-waiver order under Fed. R. Evid. 502. Until a non-waiver order is entered, information that contains privileged matter or attorney work product shall be immediately returned if such information appears on its face to have been inadvertently produced or if notice is provided within 30 days of inadvertent production.

2. **Initial Discovery Conference.**

a. **Timing.** Consistent with the guidelines that follow, the parties shall discuss the parameters of their anticipated discovery at the initial discovery conference (the "Initial Discovery Conference") pursuant to Fed. R. Civ. P. 26(f), which shall take place before the Fed. R. Civ. P. 16 scheduling conference ("Rule 16 Conference").

b. **Content.** The parties shall discuss the following:

(i) The issues, claims and defenses asserted in the case that define the scope of discovery.

(ii) The likely sources of potentially relevant information (i.e., the "discoverable information"), including witnesses, custodians and other data sources (e.g., paper files, email, databases, servers, etc.).

(iii) Technical information, including the exchange of production formats.

(iv) The existence and handling of privileged information.

(v) The categories of ESI that should be preserved.

3. **Initial Disclosures.** Within 30 days after the Rule 16 Conference, each party shall disclose:

a. **Custodians**. The 10 custodians most likely to have discoverable information in their possession, custody or control, from the most likely to the least likely. The custodians shall be identified by name, title, role in the instant dispute, and the subject matter of the information.

b. **Non-custodial data sources.**[2] A list of the non-custodial data sources that are most likely to contain non-duplicative discoverable information for preservation and production consideration, from the most likely to the least likely.

c. **Notice.** The parties shall identify any issues relating to:

(i) Any ESI (by type, date, custodian, electronic system or other criteria)

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[2]That is, a system or container that stores ESI, but over which an individual custodian does not organize, manage or maintain the ESI in the system or container (e.g., enterprise system or database).

that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(C)(i).

(ii) Third-party discovery under Fed. R. Civ. P. 45 and otherwise, including the timing and sequencing of such discovery.

(iii) Production of information subject to privacy protections, including information that may need to be produced from outside of the United States and subject to foreign laws.

Lack of proper notice of such issues may result in a party losing the ability to pursue or to protect such information.

4. **Initial Discovery in Patent Litigation.**[3]

a. Within 30 days after the Rule 16 Conference and for each defendant,[4] the plaintiff shall specifically identify the accused products[5] and the asserted patent(s) they allegedly infringe, and produce the file history for each asserted patent.

b. Within 30 days after receipt of the above, each defendant shall produce to the plaintiff the core technical documents related to the accused product(s), including but not limited to operation manuals, product literature, schematics, and specifications.

c. Within 30 days after receipt of the above, plaintiff shall produce to each defendant an initial claim chart relating each accused product to the asserted claims each product allegedly infringes.

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[3]As these disclosures are "initial," each party shall be permitted to supplement.

[4]For ease of reference, "defendant" is used to identify the alleged infringer and "plaintiff" to identify the patentee.

[5]For ease of reference, the word "product" encompasses accused methods and systems as well.

d. Within 30 days after receipt of the above, each defendant shall produce to the plaintiff its initial invalidity contentions for each asserted claim, as well as the related invalidating references (e.g., publications, manuals and patents).

e. Absent a showing of good cause, follow-up discovery shall be limited to a term of 6 years before the filing of the complaint, except that discovery related to asserted prior art or the conception and reduction to practice of the inventions claimed in any patent-in-suit shall not be so limited.

5. **Specific E-Discovery Issues.**

a. **On-site inspection of electronic media.** Such an inspection shall not be permitted absent a demonstration by the requesting party of specific need and good cause.

b. **Search methodology.** If the producing party elects to use search terms to locate potentially responsive ESI, it shall disclose the search terms to the requesting party. Absent a showing of good cause, a requesting party may request no more than 10 additional terms to be used in connection with the electronic search. Focused terms, rather than over-broad terms (e.g., product and company names), shall be employed. The producing party shall search (i) the non-custodial data sources identified in accordance with paragraph 3(b); and (ii) emails and other ESI maintained by the custodians identified in accordance with paragraph 3(a).

c. **Format.** ESI and non-ESI shall be produced to the requesting party as text searchable image files (e.g., PDF or TIFF). When a text-searchable image file is produced, the producing party must preserve the integrity of the underlying ESI, i.e., the

original formatting, the metadata (as noted below) and, where applicable, the revision history. The parties shall produce their information in the following format: single page TIFF images and associated multi-page text files containing extracted text or OCR with Concordance and Opticon load files containing all requisite information including relevant metadata.

d. **Native files.** The only files that should be produced in native format are files not easily converted to image format, such as Excel and Access files.

e. **Metadata fields.** The parties are only obligated to provide the following metadata for all ESI produced, to the extent such metadata exists: Custodian, File Path, Email Subject, Conversation Index, From, To, CC, BCC, Date Sent, Time Sent, Date Received, Time Received, Filename, Author, Date Created, Date Modified, MD5 Hash, File Size, File Extension, Control Number Begin, Control Number End, Attachment Range, Attachment Begin, and Attachment End (or the equivalent thereof).

SCHEDULE A

1. Deleted, slack, fragmented, or other data only accessible by forensics.

2. Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system.

3. On-line access data such as temporary internet files, history, cache, cookies, and the like.

4. Data in metadata fields that are frequently updated automatically, such as last-opened dates.

5. Back-up data that are substantially duplicative of data that are more accessible elsewhere.

6. Voice messages.

7. Instant messages that are not ordinarily printed or maintained in a server dedicated to instant messaging.

8. Electronic mail or pin-to-pin messages sent to or from mobile devices (e.g., iPhone and Blackberry devices), provided that a copy of such mail is routinely saved elsewhere.

9. Other electronic data stored on a mobile device, such as calendar or contact data or notes, provided that a copy of such information is routinely saved elsewhere.

10. Logs of calls made from mobile devices.

11. Server, system or network logs.

12. Electronic data temporarily stored by laboratory equipment or attached electronic

equipment, provided that such data is not ordinarily preserved as part of a laboratory report.

13. Data remaining from systems no longer in use that is unintelligible on the systems in use.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

_____,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. _____
	)	
_____,	)	Judge _____
	)	Magistrate Judge Geraldine Soat Brown
	)	
Defendant.	)	

STANDING ORDER RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION

Parties and counsel in this case shall familiarize themselves with, and conduct themselves consistently with, the Principles Relating to the Discovery of Electronically Stored Information incorporated in this order. If any party believes that there is good cause why this case should be exempted, in whole or in part, from this order, that party may raise the reason with the Court.

General Provisions

Section 1.01 Purpose

The purpose of the Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information ("ESI") without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.

Section 1.02 Cooperation

An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

Section 1.03 Discovery Proportionality

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

Early Case Assessment Provisions

Section 2.01 Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution

(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and the Principles to their specific case. Among the issues to be considered for discussion are:

(1) the identification of relevant and discoverable ESI;

(2) the scope of discoverable ESI to be preserved by the parties;

(3) the formats for preservation and production of ESI;

(4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and

(5) the procedures for handling inadvertent production of privileged information and other privilege waiver issues under Rule 502 of the Federal Rules of Evidence.

(b) Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the initial status conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference, or as soon as possible thereafter.

(c) Disputes regarding ESI will be resolved more efficiently if, before meeting with opposing counsel, the attorneys for each party review and understand how their client's data is stored and retrieved in order to determine what issues must be addressed during the meet and confer discussions.

(d) 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 or is impeding the purpose of the Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.

Section 2.02 E-Discovery Liaison(s)

In most cases, the meet and confer process will be aided by participation of an e-discovery liaison(s) as defined in the Principle. In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject. Regardless of whether the e-discovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the e-discovery liaison(s) must:

(a) be prepared to participate in e-discovery dispute resolution;

(b) be knowledgeable about the party's e-discovery efforts;

(c) be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and

(d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

Section 2.03 (Preservation Requests and Orders)

(a) Appropriate preservation requests and preservation orders further the goals of the Principles. Vague and overly broad preservation requests do not further the goals of the Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).

(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

(1) names of the parties;

(2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;

(3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;

(4) relevant time period; and

(5) other information that may assist the responding party in assessing what information to preserve.

(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:

(1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;

(2) identifies any disagreement(s) with the request to preserve; and

(3) identifies any further preservation issues that were not raised.

(d) Nothing in the Principles shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.

Section 2.04 Scope of Preservation

(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. 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 at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with 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. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

(c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate

directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning its preservation efforts; however, the identification of any such preservation issues should be specific.

(d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:

(1) "deleted," "slack," "fragmented," or "unallocated" data on hard drives;

(2) random access memory (RAM) or other ephemeral data;

(3) on-line access data such as temporary internet files, history, cache, cookies, etc.;

(4) data in metadata fields that are frequently updated automatically, such as last-opened dates;

(5) backup data that is substantially duplicative of data that is more accessible elsewhere; and

(6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.

(e) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

Section 2.05 Identification of Electronically Stored Information

(a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.

(b) Topics for discussion may include, but are not limited to, any plans to:

(1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;

(2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and

(3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.

Section 2.06 Production Format

(a) At the Rule 26(f) conference, counsel and the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.

(b) ESI stored in a database or a database management system often can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

(c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

(d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.

Education Provisions

Section 3.01

Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting the Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance:

(1) Familiarize themselves with the electronic discovery provisions of Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure; and

(2) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at www.uscourts.gov/rules/EDiscovery_w_Notes.pdf.

Section 3.02

Judges, attorneys and parties to litigation should also consult The Sedona Conference® publications relating to electronic discovery[1], additional materials available on web sites of the courts[2], and of other organizations[3] providing educational information regarding the discovery of ESI.[4]

ENTER:

Dated: _____

_____
Geraldine Soat Brown
United States Magistrate Judge

---

[1] http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110

[2] E.g. http://www.ilnd.uscourts.gov/home/

[3] E.g. http://www.7thcircuitbar.org, www.fjc.gov (under Educational Programs and Materials)

[4] E.g. http://www.du.edu/legalinstitute

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
_____ DIVISION

_____,	)	
Plaintiff(s),	)	
v.	)	CASE NO: _____
_____,	)	
Defendant(s).	)	

REPORT OF PARTIES' PLANNING MEETING

1. The parties [held a planning meeting] [conferred via electronic mail] under Fed. R. Civ. P. 26(f) and agreed to this report on _____. _____ participated for the plaintiff(s), and _____ participated for the defendant(s).

2. Jurisdiction.

   The court has jurisdiction under _____ [statutory source]. The parties agree that _____ [state key facts for federal question, diversity, or other jurisdiction].

3. Pre-Discovery Disclosures.

   _____ The parties [have exchanged] [will exchange], *but may not file*, Rule 26(a)(1) information by _____.[1]

   _____ The parties stipulate out of the mandatory initial disclosures.

   _____ [Plaintiff] [Defendant] objects to the mandatory initial disclosures for the following reasons: [describe objection].

[1] The court encourages setting all deadlines on business days.

4. Discovery Plan.

The parties propose the following discovery plan. [Use separate paragraphs as necessary if the parties disagree]

Discovery will be needed on the following subjects: [briefly describe the subjects for which discovery will be needed]

Disclosure or discovery of electronically stored information should be handled as follows: [brief description of the parties' proposals]

The last date to complete all discovery is _____.

[Discovery on _____ to be completed by _____]

Maximum of _____ interrogatories by each party to any other party.

Maximum of _____ requests for admission by each party to any other party.

Maximum of _____ depositions by plaintiff(s) and _____ by defendant(s).

Each deposition [other than of ____] is limited to a maximum of _____ hours unless extended by stipulation.

The parties must disclose the identity of any Rule 26(a)(2) witness and the witness's written report (if applicable) by:

_____ for plaintiff(s);

_____ for defendant(s); and

_____ for Rule 26(e) supplements.

5. Other Items.

The last date the plaintiff(s) may seek permission to join additional parties and to amend

the pleadings is _____.

The last date the defendant(s) may seek permission to join additional parties and to amend the pleadings is _____.

The time to file Rule 26 (a)(3) pretrial disclosures will be governed by separate order.

The case should be ready for [bench or jury] trial by _____ and at this time is expected to take approximately _____ days.

[Other matters]

6. Alternative Dispute Resolution.

The case's settlement prospects may be enhanced via the following ADR procedure:

Mediation

The parties have agreed upon _____ as mediator.

Other: [Please Identify]

Date: _____

_____ Counsel for Plaintiff(s)

_____ Counsel for Defendant(s)

Southern District of Indiana

ESI SUPPLEMENT TO CASE MANAGEMENT PLAN

To be prepared and submitted as directed pursuant to paragraph III.K. of the Master Case Management Plan or by Court Order.

1. Discovery Scope. Following a detailed discussion between counsel of a discovery plan for this matter, each party should outline below the categories and types of information that party intends to seek in discovery in this matter. This outline should include, in addition to identification of the various topics on which discovery will be sought and identification of the nature and type of documents to be produced, a list by each party of the potentially relevant custodians of such information and the date ranges relevant to discovery in this matter.

   Plaintiff(s):

   Defendant(s):

2. ESI Sources and Volumes. With regard to the discovery outlined in paragraph 1, each party should discuss the types of ESI (*e.g.*, Outlook e-mail, Word documents, Excel spreadsheets, CAD drawings, etc.) implicated by the opposing party's requests (meaning that Defendant should address the categories and types of information identified by the Plaintiff, etc.), any proprietary software involved in the production of such ESI, the location of such ESI (*e.g.*, 14 servers located in 3 states, 57 individual PC hard drives that are not connected to a central server, etc.), and the estimated volume of ESI implicated by such requests (*e.g.*, 20 GB of Outlook .pst files, 500 MB of Excel spreadsheets, etc.).

   Plaintiff(s):

   Defendant(s):

3. Accessibility. Identify any potential sources of ESI in this matter that are "not reasonably accessible" as defined by Fed. R. Civ. P. 26(b)(2)(B).

   Plaintiff(s):

   Defendant(s):

4. ESI Management Software. Describe the software each party intends to use to manage any ESI produced in this matter and identify the Information Technology personnel primarily responsible for assisting counsel with the production and management of ESI in this matter.

   Plaintiff(s):

   Defendant(s):

5. Metadata. Identify the potential sources of metadata in this matter and each party's anticipated use of metadata in this matter.

   Plaintiff(s):

   Defendant(s):

6. ESI Format. Set forth the format in which each party will produce ESI in this matter.

   Plaintiff(s):

   Defendant(s):

7. Discovery Sequencing. Have the parties agreed on a plan for the sequencing of discovery in this matter?↑Yes↑No

   If yes, please describe such agreements:

   If no, please describe the efforts undertaken to reach agreement and identify the issues that remain outstanding:

8. Search Protocol. Have the parties agreed on any protocol for the identification and review of relevant ESI (*e.g.*, search terms, predictive coding, etc.)?↑Yes↑No

   If yes, please describe such agreements, including, if applicable, a list of agreed search terms to be used:

If no, please describe the efforts undertaken to reach agreement and identify the issues that remain outstanding:

9. Preservation. Describe what efforts each party has undertaken to ensure the preservation of ESI potentially relevant to this matter and identify any unresolved issues pertaining to the preservation of ESI in this matter?

   Plaintiff(s):

   Defendant(s):

   Unresolved issues:

10. Cost of Production. Each party should analyze the data provided in paragraph 2 and provide an estimate of the costs associated with production of ESI in this matter:

    Plaintiff(s):

    Defendant(s):

11. Cost Allocation/Savings. Describe below the parties' discussions regarding cost-shifting or cost-savings measures in this matter and set forth in detail any agreements reached between the parties in that regard:

12. Discovery Proportionality. Do the parties agree that the discovery of ESI in this matter satisfies the proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C)? ↑Yes↑No

    If no, identify the nature of the dispute:

13. Claw Back Agreement. Have the parties agreed on the following unintentional production "claw back" provision?↑Yes↑No

    In the event that a document protected by the attorney-client privilege, the attorney work product doctrine or other applicable privilege or protection is unintentionally produced by any party to this proceeding, the producing party may request that the

document be returned. In the event that such a request is made, all parties to the litigation and their counsel shall promptly return all copies of the document in their possession, custody, or control to the producing party and shall not retain or make any copies of the document or any documents derived from such document. The producing party shall promptly identify the returned document on a privilege log. The unintentional disclosure of a privileged or otherwise protected document shall not constitute a waiver of the privilege or protection with respect to that document or any other documents involving the same or similar subject matter.

If no, set forth the alternative provision being proposed?

14. Other. Identify all outstanding issues or disputes concerning ESI not otherwise addressed herein.

Plaintiff(s):

Defendant(s):

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN

CORRECTED NOTICE OF CHANGE IN LOCAL FORM FOR REPORT OF PARTIES' RULE 26(f) CONFERENCE

Effective immediately, the local form prescribed by the Bankruptcy Court for the Eastern District of Michigan for the Report of Parties' Rule 26(f) Conference is modified. The modifications are intended to conform the report to the revisions made to the Federal Rules of Civil Procedure effective December 1, 2015 and to the Local Bankruptcy Rules effective February 1, 2016.

There are three specific modifications made to the report. First, there is a specific reference to Fed. R. Civ. P. 26(f)(3) in the section titled "Discovery Plan." The reason for that reference is because Fed. R. Civ. P. 26(f)(3) was substantially amended to detail the issues that the parties must now address when putting together their discovery plan. Second, there is another change in the same section to deal with discovery of electronically stored information. LBR 7026-4 was added to the Local Bankruptcy Rules effective February 1, 2016. The new rule incorporates the Model Order Relating to the Discovery of Electronically Stored Information approved by the District Court for the Eastern District of Michigan. This addition to the report ensures that parties discuss whether their case involves the discovery of any electronically stored information and, if so, the applicability of the new local rule to their case. Third, there are changes made in the language regarding the joinder of additional parties and amendments to pleadings. The report now makes clear that the parties are to agree upon a date through which leave is granted and a deadline set both to join

additional parties and amend pleadings. There are also other minor changes to the report that are intended to conform it to the language used in the revised Local Bankruptcy Rules adopted by the Court.

A redlined copy and a clean copy of the modified Report of Parties' Rule 26(f) Conference are attached to this notice. The revised form can also be found at the Bankruptcy Court's website at www.mieb.uscourts.gov.

Dated: April 19, 2016

Katherine B. Gullo
Clerk of Court

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
(NORTHERN)/(SOUTHERN) DIVISION

In re:	Chapter
,	Case No.
Debtor(s). _____/	Hon.
,	Adversary Proceeding No.
Plaintiff(s),	
v.	
,	
Defendant(s). _____/	

Field Code Changed

REPORT OF PARTIES' RULE 26(f) CONFERENCE

Pursuant to Fed. R. Bankr. P. 7026 and Fed. R. Civ. P. 26(f), a conference was held on _____, 20____, at (place) (or indicate if by telephone or other means) and was participated in by:

(name) for plaintiff(s)
(name) for defendant(s) (party name)

This is submitted as the required report of that conference.

(1) Initial Disclosures required by Fed. R. Civ. P. 26(a)(1).

[ ] The parties will provide such by _____, 20____; or

[ ] The parties agree to provide the following at the times indicated:

(2) Discovery Plan. The parties jointly propose to the Court the following discovery plan in conformance with Fed. R. Civ. P. 26(f)(3): (Use separate paragraphs or subparagraphs as necessary if parties disagree.)

(a) Discovery will be needed on the following subjects: (brief description of subjects on which discovery will be needed).

(b) All discovery commenced in time to be completed by _____, 20____. [Discovery on (issue for early discovery) to be completed by _____, 20____.

(c) Maximum of _____ interrogatories by each party to any other party. [Responses due _____ days after service.]

(d) Maximum of _____ requests for admission by each party to any other party. [Responses due _____ days after service.]

(e) Maximum of _____ depositions by plaintiff(s) and _____ by defendant(s).

(f) Each deposition [other than of _____] limited to maximum of _____ hours unless extended by agreement of parties.

(g) Reports from retained experts under ~~Rule~~ Fed. R. Civ. P. 26(a)(2) due:
from plaintiff(s) by _____, 20____
from defendant(s) by _____, 20____.

(h) Supplementation under ~~Rule~~Fed. R. Civ. P. 26(e) due (time(s) or interval(s)).

(i) Discovery of electronically stored information

Formatted: Indent: Left: 0", First line: 0"

(i) This adversary proceeding does ____ does not ____ involve the discovery of electronically stored information

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(ii) Pursuant to E.D. Mich. LBR 7026-4, the Model Order Relating to the Discovery of Electronically Stored Information approved by the District Court will ____ will not ____ apply.

Formatted: Indent: Left: 1.5", Hanging: 0.5"

(3) Other Agreed Upon Items. [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

(a) Plaintiff(s) ~~should be allowed until~~ is granted leave through, and the deadline is, _____, 20____ to join additional parties and ~~until _____, 20____~~ to amend the pleadings.

(b) Defendant(s) ~~should be allowed until~~ is granted leave through, and the deadline is, _____, 20____ to join additional parties and ~~until _____, 20____~~ to amend the pleadings.

(c) All potentially dispositive motions ~~should~~ must be filed by _____, 20____.

(d) The proceeding ~~should~~ will be ready for trial by _____, 20____. The trial is expected to take approximately _____ trial days.

(e) Jury Trial Matters.

(i) [ ] a jury trial was not timely demanded and is waived; or

[ ] a jury trial was timely demanded, but is waived; or
[ ] a jury trial was timely demanded but not waived.

(ii) [ ] the parties consent to the Bankruptcy Court conducting the jury trial; or

[ ] the parties do not at this time consent to the Bankruptcy Court conducting the jury trial.

(f) The parties agree that:

[ ] This is a core proceeding; or

[ ] This is a non-core proceeding otherwise related to the bankruptcy case.

(g) [ ] The parties consent to the Bankruptcy Court entering a final order or judgment in this proceeding; or

[ ] The parties do not consent to the Bankruptcy Court entering a final order or judgment in this proceeding.

(4) Other matters.

(5) Matters not agreed upon or insufficiently addressed by the foregoing.

_____

Attorney for _____

_____

Attorney for _____

_____

Attorney for _____

[Signatures of all participants required]

Dated:

MODEL FORM
rev. 4/~~20~~19/20~~12~~16

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
(NORTHERN)/(SOUTHERN) DIVISION

In re:	Chapter
,	Case No.
Debtor(s). _____/	Hon.
,	Adversary Proceeding No.
Plaintiff(s),	
v.	
,	
Defendant(s). _____/	

REPORT OF PARTIES' RULE 26(f) CONFERENCE

Pursuant to Fed. R. Bankr. P. 7026 and Fed. R. Civ. P. 26(f), a conference was held on _____, 20____, at (place) (or indicate if by telephone or other means) and was participated in by:

(name) for plaintiff(s)
(name) for defendant(s) (party name)

This is submitted as the required report of that conference.

(1) Initial Disclosures required by Fed. R. Civ. P. 26(a)(1).

[ ] The parties will provide such by _____, 20____; or

[ ] The parties agree to provide the following at the times indicated:

(2) Discovery Plan. The parties jointly propose to the Court the following discovery plan in conformance with Fed. R. Civ. P. 26(f)(3): (Use separate paragraphs or subparagraphs as necessary if parties disagree.)

(a) Discovery will be needed on the following subjects: (brief description of subjects on which discovery will be needed).

(b) All discovery commenced in time to be completed by _____, 20____. [Discovery on (issue for early discovery) to be completed by _____, 20____.]

(c) Maximum of _____ interrogatories by each party to any other party. [Responses due _____ days after service.]

(d) Maximum of _____ requests for admission by each party to any other party. [Responses due _____ days after service.]

(e) Maximum of _____ depositions by plaintiff(s) and _____ by defendant(s).

(f) Each deposition [other than of _____] limited to maximum of _____ hours unless extended by agreement of parties.

(g) Reports from retained experts under Fed. R. Civ. P. 26(a)(2) due:
from plaintiff(s) by _____, 20____
from defendant(s) by _____, 20____.

(h) Supplementation under Fed. R. Civ. P. 26(e) due (time(s) or interval(s)).

(i) Discovery of electronically stored information

(i) This adversary proceeding does ____ does not ____ involve the discovery of electronically stored information

(ii) Pursuant to E.D. Mich. LBR 7026-4, the Model Order Relating to the Discovery of Electronically Stored Information approved by the District Court will ____ will not ____ apply.

(3) Other Agreed Upon Items. [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

(a) Plaintiff(s) is granted leave through, and the deadline is, _____, 20____ to join additional parties and to amend the pleadings.

(b) Defendant(s) is granted leave through, and the deadline is, _____, 20____ to join additional parties and to amend the pleadings.

(c) All potentially dispositive motions must be filed by _____, 20____.

(d) The proceeding will be ready for trial by _____, 20____. The trial is expected to take approximately _____ trial days.

(e) Jury Trial Matters.

(i) [ ] a jury trial was not timely demanded and is waived; or

[ ] a jury trial was timely demanded, but is waived; or
[ ] a jury trial was timely demanded but not waived.

(ii) [ ] the parties consent to the Bankruptcy Court conducting the jury trial; or

[ ] the parties do not at this time consent to the Bankruptcy Court conducting the jury trial.

(f) The parties agree that:

[ ] This is a core proceeding; or

[ ] This is a non-core proceeding otherwise related to the bankruptcy case.

(g) [ ] The parties consent to the Bankruptcy Court entering a final order or judgment in this proceeding; or

[ ] The parties do not consent to the Bankruptcy Court entering a final order or judgment in this proceeding.

(4) Other matters.

(5) Matters not agreed upon or insufficiently addressed by the foregoing.

_____

Attorney for _____

_____

Attorney for _____

_____

Attorney for _____

[Signatures of all participants required]

Dated:

MODEL FORM
rev. 4/19/2016

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
505 THEODORE LEVIN UNITED STATES COURTHOUSE
231 W. LAFAYETTE BOULEVARD
DETROIT, MICHIGAN 48226
www.mied.uscourts.gov

DAVID J. WEAVER
COURT ADMINISTRATOR
313-234-5051
Fax 313-234-5399

DIVISIONAL OFFICES
ANN ARBOR
BAY CITY
FLINT
PORT HURON

September 20, 2013

Re: Model Order Relating to the Discovery of Electronically Stored Information (ESI) Checklist for Rule 26(f) Meet and Confer Regarding ESI

The Judges of the United States District Court for the Eastern District of Michigan have approved, on a pilot period basis, the use of the attached model ESI discovery order and Rule 26(f) checklist in appropriate cases. It is within the judicial officer's discretion whether these materials may be used. At a future date, the Bench may consider whether to adopt these materials as a uniform practice for the Court.

MODEL ORDER RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION

General Principles

Principle 1.01 (Purpose)

The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information ("ESI") without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys, and parties to litigation gain more experience with ESI and as technology advances.

Principle 1.02 (Cooperation)

An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

Principle 1.03 (Discovery Proportionality)

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be

applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable. Where the discovery request is potentially burdensome to the responding party, the parties should consider options such as staging discovery and sampling, in an attempt to reduce the costs of production. If the discovery request seeks marginally relevant information, the requesting party should expect some cost shifting to be imposed by the Court in the absence of an agreement between the parties.

Early Case Assessment Principles

Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)

(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to be discussed are:

(1) the identification of relevant and discoverable ESI and documents, including methods for identifying an initial subset of sources of ESI and documents that are most likely to contain the relevant and discoverable information as well as methodologies

for culling the relevant and discoverable ESI and documents from that initial subset (see Principle 2.05);

(2) the scope of discoverable ESI and documents to be preserved by the parties;

(3) the formats for preservation and production of ESI and documents;

(4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and

(5) 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 Rule 502(d) or (e) of the Federal Rules of Evidence.

(b) Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the initial status conference, Fed. R. Civ. P. 16(b) Scheduling Conference, or as soon as possible thereafter.

(c) The attorneys for each party shall review and understand how their respective client's data is stored and retrieved before the meet and confer discussions in order to determine what issues must be addressed during the meet and confer discussions.

(d) 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 or is impeding the purpose of these Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.

Principle 2.02 (E-Discovery Liaison(s))

In most cases, the meet and confer process will be aided by participation of an e-discovery liaison(s) as defined in this Principle. In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject. Regardless of whether the e-discovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the e-discovery liaison(s) must:

(a) be prepared to participate in e-discovery dispute resolution;

(b) be knowledgeable about the party's e-discovery efforts;

(c) be, or have reasonable access to those who are, familiar with the party's electronic information storage systems and capabilities in order to explain those systems and capabilities and answer relevant questions; and

(d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization,

and format issues, and relevant information retrieval technology, including search methodology.

Principle 2.03 (Preservation Requests and Orders)

(a) Appropriate preservation requests and preservation orders further the goals of these Principles. Vague and overly broad preservation requests do not further the goals of these Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).

(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

(1) names of the parties;

(2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;

(3) names of potential witnesses and other people reasonably

anticipated to have relevant evidence;

(4) relevant time period; and

(5) other information that may assist the responding party in assessing what information to preserve.

(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful and specific information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:

(1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;

(2) identifies any disagreement(s) with the request to preserve; and

(3) identifies any further preservation issues that were not raised.

(d) Nothing in these Principles shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.

Principle 2.04 (Scope of Preservation)

(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within

its possession, custody, or control. 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 at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with 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. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

(c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable

preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning their preservation efforts; however, the identification of any such preservation issues should be specific.

(d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:

(1) "deleted," "slack," "fragmented," or "unallocated" data on hard drives;

(2) random access memory (RAM) or other ephemeral data;

(3) on-line access data such as temporary internet files, history, cache, cookies, etc;

(4) data in metadata fields that are frequently updated automatically, such as last-opened dates;

(5) backup data that is substantially duplicative of data that is more accessible elsewhere; and

(6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course

of business.

(e) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

(f) Absent an order of the Court upon a showing of good cause or stipulation by the parties, a party from whom ESI has been requested shall not be required to search for responsive ESI:

(1) from more than ten (10) key custodians;

(2) that was created more than five (5) years before the filing of the lawsuit;

(3) from sources that are not reasonably accessible without undue burden or cost; or

(4) for more than 160 hours, exclusive of time spent reviewing the ESI determined to be responsive for privilege or work product protection, provided that the producing party can demonstrate that the search was effectively designed and efficiently conducted. A party from whom ESI has been requested must maintain detailed

time records to demonstrate what was done and the time spent doing it, for review by an adversary and the Court, if requested.

Principle 2.05 (Identification of Electronically Stored Information)

(a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.

(b) Topics for discussion may include, but are not limited to, any plans to:

(1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;

(2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and

(3) use keyword searching, mathematical, or thesaurus-based topic or concept clustering, or other advanced culling technologies.

Principle 2.06 (Production Format)

(a) At the Rule 26(f) conference, counsel and the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.

(b) The parties should confer on whether ESI stored in a database or a

database management system can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

(c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

(d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.

Education Provisions

Principle 3.01 (Judicial Expectations of Counsel)

Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel, and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting these Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance:

(1) Familiarize themselves with the electronic discovery provisions

of Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure;

(2) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/EDiscovery_w_Notes.pdf; and

(3) Familiarize themselves with these Principles.

Principle 3.02 (Duty of Continuing Education)

Judges, attorneys, and parties to litigation should continue to educate themselves on electronic discovery by consulting applicable case law, pertinent statutes, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, The Sedona Conference® publications relating to electronic discovery,[1] additional materials available on web sites of the courts,[2] and of other organizations[3] providing education information regarding the discovery of ESI.[4]

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[1] www.thesedonaconference.org/

[2] E.g., www.ilnd.uscourts.gov/home/

[3] E.g., www.discoverypilot.com, www.fjc.gov (Under Educational Programs and Materials)

[4] E.g., www.du.edu/legalinstitute

Principle 3.03 (Non-Waiver of Attorney-Client Privilege or Work Product Protection)

As part of their duty to cooperate during discovery, the parties are expected to discuss whether the costs and burdens of discovery, especially ESI, may be reduced by entering into a non-waiver agreement pursuant to Fed. R. Evid. 502(e). The parties also should discuss whether to use computer-assisted search methodology to facilitate pre-production review of ESI to identify information that is beyond the scope of discovery because it is attorney-client privileged or work product-protected.

Principle 3.04 (Discovery From Nonparties)

Parties issuing requests for ESI from nonparties should attempt to informally meet and confer with the nonparty (or counsel, if represented). During this meeting, counsel should discuss the same issues with regard to requests for ESI that they would with opposing counsel as set forth above. If an agreement cannot be reached with the nonparty, the standards outlined above will apply generally to the discovery of ESI sought pursuant to Rule 45.

ENTER:

Dated: _____

_____
[Name]
United States [District/Bankruptcy/Magistrate Judge]

United States District Court

Eastern District of Michigan

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, 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 potentially discoverable ESI that will not be preserved consistent with this Court's Principle 1.03 (Discovery Proportionality).

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 searchablility 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.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Plaintiff(s),	)	_:__CV___
v.	)	**RULE 26(f) REPORT**
Defendant(s).	)	

The following attorneys conferred to prepare the Report of Parties' Planning Conference for the above-captioned case:

(Identify, for each party, the counsel who participated in preparing the Rule 26(f) Report).

The parties discussed the case and jointly make the following report:[1]

I. INITIAL MATTERS:

A. Jurisdiction and Venue: The defendant

_____ does

_____ does not

contest jurisdiction and/or venue. If contested, such position is because:

1) Jurisdiction: _____

[1] Counsel are advised to use caution in filing this report as well as other documents so there is no disclosure of information required by the E-Government Act of 2002 to be kept non-public, such as addresses, phone numbers, social security numbers, etc. If such identifiers are required to be disclosed to opposing parties, you may wish to file redacted versions for the public court file and serve opposing parties with unredacted versions. See NECivR 5.0.3, available on the court's Website at www.ned.uscourts.gov.

2) Venue: _____

B. Immunity: The defendant

_____ has raised

_____ will raise

_____ will not raise

an immunity defense based on _____.

C. If either jurisdiction or venue is being challenged, or if a defense of immunity will be raised, state whether counsel wish to delay proceeding with the initial phases of discovery until those issues have been decided, and if so, state (i) the earliest a motion to dismiss or transfer will be filed, and (ii) what, if any, initial discovery, limited to that issue, will be necessary to resolve the motion. _____

D. Rule 11 Certification: As a result of further investigation as required by Fed. R. Civ. P. 11, after filing the initial pleadings in this case, the parties agree that the following claims and defenses raised in the pleadings do not apply to the facts of this case, and hereby agree the court may dismiss or strike these claims and defenses at this time (an order adopting this agreement will be entered). _____

II. CLAIMS AND DEFENSES:

A. Plaintiff's Claims, Elements, Factual Application: The elements of the plaintiff's claims and the elements disputed by defendant are as follows. For each claim, list and number each substantive element of proof and the facts plaintiff claims make it applicable or established in this case (DO NOT repeat boilerplate allegations from pleadings):

1) CLAIM ONE: _____

Elements: _____

Factual Application: _____

Of these elements, defendant disputes the following: _____

(REPEAT FOR EACH CLAIM)

B. Defenses. The elements of the affirmative defenses raised by the pleadings are as follows. List each affirmative defense raised or expected to be raised by the defendant(s), the substantive elements of proof for it, and how the defendant claims the facts of this case make such defense applicable or established. (DO NOT repeat boilerplate allegations from pleadings or deny matters on which the plaintiff has the burden of proof):

1) DEFENSE ONE: _____
Elements: _____
Factual Application: _____
Of these elements, the plaintiff disputes the following: _____

(REPEAT FOR EACH DEFENSE)

III. SETTLEMENT:

Counsel state:

_____ There have been no efforts taken yet to resolve this dispute.

_____ This dispute has been the subject of efforts to resolve it

_____ prior to filing in court.

_____ after court filing, but before the filing of this report.

Those efforts consisted of

_____.

_____ Counsel have discussed the court's Mediation Plan and its possible application in this case with clients and opposing counsel.

_____ Mediation will be appropriate in this case at some point.

_____ Mediation will not be appropriate because _____.

_____ Counsel believe that with further efforts in the future, the case can be settled. The parties will be prepared to discuss settlement, or again discuss settlement, by _____.

Explain. _____

IV. CASE PROGRESSION:

A. Do any of the parties believe an initial planning conference would be beneficial and/or should be held before a final scheduling order is entered? _____
Explain. _____

B. Mandatory disclosures required by Rule 26(a)(1), including a statement of how each matter disclosed relates to the elements of the disclosing party's claims or defenses

_____ have been completed.

_____ will be completed by _____.

C. Motions to amend the pleadings or to add parties.

1) The plaintiff

_____ does

_____ does not

anticipate need to amend pleadings or add parties. Any motions to amend pleadings shall be filed by _____.

2) The defendant

_____ does

_____ does not

anticipate need to amend pleadings or add parties. Any motions to amend pleadings shall be filed by _____.

If more than ninety days are needed, state the reason(s) why such time is necessary.

_____

D. Experts.

1) If expert witnesses are expected to testify at the trial, counsel agree to at least **identify** such experts, by name and address, (i.e., without the full reports required by Rule 26(a)(2)), by _____.

2) Experts and, unless otherwise agreed, expert **reports** shall be served by _____. **Note**: The parties may agree on separate dates for the plaintiff(s) and the defendant(s).

3) Motions to exclude expert testimony on *Daubert* and related grounds will be filed by _____.

E. Discovery.

1) Written discovery under Rules 33 through 36 of the Federal Rules of Civil Procedure will be completed by _____.

2) Depositions, whether or not they are intended to be used at trial, will be completed by _____.

3) Agreed Discovery Procedures:

a. Unique Circumstances. The following facts or circumstances unique to this case will make discovery more difficult or more time consuming:

_____.

Counsel have agreed to the following actions to address that difficulty:

_____.

b. Electronic Discovery Provisions: Counsel have conferred regarding the preservation of electronically produced and/or electronically stored information or data that may be relevant--whether privileged or not--to the disposition of this dispute, including:

(i) The extent to which disclosure of such data should be limited to that which is available in the normal course of business, or otherwise;

(ii) The anticipated scope, cost, and time required for disclosure of such information beyond that which is available in the normal course of business;

(iii) The format and media agreed to by the parties for the production of such data or information as well as agreed procedure for such production;

(iv) Whether reasonable measures have been implemented to preserve such data;

(v) The persons who are responsible for such preservation, including any third parties who may have access to or control over any such information;

(vi) The form and method of notice of the duty to preserve;

(vii) Mechanisms for monitoring, certifying, or auditing custodial compliance;

(viii) Whether preservation will require suspending or modifying any routine business processes or procedures, records management procedures and/or policies, or any procedures for the routine destruction or recycling of data storage media;

(ix) Methods to preserve any potentially discoverable materials such as voice mail, active data in databases, or electronic messages;

(x) The anticipated costs of preserving these materials and how such costs should be allocated; and

(xi) The entry of and procedure for modifying the preservation order as the case proceeds.

The parties agree that:

_____ No special provisions are needed in respect to electronic discovery. The court should order protection and production of such information in accordance with its usual practice.

_____ As to electronically stored information, the following provisions will be followed by the parties: _____.

c. Privileged and/or confidential communications and information.

General practice: Under the court's general practice, if any document is withheld from production or disclosure on the grounds of privilege or work product, the producing party shall, for each document, disclose a description of the document withheld with as much specificity as is practicable without disclosing its contents, including (a) the general nature of the document; (b) the identity and position of its author; (c) the date it was written; (d) the identity and position of its addressee; (e) the identities and positions of all persons who were given or have received copies of it and the dates copies were received by them; (f) the document's present location and the identity and position of its custodian; and (g) the specific reason or reasons why it has been withheld from production or disclosure. The non-producing party may move to compel documents identified on the privilege log. The producing party may also seek a protective order to preserve the privilege or confidentiality of the documents identified.

Special provisions. To facilitate an early, efficient, and expeditious resolution of discovery issues which may arise related to documents withheld on the basis of alleged privilege or confidentiality, the parties shall discuss and consider:

(i) Whether the parties anticipate discovery issues or challenges arising from non-disclosure of allegedly confidential information;

(ii) Whether reasonable date ranges should be established after which privilege log entries for privileged or confidential information need not be made; and

(iii) As contemplated by Rule 502(e) of the Federal Rules of Evidence, the need for and terms of any agreement regarding disclosure of privileged attorney-client communications or confidential work product, and whether the parties will seek court approval of any such agreement.

The parties agree that:

_____ No special provisions are needed regarding discovery of allegedly confidential information. If such issues arise, they will be resolved in accordance with the court's general practice.

_____ In addition to, or in lieu of the court's general practice for asserting confidentiality claims and resolving disputes over nondisclosure of allegedly confidential information, the parties agree the following provisions will be followed: _____.

d. The maximum number of interrogatories, including sub-parts, that may be served by any party on any other party is _____.

e. The maximum number of depositions that may be taken by the plaintiffs as a group and the defendants as a group is _____.

f. Depositions will be limited by Rule 30(d)(1), except the depositions of _____, which by agreement shall be limited as follows: _____.

g. The parties stipulate that they will be required to give at least _____ days' notice of their intention to serve records/documents or subpoenas on third parties prior to issuance. See NECivR 45.1

h. Other special discovery provisions agreed to by the parties include: _____.

F. The following claims and/or defenses may be appropriate for disposition by dispositive motion (motion to dismiss or for summary judgment or partial summary judgment): _____.
Motions to dismiss and/or for summary judgment will be filed by _____.

G. Other matters to which the parties stipulate and/or which the court should know or consider: _____.

H. Consent to Trial Before Magistrate Judge.

In accordance with the provisions of 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, the parties in this case may voluntarily consent to have a United States Magistrate Judge conduct any and all further proceedings in the case, including the trial, and order the entry of final judgment. The consent must be unanimous, and any appeal must be

taken to the United States Court of Appeals. If the parties do not presently consent, they may do so at a later time and the case will remain with the assigned United States District Judge or, if not previously assigned, will be randomly assigned to a United States District Judge.

_____ All parties hereby voluntarily consent to have the United States Magistrate Judge conduct any and all further proceedings in this case including the trial, and order the entry of final judgment.

_____ All parties do not consent at this time.

I. Trial date.

1) Jury Trial:

a. _____ No party has timely demanded a jury trial.

b. _____ A party has timely demanded a jury trial and does not anticipate waiving that demand, and the parties agree that all or part of the claims in this case must be tried to a jury.

c. _____ A party has demanded a jury trial, and the parties disagree on whether trial by jury is available in this case. A motion to strike the (plaintiff's/defendant's) demand for jury trial will be filed no later than _____.

d. _____ Having previously demanded a jury trial, the plaintiff now waives jury trial. The defendant will file a demand for jury trial within _____ days of the filing of this report, in the absence of which jury trial will be deemed to have been waived.

e. _____ Having previously demanded a jury trial, the defendant now waives jury trial. The plaintiff will file a demand for jury trial within _____ days of the filing of this report, in the absence of which jury trial will be deemed to have been waived.

2) This case will be ready for trial before the court by: (month, year). If more than eight months are required, state the special problems or circumstances that necessitate that much time for trial preparation. _____

3) The estimated length of trial is _____ days.

Dated: _____

_____ _____

Counsel for Plaintiff(s) Counsel for Defendant(s)

CERTIFICATE OF SERVICE

I hereby certify that on _____, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following: _____, and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: _____.

s/_____

LR - APPENDIX K

UNITED STATES DISTICT COURT
NORTHERN DISTRICT OF OHIO

DEFAULT STANDARD FOR DISCOVERY OF
ELECTRONICALLY STORED INFORMATION ("E-DISCOVERY")

1. Introduction. The court expects the parties to cooperatively reach agreement on how to conduct e-discovery. In the event that such agreement has not been reached by the time of the Fed. R. Civ. P. 16 scheduling conference, the following default standards shall apply until such time, if ever, the parties reach agreement and conduct e-discovery on a consensual basis.

2. Discovery conference. Parties shall discuss the parameters of their anticipated e-discovery at the Fed. R. Civ. P. 26(f) conference, as well as at the Fed. R. Civ. P. 16 scheduling conference with the court, consistent with the concerns outlined below.

Prior to the Rule 26(f) conference, the parties shall exchange the following information:

a. A list of the most likely custodians of relevant electronically stored information ("identified custodians"), including a brief description of each person's title and responsibilities (see ¶ 7).

b. A list of each relevant electronic system that has been in place at all relevant times[1] and a general description of each system, including the nature, scope, character, organization, and formats employed in each system. The parties should also include other pertinent information about their electronically stored information and whether that electronically stored information is of limited accessibility. Electronically stored information of limited accessibility may include those created or used by electronic media no longer in use, maintained in redundant electronic storage media, or for which retrieval involves substantial cost.

c. The name of the individual designated by a party as being most knowledgeable regarding that party's electronic document retention policies ("the retention coordinator"), as well as a general description of the party's electronic document

[1] For instance, in a patent case, the relevant times for a patent holder may not only be the time of the alleged infringement, but may also be the date the patent(s) issued or the effective filing date of each patent in suit.

retention policies for the systems identified above (see ¶ 6).

d. The name of the individual who shall serve as that party's "e-discovery coordinator" (see ¶ 3).

e. Provide notice of any problems reasonably anticipated to arise in connection with e-discovery.

To the extent that the state of the pleadings does not permit a meaningful discussion of the above by the time of the Rule 26(f) conference, the parties shall either agree on a date by which this information will be mutually exchanged or submit the issue for resolution by the court at the Rule 16 scheduling conference.

3. E-discovery coordinator. In order to promote communication and cooperation between the parties, each party to a case shall designate a single individual through which all e-discovery requests and responses are coordinated ("the e-discovery coordinator"). Regardless of whether the e-discovery coordinator is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, he or she must be:

a. Familiar with the party's electronic systems and capabilities in order to explain these systems and answer relevant questions.

b. Knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues.

c. Prepared to participate in e-discovery dispute resolutions.

The Court notes that, at all times, the attorneys of record shall be responsible for responding to e-discovery requests. However, the e-discovery coordinators shall be responsible for organizing each party's e-discovery efforts to insure consistency and thoroughness and, generally, to facilitate the e-discovery process. The ultimate responsibility for complying with e-discovery requests rests on the parties. Fed. R. Civ. P. 37(f).

4. Timing of e-discovery. Discovery of relevant electronically stored information shall proceed in a sequenced fashion.

a. After receiving requests for document production, the parties shall search their documents, other than those identified as limited accessibility electronically stored information, and produce relevant responsive electronically stored information in accordance with Fed. R. Civ. P. 26(b)(2).

b. Electronic searches of documents identified as of limited accessibility shall not be conducted until the initial electronic document search has been completed. Requests for information expected to be found in limited accessibility documents must be narrowly focused with some basis in fact supporting the request.

c. On-site inspections of electronic media under Fed. R. Civ. P. 34(b) shall not be permitted absent exceptional circumstances, where good cause and specific need have been demonstrated.

5. **Search methodology.** If the parties intend to employ an electronic search to locate relevant electronically stored information, the parties shall disclose any restrictions as to scope and method which might affect their ability to conduct a complete electronic search of the electronically stored information. The parties shall reach agreement as to the method of searching, and the words, terms, and phrases to be searched with the assistance of the respective e-discovery coordinators, who are charged with familiarity with the parties' respective systems. The parties also shall reach agreement as to the timing and conditions of any additional searches which may become necessary in the normal course of discovery. To minimize the expense, the parties may consider limiting the scope of the electronic search (*e.g.*, time frames, fields, document types).

6. **Format.** If, during the course of the Rule 26(f) conference, the parties cannot agree to the format for document production, electronically stored information shall be produced to the requesting party as image files (*e.g.*, PDF or TIFF). When the image file is produced, the producing party must preserve the integrity of the electronic document's contents, *i.e.*, the original formatting of the document, its metadata and, where applicable, its revision history. After initial production in image file format is complete, a party must demonstrate particularized need for production of electronically stored information in their native format.

7. **Retention.** Within the first thirty (30) days of discovery, the parties should work toward an agreement (akin to the standard protective order) that outlines the steps each party shall take to segregate and preserve the integrity of all relevant electronically stored information. In order to avoid later accusations of spoliation, a Fed. R. Civ. P. 30(b)(6) deposition of each party's retention coordinator may be appropriate.

The retention coordinators shall:

a. Take steps to ensure that relevant e-mail of identified custodians shall not be permanently deleted in the ordinary course of business and that relevant electronically stored information maintained by the individual custodians shall not be altered.

b. Provide notice as to the criteria used for spam and/or virus filtering of e-mail and attachments; e-mails and attachments filtered out by such systems shall be deemed non-responsive so long as the criteria underlying the filtering are reasonable.

Within seven (7) days of identifying the relevant document custodians, the retention coordinators shall implement the above procedures and each party's counsel shall file a statement of compliance as such with the court.

8. **Privilege.** Electronically stored information that contains privileged information or attorney-work product shall be immediately returned if the documents appear on their face to have been inadvertently produced or if there is notice of the inadvertent production within thirty (30) days of such. In all other circumstances, Fed. R. Civ. P. 26(b)(5)(B) shall apply.

9. **Costs.** Generally, the costs of discovery shall be borne by each party. However, the court will apportion the costs of electronic discovery upon a showing of good cause.

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

_____, Plaintiff(s)	:	Case No. _____
	:	District Judge: _____
	:	Magistrate Judge: _____
vs.	:	
	:	RULE 26(f) REPORT OF PARTIES
	:	(to be filed no fewer than seven (7)
_____ Defendant(s)	:	days prior to the Rule 16 Conference)

1. Pursuant to F.R. Civ.P. 26(f), a meeting was held on _____ and was attended by:

   _____, counsel for plaintiff(s) _____

   _____, counsel for plaintiff(s) _____

   _____, counsel for defendant(s) _____

   _____, counsel for defendant(s) _____

2. **Consent to Magistrate Judge**. The parties:

   ___ unanimously consent to the jurisdiction of the United States Magistrate Judge pursuant to 28 U.S.C. 636 (c).

   ___ do not unanimously consent to the jurisdiction of the United States Magistrate Judge pursuant to 28 U.S.C. 636 (c).

3. **Initial Disclosures**. The parties:

   ___ have exchanged the initial disclosures required by Rule 26(a)(1);

   ___ will exchange such disclosures by _____

   ___ are exempt from such disclosures under Rule 26(a)(1)(E).

   ___ have agreed not to make initial disclosures.

4. **Jurisdiction and Venue**

   a. Describe any contested issues relating to: (1) subject matter jurisdiction, (2) personal jurisdiction and/or (3) venue:

   _____

   _____

   _____

b. Describe the discovery, if any, that will be necessary to the resolution of issues relating to jurisdiction and venue:

_____

_____

_____

c. Recommended date for filing motions addressing jurisdiction and/or venue:

_____

5. **Amendments to Pleading and/or Joinder of Parties**

a. Recommended date for filing motion/stipulation to amend the pleadings or to add additional parties: _____

b. If class action, recommended date for filing motion to certify the class: _____

6. **Recommended Discovery Plan**

a. Describe the **subjects** on which discovery is to be sought and the nature and extent of discovery that each party will need:

_____

_____

_____

_____

b. What **changes** should be made, if any, in the limitations on discovery imposed by the Federal Rules of Civil Procedure or the local rules of this Court?

_____

_____

c. The case presents the following issues relating to disclosure or discovery of **electronically stored information**, including the form or forms in which it should be produced:

_____

_____

_____

d. The case presents the following issues relating to claims of **privilege or of protection as trial preparation materials:**

_____

_____

_____

i. Have the parties agreed on a procedure to assert such claims **AFTER** production?

___ No

___ Yes

___ Yes, and the parties ask that the Court include their agreement in an Order.

e. Identify the discovery, if any, that can be **deferred** pending settlement discussion and/or resolution of potentially dispositive motions:

_____

_____

f. The parties recommend that discovery should proceed in **phases**, as follows:

_____

_____

_____

g. Describe the areas in which **expert testimony** is expected and indicate whether each expert will be specially retained within the meaning of F.R.Civ.P.26(a)(2):

_____

_____

_____

i. Recommended date for making **primary expert designations**:

_____

ii. Recommended date for making **rebuttal expert designations**:

_____

h. Recommended discovery **completion date**: _____

7. **Dispositive Motion**(s)

   a. Recommended date for filing dispositive motions: _____

8. **Settlement Discussions**

   a. Has a settlement demand been made? _____ A response? _____

   b. Date by which a settlement demand can be made: _____

   c. Date by which a response can be made: _____

9. **Settlement Week Referral**

   The earliest Settlement Week referral reasonably likely to be productive is the

   ___ March 20____ Settlement Week

   ___ June 20____ Settlement Week

   ___ September 20____ Settlement Week

   ___ December 20____ Settlement Week

10. **Other matters for the attention of the Court:**

_____

_____

_____

_____

Signatures:

Attorney(s) for Plaintiff(s):

_____
Ohio Bar# _____
Trial Attorney for_____

_____
Ohio Bar# _____
Trial Attorney for _____

_____
Ohio Bar# _____
Trial Attorney for _____

_____
Ohio Bar# _____
Trial Attorney for _____

Attorney(s) for Defendant(s):

_____
Ohio Bar# _____
Trial Attorney for _____

_____
Ohio Bar# _____
Trial Attorney for _____

_____
Ohio Bar# _____
Trial Attorney for _____

_____
Ohio Bar# _____
Trial Attorney for _____

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

_____	:	
		Case No.
Plaintiff(s),	:	
		District Judge _____
		Magistrate Judge _____
vs.	:	
		RULE 26(f) REPORT OF PARTIES
_____	:	(to be filed not later than seven (7)
		days prior to the preliminary
Defendant(s).	:	pretrial conference)

1. Pursuant to Fed. R. Civ. P. 26(f), a meeting was held on _____,

and was attended by:

_____, counsel for plaintiff(s) _____

_____, counsel for plaintiff(s) _____

_____, counsel for plaintiff(s) _____

_____, counsel for defendant(s) _____

_____, counsel for defendant(s) _____

_____, counsel for defendant(s) _____

_____, counsel for defendant(s) _____

2. The parties:

____ have provided the pre-discovery disclosures required by Fed. R. Civ. P. 26(a)(1), including a medical package (if applicable).

____ will exchange such disclosures by _____.

____ are exempt from disclosure under Fed. R. Civ. P. 26(a)(1)(E).

3. The parties:

____ unanimously consent to the jurisdiction of the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

____ do not unanimously consent to the jurisdiction of the United States Magistrate Judge pursuant to 28 U.S.C. § 636 (c).

____ unanimously give contingent consent to the jurisdiction of the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c), for trial purposes only, in the event that the assigned District Judge is unavailable on the date set for trial (e.g., because of other trial settings, civil or criminal).

4. Recommended cut-off date for filing of motions directed to the pleadings:

_____

5. Recommended cut-off date for filing any motion to amend the pleadings and/or to add additional parties: _____

6. Recommended discovery plan:

a. Describe the subjects on which discovery is to be sought and the nature, extent and scope of discovery that each party needs to: (1) make a settlement evaluation, (2) prepare for case dispositive motions and (3) prepare for trial:

_____

_____

b. What changes should be made, if any, in the limitations on discovery imposed under the Federal Rules of Civil Procedure or the local rules of this Court, including the limitations to 25 interrogatories/requests for admissions and the limitation of 10 depositions, each lasting no more than one day consisting of seven (7) hours?

c. Additional recommended limitations on discovery:

d. Recommended date for disclosure of lay witnesses.

e. Describe the areas in which expert testimony is expected and indicate whether each expert has been or will be specifically retained within the meaning of Fed. R.

Civ. P. 26(a)(2).

_____

_____

_____

_____

f. Recommended date for making primary expert designations:

_____

g. Recommended date for making rebuttal expert designations:

_____

h. The parties have electronically stored information in the following formats:

_____

_____

The case presents the following issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced:

_____

_____

_____

_____

i. The case presents the following issues relating to claims of **privilege or of protection as trial preparation materials:**

_____

_____

_____

Have the parties agreed on a procedure to assert such claims **AFTER** production?

_____ No

_____ Yes

_____ Yes, and the parties ask that the Court include their agreement in an order.

j. Recommended discovery cut-off date: _____

6. Recommended dispositive motion date: _____

7. Recommended date for status conference (if any): _____

8. Suggestions as to type and timing of efforts at Alternative Dispute Resolution:

_____

_____

_____

9. Recommended date for a final pretrial conference: _____

10. Has a settlement demand been made? _____ A response? _____

Date by which a settlement demand can be made: _____

Date by which a response can be made: _____

11. Other matters pertinent to scheduling or management of this litigation:

_____

_____

_____

_____

Signatures:

Attorney for Plaintiff(s):

_____
Ohio Bar #
Trial Attorney for

_____
Ohio Bar #
Trial Attorney for

_____
Ohio Bar #
Trial Attorney for

_____
Ohio Bar #
Trial Attorney for

Attorney for Defendant(s)

_____
Ohio Bar #
Trial Attorney for

_____
Ohio Bar #
Trial Attorney for

_____
Ohio Bar #
Trial Attorney for

_____
Ohio Bar #
Trial Attorney for

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

IN RE: DEFAULT STANDARD FOR DISCOVERY OF ELECTRONICALLY STORED INFORMATION ("E-DISCOVERY")) Administrative Order No. 174

ADMINISTRATIVE ORDER

1. Introduction. The court expects the parties to cooperatively reach agreement on how to conduct e-discovery. In the event that such agreement has not been reached by the time of the Rule 16[1] initial case management conference, the following default standards shall apply until such time, if ever, the parties reach agreement and conduct e-discovery on a consensual basis.

2. Discovery conference. At or before the Rule 26(f) conference (which is to be held at least 21 days before the initial case management conference), the parties shall exchange and discuss the following information:

a. A list of the most likely custodians of relevant electronically stored information ("identified custodians"), including a brief description of each person's title and responsibilities.

b. A list of each relevant electronic system that has been in place at all relevant times and a general description of each system, including the nature, scope, character, organization, and formats employed in each system. The parties shall also include other pertinent information about their electronically stored information and whether that electronically stored information is of limited accessibility. Electronically stored information of limited accessibility may include that created or used by electronic media no longer in use, maintained in redundant electronic storage media, or for which retrieval involves substantial cost.

c. The name of the individual designated by a party as being most knowledgeable regarding that party's electronic document retention policies ("the retention coordinator"), as well as a general description of the party's electronic document retention policies for the systems identified above.

[1]All references to "Rules" herein are to the Federal Rules of Civil Procedure.

d. The name of the individual who shall serve as that party's "e-discovery coordinator" (see ¶ 3).

e. Notice of any problems reasonably anticipated to arise in connection with e-discovery.

To the extent that the state of the pleadings does not permit a meaningful discussion of the above by the time of the initial case management conference, the parties shall either agree on a date by which this information will be mutually exchanged or be prepared to discuss the issues with the court at the initial case management conference.

3. E-discovery coordinator. In order to promote communication and cooperation between the parties, each party to a case shall designate a single individual through whom all e-discovery requests and responses are coordinated ("the e-discovery coordinator"). Regardless of whether the e-discovery coordinator is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, he or she must be:

a. Familiar with the party's electronic systems and capabilities in order to explain these systems and answer relevant questions.

b. Knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues.

c. Prepared to participate in e-discovery dispute resolutions.

The court notes that, at all times, the parties and their attorneys of record shall be responsible for responding to e-discovery requests. However, the e-discovery coordinators shall be responsible for organizing each party's e-discovery efforts to insure consistency and thoroughness and, generally, to facilitate the e-discovery process.

4. Timing of e-discovery. Discovery of relevant electronically stored information shall proceed in a sequenced fashion. After receiving requests for document production, the parties shall search their documents, other than those identified as not reasonably accessible because of undue burden or cost, and produce, subject to any objections appropriate under the Federal Rules of Civil Procedure, relevant responsive electronically stored information.

5. Search methodology. If the parties intend to employ an electronic search to locate relevant electronically stored information, the parties shall disclose any restrictions as to scope and method which might affect their ability to conduct a complete electronic search of the electronically stored information. The parties shall use their best efforts to reach agreement as to the method of searching and the words, terms, and phrases to be searched with the assistance of the respective e-discovery coordinators, who are charged with familiarity with the parties'

respective systems. The parties also shall use their best efforts to reach agreement as to the timing and conditions of any additional searches which may become necessary in the normal course of discovery. To minimize the expense, the parties may consider limiting the scope of the electronic search (*e.g.*, time frames, fields, document types).

6. Format. If, during the course of the Rule 26(f) conference, the parties cannot agree to the format for document production, electronically stored information shall be produced to the requesting party as image files (*e.g.*, PDF or TIFF). When the image file is produced, the producing party must preserve the integrity of the electronic document's contents, *i.e.*, the original formatting of the document, its metadata and, where applicable, its revision history. After initial production in image file format is complete, a party must demonstrate particularized need for production of electronically stored information in its native format.

7. Retention. At or before the Rule 26(f) conference, the parties shall attempt to reach an agreement that outlines the steps each party shall take to segregate and preserve the integrity of all relevant electronically stored information. In order to avoid later accusations of spoliation, a Rule 30(b)(6) deposition of each party's retention coordinator may be appropriate.

The retention coordinators shall:

a. Take steps to ensure that relevant e-mail of identified custodians shall not be permanently deleted in the ordinary course of business and that relevant electronically stored information maintained by the individual custodians shall not be altered.

b. Provide notice of the criteria used for spam and/or virus filtering of e-mail and attachments. E-mails and attachments filtered out by such systems shall be deemed non-responsive, so long as the criteria underlying the filtering are reasonable.

Within seven (7) days of designating the identified custodians, the retention coordinators shall implement the above procedures.

8. Privilege. Electronically stored information that contains privileged information or attorney-work product shall be immediately returned if the documents appear on their face to have been inadvertently produced, or if there is notice of the inadvertent production within thirty (30) days of such. In all other circumstances, Rule 26(b)(5)(B) shall apply.

9. Costs. Generally, the costs of discovery shall be borne by each party. However, the court may apportion the costs of electronic discovery upon a showing of good cause.

10. Court Order. Nothing herein limits the authority of a Judge to issue an e-discovery order on other terms and conditions. This Administrative Order may be amended, in whole or in part, by further Order of the Court.

It is so **ORDERED**.

TODD J. CAMPBELL
Chief United States District Judge

ALETA A. TRAUGER
United States District Judge

WILLIAM J. HAYNES, JR.
United States District Judge

APPENDIX C

List of Cited Cases

1. *Angell v. Williams* (*In re Williams*), No. 08–02284–8–JRL, 2009 WL 1609389 [**OR]** 2009 Bankr. LEXIS 1600 (Bankr. E.D.N.C. June 8, 2009)

2. *Best Payphones, Inc. v. City of New York*, No. 1-CV-3934 (JG) (VMS), 2016 WL 792396 [**OR]** 2016 U.S. Dist. LEXIS 25655 (E.D.N.Y. Feb. 26, 2016).

3. *In re Coffee Cupboard, Inc*. 128 B.R. 509 (Bankr. E.D.N.Y. 1991)

4. *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080 (1975)

5. *Crowley v. Burke,* No. 3:13-cv-219-RCJ-VPC, 2013 WL 6284170 (D. Nev. Dec. 4, 2013)

6. *Dao v. Liberty Life Assur. Co*., No. 14-cv-04749-SI (EDL), 2016 U.S. Dist. LEXIS 28268 (N.D. Cal. Feb. 23, 2016)

7. *In re Davis*, No. 07–33986–H3–7, 2008 WL 220121 [**OR]** 2008 Bankr. LEXIS 200 (Bankr. S.D. Tex. Jan. 24, 2008)

8. *In re Dinubilo*, 177 B.R. 932 (E.D. Cal. 1993)

9. *In re Duratech Indus., Inc*., 241 B.R. 291 (Bankr. E.D.N.Y. 1999)

10. *Gilead Scis., Inc. v. Merck & Co.,* No. 5:13-cv-04057-BLF, 2016 WL 146574 [**OR]** 2016 U.S. Dist. LEXIS 5616 (N.D. Cal. Jan. 13, 2016)

11. *Gold v. Guttman* (*In re Guttman*), 237 B.R. 643 (Bankr. E.D. Mich. 1999)

12. *In re Johns-Manville Corp*., 42 B.R. 362 (S.D.N.Y. 1984)

13. *In re: Kenneth Wayne Auld*, 543 BR 676 (Bankr. D. Utah 2015)

14. *Kissing Camels Surgery Ctr. v. Centura Health Corp.*, No. 12-cv-03012-WJM-NYW, 2016 WL 277721 (D. Colo. Jan. 22, 2016)

15. *Marten Transp., Ltd. v. Plattform Adver., Inc.*, No. 14-cv-02464-JWL-TJJ, 2016 WL 492743 [**OR]** 2016 U.S. Dist. LEXIS 15098 (D. Kan. Feb. 8, 2016)

16. *Miller v. Mathis* (*In re Mathis*), Adv. Case No. 15-5001-PJS, 2016 Bankr. LEXIS 1714 **[OR]** 2016 WL 1569329 (Bankr. E.D. Mich. Apr. 18, 2016)

17. *In re Mittco, Inc*., 44 B.R. 35, 38 (Bankr. E.D. Wis. 1984)

18. *In re: Modern Plastics Corp.,* 2015 Bankr. LEXIS 2525 (Bankr. W.D. Mich. 2015)

19. *Nuvasive, Inc. v. Madsen Med., Inc.*, No. 13-cv-2077 BTM(RBB), 2016 WL 305096 (S.D. Cal. Jan. 26, 2016)

20. *Residential Funding Corp. v. DeGeorge Fin. Corp*., 306 F.3d 99 (2d Cir. 2002)

21. *In re Royce Homes, LP*, No. No. 09–32467–H4–7, 2009 Bankr. LEXIS 2986 (Bankr. S.D. Tex. Sept. 22, 2009)

22. *Secs. Investor Protection Corp. v. Bernard L. Madoff Investment Secs. LLC*, 60 Bankr. Ct. Dec. 57 (Bankr. S.D.N.Y. 2014)

23. *Synder v. Soc'y Bank*, 181 B.R. 40 (S.D. Tex. 1994)

Comparison of Current Federal Civil Rules and the Proposed Amendments Effective December 1, 2015

Old Rule	New Rule	Commentary
Rule 1. Scope and Purpose These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed**[,]** ~~and~~ administered**[, and employed by the court and the parties]** to secure the just, speedy, and inexpensive determination of every action and proceeding.	*Rule 1. Scope and Purpose* These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They 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.	Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, the parties also share the responsibility to employ the rules in the same way. This amendment neither creates a new independent source of sanctions nor does it abridge the scope of any other of these rules.

Old Rule	New Rule	Commentary
Rule 4. Summons *(d) Waiving Service.* *(1) Requesting a Waiver.* *(C)* be accompanied by a copy of the complaint, 2 copies of a**[the]** waiver form**[appended to this Rule 4]**, and a prepaid means for returning the form; *(D)* inform the defendant, using ~~text prescribed in Form 5~~**[the form appended to this Rule 4]**, of the consequences of waiving and not waiving service; *(m) Time Limit for Service.* If a defendant is not served within ~~120~~ **[90]** days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against the defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) **[or to service of a notice under Rule 71.1(d)(3)(A)]**.	*Rule 4. Summons* *(d) Waiving Service.* *(1) Requesting a Waiver.* *(C)* be accompanied by a copy of the complaint, 2 copies of the waiver form appended to this Rule 4, and a prepaid means for returning the form; *(D)* inform the defendant, using the form appended to this Rule 4, of the consequences of waiving and not waiving service; *(m) Time Limit for Service.* If a defendant is not served within 90 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against the defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).	Forms 5 and 6 are now directly incorporated into Rule 4 because of the abrogation of Rule 84 and the other official forms. The presumptive time for serving a defendant is reduced from 120 days to 90 days. This change, together with the shortened times for issuing a scheduling order set by amended Rule 16(b)(2), will reduce delay at the beginning of litigation. The final sentence is amended to make it clear that this reference to Rule 4 in Rule 71.1(d)(3)(A) does not include Rule 4(m). Shortening the time to serve under Rule 4(m) means that the time of the notice required by Rule 15(c)(1)(C) for relation back is also shortened.

Old Rule	New Rule	Commentary
Rule 16. Pretrial Conferences; Scheduling; Management *(b) Scheduling.* *(1) Scheduling Order.* Except in categories of actions exempted by local rule, the district judge – or a magistrate judge when authorized by local rule – must issue a scheduling order; *(A)* after receiving the parties' report under Rule 26(f); or *(B)* after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~. *(2) Time to Issue.* The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ **[unless the judge finds good cause for delay, the judge must issue it]** within the earlier of ~~120~~ **[90]** days after any defendant has been served with the complaint or ~~90~~ **[60]** days after any defendant has appeared.	*Rule 16. Pretrial Conferences; Scheduling; Management* *(b) Scheduling.* *(1) Scheduling Order.* Except in categories of actions exempted by local rule, the district judge – or a magistrate judge when authorized by local rule – must issue a scheduling order; *(A)* after receiving the parties' report under Rule 26(f); or *(B)* after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference . *(2) Time to Issue.* The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.	The provision for consulting at a scheduling conference by "telephone, mail, or other means" is deleted. The conference may be held in person, by telephone, or by more sophisticated electronic means. The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared. This change, together with the shortened time for making service under Rule 4(m), will reduce delay at the beginning of litigation. At the same time, a new provision recognizes that the court may find good cause to extend the time to issue the scheduling order.

Old Rule	New Rule	Commentary
Rule 16 (continued) *(3) Contents of the Order.* *(B) Permitted Contents.* The scheduling order may: *(iii)* provide for disclosure**[,]** ~~or~~ discovery**[, or preservation]** of electronically stored information; *(iv)* include any agreements the parties reach for asserting claims of privilege or of protection as trial- preparation material after information is produced**[, including agreements reached under Federal Rule of Evidence 502;** ***(v)* direct that before moving for an order relating to discovery, the movant must request a conference with the court;]** (~~v~~**[*vi*]**) set dates for pretrial conferences and for trial; and (~~vi~~**[*vii*]**) include other appropriate matters.	*Rule 16 (continued)* *(3) Contents of the Order.* *(B) Permitted Contents.* The scheduling order may: *(iii)* provide for disclosure, discovery, or preservation of electronically stored information; *(iv)* include any agreements the parties reach for asserting claims of privilege or of protection as trial- preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502; *(v)* direct that before moving for an order relating to discovery, the movant must request a conference with the court; *(vi)* set dates for pretrial conferences and for trial; and *(vii)* include other appropriate matters.	The scheduling order may provide for preservation of electronically stored information, which was also added to the provisions of a discovery plan under Rule 26(f)(3)(C). Parallel amendments to Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed. The scheduling order may also include agreements incorporated in a court order issued under Evidence Rule 502, controlling the effects of disclosure of information covered by attorney-client privilege or work-product protection. This topic was also added to the provisions of a discovery plan under Rule 26(f)(3)(D). Finally, the scheduling order may direct that the movant must request a conference with the court before filing a motion for an order relating to discovery. However, the decision whether to require such conferences is left to the discretion of the judge in each case.

Old Rule	New Rule	Commentary
Rule 26. Duty to Disclose; General Provisions; Governing Discovery *(b) Discovery Scope and Limits.* *(1) Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense**[and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.]** ~~— including the existence, description, nature, custody, condition and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~	*Rule 26. Duty to Disclose; General Provisions; Governing Discovery* *(b) Discovery Scope and Limits.* *(1) Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.	Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are taken from Rule 26(b)(2)(C)(iii), with slight modifications.

Old Rule	New Rule	Commentary
Rule 26 (continued) *(2) Limitations on Frequency and Extent.* *(C) When Required.* On motion or on its own, the court must limit the frequency or extent of discover otherwise allowed by these rules or by local rule if it determines that: *(iii)* the ~~burden or expense of the~~ proposed discovery **[is outside the scope permitted by Rule 26(b)(1)]** ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~ *(c) Protective Orders.* *(1) In General.* * * * *(B)* specifying terms, including time and place **[or the allocation of expenses]**, for the disclosure or discovery;	*Rule 26 (continued)* *(2) Limitations on Frequency and Extent.* *(C) When Required.* On motion or on its own, the court must limit the frequency or extent of discover otherwise allowed by these rules or by local rule if it determines that: *(iii)* the proposed discovery is outside the scope permitted by Rule 26(b)(1). *(c) Protective Orders.* *(1) In General.* * * * *(B)* specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;	Rule 26(b)(2)(C)(iii) is amended to reflect that the proportionality considerations were moved to Rule 26(b)(1). Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery.

Old Rule	New Rule	Commentary
Rule 26 (continued) *(d) Timing and Sequence of Discovery.* ***[(2) Early Rule 34 Requests.*** ***(A) Time to Deliver.* More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:** **(i) to that party by any other party, and** **(ii) by that party to any plaintiff or to any other party that has been served.** ***(B) When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference.]** *~~(2)~~[3]) Sequence.* Unless~~, on motion,~~ **[the parties stipulate or]** the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: (A) methods of discovery may be used in any sequence; and (B) discovery by one party does not require any other party to delay its discovery.	*Rule 26 (continued)* *(d) Timing and Sequence of Discovery.* *(2) Early Rule 34 Requests.* *(A) Time to Deliver.* More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered: (i) to that party by any other party, and (ii) by that party to any plaintiff or to any other party that has been served. *(B) When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference. *(3) Sequence.* Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: (A) methods of discovery may be used in any sequence; and (B) discovery by one party does not require any other party to delay its discovery.	Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case-specific sequences of discovery.

Old Rule	New Rule	Commentary
Rule 26 (continued) *(f) Conference of the Parties; Planning for Discovery.* *(3) Discovery Plan.* A discovery plan must state the parties' views and proposals on: (C) any issues about disclose**[,]** ~~or~~ discovery**[, or preservation]** of electronically stored information, including the form or forms in which it should be produced; (D) any issues about claims of privilege or of protection as trial-preparation materials, including – if the parties agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in an order **[under Federal Rule of Evidence 502]**;	*Rule 26 (continued)* *(f) Conference of the Parties; Planning for Discovery.* *(3) Discovery Plan.* A discovery plan must state the parties' views and proposals on: (C) any issues about disclose, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; (D) any issues about claims of privilege or of protection as trial-preparation materials, including – if the parties agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;	Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan: issues about preserving electronically stored information and court orders under Evidence Rule 502.

Old Rule	New Rule	Commentary
Rule 30. Depositions by Oral Examination *(a) When a Deposition May Be Taken.* *(2) With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)**[(1) and]**(2): *(d) Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)**[(1) and]**(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.	*Rule 30. Depositions by Oral Examination* *(a) When a Deposition May Be Taken.* *(2) With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2): *(d) Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.	Rule 30 is amended similarly to Rules 31 and 33 to reflect the new recognition of proportionality in Rule 26(b)(1).

Old Rule	New Rule	Commentary
Rule 31. Depositions by Written Questions *(a) When a Deposition May Be Taken.* *(2) With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)**[(1) and]**(2): * * * *Rule 33. Interrogatories to Parties* *(a) In General* *(1) Number.* Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)**[(1) and]**(2).	*Rule 31. Depositions by Written Questions* *(a) When a Deposition May Be Taken.* *(2) With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2): * * * *Rule 33. Interrogatories to Parties* *(a) In General* *(1) Number.* Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).	Rules 31 and 33 are amended similarly to Rule 30 to reflect the new recognition of proportionality in Rule 26(b)(1).

Old Rule	New Rule	Commentary
Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes *(b) Procedure.* *(2) Responses and Objections.* *(A) Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served**[or – if the request was delivered under Rule 26(d)(2) – within 30 days after the parties' first Rule 26(f) conference]**. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. *(B) Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ~~an objection~~**[with specificity the grounds for objecting]** to the request, including the reasons.**[The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.]**	*Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes* *(b) Procedure.* *(2) Responses and Objections.* *(A) Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or – if the request was delivered under Rule 26(d)(2) – within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. *(B) Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.	Rule 34(b)(2)(A) is amended to conform with new Rule 26(d)(2). The time to respond to a Rule 34 request delivered before the parties' Rule 26(f) conference is 30 days after the first Rule 26(f) conference. Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C), directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. The response to the request must state that copies will be produced. The production must be completed either by the time for inspection specified in the request or by another reasonable time specifically identified in the response.

Old Rule	New Rule	Commentary
Rule 34 (continued) *(C) Objections.* **[An objection must state whether any responsive materials are being withheld on the basis of that objection.**]An objection to part of a request must specify the party and permit inspection of the rest.	*Rule 34 (continued)* *(C) Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the party and permit inspection of the rest.	Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection.

Old Rule	New Rule	Commentary
Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions *(a) Motion for an Order Compelling Disclosure or Discovery.* *(3) Specific Motions.* *(B) To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: (iv) a party**[fails to produce documents or]** fails to respond that inspection will be permitted – or fails to permit inspection – as requested under Rule 34.	*Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions* *(a) Motion for an Order Compelling Disclosure or Discovery.* *(3) Specific Motions.* *(B) To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: (iv) a party fails to produce documents or fails to respond that inspection will be permitted – or fails to permit inspection – as requested under Rule 34.	Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. This change brings item (iv) into line with paragraph (B), which provides for a motion for an order compelling "production, or inspection."

Rule 37 (continued) *(e) Failure to ~~Provide~~[Preserve] Electronically Stored Information.* ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.~~**[If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:** **(1) upon finding prejudice to another party from loss of information, may order measures no greater than necessary to cure the prejudice; or** **(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:** **(A) presume that the lost information was unfavorable to the party;** **(B) instruct the jury that it may or must presume the information was unfavorable to the party; or** **(C) dismiss the action or enter a default judgment.**	*Rule 37 (continued)* *(e) Failure to Preserve Electronically Stored Information.* If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.	The current Rule 37(e) is replaced by a new Rule 37(e). The new Rule 37(e) authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures.

Rule 55. Default; Default Judgment *(c) Setting Aside a Default or a Default Judgment.* The court may set aside an entry of default for good cause, and it may set aside a **[final]**default judgment under Rule 60(b).	*Rule 55. Default; Default Judgment* *(c) Setting Aside a Default or a Default Judgment.* The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).	Rule 55(c) is amended to clarify the interplay between Rules 54(b), 55(c), and 60(b). A default judgment that does not dispose of all the claims among all parties is not a final judgment under Rule 54(b).

Rule 84. Forms **[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015.]** ~~The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.~~	*Rule 84. Forms* Abrogated (Apr. __, 2015, eff. Dec. 1, 2015.	Based on the many alternative sources for forms, Rule 84 and the Appendix of Forms have been abrogated.