ABI Northeast Conference Trial Symposium 2015: Early and Expeditious Litigation Exits — from Deposition to Disposition

Hon. Joan N. Feeney, Moderator
U.S. Bankruptcy Court (D. Mass.); Boston

Hon. Frank J. Bailey
U.S. Bankruptcy Court (D. Mass.); Boston

Patrick P. Dinardo
Sullivan & Worcester; Boston

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Dr. Frederic D. Grant, Jr.
Law Office of Frederic Grant, Jr.; Boston

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U.S. Bankruptcy Court (D. Me.); Bangor

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Bernkopf Goodman LLP; Boston

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ABI NORTHEAST CONFERENCE 2015
TRIAL SYMPOSIUM

EARLY EXIT STRATEGIES

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Law Office of Frederic D. Grant, Jr.; Boston

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ABI Northeast Conference 2015
Trial Skills Symposium

EARLY LITIGATION EXITS

Hypothetical

Zippy Mortgage, once an active refinancing lender, filed a Chapter 11 petition on October 31, 2014. Parties in interest soon determined that the proximate cause of the filing was the removal in July 2014 of approximately $2 million from its bank accounts by Zip Gone, CEO and founder of Zippy Mortgage. The resulting cash shortfall left the Debtor unable to discharge several mortgages it was refinancing, triggering state court lawsuits by its borrowers seeking satisfaction of their old mortgages plus damages. Zippy Mortgage continued to do business, trying to earn its way out of default but failing to make its regular monthly reports to The Money Pit, Inc., its lender, which had financed the Debtor since its founding in 2009. It has been suggested that the lender missed the problems at Zippy Mortgage as its loan officer Tammy Whynot had grown friendly with Zip Gone. Whynot took a leave of absence from The Money Pit in September 2014, and is said to have joined Zip Gone at his island residence off the coast of Ecuador. The Debtor filed its voluntary petition one month later. In the first week of the case, the Debtor and Money Pit entered into a stipulation governing the use of cash collateral in which, among other things, Money Pit agreed that the Debtor could use cash collateral to pay professional fees and ordinary course postpetition expenses in accordance with an agreed budget, and the Trustee stipulated to the validity, priority and perfection of Money Pit's liens and agreed to make certain adequate protection payments to the lender. The parties each reserved their rights as to the amount of Money Pit's allowed claim (if any). The interim cash collateral order provided that unless a statutory committee or other party in interest with requisite standing brought a timely challenge to the stipulations, they would be binding on all creditors and parties in interest. Learned Hound was appointed as Chapter 11 trustee on the motion of parties in interest a week before the interim cash collateral order was set to expire, and he and his counsel agreed to entry of a final order on substantially similar terms. No party brought a timely challenge to any portion of the cash collateral order before it became final. The Trustee's original counsel subsequently told the Trustee that in belatedly going through a fat stack of documents from the debtor's files concerning its loans from The Money Pit, Inc., he noticed that the default interest provision was missing from the final amended and restated loan document (with an integration clause), the dragnet clause in all of the loan documents was ambiguous, and many documents appeared to be missing or incomplete. The Trustee sought and obtained conversion of the case to a

proceeding under Chapter 7, as of March 4, 2015. Hound is now Trustee in the Chapter 7 case, represented by newly retained legal counsel.

The Money Pit, Inc. filed a Proof of Claim in the total amount of $4,800,248.23 on March 3, 2015. The only document attached to the Proof of Claim is a spreadsheet generally showing a high rate of default interest, plus a purported statement of fees and charges made by the lender to the Debtor under its loan documents. The Proof of Claim simply says that these documents, "as amended and restated, while voluminous, are available to parties in interest upon written request." It further states that the claim is secured by a blanket lien on all assets of Zippy Mortgage, tangible and intangible. The Trustee objected to the lender's claim, asserting in summary fashion that the proof of claim is not supported by adequate documentation, that the security interest is unperfected, that the alleged collateral has not been properly identified, and that the lender's interest and fee charges are improper. On March 20, 2015, the Money Pit, Inc. filed its motion seeking summary judgment allowing its claim in full on various grounds including res judicata, collateral estoppel, and/or the law of the case. The Trustee replied with a Rule 56(d) affidavit demonstrating the need for discovery of certain essential facts. The Court allowed a short period of time for a deposition under Rule 30(b)(6) and related document production. The inadequate testimony and document production of claimant's designee at this deposition resulted in a Rule 37 sanctions motion, which was allowed in part and denied in part at its hearing, with movant ordered to produce all its documents within two weeks. Just over a month later, the parties again came before the Court for a hearing on the motion of The Money Pit, Inc. for summary judgment and the Trustee's opposition.

B10 (Official Form 10) (04/13)

UNITED STATES BANKRUPTCY COURT District of Massachusetts		PROOF OF CLAIM
Name of Debtor: Zippy Mortgage, Inc.	Case Number: 14:14577	
NOTE: *Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.*		
Name of Creditor (the person or other entity to whom the debtor owes money or property): The Money Pit, Inc.		COURT USE ONLY
Name and address where notices should be sent: Dewey, Cheatem & Howe, LLP Attn: Lawrence Darrow/Percy Mason 10 Unfair Way, Boston, MA 02109 Telephone number: (617) 867-5301 email: legal@cheatem.com		☐ Check this box if this claim amends a previously filed claim. **Court Claim Number:**_____ (*If known*) Filed on:_____
Name and address where payment should be sent (if different from above): Telephone number: email:		☐ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.

1. Amount of Claim as of Date Case Filed: $ 4,800,248.23

If all or part of the claim is secured, complete item 4.

If all or part of the claim is entitled to priority, complete item 5.

☐ Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. Basis for Claim: See Attached Addendum
(See instruction #2)

3. Last four digits of any number by which creditor identifies debtor:	**3a. Debtor may have scheduled account as:**	**3b. Uniform Claim Identifier (optional):**
0 0 0 0	(See instruction #3a)	(See instruction #3b)

4. Secured Claim (See instruction #4)
Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.

Nature of property or right of setoff: ☑ Real Estate ☐ Motor Vehicle ☐ Other
Describe:

Value of Property: $ Undetermined

Annual Interest Rate 20.000% ☑ Fixed or ☐ Variable Default Rate
(when case was filed)

Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:
$_____

Basis for perfection: Mortgage

Amount of Secured Claim: $ see above

Amount Unsecured: $_____

5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.

☐ Domestic support obligations under 11 U.S.C. § 507 (a)(1)(A) or (a)(1)(B).

☐ Wages, salaries, or commissions (up to $12,475*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. § 507 (a)(4).

☐ Contributions to an employee benefit plan – 11 U.S.C. § 507 (a)(5).

Amount entitled to priority:

☐ Up to $2,775* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507 (a)(7).

☐ Taxes or penalties owed to governmental units – 11 U.S.C. § 507 (a)(8).

☐ Other – Specify applicable paragraph of 11 U.S.C. § 507 (a)(__).

$_____

**Amounts are subject to adjustment on 4/01/16 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)

B10 (Official Form 10) (04/13) 2

7. Documents: Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, security agreements, or, in the case of a claim based on an open-end or revolving consumer credit agreement, a statement providing the information required by FRBP 3001(c)(3)(A). If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. If the claim is secured by the debtor's principal residence, the Mortgage Proof of Claim Attachment is being filed with this claim. *(See instruction #7, and the definition of "**redacted**".)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain: Documents (as Amended and Restated) are Voluminous, but available to parties in interest upon request.

8. Signature: (See instruction #8)

Check the appropriate box.

☐ I am the creditor. ☑ I am the creditor's authorized agent. ☐ I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.) ☐ I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: Robin U. Wisecounsel
Title: General Counsel
Company: The Money Pit, Inc.
Address and telephone number (if different from notice address above):
One Insolvency Drive
~~Dedham, MA 02026~~
Telephone number: (781) 326-4069 email: R.U.Wisecounsel@moneypit.com

/s/ R. U. Wisecounsel (Signature) 03/03/2015 (Date)

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:
Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:
State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:
State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:
State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:
Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:
If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:
Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507 (a).
If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:
An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:
Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest and documents required by FRBP 3001(c) for claims based on an open-end or revolving consumer credit agreement or secured by a security interest in the debtor's principal residence. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:
The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS

Debtor
A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor
A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

Claim
A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim
A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. § 506 (a)
A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien.

A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim
An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. § 507 (a)
Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted
A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

Evidence of Perfection
Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

INFORMATION

Acknowledgment of Filing of Claim
To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim
Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

Addendum

The Money Pit, Inc. (the "Claimant") hereby submits this proof of claim (the "Proof of Claim") in the case of the above-named debtor Zippy Mortgage, Inc. ("Zippy" or the "Debtor"), stating as follows:

The Claimant is due $4,800,248.23 for monies loaned to Zippy through February 28, 2015, as follows:

(i)	Principal	$4,056,118.23
(ii)	Interest	$ 427,645.00
(iii)	Default Interest	$ 85,732.00
(iv)	Late Fees	$ 3,000.00
(v)	Legal Fees	$ 206,117.00
(vi)	Account Expenses	$ 6,156.00
(vii)	Additional Charges	$ 15,480.00
	Total	**$4,800,248.23**

The foregoing sums are due and owing from Zippy to Money Pit under and pursuant to the loan documents executed by the parties, as amended and restated, which, while voluminous are available to parties in interest upon request.

The Claimant reserves the right to amend or supplement this Proof of Claim as necessary with the passage of time to reflect additional sums to be owed or any applicable credits or duplicated information, and further reserves the right to assert additional claims against the Debtor, including, but not limited to, administrative expense claims, all rights of set-off and recoupment, and other claims or rights, and all rights that the Claimant had or may have against third parties (if any) concerning the transactions and occurrences which give rise to the instant claim.

{B1858744; 1}

UNITED STATES BANKRUPTCY COURT
COASTAL DISTRICT OF MASSACHUSETTS
FALMOUTH DIVISION

In re:	Chapter 7
ZIPPY MORTGAGE, INC.,	Case No. 15-0000-LHK
Debtor.	

_____/

NOTICE OF DEPOSITION OF THE MONEY PIT, INC.
PURSUANT TO BANKRUPTCY RULE 7030(b)(6)

TO: Percy Mason, Esquire
Lawrence Darrow, Esquire
Evidently Eminent, P.C.
10 Unfair Way
Boston, Mass. 02109

PLEASE TAKE NOTICE that Learned Hound, duly appointed trustee in the Chapter 7 case of Zippy Mortgage, Inc., by his attorney, will take the videotaped deposition upon oral examination pursuant to Fed. R. Bankr. P. 7030 and Fed. R. Civ. P. 30(b)(6) as incorporated therein of The Money Pit, Inc. before a notary public or other officer authorized to take oaths, on Monday, April 6, 2015 at 9:00 a.m. at the office of undersigned counsel, One Fishfry Place, Falmouth, Mass. Pursuant to Rule 30(b)(6), The Money Pit, Inc.is requested to designate the person or persons with the most knowledge regarding the matters listed on Schedule A attached hereto.

PLEASE TAKE FURTHER NOTICE that the deponent is required to bring to the deposition all documents in the possession, custody or control of The Money Pit, Inc. which are listed on Schedule B attached hereto.

The oral examination will continue from day to day until completed. You are invited to attend and cross examine.

LEARNED HOUND

By his attorneys,

/s/ Vincent Gambini
SCRAPPY & GAMBINI, LLP
Vincent Gambini
One Fishfry Place
North Falmouth, Mass. 02556
Telephone: 508-540-9400
E-mail: vg@sgllp.com

SCHEDULE A

1. All facts in any way directly or indirectly relating to The Money Pit, Inc.'s financing of Zippy Mortgage since 2009, including, without limitation, the negotiation, drafting and execution of all related loan documents between The Money Pit and Zippy Mortgage.

2. All facts in any way directly or indirectly related to the creation, perfection and validity of The Money Pit's security interest in Zippy Mortgage's assets,

3. All facts concerning the nature, extent, value and location of Zippy Mortgage's assets which serve or which you claim serve as collateral for The Money Pit's loan to Zippy Mortgage, including the dates when the collateral was acquired by Zippy Mortgage.

4. All facts, communications, correspondence and documents in any way relating directly or indirectly to all monies or debts that The Money Pit claims are owed to it by Zippy Mortgage, including but not limited to such debts as are evidenced by the Proof of Claim in the total amount of $4,800,428.23 dated March 3, 2015.

SCHEDULE B

The Money Pit, Inc. is required to bring all of the documents listed below (the term "document" and other terms used herein shall have meanings prescribed by the Uniform Definitions in Discovery Requests, Rule No. 26.5 of the Local Rules of the United States District Court for the District of Massachusetts):

1. All documents, communications, and correspondence, including without limitation all notes and memoranda in any way relating to Zippy Mortgage, Inc. (the "Debtor"), its assets, liabilities, organization or activities.

2. All documents, communications, and correspondence, including without limitation all notes and memoranda in any way relating to Zip Gone or to any entity of which he is or was an officer, director, manager or owner of more than 10% equity.

3. All documents, communications, and correspondence, including without limitation all notes and memoranda in any way relating to the loan between The Money Pit, Inc. and the Debtor.

4. All documents, communications, and correspondence, including without limitation all notes and memoranda in any way relating to the Proof of Claim filed by The Money Pit, Inc. in this bankruptcy case.

5. All documents, communications, and correspondence including without limitation, notes and memoranda used in any way by the Rule 3(b)(6) designee(s) to prepare for the deposition.

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CONSIDERATIONS IN RULE 30(b)(6) PRACTICE

Frederic D. Grant, Jr.
Boston, Massachusetts

1. **UTILITY OF THE RULE**.

A deposition noticed under the provisions of Rule 30(b)(6) is a valuable means of probing knowledge of an entity by requiring it to name and to be bound by the testimony of one or more subject witnesses it must designate. The rule states that the examining party "may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity."

The rule may prove especially useful to the examining party, and difficult for the responding party, where – as in the Hypothetical – knowledgeable employees have left the company (or are deceased or under criminal investigation).

2. **APPLICABLE RULE PROVISIONS**.

In both bankruptcy adversary proceedings and contested matters, Fed. R. Civ. P. 30(b)(6) is made applicable under Fed. R. Bankr. P. 7001 and 9014.

Fed. R. Civ. P. 30(b)(6):

> (6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and

must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Fed. R. Civ. P. 30(b)(2):

(2) *Producing Documents.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

Fed. R. Civ. P. 34(b):

(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. 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 to the request, including the reasons.

(C) *Objections.* 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.

3. **TECHNICAL REQUIREMENTS**.

A. **NOTICE (PARTY/NONPARTY)**.

The notice must: (a) name the entity to be examined ("a public or private corporation, a partnership, an association, a governmental agency, or other entity"); and (b) and "describe with reasonable particularity the matters for examination." Fed. R. Civ. P. 30(b)(6).

When a party is to be examined, a subpoena is not required.

When the entity to be examined is not a party, a subpoena is required. The Rule states that such "subpoena must advise a nonparty organization of its duty to make this designation [of persons consenting to testify]." Fed. R. Civ. P. 30(b)(6) (emphasis added). As this specific cautionary notice is mandatory under the rule, which uses the word "must," it is unwise to waive or to fail to serve the subpoena for Rule 30(b)(6) examination on a nonparty witness.

B. **FRAMING QUESTIONS**.

Topics to be examined must be "describe[d] with reasonable particularity . . ." Fed. R. Civ. P. 30(b)(6). Careful framing of the topics to be examined at deposition is extremely important, as the benefits, requirements, and preclusive utility of the rule all apply to the topics as described by the examining party. Should question arise as to a vague or ambiguous description, the issue is likely to be decided against the noticing party, as ambiguity is generally construed against the drafter. "[T]he requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute." Sprint Communs. Co., LLP v. The Globe.com, 236 FRD 524, 528 (D. Kan. 2006) (citations omitted).

A vague or overbroad description may result in the notice of deposition being ordered quashed. "One court explained that an overbroad Rule 30(b)(6) notice subjects the responding party to an impossible task. . . . When the responding party cannot identify the outer limits of the area of inquiry noticed, compliant designation is not feasible." 7 Moore's Federal Practice § 30.25[2] at 30-66 (Matthew Bender 3d Ed. 2015).

C. **DOCUMENT REQUEST**.

A party may be required to produce documents in connection with its examination under Rule 30(b)(6). The Rule requires that the request be made in compliance with Fed. R. Civ. P. 34. "The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition." Fed. R. Civ. P. 30(b)(2).

In most cases, Rule 34 is easily complied with, if a comprehensive request for documents under Rule 34 has not already been separately served.

Reference to Rule 34 makes clear at a minimum that Rule 30 may not be used to avoid (accelerate) the thirty day response period for production of documents provided for under Rule 34(b)(2)(A).

The Rule 34 "request" to a party that may "accompany" a Rule 30 deposition notice (Fed. R. Civ. P. 30(b)(2)) can be made in the form of an attachment (exhibit) to the deposition notice. The rule makes this explicit as to nonparties ("listed in the notice [of deposition] or in an attachment

[thereto]," Rule 30(b)(2)). A request made as an attachment to the deposition notice of a party should likewise be sufficient.

Document production by nonparty entities to be examined under Rule 30(b)(6) requires a subpoena duces tecum, calling for production of documents by the nonparty as "listed in the notice [of deposition] or in an attachment [thereto]." Fed. R. Civ. P. 30(b)(2).

Care should be taken in drafting a request for production of documents in connection with a Rule 30(b)(6) deposition, to be sure that the request complies with the requirements of Rule 34 and also with applicable provisions of local rules (uniform definitions &c.).

4. **DUTIES OF THE DESIGNATED WITNESS**.

Thus, one or more witnesses must be designated. "The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify." Fed. R. Civ. P. 30(b)(6). These witnesses must testify about information known or reasonably available to the entity. "The persons designated must testify about information known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6). As such, "reliance on hearsay is permitted under Rule 30(b)(6)." S. O'Neil, "Rule 30(b)(6) Witnesses at Trial," 60 Federal Lawyer 70, 73 (Sept. 2013).

Substantial affirmative effort to prepare the designated witness or witnesses is required. "[T]he responding party 'must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the interrogator] and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed by [the interrogator] as to the relevant subject matters.'" Sprint Communs. Co., LLP v. The Globe.com, 236 FRD 524, 528 (D. Kan. 2006) (citation omitted). "Once notified as to the reasonably particularized areas of inquiry, the corporation then 'must not only produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give complete, knowledgeable and binding answers on behalf of the corporation.'" Id., quoting Marker v. Union Fidelity Life Ins. Co., 125 F.R.D. 121, 126 (M.D.N.C.1989).

As the Rule "explicitly requires a company to have persons testify on its behalf as to *all matters reasonably available to it, . . .* [it] "implicitly requires persons to review all matters known or reasonably available to [the corporation] in preparation for the 30(b)(6) deposition." Sprint Communs. Co., LLP v. The Globe.com, 236 FRD 524, 527-528 (D. Kan. 2006) (citations omitted). "Thus, a corporation must prepare its Rule 30(b)(6) designee to the extent matters are reasonably available, whether from documents, past employees, or other sources." In re Brican America Equipment Lease Litig., 2013 U.S. Dist. LEXIS 142841; 2013 WL 5519980 (S.D. Fl. Oct. 1, 2013), citing United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C.), aff'd, 166 F.R.D. 367 (1996). "This interpretation is necessary in order to make the deposition a meaningful one and to prevent the sandbagging of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial. This would totally defeat the purpose of the discovery process. The Court understands that preparing for a Rule 30(b)(6) deposition can be burdensome. However, this is merely the result of the concomitant obligation from the privilege of being able to use the corporate [or other organizational] form in order to conduct business." Starlight Int'l, Inc. v. Herlihy, 186 F.R.D. 626, 638 (D. Kan. 1999), citing United States v. Taylor, 166 F.R.D. 356, 362 (M.D.N.C.), aff'd, 166 F.R.D. 367 (1966).

The absence of personnel knowledgeable about the subject issues does not relieve the entity of its substantial preparation duties. "Further, the fact that an organization no longer has a person with knowledge on the designated topics does not relieve the organization of the duty to prepare a Rule 30(b)(6) designee." In re Brican America Equipment Lease Litig., 2013 U.S. Dist. LEXIS 142841; 2013 WL 5519980 (S.D. Fl. Oct. 1, 2013), citing United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C.), aff'd, 166 F.R.D. 367 (1996). "It is of no moment that certain of those employees may no longer work for NCMIC. Indeed, when '[f]aced with such a scenario, a corporation with no current knowledgeable employees must prepare its designees by having them review available materials, such as fact witness deposition testimony, exhibits to depositions, documents produced in discovery, materials in former employees' files and, if necessary, interviews of former employees or others with knowledge.'" Id., citing QBE Ins. Corp. v. Jorda Enterprises, Inc., 277 F.R.D. 676, 688 (S.D. Fla. 2012), citing Great Am. Ins. Co. v. Vegas Constr. Co., Inc., 251 F.R.D. 534, 540 (D. Nev. 2008).

Preparing a designated corporate witness with only the self-serving half of the story that is the subject of his testimony is not an act of good faith, and may lead to sanctions in various forms. Sciarretta v. Lincoln Nat. Life Ins. Co., 778 F.3d 1205 (11th Cir. 2015) ("Norris was prepared to answer questions in ways that

were helpful to Imperial, but . . . he lacked knowledge when the questions turned to areas that might cast Imperial in a bad light or otherwise harm it.")

While a Rule 30(b)(6) designee may testify that the corporation adopts the position or testimony of another witness, a designee must nonetheless step forward and so testify. In re Brican America Equipment Lease Litig., 2013 U.S. Dist. LEXIS 142841; 2013 WL 5519980 (S.D. Fl. Oct. 1, 2013) ("there is nothing in the rules to prohibit a corporation from adopting the testimony or position of another witness in a case, the Court noted that such a procedure would still require a corporate designee to 'formally provide testimony that the corporation's position is that of another witness.'"), citing QBE Ins. Corp. v. Jorda Enterprises, Inc., 277 F.R.D. 676, 691 (S.D. Fla. 2012).

An entity may designate its counsel to be a witness at an examination noticed under Rule 30(b)(6). Whether this would be a wise decision, for reasons of the scope, preservation and possible impairment of the attorney-client privilege, or other applicable considerations, is another matter. "There is no rule that would prevent corporate counsel, or even a corporation's litigation counsel, from serving as a Rule 30(b)(6) deponent. However, there is a risk that the testifying attorney may subsequently be disqualified from serving as trial counsel." 7 Moore's Federal Practice § 30.25[3] at 30-71 (Matthew Bender 3d Ed. 2015).

"When a corporation is truly unable to designate a representative under Rule 30(b)(6), it must seek a protective order." 7 Moore's Federal Practice § 30.25[2] at 30-72.1 (Matthew Bender 3d Ed. 2015).

5. **SOME CONSEQUENCES OF RULE 30(b)(6) TESTIMONY**.

"Producing an unprepared witness [for a Rule 30(b)(6) examination] is tantamount to a failure to appear at a deposition." United States v. Taylor, 166 F.R.D. 356, 363 (M.D.N.C.), aff'd, 166 F.R.D. 367 (1996).

Documents seen by the witness in preparation are subject to inquiry. Where a witness has used documents to refresh her memory before testimony, and a court determines that justice requires that the examining party have the options provided for in Rule 612, "an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony." Fed. R. Evid. 612 (b). "Courts have almost uniformly held that Rule 612 applies equally to depositions as

to trials." R. Wise & D. Gluckman, "Fed. R. Evid. 612 – Use it or Lose it," In-House Defense Quarterly (Spring 2009), at 40 (citations omitted). "Thus, Rule 612 can provide a sword for a deposing party to gain access to attorney compilation work product." Id., at 41.

Among the sanctions that may be imposed for inadequate preparation of a witness or witnesses for examination under Rule 30(b)(6) is the direction by the court that inferences been drawn from the record. See In re Brican America Equipment Lease Litig., 2013 U.S. Dist. LEXIS 142841; 2013 WL 5519980 (S.D. Fl. Oct. 1, 2013) ("the failure of Defendant NCMIC to produce an adequate 30(b)(6) deponent is not sufficiently egregious for the Court to issue an order in limine as to 'beneficial' inferences requested by the Plaintiffs . . . In this regard, it bears noting that NCMIC has agreed, to some extent, to be bound by the testimony of the designated deponents. Specifically, in its Response to the Motion, NCMIC states, "If this matter proceeds to trial, Plaintiffs will have the opportunity to make whatever inference about these gaps that they wish . . . ." and further states, "For better or worse, NCMIC is bound by the gaps in their memories of its current and former employees." (DE # 304 at 10). Thus, although NCMIC stops short of conceding that the Plaintiffs are entitled to a beneficial inference for Plaintiffs as to those topics for which NCMIC has failed to produce an adequate 30(b)(6) deponent, NCMIC implicitly acknowledges that it will be unable to 'fill in' any gaps related to those omissions at trial."

6. THE USE OF RULE 30(b)(6) TESTIMONY AT TRIAL.

A contrary position may not be taken at trial. "If a Rule 30(b)(6) designee either disclaims any knowledge of issues listed in the Rule 30(b)(6) notice of deposition or provides a limited amount of testimony on the subject, the organization may not, at trial, use any evidence beyond that testified to at the deposition, unless the organization has presented it another way during discovery or through initial disclosures." 7 Moore's Federal Practice § 30.25[3] at 30-74 (Matthew Bender 3d Ed. 2015). "[I]f a party states it has no knowledge or position as to a set of alleged facts or area of inquiry at a Rule 30(b)(6) deposition, it cannot argue for a contrary position at trial without introducing evidence explaining the reasons for the change." United States v. Taylor, 166 F.R.D. 356, 362 (M.D.N.C.), aff'd, 166 F.R.D. 367 (1966).

Given that Rule 30(b)(6) contemplates the use of and reliance on hearsay source material by witnesses, the use of such testimony at trial may raise further

evidentiary issues. Thus, in the Rule 30(b)(6) caselaw, an "obvious tension can be observed between the Federal Rules of Evidence requiring a foundation in the personal knowledge of the witness and the absence of any such requirement for deposition testimony taken pursuant to Rule 30(b)(6)." S. O'Neil, "Rule 30(b)(6) Witnesses at Trial," 60 Federal Lawyer 70, 71 (Sept. 2013). "In view of these principles, deposition testimony taken under Rule 30(b)(6) would normally be inadmissible at trial if not based on matters within the witness's personal knowledge. However, the only guidance in the Federal Rules of Civil Procedure regarding admissibility of Rule 30(b)(6) testimony at trial appears in Rule 32(a)(3), which provides that, if the other conditions of Rule 32(a)(1) are met, Rule 30(b)(6) *deposition* testimony of a corporate party may be introduced at trial *by the adverse party for any purpose*. Neither the rules nor the advisory committee comments make any reference to the use of live Rule 30(b)(6) testimony at trial. Nevertheless, the one court of appeals decision to squarely consider the issue has held this is permitted, and even encouraged." S. O'Neil, "Rule 30(b)(6) Witnesses at Trial," 60 Federal Lawyer 70, 71 (Sept. 2013) (emphasis in the original), citing Brazos River Author. v. GE Ionics, Inc., 469 F.3d 416, 434 (5th Cir. 2006).

Testimony offered on behalf of a party opponent may be admissible by the examining party as an admission. When an adverse party's Rule 30(b)(6) witness is called at trial, "any statement made by the witness, even if predicated on hearsay or information outside the witness's personal knowledge, should be admissible as an admission by a party opponent. Fed. R. Evid. 801(d)(2) provides that a statement is not hearsay if it is offered against an opposing party and it "was made by the party in an individual or representative capacity" or "was made by a person whom the party authorized to make a statement on the subject." Either of these requirements should be easily satisfied in the case of a Rule 30(b)(6) designee, even if the witness had no personal knowledge of the matters, because it was learned as part of his Rule 30(b)(6) "education." Most circuits have found that personal knowledge is not required for an admission under Rule 801(d)(2)." S. O'Neil, "Rule 30(b)(6) Witnesses at Trial," 60 Federal Lawyer 70, 72 (Sept. 2013) (citations omitted).

Where the subject testimony was offered on behalf of a nonparty, admission at trial may prove difficult. "Unlike the party Rule 30(b)(6) witness, however, the testimony of the third-party designee would not be admissible under Rule 32(a)(3) or as an admission of a party opponent under Fed. R. Evid. 801(d)(2). In addition, a third-party has less incentive to undergo a thorough predeposition education and typically no stake in the outcome of the case." S. O'Neil, "Rule 30(b)(6) Witnesses at Trial," 60 Federal Lawyer 70, 72 (Sept. 2013) (citation omitted).

Practice Tips and Developments in Handling 30(B)(6) Depositions

Michael R. Gordon, Esq.
Manatt, Phelps & Phillips, LLP
New York City

Claudia De Palma, Esq.
Manatt, Phelps & Phillips, LLP
New York City

INTRODUCTION

More than most other procedural rules, Fed. R. Civ. P. 30(b)(6) (occasionally referred to as the "Rule"), at least in theory, embodies the ultimate aim of the Federal Rules of Civil Procedure, set forth in Federal Rule of Civil Procedure 1, to "secure the just, speedy, and inexpensive

determination of every action and proceeding."[1] But as with so many other discovery-related rules, Fed. R. Civ. P. 30(b)(6) has evolved into something different than what its creators no doubt envisioned, as litigation counsel on both sides of the deposition table have, over the years, sought to press that rule's boundaries – sometimes at the expense of justice, speed, and budget. The purpose of this article is to review the more significant developments that have taken place in the 30(b)(6) arena and suggest some practice tips that we believe can improve the effectiveness and efficiency of the discovery process.

Essentially, Fed. R. Civ. P. 30(b)(6) allows a party to depose an organization through one or more witnesses designated by that organization. Contrast this with the ordinary Rule 30(b)(1) deposition of a witness who happens to work for an organization and who might or might not have the information sought by the interrogating party.[2] The differences are tremendous. Most notably, while a litigation party can depose just about anyone pursuant to Fed. R. Civ. P. 30(a), there is no requirement that the deponent subject to such a deposition do anything to prepare for the deposition. In fact, it probably would not be much of a stretch to say that most litigators prepare their clients, if they are being deposed in their individual capacities, to get comfortable with the Holy Trinity of deposition responses: "Yes – no – I don't know."

Federal Rule of Civil Procedure 30(b)(6) has no truck with such tactics. The Rule provides not only that an organization must produce witnesses knowledgeable about the issues in the case (presumably set forth in the deposition notice, but that is the subject of some contention, as we will discuss later on in footnote 22); not only that the witness must be appropriately prepared to testify about those matters, even if the witness starts out with little or no personal knowledge on the issues; but also that the organization will be held strictly accountable for the deponent's poor performance. The 30(b)(6) deposition is, therefore, a powerful tool in the litigator's arsenal, and one that, if used effectively, can quickly drive a case to the resolution of key factual disputes. Consider: A well-schooled Rule 30(b)(1) witness can leave an interrogator entirely frustrated

[1] FED. R. CIV. P. 1.
[2] *Compare* FED. R. CIV. P. 30(b)(1) *with* (b)(6).

and with little ammunition to use on summary judgment or at trial. An evasive answer here, a lack of recollection there, a professed lack of understanding of the questioning, and, voila, a muddy and barely usable transcript. Yes, a skilled litigator can perhaps cut through this kind of obfuscation, and, yes, a skilled litigator can use the witness's reticence or intermittent amnesia to his or her tactical advantage, but that's not always the case. Sometimes the witness just won't provide the information the litigator needs, and so the litigator must resort to other means, often at great expense, to make up the evidentiary gap.

This is where the 30(b)(6) deposition comes in. It allows the lawyer squaring off against an organization, be it a corporation or partnership or some other organization, to demand straightforward answers to straightforward questions from witnesses who are commanded to be prepared to give straightforward answers. Of course, litigators are a clever bunch, and so things are not always as easy and straightforward as they might be. But there are techniques that can be used to ensure that the 30(b)(6) deposition is used most effectively and economically, whether on the taking or defending side. We discuss those techniques in Part II of this article. But first, in Part I, we cover the legal framework of Fed. R. Civ. P. 30(b)(6).

I

THE LEGAL FRAMEWORK

A. Background

Federal Rule of Civil Procedure 30(b)(6) was added to the Federal Rules of Civil Procedure as part of the 1970 amendment package. The primary purpose of the Rule was, according to the Official Advisory Committee Notes, to end the exasperating practice of "bandying," whereby organizations would produce deposition witness after deposition witness, each disclaiming knowledge of facts that, obviously, someone in the organization had to know.[3] Prior to the

[3] *See* FED. R. CIV. P. 30(b)(6) advisory committee's notes, subdivision (b) (1970). For an excellent review of the origins of FED. R. CIV. P. 30(b)(6), *see generally* Kent Sinclair and Roger P. Fendrich, *Discovering*

promulgation of Fed. R. Civ. P. 30(b)(6), the state of play was one game of 21 questions within another. *First*, the interrogator had to figure out whom to depose and the order in which to take the depositions. *Second*, the interrogator had to frame the deposition questions so that those questions elicited the necessary information from the appropriately knowledgeable witness. The problem for the interrogator, of course, was that the information sought might not be readily available from any one person, with the result that either insufficient information was provided or countless officers and employees had to be deposed.

Fed. R. Civ. P. 30(b)(6) was intended to cut through the tactics of bandying by introducing the concept of an organizational deposition: while a human would testify, that human was appearing not in his or her individual capacity but as the voice of the corporation or partnership or whatever form the deposed organization took. Similar to the interrogatory, as the Advisory Committee noted, but with sharper teeth (because the sworn statement provided is given in the context of a live deposition being taken by a presumably attentive lawyer able to follow up on less-than-clear answers), Fed. R. Civ. P. 30(b)(6) states as follows:

> In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.[4]

The procedure by which a 30(b)(6) deposition generally proceeds is as follows:

1. A party serves a deposition notice under Fed. R. Civ. P. 30(b)(6) by naming the subject organization, which can be a party or nonparty, as the deponent, and sets forth, either in the notice or subpoena or a rider thereto, particular topics as to which the organization must testify.

Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms, 50 ALA. L. REV. 651 (1999).

[4] FED. R. CIV. P. 30(b)(6).

2. In response to the 30(b)(6) deposition notice, the organization designates one or more individuals to testify on behalf of the organization with respect to the topics identified in the deposition notice. The organization can object to the topics as overbroad or otherwise improper (e.g., the topics improperly call for privileged information).

3. The designated witness(es) must testify about information known or reasonably available to the organization. Critically, a 30(b)(6) witness is not disqualified for lack of personal knowledge about the matters as to which he or she will testify and need not be the most knowledgeable witness for the topics; therefore, it is possible (and not uncommon) for corporate employees to be educated as to the relevant topics and thus transformed into suitable 30(b)(6) witnesses.

One of the best recent decisions outlining the parameters of Fed. R. Civ. P. 30(b)(6) is a Florida District Court case by the name of *QBE Insurance Corp. v. Jorda Enterprises, Inc.*[5] In *QBE*, a subrogation action in which the plaintiff insurer sought to recover from defendant subcontractor the sum that the plaintiff paid over to its insured following a loss, the defendant sought sanctions because the plaintiff refused to produce a suitably knowledgeable witness on various 30(b)(6) topics.[6] In 39 clearly delineated steps (was the court a secret Hitchcock fan?), the *QBE* court set forth its "de facto Bible" governing organizational depositions.[7]

The *QBE* court first explained that the purpose of Fed. R. Civ. P. 30(b)(6) is to "streamline the discovery process."[8] The court then went on to offer, in sum and substance, the following key observations:

- The primary purpose of the Rule is to prevent the situation where a stream of proffered witnesses lack sufficient knowledge about relevant topics;

- The Rule affords an organization being deposed considerable leeway in designating its own witnesses to represent the organization;

- The organization being deposed may (and must) identify as many witnesses as necessary to be responsive;

- The organization being deposed need not produce the most knowledgeable person, provided that the witness designated is prepared to testify "fully and non-evasively about the subjects" of the deposition, even if that means having the witness do as much homework as necessary to become a suitable witness;

[5] *QBE Ins. Corp. v. Jorda Enter., Inc.*, 277 F.R.D. 676 (S.D. Fla. 2012).
[6] *Id.* at 683.
[7] *Id.* at 687–91.
[8] *Id*. at 687.

- The witness's answers are binding on the organization;
- Sanctions are available for non-compliance with the Rule; and
- The organization being deposed has the right to seek a protective order if the deposition notice is overbroad or otherwise improper.[9]

After reviewing what certainly seemed to be some rather evasive testimony by the plaintiff's designee, the *QBE* court granted the defendant's motion in part, precluded the plaintiff from taking certain positions at trial, and imposed a financial sanction to boot.[10] The point stressed by the court was that there are severe litigation consequences to ignoring the letter and the spirit of Fed. R. Civ. P. 30(b)(6).

United States v. Taylor, a North Carolina District Court decision concerning 30(b)(6) depositions in a CERCLA action, remains another leading case on the subject and provides another good outline of how the Rule works.[11] The *Taylor* court was faced with a defendant's reluctance to prepare its 30(b)(6) designees to the extent demanded by the United States Government, the plaintiff. The crux of the issue was, as the court put it, "the extent of the duty which Fed. R. Civ. P. 30(b)(6) imposes on a corporation . . . to conduct an investigation prior to its deposition."[12]

The court began its analysis by observing, quite aptly, that "[f[or a Rule 30(b)(6) deposition to operate effectively, the deposing party must designate the areas of inquiry with reasonable particularity, and the corporation must designate and adequately prepare witnesses to address these matters."[13] The court then went on to articulate its own guidelines for 30(b)(6)

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[9] *Id.* at 687–91.
[10] *Id.* at 698.
[11] *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996).
[12] *Id.* at 358.
[13] *Id.* at 360. The court in *Prokosch v. Catalina Lighting, Inc*., another oft-cited case, had a similar take on FED. R. CIV. P. 30(b)(6): "The effectiveness of the Rule bears heavily upon the parties' reciprocal obligations. First, the requesting party must reasonably particularize the subjects of the intended inquiry so as to facilitate the responding party's selection of the most suitable deponent. In turn, the responding party, having been specifically notified as to the specific areas of exploration, is obligated to produce a deponent who has been suitably prepared to respond to questioning within that scope of inquiry." *Prokosch v. Catalina Lighting, Inc*., 193 F.R.D. 633, 638 (D. Minn. 2000). Perhaps in a tacit nod to baseball's three-strikes rule, the *Prokosch* court found that the defendant, in failing to provide suitably prepared deposition witnesses, had not met its 30(b)(6) obligations, but deferred any sanctions award for

depositions: (*a*) the party responding to a 30(b)(6) deposition must produce a witness who will speak "'for the corporation'" and not merely for himself or herself; (*b*) if the designees do not have the requisite knowledge, the organization must prepare the designees "so that they may give complete, knowledgeable and binding answers on behalf of the corporation"; and (*c*) the designees can be queried about facts as well as opinions and beliefs of the organization.[14] The point, explained the court, is that the 30(b)(6) designee testifies as if he or she is the organization itself – "[t]he corporation appears vicariously through its designee."[15] Accordingly, any burden that the organization must bear – such as requiring the designee to review prior deposition testimony, documents, and deposition exhibits so that he or she can testify as to the organization's position on various topics – "is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business."[16]

B. The deposition notice

What does a proper 30(b)(6) deposition notice look like? As with a 30(b)(1) notice, it contains the name of the organization to be deposed and provides the date and time of the deposition. Unlike with the 30(b)(1) notice, though, Fed. R. Civ. P. 30(b)(6) provides, either within the notice itself or as a rider to the notice, a list of topics that will be the subject of the deposition.[17] Most importantly, Fed. R. Civ. P. 30(b)(6) requires that this list identifying the topics of inquiry – which serve as the core of the deponent's preparation road map – be articulated with "reasonable particularity."[18] So what is "reasonable particularity"?

As discussed below, while there is no universally accepted, black-letter definition of this standard, it can be fairly said that reasonably particularized topic lists are those that call for

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the time being notwithstanding two prior occasions when the court "expressed dissatisfaction with [the defendant's] discovery responses." *Id*. at 639.
[14] *Id.* at 361.
[15] *Id.*
[16] *Id.* at 362.
[17] *Compare* FED. R. CIV. P. 30(b)(1) *with* 30(b)(6).
[18] FED. R. CIV. P. 30(b)(6).

information that has a logical bearing on the claims and defenses in the case. While that definition might seem somewhat vague, unreasonably overbroad topic lists can be easy to spot.

For example, "reasonable particularity" is ***not*** a list of things "including but not limited to," that favorite phrase of insecure litigators who worry that, no matter how carefully drafted, their discovery lists are somehow missing something.[19] Thus a 30(b)(6) deposition notice may not require testimony on a theoretically limitless list of topics "including but not limited to x, y and z," nor can it pretend to suggest a finite list of topics, each of which, in turn, calls for information "including but not limited to x, y and z." For the first version of this ploy, see the District of Kansas's opinion in *Reed v. Bennett*, which held that deposition topic lists must have discernible parameters and that "where the defendant cannot identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible."[20] For the latter, see the D.C. District Court's commentary in *Tri-State Hospital Supply Corp. v. United States*, *supra*, which dealt with a 30(b)(6) notice that listed certain topics and used that phrase "including but not limited to" in order to try to capture other, related topics.[21] Relying on *Reed v. Bennett*, *supra*, the *Tri-State Hospital* court struck the "including but not limited to" verbiage on the ground that "[l]isting several categories and stating that the inquiry may extend beyond the enumerated topics defeats the purpose of having any topics at all."[22]

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[19] *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 125 (D. D.C. 2005).

[20] *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000); *but see Cotton v. Costco Wholesale Corp.*, No. 12-2731-JWL, 2013 WL 3819975, at *2 (D. Kan. July 24, 2013) (holding that the use of "including" in the notice did not render it overbroad where the term was used to provide examples of subtopics, rather than to suggest that the areas of inquiry would not be limited to the topics listed).

[21] *Tri-State Hospital Supply Corp.*, 226 F.R.D. at 125. *See also Innomed Labs v. Alza Corp.*, in which the court denied a motion to compel compliance with a 30(b)(6) subpoena that sought testimony about certain documents "'including but not limited to' the areas specified." *Innomed Labs v. Alza Corp.*, 211 F.R.D. 237, 240 (S.D.N.Y. 2002).

[22] *Tri-State Hospital Supply Corp.*, 226 F.R.D. at 125. There is a difference of opinion on whether counsel can inquire beyond the topic list. In *Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 729–30 (D. Mass. 1985), a case that seems now to be the minority view, the District Court of Massachusetts said no. In *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995), the Southern District of Florida said yes. *See also Eng-Hatcher v. Sprint Nextel Corp.*, No. 07 Civ. 7350(BSJ)(KNF), 2008 WL 4104015, at *4–5 (S.D.N.Y. Aug. 28, 2008) and *Crawford v. Franklin Credit Mgmt. Corp.*, 261 F.R.D. 34, 38 (S.D.N.Y. 2009) ("The proper scope of questioning of a Rule 30(b)(6) witness is not defined by the notice of deposition, but by Rule 26(b)(1). . . ."). And in *Falchenberg v. N.Y. State Dept. of Educ.*, the Southern District of New York permitted questions beyond the topic list but said all answers to questions outside the topic list are 30(b)(1) answers and thus not the words of, and not binding on, the organization being deposed.

Another category of unspecified and therefore unacceptable topic lists is a request for testimony on "any matters relevant." In *Alexander v. FBI*, a case that dealt with the FBI's alleged release of private information on political appointees and employees under prior administrations, the plaintiff served a 30(b)(6) notice calling for testimony and documents regarding eight specific topics and, as a ninth, "any other matters relevant to this case, or which may lead to the discovery of relevant evidence."[23] As the *Alexander* court observed, because this ninth category was, "from the face of [it]," non-compliant with the particularity rule, the request was effectively stricken and the defendants freed of the obligation to respond to it with 30(b)(6) testimony or documents.[24]

So to return to the main question, what is sufficient particularization? The court in *Prokosch v. Catalina Lighting, Inc*., *supra*, held that it is a level of detail that shows a "conscientious effort to focus" on discrete subject areas that are substantively and temporally relevant to the claims at issue.[25] Other courts, perhaps more concerned about the potential for abuse by the interrogator, have looked for something a bit more – "painstaking specificity," as a series of Kansas District Court decisions has put it.[26]

At bottom, the consensus among most courts seems to be that, as with many legal standards predicated on the concept of reasonableness, the right result is the Goldilocks approach: not too vague (that would be unfair to the deponent) and not too restrictive (that would be unfair to the interrogator) – just right.

Falchenberg v. N.Y. State Dept. of Educ., 642 F. Supp. 2d 156, 164 (S.D.N.Y. 2008), *aff'd*, 338 Fed. Appx. 11 (2d Cir. 2009).

[23] *Alexander v. FBI*, 188 F.R.D. 111, 114 (D. D.C. 1998).

[24] *Id.* at 121.

[25] *Prokosch v. Catalina Lighting, Inc*., 193 F.R.D. at 639.

[26] *See McBride v. Medicalodges, Inc.*, 250 F.R.D. 581, 584 (D. Kan. 2008); *EEOC v. Thorman & Wright Corp*., 243 F.R.D. 421, 426 (D. Kan. 2007); *Sprint Communications v. TheGlobe.Com, Inc.*, 236 F.R.D. 524, 528 (D. Kan. 2006). *But see Espy v. Mformation Technologies*, No. 08-2211-EFM-DWB, 2010 WL 1488555, at *2 (D. Kan. 2010) (questioning whether such an articulation represented a deviation from the "reasonable" particularity specified in the Rule itself).

It should be noted that moderation is not necessarily required in the number of 30(b)(6) topics that can be designated; unlike the rule governing interrogatories, there is no limit on the number of topics that can be included in the 30(b)(6) notice.[27] In *Heartland Surgical Specialty Hosp. v. Midwest Division*, *Inc.*, for example, the Kansas District Court sustained a topic list that contained 55 separate topics.[28] In *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, *supra*, the Southern District of Florida approved 47 topics.[29] And in *Banks v. Office of the Senate Sergeant-At-Arms*, the D.C. District Court approved a notice with 35 topics (although it found some of those topics to be flawed because they were intrinsically overbroad).[30]

C. The organization's obligation to be prepared

Turning next to the organization's obligation to prepare for a 30(b)(6) deposition, the first job is to designate a suitable representative to testify as a witness for the organization. There is some value in being able to self-designate. Remember that with 30(b)(1) depositions, the deponent is named by the interrogating party. With 30(b)(6) depositions, it is up to the organization being deposed to designate the witness(es) necessary to provide the requested information. However, the organization must be prepared to call as many witnesses as necessary. So, for example, in another opinion issued in *Alexander v. FBI*, *supra*, the court held that "the designating party is under the duty to designate more than one deponent if it would be necessary to do so in order to respond to the relevant areas of inquiry that are specified with reasonable particularity by the [requesting parties]."[31] Furthermore, a defendant cannot attempt to limit the number of witnesses deposed on the basis that it had the right to decide how many such witnesses to produce.[32] The number of witnesses that must be produced is the number of

[27] *Compare* FED. R. CIV. P. 30(b)(6) (no limit on topics) *with* FED. R. CIV. P. 33(a)(1) ("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.").
[28] *Heartland Surgical Specialty Hosp. v. Midwest Division*, *Inc.*, No. 05-2164-MLB-DWD, 2007 WL 1054279, at *1 (D. Kan. Apr. 9, 2007).
[29] *QBE Ins. Corp.*, 277 F.R.D. at 681.
[30] *Banks v. Office of the Senate Sergeant-At-Arms*, 222 F.R.D. 7, 18 (D.D.C. 2004).
[31] *Alexander v. FBI*, 186 F.R.D. 137, 141 (D. D.C. 1998).
[32] *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 338, 343 (N.D. Ill. 1995).

witnesses it takes to provide the information sought by the interrogating party, no more and no less.

As a threshold matter, the burden is on the organization being deposed to make a good faith effort to identify potential witnesses with knowledge of the topics that will be the subject of the deposition.[33] At the same time, the organization has an affirmative duty to prepare such witnesses.[34] This duty to prepare "goes beyond matters personally known to designee . . . if necessary the deponent must use documents, past employees or other sources to obtain responsive information."[35] It encompasses whatever information is reasonably at the disposal of the organization.

To reiterate, it is of no moment that the designee does not have personal knowledge of the topic at hand. Rather, when a witness is designated under Fed. R. Civ. P. 30(b)(6), it "authorize[s] him to testify not only to matters within his personal knowledge but also to 'matters known or reasonably available to the organization.' . . . Thus, [the witness] [i]s free to testify to matters outside his personal knowledge as long as they [a]re within the corporate rubric."[36] Consequently, the interrogating party cannot object to a designee if that witness lacks personal knowledge; but, by the same token, the designating party[37] cannot claim that it is unable to produce a witness because none of its employees has personal knowledge.

As the Rule plainly states, the organization being deposed must make sure that its designee is appropriately knowledgeable. That means the witness may have to be educated – to the extent the information to be provided to the designee is "known or reasonably available."[38] It should

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[33] *See, e.g., Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D. Kan. 1999).
[34] *Id*.
[35] *Harris v. New Jersey*, 259 F.R.D. 89, 92 (D.N.J. 2007).
[36] *PPM Finance, Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 894 (7th Cir. 2004) (internal citation omitted); *cf. Carriage Hills Condo., Inc. v. JBH Roofing & Constructors, Inc.*, 109 So. 3d 329, 332 (Fla. Dist. Ct. App. 2013), *review dismissed*, SC13-809, 2013 WL 2157852 (Fla. May 17, 2013), *reh'g denied* (Nov. 7, 2013).
[37] That is, at least as to party 30(b)(6) witnesses; *see infra,* pp. 12-14, regarding the discussion of the interplay between FED. R. CIV. P. 30(b)(6) and FED. R. CIV. P. 45.
[38] *See Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253 (2d Cir. 1999); *EEOC v. Thorman & Wright Corp.*, 243 F.R.D. at 425 (quoting from FED. R. CIV. P. 30(b)(6)); *Quantachrome Corp. v. Micrometrics*

come as no surprise that this issue has generated considerable litigation and decisional law, since what is "reasonably known" to the organization can be, and often is, a hotly contested issue. In some cases, the lack of preparation is obvious, as in *Starlight International, supra*, where certain defendants failed to make any good faith effort to produce 30(b)(6) designees who were educated as to the subject matter at hand.[39] Nor can a witness who simply reads from an outline consider himself "prepared" within the meaning of the Rule.[40] In other cases, however, the question is much closer and turns on issues such as the availability of documents, other employees, former employees, and other sources of information that the organization can marshal and deliver to the designee: for example, the witness must review outside documents reasonably available to the company.[41] That might very well include prior deposition testimony, documents and exhibits.[42]

One additional point bears mention: the extent to which a responding organization must prepare its witnesses will depend on whether or not the organization is a party to the action. As the court observed in *Wultz v. Bank of China*, a 30(b)(6) deposition notice served on a nonparty must comply with the overarching and overriding requirements of Fed. R. Civ. P. 45, which in all cases governs nonparty discovery.[43] Accordingly, the *Wultz* court held, a nonparty 30(b)(6) target need not take any steps that would not be required by Rule 45. So, for example, the organization would not be required to designate a witness located beyond the 100-mile territorial boundary established by Rule 45.[44] And, by extension, held the court, if the 30(b)(6) subpoena called for testimony on topics that only employees located outside the 100-mile marker could

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Instrument Corp., 189 F.R.D. 697, 699 (S.D. Fla. 1999); *Booker v. Mass. Dept. of Public Health*, 246 F.R.D. 387, 389 (D. Mass. 2007).
[39] *Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. at 635–38.
[40] *In re Neurontin Antitrust Litig.*, No. 02-1390, 2011 WL 2357793, at *2–3 (D.N.J. Jun. 9, 2011).
[41] *Fabiano, Calzaturficio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 38–39 (D. Mass. 2001).
[42] *United States v. Taylor*, 166 F.R.D. at 362.
[43] *Wultz v. Bank of China*, 293 F.R.D. 677, 680 (S.D.N.Y. 2013).
[44] *Id.* at 679–80.

handle, that subpoena would be unenforceable because of the absolute territorial limits imposed by Rule 45.[45]

But what about Rule 30(b)(6)'s requirement that an organization educate its employees about the matters known to the nonresident employees? Isn't an organization that receives a 30(b)(6) notice under such circumstances in the same position as an organization that receives a 30(b)(6) notice and the only knowledgeable employee has left the organization? In the latter situation, the organization is required to educate a currently employed employee to testify on the subject topic. Wouldn't the same logic require the organization to prepare a witness where the only knowledgeable employees are located outside the 100-mile restriction?

That was precisely the argument the Bank of China made in *Wultz*, *supra*, an argument that was soundly rejected by Magistrate Judge Gorenstein, who wrote:

> Certainly, Rule 30(b)(6) imposes upon subpoenaed corporations the duty to make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought . . . and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed . . . . However, in the case of nonparties subpoenaed pursuant to Rule 45, a corporation's duty to respond to a subpoena is subject to the requirements of Rules 45(c)(1) and 45(c)(3)(A)(iv), which mandate that a court must quash a subpoena that subjects a person to "undue burden."[46]

In short, at least to some courts, there is a special "nonparty" blanket of "undue burden protection" that insulates nonparty 30(b)(6) organizations from the full extent of the 30(b)(6) preparation rule.

There has been some effort to codify greater protections for the nonparty 30(b)(6) deponent. In 2013 the Committee on Federal Courts of the Association of the Bar of the City of New York proposed an amendment to Rule 45 "to provide nonparties who are served with Rule 30(b)(6) deposition subpoenas with greater protections against undue burdens."[47]

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[45] *Id.* at 360.
[46] *Id.* (internal citations omitted).
[47] *See* Letter from the Committee on Federal Courts of the Association of the Bar of the City of New York to the Secretary of the Committee on Rules of Practice and Procedure, Apr. 3, 2013, *available at* http://www2.nycbar.org/pdf/report/uploads/20072455-

Neither the *Wultz* court nor the Association of the Bar of the City of New York has articulated a clear reason why the burdens imposed by Rule 30(b)(6) on nonparties are different or greater than the burdens that the Rule imposes on party deponents. It would seem that the rationale behind the desire to shield nonparties from the high-cost, high-stakes world of the 30(b)(6) deposition may simply be because it seems, at a gut level, unfair to impose the costs and stakes of litigation upon organizations that have no stake in the outcome of the case.

D. 30(b)(6) motion practice

Although the parameters governing the 30(b)(6) deposition are unique, the procedural vehicles for blocking or inducing its use are not. A party can make a motion to compel pursuant to Fed. R. Civ. P. 37(a)(3), and an organization that has been noticed for a deposition can seek a protective order pursuant to Fed. R. Civ. P. 26(c).[48] The protective order motion is an especially important device in the 30(b)(6) context because of the impact of organizational testimony, which arguably is more powerful than individual testimony. Generally speaking, if the organization being deposed does not take the proverbial bull by the horns and make such a motion in advance of the date for the deposition, it cannot, at least as a technical matter, refuse to comply with the 30(b)(6) deposition notice.[49] This is of particular concern in the 30(b)(6)

LetteronProposedAmendmenttoRule45reSubpoenasforRule30b6Depos.pdf (hereinafter, "ABCNY Letter").

[48] *See, e.g.*, *Interstate Narrow Fabrics, Inc. v. Century USA, Inc.*, 218 F.R.D. 455, 462 (M.D.N.C. 2003) (discussing a motion to compel); *EEOC v. Thurston Motor Lines, Inc.*, 124 F.R.D. 110, 114–15 (M.D.N.C. 1989) (discussing a protective order).

[49] *See, e.g., Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964), holding that "Rule 30(b) places the burden on the proposed deponent to get an order, not just to make a motion. And if there is not time to have his motion heard, the least that he can be expected to do is to get an order postponing the time of the deposition until his motion can be heard . . . ." *See also Fernandez v. Penske Truck Leasing Co*., 00295-JCM-GWF, 2013 WL 438669, at *2 (D. Nev. Feb. 1, 2013) ("Absent a protective order or an order staying the deposition, the party, including its officers or Rule 30(b)(6) deponents, is required to appear for a *properly noticed* deposition.") (emphasis in original). Of course, if a district court (such as the District Court of Utah) has a local rule automatically staying a deposition pending a motion for a protective order, the making of the motion will stay the obligation to appear. *See, e.g., Petersen v. DaimlerChrysler Corp*., No. 06-cv-0108, 2007 WL 2391151, at *5 (D. Utah Aug. 17, 2007) (staying a deposition under District of Utah Local Rule 26-2). As experienced counsel know, some courts will be more forgiving than others when it comes time to considering sanctions for the deliberate refusal to attend a deposition without an order suspending or canceling that deposition. In *Fernandez*, for example, the court excused the nonappearance on the ground that the notice was not proper and the deponent sent an

context, given the amount of preparation the deponent must do in advance of the deposition. In that regard, the Committee on Federal Courts of the Association of the Bar of the City of New York's proposed amendment to Rule 45, discussed *supra*, suggested a remedy.[50] Citing the "greater burdens of compliance" imposed by a 30(b)(6) deposition, the Committee proposed a minimum notice period for 30(b)(6) depositions of nonparties, and an automatic stay of such depositions upon the filing of a motion for protective order.[51] As of the writing of the article, the rules remain unchanged. Therefore, organizations that have received deposition notices need to consider carefully the consequences of not appearing for a 30(b)(6) deposition absent an order suspending or cancelling the deposition.

E. The consequences of providing (and failing to provide) 30(b)(6) testimony

As already mentioned, there are important, sometimes case-altering, consequences (what Vincent Gambini in that favorite courtroom comedy movie *My Cousin Vinny* called "the case cracker") to the testimony proffered by 30(b)(6) designees.

First, 30(b)(6) answers are generally deemed to be binding upon and attributed to the organization,[52] although most (but not all) courts will treat the statements not as judicial admissions, but rather deposition testimony (like any other deposition testimony) theoretically (but not practically) subject to contradiction on summary judgment or at trial.[53] In this sense,

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objection letter. *See* 2013 WL 438669, at *2. The basic rule to bear in mind, though, is that it is up to the deponent to move for a protective order.

[50] *See* ABCNY Letter.

[51] *Id*.

[52] *See, e.g., Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 993 (E.D. La. 2000), *aff'd*, 31 Fed. Appx. 151 (5th Cir. 2001) ("The designee testifies on behalf of the corporation and holds it accountable accordingly."); *Rainey v. American Forest & Paper Assoc*., 26 F. Supp. 2d 82, 94–95 (D.D.C. 1998) (holding that 30(b)(6) testimony is binding, and no contradiction may subsequently be introduced).

[53] *See, e.g., Indus. Hard Chrome, Ltd. v. Hetran, Inc.,* 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000) ("The testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes."); *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989); *W.R. Grace & Co. v. Viskase Corp.*, No. 90-C-5383, 1991 WL 211647, at *2 (N.D. Ill., Oct. 15, 1991); *but see Ierardi v. Lorillard*, No. 90–7049, 1991 WL 158911, at *3 (E.D. Pa. Aug. 13, 1991); *United States v. Taylor*, 166 F.R.D. at 362. Falling on the side of not permitting contradiction, the courts in *Hyde*, *supra*, and *Rainey, supra*, refused to allow a party to contradict its 30(b)(6) testimony with a subsequent affidavit that was presented as a more fulsome explanation of the issue; those courts held that it was incumbent upon an organizational party being deposed to have prepared its witness

and in most cases, 30(b)(6) testimony has remarkable adhesive qualities: if the 30(b)(6) witness makes damaging statements or gives bad testimony, the organization that proffered the witness likely is going to be stuck with it.[54] The party might be able to explain away the testimony, but the testimony cannot be rejected by the organization.

Second, the consequences of unresponsiveness are important because sanctions under Fed. R. Civ. P. 37(b)(2)(A) are a real possibility. Thus the failure to produce a knowledgeable 30(b)(6) designee has been treated as a failure to appear for the deposition. In *Starlight International*, *supra*, the court imposed sanctions because the witness failed to make any inquiries about the topics of the deposition and made no effort to review any relevant files other than those provided by counsel.[55] Failure to comply with a proper 30(b)(6) notice may also result in the matters covered by the order being taken as established;[56] an order prohibiting the disobedient party from supporting or opposing designated claims or defenses;[57] an order precluding the disobedient party from introducing evidence on that topic;[58] or in the most extreme cases, dismissal of the action or a default judgment entry against the recalcitrant party.[59] A court might even consider a failure to comply with Fed. R. Civ. P. 30(b)(6) to be a contempt of court.[60]

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accordingly. Needless to say, counsel faced with this issue must carefully review the law in the jurisdiction where the case is pending.

[54] *See, e.g.*, *Ierardi v. Lorillard*, 1991 WL 158911, at *3.

[55] *Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. at 635–38. *See also Resolution Trust Co. v. Southern Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993) (holding that if a designee "is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the [designee's] appearance is, for all practical purposes, no appearance at all"); *United States v. Taylor*, 166 F.R.D. at 363.

[56] *See, e.g., Kyoei Fire & Marine Ins. Co., Ltd. v. M/V Maritime Antalya*, 248 F.R.D. 126, 153 (S.D.N.Y. 2007).

[57] *See, e.g.*, *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 380 (5th Cir. 1996) (refusing to allow party to introduce designated matters into evidence).

[58] *See, e.g., Ierardi v. Lorillard*, 1991 WL 158911, at *3 ("If the designee testifies that [the corporation] does not know the answer to plaintiffs' questions, [the corporation] will not be allowed effectively to change its answer by introducing evidence during trial."); *see also United States v. Taylor*, 166 F.R.D. at 362.

[59] *See, e.g., Banco Del Atlantico, S.A. v. Woods Industries, Inc.*, 519 F.3d 350 (7th Cir. 2008) (in which over a decade of deposition "fiascos," during which plaintiffs failed to produce prepared deponents and instructed witnesses to be unavailable for deposition, led to the dismissal of the case); *see also Commodity Futures Trading Com'n v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 770–71 (9th Cir. 1995) (upholding an entry of summary judgment against a party that repeatedly failed to designate a witness).

[60] *See, e.g., Pioneer Drive, LLC v. Nissan Diesel America, Inc.*, 262 F.R.D. 552, 560–61 (D. Mont. 2009).

The most common form of a response to a violation of Fed. R. Civ. P. 30(b)(6) is a sanctions order under Fed. R. Civ. P. 11 and/or 37(d). That being said, courts generally will take into account the good faith of the organization when considering sanctions. For example, in *Banks v. Office of the Senate Sergeant-At-Arms*, the court chose not to issue a preclusion order at trial, since the significance of the subject evidence, which covered "every issue in the lawsuit," would have made its preclusion tantamount to a default judgment, an excessive sanction.[61] Similarly, the court in *EEOC v. Lockheed Martin* observed that "the harshest sanctions are inappropriate if the failure to comply was due to a party's inability to comply or to circumstances beyond the party's control," as opposed to a refusal to comply.[62] In these cases, courts have other tools at their disposal to correct noncompliance. The court can order the organization being deposed to redesignate a witness.[63] Or the court might decide that on the whole the witness has met the mark, and order the deposing party to submit any remaining questions in the form of interrogatories or as a request for document production.[64]

As in most matters involving the question of discovery compliance *vel non*, it is critical in the 30(b)(6) context that counsel on both sides of a motion to compel (or, for that matter, for a protective order) consider not only the merits of their respective positions but also the impact of local rules, rules of practice of the presiding judge, and the predilections and leanings of the judge who will be deciding the motion. That takes us to our next discussion: the ways in which 30(b)(6) depositions are being used in practice or, as one might say, in the field.

II

[61] *See Banks v. Office of the Senate Sergeant-At-Arms*, 222 F.R.D. at 19.
[62] *EEOC v. Lockheed Martin,* CIV. 05-00479 SPK-LEK, 2007 WL 1521252, at *9 (D. Haw. May 22, 2007) *supplemented*, 05-00496 SPK-LEK, 2007 WL 1576467 (D. Haw. May 29, 2007).
[63] *See* discussion in *Dey, L.P. v. Eon Labs, Inc.*, No. SACV 04-00243 CJC (FMOx), 2005 WL 3578120, at *6 (C.D. Cal. Dec. 22, 2005).
[64] *Alexander v. FBI*, 186 F.R.D. at 142–43; *see also United States v. Massachusetts Indus. Fin. Agency*, 162 F.R.D. 410, 412 (D. Mass. 1995) (stating that after a Rule 30(b)(6) deposition and five Rule 30(b)(1) depositions rendered contradictory and incomplete testimony, and it became clear that an attempt to redesignate a witness would be "futile," the proper course was to require the defendant "to produce more documents and clarify its position in response to a number of interrogatories").

NOTES FROM THE FIELD: HOW TO USE 30(b)(6) DEPOSITIONS MORE EFFECTIVELY AND ECONOMICALLY

Of course, the key to conducting and defending 30(b)(6) depositions effectively and economically is knowing the boundaries set by the Rule. That was the focus of Part I. Part II covers ways in which litigants have used and can use the 30(b)(6) deposition to achieve their litigation goals.

A. Frame an effective notice

The 30(b)(6) deposition begins with the interrogating party formulating the notice, continues with the deposition itself, and ends with the use of the testimony on a dispositive motion or at trial. The notice is critical. If that is not handled properly, the effectiveness of the entire tool is diminished. The practitioner should be careful to ensure that the organization is properly named (Is the corporate parent's deposition sought or that of a subsidiary? Or perhaps a holding company?), that the deposition is held in a helpful sequence (consider whether the 30(b)(6) deposition is better taken before or after that of a 30(b)(1) witness whose individual knowledge is sought), and that the topic list is appropriately broad (or narrow, depending on the aim of the deposition).

Well-crafted deposition notices, with thoughtful topic lists, are an integral part of the litigant's discovery plan. It is worth the time (and the client's money) to prepare the notice so that it meets the litigator's objectives.

B. Consider remote depositions

Occasionally, parties will want to take a deposition, whether of the 30(b)(1) or 30(b)(6) variety, in a location other than where the witness is located. In such cases, where the parties agree or the court directs, the deposition can be taken remotely, either by audio or audiovisual means.[65]

[65] *See* FED. R. CIV. P. 30(b)(4); *see also Estate of Gerasimenko v. Cape Wind Trading Co.*, 272 F.R.D. 385, 390 (S.D.N.Y. 2011), authorizing a telephonic 30(b)(6) deposition; *RP Family, Inc. v. Commonwealth*

In the ordinary application for such relief, the issue revolves around the capability or wherewithal of one of the parties to travel to the location where the witness is located or where the case is pending. Either the deponent cannot travel to where the deposition is taking place (perhaps because of a physical disability or some other circumstance) or the interrogating lawyer cannot travel to where the witness is located. But in the 30(b)(6) situation, there is another consideration: whether an interrogating lawyer who wishes to depose an organization located beyond the 100-mile radius set by Fed. R. Civ. P. 45 is using the procedure of the remote deposition to evade Rule 45's proscription against such depositions.[66]

This was precisely the concern articulated in *RP Family, Inc. v. Commonwealth Land Title Ins. Co.,* where the court recognized that some might try to evade the 100-mile requirement of Rule 45 by taking a deposition of the distant designee remotely.[67] In that case, the court found no evidence of gamesmanship.[68] But litigants and courts should be attuned to this possibility in other cases.

C. Think through the pros and cons of the scope of the 30(b)(6) deposition

Counsel taking a 30(b)(6) deposition must carefully consider the breadth of topics to be covered by the deposition. In some cases, it might actually be to the deposing counsel's benefit to limit the number of topics to be covered at the deposition. For one thing, a concise topic list increases the likelihood that the 30(b)(6) designee will be fully prepared to testify. It also decreases the likelihood that a reviewing court will be inclined to prune the topic list or perhaps reject it outright.

On the other hand, there are considerable advantages to a more fulsome list. First, obviously, a broad list captures more information than a narrow list. Second, depending on the jurisdiction,

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Land Title Ins. Co., Nos. 10 CV 1149(DLI)(CLP), 10 CV 1727(DLI)(CLP), 2011 WL 6020154 (E.D.N.Y. Nov. 30, 2011) (same).

[66] *See supra*, pp. 13–14.

[67] *RP Family, Inc. v. Commonwealth Land Title Ins. Co.,* 2011 WL 6020154, at *4.

[68] *Id.*

the court might not permit any questioning that falls or is deemed to fall outside the topic list, or might treat such questions and answers as outside the purview of 30(b)(6) and simply the testimony of a 30(b)(1) witness.[69] A broad list makes it more likely that a line of questioning will be sustained as within that topic list. Third, a broad list can effectively give an interrogating party multiple opportunities to approach an issue from multiple angles and thus potentially create internal inconsistencies that can be used for impeachment at trial. Fourth, a broad list takes advantage of the rule, followed by most (but not all) courts, that opinions and positions are fair game on a 30(b)(6) deposition.[70] Such "contention depositions" can prove to be valuable in focusing on what is really important and spending less time and money on issues that are not central to the other side's case.

D. Carefully designate the witness – he or she *is* the organization

The designated representative has an important job. That person is speaking for the organization and therefore must be able to handle himself or herself in a deposition setting. The designating party must consider the witness's poise and demeanor, existing knowledge, teachability as to matters outside his or her personal knowledge, and responsibilities within the organization. As to this last point, the defending counsel must not forget the amount of preparation required of the 30(b)(6) witness and consider whether the senior executive being offered will really have the time to prepare the way a middle-management employee might. Moreover, since the more senior executive has probably discussed the case with counsel, that witness is more likely to be privy to communications and information better not disclosed. The defending counsel can prepare a lower-level designee with sufficient information on potential contention issues to be compliant with the Rule, while remaining in control of the information and the ability to limit it appropriately and safely.

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[69] *See supra*, fn. 22.

[70] *Compare United States v. Taylor*, 166 F.R.D. at 356 (holding that 30(b)(6) permits questioning on "not only facts but subjective beliefs and opinions of the corporation"), and *Radian Asset Assurance, Inc. v. Coll. of the Christian Bros. of N.M.*, 273 F.R.D. 689, 691–92 (D.N.M. 2011), both of which favor "contention depositions," *with SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) (rejecting 30(b)(6) contention topics on the ground that they are actually invasive of the attorney work product doctrine).

There is little advantage to be gained by producing more than the minimum number of designees necessary to meet the organization's 30(b)(6) obligations. Moreover, remember that the designated witness need not be the most knowledgeable person in the organization – all the Rule requires is sufficient preparation.[71] This means that, if the most knowledgeable witness is not the best witness (or the organization wants to keep the most knowledgeable witness under wraps), that person need not be designated for 30(b)(6) purposes.

Ultimately, in most cases one witness, someone with a good handle on the topic list, is optimal. What the witness does not know can be taught, and if he or she is the only witness, there is little opportunity for internal inconsistencies. Ironically, with a broad topic list, the advantage of one witness is even greater, as the combination of a broad list and multiple witnesses can be a recipe for inconsistencies. Along the same lines, counsel defending the deposition should be careful either to object to questions that go beyond the scope or make clear that the witness's answers are offered in his or her individual capacity and not for the organization.

E. Be creative – propose a deposition by committee

In May 2004, attorneys Jerold S. Solovy and Robert Byman of Jenner & Block wrote an essay suggesting that in some cases it might make sense for 30(b)(6) depositions to take place "by committee."[72] That is, the parties would agree that instead of taking serial depositions of designated witnesses, those designated witnesses would appear in one room at one time and answer the questions put to them by the interrogator.[73] This process, which we understand a number of litigators have employed, is not required by the Federal Rules and thus is dependent upon the agreement of counsel for the parties. It is similar in concept to the "hot-tubbing" of

[71] *See Rodriguez v. Pataki,* 293 F. Supp. 2d 305, 311 (S.D.N.Y. 2003).
[72] Jerold S. Solovy and Robert L. Byman, *Deposition by Committee*, THE NATIONAL LAW JOURNAL, May 17, 2004, *available at* http://jenner.com/system/assets/assets/4557/original/05_17_2004_Deposition_By_Committee.pdf?1320177635.
[73] *Id.*

expert witnesses, where all of the experts in a case are thrown into a room and allowed to engage in a veritable battle royale over the technical issues at hand.[74]

The idea, basically, is that in order to cut to the chase on any set of 30(b)(6) topics, all possible organizational witnesses are assembled in one place and questioned, perhaps with appropriate adjustments to the time allotments under the Federal Rules.[75] The advantage of this approach, from the perspective of the taking attorney, is that it is much easier to eliminate any residual "bandying" that might otherwise take place when deposing multiple witnesses one after the other. If one witness does not know an answer, the interrogator can go down the line of designated witnesses until the one with the answer offers it. On the defending side, that process might actually make sense because the possibility of conflicting testimony is greatly reduced: since the witnesses are not effectively sequestered, as they are under ordinary circumstances, they can testify with the aid of knowing what his or her counterparts have said. Deposition by committee also offers some attraction to the budget-conscious general counsel, since the entire deposition is completed in one session, rather than multiple sessions.

Of course, this process might not fit with the tactical desires of litigation counsel on both sides who might wish to take advantage of the nature of serial depositions – such counsel might believe that their clients would be better off bearing, and imposing on the other side, the

[74] For an excellent discussion of the Australian method of hot-tubbing experts, *see* Megan A. Yarnall, *Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary*? 88 OREGON L. REV. 311 (2009).

[75] *See* FED. R. CIV. P. 30(d)(1). The application of the seven-hour time limit to Rule 30(b)(6) has generated a fair amount of motion practice. One issue is whether an organization that produces multiple witnesses subjects each witness to a seven-hour session. As the court observed in *Sabre v. First Dominion Capital, LLC*, the 2000 Advisory Committee Notes expressly provide that ""[f]or purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition." *Sabre v. First Dominion Capital, LLC*, No. 01CIV2145BSJHBP, 2001 WL 1590544, at *1 (S.D.N.Y. Dec. 12, 2001) (quoting FED. R. CIV. P. 30(d)(1) advisory committee's notes, subdivision (d) (2000)). The tougher question is how to calculate the seven-hour limit for the witness who is asked about, and gives answers to, questions that go beyond the scope of the topic list. Assuming the court has treated such extra-topical questions as individual and not organizational questions, it is likely that the court will treat the seven-hour clock as running separately as to each part of the deposition. *See, e.g., Sabre*, 2001 WL 1590544 at *1. But bear in mind the *Sabre* court's admonition that the interrogating party does not in all cases have "*carte blanche* to depose an individual for seven hours as an individual and seven hours as a 30(b)(6) witness." *Id.* at *2. Especially if the organization being deposed is a close corporation, a court might very well be inclined to issue a protective order shielding the witness from a full fourteen hours of questioning.

expense and burden of the ordinary 30(b)(6) deposition. For them, this technique would be anathema. For those looking for a creative path to effectiveness and efficiency, it should be considered.

F. Prepare the witness with care

The sloppily prepared witness, whether the result of less-than-ideal lawyering or a lazy witness, is a litigation nightmare. Remember: The witness is the organization, and the failure to be able to handle a question about a topic that was designated by the interrogator has severe consequences. Again, it is worth the time and expense to make sure the preparation is handled correctly.

A few pointers:

- **Take the time to prepare the witness**. Depending on how busy the witness is, make sure to build in adequate time to prepare. That means pushing back against a deposition notice that gives insufficient time to prepare, making sure the witness's vacation schedule is not a mystery, and checking in with the witness during his preparation. Better to be a nudge than suffer the witness's poor performance.
- **Make sure to control what the witness reviews**. The interrogating party may seek to discover what the witness reviewed to prepare for the deposition. Some courts will allow that discovery, some will not, and some will try to fashion a compromise. A witness who happens upon a privileged document or memorandum and testifies that it was part of his preparation is usually part of the proverbial worst-case scenario. The easiest way to make sure that there are no such "worst-case scenarios" is to limit the witness's review to documents and other materials preselected by the lawyer. If there is a particularly sensitive document, consider leaving it out of the binder presented to the witness and reviewing that with the witness orally.

- **Review areas beyond the topic list that are likely subjects of examination.** The well-prepared witness will be comfortable with questions that concern matters that go beyond the topic list. The defending counsel might be able to head off such questions by making timely objections, but with no guarantee that a court will sustain the objection and shield the witness from such questions, it makes sense to prepare the witness for questions that are part of the case but not on the list. Put another way, instead of gloating about the interrogating party's oversight in the topic list, assume the interrogator will get around to that topic and prepare the witness accordingly.
- **Don't forget ESI**. Remember that the existence, location, and preservation of electronically stored information is all fair game for a 30(b)(6) deposition. Make sure the witness is capable of answering questions that are likely prepared by the interrogating party's litigation geek squad. Consider using your own information technology experts to help prepare the witness.
- **Don't take the witness's preparation for granted**. Be cynical. Be paranoid. Assume your witness has not done his or her homework and take appropriate remedial action. If your witness surprises you with an Oscar-worthy performance, so much the better. Just make sure the witness can handle the questions, since a less-than-ideal performance will always be the preparing lawyer's fault.

G. Budget honestly

Whether you are handling a case on a contingency fee and thus financially responsible to your partners (or the bank), or on an hourly basis, and thus responsible for explaining your bills to your client, or working on some other alternative fee basis, budget honestly. If you are billing your client on an hourly basis, don't surprise the general counsel with a bill for preparing for 30(b)(6) depositions that swallows up the entire discovery budget. Prepare the general counsel by advising the importance of the 30(b)(6) deposition, the consequences of a 30(b)(6)

deposition that goes south, and the need for thorough preparation, including an education on topics that might not be familiar to the witness. As we all know, the reality is that litigation is rarely inexpensive, discovery is usually the most expensive part of any litigation, and 30(b)(6) depositions, in particular, demand serious attention and resources. You will be doing yourself and your client a service by making sure your budget reflects that reality.

SANCTIONS FOR DISCOVERY VIOLATIONS

By Hon. Frank J. Bailey and Mark Svalina, Intern to Judge Bailey

I. The Purpose and Essence of Rule 37

Pretrial discovery is an essential cornerstone of the U.S. adjudicatory process. Today, pre-trial discovery rules establish a vast array of methods for parties to uncover all relevant and non-privileged information prior to trial. This system largely operates on an honor system, although guided by the court, carried out independently by parties' and their respective counsel. By the very nature of the system, abuses are foreseeable.

Most litigators have at some point in their careers been placed in a situation where opposing counsel has made repeated refusals of reasonable discovery requests, withheld information, played the colloquial "hide and go seek" by placing information within mountains of documentation and/or obscure electronic formats, untimely filed documentation, failed to identify experts or witnesses in a timely manner, or took an otherwise frivolous position in their discovery denials while dancing on the fine line of ethical impropriety. Federal Rule of Civil Procedure Rule 37 was adopted to address these abuses, impress upon attorneys their responsibilities and advance the confidence and efficiency of our system of justice.

A. FRCP Rule 37 applicability in Bankruptcy Cases and Proceedings

While federal law has several tools to address non-compliance, sanctions for failure to comply with discovery rules are primarily governed by Fed. R. Civ. P. Rule 37, and made applicable in bankruptcy proceedings (both adversary proceedings and contested matters) pursuant to Fed. R. Bankr. P. 7037. See Fed. R. Bankr. P. 7037. See also *In re Peckham*, 442 B.R. 62, 85 (Bankr. D. Mass. 2010)(determining that sanctions

for violation of discovery orders are solely governed by Rule 37). An adversary proceeding can best be thought of as a civil action in Bankruptcy Court. For a list of what constitutes an "adversary proceeding," see Fed. R. Bankr. P. 7001. Adversary proceedings include: a proceeding to recover money or property; a proceeding to determine the validity, priority, or extent of a lien or other interest in property; a proceeding to object to or revoke a discharge; a proceeding to obtain an injunction or other equitable relief a proceeding to subordinate any allowed claim or interest; and a proceeding to obtain a declaratory judgment relating to any of the foregoing.

In contrast, a "contested matter" occurs once a motion is opposed or an objection to a claim is lodged. The dispute then becomes a "contested matter," to which the Federal Rules of Bankruptcy Procedure (otherwise applicable in adversary proceedings) apply. Specifically, Fed. R. Civ. P. Rule 37 is among those provisions made applicable. See Fed. R. Bankr. P. 7037. See also Bailey and Dinardo, "Litigation in Bankruptcy Court: It's all about the Rules," October 16, 2012, which can be found on the web at http://www.mad.uscourts.gov/bbc/pdf/BKLITPresentationLitigationinBankruptcyCourtItsAllAbouttheRulesB1491553.pdf.

II. How is a Motion for Sanctions is Brought under Rule 37

To protect the sanctity of the liberal discovery rules, Rule 37 provides for sanctions for acts taken in violation of both court order and/or specifically designated discovery rules. For instance, before sanctions may be imposed under Rule 37(b), a party generally must obtain an order providing or permitting discovery, e.g., an order to compel under Rule 37(a), an order for physical or mental examination under Rule 35, or an order for a discovery conference under Rule 26(f). This prior order is necessary

because Rule 37(b) applies only to a violation of a court order, not to a failure to comply with a discovery request or obligation. See Fed. R. Civ. P. 37(b)(1)-(3); See also *Judson v. Midland Credit Mgmt., Inc.*, No. CIV.A. 13-11435-TSH, 2014 WL 4965944, at *2 (D. Mass. Oct. 1, 2014)(finding that a motion for Rule 37(b) sanctions without violation of a standing discovery order lacks a factual predicate for judicial consideration.)

However, beyond Rule 37(b), there are exceptions to the principle that discovery-related sanctions can be imposed only upon the violation of a prior court order. Rule 37(c) and (d) both allow for immediate imposition of all of the sanctions listed in Rule 37(b)(2)(A) (except contempt) against a party, for failure to make disclosures or supplement earlier responses under Rule 26(a)-(e), failures to admit under Rule 36, or respond to a notice of a deposition under Rule 30 and 31, interrogatories or a request for inspection under Rules 33 and 34 respectively. See Fed. R. Civ. P. 37(c)-(d).

Thus, when a party is contemplating whether to bring a motion for sanctions the party must be cognizant of the type of violation at issue. Different violations may require a different procedural approach (e.g. require an order to compel) prior to the filing of a motion for sanctions.

III. When is a Motion for Sanctions Appropriate

Once a party has determined that a violation of the discovery procedure as imagined under Rule 37 has occurred, the party must then decide whether bringing a motion for sanctions is appropriate. In determining the propriety of any motion, a party must first make a good-faith attempt to resolve the issue out-of-court. Then and only then should a party assess the severity of the violation(s) against the appropriate court standard.

A. The Good Faith Attempt to Confer

All motions for discovery, including a motion for sanctions, must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with the party in violation. See Fed. R. Civ. P. 37(a)(1). In addition, local rules often supplement this provision to ensure discovery disputes are legitimate and proper for consumption of judicial resources. For instance, under Local Bankr. Rule 7037-1, the parties must confer by telephone or in person to resolve the discovery dispute and to eliminate as many areas of the dispute as possible without the necessity of filing a motion. See Local Bankr. Rule 7037-1(b). In addition, if the parties are unable to resolve a discovery dispute and a discovery motion is filed, the parties must file a joint stipulation specifying the dispute and their respective positions. See Local Bankr. Rule 7037-1(c). See in comparison Local Rule 37.1(a)-(c)(requiring the movant, rather than both parties identify the dispute, attempt(s) to confer, and support for the motion).

Generally, one will seldom find a court willing to entertain a motion for sanctions where a movant ignores or violates this duty to confer without justification. The court, in assessing whether there has been a violation of this duty will look to see if the movant has "meaningfully complied." See *Judson v. Midland Credit Mgmt., Inc.,* No. CIV.A. 13-11435-TSH, 2014 WL 4965944, at *2 (D. Mass. Oct. 1, 2014)(finding the failure to meaningfully comply with the good faith requirement of conferring with opposing counsel before the filing of a sanctions motion violates the local rules). Meaningful compliance is determined as to the totality of circumstances. However, at a minimum it must mean that prior to filing the respective parties must first fail to agree on a discovery matter, a movant must follow the local rules precisely and diligently (e.g. motion filed

with a certification of good faith compliance), and that the issues are narrowed and refined for the court's consideration. See *Laporte v. Lab. Corp. of Am. Holdings*, No. CIV. 13-12084-FDS, 2014 WL 2818591, at *7 (D. Mass. June 20, 2014)(defining meaningful compliance).

B. Factors Considered by the Court

Only after the party has made all reasonable efforts to confer and resolve the disputed violation(s) should a party begin to assess how the court will analyze a motion for sanctions. In so doing, the First Circuit has recently provided guidance to the district courts in considering the appropriateness of sanctions, by demanding the court take into account a non-exhaustive list of factors for consideration when reviewing a Rule 37 motion for sanctions, some substantive and others procedural. *AngioDynamics, Inc. v. Biolitec AG*, No. 14-1603, 2015 WL 1055519, at *4 (1st Cir. Mar. 11, 2015) (quoting *Vallejo v. Santini–Padilla,* 607 F.3d 1, 8 (1st Cir. 2010)). *Substantively*, the court must weigh "…the severity of the discovery violations, legitimacy of the party's excuse for failing to comply, repetition of violations, deliberateness of the misconduct, mitigating excuses, prejudice to the other party and to the operations of the court, and adequacy of lesser sanctions." *Id. Procedurally*, "[the court] considers whether the district court gave the offending party notice of the possibility of sanctions and the opportunity to explain its misconduct and argue against the imposition of such a penalty." *Id*.

If these factors predominate heavily toward one side, the court's order is clear. However, a court need not find all of the above listed factors, and not need find

substantial violations before ordering sanctions. After all, disobedience of court orders, in and of itself, constitutes extreme misconduct.

IV. Types of Sanctions

Once it has decided that sanctions should be imposed against the responding party, the court has broad discretion in deciding exactly which sanction or combination of sanctions to order. Counsel should carefully consider the best result for the client in requesting sanctions. Rule 37 provides for a broad spectrum of sanctions, which include: (1) imposition of expenses; (2) designating facts to be taken as established; (3) prohibiting a party from supporting or opposing designated claims or defenses; (4) striking pleadings; (5) staying further proceedings until order is obeyed; (6) dismissing the action in whole or in part; (7) rendering a default judgment; and (8) contempt of court. See Fed. R. Civ. P. 37(b)(2)(A)(i)-(vii). Importantly, a court is not limited to any specific type of sanction on a given matter, and need not exhaust milder forms of sanctions before imposing a harsher penalty (e.g. dismissal or default). See *In re Eddy*, 339 B.R. 8, 15 (Bankr. D. Mass. 2006).

A. What is the most Common Sanction

Perhaps the most commonly imposed sanction under Rule 37 is an award of expenses, including attorney fees, to the prevailing party. Interestingly, although the court has broad discretion in imposing sanctions, Rule 37 contemplates a mandatory award of reasonable expenses in the event certain types of violations occur. The court "must" require a party, and/or the attorney advising the party, to pay reasonable expenses under Rule 37(a)(5) (in connection with a motion to compel), Rule 37(b)(2)(C) (in connection with a party's failure to comply with a discovery order) and Rule 37(d)(3) (in

connection with a party's failure to respond to discovery). See Fed. R. Civ. P. 37(a)(5)(A); 37(b)(2)(C); 37(d)(3).

The imposition of reasonable expenses is not mandatory, however, if the court finds that the respondent was "substantially justified" in its failure or that "other circumstances make an award of expenses unjust" or, in the case of an order to compel, that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action. *Id*.; See also *Ins. Recovery Grp., Inc. v. Connolly*, No. CIV.A. 11-10935-WGY, 2015 WL 1373372, at *3 (D. Mass. Mar. 26, 2015)(granting reasonable expenses as the failures to comply with discovery orders were not substantially justified and no other circumstances make an award of expenses unjust.)

B. Substantive Sanctions: Dismissal and Defaults for Discovery Abuses

A litigant that flouts a court order does so at his/her own peril. A court faced with a disobedient litigant has wide latitude to choose from a plethora of available sanctions. Among these available sanctions is the court's ability to dismiss an action with prejudice or entering default judgement. Dismissal and default are most assuredly the harshest sanctions available as it denies a party a hearing on the merits of a claim, which is generally contrary to our principles of justice. Moreover, as most abuses are attributable to counsel, the applicability of these sanctions may at times seem too harsh. See *Rivera-Velazquez v. Hartford Steam Boiler Inspection & Ins. Co.*, 750 F.3d 1, 6 (1st Cir. 2014)(reaffirming the First Circuit's stance that the abuses of counsel are attributable to their clients.); See also *In re Balser*, No. 10-17292-JNF, 2013 WL 4409187, at *12 (Bankr. D. Mass. July 23, 2013). However, although harsh, the courts have recognized

these sanctions as both an essential tool for the courts' effective exercise of its duty to establish orderly processes and manage the case.

Consequently, courts are reluctant to impose sanctions as severe as dismissal or default. This reluctance is illustrated by many of the factors utilized by courts in determining the appropriateness of sanctions, and a general requirement that when a "…sanction carries the force of a dismissal [or default judgment], the justification for it must be comparatively more robust." See *Esposito v. Home Depot U.S.A., Inc.*, 590 F.3d 72, 79 (1st Cir. 2009).

Simply stated, there is no single blue print available to determine when dismissal or default may be considered appropriate by a court. Rather, the appropriateness will be determined through a totality of circumstances analysis. Even so, case law provides instruction as to the court's ability. The First Circuit has repeatedly upheld dismissals/defaults for "extremely protracted inaction (measured in years), disobedience of court orders, ignorance of warnings, [and] contumacious conduct." See *Vazquez-Rijos v. Anhang*, 654 F.3d 122, 127-8 (1st Cir. 2011)(citing *Cosme Nieves v. Deshler*, 826 F.2d 1, 2 (1st Cir. 1987)(listing cases)).

For instance, dismissal and default sanctions are seemingly reserved for "the severe, repeated, and deliberate abuses, with no legitimate or mitigating explanation for noncompliance." See *AngioDynamics, Inc. v. Biolitec AG*, 780 F.3d 429, 435 (1st Cir. 2015)(finding default appropriate where abuses over a five year period were repeated and deliberate); see also *Vazquez-Rijos v. Anhang*, 654 F.3d 122, 129 (1st Cir. 2011)(finding dismissal with prejudice appropriate where over a three year period abuses were deliberate and severely prejudicial). That is to say, that the violation of one discovery

rule or court order should not ordinarily be sufficient in the imposition of a dismissal/default. See *In re Hamilton*, 399 B.R. 717, 722 (B.A.P. 1st Cir. 2009) (holding that one violation of a discovery order is insufficient to warrant a dismissal).

V. Conclusion

In the adversarial construct of our judicial system, a fair pretrial discovery process is not only desirable, it is essential. Without Fed. R. Civ. P. Rule 37, the means of obtaining that discovery would often be unavailing, placing at risk an injured parties' ability to seek relief and the court's power to timely adjudicate. Rule 37 establishes certain mechanisms by which the court can assure that pretrial discovery is both fair and effective. Simply put, Rule 37 is the court's hammer which it wields by reluctant necessity to deter and punish pretrial discovery abuses.

Cases	Relief Sought under R. 37	Violations/Abuses	Sanctions Imposed
AngioDynamics, Inc. v. Biolitec AG, 780 F.3d 429, 435 (1st Cir. 2015)	Seeking the entry of default judgment.	Defendant's resisted Plaintiff's efforts to depose key witnesses in violation of multiple court orders, violated an order to compel specific documents, Defendant's violated a preliminary injunction enjoining a merger [effectuated in contradiction], Defendant's failed to appear at their subsequent contempt proceeding.	**Sanction - Default Judgment** - Here, over a five year period Defendant's resisted Plaintiff's efforts to depose key witnesses in violation of multiple court orders, violated an order to compel specific documents, Defendant's violated a preliminary injunction enjoining a merger [effectuated in contradiction], Defendant's failed to appear at their subsequent contempt proceeding.
Cavanagh v. Taranto, No. CIV.A. 12-10745-DPW, 2015 WL 1442476, at *7 (D. Mass. Mar. 31, 2015)	Seeking to strike expert witness report/testimony.	Fed.R.Civ.P. 26(a)(2) requires that a written expert report be submitted in a timely manner in accordance with the discovery schedule set by the court. A supplemental expert disclosure was not made until 3 days before the scheduled deposition. Plaintiff failed to timely file draft expert witness report.	**Sanction - Under Rule 37(c)(1),** as enforcement provisions for Rule 26(a)(2) **expert witness disclosures**, the failure to identify a witness as required by Fed.R.Civ.P. 26(a) prevents the party from using that witness to supply evidence on a motion, "unless the failure was substantially justified or is harmless. In this instance,
Bern Unlimited, Inc. v. Burton Corp., No. CIV. 11-12278-FDS, 2015 WL 1442456, at *12 (D. Mass. Mar. 31, 2015)	Seeking to strike supplemental expert report.	Under Rule 26(e), a party must supplement or correct a disclosure made under Rule 26(a) "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Plaintiff did not timely disclose witnesses.	**Sanction - Under Rule 37(c)(1)**, as enforcement provisions for Rule 26(a) and (e) , the standard sanction for a disclosure violation is preclusion of the untimely evidence, unless the violation was substantially justified or harmless. A district court has discretion to craft an alternative remedy, such as a continuance, if the prejudice caused by the untimely disclosure can be cured before trial. Here, the court found the the **untimely witness disclosure** was not harmless nor justified, and thus precluded from admittance.
Ins. Recovery Grp., Inc. v. Connolly, No. CIV.A. 11-10935-WGY, 2015 WL 1373372, at *3 (D. Mass. Mar. 26, 2015)	Seeking reasonable expenses, including attorneys costs	Did not comply with the TRO and failed to comply with the discovery orders. Motion to Compel the turning over of laptops. Defendants wiped harddrives. Court ordered to turn over copied harddrives.	**Sanction - Under Rule 37(b)(2)(c)** - Court must order disobedient party, the attorney adivisng that party, or both to pay the **reasonable expenses, including attorney's fees**, unless the failure was substantially justified or other circumstances make an awared of expenses unjust. Here, no circumstances justified.
Cohen v. Elephant Rock Beach Club, Inc., No. CIV.A. 12-11130-DPW, 2014 WL 6792106, at *4 (D. Mass. Dec. 3, 2014)	Seeking to strike supplemental expert report.	Fed.R.Civ.P. 26(a)(2) requires that a written expert report be submitted in a timely manner in accordance with the discovery schedule set by the court. A supplemental expert disclosure was not made until 3 days before the scheduled deposition.	**No Sanction - Under Fed.R.Civ.P. 37(c)(1)**, failure to comply with the disclosure requirements of Rule 26(a) can result in a sanction—a prohibition on the use of testimony stemming from an untimely **expert disclosure**, "unless the failure was substantially justified or is harmless." The violation was harmless as the supplement concerned a matter unimportant to the outcome of the case.
Judson v. Midland Credit Mgmt., Inc., No. CIV.A. 13-11435-TSH, 2014 WL 4965944, at *2 (D. Mass. Oct. 1, 2014)(	Seeking an order to compel with sactions.	Plaintiff filed a motion to compel two days after opposing counsel's stated mailing date [no court order on discovery schedule or timeframe existing].	**No Sanction - Under Fed.R.Civ.P. 37(b)(1),** a **prequisite for sanctions is an order providing for discovery**. Without such, sanctions are not available. Here, no such order was standing, and thus sanctions not warranted.
Softub, Inc. v. Mundial, Inc., No. CIV.A. 12-10619-DPW, 2014 WL 5151409, at *22 (D. Mass. Sept. 30, 2014)	1. Seeking to strike late answer to Interrogatory and to strike a later allegation within the amended complaint. 2. Preclude Plaintiff from pursuing claims based on the late answer.	Late interrogatory answer.	**No Sanction - Under Fed.R.Civ.P. 37(c)(1)**, late disclosure of the interrogatory answer in of itself does not warrant striking. Moreover, the judge found the matter unimportant to the outcome of the case.
Zhuang v. Saquet, 303 F.R.D. 4, 7 (D. Mass. 2014)	Seeking to dimiss for failure to comply with discovery orders/failure to prosecute.	Pro se litigant, within a five year old case, numerous extensions given by court for Plaintiff to comply with discovery orders [i.e. to turnover responsive discovery]. In addition failed continuously to answer and/or turnover information pursuant to discovery requests by Defendants.	**Sanction - Fed.R.Civ.P. 37(b)(2)(A)(v)** - Court ordered case **dismissal with prejudice** due to plaintiff's persistent and pervasive violations. Dismisal in this case served not only to punish the offender but also to deter others from similar conduct.
Davis v. Diversified Consultants, Inc., 36 F.Supp.3d 217, 222 (D. Mass. June 27, 2014)	To strike the affidavit of a potential witness which defendant offered in support of its motion for summary judgment and in opposition to plaintiff's motion for summary judgment.	Defendant failed to make a timely disclosure of witness pursuant to FRCP 26(a)(2).	**No Sanction - Under Rule 37(c)(1), as enforcement provisions for Rule 26(a)(2) expert witness disclosures**, the failure to identify a witness as required by Fed.R.Civ.P. 26(a) prevents the party from using that witness to supply evidence on a motion, "unless the failure was substantially justified or is harmless. In this instance, The failure was substantially justified as the witness is a new employee.
Ruiz v. Principal Fin. Grp., No. 12-CV-40069-TSH, 2013 WL 6524655, at *3 (D. Mass. Dec. 10, 2013)	To strike non-responsive pleadings, enforce an order for plaintiff to be deposed, and for reasonable expenses.	Plaintiff failed to comply with the court's discovery.	**Sanctions - Under Rule 37(b)(2)(A)**, a court may impose sanctions for a failure to obey a discovery order. Here, the **Defendants recommended many of sanctions listed per that certain rule. The Court considered every requested sanction, and granted them in part**. In addition, the Court granted the Defendants **reasonable expenses**.
Glass Dimensions, Inc. ex rel. Glass Dimensions, Inc. Profit Sharing Plan & Trust v. State St. Bank & Trust Co., 290 F.R.D. 11, 17 (D. Mass. 2013)	To strike Plaintiff's untimely disclosure an affirmative expert report and preclude the use of said expert.	Plaintiff made an untimely disclosure of an affirmative expert report.	**No Sanction - Under Rule 37(c)(1), as enforcement provisions for Rule 26(a)(2) expert witness disclosures**, the standard sanction for a disclosure violation is preclusion of the untimely evidence, unless the violation was substantially justified or harmless. A district court has discretion to craft an alternative remedy, such as a continuance, if the prejudice caused by the untimely disclosure can be cured before trial. Here, the Court found that the Plaintiff has no history of litigation abuse or was there any indication the untimely disclosure was made in bad faith. Court concludes a continuance would remove the prejudice.
Hooper-Haas v. Ziegler Holdings, LLC, 690 F.3d 34, 37 (1st Cir. 2012)	Seeking an entry of default judgment.	Defendant violated numerous discovery orders and failed to timely file motions.	**Sanction - Under Rule 37(b)**, **default judgment** is proper where such abuses rerepetitive, egregiousness in that that the abuses would effect the court and prejudice other parties, and where the party is given notice through fair warning of the courts impending action. Here, the Defendant's violated numerous discovery orders, were warned repeatedly that failure to comply would have drastic consequences, and as well failed to timely file motions.
BASF Corp. v. Sublime Restorations, Inc., 880 F. Supp. 2d 205, 210 (D. Mass. 2012)	To preclude Defendants' expert's testimony, and the affidavits used in support and opposition to Summary Judgment motions.	Defendant's untimely designature/disclosure of the expert.	**No Sanction - Under Rule 37(c)(1), as enforcement provisions for Rule 26(a)(2) expert witness disclosures**, 'the procedural rule itself makes clear [that] in the absence of harm to a party, a district court may not invoke the severe exclusionary penalty." Here, the Plaintiff has already incurred the cost of summary judgment motions regardless of the defendant's conduct. Moreover, as Plaintiff has two prior opporuntities to depose the expert witness in question such is not prejudicial.
Vazquez-Rijos v. Anhang, 654 F.3d 122, 129 (1st Cir. 2011)	Seeking dismissal with prejudice.	Plaintiff failed to attend court ordered deposition even after additional time to appear was granted, failed to timely serve Defendant, and file timely documents with the court.	**Sanction - Under Rule 37(b), default judgment is proper where the conduct is repetitive and deliberate. Here,** over a period of three years, the Plaintiff violated court deadlines, court orders, and many other procedural requirements as set by the court.

Acadia Ins. Co. v. Cunningham, 771 F. Supp. 2d 172, 174 (D. Mass. 2011)	To preclude Plaintiff's expert's testimony, and the affidavits used in support and opposition to Summary Judgment motions.	Plaintiff made an untimely disclosure of an affirmative expert report.	**No Sanction - Under Rule 37(c)(1), as enforcement provisions for Rule 26(a)(2) expert witness disclosures**, Plaintiff owner's failure to disclose his expert's identity or to file expert report was harmless, and thus preclusion of expert's summary judgment affidavit was unwarranted in insurer's action for declaration that it was not obligated to provide coverage under marine insurance policy for water damage to vessel in storage; insurer listed expert as individual likely to have discoverable information and thereby knew that possibility existed that he would provide expert testimony, and owner's failures had no effect on court's docket.
Vallejo v. Santini-Padilla, 607 F.3d 1, 7 (1st Cir. 2010)	Seeking dismissal with prejudice.	Plaintiff violated numerous discovery orders, untimely filed documents, and did not present any mitigating circumstances that might have changed the court's mind.	

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THE ADVERSE INFERENCE INSTRUCTION AFTER REVISED RULE 37(E): AN EVIDENCE-BASED PROPOSAL

Hon. Shira A. Scheindlin and Natalie M. Orr***

INTRODUCTION

The subject of adverse inference jury instructions has received significant scholarly and judicial attention in recent years.[1] The adverse inference instruction has been called "'the oldest and most venerable remedy' for spoliation,"[2] and is perhaps the most common remedy in federal courts for the loss or destruction of evidence.[3] This is particularly true with respect to electronically stored information (ESI). "E-discovery sanctions are at an all-time high,"[4] and a study by the Federal Judicial Center found that

* Judge Scheindlin is a United States District Judge for the Southern District of New York. She served as a member of the Judicial Conference Advisory Committee on Civil Rules from 1998 to 2005 and has authored several seminal opinions on e-discovery and spoliation sanctions.

** Natalie Orr is a Deputy City Attorney at the Office of the City Attorney of San Francisco and was a law clerk to the Hon. Shira A. Scheindlin (2013–2014). J.D., 2011, Columbia Law School; A.B., 2006, Harvard University. The opinions in this Article are hers alone and should not be ascribed to the San Francisco City Attorney's Office or any other person or entity.

1. *See, e.g.*, Carole S. Gailor, *In-Depth Examination of the Law Regarding Spoliation in State and Federal Courts*, 23 J. AM. ACAD. MATRIM. LAW. 71 (2010); Wm. Grayson Lambert, *Keeping the Inference in the Adverse Inference Instruction: Ensuring the Instruction Is an Effective Sanction in Electronic Discovery Cases*, 64 S.C. L. REV. 681 (2013); David C. Norton et al., *Fifty Shades of Sanctions: What Hath the Goldsmith's Apprentice Wrought?*, 64 S.C. L. REV. 459 (2013); Robert A. Weninger, *Electronic Discovery and Sanctions for Spoliation: Perspectives from the Classroom*, 61 CATH. U. L. REV. 775 (2012); Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789 (2010); Jodi Kleinick & Mor Wetzler, *Navigating the Spoliation Case Law Divide*, N.Y. L.J., June 11, 2012, at S6; Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683 (2009); Lauren R. Nichols, Note, *Spare the Rod, Spoil the Litigator? The Varying Degrees of Culpability Required for an Adverse Inference Sanction Regarding Spoliation of Electronic Discovery*, 99 KY. L.J. 881 (2011).

2. Norton et al., *supra* note 1, at 467 (quoting United Med. Supply Co. v. United States, 77 Fed. Cl. 257, 263 (2007)).

3. *See id.* at 468 ("In a 2011 study by the Federal Judicial Center, the adverse inference instruction was the most common type of sanction granted . . . .").

4. Willoughby, Jr. et al., *supra* note 1, at 790.

adverse inference instructions were imposed in 57 percent of cases involving sanctions for the loss or destruction of ESI.[5]

The adverse inference instruction can serve multiple functions: punishing wrongful conduct, deterring future conduct, and restoring the adversary balance of the proceeding.[6] Unfortunately, much of the judicial and academic commentary has been muddied by a lack of clarity about the different purposes of the instruction. While punishment and deterrence are essentially case management functions, restoring the adversary balance is an evidentiary one.[7]

Most of the federal courts of appeals have focused on the punishment and deterrence purposes of the instruction and fashioned standards based on the spoliator's level of mental culpability. However, the circuits employ widely divergent approaches with respect to the level of culpability required. About half the circuits require a showing of bad faith before imposing a jury instruction.[8] On the other end of the spectrum, some circuits permit an adverse inference instruction even in cases of ordinary negligence.[9] Several circuit courts take an intermediate approach requiring

5. *See* Norton et al., *supra* note 1, at 468. However, sanctions for discovery violations remain rare. One survey found only 230 federal cases imposing sanctions from 1987 through 2009. *See* Willoughby, Jr. et al., *supra* note 1, at 789, 849–60. Given the vast number of cases pending in federal courts in any given year, the statistics suggest that an adverse inference instruction is only imposed in a tiny fraction of cases. *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR (2013), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx (reporting 284,604 civil cases filed in federal district courts in 2013 alone).

6. *See* Nation-Wide Check Corp. v. Forest Hills Distrib., Inc., 692 F.2d 214, 218 (1st Cir. 1982) ("The adverse inference is based on two rationales, one evidentiary and one not. The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document. . . . The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial.").

7. *See* Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998) (stating that an adverse inference instruction serves the remedial purpose, "insofar as possible, of restoring the prejudiced party to the same position [it] would have been in absent the wrongful destruction of evidence by the opposing party").

8. *See, e.g.*, Bracey v. Grondin, 712 F.3d 1012, 1018 (7th Cir. 2013) ("In this circuit, when a party intentionally destroys evidence in bad faith, the judge may instruct the jury to infer the evidence contained incriminatory content."); Hallmark Cards, Inc. v. Murley, 703 F.3d 456, 461 (8th Cir. 2013) ("[W]e conclude that a district court must issue explicit findings of bad faith and prejudice prior to delivering an adverse inference instruction."); United States v. Nelson, 481 F. App'x 40, 42 (3d Cir. 2012) (noting that "where there is no showing that the evidence was destroyed in order to prevent it from being used by the adverse party, a spoliation instruction is improper"); Dalcour v. City of Lakewood, 492 F. App'x 924, 937 (10th Cir. 2012) (both permissive and mandatory adverse inference instructions require showing of bad faith). *But see* Reiff v. Marks, 511 F. App'x 220, 224 (3d Cir. 2013) (applying standard of "actual suppression or withholding of the evidence" with no discussion of bad faith (quoting Brewer v. Quaker State Oil Rig Corp., 72 F.3d 326, 334 (3d Cir. 1995))).

9. *See* Grosdidier v. Broad. Bd. of Governors, Chairman, 709 F.3d 19, 27 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 899 (2014) (noting that "the spoliation inference was appropriate in light of the duty of preservation notwithstanding the fact that the destruction

more than negligence—i.e., knowledge or recklessness—but less than bad faith.[10]

On May 29, 2014, the Standing Committee on Rules of Practice and Procedure (the "Standing Committee") approved an amendment to Federal Rule of Civil Procedure 37(e) that sets out a standard for imposing various sanctions—including adverse inference instructions—for the loss or destruction of ESI.[11] While the new rule will resolve the circuit split on the required level of culpability on the part of the spoliating party,[12] it does not adequately address the evidentiary purpose of the instruction, which is *remedial*, not punitive. In many ways, the adverse inference instruction is ill-suited for use as a punishment, particularly compared to other sanctions available to judges.[13] A financial sanction—like an award of attorneys' fees—punishes the wrongdoer without distorting the evidentiary balance. Because the adverse inference instruction can affect the relative strength of the parties' positions in a lawsuit, the focus should be on prejudice and restoring the proper evidentiary balance to the greatest extent possible.

The new rule permits the imposition of an adverse inference instruction "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation."[14] This high standard of mental culpability deprives judges of an important tool for combating unfairness in many cases involving the loss of evidence. However, it has not gutted the adverse inference instruction completely. The Advisory Committee Note to the new rule indicates that the rule "would not prohibit a court from allowing the parties to present evidence to the jury concerning

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was negligent"); Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) (finding "culpable state of mind" factor satisfied by a showing of negligence).

10. *See* Stocker v. United States, 705 F.3d 225, 235 (6th Cir. 2013) ("The requisite 'culpable state of mind' may be established through a 'showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it . . . .'" (quoting Beaven v. U.S. Dep't of Justice, 622 F.3d 540, 554 (6th Cir. 2010))); Gomez v. Stop & Shop Supermarket Co., 670 F.3d 395, 399 (1st Cir. 2012) (requiring "notice of a potential claim and of the relevance to that claim of the destroyed evidence"); Vulcan Materials Co. v. Massiah, 645 F.3d 249, 259 (4th Cir. 2011) (requiring "willful conduct"); Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) (requiring proof that the spoliator "knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction").

11. For the full text of the Rule, see *infra* notes 44–46 and accompanying text.

12. *See* JUDICIAL CONFERENCE OF U.S., REPORT OF ADVISORY COMMITTEE ON CIVIL RULES 308 (May 2, 2014), *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (May 29–30, 2014) [hereinafter MAY 2 REPORT], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf ("Resolving this circuit split with a more uniform approach to lost ESI remains a primary objective of the Advisory Committee. The Advisory Committee is satisfied that the new proposed rule will resolve the circuit split.").

13. The arsenal of sanctions includes "evidence preclusion, witness preclusion, disallowance of certain defenses, reduced burden of proof, removal of jury challenges, limiting closing statements, supplemental discovery, [] additional access to computer systems . . . [,] payments to bar associations to fund educational programs, participation in court-created ethics programs, referrals to the state bar, payments to the clerk of court, and barring the sanctioned party from taking additional depositions prior to compliance with the court's discovery order." Willoughby, Jr. et al., *supra* note 1, at 803–05.

14. MAY 2 REPORT, *supra* note 12, at 318.

the loss and likely relevance of information and instructing the jury that it may consider that evidence . . . in making its decision."[15] Yet the new rule gives no guidance on when judges should give such an instruction, what it should say, whether threshold findings are necessary, or who bears the burden of proof on those findings. In fact, the Advisory Committee Note acknowledges that the new rule consciously declines to assign the burden of proving prejudice, leaving the decision entirely to the court in every case.[16] The focus of this Article is to identify what remains of the adverse inference jury instruction after the new Rule 37(e) takes effect, and how judges can most effectively utilize it. In light of the important evidentiary effects of the instruction, we have synthesized our conclusions into a proposed evidentiary rule.

I. FORMS OF THE INSTRUCTION

The adverse inference jury instruction can take a variety of forms, as outlined in 2010 in *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC*[17]:

> In its most harsh form . . . a jury can be instructed that certain facts are deemed admitted and must be accepted as true. At the next level . . . a court may impose a mandatory presumption. Even a mandatory *presumption*, however, is considered to be rebuttable.
>
> The least harsh instruction *permits* (but does not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party. If it makes this presumption, the spoliating party's rebuttal evidence must then be considered by the jury, which must then decide whether to draw an adverse inference against the spoliating party. This sanction still benefits the innocent party in that it allows the jury to consider both the misconduct of the spoliating party as well as proof of prejudice to the innocent party.[18]

Many courts and commentators discuss the adverse inference instruction without distinguishing between its various forms. As a result, they conclude that the instruction is a severe and outcome-determinative sanction.[19]

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15. *Id.* at 322; *see also* Mali v. Fed. Ins. Co., 720 F.3d 387, 392–93 (2d Cir. 2013).

16. *See* MAY 2 REPORT, *supra* note 12, at 321 ("The rule does not place a burden of proving or disproving prejudice on one party or the other. . . . The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.").

17. 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

18. *Id.* at 470–71.

19. *See* Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 219–20 (S.D.N.Y. 2003) ("In practice, an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome. The *in terrorem* effect of an adverse inference is obvious. When a jury is instructed that it may 'infer that the party who destroyed potentially relevant evidence did so out of a realization that the [evidence was] unfavorable,' the party suffering this instruction will be hard-pressed to prevail on the merits. Accordingly, the adverse inference instruction is an extreme sanction and should not be given lightly." (quoting Linnen v. A.H. Robins Co., No. 97-2307, 1999 WL 462015, at *11 (Mass. Super. Ct. June 16, 1999))); Brookshire Bros., Ltd. v. Aldridge, 438 S.W.3d 9, 23 (Tex. 2014) (calling the instruction "among the harshest sanctions a trial court may utilize to remedy an act of spoliation" and noting that it can be "tantamount to a death-penalty sanction"); MAY 2

Yet judges have substantial flexibility in selecting the language to employ, and the effects of different instructions may vary dramatically.[20] Even the permissive inference can take multiple forms, prompting one commentator to opine that "[n]early fifty shades of adverse inference instructions have emerged."[21] Some courts inform the jury that spoliation has occurred but allow the jury to infer the likely contents of the evidence and decide what weight to accord that inference.[22] Others allow the jury to determine whether spoliation has occurred in the first place.[23]

The Second Circuit addressed the distinction between various forms of the adverse inference instruction this past year in *Mali v. Federal Insurance Co.*[24] In *Mali,* plaintiffs brought suit against their insurance company seeking indemnification under a fire policy for the destruction of their barn.[25] Although plaintiffs represented that they had no photographs of the second floor of the barn, one of plaintiffs' witnesses indicated that she had seen such a photograph.[26] The insurance company moved for an adverse inference instruction as a sanction for withholding the photograph.[27] The trial judge instructed the jury as follows:

> In this case, evidence has been received which the Defendant contends shows that a photograph exists or existed of the upstairs of what had been referred to as the barn house, but no such photograph has been produced. If you find that the Defendant has proven by a preponderance of the evidence, one, that this photograph exists or existed, two, that the photograph was in the exclusive possession of the Plaintiffs, and, three, that the non-production of the photograph has not been satisfactorily explained, then you may infer, though you are not required to do so, that if the photograph had been produced in court, it would have been unfavorable to the Plaintiffs. You may give any such inference, whatever force or effect as you think is appropriate under all the facts and circumstances.[28]

REPORT, *supra* note 12, at 310 (calling the adverse inference instruction a "very severe measure[]" and explicitly curtailing its use more than any other measure except default judgment or dismissal).

20. *See* Weninger, *supra* note 1, at 787 (noting that "how the judge frames the instruction can significantly influence the severity of the sanction").

21. Norton et al., *supra* note 1, at 491.

22. *See id.* at 460–61.

23. *See id.* ("'There is inconsistency in how courts deal with the division of fact-finding labor' when issuing an adverse inference instruction. . . . [M]any courts imposing an adverse inference instruction as a sanction allow the jury to reassess the evidence and determine whether spoliation occurred at all. Other courts . . . inform the jury that a sanctionable loss or destruction of evidence occurred and then allow the jury to infer that the lost evidence was relevant to the case and would have been prejudicial to the spoliating party." (quoting Nucor Corp. v. Bell, 251 F.R.D. 191, 202 (D.S.C. 2008))).

24. 720 F.3d 387 (2d Cir. 2013).

25. *Id.* at 389.

26. *Id.* at 390.

27. *Id.* at 391.

28. *Id.*

On appeal, the Second Circuit affirmed the standard it promulgated in 2002 in *Residential Funding Corp. v. DeGeorge Financial Corp.*[29] for any adverse inference instruction imposed as a sanction.[30] However, it noted that "the words 'adverse inference instruction' can be used to describe at least two different sorts of instructions"[31]: "[those] given as a sanction for misconduct and [those] that simply explain[] to the jurors inferences they are free to draw in considering circumstantial evidence."[32] The court noted that the trial judge in *Mali* had not imposed the adverse inference as a sanction, nor did he "direct the jury to accept any fact as true . . . [or] draw any inference against the Plaintiffs."[33] Because the judge "left the jury in full control of all fact finding,"[34] there was no need to make the predicate factual findings set out in *Residential Funding.* In other words, *Mali* recognized the distinction between a permissive and a mandatory adverse inference instruction and the need for two separate standards.[35]

II. THE NEW RULE 37(E) AND WHAT REMAINS OF THE ADVERSE INFERENCE INSTRUCTION

The recently approved Rule 37(e) has gone through multiple formulations. On August 15, 2013, the Judicial Conference Advisory Committee on Civil Rules published a proposed revision to Rule 37(e) (the "Published Rule") and invited public comment.[36] The Published Rule

29. 306 F.3d 99 (2d Cir. 2002).
30. *See id.*
31. *Mali*, 720 F.3d at 392.
32. *Id.* at 393–94.
33. *Id.* at 393.
34. *Id.*
35. The Sixth Circuit has agreed with the reasoning in *Mali*, noting that instructions that permit the jury to decide whether wrongful spoliation has occurred are "simply a formalization of what the jurors would be entitled to do even in the absence of a specific instruction." West v. Tyson Foods, Inc., 374 F. App'x 624, 635 (6th Cir. 2010).
36. *See* MAY 2 REPORT, *supra* note 12, at 324–25. The full text of the Published Rule follows:

> (e) Failure to Preserve Discoverable Information.
> (1) *Curative measures; sanctions*. If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may: (A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and (B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions: (i) caused substantial prejudice in the litigation and were willful or in bad faith; or (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation. (2) *Factors to be considered in assessing a party's conduct*. The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include: (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable; (B) the reasonableness of the party's efforts to preserve the information; (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation; (D) the

applied where a party "failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation."[37] The rule separated permissible judicial responses into two categories. A court could "permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees" without any finding of culpability on the part of the spoliating party or prejudice suffered by the innocent party.[38] However, adverse inference jury instructions and other serious sanctions were only permitted upon a showing of "substantial prejudice" and "willful[ness] or . . . bad faith," or upon a finding that the innocent party was "irreparably deprived . . . of any meaningful opportunity to present or defend against the claims in the litigation."[39]

In anticipation of its April 2014 meeting, the Advisory Committee released a revised version of the proposed Rule 37(e) (the "April Proposal").[40] The April Proposal came after the close of the comment period for the proposed amendments to the Federal Rules of Civil Procedure, which engendered an unprecedented 2345 comments in response to the Published Rule announced in August 2013.[41] In contrast to the Published Rule, the April Proposal was limited to the loss or destruction of ESI and divided discovery remedies into three categories. Subsection (e)(1)

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proportionality of the preservation efforts to any anticipated or ongoing litigation; and (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

Id.

37. *Id.* at 324.

38. *Id.*

39. *Id.*

40. *See* DISCOVERY SUBCOMMITTEE REPORT RULE 37(E) 372–81 (Apr. 10–11, 2014), *in* ADVISORY COMMITTEE ON CIVIL RULES [hereinafter APRIL 10 REPORT], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf. The April Proposal read:

(e) Failure to Preserve Electronically Stored Information. If a party failed to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, the court may:

(1) Order measures no greater than necessary to cure the loss of information, including permitting additional discovery; requiring the party to produce information that would otherwise not be reasonably accessible; and ordering the party to pay the reasonable expenses caused by the loss, including attorney's fees. (2) Upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice. (3) Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation: (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.

[(4) In applying Rule 37(e), the court should consider all relevant factors, including: (A) the extent to which the party was on notice that litigation was likely and that the information would be relevant; (B) the reasonableness of the party's efforts to preserve the information; (C) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and (D) whether, after commencement of the action, the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.]

Id. at 383–84.

41. *See* MAY 2 REPORT, *supra* note 12, at 331.

described "curative measures," or "measures no greater than necessary to cure the loss of information," which could be imposed by the court without any finding of culpability or prejudice.[42] Permissible "curative measures" included "permitting additional discovery; requiring the party to produce information that would otherwise not be reasonably accessible; and ordering the party to pay the reasonable expenses caused by the loss, including attorney's fees."[43] Subsection (e)(2) described other remedies that could be imposed by the court upon a finding of prejudice, again regardless of the spoliator's intent. The Discovery Subcommittee Note indicated that subsection (e)(2) was intended to include remedies like preclusion of evidence and deeming certain facts admitted.[44] Subsection (e)(3) addressed terminating sanctions and adverse inference instructions, which were permitted "[o]nly upon a finding [by the court] that the party acted with the intent to deprive another party of the information's use in the litigation."[45] After finding "intent to deprive," "[a court could] instruct the jury that it may or must presume the [lost] information was unfavorable to the party" that caused its loss or destruction.[46]

The Discovery Subcommittee Note clarified that subsection (e)(3) would not:

> prohibit a court, in an appropriate case, from allowing the parties to present evidence and argument to the jury concerning the loss of information. Nor would it bar a court from instructing a jury that it may determine from evidence presented during the trial—as opposed to inferring from the loss of information alone—whether lost information was favorable or unfavorable to positions in the litigation.[47]

The real distinction then between a jury instruction imposed under subsection (e)(3) as opposed to subsection (e)(2) was who would hear evidence about the circumstances of the loss or destruction and make a finding of culpability. Therefore, a variation on the permissive instruction in *Mali*, leaving all fact-finding to the jury, might still have been available without the need to demonstrate "intent to deprive."

On May 2, 2014, following its April meeting, the Advisory Committee recommended adoption of yet another version of proposed Rule 37(e),[48] which the Standing Committee approved on May 29, 2014 (the "Approved Rule"). The Approved Rule again requires a finding of "intent to deprive" before a mandatory or permissive adverse inference jury instruction may be imposed.[49] The full text of the Approved Rule is as follows:

> (e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or

42. *Id.* at 375.
43. *Id.*
44. *Id.* at 376.
45. *Id.* at 377.
46. *Id.*
47. *Id.* at 390.
48. *See id.* at 318.
49. *Id.*

> 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 may: (1) upon finding prejudice to another party from loss of the information, 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: (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.[50]

The language in the Advisory Committee Note addressing adverse inference instructions differs somewhat from the previous draft, which permitted a court to inform the jury that it could "determine from evidence presented during the trial—as opposed to inferring from the loss of information alone—whether lost information was favorable *or* unfavorable to positions in the litigation."[51] The new Note states simply that a court may instruct the jury that it may "consider [evidence of spoliation] . . . in making its decision."[52] It is unclear whether the language change is merely stylistic or intended to restrict the form of jury instructions permitted. However, the most logical conclusion is that the new Note still permits a *Mali*-type instruction to guide the jury's consideration of spoliation evidence without requiring "intent to deprive."[53]

The Advisory Committee purports to have "preserve[d] a broad range of trial court discretion for dealing with lost ESI"[54] and notes that "[t]here is no all-purpose hierarchy of the severity of various [curative] measures; the severity of given measures must be calibrated in terms of their effect on the particular case."[55] Yet, the Approved Rule does exactly the opposite with respect to the adverse inference jury instruction, precluding its use in all but the most limited circumstances.

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50. *Id.*

51. APRIL 10 REPORT, *supra* note 40, at 390 (emphasis added).

52. MAY 2 REPORT, *supra* note 12, at 322. The Note clarifies that a court may still give "the jury instructions to assist in its evaluation of [spoliation] evidence or argument, other than instructions to which subdivision (e)(2) applies." *Id.* at 321.

53. *See* SUMMARY OF COMMENTS ON PROPOSED RULE 37(E), AUGUST 2013 PUBLICATION 371, *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (May 29–30, 2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf (comment of John Rosenthal noting that the Published Rule is "bereft of a standard or guidance as to when and under what circumstances to grant [permissive instructions], likely producing years of litigation about what the rule means"); *id.* at 380 (comment of New York City Bar Association's committee on federal courts noting that "[i]f it is permissible as a 'curative measure' to allow the jury to hear evidence about the loss of information and to allow counsel to argue to the jury about it, it is hard to understand why the court cannot properly give a jury instruction to guide its consideration of that evidence." (citing Mali v. Fed. Ins. Co., 720 F.3d 387, 391–94 (2d Cir. 2013)).

54. MAY 2 REPORT, *supra* note 12, at 308–09 ("The public comments and this analysis highlighted the wide variety of situations faced by trial courts and litigants when information is lost, and strongly underscored the need to preserve broad trial court discretion in fashioning curative remedies. The revised rule proposal therefore retains such discretion.").

55. *Id.* at 321.

Nonetheless, some discretion still remains for the trial judge in determining when to submit evidence of spoliation to the jury pursuant to subsection (e)(1) without finding "intent to deprive," although this option is only addressed in the Advisory Committee Note rather than in the Approved Rule.[56] In light of this omission, an evidentiary rule could provide much-needed guidance.[57] The following sections discuss the considerations that should shape an evidentiary rule on *Mali*-type adverse inference instructions and presents a proposed model rule consistent with Approved Rule 37(e).

A. Predicate Factual Findings

The question of when evidence of spoliation should be presented to the jury is ultimately a question of institutional competency. Many courts and commentators have expressed concern that juries are unduly swayed by any suggestion of impropriety and are not fair fact-finders in the context of spoliation allegations.[58] The Texas Supreme Court recently noted that adverse inference jury instructions "can unfairly skew a jury verdict, resulting in a judgment that is based not on the facts of the case, but on the conduct of the parties during or in anticipation of litigation."[59] The court suggested that the risk of jury overreaction is actually worse when "evidence regarding the spoliating conduct is presented to a jury" than if the judge instructs the jury as a matter of law that wrongdoing has occurred.[60] Other courts have expressed concern about conserving judicial resources

56. *See supra* notes 52–53 and accompanying text.

57. *See* Brookshire Bros., Ltd. v. Aldridge, 438 S.W.3d 9, 38–39 (Tex. 2014) (Guzman, J., dissenting) ("The spoliation of evidence, as the Court notes, is both an evidentiary concept, as well as a particularized form of discovery abuse. Thus, spoliation issues are particularly well-suited to redress via the rulemaking process. . . . [T]he rulemaking process can ultimately yield clarity and uniformity not otherwise attainable when this process is eschewed in favor of judicially-crafted rules.").

58. *See* Henning v. Union Pac. R.R. Co., 530 F.3d 1206, 1219–20 (10th Cir. 2008) (opining that the adverse inference "'brands one party as a bad actor' and 'necessarily opens the door to a certain degree of speculation by the jury, which is admonished that it may infer the presence of damaging information in the unknown contents of an erased audiotape'" (quoting Morris v. Union Pac. R.R., 373 F.3d 896, 900–01 (8th Cir. 2004))); Mosaid Techs. Inc. v. Samsung Elecs. Co., 224 F.R.D. 595, 600 (D.N.J. 2004) (expressing concern that an adverse inference jury instruction "would elevate [the evidence] to an arguably unjustified level of importance and create a potentially insurmountable hurdle for defendants"); James T. Killelea, Note, *Spoliation of Evidence Proposals for New York State*, 70 BROOK. L. REV. 1045, 1060–62 (2005) (noting that some "commentators fear that juries will be unduly influenced by destruction of evidence and will unfairly penalize litigants," and that "the evidence of spoliation [can] inform[] and influence[] a jury's decision as much, if not more so, than the underlying facts of the claim itself").

59. *Brookshire Bros.*, 438 S.W.3d at 17 ("The instruction is an important remedy, but its use can affect the fundamental fairness of the trial in ways as troubling as the spoliating conduct itself.").

60. *Id.* at 13.

and the possibility that allowing parties to present evidence of spoliation will turn into a "trial within a trial."[61]

In our opinion, these concerns are somewhat overblown. We respectfully disagree with the Texas Supreme Court that juries are institutionally incapable of drawing reasoned conclusions about how evidence was lost or destroyed. While it is true that trial courts typically resolve evidentiary matters,[62] evaluating competing factual scenarios and determining a party's intent are exactly the type of functions that juries routinely perform. In the words of Judge William Young: "Few things seem more appropriately the province of a jury than the inference of a [party's] mental state."[63] After hearing both the allegations of spoliation and any innocent explanations, jurors are perfectly capable of using their common sense to decide the likely contents of the lost evidence. As the Sixth Circuit recently noted, "a permissive adverse inference instruction does not guarantee anyone a windfall; it leaves the decision in the hands of the jury."[64] In fact, sometimes "a missing piece of evidence like a photograph or video [is] irreplaceable," and even an adverse inference instruction will not fully compensate the innocent party.[65] In many cases, "a picture is indeed worth a thousand words."[66] Nonetheless, any instruction to the jury must be carefully crafted. While the jury is surely capable of drawing inferences regarding the content of lost evidence—and thereby curing any prejudice caused to the innocent party—the jury must not use evidence of spoliation to *punish* the spoliating party absent proof of "intent to deprive."[67]

Moreover, concerns about unfairly inflaming the jury or wasting judicial resources can be addressed by permitting the judge to exercise a limited gatekeeping role through predicate factual findings, while still leaving the

61. *See* Technical Sales Assocs. v. Ohio Star Forge Co., No. 07 Civ. 11745, 2009 WL 1212809, at *1 (E.D. Mich. May 1, 2009) (calling dispute over spoliation allegations "the sideshow which eclipses the circus").

62. *See Brookshire Bros.*, 438 S.W.3d at 20 ("It is well-established that evidentiary matters are resolved by the trial court.").

63. SEC v. EagleEye Asset Mgmt., 975 F. Supp. 2d 151, 159 (D. Mass. 2013).

64. Flagg v. City of Detroit, 715 F.3d 165, 178 (6th Cir. 2013).

65. *Brookshire Bros.*, 438 S.W.3d at 17.

66. *Id.* In one recent district court case, *Simms v. Deggeller Attractions, Inc.*, No. 12 Civ. 00038, 2013 WL 49756 (W.D. Va. Jan. 2, 2013), plaintiffs sued for injuries sustained on defendants' roller coaster ride. *Id.* at *1. Defendants alleged that one of the plaintiffs caused the accident when his hat lodged in the equipment, while plaintiffs contended that many other customers on the ride were also wearing hats. *Id.* at *1–2. The amusement park routinely took photographs on the rides for customer purchase and deleted them at a later time. *Id.* at *5. When the police and plaintiffs asked to see the photographs two days after the accident, however, the photographs had already been deleted. *Id.* The district court denied sanctions partially because it concluded that plaintiffs could use eyewitness testimony instead. *Id.* at *6. Unfortunately, the court did not fully appreciate the difference in evidentiary quality between photographic evidence and eyewitness testimony. Eyewitness testimony is subject to attack based on memory, bias, veracity, or even eyesight. *Simms* exemplifies a factual scenario in which a picture is indeed worth a thousand words.

67. Subsection (e)(2) lists remedies that appear to be punitive in nature, including dismissal, default, and certain forms of adverse inference jury instructions. Under subsection (e)(2), therefore, it *can* be appropriate for juries to punish the spoliating party by drawing an adverse inference—but only if there is proof of "intent to deprive."

inference-drawing function to the jury consistent with subsection (e)(1) of the Approved Rule.[68] As with any form of sanction for lost evidence, the moving party must show that the opposing party lost or destroyed relevant evidence within its control that it had a duty to preserve.[69] The Approved Rule also requires the court to make a predicate finding of prejudice before imposing a permissive adverse inference instruction pursuant to subsection (e)(1).[70] However, the Rule expressly declines to specify which party bears the burden of proving prejudice, which may create confusion and inconsistency when the Approved Rule goes into effect.[71] Who bears the burden of proving or disproving prejudice is a key question in the context of spoliation because it is often difficult for either party to demonstrate the nature and content of evidence that is no longer available. Some courts have addressed this quandary by employing a burden-shifting regime based on the level of mental culpability of the spoliator.

B. Burden Shifting

Mental culpability is irrelevant in and of itself to any potential rule of evidence because the sole concern from an evidentiary perspective is remedying the prejudice caused to the innocent party by the loss of relevant and irreplaceable evidence. However, mental culpability can be useful as a *proxy* for the contents of the missing evidence and therefore the likelihood of prejudice.[72] The Second Circuit explained the interplay between culpability and prejudice in *Residential Funding*. The court concluded that "[w]here a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party."[73]

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68. These concerns are also ameliorated by Federal Rule of Evidence 403, which gives judges the discretion to limit the evidence presented to prevent "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

69. MAY 2 REPORT, *supra* note 12, at 311.

70. *Id.* at 312.

71. The Advisory Committee Note acknowledges that the Approved Rule "does not say which party bears the burden of proving prejudice. . . . Under the proposed rule, each party is responsible for providing such information and argument as it can; the court may draw on its experience in addressing this or similar issues, and may ask one or another party, or all parties, for further information." *Id.*; *see also id.* at 321 ("The rule does not place a burden of proving or disproving prejudice on one party or the other. . . . The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.").

72. *See* Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. & TECH. L. REV. 71, 88–89 (2004) ("[C]ourts have been less concerned with proof of prejudice when faced with willful or bad faith conduct. . . . In cases where one or the other of these elements is less pronounced, there appears to be a sliding scale between the two. That is, the more prejudice there is, the less willfulness courts require before sanctioning a party for e-discovery violations, and vice versa."); *see also* Drew D. Dropkin, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference*, 51 DUKE L.J. 1803, 1826 (2002) ("As the culpability of the spoliating party increases (from innocence to bad faith conduct), the intuitive appeal of the . . . assumption underlying the inference increases. . . . [T]he spoliator's state of mind serves as a proxy for the contents of the evidence . . . .").

73. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 109 (2d Cir. 2002).

Certainly, evidence lost accidentally gives rise to no particular inference about its contents, and evidence destroyed in bad faith gives rise to the strong inference that the evidence was unfavorable to the destroying party. Between the two extremes, however, the answer is less clear. Some courts and commentators believe that negligent acts cannot give rise to any legitimate presumption about the contents of the evidence.[74] Others believe that even negligence is sufficient to indicate that the evidence was more likely favorable to the other party.[75]

Regardless of whether negligence is sufficient to justify a conclusive inference, it is sufficient to shift the burden of proof. Many courts "recognize the unseemliness of insisting that a victim of spoliation show prejudice when the wrongdoer has deprived that victim of the ability to make such a showing"[76] and have concluded that "the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss."[77] Only when the evidence is lost without fault, such as through an Act of God, is it fair to place the burden of proving prejudice on the moving party. Thus, once the moving party makes a threshold showing that relevant evidence was lost despite a duty to preserve, which is effectively a showing of at least negligence,[78] the alleged spoliator bears the burden of rebutting prejudice—either by showing that

74. *See, e.g.*, United States v. Laurent, 607 F.3d 895, 902 (1st Cir. 2010) (noting that "ordinarily, *negligent* destruction would not support the logical inference that the evidence was favorable to the defendant"); Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997) ("Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case."); Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) ("An adverse inference about a party's consciousness of the weakness of his case, however, cannot be drawn merely from his negligent loss or destruction of evidence."); Makara, *supra* note 1, at 684 (noting that some courts feel that "without a showing of willful spoliation, there is no indication of consciousness of unfavorable evidence, [and therefore] non-willful spoliation . . . cannot sustain an inference that a negligent spoliator destroyed evidence because it would have hurt the spoliator's case").

75. *See, e.g.*, Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214, 218–19 (1st Cir. 1982) (addressing the "common sense" notion that a party "who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document," and that the "abandonment of potentially useful evidence is, at a minimum, an indication that [the spoliator] believed the records would not *help* his side of the case"); Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y. 1991) ("[The] sanction [of an adverse inference] should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference. It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary mechanism for restoring the evidentiary balance."); 2 WIGMORE ON EVIDENCE § 291, at 228 (Little Brown & Co. 1923) ("The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor . . . .").

76. Weninger, *supra* note 1, at 798–99.

77. *Turner*, 142 F.R.D. at 75; *accord* Norton et al., *supra* note 1, at 465 ("[H]ow does a party show that something it never saw, read, or possessed was likely relevant to its claims or defenses?").

78. *See* Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) ("Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.").

the lost evidence would not have helped the innocent party or that an adequate replacement exists.

C. A Separate Standard for ESI?

One consideration in devising any rule on sanctions is how to fairly address technological advancements, particularly the proliferation of ESI. In developing the Approved Rule, the Advisory Committee concluded that ESI is inherently different from other forms of evidence and merits a different standard for spoliation sanctions than that applied to other forms of evidence.[79] It is beyond dispute that ESI is increasing at an exponential rate and has fundamentally changed the practice of discovery. "One industry expert reported to the Advisory Committee that there will be some 26 billion devices on the Internet in six years—more than three for every person on earth."[80] Many commentators believe the standard for sanctions based on destruction of electronic information should be more lenient than the standard for destruction of tangible things.[81] They argue that ESI is often automatically modified or deleted[82] and worry that "litigants [will] feel forced to decide between needlessly preserving excessive amounts of electronically stored information at great burden and expense or later having to compromise lawful claims or defenses."[83]

However, the concern that electronic discovery will lead to a proliferation of sanctions has not come to pass. Sanctions in any form are extremely rare.[84] One 2004 survey found that "[i]n no [federal] case did a judge sanction a party for the routine recycling of backup tapes where the party did not know (or should not have known) of its obligation to retain discoverable information."[85]

Moreover, while the volume of ESI has increased, so has storage capacity. In many cases a party must take affirmative steps to *delete* information rather than retain it. "As a result of new technology and the accompanying exponential increase in electronically stored data, document retention policies are now the rule rather than the exception."[86] Jurors are often more familiar with technological advances than judges, and the difficulty of preserving electronic information, or the ease of accidentally deleting it, is something the average layperson is capable of evaluating on a

79. MAY 2 REPORT, *supra* note 12, at 311.

80. *Id.* at 309.

81. *See, e.g.*, Thomas Y. Allman, *Defining Culpability: The Search for a Limited Safe Harbor in Electronic Discovery*, 2 FED. CTS. L. REV. 65, 70 (2007) ("[A]ssumptions about how potential evidence is lost in the world of tangible things do not necessarily apply in an electronic environment.").

82. *See* MAY 2 REPORT, *supra* note 12, at 311 ("ESI is . . . deleted or modified on a regular basis, frequently with no conscious action on the part of the person or entity that created it."); *see also id.* at 314 ("ESI is more easily lost than tangible evidence. . . .").

83. Nichols, *supra* note 1, at 902.

84. *See* Willoughby, Jr. et al., *supra* note 1, at 789.

85. Scheindlin & Wangkeo, *supra* note 72, at 95.

86. Brookshire Bros., Ltd. v. Aldridge, 438 S.W.3d 9, 37 (Tex. 2014) (Guzman, J., dissenting).

case-by-case basis. Therefore, the fact that most evidence is now electronically stored does not necessitate a separate, more lenient standard for the imposition of adverse inference instructions.

D. Flexibility and Judicial Discretion

A final question implicating the respective roles of judge and jury is whether the court *must* submit evidence of spoliation to the jury once the predicate findings have been satisfied. The answer, in our opinion, is yes. Because a central purpose of an evidentiary rule is to provide guidance and consistency, the instruction should be mandatory instead of discretionary. If the rule stated only that a judge "may" impose a permissive adverse inference instruction even when the predicate requirements are found, the optional nature of the rule would gut its effectiveness.

In *Chin v. Port Authority of New York & New Jersey*,[87] the Second Circuit affirmed the district court's decision not to give an adverse inference jury instruction even though the defendant may have been grossly negligent in failing to preserve evidence.[88] The court noted that "a finding of gross negligence merely permits, rather than requires, a district court to give an adverse inference instruction."[89] This unbounded discretion amounts to no standard at all and leads to a lopsided regime of judicial review. A district court's decision to impose a jury instruction is more easily reversible than the decision to refrain. Because the majority of sanctions for destruction of evidence are imposed on defendants, one-sided judicial review on balance disadvantages plaintiffs.[90] As the Sixth Circuit recently noted:

> When the requirements for an adverse inference instruction are met, the district court *should* issue an instruction. . . . Although the district court's findings receive deferential review . . . presumably its judgment *should* be upset if the movant clearly met all three prongs and yet an instruction was not granted.[91]

While the imposition of an instruction should be mandatory where the predicate findings are met, it is also important to preserve some degree of judicial discretion. The judge should be able to prevent highly prejudicial evidence from reaching the jury where it would exacerbate the evidentiary imbalance rather than equalize it.[92] While Federal Rule of Evidence 403

87. 685 F.3d 135 (2d Cir. 2012).

88. *See id.* at 161.

89. *Id.* at 162.

90. *See* Willoughby, Jr. et al., *supra* note 1, at 803 ("Defendants are sanctioned for e-discovery violations nearly three times more often than plaintiffs. In our survey, defendants were sanctioned 175 times, plaintiffs were sanctioned fifty-three times, and third parties were sanctioned twice. The three-to-one ratio of defendant sanctions to plaintiff sanctions has generally held steady over the last ten years, even as the number of sanction cases and sanction awards has greatly increased.").

91. Flagg v. City of Detroit, 715 F.3d 165, 177 (6th Cir. 2013) (emphasis added).

92. *See* Anderson v. Beatrice Foods Co., 900 F.2d 388, 395 (1st Cir. 1990) ("[T]he judge should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard

addresses these concerns, a balancing test could further minimize the risk of unfairly inflaming the jury. Therefore, proof of the loss of evidence should not be presented to the jury if the potential for unfair prejudice to the alleged spoliator substantially outweighs the benefit of a jury instruction to the innocent party. The court is the gatekeeper and is tasked with applying this proposed balancing test.

E. Proposed Federal Rule of Evidence

Having discussed the threshold issues, we present the following rule, more for the purpose of stimulating discussion than as an actual rule-making proposal:

> (a) *Prima Facie Showing.* To make a prima facie showing for a permissive adverse inference instruction, the moving party must demonstrate by a preponderance of the evidence that the opposing party: (1) lost or destroyed relevant evidence, (2) within that party's control, (3) as to which there existed a duty to preserve at the time of the loss or destruction.
>
> (b) *Prejudice.* The non-moving party may rebut a prima facie showing by demonstrating by a preponderance of the evidence that: (1) the lost or destroyed evidence would not have been beneficial to the moving party's case, or (2) a satisfactory replacement to the lost or destroyed evidence is available.
>
> (c) *Burden Shifting.* If the non-moving party cannot demonstrate lack of prejudice but can show that the evidence was lost or destroyed without fault, then the burden shifts to the moving party to affirmatively demonstrate prejudice as defined in (b).
>
> (d) *Balancing Test.* If the moving party carries its burden, the circumstances of destruction and the likely contents of the missing evidence shall be decided by the jury pursuant to a permissive adverse inference instruction, unless the risk of unfair prejudice to the non-moving party substantially outweighs the benefit of the instruction to the moving party.
>
> (e) *Definition.* A permissive adverse inference jury instruction is one that implies no fault or wrongdoing by the alleged spoliator, but simply explains that the jury is free to draw any inference it decides is warranted regarding the circumstances of destruction and the likely contents of the evidence, and to accord that inference whatever weight it deems appropriate.

CONCLUSION

The Approved Rule 37(e) is a laudable attempt to resolve inconsistency among the circuits in the use of adverse inference jury instructions. Unfortunately, the Approved Rule discounts the important remedial

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sword if a dragon looms. Whether deterrence or compensation is the goal, the punishment should be reasonably suited to the crime.").

function of the instruction and imposes strict limits without regard for the instruction's many forms. Trial courts have other sanctions at their disposal more appropriate for punishment and deterrence. When it comes to the adverse inference instruction, evidentiary concerns should be primary.

One form of the instruction remains available to trial courts without the need to meet the Approved Rule's strict "intent to deprive" standard. Specifically, courts may issue a *Mali*-type permissive instruction that leaves all factual findings, including the question of whether spoliation occurred, to the jury. In our opinion, courts should not balk at presenting evidence of spoliation to the jury in appropriate cases, including where one party's negligent failure to preserve evidence has harmed the other party's case and no adequate replacement is available. While some courts and commentators have expressed concern that juries will be unfairly swayed by the suggestion of impropriety, juries are frequently asked to evaluate competing factual theories and to use their common sense to decide which is most plausible. Trial courts retain the discretion pursuant to Federal Rule of Evidence 403 to exclude evidence that would unfairly inflame the jury or waste judicial resources. Moreover, the predicate finding of prejudice ensures that evidence of spoliation will only be presented in cases where the loss of evidence has affected the fairness of the proceedings.

The Approved Rule gives no guidance on when courts should employ a *Mali*-type instruction and which party bears the burden of proving or disproving prejudice. These omissions may breed confusion and inconsistency in lower courts rather than clarity. Our hope is that our suggested evidentiary rule can serve as a standard to guide trial courts in the use of permissive instructions after the Approved Rule takes effect.[***]

[***] Editor's Note: As evidenced in a September 2014 Standing Committee report published after the writing of this Article, the Standing Committee made minor stylistic changes to the Advisory Committee proposal in May instead of approving it in full. Specifically, the Standing Committee moved the word "may" in the language of the rule and made small changes to the Committee Note. These changes do not affect the analysis in this Article. JUDICIAL CONFERENCE OF U.S., SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE, Appx. B-56 to B-57 (Sept. 2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf. The Judicial Conference approved the Standing Committee's proposal with the changes noted above in September 2014. The current text of the rule is as follows:

> (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.

ABI Northeast Conference 2015
Trial Skills Symposium

STRATEGIC CONSIDERATIONS FOR MOTIONS FOR SUMMARY JUDGMENT

Patrick J. O'Toole, Jr.
Weil, Gotshal & Manges LLP
Boston, Massachusetts

I. WHY FILE A MOTION FOR SUMMARY JUDGMENT?

A. Possibly win without a trial

B. Potentially save time and money

C. Even if lose, may streamline the case and affect settlement

D. Educate the court

E. May narrow issues for trial

II. WHAT IS THE FOCUS OF THE MOTION?

A. Is there a genuine issue of material fact?

B. Are you entitled to judgment as a matter of law?

III. WHAT IS A GENUINE ISSUE OF FACT?

A. Issues of material fact are conflicts over facts that are outcome-determinative to the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)

B. A factual dispute is "genuine" if a reasonable jury could return a verdict for the nonmoving party

C. Nonmaterial issues of fact should not prevent granting of summary judgment.

D. At the summary judgment stage, the court is *not* permitted to make credibility determinations

E. If there are conflicting affidavits on a material fact, the court cannot pick one affidavit over the other, but must instead deny the motion.

F. Credibility determinations are for trial

IV. ARE YOU ENTITLED TO JUDGMENT AS A MATTER OF LAW?

A. If there are no genuine issues of material fact, the court can resolve the legal issues

V. WHAT MATERIALS SHOULD BE SUBMITTED IN SUPPORT OF THE MOTION?

A. Memorandum of Law

B. Statement of Material facts (depending on jurisdictions)

C. Affidavits

1. Is the substance admissible

2. Is the witness aware of and fully comfortable with affidavit

D. Documents/deposition testimony - supported by affidavit

E. Request for Admissions

F. Interrogatories

G. Notice of Motion (depending on jurisdictions)

VI. WHAT TO CONSIDER BEFORE FILING?

A. Is there a genuine issue of material fact?

1. What is the evidence
2. What undisputed facts exist?
3. What facts are disputed?
    a. Are the outcome determinative facts?
    b. Are they genuine disputes?
4. What contradicts your position?
5. What evidence/backup do you need?
6. Is it admissible?

B. Check the rules (FRCP, local rules, judge's rules)

VII. IS IT WORTH IT?

A. Balance costs of motion against what claims you are moving on

B. Balance costs of motion against goals in filing motion (e.g., likelihood of success, educate court)

VIII. HOW MANY CLAIMS SHOULD YOU COVER IN YOUR MOTION?

A. Avoid filing motion on several claims or on several grounds where record supports less

1. Don't confuse court
2. Be careful not to lose credibility
3. May permit adversary to argue issues not necessary to resolve motion

4. May permit adversary to claim partial victory

IX. WHEN TO FILE?

A. Issues To Consider

1. Does your adversary still need discovery? FRCP 56(d)

2. Raise early with court – get views of the court and your adversary

3. Are your own claims/defenses subject to summary judgment? Your filing may encourage other side to file cross-motion.

4. Will the court have enough time to rule before trial?

X. WHEN CAN YOU FILE?

A. Subject to local rules, any time until 30 days after close of discovery. (FRCP 56(b))

B. But, if file right out of the box, would likely be deemed premature and could fall victim to assertion that need discovery. (FRCP 56(d)).

XI. FILING EARLY – WHAT ARE THE RISKS?

A. May lose if discovery still needed (FRCP 56(d))

B. If lose, gives adversary roadmap of your case

C. Could be a waste of time and money

D. May impede settlement and delay litigation

E. Could affect credibility

XII. FILING EARLY – WHAT ARE THE BENEFITS?

A. May win

B. Avoid costs of litigation

C. Educate the court about your position

D. May streamline the case

E. Court's ruling may provide insight into issues and shape discovery

F. Learn your adversary's case

G. May lead to settlement

XIII. WHAT TO CONSIDER BEFORE RESPONDING?

A. Is there a genuine issue of material fact?

1. Clarify material factual issues in dispute

2. Provide evidentiary support for your position

B. Check the rules (FRCP, local rules, judge's rules)

C. Consider filing cross-motion

D. Consider continuance (FRCP 56(d))

XIV. USE DISCOVERY TO SHAPE MOTION

A. During depositions:

1. ask narrow and specific questions

2. avoid eliciting narrative or speculative answers

B. Serve narrow interrogatories and/or RFAs to nail down material facts not in dispute.

XV. CAN YOU APPEAL IF YOU LOSE?

A. Usually cannot appeal until all claims against all parties have been resolved.

B. Can seek immediate appeal if court determines that "there is no just reason for delay." FRCP 54(b).

C. Can request interlocutory appeal under 28 U.S.C.A § 1292(a) or (b).

D. Courts of appeal conduct a de novo review of orders granting and denying summary judgment.

LITIGATION IN BANKRUPTCY COURT: IT'S ALL ABOUT THE RULES

Presented by Hon. Frank J. Bailey, United States Bankruptcy Judge, District of Massachusetts and Patrick P. Dinardo, Partner, Sullivan & Worcester LLP

Most litigators having any familiarity at all with bankruptcy are aware of the concept of the "automatic stay", which enters immediately upon a person or entity seeking relief in U.S. bankruptcy courts. See 11 U.S.C. § 362(a). While that stay stops all pre-filing litigation and essentially bars any further action against the debtor without relief from the stay, litigation over a disputed claim can and often does continue in the Bankruptcy Court. Changing the locus of the dispute means that the litigation has entered an extremely fast paced and high stakes phase, one in which the civil litigator would do well to be intimately familiar with the applicable rules in bankruptcy court. Many of these rules vary depending on the type of proceeding at issue.

The filing of a bankruptcy gives rise to a "case," which refers to the debtor's request for bankruptcy relief. In addition, there may be specific disputes that arise in the case and those disputes give rise to litigation. There are primarily two kinds of "litigation" in Bankruptcy Court, "adversary proceedings" and "contested matters", but beware: discovery can occur in the absence of either one, in the "case" (for example, in a 341 meeting or a Rule 2004 exam), and what goes by the rather innocuous name of an "estimation proceeding" can often be outcome determinative. These types of litigation and the applicable rules are discussed below.

A. Adversary Proceedings.

An adversary proceeding can best be thought of as a civil action in Bankruptcy Court. The Federal Rules of Bankruptcy Procedure apply in these proceedings and many rules in Part VII (also known as the 7000 series) simply incorporate some of the Federal Rules of Civil Procedures in whole or in part. See e.g., Fed. R. Bankr. P. 7030, 7033 and 7034. Procedurally,

an adversary proceeding gives rise to an entirely separate docket from the main bankruptcy "case."

For a list of what constitutes an "adversary proceeding", see Fed. R. Bankr. P. 7001. These include a proceeding to recover money or property; a proceeding to determine the validity, priority, or extent of a lien or other interest in property; a proceeding to object to or revoke a discharge; a proceeding to obtain an injunction or other equitable relief; a proceeding to subordinate any allowed claim or interest; and a proceeding to obtain a declaratory judgment relating to any of the foregoing. The Advisory Committee Notes on the scope of Rule 7001 discuss in greater detail the types of cases which must comply with the adversary proceeding rules and procedures.

In addition to the Federal Rules of Bankruptcy Procedure, the Federal Rules of Evidence also apply in Bankruptcy Court (under Fed. R. Bankr. P. 9017),[*] and many jurisdictions issue Local Rules and Standing Orders as well. See e.g. Mass. Local Bankr. R. 7026-1 and 7037-1. A litigator should note with care that many, but not all, of the Federal Rules of Civil Procedure apply to adversary proceedings and most, but not all, are contained in the 7000 series of the Bankruptcy Rules. Often the Court may issue a procedural order which may also govern the parties' pre-trial activity in an adversary proceeding. An example of such an order is annexed hereto as **Exhibit A**.

Finally, in larger Chapter 11 cases, the Court may have entered a series of general procedural orders that apply in all of the adversary proceedings arising in that "case."

[*] Civil litigators routinely joke about lax evidentiary standards in Bankruptcy Court, but ignoring the need to make out a prima facie case by competent evidence is a dangerous practice. Many judges in the Bankruptcy Court now take direct examination by affidavit but all insist on compliance with the evidentiary rules.

B. Contested Matters.

Once a motion is opposed or an objection to a claim is lodged, the dispute becomes a "contested matter," to which the Federal Rules of Bankruptcy Procedure (otherwise applicable in adversary proceedings) apply. These rules generally allow for all the discovery devices available in civil litigation. See Fed. R. Bankr. P. 9014(c). A litigator must peruse Rule 9014 carefully to determine which of the 7000 series of rules apply. Also, the Court may often enter a pre-hearing order in these contested matters, and an example of one such order is Exhibit B hereto.

Sometimes what starts out as a contested matter may actually be considered an adversary proceeding. See, e.g. In re Miramar Resources, Inc., 176 B.R. 45 (Bankr. N. Colo. 1994) (where a claim objection joined with a request for other relief, of the kind specified in Rule 7001, was considered an adversary proceeding). To the extent you think your case may be advanced by a determination from the Court as to the type of proceeding you are in, you should feel free to ask for it. If the issue is unclear, most judges will generally articulate that the matter will (or will not) be considered an adversary proceeding or contested matter, so that the parties can have a clear understanding of which rules will apply.

Of course, the utility of discovery being allowed in a contested matter cannot be doubted. The tools available to probe and investigate your adversary's arguments on a motion include requests for production of documents (and the analog for third parties, a subpoena duces tecum), written interrogatories, and, one of the most powerful tools, requests for admissions.

Knowledge of variation in the applicable rules is crucial. In contested matters, there are for example some exceptions to the discovery rules otherwise applicable, and most notably, these include exceptions to the various mandatory requirements contained in Fed. R. Bankr. P. 7026(a) and (f). See Fed. R. Bankr. P. 9014(c). Particularly with the recent changes to the Rule 26 of the Federal Rules, effective December 1, 2010 (relating to expert witness disclosures), these

exceptions can be quite significant. Essentially, the changes to Rule 26 extended work product protection to draft reports and lawyer/expert communications, but opened up the way for discovery into certain aspects of the expert's analysis. In a contested matter, however, there is no mandatory initial disclosure, and no duty to disclose expert reports as part of that disclosure.

On this issue, Fed. R. Bankr. P. 9014(c) provides in part:

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> 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.

Subpoenas may be issued under Rule 9016 in all cases under the Code (incorporating Fed. R. Civ. P. 45 in its entirety), and in addition to the 7000 series, various other rules of civil procedure have analogs in the rules governing bankruptcy procedure. These include:

Fed.R. Civ. P	Analogous Fed. R. Bankr. P.
6	9006
7(b)	9013
10(a)	9004(b)
11	9011
38, 39	9015(a)-(e)
47-51	9015(f)
43, 44, 44.1	9017
45	9016
58	9021
59	9023

60	9024
61	9005
63	9028
77(a), (b), (c)	5001
77(d)	9022(d)
79(a)-(d)	5003
81(c)	9015(a), 9027
83	9029
92	9030

See the Advisory Committee Notes to Rule 7001.

C. Miscellaneous Proceedings.

(i) 341 Meetings. Shortly after the commencement of a case, the U.S. Trustee's office will organize a meeting of creditors under Section 341 of the Bankruptcy Code. The meeting is not a court hearing but typically, the meeting will be recorded. Creditors who attend are entitled to ask questions and the Debtor or its representatives will be under oath. Often, getting a transcript of the audio recording will be useful in the event of further litigation down the road, as it can sometimes be used for impeachment and sometimes simply to show the Debtor's refusal to cooperate or be forthcoming about details of the case. Informal as it is, a 341 meeting can provide valuable discovery.

(ii) 2004 Exams. In the absence of a pending adversary proceeding or a contested matter, a party in interest in a bankruptcy case may still conduct (and receive) formal discovery under Rule 2004 of the Federal Rules of Bankruptcy Procedure. Upon motion of any party, the Court may, under Rule 2004(a), order the examination of any entity, so long as the examination relates to the "acts, conduct or property or to the liabilities and financial conditions 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;" all under Fed. R. Bankr. P. 2004(b). As noted, subpoenas in aid of the examination may be issued under Rule 9016. Unlike depositions in a civil matter governed by a

relevance standard, the scope of a 2004 examination is generally fairly broad. The courts generally refer to it quite plainly as a "fishing expedition." See In re Duratech Indus. , 241 Bankr. 283 (ED NY 1999); In re Ionosphere Clubs, 156 Bankr. 414, 432 (SDNY 1993).

Nevertheless, when the scope of a proposed 2004 exam relates to matters already in issue in a pending adversary proceeding, a motion seeking authority to conduct the exam may be denied. See e.g. In re Bennett Funding Group, Inc., 203 Bankr. 24 (Bankr. ND NY 1996). Also, the court may sometimes be persuaded to limit the time or scope of such an exam, even if it is not denied outright.

(iii) Estimation Proceedings. One particular type of a contested matter bears noting here: an estimation proceeding under § 502(c) of the Bankruptcy Code.[†] In many instances, the value of a claim in litigation will have to be estimated, sometimes "for voting purposes" and sometimes for all purposes. If litigation over a contested matter can compress complex litigation into a matter of a few weeks (e.g. in the context of a claim objection), the estimation proceeding can often entail briefs and one hearing (something akin to a motion for summary judgment), and the outcome will dictate the weight your client's vote will have in any subsequent confirmation proceedings.

(iv) Special Treatment of Valuation Experts in Bankruptcy Court. Valuation of assets is often critically relevant to many disputes in bankruptcy court. Motions for relief from the automatic stay, claims litigation, confirmation hearings, and motions for the determination of secured status are all examples of issues that may well involve valuation testimony, usually by an expert. The first rule in dealing with valuation hearings is to know the way the judge will

[†] Section 502(c) provides in part: There shall be estimated for purpose of allowance under this section –

(1) Any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case. . . .

proceed with such evidence. A call to the judge's courtroom deputy will provide an answer, if the court has not issued a prehearing procedural order. In this District, the judges will often order that the expert provide a report or appraisal summary stating the opinion of value and its basis, which submission will be considered the direct testimony of the expert at the hearing. The expert will be required to appear at the hearing for cross examination, or the report or appraisal will be stricken. The bankruptcy judges are, for all practical purposes, experts themselves on valuation standards and techniques, so this aspect of the testimony need not be highlighted. As is so often the case in litigation, the rules and procedural context of the dispute are essential to achieving your client's goals, and the well-prepared advocate will have these things firmly in mind.

October 16, 2012

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re _____, Debtor _____, Plaintiff(s) v. _____, Defendant(s)	Chapter __ Case No. _____-FJB Adversary Proceeding No. _____

ADVERSARY PROCEEDING PRETRIAL ORDER

1. The Court enters this order in an effort to expedite the disposition of the matter, discourage wasteful pretrial activities, and improve the quality of the trial by thorough preparation. The parties are strongly urged to consider resolving their dispute by mediation.

2. The parties are ordered to confer as soon as possible pursuant to Fed. R. Civ. P. 26, made applicable to this proceeding by Fed. R. Bankr. P. 7026.

3. Discovery, if any, shall be completed on or before _____, unless the Court, upon appropriate motion and/or consideration of the discovery plan, alters the time and manner of discovery.

4. The parties are ordered to file, on or before _____, a Joint Pretrial Memorandum[1] approved by all counsel and unrepresented parties, which shall set forth the following:

    a. The name, address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises, together with any objection to the calling of the witness (see paragraph (c) below).

[1] If the parties cannot cooperate in filing a Joint Pretrial Memorandum, then each shall be responsible for filing, by the same date, a separate Pretrial Memorandum that conforms to the requirements set forth in this paragraph. In the event that the parties cannot cooperate in filing a Joint Pretrial Memorandum, they shall report the reasons therefore in their separately filed Pretrial Memorandum.

i. If a party requires an interpreter at trial for one of that party's witnesses, it will be the responsibility of that party to supply the interpreter. The Court cannot and does not supply interpreters.

b. An appropriate identification (pre-numeration) of each document or other exhibit, other than those to be used for impeachment, in the sequence in which they will be offered, separately identifying those exhibits which the party expects to offer and those which the party may offer if the need arises.

i. The parties shall bring sufficient copies of all exhibits to Court for trial, including three (3) copies for the Court, as well as copies for the witness and all other parties in the event the evidence presentation equipment is not operating.

ii. Judge Bailey's courtroom is equipped with an electronic evidence presentation system for displaying trial exhibits. Parties are invited to make use of this equipment.

c. A specific statement of any objection, together with the grounds therefor, reserved as to the admissibility of deposition testimony designated by another party and/or to the admissibility of documents or exhibits. Objections not so disclosed, other than objection under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the Court for good cause shown.

d. A statement confirming that the parties have exchanged copies (either electronic or paper copy) of the exhibits.

e. A statement indicating the parties' efforts to reach a resolution and positions on attempting to resolve their dispute by mediation. In the event the parties agree to mediation, the Court will liberally consider any motion to postpone the trial to accommodate the mediation.

5. Failure to strictly comply with all of the provisions of this order may result in the automatic entry of a dismissal or a default as the circumstances warrant in accordance with Fed. R. Civ. P. 16, made applicable to this proceeding by Fed. R. Bankr. P. 7016.

Date: _____

_____
Frank J. Bailey
United States Bankruptcy Judge

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

_____, Debtor(s)	Chapter __ Case No. _____-FJB

CONTESTED MATTER PRETRIAL ORDER
[#__] _____

1. The Court enters this Order in an effort to expedite the disposition of the matter, discourage wasteful pretrial activities, and improve the quality of the evidentiary hearing by thorough preparation. The parties are strongly urged to consider resolving their dispute by mediation.

2. Discovery, if any, shall be completed on or before _____, unless the Court, upon appropriate motion and/or consideration of the discovery plan, alters the time and manner of discovery.

3. The parties are ordered to file, on or before _____, a Joint Pretrial Memorandum[1] approved by all counsel and unrepresented parties, which shall set forth the following:

    a. The name, address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises, together with any objection to the calling of the witness (see paragraph (c) below).

        i. If a party requires an interpreter at trial for one of that party's witnesses, it will be the responsibility of that party to supply the interpreter. The Court cannot and does not supply interpreters.

    b. An appropriate identification (pre-numeration) of each document or other exhibit, other than those to be used for impeachment, in the sequence in which they will be offered, separately identifying those exhibits which the party expects to offer and those which the party may offer if the need arises, together with any objection to the introduction of the exhibit (see paragraph (c) below).

[1] If the parties cannot cooperate in filing a Joint Pretrial Memorandum, then each shall be responsible for filing, by the same date, a separate Pretrial Memorandum that conforms to the requirements set forth in this paragraph. In the event that the parties cannot cooperate in filing a Joint Pretrial Memorandum, they shall report the reasons therefore in their separately filed Pretrial Memorandum.

i. The parties shall bring sufficient copies of all exhibits to Court for trial, including three (3) copies for the Court, as well as copies for the witness and all other parties in the event the evidence presentation equipment is not operating.

c. A specific statement of any objection, together with the grounds therefor, reserved as to the admissibility of deposition testimony designated by another party and/or to the admissibility of documents or exhibits. Objections not so disclosed, other than objection under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the Court for good cause shown.

d. A statement confirming that the parties have exchanged copies (either electronic or paper copy) of the exhibits.

e. A statement indicating the parties' efforts to reach a resolution and positions on attempting to resolve their dispute by mediation. In the event the parties agree to mediation, the Court will liberally consider any motion to postpone the evidentiary hearing to accommodate the mediation.

4. The evidentiary hearing in this matter will commence on _____ at _____.m.

Date: _____

_____
Frank J. Bailey
United States Bankruptcy Judge