COMPLEX CASE MANAGEMENT

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ATTACHMENTS

[1] This is not an exhaustive table of contents. It only lists the major section of the outline.

COMPLEX CASE MANAGEMENT[2]

I. MANUAL FOR COMPLEX LITIGATION, FOURTH EDITION ("THE MANUAL").

A. Published by Federal Judicial Center in 2004.[3]

B. What the Manual offers:

> The impetus for this fourth edition of the *Manual for Complex Litigation* was, as with the previous editions, significant change in the landscape of federal litigation and the increasing responsibilities of federal trial judges. A recommendation of the Mass Tort Working Group *** served as a catalyst for this project. Major changes include, but are hardly limited to the growth in class action and mass tort litigation; and the trial judge's heightened role imposed by Daubert v. Merrell Dow Pharmaceuticals and cases following it, and by Markman v. Westview Instruments, Inc. The Manual's orientation, however, differs little from the first incarnation. It 'contains neither a simplified outline for the easy disposition of complex litigation nor an inflexible formula or mold into which all trial or pretrial procedure must be cast.' [Manual, Introduction at 1 (footnotes omitted)].

C. The Manual is divided into four parts:

> [A]s with the previous editions, this edition's 'organization…belies the fact that its subject matter is not neatly divisible into distinct topics.' Nor is the term 'complex litigation' susceptible to any bright-line definition. Part I treats generic topics in complex (and other) litigation, such as pretrial and trial procedures and attorney fees. Part II analyzes special problems in complex litigation, such as class actions and scientific expert evidence. Part III has separate sections on complex litigation in various subject areas, such as antitrust and intellectual property. The Appendix (Part IV) includes sample orders and forms. ***.
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> ***
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> In offering an array of litigation management techniques and procedures, the Manual does not recommend that every complex litigation necessarily employ any such procedures or follow a standard pattern.

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2 This outline focuses on federal case management law and principles. There are a number of sources that address management of complex cases in State courts. See, e.g., Deskbook on the Management of Complex Civil Litigation (Judicial Council of California: 2005); N.J. Court Rule 4:38A ("Centralized Management of Mass Torts") and the "Mass Tort Guidelines" adopted thereunder (available at www.judiciary.state.nj.us).

3 The Manual was last revised in 2004. A 2019 *Annotated Manual for Complex Litigation, Fourth* is available from Thomson Reuters and David F. Herr and seeks to 'supplement and expand' upon the Manual, and provides annual revisions and updates, including annotations to federal and state decisions dealing with complex litigation issues. [Annotated Manual, Preliminary Materials].

Choices will depend on the needs of the litigation and many other considerations.

What the Manual does urge is that choices be made, and that they be made starting early in the litigation. While those decisions are largely the responsibility of the court, the judge should not take the case from the lawyers, but rather provide guidance and direction, setting limits and applying controls as needed. ***.

Complex litigation should not be viewed as monolithic. In some areas of law, such as antitrust and securities litigation, substantive and procedural rules are relatively well settled, as are management techniques. In others, such as environmental, civil rights, and mass tort litigation, rules are still emerging or undergoing change. While all complex litigation challenges courts, the unsettled areas present the greatest challenges.

Much complex litigation, therefore, will take the judge and counsel into sparsely charted terrain with little guidance on how to respond to pressing needs for effective management. Practices and principles that served in the past may not be adequate, their adaption may be difficult and controversial, and novel and innovative ways may have to be found. While this Manual for Complex Litigation, Fourth should be helpful within the limits of its mission, it should be viewed as open-ended, and judges are encouraged to be innovative and creative to meet the needs of their cases while remaining mindful of the bounds of existing law and any variations within their own circuits. [Manual, Introduction at 1-3 (footnotes omitted)].

D. A summary of the first three parts of the Manual:

1. Part I ("Overview"):

   a. General Principles
   b. Pretrial Procedures
   c. Trial
   d. Settlement
   e. Attorney Fees
   f. Judgments and Appeals

2. Part II ("Special Problems"):

   a. Multiple Jurisdiction Litigation
   b. Class Actions
   c. Mass Torts
   d. Expert Scientific Evidence

3. Part III ("Particular Types of Litigation"):

   a. Antitrust
   b. Securities

c. Employment Discrimination
d. Intellectual Property
e. CERCLA (Superfund)
f. Civil RICO

II. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE

(third edition) (“the Scientific Manual”).

A. Published by the Federal Judicial Center in 2011.

B. Purpose and Organization:

In 1993, in the case Daubert v. Merrell Dow Pharmaceuticals, Inc., the Supreme Court instructed trial judges to serve as “gatekeepers” in determining whether the opinion of a proffered expert is based on scientific reasoning and methodology.

Soon after the Daubert decision the Federal Judicial Center published the first edition of the *Reference Manual on Scientific Evidence*, which has become the leading reference source for federal judges for difficult issues involving scientific testimony.

Supreme Court decisions during the last decade of the twentieth century mandated that federal courts examine the scientific basis of expert testimony to ensure that it meets the same rigorous standard employed by scientific researchers and practitioners outside the courtroom. Needless to say, this requirement places a demand on judges not only to comprehend the complexities of modern science but to adjudicate between parties’ differing interpretations of scientific evidence.

As with previous editions of the Reference Manual, this edition is organized according to many of the important scientific and technological disciplines likely to be encountered by federal (or state) judges. We wish to highlight here two critical issues germane to the interpretation of all scientific evidence, namely issues of causation and conflict of interest.

The *Reference Manual on Scientific Evidence*, here in its third edition, is formulated to provide the tools for judges to manage cases involving complex scientific and technical evidence. It describes basic principles of major scientific fields from which legal evidence is typically derived and provides examples of cases in which such evidence was used. Authors of the chapters were asked to provide an overview of principles and methods of the science and provide relevant citations. [Scientific Manual at ix, xiii-xv].

C. “The Admissibility of Expert Testimony” - the Berger article:

In 1993, the Supreme Court’s opinion in Daubert *** ushered in a new era with regard to the admissibility of expert testimony. As expert testimony has become increasingly essential in a wide variety of litigated cases, the Daubert opinion has had an enormous impact. If plaintiffs’ expert proof is excluded on a crucial issue, plaintiffs cannot win and usually cannot even get their case to a jury. This iscussion begins with a brief overview of the Supreme Court's three opinions on expert testimony—often called the Daubert trilogy [the other two cases dealing with the disputed issue of causation are Gen. Elec. Co. v. Joiner, and Kumho Tire Co. v. Carmichael] —and their impact. It then examines a fourth Supreme Court case that relates to expert testimony, before turning to a variety of issues that judges are called upon to resolve, particularly when the proffered expert testimony hinges on scientific knowledge. [Scientific Manual at 12 (footnotes omitted)].

D. "How Science Works" - the Goodstein article:[4]

Recent Supreme Court decisions have put judges in the position of having to decide what is scientific and what is not. Some judges may not be entirely comfortable making such decisions, despite the guidance supplied by the Court and illuminated by learned commentators. The purpose of this chapter is not to resolve the practical difficulties that judges will encounter in reaching those decisions; it is to demystify somewhat the business of science and to help judges understand the Daubert decision, at least as it appears to a scientist. In the hope of accomplishing these tasks, I take a mildly irreverent look at some formidable subjects. I hope the reader will accept this chapter in that spirit. [Scientific Manual at 38 (footnotes omitted)].

E. The subjects of the Reference Guides:

1. Forensic Identification Expertise
2. DNA Identification Evidence
3. Statistics
4. Multiple Regression
5. Survey Research
6. Estimation of Economic Losses in Damages
7. Exposure Science
8. Epidemiology
9. Toxicology
10. Medical Testimony
11. Neuroscience

[4] "Modern science can reasonably be said to have come into being during the time of Queen Elizabeth I of England and William Shakespeare. Almost immediately, it came into conflict with the law.

While Shakespeare was composing his sonnets in England, Galileo Galilei in Italy was inventing the idea that careful experiments in a laboratory could reveal universal truths about the way objects move through space. A bit later, hearing about the newly invented telescope, he made one for himself and with it made discoveries in the heavens that astonished and thrilled all of Europe. Nevertheless, in 1633, Galileo was put on trial for his scientific teachings. The trial of Galileo is usually portrayed as a conflict between science and the church, but it was, after all, a trial, with judges and lawyers, and all the other trappings of a formal legal procedure." Scientific Manual at 68.

12. Mental Health Evidence
13. Engineering

F. No further edition of the Scientific Manual is planned at present.

III. SETTING THE STAGE: THE RULE 26(F) CONFERENCE OF PARTIES

A. Timing: “the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).” Rule 26(f)

B. Purpose: Discussion of, among other things, “any issues about preserving discoverable information.” Development of “a proposed discovery plan” which “must state the parties’ views and proposals on:”

> (1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;
>
> (2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;
>
> (3) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;
>
> (4) any issues about claims of privilege or of protection as trial-preparation material, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;
>
> (5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
>
> (6) any other orders that should be entered by the court under Rule 26(c) or under Rule 26(c) or under Rule 16(b) and (c). [Rule 26(f)[5]].

C. Result:

> Following this meeting, the parties submit to the court their proposals for a discovery plan and can begin formal discovery. Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case.

[5] A sample joint proposed discovery plan from the District of New Jersey is attached at the end of this outline.

[Advisory Committee Note to 1993 amendments to Rule 26(f), 146 F.R.D. 402, 642 (1993)[6]].

D. Must conference be in person? Rule 26(f) was amended in 2000 to delete in-person requirement:

> The rule is amended to require only a 'conference' of the parties, rather than a 'meeting'. There are important benefits to face-to-face discussion of the topics to be covered in the conference, and those benefits may be lost if other means of conferring were routinely used when face-to-face meetings would not impose burdens. Nevertheless, geographic conditions in some districts may exact costs far out of proportion to these benefits. The amendment allows the court by case-specific order to require a face-to-face meeting, but 'standing' orders so requiring are not authorized. [GAP Report[7] of Advisory Committee to 2000 amendments to Rule 26(f), 192 F.R.D. 340, 393 (2000)].

E. Preservation of Discoverable Information:

> Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.
>
> The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. Cf. Manual § 11.422 ("A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") The parties should take

[6] "The advisory committee notes are the primary source of information in the nature of legislative history.' " J. Stempel, "Applying Amended Rule 26(B)(a) [sic] in Litigation: The New Scope of Discovery," 199 F.R.D. 396, 404 n.43 (2001).

[7] **"gap report.** In the making of federal court rules, a report that explains any changes made by an advisory committee in the language of a proposed amendment to a procedural rule after its publication for comment. Before advisory committees began issuing gap reports in the early 1980's, there were complaints that the public record did not show why changes were made after the public-comment period. The five advisory committees — for appellate, bankruptcy, civil, criminal, and evidence rules — therefore began filing the reports to fill in the 'gaps' in the record. Although the phrase is sometimes written in capital letters (*GAP report*), it is not an acronym." Black's Law Dictionary 688 (11th ed. 2019).

account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances. [GAP Report of Advisory Committee to 2006 amendments to Rule 26(f)].

F. Specifics of the conference:

1. What are the parties' claims and defenses?

2. Can the parties settle?

3. When will Rule 26(a)(1) initial disclosures be made?

4. What will the extent of Rule 26(a)(1) initial disclosures?

5. Should discovery be conducted in phases and/or limited to specific issues?

6. Subdivision (f) describes certain matters that should be accomplished at the meeting and included in the proposed discovery plan. This listing does not exclude consideration of other subjects, such as the time when any dispositive motions should be filed and when the case should be ready for trial." Advisory Committee Note to 1993 amendments to Rule 26(f), 146 F.R.D. 402, 643 (1993). The Manual describes matters that may be considered in §11.421.

7. Another subject to consider: will there be stipulation or order on "preservation?" This is discussed in the Manual in §11.442.

8. Another subject to consider: will discovery be in electronic format and will there be issues involving privilege and work product protection?[8]

   Note: Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan—issues about preserving electronically stored information and court orders under Evidence Rule 502. [Advisory Committee Note to 2015 amendments to Rule 26(f)].

9. Another subject to consider: the use of stipulations to eliminate or defer certain discovery. For example, in Gannett Satellite Information

[8] Increasingly, management of civil litigation, complex or not, encompasses discovery of information in electronic format. This outline does not address such discovery. For that, see the author's Discovery of Electronically Stored Information: Surveying the Legal Landscape (BNA: 2007).

Network, Inc. v. Berger, 716 F. Supp. 140 (D.N.J. 1989), aff'd in part and reversed in part, 894 F.2d 61 (3d Cir. 1990), the parties stipulated that certain defendants had engaged in "state action" so that a trial on the central First Amendment issue could be conducted. 716 F. Supp. at 142 n.2. This stipulation eliminated the need for extensive discovery on state action unless there had been a ruling against the defendants at the trial. See Manual §11.471.

IV. THE SCOPE OF DISCOVERY

A. The scope of discovery is now proportional.

> Parties may obtain discovery regarding any non privileged matter that is <u>relevant to any party's claim or defense</u> and <u>proportional to the needs of the case</u>, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. [Rule 26(b)(1)(emphasis added)].

B. This 'proportionality test' became effective with the 2015 amendments to Rule 26(b)(1). Why the change:

> Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.
>
> * * *
>
> The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.
>
> Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.
>
> Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.
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> * * *
>
> A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule adds: "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these

examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.

<u>The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense</u>. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were "other incidents of the same type, or involving the same product"; "information about organizational arrangements or filing systems"; and "information that could be used to impeach a likely witness." Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the "reasonably calculated" phrase to define the scope of discovery "might swallow any other limitation on the scope of discovery." The 2000 amendments sought to prevent such misuse by adding the word "Relevant" at the beginning of the sentence, making clear that "'relevant' means within the scope of discovery as defined in this subdivision . . . ." The "reasonably calculated" phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery. [Advisory Committee Note to 2015 amendments to Rule 26(b)(1)].

C. A scholarly comment on the "bifurcation" of discovery:[9]

[9] Bifurcation was a byproduct of the 2006 Amendments to the Federal rules. As mentioned in the Advisory Committee Note to the 2015 amendments to Rule 26(b)(1), the "for good cause" language has been removed. The author has kept the following scholarly comments and sections on bifurcation as it is still a useful concept in thinking about the evolution of the scope of discovery.

Although Amended Rule 26(b)(1) clearly narrows the scope of discovery, change was not intended to be drastic but rather to discourage excessive or abusive discovery and to shift the default standard of the Federal Rules so that broad subject-matter scope discovery is available only with judicial approval or the adverse party's acquiescence. More constrained discovery scope is now the baseline norm, but this more constrained discovery should not be so crabbed as to interfere with the overriding goal of fair and accurate adjudication.

The new standard of claim-or-defense discovery scope retains considerable breadth, depending on the context of the case and the requesting party's ability to articulate a logical relationship between the material sought and the claim or defense in question. Where useful information lies outside the reach of such a non- attenuated argument for relation to a claim or defense, the court retains power to order the broader discovery so long as it is relevant to the subject matter of the dispute.

The key to obtaining subject-matter scope discovery by motion remains a persuasive argument that even though the material sought is not strictly related to the claims or defenses of the case, it contains information that may very well shed light on important facts that have a significant likelihood of bearing on the case and its accurate adjudication. Consequently, party behavior demonstrating care, lack of care, conspiracy, notice, warning, motive, and so on would appear to be discoverable under Amended Rule 26(b)(1) even when they are arguably outside the claims or defenses as currently pleaded in the litigation.

Under new Rule 26(b)(1) , efforts to obtain potentially admissible evidence should satisfy the new standard of claim-or-defense relevancy. Information logically related to the litigation will normally seek such evidence and satisfy the standard. Where a party seeks information that does not readily bear on a claim or defense but may be important to the case and help develop potentially admissible evidence, this should ordinarily suffice as a demonstration of sufficient good cause for obtaining this further discovery. So interpreted, the 2000 Amendment to the scope of discovery would achieve the modest narrowing sought by the rulemakers without unduly truncating the effectiveness or accuracy of civil litigation." [Stempel, "Applying Amended Rule 26(B)(1) [sic] in Litigation," 199 F.R.D. 396, 423-24 (2001)[10]].

10 For another scholarly comment on amended Rule 26(b)(1), see Note, “The Sound and the Fury or the Sound of Silence?,” 37 Ga. L. Rev. 1039, 1082 (2003) (advocating adoption of a “cogent nexus” approach which “would require requesting parties to suggest clearer ties at the outset of litigation between claims and the information sought justified in terms of the [Rule 26](b)(2) balancing factors”).

D. A judicial approach to "bifurcation" of discovery in Thompson v. Department of Housing and Urban Dvlpt., 199 F.R.D. 168 (D. Md. 2001):[11]

> The most recent revisions to the discovery rules imposed changes intended to reach lingering concerns about the over breadth and expense of discovery, and remind the courts and litigants of the fact that in determining what discovery should take place in a particular case, Rule 26(b)(1) is but the first step, necessarily followed by balancing the Rule 26(b)(2) factors. ***.
>
> Although the rule changes do not specifically explain the differences in scope between discovery relevant to 'claims and defenses' in the litigation, and discovery relevant to the 'subject matter', it is clear that the former is intended to be narrower than the latter, and that the broader discovery is only to be allowed for 'good cause'. Further, it seems clear that the most valuable reference to use in implementing the new change in the scope of discovery is the pleadings that have been filed, as that is where the claims and defenses are stated. However, the pleadings are only the starting place.***.
>
> Thus, counsel should be forewarned against taking an overly rigid view of the narrowed scope of discovery. While the pleadings will be important it would be a mistake to argue that no fact may be discovered unless it directly correlates with a factual allegation in the complaint or answer. Such a restrictive approach would run counter to the underlying purpose of the rule changes, as explained by the commentary, run afoul of Fed. R. Civ. P. 1, and undoubtedly do disservice to the requirement of notice pleading in Rule 8, as parties would be encouraged to plead evidentiary facts, unnecessary to a 'short and plain statement of the claim showing that the pleader is entitled to relief, Rule 8(a)(2), simply to increase the likelihood of getting broader discovery. It equally is clear, however, that the new rule represents a change from the old version, and that, unless expanded by the court for good cause shown, it is intended that the scope of discovery be narrower than it was, in some meaningful way. Lest litigants and the court become consumed with the philosophical exercise of debating the difference between discovery relevant to the 'claims and defenses' as opposed to the 'subject matter' of the pending action--the juridical equivalent to debating the number of angels that can dance on the head of a pin—the practical solution to implementing the new rule changes may be to focus more on whether the requested discovery makes sense in light of the Rule 26(b)(2) factors, than to attempt to divine some bright line difference between the old and new rule. Under this approach, when confronted with a difficult scope of discovery dispute, the parties themselves should confer, and discuss the Rule 26(b)(2) factors, in an effort to reach an acceptable compromise, or narrow the scope of their disagreement.

[11] See footnote 9, supra.

> For example, if the plaintiff seeks discovery of information going back 20 years, and the defendant objects on the grounds of burden, a possible solution may be to agree first to produce information going back 5 years. Then, depending on the results of a review of the more recent information, if more extensive disclosure can be justified, based on the results of the initial, more limited, less burdensome, examination, it should be produced. Similarly, if the burden and expense of search for and producing all documents that fall within the scope of a broad Rule 34 request is objected, the party objecting might agree to spend up to a stated amount of time looking for the records, and producing them for inspection, with the understanding that if, following review of the documents produced, the requesting party can justify a request for more, under the Rule 26(b)(2) factors, it would be produced, perhaps under a cost sharing, or shifting agreement. The court, too, if called upon to resolve discovery disputes, may find such an incremental, phased approach useful, as a result of evaluating the Rule 26(b)(2) factors. See e.g., Marcus, 196 F.R.D. at 40 (ordering the defendant to produce documents going back 5 years, subject to plaintiffs ability to request broader disclosure if, following initial review, additional discovery was warranted under the Rule 26(b)(2) factors, and raising the possibility of the plaintiff having to bear some or all of the expense of additional production). [199 F.R.D. at 171-72 (footnote omitted)].

See Sallis v. University of Minnesota, 408 F.3d 470 (8th Cir. 2005), "bifurcation" in operation:[12]

> Sallis argues that it was an abuse of discretion for the district court to deny his discovery requests because all of UM's discrimination complaints were contained in an easily accessible, central database, and he experienced discrimination at the hands of other UM departments. We find this argument unconvincing.
>
> A district court's control over discovery has been enhanced since the changes in the Federal Rules of Civil Procedure in 2000. The Rules were amended 'to involve the court more actively in regulating the breadth of sweeping or contentious discovery.' Fed.R.Civ.P. 26 advisory committee's notes. In particular, the new rules limit the breadth of discovery that can occur absent court approval. Under Rule 26(b)(1), for example, discovery must relate more directly to a 'claim or defense' than it did previously, and 'if there is an objection that discovery goes beyond material relevant to the parties claims or defenses, the court would become involved.' * * *.
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> * * *
>
> Sallis's discovery requests had no limitation — he sought information on every allegation of discrimination against the university -- by all

12 This opinion referenced both 26(b)(1) and 26(b)(2).

complainants in all departments. However, Sallis spent the last ten years working in j t on UM department, Parking and Transportation services, and his alleg tions of discrimination focus on the behavior of the supervisors there. The magistrate's order, adopted by the district court, found Sallis's request to be overly broad and unduly burdensome and limited discovery to Parking and Transportation Services and to complaints filed no more than one year before the actions at issue here. The magistrate judge indicated:

We agree with the Defendant that, to order the disclosure to the extent requested by the Plaintiff would be overbroad, and unduly burdensome, particularly in light of the fact that the discovery deadline is rapidly approaching. We are persuaded that the discovery must be limited, in both its temporal and geographical reach, so as to ameliorate the burdensomeness of the Defendant's response, but without delimiting the persuasive weight of the information so produced. [408 F.3d at 477-78 (citations omitted)]:

E. Limitations on discovery:

1. Rule 26(b)(2)(C) provides for limitations:[13]

[T]he court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

2. The principles of Rule 26(b)(2)(C) also govern applications to extend the numerical and time limits of depositions (Rule 30(a)(2)) and to extend the number of interrogatories. Rule 33(a). See, for an analysis of a motion for

13 For an example of how Rule 26(b)(2)(C) has been applied, see Patterson v. Avery Dennison Corp.. 281 F.3d 576, 681-82 (7th Cir. 2002), in which the court of appeals affirmed the district court's refusal to compel the deposition of an officer of the defendant corporation: "[I]n light of the burdens that a deposition would have placed on the company, and Patterson's refusal to avail herself of other reasonably available means of discovery, and the relatively small amount in controversy***," the district court was affirmed. Plaintiff's request for the deposition was triggered by one e-mail the corporate officer had sent.

See also, although making no specific reference to Rule 26(b)(2)(C), Wright v. AmSouth Bancorporation, 320 F. 3d 1198 1205 (11th Cir. 2003). In Wright, the court of appeals held that the district court had not abused its discretion in denying the plaintiffs request for discovery into word processing files of five employees of the defendant over a two and one-half year period. "Wright has not tried to identify particular items within the expansive request nor has he provided a theory of relevance that might narrow the scope of his request."

leave to serve more than 25 interrogatories, Duncan v. Paragon Publishing, Inc., 204 F.R.D. 127, 128-29 (S.D. Ind. 2001).

3. The Advisory Committee Note to the 2015 amendments to Rule 26(b) explained the limitations as follows:

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called "information asymmetry." One party — often an individual plaintiff — may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that "[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." The 1993 Committee Note further observed that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression." What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized "the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

So too, consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that "[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."

* * *

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

4. What the <u>Manual</u> says:

The cost of seeking and responding to discovery is a part of the cost of litigation that each party normally must bear, subject only to specific provisions for cost-shifting contained in statutes or rules. But Federal Rule of Civil Procedure 26(b)(2) directs the judge to *** consider[] whether [] the information sought 'is obtainable from some other more convenient, less burdensome, or less expensive.' and to limit discovery if, in the circumstances of the case, its 'expense... outweighs its likely benefits.' Protective orders are a means of implementing the proportionality principle underlying the discovery rules. Rule 26(c) permits the court to issue orders 'to protect a party or person from...undue burden or expense,' including an order 'that the discovery... may be had only on specified terms or conditions... [or] only by a method of discovery other than that selected by the party seeking discovery.'

<u>Taken together, these provisions give the court broad authority to control the cost of discovery by imposing limits and conditions. The judge can implement the cost-benefit rationale by conditioning particular discovery on payment of its costs by the party seeking it.</u> Short of barring a party from conducting certain costly or marginally necessary discovery, the judge can require the party to pay all or part of

the cost as a condition to permitting it to proceed. Similarly, where a party insists on certain discovery to elicit information that may be available through less expensive methods, that discovery may be conditioned on the payment of the costs incurred by other parties. Such a cost-shifting order may require payment at the time, or may imply designate certain costs as taxable costs to be awarded after final judgment.

Reference to the court's authority to shift costs will tend to give the parties an incentive to use cost-effective means of obtaining information and a disincentive to engage in wasteful and costly discovery activity. For example, where production is to be made of data maintained on computers, and the producing party is able to search for and produce the data more efficiently and economically than the discovering party, they may agree to use the former's capabilities subject to appropriate reimbursement for costs. Where it is less expensive for a witness to travel to a deposition site than for several attorneys to travel to the witness's residence, the party seeking discovery may agree to pay the witness's travel expenses.

Cost allocation may also be an appropriate means to limit discovery that is unduly burdensome or expensive discovery. Rule 26's purpose is not to equalize the burdens on the parties, but Rule 26(b)(2)(iii) expressly requires the court to take the parties' resources into account in balancing the burden or expense of particular discovery against its benefit. Thus, where the parties resources are grossly disproportionate, the court may condition discovery that would be unfairly burdensome on one of them upon a fair allocation of costs. [Manual, §11.433 (emphasis added)[14]].

5. A judicial review of Rule 26(b)(2)(C) in Thompson v. Department of Housing and Urban Dvlpt., 219 F.R.D. 93 (D.Md. 2003) (in the context of a request for production of e-mail):

It can be argued with some force that the Rule 26(b)(2) balancing factors are all that is needed to allow a court to reach a fair result when considering the scope of discovery of electronic records. Rule 26(b)(2) requires a court, sua sponte, or upon receipt of a Rule 26(c) motion, to evaluate the costs and benefits associated with a potentially burdensome discovery request. ***.

Regardless of which test is used, the most important ingredient for the analytical process to produce a fair result is a particularization of the facts to support any challenge to discovery of electronic records. Conclusory or factually unsupported assertions by counsel that the discovery of electronic materials should be denied because of burden or expense can be expected to fail. ***.

The rationale for this requirement is obvious. Under Rules 26(b)(2) and 26(c), a court is provided abundant resources to tailor discovery requests to avoid unfair

14 See the author's Discovery of Electronically Stored Information: Surveying the Leal Landscape (BNA: 2007), for a discussion of cost-shifting in the context of electronically stored information.

> burden or expense and yet assure fair disclosure of important information. The options available are limited only by the court's own imagination and the quality and quantity of the factual information provided by the parties to be used by the court in evaluating the Rule 26(b)(2) factors. The court can, for example, shift the costs, in whole or part, of burdensome and expensive Rule 34 discovery to the requesting party; it can limit the number of hours required by the producing party to search for electronic records, or it can restrict the sources that must be checked. It can delay production of electronic records in response to a Rule 34 request until after the deposition of information and technology personnel of the producing party, who can testify in detail as to the systems in place, as well as to the storage and retention of electronic records, enabling more focused and less costly discovery. A court also can require the parties to identify experts to assist in structuring a search for existing and deleted electronic data and retain such an expert on behalf of the court. But it can do none of these things in a factual vacuum, and *ipse dixit* assertions by counsel that requested discovery of electronic records is overbroad, burdensome or prohibitively expensive provide no help at all to the court. [219 F.R.D. at 98-99].

G. A new concept of “bifurcation”

Rule 26(b)(2) was amended, effective December 1, 2006, to introduce into electronic discovery a second concept of bifurcation:

> (B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonable accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Rule 26(b)(2) became (b)(2)(C).

H. Assertion of Privileges

1. New Rule 26(b)(5)(B) provides, in relevant part:

> Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take

reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

2. For a discussion of waiver of privilege in the context of Rule 26(b)(5)(A), see United States v. Philip Morris Inc., 347 F.3d 951, 954 (D.C. Cir. 2003):

> Rule 26(b)(5) requires the party to note its privilege objection and to describe the document only when the document is 'otherwise discoverable.' This means, as the 1993 Advisory Committee Notes to Rule 26(b)(5) explain, that if a broad discovery request includes an allegedly privileged document, and if there is an objection to the scope of the request, the court should first decide whether the objection covers the document. If the court finds that the document is within the scope of the objection, and the court overrules the objection, it must then give the party an opportunity to list the document on a privilege log pursuant to Rule 26(b)(5). 'In short, if a party's pending objections apply to allegedly privileged documents, the party need not log the document until the court rules on its objections.' ***. On the other hand, if the court determines that the objection does not cover the allegedly privileged document, or that the objection was not made in good faith as Rule 26(g) requires ***, the court may then decide whether the party should be deemed to have waived the privilege. Waiver is not automatic, particularly if the party reasonably believed that its objections applied to the document. 'As the federal rules, case law and commentators suggest, waiver of a privilege is a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith.' [citations omitted].

See also Kansas City Power & Light Co. v. United States, 139 Fed. Cl. 546, 574 (2018), which discussed waivers since Philip Morris:

> Indeed, since Phillip Morris was decided, courts have held that a party waives attorney-client or work-product objections by failing to assert them within the time frame to respond to interrogatories regardless of whether other objections were submitted in response. See, e.g., Cardenas v. Dorel Juvenile Grp., Inc., 231 F.R.D. 616, 620 (D. Kan. 2005) (concluding that privilege objections to interrogatories were waived when the objections were not included with the timely submitted objections based on other grounds).

See also Banks v. Office of the Senate Sergeant-at-Arms, 226 F.R.D. 113, 117 (D.D.C. 2005), which discussed the duty to provide a privilege log:

> Thus, an accurate summary of the existing case law would have been that federal courts are insistent upon the timely production of a privilege log, have enforced waivers when the production was not timely, and concluded, in one given case, that timely production meant when a party produced the documents that were not privileged. Furthermore, at least one court excused a party from producing a privilege log only because the opposing party had already provided an adequately specific description of the nature of the privilege claimed and its application to the

documents in question or when it was self-evident from the request itself that a party was seeking documents to which it was not entitled.

That case law would have alerted any lawyer with a health respect for his own skin to either produce the privilege log with the documents her client was producing, negotiate some other arrangement with opposing counsel, or seek judicial relief from the obligation to produce a privilege log until a date certain or until some other event, such as the resolution of its objections to the document requests. What a lawyer cannot do is ignore the obligation to produce a privilege log when the opposing party has repeatedly demanded it over several months, and then, without judicial approval, further delay its production once opposing counsel formally demanded the privilege log by a letter. Indeed, what is so maddening about this entire controversy is that it so easily could have been avoided by [defendant] SSA's moving for a protective order. But SSA never did and now, plaintiff had to file a motion to compel. At this point in time, simple fairness dictates that SSA reimburse plaintiff for the fees and costs it incurred. [emphasis added].

3. For a recent discussion of waiver of privilege in the context of Rule 34, see Burlington & Santa Fe Northern Rr. Co. v. United States District Court, 408 F.3d 1142, 1149-50 (9th Cir. 2005):

We hold that boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a privilege. However, we also reject a *per se* waiver rule that deems a privilege waived if a privilege log is not produced within Rule 34's 30-day time limit. Instead, using the 30-day period as a default guideline, a district court should make a case-by-case determination, taking into account the following factors: the degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged (where providing particulars typically contained in a privilege log is presumptively sufficient and boilerplate objections are presumptively insufficient); the timeliness of the objection and accompanying information about the withheld documents (where service within 30 days, as a default guideline, is sufficient); the magnitude of the document production; and other particular circumstances of the litigation that make responding to discovery unusually easy (such as, here, the fact that many of the same documents were the subject of discovery in an earlier action) or unusually hard. These factors should be applied in the context of a holistic reasonableness analysis, intended to forestall needless waste of time and resources, as well as tactical manipulation of the rules and the discovery process. They should not be applied as a mechanistic determination of whether the information is provided in a particular format. Finally, the application of these factors shall be subject to any applicable local rules, agreement or stipulations among the litigants, and discovery or protective orders. [footnote omitted].

Here, the district court found a waiver where the log not only was not filed during the Rule 34 time limit, but was filed five *months* later. In the absence of mitigating considerations, this fact alone would immunize the district court's ruling from

> reversal under the standard just articulated. But additional circumstances support the district court's ruling. Burlington is a sophisticated corporate litigant and a repeat player in environmental lawsuits and regulatory action involving the site that is the subject of the underlying lawsuit. The claim that responding in a timely fashion would have been impossible or overly burdensome is hard to justify, especially because the record reveals agreement between the parties that many of the same documents were previously produced in a prior lawsuit. The record also contains evidence that even the untimely assertion of privileges by Burlington was insufficient. The district court noted that the untimely logs 'failed to correlate [specified] documents with specific discovery requests.' Moreover, the Kapsners represented, and Burlington admitted, that even after producing the privilege log, Burlington made substantive changes to that log, removing 'documents which, upon additional review, were not responsive.' While an appellate court is not in a position, given the absence of explicit fact-finding on this matter, to definitely resolve the reciprocal claims of gamesmanship advanced by both parties, this is precisely the type of evaluation that is entrusted to the district court.

But see Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412, 425 (N.D. Ill. 2006):

> Plaintiffs finally urge the court to find waiver based on Defendants' failure to provide a privilege log for the disputed documents for some three months between June 29 and October 16, 2006. In Burlington, the Ninth Circuit upheld the lower court's finding of waiver where a privilege log 'not only was not filed during the Rule 34 time limit [30 days], but was filed five months later,' and there were no mitigating considerations. The court rejected, however, a per se waiver rule in favor of 'using the 30–day period as a default guideline' in making a 'case-by-case determination.'Significantly, Defendants have now provided privilege logs covering all documents in question as of September 8 and October 25, 2006. Given that more than four million pages of documents are at issue in this case, the court declines to find waiver based on the delay in submitting a privilege log. [citations omitted].

4. Any assertion of privilege, of course, raises the question of how that assertion is to be tested. That question may be magnified by the sheer volume of information at issue. Will a document-by-document in camera review be necessary? Can a sampling procedure be used? Will a judge or special master undertake the review? In this regard, see American Nat'l Bank and Trust Co v. Equitable Life Assur. Society, 406 F.3d 867 (7th Cir. 2005). There, the court reversed an award of sanctions imposed by a judge who used a sampling procedure that the Seventh Circuit characterized as "too arbitrary to be accurate and with a consequence that was onerous." 406 F.3d at 878. The Seventh Circuit concluded that, "rather than resorting to an ill-advised and imprudent sampling procedure, a full in camera review of the log documents [a half box] would have been 'a highly appropriate and useful means of dealing with' the sensitive privilege issues in this case." 406 F.3d at 880 (quoting Kerr v. United States District Court, 426 U.S 394, 406 (1976)). See also In re Vioxx Products Liability Litigation, 2006 WL 1726675 (5th Cir. May

26, 2006) (per curium), directing that an in camera review must be document-by document or through some statistically sound random sampling. 2006 WL 1726675, *2 & n.5.

I. The controversial question of cost shifting:

1. In August, 1998, the Advisory Committee proposed an amendment to Rule 34(b). The amendment would have added this sentence:

On motion under Rule 37(a) or Rule 26(c), or on its own motion, the court shall-if appropriate to implement the limitations of Rule 26(b)(I), (ii) or (iii)- limit the discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party. [181 F.R.D. 18, 88-89 (1999)].

2. The purpose of the proposed amendment:

Subdivision (b). The amendment makes explicit the court's authority to condition document production on payment by the party seeking discovery of part or all of the reasonable costs of that document production if the request exceeds the limitations of Rule 26(b)(2)(I), (ii), or (iii). This authority was implicit in the 1983 adoption of Rule 26(b)(2), which states that in implementing its limitations the court may act on its own initiative or pursuant to a motion under Rule 26(c). The court continues to have such authority with regard to all discovery devices. If the court concludes that a proposed deposition, interrogatory, or request for admission exceeds the limitations of Rule 26(b)(2)(I), (ii), or (iii), it may, under authority of that rule and Rule 26(c), deny discovery or allow it only if the party seeking it pays part or all of the reasonable costs.

This authority to condition discovery on cost-bearing is made explicit with regard to document discovery because the Committee has been informed that in some cases document discovery poses particularly significant problems of disproportionate cost. *Cf.* Rule 45(c)(2)(B) (directing the court to protect a nonparty against 'significant expense' in connection with document production required by a subpoena). The Federal Judicial Center's 1997 survey of lawyers found that [o]f all the discovery devices we examined, document production stands out as the most problem-laden.' T. Willging, J. Shapard, D. Steinstra & D. Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change, at 36 (1997). These problems were 'far more likely to be reported by attorneys whose cases involved high stakes, but even in low-to-medium stakes cases...36% of the attorneys reported problems with document production.' *Id.* at 35: Yet it appears that the limitations of Rule 26(b)(2) have not been much implemented by courts, even in connection with document discovery. S*ee* 8 Federal Practice & Procedure § 2008.1 at 121. Accordingly, it appears worthwhile to make the authority for a cost bearing order explicit in regard to document discovery.

Cost-bearing might most often be employed in connection with limitation (iii), but it could be used as well for proposed discovery exceeding limitation (I) or (ii). It is not expected that this cost-bearing provision would be used routinely; such an order is only authorized when proposed discovery exceeds the limitations of subdivision (b)(2). But it cannot be said that such excesses might occur only in certain types of cases; even in `ordinary' litigation it is possible that a given document request would be disproportionate or otherwise unwarranted.

The court may employ this authority if doing so would be 'appropriate to implement the limitations of Rule 26(b)(2)(I), (ii), or (iii).' In any situation in which a document request exceeds these limitations, the court may fashion an appropriate order including cost-bearing. When appropriate it could, for example, order that some requests be fully satisfied because they are not disproportionate, excuse compliance with certain requests altogether, and condition production in response to other requests on payment by the party seeking the discovery of part or all of the costs of complying with the request. In making the determination whether to order cost-bearing, the court should ensure that only reasonable costs are included and (as suggested by Rule 26(b)(2)(iii) it may take account of the parties' relative resources in determining whether it is appropriate for the party seeking discovery to shoulder part or all of the cost of responding to the discovery.

The court may enter such a cost-bearing order in connection with a Rule 37(a) motion by the party seeking discovery, or on a Rule 26(C)) motion by the party opposing discovery. The responding party may raise the limits of Rule 26(b)(2) in its objection to the document request or in a Rule 26(c) motion. Alternatively, as under Rule 26(b)(2), the court may act on its own initiative, either in a Rule 16(b) scheduling conference or order or otherwise. [181 F.R.D. 18, 89-91 (1999)].

3. The proposed amendment was discussed at November 12 and 13, 1998, meeting of Civil Rules Advisory Committee:

Cost-bearing. The published Rule 34(b) language was drafted after the March meeting, in response to deserved dissatisfaction with the proposals offered there. At the Standing Committee meeting, it was asked whether the proposed language adequately describes the intent to apply cost-bearing only as an implementation of Rule 26(b)(2) principles — whether cost-bearing could be ordered as to discovery that would be permitted to proceed under present applications of (b)(2) principles. The problem of drafting Rule 34 language, indeed the general problem of incorporating this provision specifically in Rule 34, joined with-policy doubts to suggest reconsideration of the question whether cost-bearing would better be incorporated directly in Rule 26(b)(2). There was extensive debate of this question at the April Subcommittee meeting, leading to a close division of views. The Rule 26(b)(2) approach would have at least two advantages in addition to better drafting. The Reporters believe that Rule 26(b)(2) and Rule 26(c) now authorize cost-bearing orders; incorporation in Rule 26(b)(2) would quash the doubts that might arise by implication from location in Rule 34. In addition, it is important to emphasize that the cost-bearing principle can be applied in favor of plaintiffs as well as in favor of defendants; there is a risk that location in Rule 34 will stir questions whether the proposal is aimed to help defendants in light of the fact that defendants complain of document production, while plaintiffs tend to complain more of deposition practice. ***.

It was observed that the arguments for relocation of the cost-bearing provision in Rule 26(b)(2) are strong. The Committee should feel free to consider the matter further in light of the views that may emerge from the public comments and testimony.

An important question was raised at the standing Committee meeting that may deserve a drafting response. After a court allows discovery on condition that the requesting party pay the costs of responding, the response may provide vitally important information that belies the court's initial prediction that the request was so tenuous that the requesting party should bear the response costs. Should the rule provide a clear answer whether the cost bearing order can be overturned in light of the value of the information provided in response?

The New York State Bar Association opposes this proposal because it agrees that the intended authority already exists. Adoption of an explicit rule will lead some litigants to contend for — and perhaps win — a broader sweep of cost-sharing than is intended.

Some preference was expressed for leaving the proposed amendment in Rule 34. This view was that 'there is too much in Rule 26' now; 'no one reads all of Rule 26.' The most important source of the most extravagantly expensive over-discovery is document production. The explicit cost-bearing protection should be expressed in Rule 34.

It also was noted that at the Standing Committee meeting, it had been urged that if the target is the complex or 'big documents' case, the rule should be drafted expressly in terms of complex cases. It also was feared that the proposal will create a 'rich-poor' issue: there will be a marked effect on civil rights and employment cases, where poor plaintiffs will be denied necessary discovery because neither they nor their lawyers can afford to pay for response costs. There have been few cost-bearing orders in the past; no matter what the rule intends, it will be difficult to convince lawyers that they can continue to afford to bring these cases. They will fear that cost-bearing will be ordered in cases where discovery is now allowed.

These concerns were met by responses that Rule 26(b)(2) now says that the court shall deny disproportionate discovery; the cost-bearing provision simply confirms a less drastic alternative that allows access to otherwise prohibited discovery. No one is required to pay for anything; it is only that if you want to force responses to discovery requests that violate Rule 26(b)(2) limits, you can at times obtain discovery by agreeing to pay the costs of responding. All reasonable discovery will be permitted without interference, as it now is under Rule 26(b)(2). Rule 26(b)(2) principles expressly include consideration of the parties' resources; there is no reason to anticipate that poor litigants will be put at an unfair disadvantage. And it has proved not feasible, even after some effort, to define ‘big,’ `complex,’ or ‘contentious’ cases in terms that would make for administrable rules.

4. There was discussion of the proposed amendment at the April 19 and 20, 1999, meeting of the Civil Rules Advisory Committee:

   a. Relation of cost-bearing to ‘good cause’:

Rule 26(b)(1): Relation of cost-bearing to good-cause expansion. The committee conceived the subdivision (b)(1) scope proposal as a matter entirely independent of the cost-bearing proposal that was published as an amendment to Rule 34(b). Many of the comments, however, have assumed that there is a connection. The supposed connections have run in various directions. Some assume that showing good cause for expanding the scope of discovery automatically means that cost-bearing is not appropriate. Others assume that a party who is willing to bear the costs is automatically entitled to expand the scope of discovery. And still others assumed that an order finding good cause to expand the scope of discovery automatically should order cost bearing. The discovery Subcommittee discussed a possible addition to the Committee Note that is set out at page 38, note 7, lines 1199 to 1212 of the agenda materials. Different and more expanded Note language is set out at pages 39 to 40, lines 1223 to 1257, yet another and earlier alternative model is set out at page 40, note 9, lines 1261 to 1285. The Special Reporter remained dissatisfied with each of these versions, and suggested that perhaps further work should be done.

Discussion of these alternative began with the reassurance that cost bearing is contemplated only within the principles of Rule 26(b)(2) and 26(c), whether the new provision is located in Rule 34(b) as published or is relocated to Rule 26(b)(2) as proposed for later discussion. The relation of cost bearing to expanding the scope of discovery depends, however, on the context of actual administration. A judge, for example, might find good cause for expanded discovery of three specified items; if nothing is said about cost bearing, the ordinary assumption should be that there is no need to consider cost-bearing further. A general order that opens the scope of discovery, however, need not have resolved that everything within the reach of `subject-matter’ discovery is discoverable within the limits of Rule 26(b)(2) and the protective power of Rule 26(c). The scope and cost-bearing provisions are conceptually independent, and it may help to emphasize that the risk of confusion arises in actual administration when an initial focus on scope may — or may not — include consideration of (b)(2) principles. Concrete examples could illustrate the risks of confusion and clarify the conceptual independence.

   a. Relation of proposed amendment what was Rule 26(b)(2) (now 26(c)(1)(B))

Rule 26(b)(2): The Location of Cost Bearing. The published proposals included amendment of Rule 34(b) to provide for cost bearing in these terms: ‘On motion under Rule 37(a) or Rule 26(c), or on its own motion, the court shall — if appropriate to implement the limitations of Rule 26(b)(2)(I), (ii), or (iii) — limit the discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party.' The letter submitting the proposals for publication, however, solicited comment on an alternative proposal to locate cost-bearing in Rule 26(b)(2) for the reasons described at pages 14 to 15 of the publication book. The choice of location was the subject of mixed comments. The Discovery Subcommittee, although not unanimously, recommended that the provision be relocated to Rule 26(b)(2). Location in Rule 26(b)(2) supports clearer drafting. The Committee has believed throughout, moreover, that Rules 26(b)(2) and 26)(c) already support cost-bearing orders, and recognizes that courts have in fact exercised this power. Explicit confirmation of the power in Rule 34(b) was suggested in the belief that the most frequent occasions for a cost-bearing order will arise in connection with document discovery. The published Committee Note says as much and expressly states that courts continue to have authority to order cost bearing with respect to depositions, interrogatories, or requests for admission. The Note, however, may not be effective to defuse the possible negative implication that confirmation of the existing power in Rule 34(b) somehow defeats the same power with respect to other modes of discovery. Relocation to Rule 26(b)(2) ensures the evenhanded availability of the cost-bearing power.

It was urged that the committee had it right. The problems arise with document production under rule 34. If cost bearing is relocated to Rule 26(b)(2), 'it will get lost.' If this provision is relocated to Rule 26, at least Rule 34 should be amended to include an explicit reminder of the power. It also was urged that cost bearing 'is very controversial. You double the controversy by putting it in Rule 26.'

Relocation was supported by urging that greater controversy will arise from the Rule 34 location. The Committee Note says that this is an existing power, and that it will continue to exist across all discovery devices. The arguments summarized at page 15 of the publication book say it well. Location in Rule 34 requires unnecessarily complicated drafting, and will lead to negative implications for those who do not bother to read the Committee Note. Cost bearing is a discovery management tool, and should be located with the Rule 26(b) management provisions.

A motion to move cost bearing to Rule 26(b)(2) passed 8 for and 3 against. The question of adopting a cross-reference in Rule 34 was postponed for later discussion of Rule 34.

5. The May 11, 1999, report of the Chair of the Civil Rules Advisory Committee:

In addition to Professor Rowe's motion, Mr. Lynk made a motion to delete the proposal that affirms the court's authority to require a party to pay for excessive discovery. In the Committee's proposal, which originally was contained in Rule 34(b) and now has been moved to Rule 26(b), the Committee makes explicit the court's implicitly authority to condition discovery which exceeds the limitations of Rule 26(b)(2)(I), (ii), and (iii), on the payment of reasonable costs of the discovery.

The limitations of Rule 26(b)(2)(I), (ii) and (iii) are against excessive discovery. The Committee acted on the assumption that even now the courts have the authority to refuse excessive discovery or implicitly to condition it on the payment of costs.

Mr. Lynk moved to delete the proposed change, arguing that there was no need to add an explicit provision to the rules because judges already have the authority. By making the authority explicitly, he maintained, the change would encourage courts to permit excessive discovery on the condition that costs be paid, thus undermining the limitations of (I), (ii), and (iii). He also maintained that moving the cost-bearing provision from Rule 34(b) to Rule 26(b)(2) only heightened this encouragement by applying it more clearly to all discovery. In the end, he argued, the result would be differential justice: the party who cannot afford to pay will not get this discovery, while the one who can pay - who may be eager to pay will get the discovery.

Again, the Committee debated the motion at length, reviewing the policy considerations for and against, and following debate, five members voted in favor and eight voted against the motion. Accordingly, the Committee again elected to remain with its original proposal to the Standing Committee, subject to the change of moving the provision from Rule 34(b) to Rule 26(b). [192 F.R.D. 340, 360 (footnote omitted)].

6. The Judicial Conference Committee on Rules of Practice and Procedure recommended approval of the proposed amendments to the Judicial Conference. The committee report stated:

Cost-bearing-Rule 26(b)(2). The proposed amendments to Rule 26(b)(2) make explicit the authority that the advisory committee believes is implicit in the current rule - to condition 'disproportionate' discovery on payment of part or all of the resulting cost. The advisory committee was told repeatedly about excessive expenses due to discovery requests that held little promise of producing useful information. Rule 26(b)(2) already directs that disproportionate discovery be limited, but it is infrequently used. Dealing with disproportionate discovery emerged as an important way to reduce unduly costly litigation.

The amendments make it clear that the judge has this management tool available in instances of overbroad discovery. The authority should be used only when a discovery request exceeds the existing limitations of Rule26(b)(2), and it does not introduce improper differential treatment among litigants based on ability to pay. The court is also to take account of ability to pay in making its determination how to use this management tool. In addition, Rule 26(b)(2) is amended to apply the numerical limitations on interrogatories and depositions in a nationally uniform manner. The committee approved the proposed amendment by a vote of 11 to 1

Rule 34(b) (Production of Documents). Because disproportionate discovery is frequently an issue in document discovery, a cross-reference has been inserted calling attention to the cost-bearing amendment to Rule 26(b)(2).

7. “At its September 15, 1999, session the Judicial Conference of the United States did not approve the proposed cost-bearing provision. The proposed cost-bearing addition to Rule 26(b)(2) and the cross-reference to Rule 34(b) has been deleted.” 192 F.R.D. 340, 379 n.* (2000).

8. In summary, this is what Wright, Miller and Marcus says about cost-shifting:

In 1998, the Supreme Court signaled the importance of the proportionality concept in some cases by quoting portions of Rule 26(b)(2) and observing that ‘Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.’ In 2000, when the scope of discovery was revised, a sentence was added to Rule 26(b)(1) reminding litigants and courts that the proportionality provisions of Rule 26(b)(2) apply to all discovery. The Committee Note accompanying that change noted the reports that courts had not implemented the limitations and explained that the ‘otherwise redundant cross–reference’ was added to ‘emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.’ Concern with disproportionate burden also grew as the frequency of discovery of electronically stored information increased, focusing litigants and courts more frequently on the proportionality provisions. In 2006, special proportionality provisions were added to Rule 26(b)(2) to deal with some aspects of that form of discovery. Altogether, these developments magnified attention to the proportionality provisions.

Whether or not caused by these developments, it is apparent that the proportionality provisions appear more frequently in reported cases. Judges relatively frequently limit or forbid discovery when the cost and burden seem to outweigh the likely benefit in producing evidence, as demonstrated by the plentitude of cases summarized in the margin.19 At the same time, when relevance has been demonstrated courts will scrutinize claims that the burden of producing requested information is disproportionate; and an unsupported burden objection is not a guaranteed protection against responding to discovery.20

Besides forbidding or limiting discovery, another method for regulating discovery requests that infringe on the limitations of Rule 26(b)(2) is to condition orders that such discovery go forward on the payment by the party seeking discovery of part or all of the resulting expense incurred by the responding party. The 1998 package of proposed amendments to the discovery rules included a proposal to add explicit reference to this method of implementing Rule 26(b)(2) to Rule 34. At that time, an alternative proposal that would have made the authority explicit in Rule 26(b)(2) was also published, and comment was invited on that proposal as well. In publishing these alternative proposals, the Committee was clear that the effect of the proposed amendments would only be to make explicit what had previously been implicit. Thus, even with regard to the Rule 34 proposal, the proposed Committee Note observed that ‘[t]his authority was implicit in the 1983 adoption of Rule 26(b)(2), which states that in implementing its limitations the court may act on its own initiative or pursuant to a motion under Rule 26(c). The court continues to have such authority with regard to all discovery devices.’

During the public hearing process, a number of comments were received emphasizing the view that the amendment was not necessary because courts have already used this power without explicit provision in the rules. In addition, some expressed concern that the addition of explicit authority would unduly emphasize the existence of this power and result in overuse of the authority. Eventually the Advisory Committee voted to substitute the proposed amendment to Rule 26(b)(2) for the change to Rule 34(b), despite arguments that the change was unnecessary and that highlighting it would result in overuse of the authority. Thereafter the Judicial Conference decided not to forward this change to the Supreme Court. Nonetheless, the addition of the cross-reference to Rule 26(b)(2) in Rule 26(b)(1) should alert courts and lawyers to the possibility this technique for enforcing those limitations may be worth considering, and the consideration of these amendment proposals shows that courts may use cost-bearing to tailor implementation of the limitations in appropriate case.

* * *

Another element included in the 2015 amendments may sometimes bear on the appropriate handling of proportionality issues. As noted above, in 1998 an amendment was considered that would explicitly recognize the widely-acknowledged authority of the court to issue orders calling for the party seeking discovery to pay part or all of the cost of complying with its requests. Ultimately, that amendment was not adopted. But effective 2015, Rule 26(c)(1)(B) was amended to authorize an protective order regarding 'the allocation of expenses.' As the Committee Note acknowledges, 'courts already exercise this authority.' And the amendment is not meant to cause a major shift in judicial behavior: 'Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.' [8 Wright, Miller, & Kane, Federal Practice & Procedure § 2008.1 (3d ed. 2010) (footnotes omitted)].

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

A. Scope of disclosure: The duty to make initial disclosures was introduced into the Federal Rules in 1993. The duty was introduced with the 2000 amendments and narrowed the duty to disclose:[15]

> The initial disclosure obligation of subdivisions (a)(1)(A) and (B) has been narrowed to identification of witnesses and documents that the disclosing party may use to support its claims or defenses. Use includes any use at a pretrial conference, to support a motion, or at trial. The disclosure obligation is also triggered by intended use in discovery, apart from use to respond to a discovery request; use of a document to question a witness during a deposition is a common example. The disclosure obligation attaches both to witnesses and documents a party intends to use and also to witnesses and to documents the party intends to use if—in the language of Rule 26(a)(3)—'the need arises.'
>
> A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use. The obligation to disclose information the party may use connects directly to the exclusion sanction of Rule 37(c)(1). Because the disclosure obligation is limited to material that the party may use, it is no longer tied to particularize allegations in the pleadings. Subdivision (e)(1), which is unchanged, requires supplementation if information later acquired would have been subject to the disclosure requirement. As case preparation continues, a party must supplement its disclosures when it determines that it may use a witness or document that it did not previously intend to use.
>
> The disclosure obligation applies to 'claims and defenses,' and therefore requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. It thereby bolsters the requirements of Rule 11(b)(4), which authorizes denials `warranted on the evidence,' and disclosure should include the identity of any witness or document that the disclosing party may use to support such denials.
>
> Subdivision (a)(3) presently excuses pretrial disclosure of information solely for impeachment. Impeachment information is similarly excluded

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15 Under Rule 26(a)(1)(A) as amended in 2000, "the essential inquiry [into whether a disclosure must be made] is whether the disclosing party intends to use the witness." Gluck v. Amsett Australia Ltd., 204 F.R.D. 217, 221-22 (D.D.C. 2001).

Care should also be taken to disclose so-called "dual functionality" documents: those that can be used both for substantive and impeachment purposes. See Lomascolo v. Otto Oldsmobile-Cadillac, Inc., 253 F. Supp 2d 354, 357-61 (N.D.N.Y. 2003).

from the initial disclosure requirement. [Advisory Committee Note to 2000 amendments to Rule 26(a)(1), 192 F.R.D. 340, 385-86 (2000)].

B. What "categories of proceedings" are exempt under Rule 26(a)(1)(E)?

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

C. What must be disclosed?[16]

(A) the name and, if known, the address and telephone number of each <u>individual</u> likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(B) a copy—or a description by category and location—of <u>all documents, electronically stored information</u>, and tangible things that the disclosing party has in its possession, custody, or control and <u>may use to support its claims or defenses</u>, unless solely for impeachment;

16 An amendment to Rule 26(a)(1)(B), effective December 1, 2006, replaced "data compilations" with "electronically stored information."

(C) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment. [Rule 26(a)(1) (emphasis added)].

D. Timing:

A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made, and must set the time for disclosure. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order. [Rule 26(a)(1)].

E. What is the basis for disclosure?

A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures. [Rule 26(a)(1)[17]].

F. "New" parties and the duty to make initial disclosures:

The presumptive disclosure date is also inapplicable to a party who is 'first served or otherwise joined' after the subdivision (f) conference. This phrase refers to the date of service of a claim on a party in a defensive posture (such as a defendant or third-party defendant), and the date of joinder of a party added as a claimant or an intervener. Absent court order or stipulation, a new party has 30 days in which to make its initial disclosures. But it is

[17] Note that Rule 26(a)(1) does not incorporate the accessible versus "not reasonably accessible because of undue burden or cost" distinction of 26(b)(2)(B).

expected that later-added parties will ordinarily be treated the same as the original parties when the original parties have stipulated to forgo initial disclosure, or the court has ordered disclosure in a modified form. [Advisory Committee Note to 2000 amendments to Rule 26(a)(1), 192 F.R.D. 340, 387 (2000)].

G. What the Manual says:

Prediscovery disclosure avoids the cost of unnecessary formal discovery and accelerates the exchange of basic information to plan and conduct discovery and settlement negotiations. The judge should administer Rule 26(a)(1) to serve those purposes; disclosure should not place unreasonable or unnecessary burdens on the parties (and should not require disclosure of any information that would not have to be disclosed in response to formal discovery requests). In complex litigation, this rule may need modification or suspension.

The scope of disputed issues and relevant facts in a complex case may not be sufficiently clear_ from the pleadings to enable parties to make the requisite disclosure. One purpose of Rule 26(f)'s required meeting of counsel is to identify issues and reach agreement on the content and timing of the initial disclosures. To the extent the parties cannot agree at their meeting, it sometimes helps to defer disclosure and fashion an order at the Rule 16 conference, defining and narrowing the factual and legal issues in dispute and, establishing the scope of disclosure. This will require suspending, by stipulation or order, the rule's presumptive ten-day deadline for making disclosure.

Although the rule defines certain information that must be disclosed, it does not limit the scope of prediscovery disclosure and exchange of information. The parties have a duty to conduct a reasonable investigation pursuant to disclosure, particularly when a party possesses extensive computerized data, which may be subject to disclosure or later discovery. The rule does not require actual production (except for damage computations and insurance agreements), but only identification of relevant information and materials. The judge may nevertheless direct the parties to produce and exchange materials in advance of discovery, subject to appropriate objections. Effective use of this device without excessive and unnecessary burdens on the parties can streamline the litigation. [Manual, §11.13 (footnote omitted)].

H. Disclosure of Expert Testimony

1. Rule 26(a)(2):

(A) In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) A party must make these disclosures shall be made at the times and in the sequence that the court orders. Absent a stipulation or court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(D) The parties must supplement these disclosures when required under Rule 26(e).

2. What the Advisory Committee Notes say:

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. The type of investigation that can be expected at this point will vary based upon such factors as the number and complexity of the issues; the location, nature, number, and availability of potentially relevant witnesses and documents; the extent of past working relationships between the attorney and the client, particularly in handling related or similar litigation; and of course how long the party has to conduct an investigation, either before or after filing of the case. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure. [Advisory Committee Note to 1993 amendment to Rule 26(a)(1), 146 F.R.D. 402, 632-33 (1993)].

Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel. [Advisory Committee Note to 2010 amendment to Rule 26].

3. What does "considered" mean:

a. Advisory Committee Note to 1993 amendment to Rule 26(a)(2):

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. <u>Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed</u>. [146 F.R.D. 402, 634 (1993) (emphasis added)].

b. One court has defined "considered" to "encompass: (a) all documents and oral communications relief [sic] [relied] upon by the experts in formulating their opinions; and (b) all documents and oral communications reviewed by the experts in connection with the formulation of their opinions, but ultimately rejected or not relied on." <u>TV-3, Inc. v. Royal Ins. Co.</u>, 193 F.R.D. 490, 492 (S.D. Miss., aff'd, 194 F.R.D. 585 (S.D. Miss. 2000); see Karn v. Ingersoll Rand, 168 F.R.D. 633, 635 (N.D. Ind. 1996).

c. Must communications between attorney and expert be disclosed? Compare TV-3, Inc., 193 F.R.D. at 491-92 (collecting cases) (adopts "bright line" test: discovery allowed "even if those communications contain the attorneys' mental impressions or trial strategy or is otherwise protected by the work product privilege"), Suskind v. Home Depot Corp., 2001 WL 92183, *6 (D. Mass. Jan. 2, 2001) ("the present weight of the caselaw tends to be in favor of allowing discovery of core attorney work product materials which have been considered by an expert") and Synthes Spine Co. v. Walden, 232 F.R.D. 460, 463 (E.D. Pa. 2005) ("the overwhelming majority of courts * * * have adopted a pro-discovery position") with Kennedy v. Baptist Memorial Hospital - Booneville, Inc., 179 F.R.D. 520, 521-22 (N.D. Miss. 1998) (adopts "more moderate position;" would protect mental impressions of lawyer but not under circumstances where attorney input resulted in revision of expert opinion).[18]

d. Expert Testimony and Daubert at Class Certification: There is a Circuit split among courts on the standard under Rule 23 and Daubert. The Second, Third, Fifth and Seventh Circuits require that to be "considered" expert testimony must be admissible under Daubert. See, e.g., In re Blood Reagents Antitrust Litigation, 783 F.3d 183, 187 (3d Cir. 2015), Messner v. Northshore University Health System, 669 F.3d 802, 812 (7th Cir. 2012). The Eighth and Ninth Circuits, however, impose less stringent requirements, i.e., a 'focused analysis which scrutinize[s] the reliability of the expert testimony…' In re Zurn Pex Plumbing Products Liability Litigation, 644 F.3d 604, 613-14 (8th Cir. 2011).

In August of 2006, the ABA House of Delegates adopted a recommendation that:

(i) an expert's draft reports should not be required to be produced to an opposing party;

(ii) communications, including notes reflecting communications, between an expert and the attorney who has retained the expert should not be discoverable except on a showing of exceptional circumstances;

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18 In In re: Cendant Corp. Securities Litigation, 343 F.3d 658 (3d Cir. 2003), the court of appeals held that the work product of a non-testifying trial consultant was privileged and subject to only limited discovery. "Rule 26(b)(3) provides work product protection independently of Rule 26(b)(4)(B)." 343 F.3d at 664-65.

For a discussion of, among other things, "transmitting work product" to experts and "ghost-writing the expert report," see P. Mannix, "Avoiding Harmful Expert Disclosures, For the Defense 30 (Jan. 2004).

(iii) nothing in the preceding paragraph should preclude opposing counsel from obtaining any facts or data the expert is relying on in forming his or her opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches or into the validity of the expert's opinions.

e. In Fidelity Nat'I Title Ins. Co. v. Intercounty Nat'l Title Ins. Co., 412 F.3d 745 (7th Cir. 2005), the court of appeals held that the duty to preserve "considered" materials trumped a document retention policy:

> Fidelity's further argument that because the notes were discarded pursuant to Deloitte's 'document retention' (i.e., document destruction) policy, there was no violation of Rule 26, is also frivolous. There is nothing wrong with a policy of destroying documents after the point is reached at which there is no good business reason to retain them. * * *. Without such a policy a firm or an individual could drown in paper. There is no legal duty to be a pack rat. But a firm's document-retention policy cannot trump Rule 26(a)(2)(B). The rule does not require merely that the party disclose data that it happens to have retained; it must disclose all the data that an expert that it retained to testify at trial "considered," implying that it must retain those data, as otherwise it could not disclose them. * * *. A testifying expert must disclose and therefore retain whatever materials are given him to review in preparing his testimony, even if in the end he does not rely on them in formulating his expert opinion, because such materials often contain effective ammunition for cross-examination. * * *. [412 F.3d at 750-71 (citations omitted)].

4. Treating Physicians:

a. What the Advisory Committee says:

The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. [Advisory Committee Note to 1993 amendment to Rule 26(a)(2), 146 F.R.D. 401, 635 (1993)].

b. How has the rule been interpreted: "A treating physician is not automatically an 'expert' witness simply because he is a doctor. *** A treating physician that has not been previously disclosed as an expert may still testify regarding his observations made during the course of treatment and on matters in his personal knowledge. *** If such a physician's testimony goes beyond his personal observations, treatment, and diagnosis, however, and slips over into matters normally considered 'expert' testimony, it may be barred." Tzoumis v. Tempel Steel Co., 168 F. Supp. 2d 871, 876 (RD. Ill. 2001) (citations omitted). See, e.g., Sprague v. Liberty Mutual Ins. Co., 177 F.R.D. 78, 80-81 (D.N.H. 1998) (no report required so long as all opinions to be expressed were formed on basis of treatment): Sullivan v. Glock, 175 F.R.D. 497, 499- 501 (D.Md. 1997) (no report required if opinions derive from actual treatment as opposed to information supplied by an attorney). "It is clear that there is some expert testimony in the nature of the treating physician's testimony that does not require a report. But some district courts have suggested that if the Rule 26(a)(2)(A) testimony exceeds the scope of treatment and ventures into more general expert opinion testimony, a report may be necessary." Musser v. Gentiva Health Services, 356 F.3d 751, 758 n.3 (7th Cir. 2004).

5. Lay Opinion: Rule 26(a)(2) does not require identification of a lay witness who may present opinion testimony under F.R.E. 701. Wilburn v. Maritrans GP, Inc., 139 F. 3d 350, 355-56 (3d Cir.1998).

6. Employee as expert: Rule 26(a)(2)(B) treats as an "expert" an employee of a party "whose duties *** regularly involve giving expert testimony"). Long v. Cottrell, Inc., 265 F.3d 663, 668 (8th Cir. 2001).

I. Deferring disclosures:

The presumptive disclosure date does not apply if a party objects to initial disclosure during the subdivision (f) conference and states its objection in the subdivision (f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to 'opt out' of disclosure unilaterally. It does provide an opportunity for an objecting party to present to the court its position that disclosure would be 'inappropriate in the circumstances of the action.' Making the objection permits the objecting party to present the question to the judge before any party is required to make disclosure. The court must then rule on the objection and determine what disclosures-if any-should be made. Ordinarily, this determination would be included in the Rule 16(b) scheduling order, but the court could handle the matter in a different fashion. Even when circumstances warrant suspending some disclosure obligations, others-such as the damages and insurance information called for by subdivisions (a)(1)(C) and (D)-may continue to be appropriate. [Advisory Committee Note to 2000 amendments to Rule 26(a)(1), 192 F.R.D. 340, 387 (2000)].

J. Duty to supplement.

1. Rule 26(e) provides:

(1) A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(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;

(B) as ordered by the court.

(2) For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

2. The Advisory Committee Note to the 1993 amendments examined the duty to supplement:

Subdivision (e). This subdivision is revised to provide that the requirement for supplementation applies to all disclosures required by subdivisions (a)(1)(3). Like the former rule, the duty, while imposed on a 'party,' applies whether the corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful for the scheduling order to specify the time or times when supplementations should be made.

The revision also clarifies that the obligation to supplement responses to formal discovery request applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent disposition are subject to a duty of supplemental disclosure under subdivision (e)(1).

The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report. [146 F.R.D. 401, 641 (1993)].

3. Rule 26(e) was updated to reflect actual practice in 2007:

Rule 26(e) stated the duty to supplement or correct a disclosure or discovery response "to include information thereafter acquired." This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present rule.

Former Rule 26(e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were to be supplemented "at appropriate intervals." A prior discovery response must be "seasonably * * * amend[ed]." The fine distinction between these phrases has not been observed in practice. Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct "in a timely manner." [Advisory Committee Note to 2007 amendments to Rule 26(e)].

4. "The current version of the Rule [26(e)] imposes a broad requirement on parties to update their earlier disclosures and discovery responses." Klonoski v. Mahlab, 156 F.3d 255, 268 (1st Cir. 1998), cert. denied, 526 U.S. 1039 (1999).

K. Consequences of nondisclosure.

1. Rule 37(c)(1) now provides:

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

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

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

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

2. "The Rule 26(a) disclosure obligations are not optional and complying with *** [a] Scheduling Order is not discretionary." Saudi v. Valmet-Appleton, Inc., 219 F.R.D. 128, 131 (E.D.Wis. 2003). "Rule 37 is written in mandatory

terms, and 'is designed to provide strong inducement for disclosure of Rule 26(a) material.'*** Nonetheless, the rule expressly provides that sanctions should not be imposed if substantial justification exists for the failure to disclose, or if the failure to disclose was harmless. Thus, the rule does not leave district courts without discretion. ***For our purposes, then, even under Rule 37, 'the imposition of sanctions for abuse of discovery under Fed. R. Civ. Pro. 37 is a matter within the discretion of the trial court."'***. Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 156 (3d Cir. 1995) (citations omitted). For a contrary view that exclusion is mandatory "absent some unusual extenuating circumstances," see Klonoski v. Mahlab, 156 F.3d 255, 266-69 (1st Cir. 1998), cert. denied, 526 U.S. 1039 (1999). There is a split in the circuits whether Rule 37(c)(1) requires a finding that the nondisclosing party acted in bad faith. See Southern States Rack and Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 595- 98 (4th Cir. 2003). One appellate court has held that sanctions may be imposed for a party's negligent breach of a discovery obligation. Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99, 108 (2d Cir. 2002).[19]

L. General principles governing sanctions in complex cases:

The rules and principles governing the imposition of sanctions in complex litigation require special care because misconduct may have more severe consequences. Sanctions proceedings can be disruptive, costly, and may create personal antagonism inimical to an atmosphere of cooperation. Moreover, a resort to sanctions may reflect a breakdown of case management. Close judicial oversight and a clear, specific, and reasonable management program, developed with the participation of counsel, will reduce the potential for sanctionable conduct because the parties will know what the judge expects of them. On the other hand, the stakes involved in and the pressures generated by complex litigation may lead some parties to violate the rules. Although sanctions should not generally be a management tool, a willingness to resort to sanctions, sua sponte if necessary, may assure compliance with the management program.

In designing the case-management program, the judge should anticipate compliance problems and include prophylactic procedures, such as requiring parties to meet and confer promptly in the event of disputes and

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19 Rule 37 addresses a variety of discovery failures other than failure to comply with Rules 26(a)(1) and 26(e). For example, sanctions may be imposed on a corporate party which produces an unprepared and uncooperative Rule 30(b)(6) witness, see Black Horse Lane Assoc. v. Dow Chemical Corp., 228 F.3d 275 (3d Cir. 2000), and for failure to disclose witnesses as experts. See Musser v. Gentive Health Services, 356 F.3d 751, 754-60 (7th Cir. 2004).

For an egregious example of misconduct in discovery (including discovery in electronic format), which led to the entry of judgment as to liability against the offending party and other sanctions, see Metropolitan Opera Ass'n v. Local 100, 212 F.R.D. 178 (S.D.N.Y. 2003), reconsideration denied, 2004 WL 1943099 (S.D.N.Y. Aug. 27, 2004).

providing ready access to the judge if the parties cannot resolve their differences. In addition, it helps if the court informs counsel at the outset of the court's expectations about cooperation and professionalism. Perceptions of the limits of legitimate advocacy differ, and advance guidance can reduce the need for sanctions later.

Although sanctions should be a last resort, they are sometimes unavoidable and may be imposed for general or specific deterrence, to punish, or to remedy the consequences of misconduct. If imposed, the court should explain on the record or in an order the basis and purpose of its action. [Manual, §10.151 (footnote omitted)[20]].

[20] A motion for sanctions against an attorney who, in the future, will negotiate settlement with the moving attorney raises a number of interesting questions.

VI. WRITTEN DISCOVERY

A. Interrogatories

1. The basics

a. Rule 33(a):

> (a). Number. Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).
>
> (b). Scope. An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

b. What the Manual says:

> Because interrogatories are often poorly drafted, misused, or employed to burden and harass an opponent, courts generally restrict the number permitted, forcing counsel to make the best use of the limited number of interrogatories through skillful and thoughtful drafting deigned to accomplish a legitimate purpose. [Manual, § 11.46].

The Manual goes on to state:

> Primarily, interrogatories help determine the existence, identity, and location of witnesses, documents, and other tangible evidence as a prerequisite to planning further discovery. Much of this information is subject to prediscovery disclosure under the national or local rules. If not, the court's discovery order can require it. See sections 11.13, 11.423. Interrogatories may help fill gaps, ensure full compliance with informal requests, and obtain information dispersed among a number of persons under the opponent's control. They may also help to gather technical information when the requesting party may need an expert's assistance in formulating precise questions and the answering party may need time and special assistance to respond (e.g., when discovery is sought concerning systems and programs for the storage and retrieval of computerized data).[[21]]

[21] For a discussion of the value of interrogatories, see Javne H. Lee, Inc. v. Flagstaff Ind. Corp., 173 F.R.D. 651, 652-53 (D. Md. 1997).

Contention interrogatories may sometimes help define issues, though the procedures discussed in section 11.33 are usually more productive in clarifying and narrowing issues and the contentions of the parties. Rule 33(c) permits interrogatories that call for 'an opinion or contention that relates to fact or the application of law to fact,' but permits the court to defer an answer 'until after designated discovery has been completed or until a pretrial conference or other later time.' Before allowing contention interrogatories, consider whether they are likely to be useful at that stage of the proceeding and ensure that they will not be argumentative. [[22]]

Interrogatories may also be used, either alone or in conjunction with requests for admission under Federal Rule of Civil Procedure 36 (see section 11.47), to provide the foundation for a summary judgment motion. Whether certain facts are genuinely in dispute may be difficult to ascertain from depositions and affidavits, and even in response to Rule 36 requests, the opposing party may state that although reasonable inquiry has been made, it can neither admit nor deny the truth of particular matters that depend on the credibility of third persons. Interrogatories are a means of requiring a party to disclose any facts that it believes raise a triable issue with respect to particular elements of a claim or defense. [Manual, § 11.462].

2. "[N]ot exceeding 25 in number ***"

a. What the Advisory Committee Note says.

Subdivision (a). Revision of the subdivision limits interrogatory practice. Because Rule 26(a)(1)-(3) requires disclosure of much of the information previously obtained by this form of discovery, there should be less occasion to use it. Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable. Moreover, because the device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2), particularly in multi-party cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of the adversaries.

Each party is allowed to serve 25 interrogatories upon any other party, but must secure leave of court (or a stipulation from the opposing party) to serve a larger number. Parties cannot evade this presumptive limitation through the device of joining as 'subparts' questions that seek information about discrete separate subjects. However, a question asking about communications of a particular type should be treated as a single

[22] The issue with contention interrogatories is often one of timing. See McCarthy v. Paine Webber Group, 168 F.R.D. 448, 450 (D. Conn. 1996).

interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.

As with the number of depositions authorized by Rule 30, leave to serve additional interrogatories is to be allowed when consistent with Rule 26(b)(2). The aim is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device. In many cases it will be appropriate for the court to permit a larger number of interrogatories in the scheduling order entered under Rule 16(b).

Unless leave of court is obtained, interrogatories may not be served prior to the meeting of the parties under Rule 26(f).

When a case with outstanding interrogatories exceeding the number permitted by this rule is removed to federal court, the interrogating party must seek leave allowing the additional interrogatories, specify which twenty-five are to be answered, or resubmit interrogatories that comply with the rule. Moreover, under Rule 26(d), the time for response would be measured from the date of the parties' meeting under Rule 26(f). See Rule 81(c), providing that these Rules govern procedures after removal. [Advisory Committee Note to 1993 Amendment to Rule 33(a), 146 F.R.D. 402, 676 (1993)].

b. What Wright, Miller & Marcus says:

The application of the numerical limitation on interrogatories can present problems in some cases, given the direction that 'discrete subparts' be counted as separate interrogatories for purposes of the 25-question rule. The Advisory Committee provided some insight on this problem by explaining that 'a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the times, place, persons present, and contents be stated separately for each such communication.' Thus, it would appear that an interrogatory containing subparts directed at eliciting details concerning a common theme should be considered a single question, although the breadth of the area inquired about may be disputable. On the other hand, an interrogatory with subparts inquiring into discrete areas is likely to be counted as more than one for purposes of the limitation.

The courts have attempted to resolve these issues on a case–by–case basis. Similarly, efforts to use other devices such as requests for admissions to circumvent the limitation on number of interrogatories has been rejected.

Whether a party that overtly exceeds the 25–question limit can solve this problem by 'withdrawing' some of the questions may depend upon the circumstances. It has been held that, if a party believes that the numerical limitation has been exceeded, it waives the objection if it selectively answers some of the interrogatories and objects on this ground to the rest. This seems a sensible rule, for otherwise the responding party could 'pick and choose' the questions it wanted to answer.

Another possible area of disagreement is counting parties. The limitation on number of depositions, also imposed in 1993, speaks in terms of 'sides' rather than parties. Because it frequently happens that a number of parties on the same side are represented by a single attorney and in that sense act in unison, this concept might be attractive in the interrogatory setting as well. In instances of legally related parties such as a parent corporation and its subsidiary, this could be particularly attractive. But the basic problem is more wide- spread. Consider, for example, a situation in which ten people injured in a bus crash sue the bus company in a single suit represented by the same lawyer. Should they be considered one party or ten for purposes of the interrogatory limitation? The best result would seem to be to recognize that in some instances nominally separate parties should be considered one party for purposes of the 25-interrogatory limitation.

Rather than debate close cases, it seems that the preferred solution would be agreement among the parties to disregard the limitation or a court order allowing more questions. Because formal discovery should await the conference required by Rule 26(f), that conference should provide an occasion to discuss the number of likely interrogatories. The parties can always stipulate in writing to allow more questions, and the conference would be a good time to consider such a stipulation. Since the desire to send additional interrogatories may in many instances by bilateral (or multilateral in multiparty cases), and since parties might learn that courts readily grant leave in proper cases, frequent agreement could be expected.

In the absence of a stipulation a party wishing to propound more than 25 interrogatories should seek leave of court. Although such leave might often be granted in conjunction with a scheduling conference held pursuant to Rule 16(b) or another hearing, in many instances it may be necessary to make a formal motion. In considering such a motion, the court is to be guided by the proportionality considerations now contained in Rule 26(b)(2)(C), and it will probably approach the matter initially in terms of whether there is some articulable reason for the need to send more interrogatories. It would certainly be helpful in that connection for the court to have before it the actual interrogatories proposed. Unless these have been written already, it may often be difficult for the moving party to demonstrate a need to send more than 25 (or by how many it needs to exceed that number). But in many instances that nature of the case may demonstrate that substantially more interrogatory discovery will be needed. As the Advisory Committee put it, '[t]he aim is not to prevent needed discovery, but to provide some judicial scrutiny before parties make potentially excessive use of this discovery device.'

In removed cases, the Committee Note states that, if more than 25 interrogatories have been propounded by a party before removal, it should seek leave to exceed 25, specify which 25 should be answered, or resubmit a complying set of interrogatories.26 If a party to a case already in federal court submits more than 25 interrogatories without first obtaining leave of court or a stipulation, a similar set of options would seem to be presented. If the responding party fails to raise the issue and instead answers the questions, that should waive the objection.

Rule 26(b)(2)(A) permits a court to alter the interrogatory limit by order or local rule, so counsel should be alert to this possibility. [8B Wright, Miller & Kane, Federal Practice & Procedure § 2168.1 (3d ed. 2010) (footnotes omitted)[23]].

c. What the Manual says:

Rule 33(a) imposes a presumptive limit of twenty-five interrogatories (including subparts) per party, and many local rules also restrict the number of interrogatories that may be propounded without stipulation or a court order. In complex litigation, with a great number of potentially relevant facts, a large amount of noncontroversial background information may be counterproductive. Nevertheless, it is best to retain some control over the use of interrogatories and, in considering requests to file additional interrogatories, to be guided by the principles of Rule 26(b)(2). A basic question is whether the resulting benefits will outweigh the burdens. [Manual, §41-.462 (footnote omitted)].

3. Answers and Objections

1. Rule 33(b) governs answers and objections.

2. What the Manual says:

Federal Rule of Civil Procedure 33(b)(3) requires that answers and objections be served within thirty days of the interrogatory unless the parties stipulate otherwise. The court may establish a different period by order and should consider doing so after determining, in consultation with counsel, how much time is truly needed to respond to specific interrogatories. Fed. R. Civ. P. 33(b)(1), (4). Any ground not stated in a timely objection will be deemed waived in the absence of good cause. Fed. R. Civ. P. 33(b)(4). Rule 26(e)(2) requires parties to reasonably amend interrogatory responses if, as new information comes to light, the responding party learns that a response - even if complete and correct when made - has become incomplete or incorrect (unless this

[23] For a discussion of how subparts should be counted, see Safeco v. Rawstron, 181 F.R.D. 441, 443-47 (C.D. Ca. 1998).

information has otherwise been made known to opposing parties during discovery or in writing). The discovery plan should schedule periodic dates for review and amendment of interrogatory responses (see section 11.421). If an answer is withheld on privilege grounds, the claim must be accompanied by a description of the information withheld sufficient to enable other parties to assess the applicability of the privilege. Answers must be signed by the person making them, and objections must be signed by counsel, subject to the certification required by Rule 26(g) when propounding and responding to interrogatories. Some judges require that responses to contention interrogatories by signed by counsel; others permit a party to sign, stating in substance, have been advised by my attorneys that....' Such a statement, however, may waive attorney-client privilege. [Manual, § 11.463 (footnotes omitted)].

4. Opinions. What the Advisory Committee Note says:

> Rule 33 is amended to provide that an interrogatory is not objectionable merely because it calls for an opinion or contention that relates to fact or the application of law to fact. Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful, and the clear trend of the cases is to permit 'factual' opinions. As to requests for opinions or contentions that call for the application of law to fact, they can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery. ***. On the other hand, under the new language interrogatories may not extend to issues of 'pure law,' i.e. legal issues unrelated to the facts of the case. ***.
>
> Since interrogatories involving mixed questions of law and fact may create disputes between the parties which are best resolved after much or all of the other discovery has been completed, the court is expressly authorized to defer an answer. Likewise, the court may delay determination until pretrial conference, if it believes that the dispute is best resolved in the presence of the judge. [Advisory Committee Note to 1970 Amendment to Rule 33(b), 48 F.R.D. 487, 524 (1970)].

5. The Manual suggests practices that "may increase the effectiveness and efficiency of interrogatories":

Master interrogatories; precluding duplicate requests. The court should consider requiring similarly situated parties to confer and develop a single or master set of interrogatories to be served on an opposing party. If interrogatories have already been served by one party, other parties should be prohibited from asking the same questions, because any party may use the answers to interrogatories served by another regardless of who propounded the interrogatory.

Use of interrogatories from other litigation. Parties may also be barred from propounding interrogatories that an adversary has already answered in other litigation, when such answers are available or may be made available by the adversary.

Successive responses. If some questions will require substantially more investigation than others, counsel may stipulate that the responding party will provide answers in stages as the information is obtained, rather than seek additional time for the first response. Federal Rule of Civil Procedure 29(2) requires court approval of stipulations extending time to respond to interrogatories only is such stipulations would interfere with court-ordered time limits (see section 11.423).

Modified responses. When interrogatories seek information that the responding party lacks or can obtain only with significant expenditure of time and money, and the information can be provided in a different form, that party should not object but rather advise the opponent and attempt to reach agreement on an acceptable form of response. For example, information requested on a calendar-year basis may be readily available on a fiscal-year basis, or information on overtime hours may be derived from records of compensation rates and overtime paid.

Early resolution of disputes. The judge may require parties to object to interrogatories before expiration of the time for filing answers, particularly in cases where more than the standard thirty-day period is allowed for filing answers. If the parties cannot resolve the objections by modifying or clarifying the troublesome interrogatories, they should present their dispute to the court in a clear and concise manner, avoiding lengthy motions and briefs, and the court should rule promptly to avoid disruption of the progress of the litigation (see section 11-424).

Rule 30(b)(6) depositions. When a party seeks discovery from an organization but does not know the identity of the individuals with relevant knowledge, the party may name the organization as the deponent, requiring it to designate persons to testify in response. This avoids the need for the two-step process of using an interrogatory to discover the identity of knowledgeable individuals and then deposing them individually. [Manual, § 11.464 (footnotes omitted)].

6. Relation of interrogatories to depositions:

The obvious advantage of interrogatories over a deposition is that they are much less expensive. There is no significant expense for the party sending the interrogatories except for the time spent in preparing the questions. In addition, interrogatories are a much simpler device. There are none of the details that must be taken care of in in arranging for a deposition, such as obtaining a court reporter and fixing the time and place for the examination. And a party answering interrogatories generally must make efforts to obtain desired information, while the rules do not require a deponent to prepare for the deposition.

On the other hand, depositions are preferable if a searching interrogation of the other party is desired. At a deposition the examining party has great flexibility and can frame the questions on the basis of answers to previous questions. Moreover, the party being examined does not have the opportunity to study the questions in advance and to consult with counsel before answering, as is the case if interrogatories are used. Attempts at evasion, which might be stymied by a persistent oral examination, cannot easily be countered by interrogatories. The flexibility and the potency of oral depositions is in large part lacking in written interrogatories. Particularly in this era of word processors, interrogatories can readily be misused or employed in such a rote manner as almost to ensure unhelpful answers for any but the most basic or simple questions. [8B Wright, Miller & Kane, Federal Practice and Procedure §2163 (3d ed. 2010) (footnotes omitted)].

B. Requests for production of documents[24]

1. The basics

a. Rule 34(a):

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

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

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

[24] On how to assert a privilege in the Rule 34 context, see above at pages 25-26.

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

b. What the Manual says:

In litigation with voluminous documents, requests for production and the required responses can become mired in confusion. The discovery plan should anticipate the possibility of overlooked requests, costly responses, obscured failures to respond, and uncertainty about the specifics of requests and production.

The discovery plan should call for strict observance of Rule 34's requirements that requests to produce documents for inspection and copying specify the items sought individually or by category and describe each with 'reasonable particularity'. Each request must specify a reasonable time, place, and manner for inspection and copying. A party served with a request must respond in writing within thirty days, stating for each item or category either that inspection and copying will be permitted as requested or that the party objects to the request; in the latter case, the reasons for the objection must be stated. If the responding party objects to only part of an item or category, it must permit inspection of the remaining parts. Documents must be produced for inspection 'as they are kept in the usual course of business' or organized and labeled 'to correspond with the categories in the request.' In many cases, the volume of computer data produced will far exceed the volume of paper documentation, and conventional procedures for 'inspection and copying' are not applicable. Section 11.446 describes practices for the production of computer data in complex litigation.

The discovery plan should establish a schedule for submitting requests and responses and for subsequent supplementation of responses under Rule 26(e). In developing the plan, the court should consider counsel's proposals for document discovery and imposing limits based on Rule 26(b)(2). The court may initially limit production to the most relevant files or may require a preliminary exchange of lists identifying files and documents from which the requesting party may then make selections. The court may also require, even if lead counsel or committees of counsel have not been appointed, that similarly situated parties confer and present joint Rule 34 requests and conduct their examinations at the same time and place. Parties can also be required to share extensive copies to save money.

In overseeing document production, the court should

- ensure that the burdens are fairly allocated between the parties;
- prevent indiscriminate, overly broad, or unduly burdensome demands - in general, forbid sweeping requests, such as those for 'all documents relating or referring to' an issue, party, or claim, and direct counsel to frame requests for production of the fewest documents possible (this may be facilitated by prediscovery conferences or discovery devices to identify relevant files before the request is made);

- prevent the parties from filing overwhelming or confusing responses; and

- guard against the parties tampering with files and other abusive practices. [Manual, § 11.443 (footnotes omitted)].

2. Designation:

a. What Wright, Miller & Kane says:

b. Many cases have saidthat the things to be produced should be described with reasonable particularity. This indeed is the language of Rule 34(b) as amended in 1970. Particularity of designation, however, like so many other things in life and law, is a matter of degree, dependent upon a pragmatic consideration of the circumstances in each case. Necessarily the test must be a relative one, turning on the degree of knowledge that a movant in a particular case has about the documents it requests. In some cases it has such exact and definite knowledge that it can designate, identify, and enumerate with precision the documents to be produced. This is the ideal designation, since it permits the party responding to go at once to its files and without difficulty produce the document for inspection ***. But the ideal is not always attainable and Rule 34 does not require the impossible. Even a generalized designation should be sufficient when the party seeking discovery cannot give a more particular description and the party from when discovery is sought will have no difficulty in understanding what is wanted. Though description of categories of documents was sometimes held insufficient in old cases, the amended rule, in accord with the bulk of the cases, permits a request to describe items by categories so long as the category is itself described with reasonable particularity. A common method is to request all documents that 'relate or refer' to specified pertinent matters. The goal is that the designation be sufficient to apprise a person of ordinary intelligence what documents are required and that the court be able to ascertain whether the requested documents have been produced. [8B Wright, Miller & Kane, Federal Practice & Procedure § 2211(3d ed. 2010)]. Hagemeyer North America, Inc. v. Gateway Data Sciences Corp., 222 F.R.D. 594, 598 (E.D. Wisc. 2004):

A party responding to a document request under Rule 34 has a choice of producing the documents 'as they are kept in the usual course of business' or of 'organiz[ing] and label[ing] them to correspond with the categories in the request.' Fed. R. Civ. P. 34(b). When producing documents, the responding party cannot attempt to hide a needle in a haystack by mingling responsive documents with large numbers of nonresponsive documents. See Bratka v. Anheuser-Busch Co., Inc., 164 F.R.D. 448, 462-463 (S.D. Ohio 1995). However, according to the plain language of Rule 34, a responding party has no duty to organize and label the documents if it has produced them as they are kept in the usual course of business.

The documents in the Phoenix storage facility have not been moved since the trustee placed them there in June 1998. All other materials that were in the trustee's control have been placed in an office in Phoenix. The materials are kept in the usual course of business and are kept in clearly labeled boxes. No attempt has been made to hide responsive documents among nonresponsive documents. Although there is a dispute concerning the organization of the documents at the storage facility, the photographs attached to Gordon's Declaration sufficiently demonstrate that Hagemeyer's charges that the facility is a 'document dump' are unfounded. Additionally, Hagemeyer has refused Rudolph's *bona fide* attempts to resolve the dispute by granting French access to the storage facility.

Since Gateway has discharged its duty to produce the documents as they are kept in the usual course of business, this portion of Hagemeyer's motion to compel production will be denied. However, Hagemeyer must be given continuing access to materials kept in the storage facility as well as in the office.

3. "Possession" - 'What Wright, Miller & Kane says:

Amended Rule 34 provides, in language that has always been in the rule, that discovery may be had of documents and things that are in the 'possession, custody or control' of a party. Prior to 1970, when the rule required a motion for inspection, the courts required a showing to be made that the documents or things in question were in the possession, custody, or control of the party from whom discovery was sought, although this requirement was not applied in a formalistic way. Under the revised procedure introduced in 1970, only a request for inspection is needed, and the party believed to have the documents or things can respond by saying that they are not in its possession, custody, or control should this be the case.

The concept of 'control' is very important in applying the rule, but the application of this concept is often highly fact-specific. ***.

> Particular concerns arise when a corporate party is related to another corporation, and this nonparty corporation actually possesses the materials in question. Rather than adopting an overarching rule for such situations, the courts have tended to focus on the facts shown in a particular case. In parent-subsidiary situations, courts have looked to whether the 'alter ego' doctrine would justify piercing the corporate veil, whether the litigant corporation acted as the agent of the nonparty corporation in connection with the matter in litigation, whether the litigant corporation could secure materials from the nonparty corporation to meet its own business needs, and whether, by virtue of stock ownership or otherwise, one corporation effectively controls the other. Other corporate connections, such as 'sister' corporations, have also been analyzed with an eye to such considerations. ***, [8B Wright, Miller, Kane, Federal Practice & Procedure, § 2210 (3d ed. 2010) (footnotes omitted)[25]].

4. Rule 34 and nonparties:

> Under Federal Rule of Civil Procedure 34(c), a nonparty may be compelled to produce and allow copying of documents and other tangibles or submit to an inspection by service of a subpoena under Rule 45; the producing person need not be deposed or even appear personally. A party seeking such production has a duty to take reasonable steps to avoid imposing undue burden or expense on the person subpoenaed. Objections to production must be made in writing by the subpoenaed person; the requesting party must then move for an order to compel production. If granted, the order must protect the nonparty from significant expense resulting from the inspection or copying - the order may also protect against disclosure of privileged, confidential, or otherwise protected material and undue burden. [Manual, § 11.447 (footnotes omitted)].

5. 2006 Amendment to Rule 34:

On December 1, 2006, Rule 34(a) was amended to "confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents" and to provide that parties "may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them."

Rule 34(b) was amended to permit the requesting party to "specify the form or forms in which electronically stored information is to be produced," to require the responding party to identify the form in which it intends to produce such information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specified, to require the parties to meet and confer if there is a dispute about form of production and to provide that:

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[25] For discussion of "control" among related corporations, see, e.g., In re. ATM Fee Antitrust Litigation, 2005 WL 3299763, *2-3 (N.D. Ca. Dec. 5, 2005); SEC v. Credit Bancorp, LTD., 194 F.R.D. 469, 471-72 (S.D.N.Y. 2000).

> [u]nless the parties otherwise agree, or the court otherwise orders,
>
> > (i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request; and
> >
> > (ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable; and
> >
> > (iii) a party need not produce the same electronically stored information in more than one form. [Advisory Committee Note to 2006 amendment to Rule 34].

6. 2015 Amendment to Rule 34:

Several amendments are made in Rule 34, aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce.

Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(2). The time to respond to a Rule 34 request delivered before the parties' Rule 26(f) conference is 30 days after the first Rule 26(f) conference.

Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters 'withheld' anything beyond the scope of the search specified in the objection.

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

Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been 'withheld.' [Advisory Committee Note to 2015 amendment to Rule 34].

C. Requests to Admit[26]

1. The basics

a. Rule 36(a):

(1) A party may serve upon any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

b. What the Manual says:

When voluntary means of narrowing factual disputes have been exhausted, admissions may be obtained under Federal Rule of Civil Procedure 36. This rule has its limitations, however. As discussed in section 11.463, complementary or supplementary interrogatories may be needed if a party in apparent good faith declines to admit the truth of some fact that depends on the credibility of other witnesses. In addition, like interrogatories, Rule 36 admissions are usable only against the party who made them and only in the action in which they were made. In multiparty

[26] "The assertion that requests for admissions may not be, technically speaking, tools of discovery has led to a split of authority as to whether requests for admission should be subject to discovery cutoff dates." Gluck v. Ansett Australia Ltd., 204 F.R.D. 217, 219 (D.D.C. 2001).

litigation, therefore, requests may have to be directed to each party in each related action. Rule 36 requests answered by a party in prior or related litigation should be renewed; a straightforward new request that asks the party to admit each matter previously admitted should suffice.

Because parties often deny a requested admission on the basis of a trivial disagreement with a statement or without indicating the portions of the stated fact that are true, the court can urge the parties to observe their obligation under the rule to respond in good faith and point out the availability of sanctions for failure to do so. [Manual, § 11.472 (footnotes omitted)].

2. Relation to other rules:

Strictly speaking Rule 36 is not a discovery procedure at all, since it presupposes that the party proceeding under it knows the facts or has the document and merely wishes its opponent to concede their genuineness. A party who desires to discover what the facts are should resort to other discovery rules rather than Rule 36. However, a party need not elect between Rule 36 and the other rules and it may use the various devices at the same time.

For the purposes for which it is intended, Rule 36 is often more effective than the other discovery rules. Litigants can formulate their own answers to interrogatories and to questions at a deposition and can state their position in an ambiguous and equivocal manner. Requests for admissions, however, are formulated by the requesting party and are closed-ended. If the matter to which the request is directed is known to be true, the answering party can avoid an admission only by an answer that is patently false rather than merely evasive. In addition, responses to other discovery procedures are merely evidence to be introduced at trial and they are subject to contradiction at the trial. An admission, unless it is allowed to be withdrawn, concludes the matter and avoids any need for proof at trial. For both of these reasons admissions are more likely to be fruitful in defining and limiting the controversy than are the other devices. [8B Wright, Miller, & Kane, Federal Practice & Procedure § 2253 (3d ed. 2010) (footnotes omitted)].

3. Matters of Law - What the Advisory Committee Note says:

Not only is it difficult as a practical matter to separate 'fact' from 'opinion' ***, but an admission on a matter of opinion may facilitate proof or narrow the issues or both. An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial. ***. The amended provision does not authorize requests for admissions of law unrelated to the facts of the case.

Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference. [Advisory Committee Note to 1970 Amendment to Rule 36(a), 48 F.R.D. 487, 532 (1970)].

D. Duty to Supplement - see above at page 40-41.

VII. MANAGING THE COMPLEX CASE

A. The role of judges and attorneys:

> The judge's role is crucial in developing and monitoring an effective plan for the orderly conduct of pretrial and trial proceedings. Although elements and details of the plan will vary with the circumstances of the particular case, each plan must include an appropriate schedule for bringing the case to resolution. Case-management plans ordinarily prescribe a series of procedural steps with firm dates to give direction and order to the case as it progresses through pretrial proceedings to summary disposition or trial. In some cases, the court can establish an overall plan for the conduct of the litigation at the outset; in others, the plan must be developed and refined in successive stages. It is better to err on the side of over-inclusiveness initially and subsequently modify plan components that prove impractical, rather than omitting critical elements. Nevertheless, in litigation involving experienced attorneys working cooperatively, a firm but realistic trial date may suffice if coupled with immediate access to the court for disputes that counsel cannot resolve.
>
> The attorneys—who will be more familiar than the judge with the facts and issues in the case—should play a significant part in developing the litigation plan and should have primary responsibility for its execution. Court supervision and control should recognize the burdens placed on counsel by complex litigation and should foster mutual respect and cooperation between the court and the attorneys and among the attorneys. [Manual, §10.13].

* * *

Judicial involvement in managing complex litigation does not lessen the duties and responsibilities of the attorneys. To the contrary, complex litigation places greater demands on counsel in their dual roles as advocates and officers of the court. The complexity of legal and factual issues makes judges especially dependent on the assistance of counsel.

Greater demands on counsel also arise from the following:

- the amounts of money or importance of the interests at stake;
- the length and complexity of the proceedings;
- the difficulties of having to communicate and establish effective working relationships with numerous attorneys (many of whom may be strangers to each other);
- the need to accommodate professional and personal schedules;

- the problems of having to appear in courts with which counsel are unfamiliar;

- the burdens of extensive travel often required;

- the complexities of having to act as designated representative of parties who are not their clients (see section 10.22); and

- The burdens of extensive travel often required.

The added demands and burdens of complex litigation place a premium on attorney professionalism, and the judge should encourage counsel to act responsibly. The certification requirements of Federal Rules of Civil Procedure 11 and 26(g) reflect some of the attorneys' obligations as officers of the court. By presenting a paper to the court, an attorney certifies in essence that he or she, based on reasonable inquiry, has not filed the paper to delay, harass, or increase costs. A signature on a discovery request, response, objection certifies that the filing is not `unreasonable or unduly burdensome or expensive' under the circumstances of the case. These provisions encourage attorneys to 'stop and think' before taking action.

Counsel need to fulfill their obligations as advocates in a manner that will foster and sustain good working relations among fellow counsel and with the court. They need to communicate constructively and civilly with one another and attempt to resolve disputes informally as often as possible. Even where the stakes are high, counsel should avoid unnecessary contentiousness and limit the controversy to material issues genuinely in dispute. Model Rule of Professional Conduct 3.2 requires lawyers to make 'reasonable efforts to expedite litigation consistent with the interests of the client'. [Manual, §10.21 (footnotes omitted)].

B. The relationship between management of issues and discovery:

The sine qua non of managing complex litigation is defining the issues in the litigation. The materiality of facts and the scope of discovery (and the trial) cannot be determined without identification and definition of the controverted issues. The pleadings, however, will often fail to define the issues clearly, and the parties may lack sufficient information at the outset of the case to arrive at definitions with certainty. Probably the judge's most important function in the early stages of litigation management is to press the parties to identify, define, and narrow the issues. The initial conference should start this process.

Plaintiffs may assert that substantial discovery must precede issue definition, and defendants may contend that plaintiffs must first refine their claims. Nonetheless, the judge must start the process of defining and structuring the issues, albeit tentatively, to establish the appropriate sequence and limits for discovery.

The controlling factual and legal issues can almost always be identified by a thorough and candid discussion with counsel at the initial conference, prior to discovery. The judge should construct the discovery plan after identifying the primary issues, at least preliminarily, based on the pleadings and parties' positions at the initial conference. Discovery may then provide information for further defining and narrowing issues which may in turn lead to revision and refinement of the discovery plan. [Manual, §11.31].

* * *

Fundamental to controlling discovery is directing it at the material issues in controversy. The general principle governing the scope of discovery stated in Rule 26(b)(1) permits discovery of matters, not privileged, `relevant to the claim or defense of any party.' The court has discretion to expand that to any matter relevant to the subject matter involved in the action.' But Rule 26(b)(2) directs the court to limit the use of discovery methods permitted by the rules in order to prevent 'unreasonably cumulative or duplicative' discovery and discovery for which 'the burden or expense...outweighs its likely benefit, taking into account the needs of the case... the importance of the issues at stake... and the importance of the proposed discovery in resolving the issues.' This underlying principle of proportionality means that even in complex litigation, discovery does not require leaving no stone unturned.

Early identification and clarification of issues * * * is essential to discovery control. It enables the court to assess the materiality and relevance of proposed discovery and provides the basis for a fair and effective discovery plan. A plan established early in the litigation needs to take into account the possibility of revisions based on information gained through discovery. Alternative approaches to the sequencing of discovery have different costs and benefits. For example, deferring discovery on damages until liability has been decided may result in savings, but may also lead to duplicative discovery if resumed. Conversely, conducting discovery on damages before discovery on liability will sometimes facilitate early settlement by informing the parties of their potential exposure, but may be rendered unnecessary if the defendant is found not liable. [Manual, §11.41(footnote omitted)].

C. What of related litigation? What the Manual says:

Complex litigation frequently involves two or more separate but related cases. All pending related cases or cases that may later be filed in the same court, whether or not in the same division, should be assigned at least initially to the same judge. Pretrial proceedings in these cases should be coordinated or consolidated under Federal Rule of Civil Procedure 42(a), even if the case are filed in more than one division of the court. It may be necessary to transfer to the district judge related adversary proceedings in

> bankruptcy court, including proceedings to determine the dischargeability of debts. Counsel should be directed to inform the assigned judge of any pending related cases (as many local rules require). Sometimes related cases are identified on the face of the complaint. The judge to whom the complex litigation has been assigned should also ask whether related cases are pending in that district.
>
> Assignment of related criminal and civil cases to a single judge will improve efficiency and coordination, especially when the cases are pending at the same time. Other factors, however, may suggest that the cases be handled by different judges—for example, extensive judicial supervision of pretrial proceedings in the civil litigation may be needed while the criminal trial is being conducted. * * *.
>
> Consolidation may be possible even when related cases are filed in different courts. Other courts can transfer cases under 28 U.S.C. §1404(a) or 1406 to the consolidation court, but only if personal jurisdiction and venue lie in the transferee forum. Pretrial proceedings in related cases may also be consolidated in a single district by the Judicial Panel on Multidistrict Litigation under 28 U.S.C. §1407. ***. State court cases may be removed to federal court[27]—they may also be transferred to or refilled in the consolidating district court following voluntary dismissal or dismissal based on forum nonconveniens.

When transfer of all cases to a single court for centralized management is not possible the affected courts can still use informal means to coordinate proceedings to the extent practicable. Coordination methods include arrangements made by counsel, communications between judges, joint pretrial conferences and hearings at which all involved judges preside, and parallel orders. Another coordination method is to designate a 'lead' case in the litigation; rulings in the lead case would presumptively apply to the other coordinated cases, and the judges in those cases may stay pretrial proceedings in those cases pending resolution of the lead case. Section 20.14 (cases in different federal courts) and section 20.31 (cases in federal and state courts) discuss coordination of related litigation more fully. [Manual, §10.123 (footnotes omitted)].Section 20.14 of the Manual states:

> Even when related cases pending in different districts cannot be transferred to a single district, judges can coordinate proceedings in their respective courts to avoid or minimize duplicative activity and conflicts.
>
> Coordination requires effective communication between judges and among judges and counsel.

[27] For a recent Supreme Court discussion on removal of third party counterclaims, see Home Depot U.S.A., Inc. v. Jackson, 587 U.S. ___ (May 28, 2019). In Home Depot, the Supreme Court held that neither the General Removal Statute, 28 U.S.C. § 1441(a), nor the Class Action Fairness Act of 2005, 28 U.S.C. § 1453(b) permit removal by a third party counterclaim defendant. The dissent argued that third-party defendants are a subset of 'defendants;' and thus should have the option to invoke the removal statutes.

Steps that may be taken include the following:

- Special assignment of judge. All cases may be assigned to a single judge designated by the chief justice or the chief circuit judge under 28 U.S.C. §§ 292-294 to sit temporarily in the district where the cases are pending (either within or outside of the assigned judge's own circuit).

- Lead case. Counsel in the various cases may agree with the judge to treat one case as the 'lead case.' The agreement may provide for staying proceedings in the other cases pending resolution of the lead case, or rulings in the lead case may be given presumptive, though not conclusive, effect in the other courts.

- Joint conferences and orders. All judges may attend joint hearings or conferences, in person or by telephone. Federal Rule of Civil Procedure 77(b) requires consent of the parties for trials or hearings to be conducted outside the district; consent is not required for other proceedings, such as conferences. The joint proceedings may be followed by joint or parallel orders by the several courts in which the cases are pending.

- Joint appointments. The several courts may coordinate the appointment of joint experts under Federal Rule of Evidence 706, or special masters under Federal Rule of Civil Procedure 53, to avoid duplicate activity and inconsistencies. The appointments may help resolve claims of privilege made in a number of cases on similar facts, or where global settlement negotiations are undertaken. The courts may also coordinate in appointing lead or liaison counsel.

- Avoiding duplicative discovery. Judges should encourage techniques that coordinate discovery and avoid duplication. ***. Filing or cross-filing deposition notices, interrogatories, and requests for production in related cases will make the product of discovery usable in all cases and avoid duplicative activity. Relevant discovery already completed should ordinarily be made available to litigants in the other cases. If the material is subject to a protective order, the court usually may accommodate legitimate privacy interests by amending the order to include the new litigants within the order's restrictions, and the party seeking the discovery may be required to bear a portion of the cost incurred in initially obtaining the information. Document production should be coordinated and joint depositories established. The resolution of discovery disputes can also be coordinated to some degree (e.g., by referring them to a single magistrate judge or special master).

- Clarifying class definitions. Conflicts between class actions, or between a class action and individual actions, can be avoided by coordinating the drafting of class definitions when actions are certified. ***.

- Stays. In appropriate cases, a judge may order an action stayed pending resolution of a related case in a federal court. Footnotes omitted].

Section 20.31 speaks of coordination between State and federal courts:

> Increasingly, complex litigation involves related cases brought in both federal and state courts. Such litigation often involves mass torts (see section 22.2). Some sets of cases may involve numerous claims arising from a single event, confined to a single locale (such as a plane crash or a hotel fire). Other more-complicated litigations may arise from widespread exposure to harmful products or substances dispersed over time and place.
>
> No single forum has jurisdiction over these groups of cases. Unless the defendant files for bankruptcy, no legal basis exists for exercising exclusive federal control over state litigation. Interdistrict, intradistrict, and multidistrict transfer statutes and rules apply only to cases filed in, or removable to, federal court (see sections 22.32 and 22.33).
>
> State and federal judges, faced with the lack of a comprehensive statutory scheme, have undertaken innovative efforts to coordinate parallel or related litigation so as to reduce the costs, delays, and duplication of effort that often stem from such dispersed litigation. State judges, for example, can bring additional resources that might enable an MDL transferee court to implement a nationwide discovery plan or a coordinated national calendar. There are, however, potential disadvantages of cooperative activity. Coordination can delay or otherwise affect pending litigation, conferring an advantage to one side in contentious, high-stakes cases. Such litigation activates strategic maneuvering by plaintiffs and defendants. For example, plaintiffs may seek early trial dates in jurisdictions with favorable discovery rules.
>
> State and federal judges also have initiated state-federal cooperation between jurisdictions to minimize conflicts that distract from the primary goal of resolving the parties' disputes. [footnotes omitted].

D. Organizing the complex case: what can a judge do to manage the case more efficiently?[28]

1. ***Are all parties in?***

[28] Certain headings are emphasized for ease of reference.

a. For example, in CERCLA case, the United States may only name large, solvent[29] parties.

b. This may lead to substantial third-and fourth party practice over time with concomitant delay. The Manual says, with regard to CERCLA cases:

> Incentives for locating all possible PRPs can lead to a continuous parade of new parties. The pretrial conference can assist the court in assessing the likely number of additional PRPs that the parties may seek to add and help ensure control over the size and shape of the litigation. Where the EPA's investigation has been exhaustive, the number of unidentified PRPs remaining will be significantly less. Similarly, a primary PRP group that has undertaken remediation at the site will often have retained an outside investigator who will have identified most other locatable PRPs, again reducing the number of parties likely to be joined at a later date. The judge is advised to discourage joinder of insignificant parties, or parties with no more than de micromis liability. Discussions with counsel about the feasibility of joinder of very small or de micromis parties will also assist in ensuring that the parties and the court have a realistic view of the scope of the case. Each new party will likely want to catch up with discovery and motion practice, thereby delaying the progress of the action. Furthermore, entry of a new party may create a conflict of interest of counsel or grounds for recusal by the judge.
>
> Targeting the first phase of discovery at identifying all PRPs and developing information about the quantity and quality of waste produced by each PRP during the history of the site can minimize complications arising from joinder issues. Moreover, discovery targeted at site owners and operators, and at transporters, often generates information concerning other PRPs. A reasonable but firm deadline, which might be as long as a year, is advisable for adding parties or cross-claims, absent special issues in individual instances. Once the deadline for joinder is reached, the parties and the court will have an overview of the size and scope of the litigation. At that point, pretrial, settlement, and trial plans can proceed, addressing issues relating to all the parties, while consideration of late presented claims is deferred. This approach may be conducive to a global disposition of the entire litigation. General discovery and other proceedings are sometimes stayed until the joinder deadline. In the interest of avoiding unnecessary paper, the case management order can provide that all parties joined will be deemed to have denied the claim, obviating the need for a formal pleading. Rulings

[29] The Manual includes sections on complex litigation in various subject areas other than CERCLA: Antitrust, securities, employment discrimination, intellectual property, and civil RICO.

on Rule 12 motions can also be deemed to apply to new parties absent special circumstances.

Another approach is to postpone or stay joinder issues, contribution claims, and other cross claims until the litigation against the initial defendants has been resolved. In cases with large numbers of PRPs, this keeps the organization relatively simple while a plan to remedy the site or determine the costs of the remedy is devised. The primary PRPs may also be more inclined to reach out of court settlements with third parties without the expense of litigation. The disadvantage is that parties joined later may wish to relitigate those issues or reopen discovery. This phased approach is more feasible where the government has initiated the case, or in some contested consent decrees, but it does not work well where the government is not involved in the litigation and the primary PRP group has filed a separate action for contribution.

A third approach is to schedule rolling joinder dates. Rather than permitting motions for joinder at any time, rolling dates give the parties windows within which to file joinder motions, permitting a consolidated hearing on all joinder motions filed during that window, and lessening the burden on the court as well as the parties. Similar orders regarding responsive pleadings and discovery would apply as well. Whatever the approach to the joinder of new parties, possible statute-of-limitation issues both, federal and state, should be considered. [Manual, §34.27 (footnotes omitted)].

c. There is need to close pleadings.

d. Set dates to close pleadings and attempt to adhere to the dates.[30] What the Manual says with regard to pleadings:

The judge should consider establishing a schedule for filing all pleadings, including counterclaims, cross-claims, third-party complaints, and amendments to existing pleadings, that add parties, claims, or defenses. This avoids later enlargement of issues and expansion or duplication of discovery. The judge should also consider suspending filing of certain pleadings if statutes of limitations present no problems and ordering that specified pleadings, motions, and other court orders (unless specifically disavowed by a party) are 'deemed' filed in cases later brought, transferred, or removed, without actually filing the document ***. [Manual, § 11.32].

2. ***Are there dispositive motions to be made?***

---

30 In S&W Enterprises v. South Trust Bank, 315 F.3d 533 (5[6] Cir. 2003), the court of appeals addressed the tension between Rule 15(a) (leave to amend "shall be freely given when justice so requires") and Rule 16(b), which governs case management orders. The court held "Rule 16(b) governs amendment of pleadings after a scheduling order deadline has expired." 315 F.3d at 536; accord O'Connell v. Hyatt Hotels, 357 F.3d 152, 154-56 (1st Cir. 2004); Learn v. Daeschner, 349 F.3d 888, 904-09 (6th Cir. 2003).

a. Rule 12(b) motions made in lieu of answers can delay some or all of the case.

b. Tensions in scheduling dispositive motions:

1. There is a desire to allow motions with the prospect, if the motions are successful, of disposing of parties and/or issues.

2. What are the prospects of motions being successful?

3. Motions can lead to delay if discovery is stayed.

4. Motions often lead to requests to stay discovery.[31]

5. If discovery is not stayed, moving party may be required to proceed with discovery (perhaps) unnecessarily.

6. There may be skepticism on the part of the judge that motions that will succeed.

7. Use of motions by parties as tactic to delay or increase cost of litigation.

a. Rule 16(b): "[T]he district judge, or a magistrate judge *** shall *** enter a scheduling order that limits the time *** (2) to file motions. ***."

b. The e party desiring to make dispositive motion in complex case should be prepared to demonstrate:

1. Likelihood that the motion will be successful.

2. Lack of need (or limited need) of adversary for discovery in opposition to motion.[32]

3. Effect of motion practice on organization of case.

8. The Manual suggests certain points to consider with regard to motion practice:

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31 For example, the standard for a stay in the Southern District of New York is that the motion "`appear[s] to have substantial grounds' or, stated another way, 'do[es] not appear to be without formation in law.'" In re Currency Conversion Fee Antitrust Litigation, 2002 WL 88278, *1 (S.D.N.Y. Jan. 22, 2002) (quoting Chrysler Capital Corp. v. Century Power Corp., 137 F.R.D. 209, 209-10 (S.D.N.Y. 1991)).

32 For an example of a successful attempt to stay discovery until a summary judgment motion was decided, see Medical Billing Consultants, Inc. v. Intelligent Medical Objects, Inc., 2003 WL 1809465, at *1-2 (N.D. Ill. Apr. 4, 2003).

*A Rule 12 motion can cause unnecessary expense if the asserted defect can be cured by amendment; therefore, instruct counsel to notify the opposing party and the court before filing such a motion in order to ascertain whether it will serve to narrow the issues in the case.

* Some motions can be decided based on oral presentations and reference to controlling authority, without briefs.

* Limiting the length of briefs and of appendices, affidavits, declarations, and other supporting materials, and requiring joint briefs whenever feasible, will expedite the litigation.

* Prefiling conferences and requiring leave of court for filing of reply or supplemental briefs, or motions for reconsideration, will help avoid useless or unnecessary briefing.

* Prompt rulings from the bench will often avoid unnecessary litigation action.

* Some judges issue tentative rulings on motions in advance of the motion hearing. If the parties reject the rulings, they can direct their arguments at the hearing to specific issues.

* Multiparty litigation requires particular attention to scheduling. Counsel should inform the court as soon as possible of any motion to be filed, with sufficient time for opposing counsel to respond and the court to review submissions in advance. Discourage expedited motions unless they concern matters that will delay further proceedings if not resolved. It is sometimes <u>best to specially set multiparty motions</u> rather than schedule them as part of a regular motion docket or calendar call of the court; such motions also may be combine with status conferences in the litigation. [<u>Manual</u>, §11.32].

9. Rule 56(d)[33]

a. What the rule says:

(d) When Facts are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

[33] Previously Rule 56(f) prior to the 2010 Amendments: 'Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).'

(3) issue any other appropriate order.

b. Is strict compliance required?

We have made clear that, in all but the most exceptional cases, failure to comply with Rule 56(1) is fatal to a claim of insufficient discovery on appeal." *** we have generally rejected constructive compliance arguments. [Bradley v. United States, 299 F.3d 197, 207 (3d Cir. 2002)].

c. What should the affidavit contain?

Rule 56([d]) discovery is intended to allow a party to show facts sufficient to withstand a summary judgment motion and should be distinguished from broader pretrial discovery allowed under Rule 26. First National Bank v. Cities Service Co., 391 U.S. 253, 265 (1968).

Affidavits submitted in support of a Rule 56([d]) application must "explain the need for discovery and what material facts" the party seeking the discovery expects to uncover. Hancock Industries v. Schaeffer, 811 F.2d 225, 230 (3d Cir. 1987). [T]he affidavit required by Rule 56(d) must state "with sufficient particularity why discovery [is] necessary." Service Employees International Union National Industry Pension Fund v. Castle Hill Health Care Providers, LLC, 312 F.R.D. 678 (D.D.C. 2015)

Courts have developed a series of tests to determine whether discovery is appropriate under Rule 56(f). There must be a showing of what discovery will be obtained. Speculative requests are inadequate. Exxon Corporation v. FTC, 663 F. 2d 120, 128 (D.C. Cir. 1980); Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 107 (2d Cir. 1981). There must be a showing that the discovery sought is relevant to the issues on the summary judgment motion. Powers v. McGuigan, 769 F.2d 72, 76 (2d Cir. 1985). There must also be a showing that the discovery sought is not accessible other than through formal discovery. United States ex rel. Kolton v. Halpern, 260 F.2d 590, 591 (3d Cir. 1958); Tesch v. United States, 546 F. Supp. 526, 528 n.1 (E.D. Pa. 1982).

3. ***Is there a benefit in staying discovery, bifurcating discovery, or focusing discovery on specific issues?***

a. How will bifurcation/stay benefit organization of the case?

b. Example: In § 113 CERCLA contribution action, proceed with "nexus" discovery only and then allow motions and/or settlement discussions.

c. Example: In CERCLA action when clean-up is continuing and clean-up costs not quantified, stay "damage" discovery and proceed with liability only.

4. ***Can parties be grouped to further management of case?***

5. ***Should liaison counsel, etc., be named?***

a. The Manual identifies the following categories of attorneys who are "designated by the court to act in the litigation on behalf of other counsel and parties in addition to their own clients." Manual, § 10.221:

1. Liaison counsel

2. Lead counsel

3. Trial counsel

4. Committees of counsel

a. The Manual goes on to state:

> The types of appointments and assignments of responsibilities will depend on many factors. The most important is achieving efficiency and economy without jeopardizing fairness to the parties. Depending on the number and complexity of different interests represented, both lead and liaison counsel may be appointed for one side, with only liaison counsel appointed for the other. One attorney or several may serve as liaison, lead, and trial counsel. The functions of lead counsel may be divided among several attorneys, but the number should not be so large as to defeat the purpose of making such appointments. [Manual, § 10.221].

b. What the Manual says about CERCLA cases:

> CERCLA cases are strong candidates for the appointment of liaison or lead counsel, in light of the number of parties usually involved in such cases. Counsel should (1) be sensitive to conflicts between their role as liaison counsel and the representation of their individual client; (2) keep all other counsel informed and encourage their participation in the direction of the group's strategy; and (3) ensure that a balance is maintained between the 'common needs of the group and the divergent needs of an individual member...'.
>
> Organization of counsel is essential in order for the court and the parties to be able to communicate effectively. It minimizes duplicative discovery and motion practice and provides the court with an individual liaison for each group to contact about scheduling and other nonsubstantive matters. It also limits the number of attorneys seeking to argue motions or file papers. Counsel should be advised of relevant guidelines, such as the avoidance of duplicative efforts (e.g., providing in a case management order that

a party waives its right to raise an issue unless it is first presented to a committee of counsel). Subject-matter subcommittees can be created to work on what are likely to be common issues relating to defenses, liability (e.g., standards for successor liability), joinder of parties, jurisdiction, discovery, liability, remediation, and allocation. These committees can be delegated authority to represent the parties in that group for purposes of litigation, management, and trial preparation. To do this, the court will need to determine a fair and efficient grouping of the parties. Lead or liaison counsel then can be selected after consultation with the groups of parties as to method and manner of selection, as well as compensation.

At the outset, it is useful to become familiar with the parties' own efforts to organize themselves in response to EPA's prelitigation investigation at the site. Often the primary PRPs will have formed a group that was represented in negotiations with EPA by common or joint counsel, and this same counsel may also be representing the PRP group in the subsequent litigation. These PRPs are also likely to have grouped themselves (usually by size) in a manner they have already determined was fair and effective—at least for administrative purposes and for remediating the site—and that may be effective for the litigation as well. In such cases, the primary PRPs also may have established a binding allocation agreement among themselves and reached agreement on how many monies will be distributed, thus minimizing conflicts and cross-claims. The focus would then shift to an effective organization for the remaining parties, usually third-party defendants. In these third-party matters and in cases where no agreement exists among the primary PRP group, conflicting interests are common, and the court and the parties will need to be sensitive to the problems that can arise from grouping parties that may have adverse claims.

The method of organization may vary. One approach is to allow the parties to organize themselves, nominate lead and liaison counsel, propose a mode of payment, define the authority of lead and liaison counsel, and define a committee structure. It may be sufficient for the court to suggest these topics as an agenda for a meeting of counsel. The judicial role would then be simply to evaluate any proposal to ensure that it meets the court's litigation management needs, and to issue an appropriate order for its implementation with any necessary modifications. The judge, of course, retains the final authority whether to enter an order adopting the parties' recommendations.

Another alternative is to organize the parties based on similar interests with respect to the legal issues, such as using the statutory classifications for liability set out in section 107(a): owners, operators, generators and transporters. A third approach is to organize the parties by volumetric share of waste sent to the site, thus separating large generators from small or de minimis participants. This is a particularly useful classification for settlement purposes. In fact, the court may establish a separate 'settlement committee' of counsel that focuses solely on settlement. Other relevant communities of interest for facilitating settlement may be defined by the type of substance a group of PRPs sent to the site, its toxicity, or where it is located on the site. Regardless of how the parties are organized, the court should ensure that they have agreed to a method of funding (typically pro rata) of group activities or other joint services, as well as the method of compensation of liaison counsel, and that this agreement is put in to writing. For example, the parties may undertake joint studies, retain an allocation consultant, or engage in private mediation. [Manual, §34.24 (footnotes omitted)].

c. What the Manual says about mass torts:

Early organization of the counsel who have filed the various cases transferred or consolidated for pretrial purposes is a critical case-management task. The judge will often need to appoint lead counsel or a committee of counsel to coordinate discovery and other pretrial preparation. Lead counsel and committees of counsel for the plaintiffs in mass tort litigation perform a host of functions. They develop proof of liability and anticipate defenses; gather the expertise necessary to prove causation and other elements of plaintiffs' cases; trace patterns of exposure; manage discovery; coordinate the various filings; and communicate with counsel for plaintiffs, counsel for defendants, and the court. In cases involving numerous defendants, liaison counsel for defendants generally play an important coordinating role in the mass tort litigation. As the appointing authority, the judge has the opportunity and obligation to monitor the activities of counsel and to implement the litigation management plan. Many judges monitor the activities of the parties and counsel through regularly scheduled status conferences and hearings on pretrial motions and discovery. Section 21.27 discusses the rule provision that applies to appointing counsel in class actions.

Where several counsel are competing to be lead counsel or to serve on a key liaison committee, the court should establish a procedure for attorneys to present their qualifications, including their experience in managing complex litigation and knowledge of the subject matter, their efforts in researching and investigating the claims before the court, and the resources that they can contribute to the litigation. Often counsel will agree among themselves as to who should serve as lead counsel or assume responsible positions on counsel committees; but the judge must be satisfied that counsel can perform the assigned roles and that they have not entered into improper arrangements to secure such positions. Including plaintiffs' attorneys with different perspectives and experience in lead or liaison counsel or as committee members can be helpful. Consider also including counsel handling significant number of state cases to facilitate coordination among state and federal cases. Section 20.31 discusses steps that judges can take in organizing counsel to help coordinate cases among state and federal courts, emphasizing the need to include attorneys involved in cases needing coordinated efforts.

During the selection process, judges should explicitly articulate their expectations about attorney compensation. For example, the judge can establish guidelines on the number of attorneys who can be present for or involved in specific tasks, the use of paralegals and associates, record keeping and reporting of time and expenses, ranges of allowable expenses, and similar requirements. See section 14.21.

The cost of the legal services may be apportioned among all parties who benefit from the services. Fees, however, may not be imposed by an MDL transferee judge on attorneys in cases that are not within the jurisdiction of the MDL courts. In general, those attorneys who provide a common benefit to a group of litigants may also receive compensation from a common fund - even if the attorneys who provide the benefit are not part of an official committee.

At a minimum, the judge should consider designating one or more attorneys for the plaintiffs and defendants to conduct common discovery and to present motions and arguments during coordinated pretrial proceedings. To minimize repetitious or marginal presentations, lawyers should be encouraged to consult with such designated or liaison counsel before presenting motions or arguments to the court.

Disagreements among the parties and counsel should not prevent designation of an attorney to act as liaison counsel in distributing documents, developing joint discovery requests, and otherwise assisting in the coordination of the litigation. [Manual, § 22.62 (footnotes omitted).]

E. Organizing the Flow of Information: How Can a Judge Best Begin to Manage Discovery at the Initial Conference?

1. ***Records:***

   a. Have all documents been located and collected?

   b. Has a document depository been established?

   c. What the <u>Manual</u> says about depositories:

Central document depositories can promote efficient and economical management of voluminous documents in multiparty litigation. Requiring the production of all discovery materials in common, computer-readable formats and insisting that these materials be made available on centrally generated computer-readable media (such as CD-ROM or DVD), through a secure Internet Web site or a dial-in computer Network, may reduce substantially the expense and burden of document production and inspection. A depository also facilitates determination of which documents have been produced and what information is in them, minimizing the risk of later disputes.

On the other hand, the cost of establishing and maintaining either a paper or computerized central document depository may be substantial; before ordering or approving one, the court must be sure that the cost is justified by the anticipated savings and other benefits. In consultation with counsel, the court should allocate costs fairly among the parties, considering their resources, the extent of their use of the depository, and the benefit derived from it. The cost of establishing and maintaining a central document depository is not a 'taxable cost' under 28 U.S.C. §1920 and Federal Rule of Civil Procedure 54(d). One way of allocating costs is to charge parties for each use of the depository. The charge should be set no higher than is necessary to cover costs; a depository should not be a profit-making enterprise. The judge may consider special arrangements for less affluent or less technologically sophisticated parties to ensure fair access.

It may be necessary to appoint an administrator to operate the depository, with the cost allocated among the parties. If document depositories have been established in related cases in other courts, counsel may be able to arrange for the depositories' joint use, sharing the expense; likewise, the judge should consider the requests of litigants in other cases, wherever pending, to use a depository established in the case before the court. Where significant costs are involved, periodic assessments to fund operations might be necessary, usually beginning with the order establishing the depository.

To create and operate a depository, counsel and the judge should collaborate in establishing procedures for acquisition, formatting, numbering, indexing, and maintaining discovery materials, and they should establish rules governing when and by whom documents may be accessed for examination or copying. If a party objects to placing documents in a central depository or to making them available on-line, the judge can issue an order under Rule 26(c) directing production at the depository (or the place designated by the requesting parties) or permit the producing party at its expense to furnish copies to all parties.

Counsel and the judge must agree on a computer service provider to administer the depository, although technologies such as CD-ROM and the Internet reduce the need for physical storage facilities, inspection, and copying. Most discovery material can be produced by the parties to the depository in computer-readable form. For the remaining paper documents, the court may direct that some of all be 'imaged' or scanned and made available either on discs or on-line (special provision for the retention of originals, if they carry independent legal significance, may be necessary). [Manual, §11.444 (footnotes omitted)].

d. There is newer data storage technology available, as noted in Effective Use of Courtroom Technology: A Judicial Guide to Pretrial and Trial (Federal Judicial Center: 2001):

Service companies offer storage capacity for digital files that can be accessed through the Internet at very low monthly rates compared to the cost of buying the equivalent hard disk or DVD storage. This is much more efficient equivalent of the repositories for hard copy documents that have been used in cases involving high volumes of documents. Each party transmits the digital files of its discovery materials to the storage site using file-naming conventions agreed by the parties. Thereafter, anyone with a password can search and download files as needed.

Storage made available by these Internet companies can be protected against incursions by outsiders in a number of effective ways beyond simple passwords. The access to this storage can be by virtual private net (VPN) connections that are insulated from the public connections in the Internet channels of communication. The content of the storage can be encrypted with keys issued only to authorized users. Security is an important concern with respect to any discovery repository. Many knowledgeable lawyers regard the technical security available for Internet repositories far more reliable than the human security that protects physical repositories.

This is the way that some lawyers representing plaintiffs sell their document collections to other lawyers who have similar cases. The lawyer who first obtained the documents in discovery scans them into digital format and stores them on an Internet repository. That lawyer can then sell access to this repository and deliver an appropriate password to those who pay the fee. With the password, there is complete access to the repository so that files can be downloaded and printed out for those who like to work with hard copy, or can be processed with optical character recognition software for those who want to do searches. The lawyer who put the documents into the repository never needs to make another set. [Effective Use at 97-98].

e. Early establishment of evidentiary foundation. What the Manual says in general:

> The production of documents, either in the traditional manner or in a document depository, will not necessarily provide the foundation for admission of those documents into evidence at trial or for use in a motion for summary judgment. Management of documents should therefore also take into account the need for effective and efficient procedures to establish the foundation for admission. This can be accomplished by stipulation, requests for admission, interrogatories, or depositions (particularly Rule 31 depositions on written questions). While admissions are only binding on the party making them, authenticity (as opposed to admissibility) may be established by the testimony of any person having personal knowledge that the proffered item is what the proponent claims is to be. This is particularly true when discovery involves computerized data *** that must be retrieved from computer systems or storage media, imaged, converted to a common format, or handled by a third-party expert or court-appointed neutral in the process of production. The judge should advise parties to agree on handling because admissibility will depend on the efficacy of these procedures and the parties. [Manual, §11.445 (footnotes omitted)].

What the Manual says in the employment discrimination context:

> Employment discrimination litigation frequently involves the collection and presentation of voluminous data regarding characteristics of the company's workforce and its employment practices. In addition to using data already computerized by the company, the parties often prepare new databases, electronically storing information manually extracted from other records. Disagreements may arise about the accuracy of these new databases, and preparing and verifying separate databases involves time and expense. Consider encouraging the parties to agree on joint development of a common database on which their respective expert will conduct their studies. If they cannot agree on a common database, the court should direct them to use pretrial verification procedures to eliminate (or quantify) errors in the different databases. Whenever possible, complex data should be presented at trial through summaries, charts, and other tabulations.
>
> Adopting pretrial procedures to facilitate this presentation will reduce disputes over the accuracy- of the underlying data and the compilations derived from such data. Indeed, to the extent practicable, disputes at trial regarding statistical evidence should be limited to its interpretation, relevance, and weight, not its accuracy. Experts submitting statistical studies in the form of written reports should include, among other things, the data and information considered in arriving at their conclusions. Such

information includes the applicable labor or employment pool, historical data, and other characteristics. After reviewing these reports and considering the comments of counsel, it may be appropriate to appoint an independent statistical expert under Federal Rule of Evidence 706. The court should be wary of making such an appointment, however, if the plaintiffs will be able to pay their share of any assessed fees only if they prevail. [Manual, § 32.435 (footnotes omitted)].

2. Has a privilege log been prepared?[34]

3. Why is early document collection important?

   a. Needed to meet Rule 11 obligations.

   b. Needed to prepare for Rule 26(a)(1) initial disclosures.

   c. Volume of documents to be reviewed may support deferral of initial disclosures

4. ***Expert disclosures:***

The probability that expert testimony will play a prominent role in a case often is apparent from the face of the complaint. Where the expert evidence promises to be protracted or controversial, or to address novel subjects that will challenge the comprehension of the judge and the jury, management of expert testimony should be part of a coordinated case-management strategy. The initial conference presents a good opportunity to explore preliminarily the nature and extent of the need for judicial management of expert evidence in the case. Areas that can be explored, either at the initial conference or, depending on the complexity of the litigation, in subsequent case-management conferences once the issues have been more refined, include the kinds of evidence likely to be offered, the technical and scientific subject matter, and anticipated areas of controversy. The court should inquire into whether the science involved is novel and still in development, or whether the scientific issues for which expert testimony will be offered are well settled. To the extent the conference discloses that a particular scientific issue is relevant but not in dispute, such as whether exposure to asbestos is capable of causing lung cancer and mesothelioma (i.e., general causation), the court should encourage the parties to stipulate to its admission. (Judges take different positions on use of collateral estoppel to preclude relitigation or facts based on scientific evidence).

One approach to handling the issue of expert evidence at the initial pretrial conference is to advise counsel in advance to be prepared to respond

[34] As an alternative to addressing privilege issues in the first instance, parties may choose to enter into an agreement which provides that inadvertent production of a privileged document will not be deemed to be a waiver of the privilege. See Rule 26(b)(5)(B) and proposed Federal Rule of Evidence 502.

> to inquiries into the nature of the claims and defenses together with any underlying assumptions, into the nature of expert evidence expected to be offered, and, if known, into the areas of disagreement among experts. Additional areas that may be appropriate for discussion during the initial conference, depending on the complexity of the case, include the following:
>
> - Do the parties anticipate retaining testifying experts? ***.
> - Should there be a limit on the number of expert witnesses? ***.
> - When should the parties exchange experts reports? ***.
> - Is the case appropriate for referral to a magistrate judge? ***.
> - Should the court appoint a special master or an outside expert? ***. [Manual, § 23.32 (footnotes omitted)].

What the Manual says about experts in CERCLA cases:

> CERCLA cases are prone to battles of experts in highly technical areas, such as chemistry, hydrology, and geology. Environmental experts testify on aspects such as site conditions, migration of contaminants, geological conditions. and toxicity. Continuous testing and sampling of soil and groundwater at a given site, as well as analyzing the synergistic and migratory capacities of contaminants is often necessary. At a minimum, procedures should be adopted to produce a common database for the experts to analyze. The judge, to reduce unproductive contentiousness and keep the focus on genuine issues, may also encourage creation of an experts' committee with responsibility for defining issues, testing soil and allegedly hazardous materials, creating joint databases, developing proposed factual stipulations, and splitting samples. Some judges have directed the parties to have their experts meet without counsel to identify and consider the technical issues relating to the proposed remedial design. Such a meeting can uncover erroneous assumptions and avoid wasting resources on a remedy that might be technically flawed. In addition, such expert assistance may prove helpful in the settlement or allocation process. Where the case appears to be headed for trial, or where motions for summary judgment rely in part on scientific evidence, consider how best to handle Daubert issues. [Manual, §34.29 (footnotes omitted)].

5. ***A sequence for discovery:***

    a. Initial disclosures

    b. Interrogatories and document requests

    c. Fact depositions

d. Dispositive motions

e. Expert depositions

6. ***Why should discovery be sequenced?***

   a. If fact depositions commence before written discovery is completed, depositions may not be "complete" and there may be need to reopen depositions.

   b. Close fact discovery before expert discovery commences so that experts have all available information.

   c. Dispositive motions may be made at end of fact discovery and expense of experts may be avoided.

   d. Sequencing creates "firebreaks" in complex litigation to enable settlement discussions/ADR.

VIII. CONCLUSION

A. The key to successful management of complex civil cases is early and sustained judicial involvement. Judges should confer with attorneys on a regular basis to ensure that complex cases remain "on track." Attorneys should request — and embrace — such conferences as a means to avoid undue expense and delay.

B. From an attorney's perspective, management begins at the earliest stage of litigation. In meeting their Rule 11 obligations, attorneys should begin to plan for the Rule 26(f) "meet-and-confer" and for Rule 26(a)(1) disclosures.

C. The obligation to meet-and-confer under Rule 26(f) should not be taken lightly. This conference gives attorneys an opportunity to shape the course of litigation. Attorneys should devote sufficient time to prepare a comprehensive discovery plan for submission to a judge and should be realistic in proposing a schedule for litigation.

D. Discovery disputes can take on a life of their own in complex cases. To minimize such disputes, attorneys should attempt to reach agreement at the earliest possible time on the parameters of discovery and should also present discovery disputes to the judge as soon as possible.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Plaintiff, **v.** **Defendants.**	**Civil Action No. (-CLW)** **PRETRIAL SCHEDULING ORDER**

THIS MATTER having come before the Court for a scheduling conference pursuant to Rule 16 of the Federal Rules of Civil Procedure on __________, and the parties having reviewed the Court's Civil Case Management Order as well as the Local Civil Rules, and for good cause shown,

IT IS on this day of _________,

ORDERED THAT the next event in this matter will be **__________________;** and

FURTHER ORDERED that this matter will proceed as follows:

1. **Fact Discovery Deadline.** Fact discovery is to remain open through . All fact witness depositions must be completed by the close of fact discovery. No discovery is to be issued or engaged in beyond that date, except upon application and for good cause shown.

2. **Motions to Add New Parties.** Any motion to add new parties, whether by amended or third-party complaint, must be electronically filed no later than .

3. **Motions to Amend Pleadings.** Any motion to amend pleadings must be electronically filed no later than .

4. **Rule 26 Disclosures.** The parties shall exchange disclosures pursuant to Rule 26 no later than _________.

5. **Interrogatories.** The parties may serve interrogatories limited to ______ single questions including subparts, on or before, which shall be responded to by ______.

6. **Document Requests.** The parties may serve requests for production of documents on or before , which shall be responded to by .

7. **Depositions.** The number of depositions to be taken by each side shall not exceed _____.

8. **Electronic Discovery.** The parties are directed to Rule 26(f), as amended, which, inter alia, addresses preservation of discoverable information, discovery of electronically stored information, and claims of privilege or work product protection. The parties are also directed to Local Civil Rule 26.1(d) which describes the obligations of counsel with regard to their clients' information management systems.

9. **Discovery Disputes.** Please refer to the Court's Civil Case Management Order.

10. **Motion Practice.** Please refer to the Court's Civil Case Management Order.

11. **Expert Reports.** All affirmative expert reports shall be delivered by _________. All responsive expert reports shall be delivered by _________. Depositions of all experts to be completed by ______.

12. **Form and Content of Expert Reports.** All expert reports must comport with the form and content requirements set forth in Rule 26(a)(2)(B). No expert shall testify at trial as to any opinions or base those opinions on facts not substantially disclosed in the expert's report.

13. **Extensions and Adjournments.** Please refer to the Court's Civil Case Management Order.

14. **Protective Orders.** Any proposed confidentiality order agreed to by the parties must strictly comply with Rule 26(c), Local Civil Rule 5.3, and applicable case law. Please also refer to the Court's Civil Case Management Order.

15. **Local Rules.** The parties are directed to the Local Civil Rules for any other matter not addressed by this Order or the Court's Civil Case Management Order.

16. **FAILURE TO COMPLY WITH THE TERMS OF THIS ORDER OR ANY OTHER ORDERS WILL RESULT IN SANCTIONS.**

s/Cathy L. Waldor____________________________
CATHY L. WALDOR
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

________________________________ Plaintiff(s)	Civil Action No. ______________
v.	Hon. ______________________
________________________________ Defendant(s)	**JOINT PROPOSED DISCOVERY PLAN**

1. Set forth the name of each attorney appearing, the firm name, address and telephone number and facsimile number of each, designating the party represented.

   ____

2. Set forth a brief description of the case, including the causes of action and affirmative defenses asserted.

   ____

3. Have settlement discussions taken place? Yes _______ No _______

   (a) What was plaintiff's last demand?

      (1) Monetary demand: $ ______________
      (2) Non-monetary demand: ______________

   (b) What was defendant's last offer?

      (1) Monetary offer: $ ______________
      (2) Non-monetary offer: ______________

4. The parties [have _______ have not _______] met pursuant to Fed. R. Civ. P. 26(f):

   ____

5. The parties [have ______ have not _______] exchanged the information required by Fed. R. Civ. P. 26(a)(1). If not, state the reason therefor.

   ____

6. Explain any problems in connection with completing the disclosures required by Fed. R. Civ. P. 26(a)(1).

   ____

7. The parties [have _______ have not ________] conducted discovery other than the above disclosures. If so, describe.

8. Proposed joint discovery plan:

   (a) Discovery is needed on the following subjects:

   ____

   (b) Discovery [should ______ should not ______] be conducted in phases or be limited to particular issues. Explain.

   (c) Proposed schedule:

      (1) Fed. R. Civ. P. 26 Disclosures _____________.

      (2) E-Discovery conference pursuant to L. Civ. R. 26.1(d) _____________.

      (3) Service of initial written discovery _____________.

      (4) Maximum of _____ Interrogatories by each party to each other party.

      (5) Maximum of _____ depositions to be taken by each party.

      (6) Motions to amend or to add parties to be filed by _____________.

      (7) Factual discovery to be completed by ____________.

      (8) Plaintiff's expert report due on _____________.

      (9) Defendant's expert report due on ____________.

      (10) Expert depositions to be completed by ______________.

      (11) Dispositive motions to be served within ________ days of completion of discovery.

   (d) Set forth any special discovery mechanism or procedure requested.

   ____

   (e) Set forth any orders, such as data preservation orders, protective orders, or orders reflecting agreements under Federal Rule of Evidence 502, which should be entered

   ____

   (f) A pretrial conference may take place on ______________.

(g) Trial date: _________________ (_______ Jury Trial; _______ Non-Jury Trial).

9. Do you anticipate any special discovery needs (i.e., videotape/telephone depositions, problems with out-of-state witnesses or documents, etc)? Yes ______ No ______.
If so, please explain.

____

10. Do you anticipate any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced?
Yes ______ No ______.

If so, how will electronic discovery or data be disclosed or produced? Describe any agreements reached by the parties regarding same, including costs of discovery, production, related software, licensing agreements, etc.

____

11. Do you anticipate entry of a Discovery Confidentiality Order? <u>See</u> L.Civ.R. 5.3(b) and Appendix S.

____

12. Do you anticipate any discovery problem(s) not listed above? Describe.
Yes ______ No ______.

____

13. State whether this case is appropriate for voluntary arbitration (pursuant to <u>Local Civil</u> Rule 201.1 or otherwise) or mediation (pursuant to <u>Local Civil Rule</u> 301.1 or otherwise). If not, explain why and state whether any such procedure may be appropriate at a later time (<u>i.e.</u>, after exchange of pretrial disclosures, after completion of depositions, after disposition or dispositive motions, etc.).

____

14. Is this case appropriate for bifurcation? Yes ________No _________.

15. An interim status settlement conference (with clients in attendance), should be held in
____.

16. We [do ____________do not ____________] consent to the trial being conducted by a Magistrate Judge.

17. Identify any other issues to address at the Rule 16 Scheduling Conference.

____

____

Attorney(s) for Plaintiff(s) / Date

Attorney(s) for Defendant(s) / Date