MIDDLE DISTRICT DISCOVERY

A HANDBOOK ON CIVIL DISCOVERY PRACTICE

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

Rev. 9/04/01

INTRODUCTION

The Federal Rules of Civil Procedure, the Local Rules of the Middle District of Florida, and existing case law cover only some aspects of civil discovery practice. Many of the gaps have been filled by the actual practice of trial lawyers and, over the years, a custom and usage has developed in this district in frequently recurring discovery situations. Originally developed by a group of trial lawyers, this handbook on civil discovery practice in the United States District Court, Middle District of Florida, updated in 2001, attempts to supplement the rules and decisions by capturing this custom and practice. The revised handbook also incorporates portions of the American Bar Association's 1999 Civil Discovery Standards that are applicable to practice in this district. This handbook is neither substantive law nor inflexible rule; it is an expression of generally acceptable discovery practice in the Middle District. Judges and lawyers practicing in the Middle District should regard the handbook as highly persuasive in addressing discovery issues.

The revised handbook has been reviewed and approved by the Advisory Committee on Local Rules and the Magistrate and District Judges of the Court.

~~ The Judges of the Middle District ~~

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I. DISCOVERY IN GENERAL

A. Courtesy and Cooperation Among Counsel

1 - Courtesy. Discovery in this district should be practiced with a spirit of cooperation and civility. The district's lawyers and the Court are justifiably proud of the courteous practice that is traditional in the Middle District. Courtesy suggests that good faith consultation is appropriate before commencing action that might result in disagreement among counsel.

2 - Scheduling. A lawyer shall reasonably attempt to accommodate the schedules of opposing lawyers, parties, and witnesses in scheduling discovery.

3 - Stipulations. Unless contrary to Rule 29, Federal Rules of Civil Procedure, the parties may stipulate in writing in accordance with Local Rule 4.15, Middle District of Florida, to alter, amend, or modify any practice with respect to discovery. However, any such stipulations do not relieve the parties from compliance with court orders, absent approval of the Court.

4 - Withdrawal of Motions. If counsel resolve their differences and render a pending discovery motion moot, the moving party should immediately file a notice of withdrawal of the motion in order to avoid unnecessary judicial labor.

B. Duty of Disclosure

Attorneys are responsible for complying with the provisions of Rule 26(a)(1), Federal Rules of Civil Procedure (as amended December 1, 2000), regarding required initial disclosures.

C. Filing of Discovery Materials and Other Discovery Considerations

1 - General Rule Governing Filing of Discovery Materials. In accordance with Local Rule 3.03(c) - (e), Middle District of Florida, copies of written interrogatories, answers and objections to interrogatories, notices of oral depositions, transcripts of oral depositions, requests for the production of documents and other things, responses to requests for production, matters disclosed pursuant to Rule 26(a)(1), Federal Rules of Civil Procedure, requests for admissions, and responses to requests for admissions shall not be filed with the Court as a matter of course. Discovery materials are filed only in limited circumstances,

including if ordered by the Court, if necessary to the presentation or defense of a motion, or if required by Rule 26(a)(3).

Correspondence exchanged during the course of litigation either between opposing counsel or between counsel for one party and an unrepresented party should be filed with the Court only to comply with an order of the Court or when necessary to the presentation and consideration of a motion and only when the filing of traditional discovery material will clearly not suffice for the purpose. Counsel should carefully redact correspondence to exclude irrelevant and prejudicial material, e.g., settlement discussions.

2 - Filing Discovery or Other Papers Under Seal. In certain rare circumstances involving trade secrets or other confidential information, the Court may order the filing under seal of discovery in order to preserve the integrity of the information. However, the Court wishes to minimize the number of documents filed under seal. Applicable precedent allows the Court to file documents under seal only in certain limited circumstances. Therefore, no paper may be filed under seal without prior approval by the Court upon the demonstration of a sufficient legal and factual basis.

3 - Tailoring Discovery Requests to the Needs of the Case. A party should tailor discovery requests to the needs of each case. The content of the requests should apply to the particular case, and the form of discovery requested should be the one best suited to obtain the information sought. In each case a party should carefully determine which discovery methods will achieve the discovery goal of obtaining useful information as efficiently and inexpensively as possible for everyone concerned.

4 - Responding to Discovery Requests. A party responding to a discovery request should make diligent effort to provide a response that (i) fairly meets and complies with the discovery request and (ii) imposes no unnecessary burden or expense on the requesting party.

D. Supplementing Answers

Rule 26(e), Federal Rules of Civil Procedure, expressly provides that in many instances a party is under a duty to supplement or correct prior disclosures pursuant to Rule 26(a) or in discovery responses. Fairness and professionalism suggest a broader range of circumstances requiring supplementation. However, a party may not vary the provisions of the Federal Rules of Civil Procedure by placing supplementation language in a discovery request.

E. Timeliness and Sanctions

1 - Timeliness of Discovery Responses. The Federal Rules of Civil Procedure set forth explicit time limits for responding to discovery requests. If unable to answer timely, a lawyer should first seek an informal extension of time from counsel propounding the discovery. Counsel in this district typically accommodate reasonable requests for additional time. If unable to informally resolve the matter, counsel should move for an extension of time to respond. (See Local Rule 3.01(g), Middle District of Florida, requiring a certificate that counsel have conferred before seeking judicial relief.)

2 - Motions for Extensions of Time. Motions for extension of time within which to respond to discovery should be filed sparingly and only when counsel are unable to informally resolve their disputes. Counsel should be aware that the mere filing of a motion for an extension of time in which to respond does not, absent an order of the Court, extend the deadline for responding to discovery requests.

3 - Sanctions. Rule 37, Federal Rules of Civil Procedure, provides that if a party must seek relief from the Court to compel a recalcitrant party to respond, the moving party may be awarded reasonable expenses including attorney's fees incurred in compelling the responses. Rule 37 is enforced in this district. Further, if a Court order is obtained compelling discovery, unexcused failure to comply with such an order is treated by the Court with special gravity and disfavor.

4 - Stays of Discovery. Normally, the pendency of a motion to dismiss or a motion for summary judgment will not justify a unilateral motion to stay discovery pending resolution of the dispositive motion. Such motions for stay are rarely granted. However, unusual circumstances may justify a stay of discovery in a particular case upon a specific showing of prejudice or undue burden. This policy also applies to cases referred to arbitration or mediation under the Local Rules.

F. Completion of Discovery

1 - Deadline for Discovery Completion. The Court ordinarily sets a discovery completion date through its Case Management and Scheduling Order (although a Judge may have another method of setting and extending that deadline). The Court follows the rule that the completion date means that *all discovery must be completed by that date*. For example, interrogatories must be served more than thirty days prior to the completion date to permit the opposing party to respond before the discovery deadline. Untimely discovery requests are subject to objection on that basis. Counsel, by agreement, may conduct discovery after the formal completion date but should not expect the Court to resolve discovery disputes arising after the discovery completion date.

2 - Extension of Time for Discovery Completion. Occasionally, the Court will allow additional discovery time upon motion, but it is a serious mistake to assume that an extension of the discovery completion date will be granted. When allowed, the discovery completion date is normally extended only upon a written motion showing good cause (including due diligence in the pursuit of discovery before the completion date) and stating both the specific additional discovery needed and its purpose. Motions for extension of discovery time are treated with special disfavor if filed after the discovery completion date and will normally be granted only if it clearly appears that an extension will not necessitate the continuance of a scheduled trial.

II. DEPOSITIONS

A. General Policy and Practice

1 - Scheduling. A courteous lawyer is normally expected to accommodate the schedules of opposing lawyers. In doing so, the attorney should normally pre-arrange a deposition with opposing counsel before serving the notice. If this is not possible, counsel may unilaterally notice the deposition while at the same time indicating a willingness to be reasonable about any necessary rescheduling. Rule 30(a)(2)(A), Federal Rules of Civil Procedure, and Local Rule 3.02(b), Middle District of Florida, limit each *side* to no more than ten depositions unless otherwise ordered by the Court. Additionally, Local Rule 3.02(a) requires the party noticing the deposition to give a minimum (absent agreement or an order based upon some exigent circumstance) of ten days written notice to every other party and the deponent, if not a party, although giving substantially more than ten days notice is strongly encouraged. Customarily parties provide at least thirty days notice of a deposition. Rule 30(d)(2) limits a deposition to one day of seven hours, unless otherwise authorized by the Court or stipulated by the parties. This is generally interpreted to mean seven hours of actual testimony, with appropriate adjournments for meals, rest, or refreshment.

2 - Persons Who May Attend Depositions. Each lawyer may ordinarily be accompanied at the deposition by one representative of each client and, in technical depositions, one or more experts. Business necessity may require substitution for the representative of a party, but this privilege should not be abused. Lawyers may also be accompanied by records custodians, paralegals, secretaries, and the like, even though they may be called as technical witnesses on such questions as chain of custody, the foundation for the business record rule, or other technical matters. While more than one lawyer for each party may attend, only one should question the witness or make objections, absent an agreement to the contrary. Those in attendance should conduct themselves in the manner expected during courtroom proceedings in the presence of a judge. Conduct during depositions should accord with Local Rules 5.03(7), (8), (9), (12), (13), and (16), Middle District of Florida.

3 - Place Where Deposition May Be Taken. Local Rule 3.04(b), Middle District of Florida, provides that a non-resident plaintiff may reasonably expect to be deposed at least once in this district during the discovery stages of the case and that a non-resident defendant who intends to be present in person at trial may be deposed at least once in this district either during discovery in the case or within a week before trial, as the circumstances suggest. A non-resident is defined by Local Rule 3.04(b) as a person residing outside the state of Florida.

4 - Designations by an Organization of Someone to Testify on Its Behalf. In issuing or responding to a properly drawn notice of deposition pursuant to Rule 30(b)(6), Federal Rules of Civil Procedure, counsel should adhere to the following guidelines:

(a) Requested Areas of Testimony. A notice or subpoena to an entity, association, or other organization should accurately and concisely identify the designated area(s) of requested testimony, giving due regard to the nature, business, size, and complexity of the entity being asked to testify.

(b) Designating the Best Person to Testify for the Organization. An entity, association, or other organization responding to a deposition notice or subpoena should make a diligent inquiry to determine the individual(s) best suited to testify.

(c) Reasonable Interpretation Is Required. Both in preparing and in responding to a notice or subpoena to an entity, association, or other organization, a party or witness is expected to interpret the designated area(s) of inquiry in a reasonable manner consistent with the entity's business and operations.

(d) If in Doubt, Clarification Is Appropriate. A responding party or witness, who is unclear about the meaning and intent of any designated area of inquiry, should communicate in a timely manner with the requesting party to clarify the matter so that the deposition may proceed as scheduled. The requesting party is obligated to provide clarification sufficient to permit informed, practical, and efficient identification of the proper witness.

(e) Duty to Prepare Witness. Counsel for the entity should prepare the designated witness so that the witness can provide meaningful information about the designated area(s) of inquiry.

5- If an Officer Lacks Knowledge. Whenever an officer, director, or managing agent of an entity is served with a deposition notice or subpoena that contemplates testimony on a subject about which the witness lacks knowledge or information, that individual may submit to the noticing party, reasonably before the date noticed for the deposition, an affidavit or declaration under penalty of perjury so stating and identifying a person within the entity, if any, having knowledge of the subject matter. The noticing party should then proceed with the deposition of the officer, director, or managing agent initially noticed or subpoenaed only after careful consideration and for a specific reason, provided to the deponent in writing in advance of the deposition.

6- Consideration for an Organization's Senior Management. If information is sought from an organization, counsel ordinarily should not seek in the first instance to take the deposition of the organization's senior management if someone else in the organization can be expected to have more direct and firsthand knowledge or information. Depositions are not properly used as a mechanism to inconvenience or distract senior management who may not be immediately involved in the dispute.

B. Objections

1 - Objection to the Form of the Question. Rule 32(d)(3)(B), Federal Rules of Civil Procedure, provides that an objection to the form of the question is waived unless asserted during the deposition. Many lawyers object by simply stating "I object to the form of the question." This normally suffices because it is usually apparent that the objection is, for example, "leading" or based upon an insufficient or inaccurate foundation. The interrogating lawyer has a right to ask the objecting party to state a sufficiently specific objection so that any problem with the question can be understood and, if possible, cured. If the interrogating lawyer chooses not to ask for clarification, the objecting lawyer should stand on the objection without further elaboration; the objection is preserved.

2 - Instruction That a Witness Not Answer. Occasionally during a deposition, a lawyer may instruct a deponent not to answer a question. Rule 30(d), Federal Rules of Civil Procedure, expressly provides that a lawyer may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation established by the Court, or to present a motion to show that the examination is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent or party.

The use of the instruction not to answer, absent the limited circumstances set forth in Rule 30(d)(1), Federal Rules of Civil Procedure, is disfavored by the Court. A party or a lawyer who improperly instructs a deponent not to answer is subject to the expense and sanction provisions of Rule 37(a)(4).

3 - Attorney-Deponent Conference During Deposition. Except during routine recesses and for purposes of determining the existence of a privilege, an attorney and a deponent should not normally confer during a deposition. Likewise, attorneys should not attempt to prompt a deponent by suggestive or unnecessarily narrative objections.

4 - Attorney-Deponent Communication During a Recess. During a recess, an attorney for a deponent may communicate with the deponent; this communication should be deemed subject to the rules governing the attorney-client privilege. If, as a result of a communication between the deponent and his or her

attorney, a decision is made to clarify or correct testimony previously given by the deponent, the deponent or the attorney for the deponent should, promptly upon the resumption of the deposition, bring the clarification or correction to the attention of the examining attorney. The examining attorney should not attempt to inquire into communications between the deponent and the attorney for the deponent that are protected by the attorney-client privilege. The examining attorney may inquire as to the circumstances that led to any clarification or correction, including inquiry into any matter that was used to refresh the deponent's recollection.

5 - Telephone Hearing to Resolve Disputes During Deposition. In unusual circumstances with material and adverse consequences, the parties involved in a deposition may telephone the chambers of the assigned Magistrate Judge for resolution of an intractable dispute that has arisen during the deposition. The Magistrate Judge, if available, will entertain such a request only if all parties are present. This procedure should be employed rarely (and only after counsel have made every effort to resolve the dispute).

C. Production of Documents at Depositions

1 - Scheduling. Consistent with the requirements of Rules 30 and 34, Federal Rules of Civil Procedure, a party seeking production of documents and other matters from another party in connection with a deposition should schedule the deposition to allow for the production in advance of the deposition.

2 - Option to Adjourn or Proceed. If requested documents that are discoverable are not timely produced prior to the deposition, the party noticing the deposition may either adjourn the deposition until after such documents are produced or, without waiving the right to have access to the documents and to subsequently examine the deponent regarding the documents, proceed with the deposition.

D. Non-Stenographic Recording of Depositions

Rule 30(b), Federal Rules of Civil Procedure, provides that parties are authorized to record deposition testimony by non-stenographic means without first obtaining permission of the Court or agreement from other counsel. Rule 30(b)(2) states that the party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the Court orders otherwise, the testimony may be recorded by sound, sound and visual, or stenographic means, and the party taking the deposition shall bear the costs of recording. Rule 30(b)(3) allows any party to designate an additional method to record the deponent's testimony so long as prior notice is provided to the deponent and other

parties. The additional record or transcript shall be made at that party's expense unless the Court otherwise orders.

A party choosing to record a deposition only by videotape or audiotape should understand that a transcript will be required by Rules 26(a)(3)(B) and 32(c), Federal Rules of Civil Procedure, if the deposition is later to be offered as evidence at trial or in conjunction with a Rule 56 motion. Objections to the non-stenographic recording of a deposition may be presented to the Court under the provisions of Rule 26(c).

Parties using non-stenographic means to record deposition testimony shall refer to Rule 30(b)(4), Federal Rules of Civil Procedure, for specific procedures to ensure proper recording.

E. Experts

1 - Disclosure of Expert Witnesses. Each party should disclose the identity of prospective retained expert witnesses and provide a complete expert report under Rule 26(a)(2), Federal Rules of Civil Procedure, within the time provided in the Court's Case Management and Scheduling Order (which often adopts the schedule proposed by the parties in the Case Management Report). This includes any expert witness retained by another party (such as a co-defendant's expert) who may be used by the disclosing party. The expert report is not required of a "hybrid" witness, such as a treating physician, who was not specifically retained for the litigation and will provide both fact and expert testimony (though non-retained experts must still be disclosed and are subject to regular document and deposition discovery). The parties are encouraged to communicate openly about all opinions that a treating physician is expected to render in support of a party's case.

2 - Scheduling the Deposition. Pursuant to Rule 26(b)(4)(A), Federal Rules of Civil Procedure, a party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Rule 26(a)(2)(B), the deposition shall not be conducted until after the report is provided.

III. PRODUCTION OF DOCUMENTS

A. Preparation and Interpretation of Requests for Documents

1 - Formulating Requests for Documents. In addition to complying with the provisions of Rules 34 and 45, Federal Rules of Civil Procedure, a request for documents, whether a request for production or a subpoena *duces tecum*, should be clear, concise, and reasonably particularized. For example, a request for "each and every document supporting your claim" is objectionably broad in most cases.

2 - Use of Form Requests. An attorney shall review any standard form document request or subpoena *duces tecum* and modify it to apply to the facts and contentions of the particular case. A "boilerplate" request or subpoena not directed to the facts of the particular case shall not be used. Neither should burdensome "boilerplate" definitions or instructions be used in formulating a document request or subpoena. Words used in discovery normally should carry their plain and ordinary meaning unless the particular case requires a special or technical definition, which should be specified plainly and concisely by the party required to respond to the term(s).

3 - Reading and Interpreting Requests for Documents. An attorney receiving a request for documents or a subpoena *duces tecum* shall reasonably and naturally interpret it, recognizing that the attorney serving it generally does not have specific knowledge of the documents sought and that the attorney receiving the request or subpoena generally has or can obtain pertinent knowledge from the client. Furthermore, attorneys are reminded that evasive or incomplete disclosures, answers, or responses may be sanctionable under the provisions of Rule 37, Federal Rules of Civil Procedure.

4 - Contact With the Client When a Document Request Is Received. Upon receiving a document request, counsel should promptly confer with the client and take reasonable steps to ensure that the client (i) understands what documents are requested, (ii) has adopted a reasonable plan to obtain documents in a timely and reasonable manner, and (iii) is purposefully implementing that plan in good faith.

5 - Responding to a Document Request. A party and counsel ordinarily have complied with the duty to respond to a document request if they have:

(a) Responded to the requests within the time set by the governing rule, stipulation, or court-ordered extension;

(b) Objected with specificity to objectionable requests;

(c) Produced the documents themselves (or copies), specifically identified those documents that are being or will be produced, or specified precisely where the documents can be found and when they can be reviewed;

(d) Stated specifically that no responsive documents have been found; and

(e) Ensured a reasonable inquiry with those persons and a reasonable search of those places likely to result in the discovery of responsive documents.

6 - Objections. Absent compelling circumstances, failure to assert an objection to a request for production within the time allowed for responding constitutes a waiver and will preclude a party from asserting the objection in response to a motion to compel. Objections to requests for production should be specific, not generalized, and should be in compliance with the provisions of Rule 34(b), Federal Rules of Civil Procedure. Objections to portions of a document request do not excuse the responding party from producing those documents to which there is no objection. Specific objections should be matched to specific requests. General or blanket objections should be used only when they apply to every request.

7 - Producing Documents Subject to Objection. When the scope of the document production is narrowed by one or more objections, this fact and the nature of the documents withheld should be asserted explicitly.

8 - When Production Is Limited by Interpretation. If a party objects to a request as overbroad when a narrower version of the request would not be objectionable, the documents responsive to the narrower version ordinarily should be produced without waiting for a resolution of the dispute over the scope of the request. When production is limited by a party's objection, the producing party should clearly describe the limitation in its response.

9 - Supplementation of Document Production. A party should promptly produce any responsive documents discovered after the original production.

10 - Producing Business Records in Lieu of Answering Interrogatories. Rule 33(d), Federal Rules of Civil Procedure, allows a party in very limited circumstances to produce business records in lieu of answering interrogatories. To avoid abuses of Rule 33(d), the party wishing to respond to interrogatories in the manner contemplated by Rule 33(d) should observe the following practice:

(a) Specify the documents to be produced in sufficient detail to permit the interrogating party to locate and identify the records and to ascertain the answer as readily as could the party from whom discovery is sought.

(b) The producing party shall make its records available in a reasonable manner [i.e., with tables, chairs, lighting, air conditioning or heat, and the like if possible] during normal business hours, or, in lieu of agreement, from 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding holidays.

(c) The producing party shall designate one of its regular employees to instruct the interrogating party on the use of the records retention system involved. That person shall be one who is fully familiar with the records system and, if a question concerning the records arises and the designated person cannot answer, the producing party should act reasonably and cooperatively in locating someone who knows the answer to the question.

(d) The producing party shall make available any computerized information or summaries that it either possesses or can produce by a reasonably efficient procedure.

(e) The producing party shall provide any relevant compilations, abstracts, or summaries, either in its custody or reasonably obtainable by it, not prepared in anticipation of litigation. If it has any documents arguably subject to this clause but which it declines to produce for some reason, the producing party shall call the circumstances to the attention of the opposing party, who may move to compel.

(f) All of the actual clerical data extraction work shall be performed by the interrogating party unless agreed to the contrary, or unless, after actually beginning the effort, it appears that the task could be performed more efficiently by the producing party. In that event, the interrogating party may ask the Court to review the propriety of Rule 33(d) election. In other words, it behooves the producing party to make the document search as simple as possible, or the producing party may be required to answer the interrogatory in full.

11 - Oral Requests for Production of Documents. As a practical matter, many lawyers produce or exchange documents upon informal request, often confirmed by letter. A lawyer's promise that documents will be produced should be honored. Requests for production of documents and responses may be made on the record at depositions but usually should be confirmed in writing to avoid uncertainty. Attorneys are reminded that informal requests may not support a motion to compel.

B. Procedures Governing Manner of Production

Production of Documents. Rule 34, Federal Rules of Civil Procedure, sets forth the procedures required for responding to a request for production of documents. Rule 34 also defines the term "document." In addition, the following general guidelines, although varied to suit the needs of each case, are normally followed:

1- Place of Production. As a matter of convenience, the request may suggest production at the office of either counsel. The Court expects the lawyers to reasonably accommodate one another with respect to the place of production of documents.

2- Manner of Production. Rule 34, Federal Rules of Civil Procedure, requires that a party producing documents for inspection produce them as they are maintained in the usual course of business or organize and label them to correspond with the categories in the request. In addition, if feasible, all of the documents should be made available simultaneously, and the party inspecting can determine the desired order of review. While the inspection is in progress, the inspecting party shall have the right to review again any documents which have already been examined during the inspection.

If the documents are produced as they are kept in the usual course of business, the producing party has an obligation to explain the general scheme of record-keeping to the inspecting party. The objective is to acquaint the inspecting party generally with how and where the documents are maintained. If the documents are produced to correspond with the categories in the request, some reasonable effort should be made to identify certain groups of the produced documents with particular categories of the request or to provide some meaningful description of the documents produced. The producing party is not obligated to rearrange or reorganize the documents.

3- Listing or Marking. The producing party is encouraged to list or mark the documents which have been produced. This will prevent later confusion or dispute about which documents were produced. For relatively few documents, a list prepared by the inspecting attorney (which should be exchanged with opposing counsel) may be appropriate; when more documents are involved, the inspecting attorney may want to number each document. The producing party should allow such numbering so long as marking the document does not materially interfere with its intended use. Documents that would be materially altered by marking (e.g., promissory notes) should be listed rather than marked. Alternatively, copies of the documents (rather than originals) may be marked.

4- Copying. Photocopies of the original documents are often prepared by the producing party for the inspecting party as a matter of convenience. However, the inspecting party has the right to insist on inspecting the original documents.

The photocopying of documents will generally be the responsibility of the inspecting party, but the producing party must render reasonable assistance and cooperation depending on its staffing and facilities. In a case with a manageable number of documents, the producing party should allow its personnel and its photocopying equipment to be used with the understanding that the inspecting party will pay reasonable charges. If a large quantity of documents is produced, it may be reasonable for the inspecting party to furnish personnel to make copies on the producing party's equipment or it may be reasonable for the inspecting party to furnish both the personnel and the photocopying equipment. On occasion it may be reasonable for the documents to be photocopied at another location or by an outside professional copy service.

5- Scanning. The producing party should cooperate reasonably if the inspecting party wishes to scan rather than copy documents. The inspecting party must pay for all expenses associated with the scanning.

6- Later Inspection. The inspecting party's right to inspect the documents again at a later date (after having completed the entire initial inspection) must be determined on a case-by-case basis, but permission should not be unreasonably withheld.

7- Objections. Rule 34, Federal Rules of Civil Procedure, requires that if a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable portions of the request. Objections to the production of documents based on generalized claims of privilege will be rejected. A claim of privilege must be supported by a statement of particulars sufficient to enable the Court to assess its validity. For a more detailed discussion of the invocation of privilege see Section V of this handbook. The procedures for invoking privilege set forth in Section V also apply to document production (which often requires the production of a "privilege log" containing the information requested in Section V).

8- General. The Court expects lawyers to reach agreements regarding the production of documents based upon considerations of reasonableness, convenience, and common sense. Lawyers and parties can expect the Court to deal appropriately with a lawyer or party who acts unreasonably to thwart the discovery process.

IV. Interrogatories

A. Preparation and Answering of Interrogatories

1 - Informal Requests. Whenever possible, counsel should try to exchange information informally. The results of such exchanges, to the extent relevant, may then be included in the record by requests for admissions or stipulations.

2 - Number and Scope of Interrogatories. Rule 33(a), Federal Rules of Civil Procedure, and Local Rule 3.03(a), Middle District of Florida, restrict to 25 (including all parts and subparts) the number of interrogatories a party may serve on any other party. Leave of court, which is not routinely given absent stipulation, is required to serve more than 25 interrogatories cumulatively. Pursuant to Rule 26(g), counsel's signature on interrogatories constitutes a certification of compliance with those limitations. Interrogatories should be brief, simple, particularized, unambiguous, and capable of being understood by jurors when read in conjunction with the answer. They should not be argumentative nor should they impose unreasonable burdens on the responding party.

3 - Responses. Rule 33(b), Federal Rules of Civil Procedure, requires the respondent to answer an interrogatory separately and fully in writing and under oath, unless the respondent objects, in which event the party objecting shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable. Interrogatories should be interpreted reasonably, in good faith, and according to the meaning the plain language of the interrogatory would naturally import. When in doubt about the meaning of an interrogatory, the responding party should give it a reasonable interpretation (which may be specified in the response) and offer an answer designed to provide, rather than deny, information.

4 - Objections. Absent compelling circumstances, failure to assert objections to an interrogatory within the time for answers constitutes a waiver and will preclude a party from asserting the objection in a response to a motion to compel. All grounds for an objection must be stated with specificity. Specific objections should be matched to specific interrogatories. General or blanket objections should be used only when they apply to every interrogatory. When an answer is narrowed by one or more objections, this fact and the nature of the information withheld should be specified in the response itself.

5 - Assertions of Privilege. Generalized assertions of privilege will be rejected. A claim of privilege must be supported by a statement of particulars sufficient to enable the Court to assess its validity. For a more detailed discussion of the invocation of privilege, see Section V dealing with privilege. The procedures for invoking privilege set forth in Section V also apply to interrogatory answers.

6 - Interrogatory Responses. A party and counsel ordinarily have complied with their obligation to respond to interrogatories if they have:

(a) Responded to the interrogatories within the time set by the governing rule, stipulation, or court-ordered extension;

(b) Ensured a reasonable inquiry, including a review of documents likely to have information necessary to respond to interrogatories;

(c) Objected specifically to objectionable interrogatories; and

(d) Provided responsive answers to other interrogatories.

7 - Form Interrogatories. There are certain kinds of cases which lend themselves to interrogatories which may be markedly similar from case to case, for example, employment discrimination and maritime cargo damage suits or diversity actions in which form interrogatories have been approved by state law. Aside from such cases, the use of "form" interrogatories is ordinarily inappropriate. Carefully review interrogatories to ensure that they are tailored to the individual case; "boilerplate" is to be avoided.

8 - Contention Interrogatories. Interrogatories that generally require the responding party to state the basis of particular claims, defenses, or contentions in pleadings or other documents should be used sparingly and, if used, should be designed (1) to target claims, defenses, or contentions that the propounding attorney reasonably suspects may be the proper subject of early dismissal or resolution or (2) to identify and narrow the scope of unclear claims, defenses, and contentions. Interrogatories that purport to require a detailed narrative of the opposing parties' case are generally improper because they are overbroad and oppressive.

9 - Reference to Deposition or Document. Because a party is entitled to discovery both by deposition and interrogatory, it is ordinarily insufficient to answer an interrogatory by reference to an extrinsic matter, such as "see deposition of James Smith" or "see insurance claim." For example, a corporation may be required to state its official, corporate response even though one of its high-ranking officers has been deposed, because the testimony of an officer may not necessarily represent a complete or express corporate answer. Similarly, a reference to a single document is not necessarily a full answer, and the information in the document--unlike the interrogatory answer--is not ordinarily set forth under oath.

In rare circumstances, it may be appropriate for a corporation or partnership to answer a complex interrogatory by saying something such as "Acme Roofing Company adopts as its answer to this interrogatory the deposition testimony of James Smith, its Secretary, on pages 127-145 of his deposition transcript." This may suffice when an individual has already fully answered an interrogatory in the course of a previous deposition and the party agrees to be bound by this testimony. However, counsel are reminded, as provided in Rule 37(a)(3), Federal Rules of Civil Procedure, that for purposes of discovery sanctions, "an evasive or incomplete answer is to be treated as a failure to answer."

10 - Interrogatories Should Be Reasonably Particularized. Interrogatories designed to force an exhaustive or oppressive catalogue of information are generally improper. For example, an interrogatory such as "identify each and every document upon which you rely in support of your claim in Count Two" is objectionably overbroad in a typical case, although it may be appropriate in, for example, a simple suit on a note. While there is no simple and reliable test, common sense and good faith usually suggest whether such an interrogatory is proper.

11 - Rule 33(d). Rule 33(d), Federal Rules of Civil Procedure, allows a party in very limited circumstances to produce business records in lieu of answering interrogatories. Please refer to Section III A 10 for a detailed discussion of this option.

12 - Answering Objectionable Interrogatories. If any interrogatory is objectionable because of overbreadth, the responding party, although objecting, must answer the interrogatory to the extent that the interrogatory is not overbroad. In other words, an objection for overbreadth does not relieve the duty to respond to an extent that is not overbroad, while a party awaits a judicial determination.

V. PRIVILEGE

A. Invocation of Privilege

1 - Claims of Privilege or Protection of Trial Preparation Materials. A party who responds to or objects to discovery requests and who withholds information otherwise discoverable, asserting that the information is privileged or subject to protection as trial preparation material, must assert the claim expressly and must describe the nature of the documents, communications, or things not produced or disclosed, such that, without revealing the privileged or protected information itself, the description will enable other parties to assess the applicability of the privilege or protection. See Rule 26(b)(5), Federal Rules of Civil Procedure. Withholding materials without notice is contrary to Rule 26 and may result in sanctions.

2 - Procedure for Invocation of Privilege During a Deposition. Rule 30(d), Federal Rules of Civil Procedure, permits objection during a deposition but requires a concise statement of the objection. Argumentative and suggestive objections or responses are improper. Rule 30(d) allows a person to instruct a deponent not to answer if necessary to preserve a privilege. While Rule 30(d) provides certain protections, counsel should be mindful that abuse of these protections is sanctionable. If a claim of privilege is asserted during a deposition and information is not provided on the basis of such assertion:

(a) The attorney asserting the privilege shall identify during the deposition the nature of the claimed privilege (including work product) and, if the privilege is asserted in connection with a claim or defense governed by state law, specify the claimed state law privilege; and

(b) At the time the privilege is asserted, the deposing attorney may seek and the deposed party must provide, if sought (unless divulgence of the information would cause disclosure of privileged information):

(i) For documents, to the extent the information is readily obtainable from the witness being deposed or otherwise:

(1) the type of document, e.g., letter or memorandum;

(2) the general subject matter of the document;

(3) the date of the document; and

(4) other information sufficient to identify the document for a subpoena *duces tecum*, including, if appropriate, the author, addressee, and any other recipient of the document, and, unless apparent, the relationship to each other of the author, addressee, and any other recipient;

(ii) For oral communications:

(1) the name of the person making the communication and the names of persons present when the communication occurred, and unless apparent, the relationship of the persons present during the communication;

(2) the date and place of communication; and

(3) the general subject matter of the communication.

(iii) Objection on the ground of privilege asserted during a deposition may be amplified by the objecting party subsequent to the objection.

(c) After a claim of privilege has been asserted, the attorney seeking disclosure shall have reasonable latitude during the deposition to question the witness to establish other relevant information concerning the assertion of the privilege, unless divulgence of such information would cause disclosure of privileged information, including:

(i) the applicability of the particular privilege being asserted,

(ii) the circumstances which may constitute an exception to the assertion of the privilege,

(iii) the circumstances which may result in the privilege having been waived, and

(iv) the circumstances which may overcome a claim of qualified privilege.

VI. MOTIONS TO COMPEL, FOR A PROTECTIVE ORDER, OR TO QUASH

A. Reference to Local Rule 3.04

The procedures and guidelines governing the filing of motions to compel and for protective order are set forth in Local Rule 3.04, Middle District of Florida. Local Rule 3.01(g), requiring certification of a good faith conference before any discovery motion is filed, is strictly enforced. Many potential discovery disputes are resolved (or the differences narrowed or clarified) when counsel confer in good faith, preferably in person or by telephone.

B. Effect of Filing a Motion for a Protective Order

The mere filing of a motion for a protective order does not, absent an order of the Court granting the motion, excuse the moving party from complying with the requested or scheduled discovery. Upon receipt of objectionable discovery, a party has a duty to seek relief immediately, i.e., without waiting until the discovery is due or almost due. Upon receipt of a motion for a protective order, the Court may issue a temporary stay of discovery pending resolution of the motion. However, a party's diligence in seeking relief is a principal factor in the decision whether to grant a stay. Of course, a conference under Local Rule 3.01(g), Middle District of Florida, must precede a motion for a protective order.

VII. TECHNOLOGY

A. Preserving and Producing Electronic Information

1 - Document Request. Unless otherwise stated in a request, a request for "documents" should be construed as also asking for information contained or stored in an electronic medium or format.

2 - Document Production. Upon request, a party serving written discovery requests or responses should provide the other party or parties with a diskette or other electronic version of the requests or responses (if reasonably available).

3 - Preserving Electronic Information. Unless the requesting party can demonstrate a substantial need, a party does not ordinarily have a duty to take steps to try to restore electronic information that has been deleted or discarded in the regular course of business but may not have been completely erased from computer memory.

4 - Discovery of Electronic Information.

(a) A party may request the production of electronic information, if reasonable, in hard copy, in electronic form, or in both forms. A party may also ask for the production of ancillary electronic information that relates to relevant electronic documents, such as information that would indicate (i) whether and when electronic mail was sent or opened by its recipient(s) or (ii) whether and when information was created or edited. A party also may request the software necessary to retrieve, read, or interpret electronic information.

(b) In resolving a motion seeking to compel or protect against the production of electronic information or related software, the Court will consider such factors as (i) the burden and expense of the discovery, (ii) the need for the discovery, (iii) the complexity of the case, (iv) the need to protect an applicable privilege, (v) whether the information or the software needed to access the information is proprietary or constitutes confidential business information, (vi) the breadth of the discovery request, and (vii) the relative resources of the parties.

(c) The discovering party generally should bear any special expenses incurred by the responding party in producing requested electronic information. The responding party generally need not incur undue burden or expense in producing electronic information, including the cost of acquiring or creating software needed to retrieve responsive electronic information for production to the other side.

(d) Where the parties are unable to agree on who bears the costs of producing electronic information, the Court's resolution will consider, among other factors: (i) whether the cost of producing it is disproportional to the anticipated benefit of requiring its production, (ii) the relative expense and burden on each side of producing it, (iii) the relative benefit to the parties of producing it, and (iv) whether the responding party has any special or customized system for storing or retrieving the information.

(e) The parties are encouraged to stipulate to the authenticity and identifying characteristics (date, author, etc.) of electronic information that is not self-authenticating.

5 - Using Technology to Facilitate Discovery. In appropriate cases, the parties may agree to, or the Court may direct, the production of some or all discovery materials, at least in the first instance, in an electronic format and allocate the resulting expenses among the parties.