MIDDLE DISTRICT DISCOVERY

A HANDBOOK ON CIVIL DISCOVERY PRACTICE

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

Rev. 6/05/15

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 attorneys 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 attorneys, this handbook on civil discovery practice in the United States District Court, Middle District of Florida, updated in 2001, and again in 2015, attempts to supplement the rules and decisions by capturing this custom and practice. This handbook is neither substantive law nor inflexible rule; it is an expression of generally acceptable discovery practice in the Middle District. It is revised only periodically and should not be relied on as an up-to-date reference regarding the Federal Rules of Civil Procedure, the Local Rules for the Middle District of Florida, or existing case law. Judges and attorneys practicing in the Middle District should regard the handbook as highly persuasive in addressing discovery issues. Parties who represent themselves ("pro se") will find the handbook useful as they are also subject to the rules and court orders and may be sanctioned for non-compliance. Judges may impose specific discovery requirements in civil cases, by standing order or case-specific order. This handbook does not displace those requirements, but provides a general overview of discovery practice in the Middle District of Florida.

[The revised handbook has been reviewed and approved by the Magistrate and District Judges of the Court.]

-The Judges of the Middle District

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The Local Rules for the Middle District of Florida can be found at www.flmd.uscourts.gov.

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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 attorneys and the Court are justifiably proud of the courteous practice that is traditional in the Middle District.

2- Certificate of Good Faith Conference. Before filing any motion in a civil case, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, or to involuntarily dismiss an action, the moving party shall confer with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion, and shall file with the motion a statement (1) certifying that the moving counsel has conferred with opposing counsel and (2) stating whether counsel agree on the resolution of the motion. A certification to the effect that opposing counsel was unavailable for a conference before filing a motion is insufficient to satisfy the parties' obligation to confer. The moving party retains the duty to contact opposing counsel expeditiously after filing and to supplement the motion promptly with a statement certifying whether or to what extent the parties have resolved the issue(s) presented in the motion. If the interested parties agree to all or part of the relief sought in any motion, the caption of the motion shall include the word "unopposed," "agreed," or "stipulated" or otherwise succinctly inform the reader that, as to all or part of the requested relief, no opposition exists. Local Rule, 3.01(g), Middle District of Florida.

The term "confer" in Rule 3.01(g) means a substantive discussion. Counsel must respond promptly to inquiries and communication from opposing counsel. Many potential discovery disputes are resolved (or the differences narrowed or clarified) when counsel confer in good faith. Rule 3.01(g) is strictly enforced. A motion that does not comply with the rule may be summarily denied.

3 - Scheduling. An attorney shall reasonably attempt to accommodate the schedules of opposing counsel, parties, and witnesses in scheduling discovery.

4 - 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.

5 - 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), Federal Rules of Civil Procedure, regarding required disclosures unless modified by Court order or Local Rule.

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 law or rule.

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 in accordance with Local Rule 1.09, and 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, an attorney 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 ("CMSO") (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.

II. DEPOSITIONS

A. General Policy and Practice

1 - Scheduling. An attorney is expected to accommodate the schedules of opposing counsel. 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, limits each *side* to no more than ten depositions unless otherwise ordered by the Court. Additionally, Local Rule 3.02 requires the party noticing the deposition to give a minimum of fourteen days' written notice to every other party and the deponent, absent agreement or an order based upon some exigent circumstance. And giving substantially more than fourteen days notice is strongly encouraged. Rule 30(d)(1) 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, and does not include time spent for meals, rest, or refreshment.

2 - Persons Who May Attend Depositions. Each attorney 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. Attorneys 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 attorney 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(b)(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 attorneys 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 attorney 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 attorney chooses not to ask for clarification, the objecting attorney should stand on the objection without further elaboration; the objection is preserved.

2 - Instruction That a Witness Not Answer. Occasionally during a deposition, an attorney may instruct a deponent not to answer a question. Rule 30(c)(2), Federal Rules of Civil Procedure, expressly provides that an attorney 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(c)(2), Federal Rules of Civil Procedure, is disfavored by the Court. A party or an attorney who improperly instructs a

deponent not to answer is subject to the expense and sanction provisions of Rule 37(a)(5).

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.

3 - Non-Parties. For non-parties, a subpoena is required to obtain documents or testimony. (see section V)

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)(3)(A) 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 audio, audiovisual, or stenographic means, and the party taking the deposition shall bear the costs of recording. Rule 30(b)(3)(B) 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 the designating party's expense unless the Court orders otherwise.

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)(A)(ii) 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 and Reports 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.

Rule 26(b)(4)(C), Federal Rules of Civil Procedure, requires:

Unless otherwise stipulated or ordered by the court, if the witness is not

required to provide a written report, this disclosure must state: (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify.

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" or a request for “the documents you believe support Count I” 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; if the documents will be produced, the response should state a specific date when the responsive documents will be available. For example, to state that the requested documents will be available at an ambiguous "mutually agreeable time" is not sufficient.

(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. Attorneys should not make objections solely to avoid producing documents that are relevant to the case or that are otherwise necessary to discover or understand those the issues. 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. Boilerplate objections such as "the request is overly broad, unduly burdensome, and outside the scope of permissible discovery" are insufficient without a full, fair explanation particular to the facts of the case.

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 for that request.

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, without having to be asked, 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. See, Section VII on E-Discovery.

(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 the 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 attorneys produce or exchange documents upon informal request, often confirmed by letter. An attorney'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 - General. The Court expects attorneys to reach agreements regarding the production of documents based upon considerations of reasonableness, convenience, and common sense.

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

3 - Response. An attorney should not state the documents are available for inspection and copying if they are not in fact available when this representation is made.

4 - 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.

5 - Listing or Marking. The producing party is encouraged to list or mark the documents which have been produced with unique Bates labels, Hash tags, Hash values or similar document recognition systems. The parties are encouraged to then use Bates stamped documents for deposition and trial exhibits. 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.

6 - 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.

7 - Scanning. The producing party should cooperate reasonably if the inspecting party wishes to scan rather than copy documents.

8 - 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.

9 - 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 VI also apply to document production (which often requires the production of a "privilege log" containing the information requested in Section VI).

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. However, Rule 26(a), Federal Rule of Civil Procedure, now requires a party, without awaiting a discovery request, to provide to the other parties an initial exchange of disclosures.

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. In some cases, the court will propound interrogatories for each party to answer. These must be responded to in a timely manner. The 25 interrogatory limit does not apply to court-ordered interrogatories.

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.

B. Objections, Privilege, and Responses

1 - 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.

2 - 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.

3 - 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) Conducted a reasonable inquiry, including a review of documents likely to have information necessary to respond to interrogatories;

(c) Objected specifically to objectionable interrogatories;

(d) Provided responsive answers; and,

(e) Submitted the answers under oath, signed by the appropriate party representative.

C. Other Interrogatory Issues

1 - 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.

2 - 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.

3 - 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."

4 - 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.

5 - 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.

6 - 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 regarding the objection.

V. SUBPOENAS

A. General

1 - A subpoena is necessary in discovery to obtain deposition testimony or other information, including documents, from a non-party.

2 - Rule 45, Federal Rules of Civil Procedure, governs subpoenas for discovery as well as for trial or hearings. The rule was significantly amended on December 1, 2013.

3 - A subpoena to obtain deposition testimony or other information from a non-party must issue from the court in the district where the action is pending. Rule 45(a)(2), Federal Rules of Civil Procedure. This is a change from the former rule which required a subpoena to issue from the court in the district where the deposition is to be taken or where the production or inspection of documents is to be made.

4 - A motion to quash or a motion to enforce a discovery subpoena must be filed with the court in the district where the discovery is to be obtained. Rule 45(c), Federal Rules of Civil Procedure. However, that court may transfer a subpoena-related motion to the court in the district where the action is pending if the person subject to the subpoena consents or if there are exceptional circumstances. Rule 45(f), Federal Rules of Civil Procedure.

B. Contents of Subpoena

1 - The subpoena must identify the court from which it is issued, the title of the action and the court case number, the specified time and place for the testimony or document production, and a description of the documents, electronically-stored information, or tangible things to be produced. For a deposition, the subpoena must state the method for recording the testimony. For ESI the subpoena may specify the form or forms in which ESI is to be produced. The subpoena must also set out the text of Rule 45(d) and (e). Rule 45(a)(1), Federal Rules of Civil Procedure.

2 - If the subpoena commands the production of documents, ESI, or tangible things or the inspection of premises prior to trial, before it is served on the person to whom it is directed, a notice and copy of the subpoena must be served on each party. Rule 45(a)(4), Federal Rules of Civil Procedure.

C. Other Requirements for Service of Subpoena

1 - Rule 45 has other requirements for issuing and serving a subpoena. Only an attorney authorized to practice in the court where the subpoena is issued may issue and sign a subpoena. Otherwise, the clerk of court must issue the subpoena. Rule 45(a)(3), Federal Rules of Civil Procedure. Any person who is at least 18 years old and not a party may serve a subpoena by delivering a copy to the named person. If the person's attendance is required, the fee for 1 day's attendance and the mileage allowed by law, those amounts must be provided when the subpoena is served, unless the subpoena is issued on behalf of the United States or any of its officers or agencies. Rule 45(b), Federal Rules of Civil Procedure.

2 - A subpoena may be served at any place within the United States. Rule 45(b)(2), Federal Rules of Civil Procedure. Generally, however, a subpoena may command a person to provide deposition testimony or other information only within 100 miles of where the person resides, is employed, or regularly transacts business in person. Rule 45(c), Federal Rules of Civil Procedure.

VI. PRIVILEGE

A. Invocation of Privilege or Other Protection

1 - Claims of Privilege or Other Protection. 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 other protection from discovery, 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. If a motion to compel is filed, the party asserting a protection generally has the obligation to establish by affidavit or other evidence, all facts essential to the establishment of the privilege or protection relied upon.

2 - Procedure for Invocation of Privilege or Other Protection Against Discovery 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 or other protection against discovery. While Rule 30(d) provides certain protections, counsel should be mindful that abuse of these protections is sanctionable. If a claim of privilege or other protection against discovery is asserted during a deposition and information is not provided on the basis of such assertion:

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

(b) Unless doing so would result in disclosure of protected information, a deposed party asserting privilege or other protection must upon request of the deposing party provide:

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

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

(2) Its date;

(3) The name, address and employer of the author(s) of the document, or the person giving, recording and/or transcribing a statement;

(4) Purpose for which the document was created and transmitted;

(5) Subject of the document;

(6) Persons to whom the document is addressed;

(7) Persons indicated thereon as having received copies;

(8) Name, address, job title and employer of any person known or believed to have received or seen the document or any copy or summary thereof;

(9) The relationship to each other of the author, addressee, and any other recipient;

(10) Degree of confidentiality with which it was treated at the time of its creation and transmission, and since;

(11) Other information sufficient to identify the document for a subpoena duces tecum, including, if available, bates numbers assigned to the document; and

(12) Any other facts relevant to the elements of the particular privilege or protection asserted.

(ii) For oral communications:

(1) The general subject matter of the communication;
(2) Its date;
(3) The place where the communication was made;
(4) The name, address and employer of the person making the communication;
(5) The name(s), address(es) and employer(s) of the person(s) present when the communication was made;
(6) The relationship to each other of the speaker and persons present; and
(7) Any other facts relevant to the elements of the particular privilege or protection asserted.

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

(c) After a claim of privilege or other protection 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 or other protection, unless divulgence of such information would cause disclosure of privileged or other protected information, including:

(i) the applicability of the particular privilege or other protection being asserted,
(ii) the circumstances which may constitute an exception to the assertion of the privilege or other protection,
(iii) the circumstances which may result in the privilege or other protection having been

waived, and

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

B. Procedure for Resolving Claims of Privilege or Other Protection Against Discovery with the Court

1 - A party asserting a privilege or other protection against discovery normally has the obligation to establish, by affidavit of a competent witness or other evidence, all facts essential to the establishment of the privilege or protection. The attorney asserting the privilege or other protection against discovery should also file a memorandum of law specifically defining the privilege or protection being asserted and citing relevant legal authority;

2 - Any affidavits used to support a claim of privilege or other protection against discovery should be tested by the rules of evidence; and

3 - Documents or other privileged information should not be furnished to the Court for in camera review without prior court approval.

C. Waiver of Privilege

Rule 502, Federal Rules of Evidence, addresses waiver of attorney-client privileged or work product information and provides standards for the parties to limit the consequences of a disclosure of privileged information. An agreement among the parties in a case to limit waiver under Rule 502 is binding only if incorporated in a court order under Rule 502(d).

VII. 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.

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.

C. Motion for Stipulated Protective Order

Parties wishing to keep confidential documents obtained or disclosed during discovery, including for attorneys' eyes only, may file a motion for protective order, with a proposed order, showing good cause for the relief requested. Notwithstanding any provision in the stipulated protective order, nothing in the court's order shall authorize any party to file under seal, absent further court order, any confidential discovery material with the Clerk of Court or at trial, as such filings are subject to greater scrutiny due to the common law right to inspect and copy judicial records and public documents. See Section I(C) for filing of discovery and other documents under seal. See also Local Rule 1.09, Middle District of Florida.

VII. E-DISCOVERY

A. General

The Court's e-discovery goal is to facilitate fair, open, proportional discovery of the facts underlying a dispute so that it is resolved on the merits and not by gamesmanship. This requires cooperation among counsel. The discovery of electronically stored information ("ESI") stands on equal footing with the discovery of paper documents. The Federal Rules of Civil Procedure and Evidence provide a framework within to conduct cost effective e-discovery but they cannot be effective unless attorneys become familiar with their applicability and use them where appropriate. The early discussion and resolution of discovery issues is an important factor in reducing overall case length and the cost of litigation. Attorneys must take the time to educate themselves about ESI and because attorneys often lack the technical knowledge to fully understand ESI they should consult their clients' information technology departments and vendors regarding ESI issues. The Sedona Principles and the Sedona Cooperation Proclamation published by the Sedona Conference are an excellent source of information on the duties of clients and counsel and best practices for addressing the discovery of ESI. Additionally, The United States District Court for the District of Maryland has made available on its website, Judge Paul Grimm's Suggested Protocol for Discovery of Electronically Stored Information which provides an excellent template for counsel.

B. Preservation

A party has a duty to retain ESI that may be relevant to pending or reasonably anticipated litigation. The scope of a party's preservation obligation is determined on a case-by-case basis. Rule 26(f) requires the parties to confer as soon as practicable and plan for discovery. The discussion of preservation issues, to include each party's records management policies and procedures ideally should occur before suit is filed but certainly no later than the Rule 26 conference. The parties should exercise reason and good faith when they discuss issues concerning ESI. On the topic of preservation, counsel should be informed and

otherwise prepared to articulate both good cause for the preservation of ESI and the costs and burdens of maintaining ESI.

C. Proportionality

The discovery of ESI should be proportional to the amount in controversy, the nature of the case and the resources of the parties. Rule 26(b)(2)(c) imposes a duty on the parties to balance the need for the discovery with the burdens of production. Rule 26(b)(2)(B) expressly provides that a party does not have to provide discovery of ESI that is not reasonably accessible because of undue burden or cost except on motion and order of the Court. The Sedona Conference has published six principles to guide the Court and counsel in applying the concept of proportionality to civil litigation:

1. The burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.
2. Discovery should generally be obtained from the most convenient, least burdensome, and least expensive sources.
3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.
4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of production.
5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.
6. Technologies to reduce cost and burden should be considered in the proportionality analysis.[1]

D. ESI Conference

The following is a list of topics counsel should discuss prior to or at the beginning of the case and no later than the Rule 26(f) case management meeting. They are strongly encouraged to include their clients' information technology employees and vendors in these discussions.

1. The locations and sources where relevant ESI is likely to be found. This includes the identity of people likely to have relevant ESI.
2. Reasonable steps to preserve ESI.
3. The relevant time period.

1 *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 Sedona Conf. J. 289 (2010).

4. The manner and forms of preservation and production including the production of live database-based materials. Possible forms for the production of ESI include native, TIFF and PDF. Absent agreement or a Court order, Rule 34(b) provides that ESI should be produced in either the form in which it is "ordinarily maintained" or in a "reasonably useable" form. When deciding what format(s) to use counsel, with the assistance of their information technology experts, are encouraged to discuss:
    a. The form or forms of ESI that will be most likely to provide the information needed to establish the relevant facts in the case.
    b. The need for metadata.
    c. Accessibility of ESI in the form requested.
    d. The requesting party's ability to manage and use ESI in the form requested.
    e. Risks associated with the inadvertent production of privileged or confidential information associated with the different forms of production.
    f. The difficulty of redacting ESI in the form requested.
    g. The extent to which alternative forms of production will satisfy a party's needs.
5. The types of metadata that will be preserved and produced.
6. Sources of ESI that are not reasonably accessible.
7. The relative costs and other burdens associated with production, review and processing ESI.
8. Allocation of the costs of production.
9. The use of search terms, sampling, de-duplication, "quick-peeks," technology assisted review methods including, for example, predictive coding and other strategies to reduce the volume of ESI that must be preserved and produced.
10. How to deal with issues of confidentiality and privilege including the use of "claw-back agreements" or the appointment of a special master to resolve disagreements.
11. Tiered discovery in which ESI is produced sequentially in tranches.
12. Disposal of ESI at the appropriate time.

E. Procedure

Counsel should have sufficient technical knowledge to propound educated and reasonable requests for ESI. Opposing counsel should have sufficient technical knowledge to provide educated and reasonable responses to requests for ESI. Blanket, overbroad, burdensome requests for production invite blanket objections and lead to motions to compel and for protective orders. To avoid this process and reduce the volume and expense of discovering ESI, requests for production should, to the extent possible, clearly specify what is being sought including by topic and reference to persons involved. Responses to requests for ESI should state clearly and specifically what is being objected to and why. They should also clearly

state the extent to which discovery of ESI will be permitted, the sources from which ESI has been obtained and potential sources of ESI that were not searched.

Rule 34(a) establishes that unless requested in another form, the producing party must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. The Rule permits testing and sampling as well as the inspection and copying of ESI.

Inspection of an opponent's computer system is the exception, not the rule and the creation of forensic image backups of computers should only be sought in exceptional circumstances which warrant the burden and cost. A request to image an opponent's computer should include a proposal for the protection of privacy rights, protection of privileged information, and the need to separate out and ignore non-relevant information.

As an alternative to Bates numbers, consider using Hash tags or Hash values to identify ESI.

Ordinarily, information should only be produced once, i.e., electronically or by paper copies, not both.

F. Resolving Discovery Disputes

The parties should resolve discovery disputes through the meet and confer process of if such negotiations are unsuccessful, resort to motion practice. Counsel should consult Rule 26(b)(2)(B) on proportionality and this Handbook for relevant factors to discuss when they confer.

G. Discovery from Non-Parties

Rule 45 does not require a party issuing a subpoena for ESI to a non-party to confer with the non-party in advance. Nevertheless, in most cases, the party issuing the subpoena and the non-party responding to the subpoena should discuss, in advance, the same issues a party would discuss with an opposing party before commencing discovery of ESI.

H. Metadata

Counsel are encouraged to discuss:

1. The types of metadata that are ordinarily maintained.
2. The potential relevance of the metadata.
3. The importance of reasonably accessible metadata to facilitate the parties' review, production and use of ESI.
4. The locations of metadata that will be sought in discovery.

Except as otherwise ordered by the Court, once produced, metadata is reviewable without notice to the producing party.