# CIVIL DISCOVERY STANDARDS*

## AUGUST 2004

*The Standards, which appear in bold face type, were adopted as ABA policy in August 1999 and revised in 2004.

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SECTION OF LITIGATION
American Bar Association

# CIVIL DISCOVERY STANDARDS

August 1999

## PREFACE

These Standards are intended as guidelines to assist the parties, counsel and the court in civil discovery. They are based on the premise that discovery can be costly and inefficient if it is conducted (or resisted) without a clear set of goals or a careful, reasoned plan. The Standards recognize the interrelated roles of the court and the parties and counsel in fairly and efficiently managing discovery, and therefore include suggested practices to guide both judges and the parties. Each Standard is intended (i) to eliminate unnecessary effort and expense, (ii) to restrict the opportunities for misusing the discovery process, both offensively and defensively, and (iii) where possible, to encourage a cooperative rather than adversarial approach to discovery. Attorneys should select the means and the methods of discovery which maximize the possibility that these intended goals will be achieved.

The Standards do not provide definitions. Words are used according to their ordinary legal meaning. In particular, the definition of what is "relevant" and the permissible scope of discovery will be governed by the rule or rules in the relevant jurisdiction.

The Standards also are not a restatement of the law, nor are they intended to replace existing law or rules. They seek, instead, to address practical aspects of the discovery process that may not be covered by the rules or other law in a given jurisdiction or may be covered only in part. In the event of a conflict or inconsistency between existing substantive law or procedural rules and these Standards, the existing law or rules of the jurisdiction will govern. Counsel should therefore always review each court's rules and governing law to see whether a particular issue has been settled.



1620427.1

## I. JUDICIAL MANAGEMENT AND PARTY INVOLVEMENT

**1. Discovery Conferences and Plan.**

**a. Discovery Plan. As a general practice, the court should (i) direct or encourage (as appropriate under the governing rules) the parties to develop a reasonable, comprehensive discovery plan and (ii) promptly set a scheduling conference where they will submit a proposed case management plan, including discovery, for the court's approval.**

**b. Scheduling Conference. As a general practice, the court should set a scheduling conference promptly after all counsel have appeared (or after an unrepresented party has had a reasonable opportunity to obtain counsel) to consider the items listed in the following section. Lead counsel, or counsel with decision-making authority, should be required to participate either in person or by telephone. At or promptly following the conference, the court should enter an order governing the further conduct of the case, including discovery.**

**c. Before the Scheduling Conference. Before the scheduling conference, the parties should confer, in person if possible but at least by telephone, to try to agree on a proposed discovery plan that may address:**

**i. Discovery.**

**A. The scope and timing of discovery, including any substantive or numerical limits on discovery and whether bifurcation or staging of discovery would help to reduce expense and make discovery more effective;**

**B. Whether the parties are prepared to make any voluntary disclosures;**

**C. The possibility of informal production of documents or other information;**

**D.** **The number, identity, location, date and length of any fact witness depositions;**

**E.** **Expert discovery, including the timing and dates for identifying experts and exchanging expert reports and, if an expert's deposition is to be taken, its location, date and length; and**

**F.** **Any other remaining issues, including difficulties in obtaining access to or retrieving documents or other information, document or deposition discovery of third parties, privilege claims and ways to resolve them, and any other potential area of dispute.**

**ii.** **Other Scheduling.**

**A.** **Deadlines for the staging and completion of discovery;**

**B.** **When dispositive motions on all or part of the case should be filed, briefed (and/or argued) and decided;**

**C.** **Deadlines for amending the pleadings or joining additional parties;**

**D.** **When to have settlement discussions; whether some form of alternative dispute resolution might be useful and, if so, what kind and when to have it;**

**E.** **Dates for exchanging lists of trial witnesses and exhibits;**

**F.** **Whether the parties will consent to trial by a magistrate judge (or similar judicial officer) and, if so, which one;**

**G.** **Whether a trial date or range of dates should be set and, if appropriate, the date(s)**

**for one or more preliminary or final pretrial conferences;**

**H. In a jury trial, when proposed jury instructions should be submitted;**

**I. In a bench trial, if and when proposed findings and conclusions should be submitted;**

**J. Whether trial briefs should be submitted and, if so, when; and**

**K. Any other appropriate issues.**

**iii. Joint Submission. The parties should prepare and submit to the court prior to the conference a joint submission reflecting their agreement and any areas of disagreement to be resolved at the court's scheduling conference or a subsequent conference.**

**d. The Court's Discovery Plan. At or shortly after the scheduling conference, the court should enter an order adopting a case management plan agreed to by the parties, if it is reasonable, and rule on any other pending matters, including those items on which the parties have not reached agreement. If the parties have been able to agree on a proposed case management plan, they should promptly advise the court, which can then decide whether it needs to have a scheduling conference or can simply enter an order adopting the parties' proposed plan. The court should retain plenary authority to modify its order if circumstances warrant.**

Comment

Subsections (a)-(d). In Rand Corporation, Institute for Civil Justice, *An Evaluation of Judicial Case Management Under the Civil Justice Reform, Effects of Early Judicial Case Management* 51-59 (1996) and *Discovery Management, Further Analysis of the Civil Justice Reform Act, Evaluation Data* 67 (1998) (collectively the "Rand Report"), the Rand

Report concluded that the time from a case's start to its disposition was significantly reduced by early judicial management. The Rand Report also found that judicial control of discovery reduced the amount of time lawyers and their clients would be required to spend on a case.

This Standard therefore recommends that both the parties and the court take an active, early role in addressing discovery matters. For example, where appropriate, the court should encourage voluntary discovery or disclosures between the parties. The Standard also suggests that, as a general rule, the court should encourage, and preferably direct, the parties to develop an overall discovery plan for the court's approval at a scheduling conference as soon as possible at the start of the case.

The volume and types of cases in some courts and other practical considerations may make it difficult or even impossible to adopt all of the procedures suggested here. Some cases also may not require detailed case management plans or pretrial orders. The courts and the parties are nevertheless encouraged to use them where practicable, particularly in complex cases, and where they would help to reduce the costs and time incurred in litigation.

Many of the practices outlined in this Standard are found in Fed. R. Civ. P. 16 and 26(f) and similar provisions in various state court rules, *e.g.*, Va. Sup. Ct. R. 4:13; Tex. R. Civ. P. 190.1 - 190.4, and guidelines, *e.g.*, Discovery Guidelines of the Maryland State Bar Ass'n, reprinted in Md. R. Civ. P., Ch. 400, preface (1998) ("*Md. Discovery Guidelines*"). They are also consistent with Guideline 4 of the National Conference of State Trial Judges, adopted by the ABA in August 1998:

> The court shall promptly schedule a supervised discovery conference at which counsel shall submit a reasonable and comprehensive discovery plan, subject to court approval, which shall designate the time, place and the most cost effective manner of discovery; the dates for exchange of expected trial witnesses; the dates and sequence for disclosure of experts and written reports containing their opinions; and the deadline for completion of all discovery.

Some courts require pretrial conferences if requested by the parties or the court. In Arizona, experience has shown that these procedures reduce the number of pretrial disputes and streamline the trial process by making the parties work together. *See* Robert D. Myers, *MAD*

*Track: An Experiment in Terror,* 25 Ariz. St. L.J. 11, 27 (1993). In some courts — for example, Michigan — a pretrial conference is not required if the parties can agree on a discovery plan and pretrial schedule by themselves to be adopted in a court scheduling order. *See* Mich. Ct. R. MCK 2.401(B). In other courts, the parties are given broad latitude to guide the course of discovery. *E.g.,* Va. Sup. Ct. R. 4:4.

The court may formalize these practices by rule or standing order, or by less formal means such as pretrial orders, notices or letters to the parties.

Subsection (c). This subsection describes specific matters the parties should address in a proposed discovery plan, which will of course depend upon the nature of the case. The guiding principle should be to arrive at a plan that reduces unnecessary time and expense without compromising the substantive or procedural rights of any party. Where a case is particularly complex or if a judicial decision on one or more facts or issues in the case may be dispositive and/or would encourage a settlement, the parties and the court should consider conducting discovery in stages. There may also be cases where judicial efficiency would be served by bifurcating discovery of the liability and damages issues, or putting some limitations on discovery pending initial settlement discussions or the filing of dispositive motions.

The Advisory Committee Notes to the 1993 amendments to Fed. R. Civ. P. 26(f) (requiring a "meeting" to develop a proposed discovery plan) state that "it is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person . . . . The revised rule directs that in all cases not exempted by local rule or special order the litigants must meet in person and plan for discovery." Other court and local rules, on the other hand, require only a "conference" rather than an in-person "meeting." *E.g.,* U.S.D.C. - D. Mass. Local Rule 16.1(B) ("[u]nless otherwise ordered by the judge, counsel for the parties shall . . . confer no later than fourteen (14) days before the date for the scheduling conference"). This Standard recommends that the court approve, by local rule or order, telephone conferences as satisfying the meet and confer requirements. In-person conferences are not required in a great many cases.

Subsection (d). Each case should have a discovery plan, even if it is highly informal or the parties simply agree to have no discovery. The amount of discovery and complexity of the plan will depend on the size and complexity of each case. *E.g.*, U.S.D.C. - C.D.

Cal. Local Rule 6.4.1; Tex. R. Civ. P. 190. The court should consider whether efficiency can be gained through the adoption of forms for discovery plans and for case management plans.

**2. Resolving Discovery Disputes.**

**a. Prompt, Informal Contact with the Court. The court should hear and decide discovery disputes as soon as reasonably possible after they arise. The court should consider ways to resolve these disputes that do not require a formal written motion or in-person hearing. Any resulting ruling should be made a matter of record.**

**i. Depositions. Where the parties (and/or a nonparty witness) are unable to resolve a dispute in a deposition, unless the court has by rule or otherwise directed that they not do so, they should call the court and ask for a telephone conference. If appropriate, and if the court is available, the court should consider resolving the matter at that time. If the dispute is not resolved by the telephone conference, the court should consider other ways to resolve the issue promptly and with minimal time and expense, including having a discovery dispute conference (discussed below), before having the parties file formal discovery motions or papers and holding a hearing.**

**ii. Other Discovery. Where the parties (and/or a nonparty witness or subpoena recipient) are unable to resolve any other discovery dispute, unless the court has by rule or otherwise directed that they not do so, the party seeking relief should notify the court, either by telephone or by short letter, outlining the nature of the dispute and attaching any pertinent materials. If the notification is by telephone, all other parties should also be given the opportunity to be on the line. If the notification is by letter, the opposing party (and/or affected witness or subpoena recipient) should be allowed to submit a short letter in response attaching any pertinent**

**materials. The court should then resolve the matter promptly, either by a telephone call, by a letter-ruling, by an order or by calling an informal discovery conference to hear the parties further.**

**iii. The Parties Should First Confer. Before any informal contact with the court, the parties should confer in good faith, either in person or by telephone, to try to resolve the dispute. Any letter sent to the court on a discovery dispute should outline the efforts to resolve the dispute.**

**iv. Informal Discovery Conference. The court may hold an informal conference, either in person or by telephone, to try to resolve any discovery dispute.**

**b. No Discovery Motions Before Attempting to Resolve the Issue Informally.**

**i. Most Issues. The court normally should not permit a formal discovery motion unless the court and the parties have not been able to resolve or narrow the dispute informally. The court may, and at the request of any party should, memorialize a ruling in writing.**

**ii. Some Issues May Not Be Appropriate For Informal Resolution. Some discovery issues ordinarily would not be appropriate for informal resolution. These may include attorney-client privilege or work-product claims, the adequacy of a party's discovery responses or production, or the scope of appropriate discovery in a particular case. The court may by rule or otherwise exempt these or similar issues from the requirement that the parties first present them informally to the court.**

**c. Formal Discovery Motions. A party that is dissatisfied with a ruling does not, by complying with this standard, waive its right to file a formal discovery motion.**

i. **The Parties Should First Confer. Before filing a discovery motion, the parties should confer in good faith to attempt to resolve the dispute, narrow the issues needing formal adjudication and agree on a schedule so that the matter may be resolved by the court as promptly and efficiently as possible.**

ii. **Motions to Compel and/or for Sanctions. A party seeking an award of attorney fees or other form of sanction for an alleged discovery or disclosure violation should include as part of its motion:**

A. **The facts and circumstances that support the motion;**

B. **The efforts made by the moving party to obtain compliance with the rule, obligation or order that allegedly has been violated;**

C. **What sanctions are being sought and why they are appropriate;**

D. **Whether attorney fees or other costs or expenses are requested and, if so, a description of the time and expenses directly caused by the alleged violation.**

iii. **Prompt Ruling by the Court. The court should rule on any pending discovery motion as soon as reasonably practicable. This may be by letter or memorandum ruling before the time set for hearing, from the bench at the hearing or as soon as possible after the hearing. It is often more valuable to the parties to have a prompt ruling than an elaborate one.**

Comment

Subsection (a). The practices in this Standard are patterned after U.S.D.C. - E.D.N.Y. Local Civil Rule 37.3. They stem from a concern that discovery disputes often create unnecessary expense for the parties and can be an inefficient use of scarce court resources. In many cases, discovery disputes can be resolved more quickly and efficiently by informal approaches than by full-blown motion practice. A large number of discovery disputes are not case-dispositive and delaying a ruling on them will simply add time and expense to the case. Local rules in a number of federal and state courts provide for prompt access to and rulings by the court as soon as problems first appear. *See* James G. Carr & Craig T. Smith, *Depositions and the Court*, 32 Tort & Ins. L.J. 635, 648-49 n.70 (1997); U.S.D.C. - E.D. Va. Local Rules 7, 37.

Although these Standards favor informal resolution of discovery disputes, they do not contemplate or permit *ex parte* communications with the court. Except in highly unusual cases, all calls, letters or conferences should be attended by or copied to all counsel (and any self-represented party) of record.

Subsections (b)-(c). It has now become widely accepted that the parties should first attempt to resolve discovery (as well as other) issues informally in good faith before seeking the court's assistance. *E.g.,* U.S.D.C. - C.D. Cal. Local Rule 7.15.1; U.S.D.C. - E.D. Va. Local Rule 37(e); Cal. Civ. Proc. Code §§ 2025(g) (depositions), 2031(l) (documents).

A ruling by a court, although it may arise informally, is nonetheless a ruling and should be viewed as a final court order or determination. Depending on the jurisdiction, such a ruling may be challenged by a motion for reconsideration.

The adequacy of a party's discovery responses or production, as well as the appropriate scope of discovery, may be resolved by the court informally. The determination in each particular case as to which discovery issues are appropriate for informal resolution remains within the discretion of the court.

The requirements for supporting a motion to compel and/or for sanctions are based on U.S.D.C. - N.D. Cal. Local Rule 37-1(e); *see also* U.S.D.C. - C.D. Cal. Local Rule 7.15.2; U.S.D.C. - E.D. Va. Local Rule 37. California also requires that the motion specifically identify each party or attorney against whom sanctions are sought. Cal. Civ. Proc. Code § 2023(b), (c); *Blumenthal v. Superior Court of Marin County*, 163 Cal. Rptr. 39, 40 (Ct. App. 1980).

These Standards primarily seek to establish general principles that should help reduce time and expense required of the parties and the court for discovery disputes. They are, however, not intended to restrict the court's broad discretion to fashion particular methods to resolve discovery disputes efficiently. They are not intended to operate to deprive a party of its right to have a record of the court's discovery rulings or to file a motion for reconsideration if a party can demonstrate that with additional time and an opportunity for the formal presentation of additional information, a different result might be appropriate.

If a motion for attorneys' fees is being made, it should be supported by contemporaneous time records and affidavits containing such relevant information as hourly rates and attorney experience.

**3. Sanctions for Failure to Comply with Discovery Obligations. To obtain the benefits of early judicial management and control of discovery, the court should consider whether to impose appropriate sanctions for noncompliance with discovery obligations, including the failure to participate in preparing a discovery plan, unless the court finds good cause for the party's failure to do so.**

Comment

To achieve the benefits of these Standards, parties and their counsel must comply with their obligations and must not abuse the discovery process. Although sanctions are not the primary or favored device for solving discovery problems, they must be perceived by counsel and the parties as the likely consequence of noncompliance with or abuse of discovery. Studies indicate that a major problem is the perception by counsel that judges are unwilling to resolve discovery disputes and are reluctant to impose meaningful sanctions for discovery violations. *E.g.,* Susan Keilitz et al., *Attorneys' Views of Civil Discovery*, 32 Judges' J., Spring 1993, at 2. *See also* ABA Court Delay Reduction Committee of the National Conference of State Trial Judges, *Discovery Guidelines Reducing Cost and Delay*, Guideline 6, 36 Judges' J., Spring 1997, at 9.

This Standard therefore creates a presumption that sanctions will be imposed for discovery violations, with the burden shifting to the non-complying party to demonstrate why they are not warranted. This is consistent with the discovery guidelines of the National Conference of State Trial Judges adopted by the ABA in August 1998: "When a party fails to comply with its disclosure obligations the court has a duty to impose appropriate sanctions." It also accords with the provisions in Fed. R. Civ. P. 16(f), 26(g)(3), 37(b)(2), and many state court rules, *e.g.,* Ariz. R. Civ. P. 16(C)(5); Cal. Civ. Proc. Code §§ 2025-2031; Va. Sup. Ct. R. 4:12(b)(2), and local federal court rules, *e.g.,* U.S.D.C. - E.D. Va. Local Rule 37(G), (H).

Noncompliance applies to a complete failure to respond to a discovery request, the failure to comply with a court's discovery order, or an obvious disregard for compliance with the spirit of discovery rules, i.e., bad faith. Such noncompliance would include in the appropriate case of an obvious disregard for compliance not only the outright failure to do something, but also an inadequate or inappropriate response. *E.g.*, *Traxler v. Ford Motor Co.*, 576 N.W.2d 398 (Mich. 1998) (sanctions imposed for evasive discovery responses). And it would include propounding unnecessary and/or oppressive discovery requests. *See* U.S.D.C. - E.D. Va. Local Rule 37(G); Tex. R. Civ. P. 215.3.

The type and scope of sanction will depend on the nature of the violation. The court should impose sanctions proportionately, taking into consideration any pattern of improper behavior, any aggravating or mitigating circumstances, notice and knowledge. Sanctions might include *(a)* entering specified findings of fact or admissions against a party; *(b)* excluding or limiting a party's evidence; *(c)* striking part or all of a party's claims or defenses; *(d)* entering full or partial default on one or all of the party's claims; and *(e)* requiring a party or counsel to pay the other side's counsel fees and expenses caused by the default or failure.

**4. Alternative Discovery Management. Consistent with the demands on the court, the need for a prompt resolution of any potential disputes or issues, the parties' resources and the nature of the case, the court may assign discovery disputes to a magistrate judge, similar judicial officer, referee or a specially appointed master, with the cost to be borne initially by one or more of the parties and/or taxed as costs at the end of the case. Any decisions by the magistrate judge or master should be subject to timely review by the court.**

Comment

Many cases will not require significant court supervision, much less having a magistrate judge or someone other than a trial judge supervise discovery. On the other hand, the delegation of discovery disputes to a magistrate judge (or similar officer) or special master may be appropriate, particularly if a case is large or complex, or if for practical reasons the court is unable to provide the time and attention to discovery issues that are necessary for the case to proceed on a reasonable timetable. If this is so, the parties and the court would be well advised to consider having someone other than the trial judge become involved in overseeing discovery from the outset. *See* N.Y. C.P.L.R. 3104 (upon motion or court initiative, referee may be designated to supervise disclosure). The court should, however, always weigh each party's economic resources and its ability to bear the additional cost of having discovery issues decided in the first instance by someone other than a judicial officer. Continued court involvement should be the norm in cases that require ongoing pre-trial supervision. *See* James S. Kakalik et al., *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* 89 (1996) (finding that although early judicial management of cases decreased the time to disposition, the assignment of discovery matters to a magistrate judge did not result in any significant decrease).

## II. THE PARTIES' DISCOVERY OBLIGATIONS

### 5. Tailoring Discovery Requests and Responses to the Needs of the Case.

**a. Preparing Discovery Requests. A party should tailor discovery requests to the needs of each case. This means that the content of the requests should apply to the case, and the form of discovery requested should be the one best suited to obtain the information sought. A party should weigh in each case which discovery methods will achieve the discovery goals of *(i)* obtaining usable information and *(ii)* obtaining it as efficiently and inexpensively as possible for everyone concerned.**

**b. Responding to Discovery Requests. A party responding to a discovery request should see that the response *(i)* fairly meets and complies with the discovery request and *(ii)* does not impose unnecessary burdens or expense on the requesting party.**

Comment

Both the federal and many state court rules of civil procedure call for counsel or a self-represented party to certify, implicitly if not explicitly, that his or her discovery requests and responses are appropriate and not propounded or interposed for an improper purpose, including imposing unnecessary burdens or expense on the other side. *E.g.,* Fed. R. Civ. P. 26(g); Va. Sup. Ct. R. 4:1(f).

Beyond these requirements, the parties should also consider what is the most appropriate way to obtain or furnish the requested information. Most court rules provide for various forms of discovery. Depending on the case, some information can best be obtained through interrogatories, while other information can best be obtained through document requests, requests for admission or depositions. Some cases may call for limited interrogatories. Others may require more extensive ones. In some cases, the same information can be obtained more readily (and easily) by taking one or more depositions or simply asking for selected documents, rather than spending hours crafting interrogatories, which then require the other side to spend even more time framing responses.

Although discovery is an integral part of the adversary process, and a lawyer has no duty to help prepare an opponent's case but does have a duty to vigorously represent the client, at times a party can and should provide requested information in a way that minimizes time and expense for everyone concerned, including the court. This is explicit in rules such as Fed. R. Civ. P. 26(c), 33(d) and 34(b) and similar state court provisions, e.g., Tex. R. Civ. P. 192.4, 192.6(b), and it is also implicit in the overriding spirit of the discovery process itself. *Cf.* Fed. R. Civ. P. 1 ("[These rules] shall be construed and administered to secure the just, *speedy, and inexpensive* determination of every action." (Emphasis added.)).

## III. INTERROGATORIES

### 6. Propounding Interrogatories.

**a. Use of Interrogatories. The ease of propounding numerous interrogatories and the often substantial burden placed upon the party with the obligation to respond imposes a duty upon an attorney who chooses this form of discovery to consider, as to each question posed and as to the set of interrogatories as a whole, (a) whether the information sought is the type that the responding party can efficiently provide through this form of discovery and (b) whether depositions or other discovery forms should be employed as the more appropriate and more efficient method of obtaining the information sought.**

**b. The Framing of Interrogatories. Interrogatories should be concise, focused, objective and unambiguous. They should not be argumentative or used for cross-examination, nor should they impose unreasonable burdens on the responding party.**

**c. Form Interrogatories. The court, together with advisory panels or bar organizations, should consider developing form interrogatories that presumptively will be deemed appropriate forms of inquiry.**

Comment

Subsection (a). This section is modeled on U.S.D.C. - S.D.N.Y. Civil Rule 33.3(b). It is a more specific statement of the general rule that any discovery mechanism should be used only when it is the most efficient and economical means to obtain the desired information. The Standard emphasizes that an attorney should consider efficiency and economy not only as to the set of interrogatories as a whole but as to each interrogatory posed and not only from that attorney's own perspective but also, to the extent possible, from the perspective of the party with the obligation to respond.

The underlying policy — that interrogatories should not be used to impose unnecessary or unreasonable burdens on the responding party — also supports the numerical limits in the current federal rule and many state rules. While interrogatories generally are the least expensive form of discovery to prepare, they can be costly to answer and used as a means of harassment. *See, e.g.,* Fed. R. Civ. P. 33(a), 1993 Advisory Committee Notes. This Standard is also consistent with the provision in Fed. R. Civ. P. 26(b)(2) that any discovery device *"shall* be limited by the court if it determines that . . . the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." (Emphasis added.)

Subsection (b). These requirements are based, in part, on the principles underlying Standard 5 above, including the premise that one party should avoid imposing unreasonable burdens on a responding party. They also stem from a practical concern that discovery should not be an exercise in semantics or grammatical construction. Interrogatories that are clear and concise leave less room for the responding party to object or to provide vague and evasive answers. Interrogatories that do not seek objective facts invite artfully drafted responses and generalities that are apt to be of little use to the proponent. In addition, a party who serves a large number of onerous interrogatories may have a hard time arguing against responding to an equally burdensome set of interrogatories from the other side.

Subsection (c). A number of courts and/or bar organizations have developed pattern or form interrogatories that are presumptively deemed to be appropriately worded to obtain discoverable information. *E.g.,* Md. R. 2-421(a), Md. R. Appendix, Form Interrogatories (1998).

**7. Responding to Interrogatories.**

**a. Interpreting Interrogatories. Interrogatories should be interpreted reasonably, in good faith and according to the meaning the plain language of the interrogatories would naturally import.**

**b. Interrogatory Responses. A party and counsel should ordinarily be viewed as having complied with their obligation to respond to interrogatories if they have:**

**i. Responded to the interrogatories within the time set by the governing rule, stipulation or court-ordered extension;**

**ii. Made reasonable inquiry, including a review of documents likely to have information necessary to respond to the interrogatories;**

**iii. Given specific objections to those interrogatories they have objected to;**

**iv. Provided responsive answers to any interrogatories not objected to.**

**c. Objecting to Interrogatories.**

**i. Matching Objections to Interrogatories. Specific objections should be matched to specific interrogatories. General or blanket objections should be used only when they apply to every interrogatory.**

ii. **Narrowing the Scope of a Response. When an answer is narrowed by one or more objections, this fact and the nature of the information withheld should be made clear in the response itself.**

d. **When Responses Should Be Served. Answers and objections to interrogatories are presumptively due on the date specified by the requesting party unless that date conflicts with a court order or the discovery rules themselves. When the parties agree on additional time to respond to certain interrogatories or subparts, but not all of them, responses to the other interrogatories and subparts should be provided by the original deadline unless otherwise agreed or ordered.**

Comment

Subsection (a). A responding party should resist the temptation to impose strained interpretations on interrogatories that are clearly not what was intended and that thwart the legitimate inquiries of the opposing party. *E.g.,* 7 James Wm. Moore et al., *Moore's Federal Practice* § 33.101, at 33-67 (Daniel R. Coquillette *et al*. eds., 3d ed. 1999) ("A sufficient answer [to an interrogatory] generally entails a conscientious and good faith effort to comprehend the question and to answer it explicitly."). Forced interpretations and evasive answers also lead to disputes that unnecessarily lengthen discovery and, where motions follow, are an inappropriate use of judicial resources.

Subsection (b). Fed. R. Civ. P. 26(g) and many state rules, e.g., Va. Sup. Ct. R. 4:1(g), contain a certification requirement with respect to all written discovery responses. These rules impose on counsel and parties an affirmative duty of reasonable inquiry into both law and fact. Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (2d ed. 1994). A certification in violation of the rule, made without substantial justification, provokes a mandatory sanction. *See* Fed. R. Civ. P. 26(g)(3); Va. Sup. Ct. R. 4:1(g).

This Standard attempts to guide courts and the parties as to what is expected in responding to interrogatories, and is patterned on a proposal of the Defense Research Institute submitted to the Discovery Subcommittee of the Advisory Committee on Civil Rules in August 1997.

Subsection (c)(i). In objecting to interrogatories, the practice of making boilerplate objections at the outset of the response and incorporating them *in toto* into the specific numbered responses generally is not acceptable. *Cf.* Tex. R. Civ. P. 193.2(e) (an objection that is "obscured by numerous unfounded objections" will be deemed waived unless the court excuses it for good cause). The responding party should make plain exactly which objections apply to exactly which interrogatories. The response to each interrogatory should identify the particular language or characteristics of the interrogatory that is being objected to. *E.g.,* Tex. R. Civ. P. 193.2(a) ("The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request."); *see also Obiajulu v. City of Rochester*, Dep't of Law, 166 F.R.D. 293, 295 (W.D.N.Y. 1996) ("pat, generic, non-specific objections, intoning the same boilerplate language, are inconsistent with both the letter and the spirit of the [discovery rules]").

Subsection (c)(ii). The practice of answering an interrogatory "subject to these objections" or "without waiving these objections" often leaves the requesting party unsure as to whether the full answer is being provided or only a portion of it. To prevent this uncertainty, the responding party should expressly state either that (i) the information being provided is the entire answer or (ii) the information being provided is responsive only to that portion of the interrogatory to which no objection is asserted.

Subsection (d). Fed. R. Civ. P. 33(b)(3) and many state court rules provide that answers and objections to interrogatories ordinarily are to be provided within "x" number of days after the interrogatories were served. The court is always free to set a different deadline. Where a party needs additional time to gather the information to answer one or more of the interrogatories or subparts, the parties may agree to a later deadline as long as it does not conflict with a court order (including a discovery cut-off date). The propounding party should be agreeable to a reasonable request for more time. Unless the propounding party agrees to a different date, however, the responding party should serve its answers and objections to any interrogatories and subparts that do not require additional time by the original deadline. There is no justification for delaying the progress that the propounding party can make with initial responses while the responding party is collecting the information needed to answer the balance.

**8. Contention Interrogatories. Interrogatories that generally require the responding party to state the basis of particular claims, defenses or contentions made in pleadings or other**

**documents should be used sparingly and, if used, should be designed to target claims, defenses or contentions that the propounding attorney reasonably suspects may be the proper subjects of early dismissal or resolution or, alternatively, to identify and to narrow the scope of claims, defenses and contentions made where the scope is unclear.**

Comment

Contention interrogatories are expressly authorized by Fed. R. Civ. P. 33(c) and similar state rules, e.g., Tex. R. Civ. P. 194.2(c). Contention interrogatories, like all forms of discovery, can be susceptible to abuse. Among other things, they can be used as an attempt to tie up the opposing party rather than to obtain discovery. The legitimate purpose of contention interrogatories is to narrow the issues for trial, not to force the opposing side to marshal all its evidence on paper. *See* Tex. R. Civ. P. 194.2(c) cmt. (contention interrogatories "are not properly used to require a party to marshal evidence or brief legal issues").

The potential for overreaching is particularly present when interrogatories seeking the detailed underpinnings of the opposing party's allegations are served early in the case. Although, when used with discretion, interrogatories served near the outset of the case can be useful in narrowing the issues to define the scope of necessary discovery, contention interrogatories ordinarily are more appropriate after the bulk of discovery has already taken place. At that point, the party on whom the interrogatories are served should have the information necessary to give specific, useful responses. *See, e.g.,* Fed. R. Civ. P. 33(c); Va. Sup. Ct. R. 4:8(e).

**9. Supplementation of Interrogatory Responses. A party should timely supplement or correct any answer provided in its original response if it acquires new material information or otherwise learns that the answer is incomplete or incorrect in some material respect and if the parties to whom the original response was due do not have written notice or other notice through discovery of the additional or corrective material information.**

Comment

This Standard, which is based on Fed. R. Civ. P. 26(e) and analogous state court provisions such as N.Y. C.P.L.R. 3101(h) and Tex. R. Civ. P. 193.5, establishes a reasonable requirement if the goals of discovery are to be achieved. Supplementation should be made promptly, and particularly when a case is approaching a discovery cut-off, pre-trial conference or trial date. In determining whether newly discovered information is material, both the party and counsel should consider the effect on the party's case if favorable information were to be precluded at trial or, conversely, the consequence of a bar on any evidence to rebut information that would appear to favor the other side. Depending on the circumstances, the court may consider sanctions or remedies other than exclusion of evidence for a party's failure to timely supplement an interrogatory answer.

## IV. DOCUMENT PRODUCTION

**10. The Preservation of Documents. When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents in the client's custody or control and of the possible consequences of failing to do so. The duty to produce may be, but is not necessarily, coextensive with the duty to preserve. Because the Standards do not have the force of law, this Standard does not attempt to create, codify or circumscribe any preservation duty. Any such duty is created by governing state or federal law. This Standard is, instead, an admonition to counsel that it is counsel's responsibility to advise the client as to whatever duty exists, to avoid spoliation issues.**

2004 Comment

The addition of the phrase "in the client's custody or control" in the first sentence is not substantive. It is intended as a reminder to counsel that documents in the control, as well as the custody, of a client should also be the subject of counsel's advice with respect to document preservation. This includes, for example, documents in the control of senior executives of a corporation.

The second sentence is added to indicate that the duty to preserve data prior to litigation may be different from the duties imposed either by agreement or court order once litigation has commenced. The duty to preserve, whatever its scope, will vary significantly over time, becoming more pronounced as litigation becomes more likely and once litigation is, in fact, commenced. Litigants often will be required to produce that which they had no duty to preserve.

The third sentence is added to clarify that the Standards do not have the force of law and do not purport to create any duty. All duties are created by governing state or federal law.

**11. What to Do When a Document Request Is Received.**

**a. Advising the Client. On 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 being requested, (ii) has adopted a reasonable plan to obtain the documents in a timely manner and (iii) is actually implementing that plan.**

**b. Interpreting Document Requests. A document request should be interpreted reasonably, in good faith, and according to the meaning the plain language of the requests would naturally import.**

Comment

Subsection (a). Counsel should take an active role in ensuring that a client properly complies with a document request. Counsel should develop or oversee the client's development of a plan that will achieve a timely and complete production, and should take whatever follow-up steps are necessary to ensure that the plan is effectively carried out. In particular, counsel should look for areas where the plan may have broken down. For example, where a person who is likely to have responsive documents has not provided anything in response, an attorney should confirm that someone has contacted that person to verify that an appropriate search was made. In the final analysis, as in many areas of discovery compliance, counsel must accept the client's word as to what searches have been made and what documents have been found. It is the lawyer's responsibility, however, to guide the client in devising and implementing a procedure that satisfies its obligations under the discovery rules. *E.g.*, *Meeropol v. Meese*, 790 F.2d 942, 950-51 (D.C. Cir. 1986) (*FOIA* case: "[I]n determining whether an agency has discharged its responsibilities 'the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the <u>search</u> for those documents was <u>adequate</u>.'") (quoting *Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

Subsection (b). Both counsel and the party who receives a document request should bear in mind that the propounding party may have drafted it without knowing what specific documents or types of documents the other side possesses. While objections may be asserted where this gap in the propounding party's knowledge has produced vague or overbroad requests, requests for production should not be interpreted "in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request." Fed. R. Civ. P. 37(a) 1993 Advisory Committee Notes; *see also* 7 James Wm. Moore et al., *Moore's Federal Practice* § 34.11[3], at 34-30 (Daniel R. Coquillette *et al*. eds., 3d ed. 1999) (the "degree of specificity required [in document requests] may depend on the extent of the requesting party's knowledge with respect to the documents sought"); *Sellon v. Smith*, 112 F.R.D. 9 (D. Del. 1986) (party may not adopt an unreasonably narrow interpretation of document requests); *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,* 858 P.2d 1054 (Wash. 1993) (en banc) (candor and reason are required in discovery; misleading responses, even if technically accurate, are improper).

**12. Responding to a Document Request.**

**a. Response to a Request for Production. A party and counsel ordinarily should be viewed as having complied with its duty to respond to a document request by:**

**i. Responding to the requests within the time set by the governing rule, stipulation or court-ordered extension;**

**ii. Making specific objections to those requests they have objected to;**

**iii. Physically producing the documents themselves (or copies) or specifically identifying those documents that are being or will be produced and/or specifying precisely where the documents can be found and when they can be reviewed;**

**iv. Specifically stating if no documents have been found to respond to a given request; and**

v. **Making a reasonable inquiry of those persons and a reasonable search of those areas likely to have responsive documents.**

b. **Matching Objections to Requests. Specific objections should be matched to specific requests. General or blanket objections ordinarily should be used only when they apply to every request.**

c. **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 made explicit.**

d. **Where Production Is Limited by Interpretation. Where a party objects to a request as overbroad when a narrower version of the request would not be in dispute, 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 a production is limited by a party's objection, the producing party should clearly describe the limitation in its response.**

Comment

Subsection (a). Fed. R. Civ. P. 26(g) and many state rules, e.g., Va. Sup. Ct. R. 4:1(g), contain a certification requirement for all written discovery responses. These rules impose an affirmative duty on counsel and parties of reasonable inquiry into both law and fact. Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (2d ed. 1994). A certification in violation of the rule, made without substantial justification, calls for a mandatory sanction. *See* Fed. R. Civ. P. 26(g)(3); Va. Sup. Ct. R. 4:1(g).

This Standard is an attempt to provide guidance to courts, counsel and the parties as to what is expected in responding to a request for production of documents, and is patterned on Tex. R. Civ. P. 196.2 and a proposal of the Defense Research Institute submitted to the Discovery Subcommittee of the Advisory Committee on Civil Rules in August 1997. *Cf.* Standard 7(b) above.

Subsections (a)(ii), (b). The responding party should make plain exactly which objections are applicable to exactly which requests.

The response to each request should also identify the particular language or characteristic of the request that is the basis of the objection. *E.g.*, *Obiajulu v. City of Rochester,* Dep't of Law, 166 F.R.D. 293, 295 (W.D.N.Y. 1996) ("[P]at, generic, non-specific objections, intoning the same boilerplate language, are inconsistent with both the letter and the spirit of the [discovery rules]. An objection to a document request must clearly set forth the specifics of the objection and how that objection relates to the documents being demanded.").

Subsections (a)(iii), (c). The practice of producing documents "subject to these objections" or "without waiving these objections" often leaves the party who served the requests unclear as to whether all responsive documents or only a subset is being provided. In addition, withholding documents after asserting such a response can be a violation of the discovery rules, including the certification requirement of the attorney who signs the response. *E.g.*, *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1081 (Wash. 1993) (en banc) (awarding sanctions where key documents were withheld after response stated that "[w]ithout waiver of these objections and subject to these limitations, [defendant] will produce documents responsive to this request").

To prevent these problems, whenever documents are produced at the same time that an objection has been made to a request, including a claim of privilege, the response to the request should expressly state either that (i) all responsive documents are being produced or (ii) the documents provided are only those to which the stated objection does not apply. *See* Tex. R. Civ. P. 193.2. Otherwise the requesting party may unknowingly file an unnecessary motion to overrule the objection.

Subsection (d). In many situations where a party objects to a request as overbroad it does not dispute that the opposing party is entitled to at least some portion of the documents requested. If so, the responding party should ordinarily produce any documents that have not been objected to, notwithstanding its objection to producing others. It is improper to withhold documents that are clearly called for by a request simply because the responding party objects to producing some of the documents that have been asked for. For example, a party may object to a request as overbroad in failing to restrict the request to a particular time frame. The party should make clear in its written response that it objects to the request as written, and that the documents it is producing are limited to the specified period that it does not object to. There may, however, be situations where all parties would save time and money by deferring a comprehensive search for documents until the issue of what documents have to be produced has been resolved. This would be particularly appropriate if it would avoid multiple, expensive searches through a large universe of potentially responsive documents.

**13. When and Where Documents Should Be Produced.**

**a. The Date Set by the Party Asking for Documents. The requesting party should set a realistic date for document production, one that gives the responding party enough time to obtain, review and organize the documents after submitting its written response to the request.**

**b. By the Responding Party. If the responding party objects to the date and/or place of production set by the requesting party, the responding party's response should give a reasonable alternative date and/or place for production, to which it will be bound without further request unless the parties stipulate or the court orders otherwise. Unless otherwise specified by the requested party, documents should be produced on a "rolling" basis when they become available.**

**c. Where Documents Should Be Produced. Documents presumptively should be produced for inspection at the place where they are regularly kept and in their original form. The parties may agree otherwise or, for good cause, the court may order otherwise.**

Comment

Subsection (a). Fed. R. Civ. P. 34(b) and many state rules provide that a request for production of documents specify a "reasonable time [and] place" for producing the documents. This should be self-evident. In practice, however, the requesting party often will unilaterally set the same date for the written response as for the production itself. In many cases the production will follow the written response. It may be virtually impossible to produce a large volume of documents that must be obtained from many sources within the time provided for the written response. Although production may follow the written response, a proper written response cannot be prepared without first reviewing the relevant documents.

The better practice is for the requesting party to consult and try to agree with the responding party on a deadline that allows a reasonable time to complete the production.

Subsection (b). Although most court rules typically require that a written response specifying what documents will be produced, and which requests will be objected to, be served within a particular number of days, they do not dictate when, other than the date initially specified, the responding party has to actually produce the documents. The responding party should try to reach an agreement with the propounding party on a reasonable date for production. Generally, documents should then be produced on a rolling basis, because in most cases there is no justification for withholding documents that are ready for production.

Where documents are not voluminous and objections have not been raised, the documents should be copied and produced simultaneously with the written response to the request.

Subsection (c). Fed. R. Civ. P. 34(b) and similar state court rules state that the request for production "shall specify a reasonable . . . place" for making documents available for inspection. What is reasonable will depend on the nature of the request. The presumption should be that they will be produced where they are normally kept. *E.g.*, *Bercow v. Kidder, Peabody & Co.,* 39 F.R.D. 357 (S.D.N.Y. 1965); *Niagara Duplicator Co. v. Shackleford*, 160 F.2d 25 (D.C. Cir. 1947). In practice, counsel for the responding party may make them available at his or her counsel's office or some other convenient location.

The rules contemplate that the producing party will make the originals available for the other side to inspect and copy. The parties may agree to supply copies in the first instance, subject to the requesting party's right to examine the originals. *See* Tex. R. Civ. P. 196.3(b). The parties should also attempt to reach agreement on who will pay for the copying costs.

**14. How Documents Should Be Produced.**

**a. Where Voluminous Amounts of Documents Are Involved. Where a request for production may call for a large number of responsive documents, the parties should confer to try to agree on the most efficient and cost-effective way to have the documents produced and reviewed.**

**b. Organization of Production. Documents should be produced either as they are kept in the usual course of business or to correspond to the categories in the request.**

Comment

Subsection (a). In cases involving productions of a large number of documents, cooperation between the parties may help to reduce the costs to both sides of the production and review. For example, where a request calls for many documents that are largely redundant on a particular issue, the parties may agree to the production of a smaller number of sample documents. Alternatively, the parties may agree to produce the documents in installments until sufficient information has been obtained. The parties may also save significant expense by agreeing to defer production of certain types of documents pending resolution of issues in the case that might eliminate the need for the documents. Efficiencies in the mechanics of production also should be explored. For example, as discussed in Standard 30 below, documents may be "scanned" and then data-coded into a digital visual format, which may allow all parties to review and retrieve information from them much more easily and inexpensively than by some other method. The parties can also agree on how to share or allocate the costs of doing so.

Subsection (b). Although Fed. R. Civ. P. 34(b) and many state court rules, e.g., N.Y. C.P.L.R. 3122(c), Tex. R. Civ. P. 193.5, require production of documents either as they are kept in the usual course of business or organized and labeled to correspond to the categories in the request, in practice these provisions are often ignored. This not only is required by the rules, but also constitutes the best practice even where it is not covered by a rule.

**15. Supplementation of Document Production. A party should timely produce any responsive documents discovered after the original production if the newly discovered documents**

**would make the original production incomplete or incorrect in a material respect.**

Comment

This Standard, based on Fed. R. Civ. P. 26(e) and analogous state provisions such as Va. Sup. Ct. R. 4:1(e) and Tex. R. Civ. P. 193.5, is necessary to achieve the basic purpose of discovery. Supplementation should be made promptly, particularly when the case is approaching a discovery cut-off date, a final pre-trial conference or trial itself. In determining whether a newly discovered document is material, a party and counsel should consider the effect on the party's case if a favorable document were to be precluded at trial or, conversely, the consequence of a bar on any evidence to rebut the contents of a document that would appear to favor the other side. As with the failure to serve supplementary interrogatory answers, the court will have discretion to determine what remedy, including the exclusion of evidence or adverse inferences, is appropriate for a party's failure to supplement its production of requested documents.

## V. DEPOSITIONS

### 16. General Procedures for Depositions.

**a. Scheduling a Deposition. Before noticing a deposition, unless there are extraordinary circumstances, a party should try to consult all other parties to agree on the date(s) and place for the deposition, taking into account the convenience of all counsel, the parties and the person to be deposed. A deposition notice should be served a reasonable period of time in advance of the date set for the deposition.**

**b. Objections to a Deposition. An objection to the date or place of a deposition should be made promptly after a notice of deposition is received. If an objection is made promptly, in most cases meaning within three business days of receipt of the notice, the deposition should ordinarily be stayed until the parties agree on or the court sets a date or place for it.**

**c. Length of the Deposition. The court may consider, either by rule, order or as part of a case management plan, whether it would be appropriate to place a**

**presumptive limit on the length of some or all of the depositions in specific types of cases or the particular case before it.**

**d. Who Should Be Permitted to Attend a Deposition. The parties, a deponent's spouse or one other member of the deponent's immediate family, a designated representative of a party that is not a natural person, the attorney(s) (including one or more legal assistants) for a party or the witness and any expert retained by a party ordinarily should be permitted to attend a deposition.**

**e. Pertinent Documents Should Be Produced Before a Deposition. A party seeking production of documents in connection with or that will be used in a deposition should, whenever reasonably possible, schedule the deposition to allow for the production of documents in advance.**

**f. Where Depositions Should Be Taken: Presumptions. A defendant may take a plaintiff's deposition where the suit has been brought; a plaintiff may take a defendant's deposition where the defendant resides or, if the defendant is a corporate or associational entity, where it has its principal place of business; and the deposition of a nonparty witness may be taken where he or she resides or works. Subject to the preceding requirements, a deposition ordinarily will be taken at the office of the attorney noticing the deposition. The deposing party and/or the witness may agree on another location taking into account the convenience of the witness, counsel and the parties.**

Comment

Subsection (a). Fed. R. Civ. P. 30(b)(1) and similar state court rules, e.g., Va. Sup. Ct. R. 4:5(b)(1), do not specify any minimum number of days between service of notice and the date noticed for a deposition, but merely state that it shall be "reasonable." Before noticing a deposition (or scheduling any other date or deadline), counsel should almost always consult with and try to accommodate the schedules and pre-existing commitments of other counsel, the parties and any nonparty witnesses. *See* ABA Guidelines for Conduct Nos. 14, 15 (Aug. 1998); Seventh Circuit Standards of Civility, Nos. 14, 15 (1992); Md. Discovery Guidelines 4, 7; Va. State Bar Principles of Professional Courtesy, Art. III(d); D.C. Bar Voluntary Standards for Civility in Professional Conduct, No. 8 (1996).

There will be rare occasions (for example, expedited discovery in aid of a preliminary injunction motion) when prior consultation may not be possible. Even then, a party should try to accommodate a reasonable request for some other date or time. If the court has to become involved in what is essentially a housekeeping matter, it is a strong indication that the courtesy expected among counsel has broken down.

Subsection (b). The federal and many state rules are silent on the effect of an objection to the date or place of a deposition. Fed. R. Civ. P. 37(d) and similar state rules provide for sanctions where a party does not attend at its own noticed deposition and the party's failure to attend is not excused unless that party has filed a motion for a protective order. Some courts, however, have taken the position that the objecting party must actually obtain a protective order to be excused from attending a deposition. For obvious practical reasons, particularly where a deposition is set on relatively short notice, an objection should act as a stay of the deposition to give the parties time to agree or obtain a court ruling on the issue rather than precipitate a formal motion for protective order.

Subsection (c). A number of state and local federal court rules now provide presumptive limits on the length of a single deposition. *E.g.,* Tex. R. Civ. P. 199.5(c) (six hours); Ariz. R. Civ. 30(d) (four hours).

Subsection (d). Fed. R. Civ. P. 30(c) excludes from its operation Fed. R. Evid. 615 (providing for the exclusion of witnesses). State provisions such as Va. Sup. Ct. R. 4:5(c) merely state that "[e]xamination and cross-examination may proceed as permitted at trial" and therefore also do not address who can attend. Depositions normally are held in nonpublic settings, such as an attorney's or the deponent's office. Even depositions taken at a courthouse are not normally viewed as being in a public forum. *E.g*., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) (pre-trial depositions are not public components of a civil trial); *Amato v. City of Richmond*, 157 F.R.D. 26, 27 (E.D. Va. 1994), *cert*. *denied*, 519 U.S. 862 (1996) (press not permitted to attend depositions); *Kimberlin v. Quinlan*, 145 F.R.D. 1 (D.D.C. 1992) (same); *Times*

*Newspapers, Ltd. (of Great Britain) v. McDonnell Douglas Corp.,* 387 F. Supp. 189, 197 (C.D. Cal. 1974) (same); *but see Avirgan v. Hull*, 118 F.R.D. 252 (D.D.C. 1987) (order denying motion to preclude the press from attending a deposition).

Except in extraordinary cases, a deposition, unlike a trial, should not be considered a "public" proceeding. The attendees at a deposition presumptively should be limited to those persons who have a direct relationship to the case itself that gives them a legitimate reason for being there to hear, firsthand, what the witness has to say. Tex. R. Civ. P. 199.5(d)(3). In addition, if the person's presence will not otherwise be disruptive or objectionable, one member of the deponent's family may also be permitted to attend. This latter allowance is intended to take into account those circumstances in which the mere presence of a deponent's spouse or a caretaker child or other close family member in a purely supportive role might be considered helpful. It would not include other persons who have no other relationship to the case. It would include a party, counsel to a party and counsel to the witness, as well as any expert who can assist in questioning or understanding the testimony of the witness. *Id.* Fed. R. Civ. P. 26(c)(5), 45(c)(1) and 45(c)(3)(B) and similar state provisions authorize a party or the witness to seek a protective order to further limit attendance at the deposition. *E.g., Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973). Tex. R. Civ. P. 199.5(a)(3) takes a slightly different approach, and requires advance notice if a party intends to have anyone other than the parties, counsel, etc., attend — presumably to allow the other side or the deponent to object and/or file for a protective order.

This Standard leaves open the issue of who should have the burden of moving to enlarge or restrict the attendees at a deposition if it becomes an issue. *See* Fed. R. Civ. P. 30(c), 1993 Advisory Committee Note (the rule "does not attempt to resolve issues concerning attendance by others, such as members of the public or press").

Subsection (e). Producing documents just before or during a deposition usually generates only delay and aggravation to both the witness (who is asked either to wait while examining counsel reviews the documents for the first time or to return later to complete the deposition) and the attorney seeking the documents, who faces a Hobson's choice of either undertaking a less-than-thorough review or adjourning the session to a later time or date. Whenever possible, the parties should agree to have any requested documents made available long enough before the deposition so that they can be reviewed and the deposition can go forward at a reasonable pace. Fed. R. Civ. P. 26(c) and 30(d) and similar state law provisions are available if an examining attorney unduly delays the deposition by insisting on examining a large volume of documents during a deposition.

In appropriate cases and subject to the examining party's right to determine how to frame questions to the deponent, the parties also may consider having the witness review specified documents before the deposition or during a recess so that everyone does not have to wait during the deposition itself while the witness painstakingly peruses each exhibit he or she is questioned about.

Subdivision (f). The plaintiff should normally attend his or her deposition in the place where the suit is pending on the theory that the plaintiff chose the forum. Sonitrol *Distributing Corp. v. Security Controls, Inc.,* 113 F.R.D. 160 (E.D. Mich. 1986). A defendant, who usually has had no role in deciding where the suit was filed, should normally be allowed to have his or her deposition taken where he or she resides or works. *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979) (The deposition of a corporation "'should ordinarily be taken at its principal place of business,' especially when . . . the corporation is the defendant. 8 C.Wright & A.Miller, Federal Practice & Procedure § 2112 at 410 (1970)[.]"); Pinkham v. Paul, 91 F.R.D. 613, 615 (D. Me. 1981); *but see Dollar Sys., Inc. v. Tomlin*, 102 F.R.D. 93, 94 (M.D. Tenn. 1984) (defendant that contractually agreed to the forum cannot complain about having to give a deposition there). Depositions of nonparty witnesses also normally should be taken where they reside or do business. *See* 8A Charles Alan Wright et al., *Federal Practice and Procedure* § 2112 (2d ed. 1994). While the parties are encouraged to agree on a reasonable place to take a deposition, the normal rule is that, subject to the basic principles described above, the examining attorney is allowed to pick the site, which is often his or her own office.

In agreeing on another location for a deposition, taking into account the convenience of the witness, counsel and the parties, the factor of "expense" should be considered. For example, if numerous plaintiff-party witnesses are located outside the forum where the litigation is occurring, it may be far less costly (and therefore convenient) for an attorney for each party to travel to where the witnesses are located, rather than requiring each of the witnesses to travel to, and to be housed in, the forum where the case is being litigated. Moreover, in such cases (as in all appropriate cases), the court may exercise its discretion to require a departure from the normal presumption and should encourage the parties to negotiate these issues voluntarily.

**17. Objections and Comments During a Deposition.**

**a. Form of Objections. Where the court's rules provide that all deposition objections are preserved for further ruling and the testimony is subject to the objection, any objection ordinarily should be made concisely and in a non-argumentative and non-suggestive manner. In most cases, a short-form objection such as "leading," "argumentative," "form," "asked and answered" or "non-responsive" will suffice.**

**b. Appropriate Remedies for Deposition Misconduct. In addition to imposing sanctions against a party and/or its attorney for misconduct during a deposition, the court should, consistent with the applicable rules of evidence, consider whether deposition misconduct warrants allowing portions of a deposition transcript or other evidence to be admitted at trial on the issue of the witness' credibility during that deposition.**

Comment

Subsection (a). Fed. R. Civ. P. 30(d)(1) provides that "[a]ny objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner." Many state rules are similar, and numerous cases from both federal and state court have stressed that only simple straightforward objections are appropriate. Tex. R. Civ. P. 199.5(e) is explicit: "Objections to questions during the oral deposition are limited to 'Objection, leading' and 'Objection, form.' Objections to testimony during the oral deposition are limited to 'Objection, nonresponsive.'"

Subsection (b). To give added teeth to these commands, where counsel and/or the witness violates them, the jury should be permitted to have this evidence before it. By the same token, if the examining attorney engages in oppressive conduct, the jury should also be allowed to consider this evidence in determining the merits of the case.

**18. Conferring with the Witness.**

**a. During the Deposition.**

**i. An attorney for a deponent should not initiate a private conference with the deponent during the**

**taking of the deposition except to determine whether a privilege should be asserted or to enforce a court-ordered limitation on the scope of discovery. Subject to the provisions of subparagraph (a)(ii) and (b) below, a deponent and the attorney may confer during any recess in a deposition.**

**ii. An attorney for a deponent should not request or take a recess while a question is pending except to determine whether a privilege should be asserted or to ascertain whether the answer to the question would go beyond a court-ordered limitation on discovery.**

**iii. In objecting to or seeking to clarify a pending question, an attorney for a deponent should not include any comment that coaches the witness or suggests an answer.**

**iv. Any discussion among counsel about the subject matter of the examination should at the request of the examining attorney occur only when the deponent has been excused from the deposition room.**

**v. An attorney shall not instruct or permit another attorney or any other person to violate the guidelines set forth in sections a(i)-a(iv) with respect to that attorney's client.**

**b. During a Recess.**

**i. 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.**

**ii. 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.**

**iii. 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.**

Comment

Subsection (a). Conferences between a witness and the witness's attorney during a deposition, while at times perhaps appropriate to clarify a question or prevent abuse, can be used to prevent forthright, uncoached answers from the witness. Except for conferences necessary to determine whether the attorney-client or other privilege should be asserted, an attorney for a deponent ordinarily should not initiate a private conference with the deponent during the deposition. *E.g*., U.S.D.C. - S.D. Ind. Gen. Rule 30.1(c); U.S.D.C. - D. Or. Local Rule 230-5(d); Tex. R. Civ. P. 199.5(d). This Standard is not intended to prevent a witness from requesting the opportunity to consult with counsel; however, counsel should be mindful of the obligation to avoid the suggesting of answers or other abuse of the consultation right. Moreover, the Standard is not intended to restrict an attorney's intervention when the attorney has a good faith concern that the witness is unable to continue the deposition.

For the same reason, an attorney for the witness (or for any party) should not be permitted to take a recess while a question is pending. The only exception is to clarify an issue to determine whether the attorney-client (or some other) privilege should be asserted.

Counsel should not as part of an objection make a "speaking objection" or include commentary that would suggest an answer to the witness. Fed. R. Civ. P. 30(c) provides that the deposition should proceed "with the testimony being taken subject to the objections," reserving a ruling on any objection to when the deposition is used in court. *See also* Tex. R. Civ. P. 199.5(d), (e); Va. Sup. Ct. R. 4:5(c); *Ethicon Endo-Surgery v. United States Surgical Corp.,* 160 F.R.D. 98, 99 (S.D. Ohio 1995); *American Directory Serv. Agency v. Beam*, 131 F.R.D. 635, 642-43 (D.D.C. 1990) (Magistrates Report), *adopted,* 131 F.R.D. 15, 18-19

(D.D.C. 1990). There is therefore normally no reason to object to a question with anything more than a brief description of the nature of the objection or, as Fed. R. Civ. P. 30(d)(1) puts it, "concisely and in a non-argumentative and non-suggestive manner."

There may, however, be times when a discussion among counsel can clarify or shorten some or all of the line of questioning. If this occurs, and if the examining attorney requests it, the witness should be excused from the deposition while counsel discuss the issue.

Subsection (b). Some decisions have taken the position that, so long as the deposition has not been completed, there should be no communication between the deponent and counsel. *E.g.*, *Hall v. Clifton Precision*, 150 F.R.D. 525, 531-32 (E.D. Pa. 1993); Standing Order of Hon. G. Ross Anderson, Jr., U.S.D.C. - D.S.C., ¶ 5 (Dec. 18, 1993); *Cascella v. GDV, Inc.,* No. 5899, 1981 WL 15129 (Del. Ch. Jan. 15, 1981).

To afford every person an unrestricted right to obtain the advice of his or her counsel, the bar against conferring with counsel should not apply (i) when the conference is initiated by the witness and (ii) whenever there is a recess from the actual taking of deposition testimony. *E.g., Odone v. Croda Int'l PLC*, 170 F.R.D. 66, 68-69 (D.D.C. 1997). The witness and counsel should therefore be able to confer during a recess, either during the day or between deposition sessions, without having to risk a finding that the attorney-client privilege does not apply.

If a conference during a recess between the witness and the witness's attorney results in a decision to correct or clarify previous testimony, the correction or clarification should be promptly placed in the record when the deposition resumes. If the deposition has been completed when the decision to make a correction or clarification is made, the correction should promptly be brought to the examining attorney's attention. *Cf.* Fed. R. Civ. P. 30(e) ("if there are changes in form or substance," the deponent must "sign a statement reciting such changes and the reasons given by the deponent for making them"); *see Lugtig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981) (outlining the requirements of the rule).

Where a substantive correction is made, it may be appropriate to resume or re-open the deposition so that the examining attorney can question the deponent in person about the change. *Id.* In any further deposition the examining attorney may inquire as to the circumstances that led to the change, including any matter that was used to refresh or alter the witness's recollection, but the examining attorney may not inquire into areas protected by the attorney-client privilege.

**19. Designations by an Organization of Someone to Testify on Its Behalf.**

**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. The notice or subpoena should ask the recipient to provide the name(s) of the designated person(s) and the areas that each person will testify to by a reasonable date before the deposition is scheduled to begin.**

**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 what individual(s) is (are) best suited to testify.**

**c. More Than One Person May Be Necessary. When it appears that more than one individual should be designated to testify without duplication on the designated area(s) of inquiry, each such individual should be identified, a reasonable period of time before the date of the deposition, as a designated witness along with a description of the area(s) to which he or she will testify.**

**d. 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.**

**e. If in Doubt, Clarification Is Appropriate. A responding party or witness that 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 go forward as scheduled.**

**f. Duty to Prepare the Witness. Counsel for the entity should prepare the designated witness to be able to provide meaningful information about any designated area(s) of inquiry.**

**g. If an Officer, etc., Lacks Knowledge. Whenever an officer, director or managing agent of an entity is served with a deposition notice or subpoena that contemplates giving testimony on a subject about which he or she has no knowledge or information, that individual may submit, 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 having knowledge of the subject matter. The noticing party should then consider whether to proceed with the deposition of the officer, director or managing agent initially noticed or subpoenaed.**

**h. Consideration for an Organization's Senior Management. Where information is being 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.**

Comment

Subsection (a). The use of organizational designations under Fed. R. Civ. P. 30(b)(6) and similar state rules imposes responsibilities on both the examining and the defending party. The examining party should designate the areas of inquiry with reasonable particularity so that the defending party will have enough information to identify the person(s) whose testimony can be taken to provide an adequate and complete response. *E.g.*, *United States v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996); *Mitsui & Co. (U.S.A.) v. Puerto Rico Water Resources Auth.,* 93 F.R.D. 62, 66 (D.P.R. 1981); Cal. Civ. Proc. Code § 2025(d).

Subsections (b), (c). The defending party should then identify the person or persons who are in the best position to testify on these areas. *E.g.*, *Protective Nat'l Ins. Co. v. Commonwealth Ins. Co.,* 137 F.R.D. 267 (D. Neb. 1989); *see also* 7 James Wm. Moore et al., *Moore's Federal Practice* § 30.25[3], at 30-53 (Daniel R. Coquillette et al. eds., 3d ed. 1999). If this means that more than one person should testify to cover the requested areas adequately, the defending party should designate each person and identify the area(s) he or she will cover. *Marker v. Union Fidelity Life Ins. Co.,* 125 F.R.D. 121, 126 (M.D.N.C. 1989). Both sides are expected to interpret the designated areas in a reasonable manner, taking into account the business and operations of the entity. Any issues of interpretation that remain unclear should be clarified in a timely manner so that the deposition can proceed as scheduled.

Fed. R. Civ. P. 30(b)(6) and similar state provisions typically call for a designated person to consent to testify on behalf of the entity. Sometimes the person who would seem to have the most knowledge on the subject, and would therefore be the logical person to designate, will not agree to testify. *E.g*., *Mitsui & Co. (U.S.A.) v. Puerto Rico Water Resources Auth.*, 93 F.R.D. 62 (lower-level employee's deposition is normally not considered to be that of the corporation). *But see* Cal. Civ. Proc. Code § 2025(d) (requiring that the most qualified individual among an entity's "officers, directors, managing agents, employees, or agents" must be produced; the individual's consent is not optional).

Subsection (f). Fed. R. Civ. P. 30(b)(6) and similar state provisions, e.g., Va. Sup. Ct. R. 4:5(b)(6), also provide that the designated person "shall testify as to matters known or reasonably available to the organization." A number of decisions have construed this language to impose an obligation on the defending party to prepare the designated person so that he or she will be able to give "knowledgeable and binding" answers. *E.g*., *United States v. Taylor*, 166 F.R.D. at 361; *Marker v. Union Fidelity Life Ins. Co.,* 125 F.R.D. at 126; Cal. Civ. Proc. Code § 2025(d) (designee shall testify "to the extent of any information known or reasonably available to the deponent"); Robert I. Weil & Ira A. Brown, Jr., *California Practice Guide: Civil Procedure Before Trial* ¶ 8:475 (1998) (a designee who does not have personal knowledge "is supposed to find out from those who do!"). This would require counsel to review with the witness materials that he or she may not previously have seen but that are part of the organizational "mind," so that the witness will be in a position to answer "fully, completely, [and] unevasively" all questions on the designated subject matter. *Mitsui & Co. (U.S.A.) v. Puerto Rico Water Resources Auth.,* 93 F.R.D. at 67.

Subsections (g), (h). A number of court decisions have held that it is improper to try to take the deposition of a company's or organization's senior executives if they are not the best persons within the organization to provide the information being sought. *See, e.g.*, *Baine v. General Motors Corp.*, 141 F.R.D. 332, 334-36 (M.D. Ala. 1991); *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995); *Liberty Mut. Ins. Co. v. Superior Court*, 13 Cal. Rptr. 2d 363 (Ct. App. 1992).

## VI. EXPERTS

**The following Standards on experts are intended for those jurisdictions where the practice or procedure is not otherwise governed by statute or rule.**

**20. Disclosure of Expert Witnesses.**

**a. What "Experts" Should Be Disclosed. Each party should disclose the identity of any person who may be used at trial to present evidence as an expert witness. This includes an expert witness retained by another party (such as a co-defendant's expert) who may be used by the disclosing party. It does not include a "hybrid" witness, such as a treating physician, who was not specially retained for the litigation and will provide both fact and expert testimony.**

**b. When Experts Should Be Disclosed. The identity of every expert should be disclosed at least 90 days before the trial date or the date the case is to be ready for trial.**

**c. The Sequence of Expert Disclosure. The plaintiff usually should disclose its expert first, followed by the defendant's disclosure of its expert, followed by plaintiff's disclosure of any rebuttal expert. Each party should be permitted at least 20 days between each disclosure.**

Comment

Subsection (a). Public policy favors pretrial disclosure of any experts a party plans to use as well as their opinions and the grounds for their opinions. Fed. R. Civ. P. 26(a)(2), 26(b)(4); Tex. R. Civ. P. 195.3. At least in the Federal Rules, however, not all experts have to be identified.

Fed. R. Civ. P. 26(a)(2)(B) requires written reports only from retained experts and from employee experts who give expert testimony as part of their regular duties, but does not expressly require written reports from employees who are called on to give expert testimony only in the case at hand. *Compare* Cal. Civ. Proc. Code § 2034(a)(2), (f)(2)(B) (requiring an expert witness statement from any employee of a party but that the statement for all experts provide only a "brief narrative statement of the general substance of the testimony that the expert is expected to give").

The better practice is to identify and provide a written report from any person who will be called upon to provide expert opinion testimony, regardless of whether the person regularly provides expert testimony. *3M v. Signtech USA*, No. 4-96-1262, 1997 U.S. Dist. LEXIS 21738, at *2 (D. Minn. Nov. 24, 1997) (while the wording of Fed. R. Civ. P. 26(a)(2)(B) seemingly does not embrace employees who are not "retained or specially employed to provide expert testimony in the case or whose duties . . . [do not] regularly involve giving expert testimony," it is inconsistent with the purposes of that rule to exempt an employee from the report requirement merely because he does not "regularly" give testimony).

The Standard makes an exception to the expert disclosure requirement for "hybrid" witnesses, typically treating physicians, who were not specially retained for the litigation and are providing both fact and expert testimony. *E.g.*, *Sprague v. Liberty Mut. Ins.,* 177 F.R.D. 78, 80 (D.N.H. 1998) (no report required from treating physician); *Paxton v. Stewart*, 80 Cal. Rptr. 2d 179 (Ct. App. 1998), *rev. granted* (same; but treating physician is limited to testimony based on personal observation and cannot testify on liability issues); District of Columbia v. Mitchell, 533 A.2d 629, 652 (D.C. 1987) (same); *Turgut v. Levine*, 556 A.2d 720 (Md. Ct. Spec. App. 1989); *but see Salas v. United States*, 165 F.R.D. 31, 33 (W.D.N.Y. 1995) (doctor must submit an expert report when his opinion goes beyond facts developed during treatment); *Plunkett v. Spaulding*, 60 Cal. Rptr. 2d 377, 380 (Ct. App. 1997) (expert witness statement when a doctor goes beyond factual testimony to address the standard of care); 6 James Wm. Moore et al., *Moore's Federal Practice* § 26.23[2][b][iii], at 26-74 to -75 & nn.29-30.1 (Daniel R. Coquillette et al. eds., 3d ed. 1999) (collecting cases).

Because the identity and opinion of a "hybrid" fact-and-expert witness normally will be disclosed or discoverable using the other discovery mechanisms, failure to designate a fact witness as an expert should not result in surprise to the opposing party.

Subsections (b), (c). Some jurisdictions call for simultaneous disclosure of experts and their opinions by both sides, followed by simultaneous rebuttal or reply reports. *See, e.g.,* Fed. R. Civ. P. 26(a)(2)(A), (B); Robert I. Weil & Ira A. Brown, Jr., *California Practice Guide: Civil Procedure Before Trial* (1997) (explaining that the rationale for simultaneous disclosure in California as provided in Cal. Civ. Proc. Code § 2034 is fairness to both parties).

The better practice, at least in most cases, is to have the party with the burden of proof provide its expert report first, followed by the opposing party's report, and any rebuttal or surrebuttal reports in turn after that. *See* U.S.D.C. - E.D. Va. Local Rule 26(D); Tex. R Civ. P. 195.2. The plaintiff presumably will have framed its case before filing suit, and should be expected to have a reasonably good idea of how it will prove it by the time an expert report is due. Although an argument can be made that the defendant should also have a good grasp on the issues by then, as a practical matter the defendant will normally not know what the plaintiff's expert is going to say until it receives the expert's report.

An expert should be identified and, as provided in Standard 21 below, his or her report given to the other side enough in advance so that it can be analyzed and, if the opposing party wants one, the expert's deposition can be taken before the final pretrial conference and/or trial.

**21. Written Reports From Each Testifying Expert.**

**a. When the Report Should Be Disclosed. At the same time a party discloses the identity of its expert, it should also furnish to the other side a written report signed by the expert.**

**b. What the Report Should Contain. The expert's report should contain:**

**i. A complete statement of each opinion the expert will give;**

**ii. The basis and reason(s) for that opinion;**

**iii. The data or information the expert is relying on in formulating the opinion and a description of where this data or information can be found if it is not part of the record or has not been produced in discovery;**

**iv. Any exhibit(s) to be used as a summary of or support for the opinion;**

**v. The expert's qualifications, including a list of any publication written by the expert in the last ten years;**

**vi. The compensation paid or to be paid to the expert;**

**vii. A list of any cases, including each case's name, court, docket number and the name, address and telephone number of each counsel of record, in which the expert has testified at trial or in deposition in the last four years; and**

**viii. If not provided in response to subsection (v) above, the expert's current résumé and bibliography, if any.**

**c. When a Non-Testifying Consultant Becomes a Testifying Expert. A testifying expert who was initially retained as a non-testifying consultant and who prepared a written report in a consultant capacity should disclose the written report to the opposing party in the same manner and subject to the same requirements as any other testifying expert.**

**d. Supplementation of an Expert's Opinion.**

**i. Ordinarily an expert's report, as well as his or her deposition testimony, should be final and complete when given, and not subject to later revision or amendment. The parties may stipulate that an expert's opinion can be supplemented within a reasonable specified time before trial.**

**ii. In the absence of stipulation, a party wishing to supplement an expert's opinion less than 30 days before trial or a discovery cut-off or other date set by the court should first obtain leave of court. Factors that a court should consider in determining whether or not to allow supplementation include:**

**A. The good faith of the party seeking to supplement the opinion;**

**B. Whether the information was available to that party and/or the expert at an earlier date;**

**C. Unfair prejudice to any party; and**

**D. Whether it would result in an unfair delay of the trial.**

**iii. A party that is permitted to supplement its expert's opinion less than 30 days before trial or a discovery cut-off date should promptly make the expert available for deposition.**

**e. No Waiver of Attorney Work Product. The provision in section 21(b)(iii) above that an expert's report describe "the data or information the expert is relying on in formulating [his or her] opinion" does not require the disclosure of communications that would reveal an attorney's mental impressions, opinions or trial strategy protected under the attorney work product doctrine. The report should disclose, however, any data or information, including that coming from counsel, that the expert is relying on in forming his or her opinion. In jurisdictions where this issue has not been addressed or decided, the parties should either stipulate how to treat this issue or seek a ruling from the court at the earliest practical time as to its view on the scope of protection for this information.**

**f. Failure to Provide a Report or Opinion. The court should consider whether a party's failure to disclose the identity of its expert or to provide the expert's written report or a deposition within a reasonable period of time before trial or by a date set for doing so should preclude that party from *(i)* calling the expert at trial or *(ii)* introducing that part of the expert's opinion that was not timely disclosed.**

**g. Sanctions: Factors to Consider. Among the factors a court should consider in assessing what sanctions, if**

**any, should be imposed for a party's failure to identify an expert or to provide the expert's report in timely fashion are:**

**i. The party's good or bad faith in the matter;**

**ii. Whether or not the failure was due to circumstances beyond the party's control;**

**iii. Whether there has been unfair surprise or prejudice to the opposing side; and**

**iv. Whether the failure will unreasonably delay the trial or any other key events in the case.**

Comment

Subsection (a). See Comment above for Standard 20(a). Unlike the federal rule, this Standard requires that reports be provided by any person, other than a "hybrid" fact-opinion expert, who will give expert testimony at trial. In jurisdictions where there is no requirement that all experts furnish written reports containing the information listed in this Standard, it would be prudent to serve interrogatories that ask for this information.

Subsection (b). This Standard is modeled on the disclosure and discovery requirements in Fed. R. Civ. P. 26(a)(2)(B) and similar state rules, e.g., Tex. R. Civ. P. 194.2(f). *Compare* Cal. Civ. Proc. Code § 2034(f) (which requires less detailed information); *Castaneda v. Bornstein*, 43 Cal. Rptr. 2d 10, 17 (Ct. App. 1995) (expert should not be excluded for failure to disclose the "general substance" of testimony).

Subsection (d). A party has a duty to supplement its expert's disclosure whenever it learns that the disclosure is incomplete or incorrect in some material respect. This duty applies to changes in the opinions in the expert's report, as well as those the expert gives in deposition. While supplementation should be made promptly after the deficiency has been discovered, the Standard sets a 30-day deadline before trial or a discovery cut-off after which a party must obtain the court's permission to make the change. *Accord* Fed. R. Civ. P. 26(e), (a)(3).

Subsection (e). Other than court-appointed experts, which are *sui generis*, an expert is retained to provide testimony to assist one side in the case. The expert is entitled to have the benefit of the theories, however tentative or preliminary they may be, of the counsel that has retained the expert. Experts logically come within the "zone of privacy for strategic litigation planning" that is the rationale for the attorney work product doctrine. *See United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir. 1995) (construing Fed. R. Civ. P. 26(b)(3) in an unrelated context). Counsel should be able to explore counsel's theories or ideas about the litigation with an expert without the worry that the discussion is tantamount to disclosure to the other side.

At least in federal practice, however, there is a split of authority as to whether communications to an expert of an attorney's "core" or "opinion" work product are immune from disclosure after the 1993 amendments to Rule 26.

For cases holding that all work product is now discoverable under Fed. R. Civ. P. 26(a)(2)(B), see, e.g., *Musselman v. Phillips*, 176 F.R.D. 194 (D. Md. 1997); *Barna v. United States*, No. 95 C 6552, 1997 U.S. Dist. LEXIS 10853 (N.D. Ill. July 23, 1997); *B.C.F. Oil Ref. v. Consolidated Edison Co.*, 171 F.R.D. 57, 66 (S.D.N.Y. 1997); *Karn v. Ingersoll Rand*, 168 F.R.D. 633, 639-40 (N.D. Ind. 1996).

For cases holding otherwise, see, e.g., *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642 (E.D.N.Y. 1997); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995); *All W. Pet Supply Co. v. Hill's Pet Prods. Div.*, 152 F.R.D. 634 (D. Kan. 1993); *see also* Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure,* 164 F.R.D. 97, 101-04 (1996) (collecting cases, and outlining reasons why the continuing recognition of protection for opinion work product is appropriate after recent amendments to Rule 26).

Particularly where an expert is acting as a consultant, the expert's report is likely to reflect counsel's mental processes and legal theories. The court may, however, assess whether there is "substantial need" for using the report to impeach the expert that would outweigh the policy of protecting work product. *National Steel Prods. Co. v. Superior Court*, 210 Cal. Rptr. 535, 543 (Ct. App. 1985).

An attorney's mental impressions, theories and strategies — archetypal "work product" — that have been conveyed to an expert should not have to be disclosed if the expert is not relying on them in his or her testimony. The ability to have untrammeled access to the process by which an expert has formulated his or her final opinion(s) in the case is outweighed by (1) the undesirability of placing substantial barriers to a full and free exchange of ideas and theories between counsel and the expert; (2) the fact that the expert has been retained to advise and assist one side in an adversary trial system; (3) the added, unnecessary expense of having to retain two experts — one to testify and the other to consult — if a lawyer wants to maintain the confidentiality of his or her work product, and (4) the ability of counsel to obtain and cross-examine the expert on anything the expert is actually relying on in his or her opinion.

If there is no controlling contrary case law in a particular jurisdiction, counsel should assume that there is a reasonable possibility that any communication with the expert will be fair game for inquiry by the other side. 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2031.1, at 442 (2d ed. 1994 & Supp. 1999) ("It appears that counsel should now expect that any written or tangible data provided to testifying experts will have to be disclosed."). Until there is a clear legal rule, the best way to deal with the issue is to try to obtain an agreement from all the parties to the case on how they will treat the issue or seek a ruling from the court on it.

Although a stipulation that there will be no waiver by sharing work product with an expert would probably protect the information in the particular case, there is no guarantee that it would protect it against nonparties in another setting. *E.g.*, *Bank Brussels Lambert v. Crédit Lyonnais (Suisse) S.A.,* 160 F.R.D. 437, 448 (S.D.N.Y. 1995) (the test is whether disclosure is done in a way that "substantially increases the likelihood that the work product will fall into the hands of the adversary").

Subsection (f). This Standard is modeled on Fed. R. Civ. P. 37(c)(1). The Standard creates a presumption that an expert will not be permitted to give trial testimony that has not first been disclosed in either a report or a deposition. *But see Martinez v. City of Poway*, 15 Cal. Rptr. 2d 644, 646 (Ct. App. 1993) (if an expert declaration has been submitted the expert cannot be excluded based on the inadequacy of the information in the declaration). The Standard also recognizes the court's discretion to use other remedies than an absolute bar on the expert's testimony.

Subsection (g). This subsection identifies factors that are among those to be considered in determining whether or not a failure to identify an expert or to provide a report in a timely fashion should result in some form of sanction and, if so, what form. The list is not exclusive and a court should consider any other factors that would promote the interests of justice.

**22. Expert Depositions.**

**a. Timing. If requested by the other side, a party's testifying expert should be made available for deposition promptly after the expert's report has been given to the other side. Where no expert report is required (for example, where a treating physician will testify as a "hybrid" fact-expert witness), an expert should be made available for deposition promptly after discovery of the facts underlying the expert's testimony has been completed.**

**b. When and Where. Subject to the general principles in Standard 16(f), each party should make its expert available for deposition at a reasonably convenient time and place for the witness, the parties and counsel.**

**c. Supplying Underlying Information. Reasonably in advance of an expert's deposition, each party should identify or, to the extent not otherwise readily available to the other side, make available all of the materials or information that the expert is specifically relying on or specifically using in formulating his or her opinion. These materials or information ordinarily should be given to the other side no less than five days before the deposition, except where an earlier deadline is set by rule, order, stipulation or a discovery request. The identification and/or other disclosure of such materials in an expert's report will be sufficient to satisfy the requirements of this Standard. This Standard does not require the disclosure of that part of a communication that would reveal an attorney's mental impressions, opinions or trial strategy protected under the work product doctrine.**

Comment

Making experts available for deposition as of right has become the standard practice in many jurisdictions, either formally by rule or informally by general agreement. *But see* N.Y. C.P.L.R. 3101(d)(1)(iii) (deposition of an expert may be obtained only by court order upon showing of special circumstances). Usually, an expert should be available for deposition just like any other witness who will testify at trial.

For the deposition to be effective, the other side must be given, in advance, access to the information or materials the expert is relying or basing his or her opinion on.

Fed. R. Civ. P. 26(b)(4)(C) and similar state rules, *e.g.,* Va. Sup. Ct. R. 4:1(b)(4), call for the party that takes an opposing side's expert's deposition to pay for the time spent in the deposition. *Contra* Tex. R. Civ. P. 195.7 (the party that retains an expert pays for all of the expert's fees). These rules are silent as to travel costs. In line with a general presumption that depositions ordinarily will take place in or near the forum court, it is expected that ordinarily the party that retains an expert will pay the expert's fees and expenses in traveling to the site of the deposition.

**23. Motions to Preclude or Limit Expert Testimony.**

**a. When the Motion Should Be Filed. A motion challenging all or part of the admissibility of proposed expert testimony should be filed at the earliest practical time and, at the latest, sufficiently in advance of the date set for a final pretrial order or conference so that the court can rule on the motion as part of or before the entry of the final pretrial order. This would include any motion to bar an expert for failure to meet the jurisdiction's standards for the admissibility of expert testimony.**

**b. Parties Should Confer Before Filing a Motion. As with discovery in general, before filing a motion on the admissibility of expert testimony a party should make a good faith attempt to resolve or narrow the dispute with the other side.**

Comment

This Standard seeks to have the basic issue of the admissibility of an expert's testimony settled, if possible, before discovery has closed and/or a final pretrial order is entered. It is intended to prevent last-minute claims that a party's expert should not be permitted to testify for one reason or another, including the claimed failure of the expert's testimony to satisfy the applicable evidentiary standard.

In *Daubert v. Merrell Dow Pharms.,* 509 U.S. 579 (1993), the U.S. Supreme Court rejected the *Frye* "generally accepted" test for the admissibility of expert scientific evidence and embraced a "scientifically reliable" standard in accordance with Fed. R. Evid. 702. *Compare Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Some states have followed *Daubert'*s lead, while others have adhered to a test that more closely resembles *Frye. State v. Porter*, 698 A.2d 739, 742 (Conn. 1997) (adopting *Daubert* standard), *cert. denied*, 118 S. Ct. 1384 (1998); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) (same); *but see State v. Isley*, 936 P.2d 275, 279 (Kan. 1997) (*Frye* test applicable in Kansas); *Brim v. State*, 695 So. 2d 268, 271-72 (Fla. 1997) (rejecting *Daubert* and maintaining "the higher standard of reliability as dictated by *Frye*"); *People v. Leahy*, 882 P.2d 321 (Cal. 1994) (retaining the *Kelly/Frye* standard and rejecting *Daubert* for California). In *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), the Supreme Court held that the standard of appellate review of a federal trial court's "gatekeeping" decision on the admissibility of scientific evidence is whether the trial court abused its discretion. Given the difficulty of overturning an evidentiary ruling on appeal in state or federal court, motions challenging an expert's testimony under the standard of *Daubert*, *Frye* or similar cases should be filed promptly and, at the latest, sufficiently before a discovery cut-off or final pretrial conference or order to give the other party time to develop an alternative for trial if its expert is barred from testifying.

The trial court always retains discretion to exclude or limit expert testimony if it is cumulative or if its probative value is outweighed by its potential prejudice. Fed. R. Evid. 403; *United States v. Carswell,* 922 F.2d 876, 879 (D.C. Cir. 1991); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995); *Anthony's Pier Four, Inc. v. HBC Assocs.,* 583 N.E.2d 806, 825 (Mass. 1991).

## VII. CLAIMS OF PRIVILEGE

**24. What Constitutes Privileged Information. Information or a document is "privileged" if it is protected from disclosure by any recognized legal privilege, including without limitation any privilege established by the United States or a State Constitution, statute, rule or common law.**

Comment

These Standards apply to discovery from a party or nonparty. They apply to information sought by any form of discovery.

**25. How a Privilege Should Be Asserted.**

**a. In Response to a Written Discovery Request. Unless otherwise provided by Standard 26, as soon as reasonably practicable, and in any event no later than the date that the discovery response is due under applicable discovery rules, a party should identify in writing each document or communication the other side has requested in discovery that the party claims is privileged. A discovery response that does not include this identification due to the voluminous nature of the documents or the attorney's lack of particularized identifying information as of the response due date should assert the applicable privilege as to each inquiry to which the privilege relates and give a date within a reasonable time by which the identity of the writing or other communication asserted to be privileged will be furnished. That date will be binding on the responding party unless modified by stipulation or court order.**

**b. During a Deposition. Unless the basis for the claim of privilege is apparent from the question itself, a party that objects to answering a deposition question based on a claim of privilege should, if possible at that time and without revealing the privileged information, state the basis for the claim of privilege on the record. If requested by the examining party, the objecting party should provide in writing as soon as practicable any additional nonprivileged factual information supporting the claim of privilege.**

**c. Further Inquiry to Test a Claim of Privilege. The examining party should be able to question a party or witness at the deposition or by interrogatories and, if appropriate, to conduct other reasonable inquiries to ascertain whether the information in question is or should remain privileged. An appropriate inquiry could include questions designed to ascertain:**

**i. The applicability of the particular privilege being claimed;**

**ii. Any circumstances that may be deemed a waiver or exception to the privilege being claimed; and**

**iii. Any other circumstances that may overcome a claim of privilege.**

Comment

Subsections (a), (b). Fed. R. Civ. P. 26(b)(5) and 45(d), similar state provisions and federal and state case law require that a party or other person who asserts a privilege must claim it expressly at or before the time that a response or answer to a question would be required. *See generally* Tex. R. Civ. P. 193.2, 193.3. As a practical matter, particularly where large amounts of documents are involved or a number of locations have to be searched, it may not be reasonable to expect a party to provide detailed information about all of the documents claimed as privileged at the time the party's initial response to a discovery request or disclosure requirement is due. If this is the case, it would be appropriate to describe generally the class or type of documents being claimed as privileged and to state that a more detailed listing and supporting information will be given at a specified future date.

Subsection (c). A party that has asked for documents or information must be able to inquire into the factual basis of a claimed privilege against producing or disclosing them, including whether the privilege has been waived or, if it is qualified, whether an exception or exemption would apply. As with discovery in general, the inquiry should be reasonable and use the mechanism best suited to obtain the kind of information that may legitimately be sought.

**26. Information Supporting a Claim of Privilege. Except as provided by Standard 27, the following information ordinarily should be provided to support a claim of privilege unless doing so would disclose the privileged information itself.**

**a. For a Document.**

**i. The type of document (e.g., letter, memo), its length and a description of any enclosures or accompanying documents claimed to be privileged. Any enclosure or accompanying document that is not claimed to be privileged in and of itself should be produced unless it would**

**somehow disclose the information claimed to be privileged or result in a waiver of the privilege.**

- **ii.** **Its general subject matter.**
- **iii.** **The date on the document and/or when it was created; if there is no specific date, a best estimate of when it was created.**
- **iv.** **Its author(s), including for each his or her last known address.**
- **v.** **Each addressee and/or recipient, including his or her last known address, and, if not apparent, his or her relationship to the author(s).**
- **vi.** **The type of privilege (e.g., attorney-client privilege, work product, etc.) being claimed.**

**b.** **For an Oral or Other Non-Written Communication.**

- **i.** **The name of the person making the communication, any person present when the communication was made and for each his or her last known address.**
- **ii.** **The date and place it was made.**
- **iii.** **Its general subject matter.**
- **iv.** **The type of privilege (e.g., attorney-client privilege, work product, etc.) being claimed.**

**c.** **Deleted or Redacted Information. Any deleted, redacted or withheld portion of a document or communication should be clearly identified as deleted and redacted on the ground of privilege and the same information described above should be provided to support the claim of privilege. If some, but not all, of the information on a document or in a communication is withheld on the ground that it is not relevant or not responsive to a discovery request, this fact should also be clearly stated along with the grounds for not producing it.**

Comment

Most courts require that a party must provide enough information about documents or information claimed as privileged so that the requesting party can assess the claim and, if a motion is filed, the court can then rule on it. *E.g.,* Fed. R. Civ. P. 26(b)(5); *see also* Cal. Civ. Proc. Code § 2031(f)(3) (items not produced and the basis for objection must be identified "with particularity"); *Wellpoint Health Networks, Inc. v. Superior Court*, 68 Cal. Rptr. 2d 844, 857 (Ct. App. 1997) (privilege log must be sufficiently specific to make a determination of the validity of the privilege claim); Tex. R. Civ. P. 193.3(b) (same).

Many court rules and decisions require a "privilege log" that gives a document-by-document basis for the privilege(s) claimed for each withheld document. *E.g.*, U.S.D.C. - S.D.N.Y. Civil Rule 26.2(a)(2)(A) (type, subject matter, date, author(s), addressee(s) and relationship of author(s) and addressee(s)); U.S.D.C. - E.D.N.Y. Standing Order on Effective Discovery, Rule 21 (requiring similar information for depositions and document productions); N.Y. C.P.L.R. 3122(b); William W Schwarzer et al., *Federal Civil Procedure Before Trial* § 11:34.1-.4 (1997) (suggesting similar information for a privilege log); *United States v. Construction Prods. Research*, 73 F.3d 464, 473 (2d Cir.), *cert. denied*, 519 U.S. 927 (1996) (a "party asserting the privilege must establish the essential elements of the privilege"; a cursory description of individual documents is insufficient); *Eureka Fin. Corp. v. Hartford Accident. & Indem. Co.,* 136 F.R.D. 179, 182 (E.D. Cal. 1991) (privilege waived where "blanket objections" did not specifically identify each document and the basis for the claimed privilege); *Wellpoint Health Networks,* 68 Cal. Rptr. 2d 844.

These requirements also are appropriate given that the burden normally rests with the party claiming a privilege to support it. *E.g*., Construction Prods. Research, 73 F.3d at 473; *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992).

**27. Alternatives to Supplying Detailed Information. If it would be overly burdensome, expensive and/or time-consuming to prepare a detailed listing of the information called for in Standard 26, the parties and the court should consider whether the information can be supplied in some other way or, given the demands and circumstances of the case, it can be reduced or eliminated for some or all of the documents or communications in question, including whether:**

**a.** **a categorical or general description of the material in question would be sufficient;**

**b.** **the existence of particular privileged communications, as opposed to their content, is material to the litigation;**

**c.** **the likely probative value of the material in question justifies the expense and burden of providing detailed information; and**

**d.** **the expense of providing detailed information should be shared or paid by the party requesting that it be done.**

Comment

The 1993 Advisory Committee Notes to Fed. R. Civ. P. 26(b)(5) acknowledge that providing detailed descriptions may be "unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories." The Advisory Committee Notes add that, if this is the case, a party can seek a protective order under Fed. R. Civ. P. 26(c).

Where individual identification of privileged materials may be unduly burdensome or expensive, the parties and/or the court should consider reasonable alternatives. In cases involving numerous communications, documents and files, the parties may agree that communications within certain categories or within certain given time periods may be generally described rather than individually identified. The parties or other persons from whom discovery is sought have an obligation to confer in good faith to try to devise a workable solution. This could include, for example, exempting documents of certain types or within specified date ranges from having to be included on a privilege log; requiring only certain information to be provided about certain categories of documents; or asking the court to appoint an independent third person or special master to review the materials *in camera*.

The parties also can agree that no privilege will be waived by producing documents *en masse* but that all claims of privilege would be preserved until the requesting party actually designates the particular documents to be copied or tries to use them in the case. As noted above in connection with Standard 21, however, a stipulation may not preserve the claim of privilege against nonparties in another setting and the parties would be advised to obtain a court order to this effect. *E.g.*, *Bank Brussels*

*Lambert v. Crédit Lyonnais (Suisse) S.A.,* 160 F.R.D. 437, 448 (S.D.N.Y. 1995) (the test is whether disclosure is done in a way that "substantially increases the likelihood that the work product will fall into the hands of the adversary").

**28. Inadvertent Disclosure of Privileged Information.**

**The parties should consider stipulating in advance that the inadvertent disclosure of privileged information ordinarily should not be deemed a waiver of that information or of any information that may be derived from it.**

Comment

The law among various jurisdictions differs on the effect of an inadvertent production of privileged communications. The better practice, consistent with most jurisdictions' ethical rules governing attorneys, is that an inadvertent disclosure of privileged information ordinarily should not be deemed a waiver, either of that information or any information that can be derived from it. *See* Tex. R. Civ. P. 193.3(d) ("[a] party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules," provided it promptly seeks to rectify the issue; the requesting party must then return the material uncopied pending a court ruling); ABA Formal Op. 92-368 (1992) (a lawyer who receives privileged materials through error should not read them and should return them).

To avoid any uncertainty, particularly in those jurisdictions that do not follow this principle, the parties would be advised to obtain a stipulation and/or court order that the inadvertent production of privileged documents will not constitute a waiver, and that these documents will be immediately returned uncopied to the producing party if the inadvertent disclosure is promptly brought to the receiving party's attention after their disclosure has come to light. *See* Federal Judicial Center, *Manual for Complex Litigation 3d* § 21.431 (1995) (parties may so stipulate or court may so order). This avoids unfairness or overreaching and provides the parties with the assurance that inadvertent errors of counsel, the client or their personnel will not prejudice them or their case.

## VIII. TECHNOLOGY

**29. Electronic Information.**

**a. Identifying Electronic Information. In identifying electronic data that parties may be called upon, in appropriate circumstances, to preserve or produce, counsel, parties and courts should consider:**

**i. The following types of data:**

**A. Email (including attachments);**

**B. Word processing documents;**

**C. Spreadsheets;**

**D. Presentation documents;**

**E. Graphics;**

**F. Animations;**

**G. Images;**

**H. Audio, video and audiovisual recordings; and**

**I. Voicemail.**

**ii. The following platforms in the possession of the party or a third person under the control of the party (such as an employee or outside vendor under contract):**

**A. Databases;**

**B. Networks;**

**C. Computer systems, including legacy systems (hardware and software);**

**D. Servers;**

**E. Archives;**

**F. Back up or disaster recovery systems;**

**G. Tapes, discs, drives, cartridges and other storage media;**

**H. Laptops;**

**I. Personal computers;**

**J. Internet data;**

**K. Personal digital assistants;**

**L. Handheld wireless devices;**

**M. Mobile telephones;**

**N. Paging devices; and**

**O. Audio systems, including voicemail.**

**iii. Whether potentially producible electronic data may include data that have been deleted but can be restored.**

**b. Discovery of Electronic Information.**

**i. Document requests should clearly state whether electronic data is sought. In the absence of such clarity, a request for "documents" should ordinarily be construed as also asking for information contained or stored in an electronic medium or format.**

**ii. A party should specify whether electronic information should be produced in hard copy, in electronic form or, in an appropriate case, in both forms. A party requesting information in electronic form should also consider:**

**A. Specifying the format in which it prefers to receive the data, such as:**

**I. Its native (original) format, or**

**II. A searchable format.**

**B. Asking for the production of metadata associated with the responsive data — i.e., ancillary electronic information that relates to responsive electronic data, such as information that would indicate whether and when the responsive electronic data was created, edited, sent, received and/or opened.**

**C. Requesting the software necessary to retrieve, read or interpret electronic information.**

**D. Inquiring as to how the data are organized and where they are stored.**

**iii A party who produces information in electronic form ordinarily need not also produce hard copy to the extent that the information in both forms is identical or the differences between the two are not material.**

**iv. In resolving a motion seeking to compel or protect against the production of electronic information or related software, or to allocate the costs of such discovery, the court should consider such factors as:**

**A. The burden and expense of the discovery, considering among other factors the total cost of production in absolute terms and as compared to the amount in controversy;**

**B. The need for the discovery, including the benefit to the requesting party and the availability of the information from other sources;**

**C. The complexity of the case and the importance of the issues;**

**D. The need to protect the attorney-client privilege or attorney work product, including the burden and expense of a privilege review by the producing party and the risk of inadvertent disclosure of privileged or protected information despite reasonable diligence on the part of the producing party;**

**E. The need to protect trade secrets, and proprietary or confidential information;**

**F. Whether the information or the software needed to access it is proprietary or constitutes confidential business information;**

**G. The breadth of the discovery request;**

**H. Whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data;**

**I. The extent to which production would disrupt the normal operations and processing routines of the responding party;**

**J. Whether the requesting party has offered to pay some or all of the discovery expenses;**

**K The relative ability of each party to control costs and its incentive to do so;**

**L. The resources of each party as compared to the total cost of production;**

**M. Whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party**

**would not do so in the ordinary course of its day-to-day use of the information;**

**N. Whether responding to the request would impose the burden or expense of converting electronic information into hard copies, or converting hard copies into electronic format;**

**O. Whether the responding party stores electronic information in a manner that is designed to make discovery impracticable or needlessly costly or burdensome in pending or future litigation, and not justified by any legitimate personal, business, or other non-litigation related reason; and**

**P. Whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable and, if so, the responding party's state of mind in doing so.**

**v. In complex cases and/or cases involving large volumes of electronic information, the court may want to consider using an expert to aid or advise the court on technology issues**

**vi. The parties are encouraged to stipulate as to the authenticity and identifying characteristics (date, author, etc.) of electronic information that is not self-authenticating on its face.**

2004 Comment

Subdivision(a)

Subdivision (a)(i). Standard 29(a)(i) is principally designed to provide a checklist to assist counsel in identifying types of electronic data as to which the duty to preserve may apply, once that duty has been triggered under applicable law. *See*, *e.g*., *Super Film of Am., Inc. v. UCB Films, Inc.*, 219 F.R.D. 649, 657 (D. Kan. 2004) (for purposes of Federal Rule of Civil Procedure 26, "[c]omputerized data and other electronically-recorded information includes, but is not limited to: voice mail messages and files, back-up voice mail files, e-mail messages and files, backup e-mail files, deleted e-mails, data files, program files, backup and archival tapes, temporary files, system history files, web site information stored in textual, graphical or audio format, web site log files, cache files, cookies, and other electronically-recorded information") (citation and quotations omitted).

This Standard is not intended to suggest that electronic discovery is appropriate in all cases. There may be many cases in which electronic discovery is not warranted, in light of the amount in controversy or any number of other reasons.

The deletion of the former first sentence of subdivision (a)(i) is intended to clarify that the Standards do not create or codify law but rather defer to governing substantive law. The purpose of the list provided in subdivision (a)(i) is to assist counsel in protecting client interests under whatever strictures may be imposed by governing law. It is not to suggest that every item in the list is applicable in every case or that counsel has any duty to instruct a client to preserve any, much less every, item on the list. All duties are dictated by governing state or federal law and not by this or any other of these Standards.

Subdivision (a)(ii). Just as subdivision (a)(i) provides a checklist of the types of electronic data that counsel should bear in mind, Standard 29(a)(ii) provides a checklist of platforms and places where such data may be found. As with subdivision (a)(i), subdivision (a)(ii) does not create a preservation duty. Rather, it is another reference tool intended to be consulted once the duty to preserve electronic data has accrued under local law.

Subdivision (a)(iii). Standard 29(a)(iii) is simply a reminder that, as is well established in the case law, when a preservation duty has been triggered, it may be found to apply to "deleted" information remaining on the hard drive of the computer. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 313 n.19 (S.D.N.Y. 2003) ("The term 'deleted' is sticky in the context of electronic data. 'Deleting' a file does not actually erase that data from the computer's storage devices. Rather, it simply finds the data's entry in the disk directory and changes it to a 'not used' status -- thus permitting the computer to write over the 'deleted' data. Until the computer writes over the 'deleted' data, however, it may be recovered by searching the disk itself rather than the disk's directory. Accordingly, many files are recoverable long after they have been deleted -- even if neither the computer user nor the computer itself is aware of their existence. Such data is referred to as ‘residual data.’”)(internal quotations and citation omitted).

Former Subdivision (a)(ii). Former subdivision (a)(ii) has been moved to subdivision (b), where it conceptually belongs, as new subdivision (b)(i), with minor modification.

Former Subdivision (a)(iii). Former subdivision (a)(iii) has been deleted. As drafted, it appeared to create or codify a proposition of law, which is not the proper function of a Standard. Moreover, the law is evolving swiftly in the area of electronic discovery and, as stated, the deleted language is not necessarily good law. *See*, *e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (“because the cost-shifting analysis is so fact-intensive, it is necessary to determine what data may be found on the inaccessible media. Requiring the responding party to restore and produce responsive documents from a small sample of the requested backup tapes is a sensible approach in most cases”).

Subdivision(b)

Subdivision (b)(i). The second sentence of subdivision (b)(i) is the former subdivision (a)(ii), with the addition of a connecting dependent clause and the insertion of the modifier “ordinarily,” the latter in recognition of the fact that there may be unusual circumstances in which the stated presumption is obviously inapt. The new first sentence is added as a “best practices” reminder to counsel.

Subdivision (b)(ii). Subdivision (b)(ii) restates and expands the former subdivision (b)(i). The substantive additions are to remind counsel, first, that they have the option of specifying the format in which they wish to receive the desired data and, second, that they may want to inquire as to how the data were organized and where they were stored, since this information may be lost in electronic production.

Subdivision (b)(iii). Subdivision (b)(iii) combines the former subdivisions (b)(ii) and (b)(iv) in recognition of the fact that the factors applied by the courts in resolving motions to compel (or resist production) and motions to allocate costs are largely the same. Additionally, subdivision (b)(iii) expands the former subdivisions (b)(ii) and (b)(iv) to capture additional factors that experience and the developing case law have identified as pertinent to the court’s decision. Among the authorities relied on in the recitation of factors in this subdivision are: Federal Judicial Center, Manual for Complex Litigation § 11.446 (4th ed. 2004); 7 Moore’s

Federal Practice §§ 37a.30-33 (3d ed. 2004); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Computer Associates International, Inc. v. Quest Software, Inc.*, No. 02-C-4721, 2003 WL 21277129 (N.D. Ill. June 3, 2003); *Medtronic Sofamor Danek, Inc. v. Michelson*, No. 01-2373-M1V, 2003 WL 21468573 (W.D. Tenn. May 13, 2003); *Dodge, Warren, & Peters Ins. Servs. v. Riley*, 130 Cal. Rptr. 2d 385 (Cal. App. 2003); *Byers v. Illinois State Police*, 2002 WL 1264004 (N.D. Ill. June 3, 2002); *Southern Diagnostic Assocs. v. Bencosme*, 833 So.2d 801 (Fla. App. 2002); *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 2002 WL 246439 (E.D. La. Feb. 19, 2002); *Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. Jan 16, 2002); *In re CI Host, Inc.,* 92 S.W. 3d 514 (Tex. 2002); *In re Bristol-Meyers Squibb Secs. Litig.,* 205 F.R.D. 437 (D.N.J. 2002); *McPeek v. Ashcroft*, 202 F.R.D. 31 (D.D.C. Aug. 1, 2001); McCurdy *Group, LLC v. American Biomedical Group, Inc.*, Nos. 00-6183, 00-6332, 2001 WL 536974 (10th Cir. May 21, 2001).

Subdivision (b)(iv). Subdivision (b)(iv) is the former subdivision (b)(v) unchanged.

Former Subdivision (b)(ii). Former subdivision (b)(ii), together with former subdivision (b)(iv), is contained within new subdivision (b)(iii).

Former Subdivision (b)(iii). Former subdivision (b)(iii) has been deleted. As drafted, it appeared to create or codify a proposition of law, which is not the proper function of a Standard. Moreover, the law is evolving swiftly in the area of electronic discovery and, as stated, the deleted language is not necessarily good law. *See*, *e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003).

Former Subdivision (b)(iv). Former subdivision (b)(iv), together with former subdivision (b)(ii), is contained within new subdivision (b)(iii).

**30. Using Technology to Facilitate Discovery.**

**a. In appropriate cases, the parties may agree or the court may direct that some or all discovery materials that have not been stored in electronic form should nonetheless be produced, at least in the first instance, in an electronic format and how the expenses of doing so will be allocated among the parties.**

**b. A party serving written discovery requests or responses should provide the other party or parties with an electronic version of the requests or responses unless the parties have previously agreed that no electronic version is required.**

2004 Comment

Subdivision (a). This change is not substantive but merely clarifying. If the data sought in discovery already exist in electronic form, there is no need for a court order requiring their production in that format. This subdivision is directed at the production in electronic format of data not currently stored electronically. The amendment makes that clear.

Subdivision (b). Subdivision (b) has been amended to interpose a presumption where previously a request was suggested. As amended, this subdivision affirmatively recommends that counsel provide adversaries with discovery requests or responses in electronic format unless the parties have previously agreed to the contrary. Because the Standard is purely precatory, it imposes no duty. Rather, it recommends a practice for counsel to consider.

**31. Discovery Conferences.**

**a. At the initial discovery conference, the parties should confer about any electronic discovery that they anticipate requesting from one another, including:**

**i. The subject matter of such discovery.**

**ii. The time period with respect to which such discovery may be sought.**

**iii. Identification or description of the party-affiliated persons, entities or groups from whom such discovery may be sought.**

**iv. Identification or description of those persons currently or formerly affiliated with the prospective responding party who are knowledgeable of the information systems, technology and software necessary to access potentially responsive data.**

**v. The potentially responsive data that exist, including the platforms on which, and places where, such data may be found as set forth in Standard 29 (a).**

**vi. The accessibility of the potentially responsive data, including discussion of software, hardware or other specialized equipment that may be necessary to obtain access.**

**vii. Whether potentially responsive data exist in searchable form.**

**viii. Whether potentially responsive electronic data will be requested and produced:**

**A. In electronic form or in hard copy, and**

**B.If in electronic form, the format in which the data exist or will be pro**

**ix. Data retention policies applicable to potentially responsive data.**

**x. Preservation of potentially responsive data, specifically addressing (A) preservation of data generated subsequent to the filing of the claim, (B) data otherwise customarily subject to destruction in ordinary course, and (C) metadata reflecting the creation, editing, transmittal, receipt or opening of responsive data.**

**xi. The use of key terms or other selection criteria to search potentially responsive data for discoverable information.**

**xii. The identity of unaffiliated information technology consultants whom the litigants agree are capable of independently extracting, searching or otherwise exploiting potentially responsive data.**

**xiii. Stipulating to the entry of a court order providing that production to other parties, or review by a mutually-agreed independent information technology consultant, of attorney-client privileged or attorney work-product protected electronic data will not effect a waiver of privilege or work product protection.**

**xiv. The appropriateness of an inspection of computer systems, software, or data to facilitate or focus the discovery of electronic data.**

**xv. The allocation of costs.**

**b. At any discovery conference that concerns particular requests for electronic discovery, in addition to conferring about the topics set forth in subsection (a), the parties should consider, where appropriate, stipulating to the entry of a court order providing for:**

**i. The initial production of tranches or subsets of potentially responsive data to allow the parties to evaluate the likely benefit of production of additional data, without prejudice to the requesting party's right to insist later on more complete production.**

**ii. The use of specified key terms or other selection criteria to search some or all of the potentially responsive data for discoverable information, in lieu of production.**

**iii. The appointment of a mutually-agreed, independent information technology consultant pursuant to Standard 32(a) to:**

**A. Extract defined categories of potentially responsive data from specified sources, or**

**B. Search or otherwise exploit potentially responsive data in accordance with specific, mutually-agreed parameters.**

2004 Comment

The Federal Rules of Civil Procedure require a discovery conference at the outset of every case and prior to the filing of any discovery motion. Practices vary district by district. State court practice varies state by state, but a conference early in the case is sensible in connection with electronic discovery, regardless of whether it is compelled. Standard 31 focuses on effective use of discovery conferences to address electronic discovery issues.

Subdivision (a). Subdivision (a) focuses on the initial discovery conference. It specifies several categories of electronic discovery related matters that the parties should confer about at an initial discovery conference. It is intended to assist counsel and the court by providing a detailed array of potentially relevant issues to address. These include:

- Subject matter
- Relevant time period
- Identification of the party-affiliated persons or entities from whom electronic discovery may be sought
- Identification of those persons (including former employees) who are knowledgeable of the information systems, technology and software necessary to access potentially responsive data

- The universe of potentially responsive data that exist, including the platforms on which, and places where, such data may be found (including databases, networks, systems, servers, archives, back up or disaster recovery systems, tapes, discs, drives, cartridges and other storage media, laptops, PCs, Internet data, and PDAs)

- Accessibility issues, such as the software that may be necessary to access data

- Whether potentially responsive data exist in searchable form

- Whether potentially responsive electronic data will be requested and produced in electronic form or in hard copy

- Data retention policies

- Preservation issues, including preservation of data generated subsequent to the filing of the claim

- Possible use of key terms or other selection criteria to scour massive amounts of data for relevant information

Anticipating the privilege-related issues addressed in Standard 32, subdivision (a)(xii) suggests that the parties discuss whether they can agree on the names of unaffiliated information-technology consultants who would be capable of serving them jointly, either in a privately-retained or court-appointed capacity. In the same vein, subdivision (a)(xiii) proposes that the parties consider whether it would be desirable for them to stipulate to entry of a court order along the lines discussed in Standard 32(b) or (c).

Subdivision (b). Subdivision (b) focuses on discovery conferences relating to outstanding discovery requests (in common parlance, the “meet-and-confer”). It recognizes that there are additional issues for the parties to consider once discovery demands have been served and specific issues are on the table. Subdivision (b) anticipates a number of the privilege-related initiatives contained in Standard 32, recommending that the parties consider stipulating to a court order providing for:

- Initial production, on a without-prejudice basis, of subsets of electronic data to allow the parties to evaluate the likely benefit of production of additional data;

- The use of search terms or other selection criteria in lieu of production; or

- The appointment of an independent consultant pursuant to Standard 32

**32. Attorney-Client Privilege and Attorney Work Product.**

**To ameliorate attorney-client privilege and work product concerns attendant to the production of electronic data, the parties should consider, where appropriate, stipulating to the entry of a court order:**

**a. Appointing a mutually-agreed, independent information technology consultant as a special master, referee, or other officer or agent of the court such that extraction and review of privileged or otherwise protected electronic data will not effect a waiver of privilege or other legal protection attaching to the data.**

**b. Providing that production to other parties of attorney-client privileged or attorney work-product protected electronic data will not effect a waiver of privilege or work product protection attaching to the data. In stipulating to the entry of such an order, the parties should consider the potential impact that production of privileged or protected data may have on the producing party's ability to maintain privilege or work-product protection vis-à-vis third parties not subject to the order.**

**c. Providing that extraction and review by a mutually-agreed independent information technology consultant of attorney-client privileged or attorney work-product protected electronic data will not effect a waiver of privilege or work product protection attaching to the data.**

**d. Setting forth a procedure for the review of the potentially responsive data extracted under subdivision (a), (b), or (c). The order should specify that adherence to the procedure precludes any waiver of privilege or work product protection attaching to the data. The order may contemplate, at the producing party's option:**

**i. Initial review by the producing party for attorney-client privilege or attorney work product protection, with production of the unprivileged**

**and unprotected data to follow, accompanied with a privilege log, or**

**ii. Initial review by the requesting party, followed by:**

**A. Production to the producing party of all data deemed relevant by the requesting party, followed by**

**B. A review by the producing party for attorney-client privilege or attorney work product protection. Before agreeing to this procedure, the producing party should consider the potential impact that it may have on the producing party's ability to maintain privilege or work-product protection attaching to any such data if subsequently demanded by non-parties.**

**The court's order should contemplate resort to the court for resolution of disputes concerning the privileged or protected nature of particular electronic data.**

**e. Prior to receiving any data, any mutually-agreed independent information technology consultant should be required to provide the court and the parties with an affidavit confirming that the consultant will keep no copy of any data provided to it and will not disclose any data provided other than pursuant to the court's order or parties' agreement. At the conclusion of its engagement, the consultant should be required to confirm under oath that it has acted, and will continue to act, in accordance with its initial affidavit.**

**f. If the initial review is conducted by the requesting party in accordance with subsection (d)(ii), the requesting party should provide the court and the producing party an affidavit stating that the requesting party will keep no copy of data deemed by the producing party to be privileged or work product, subject to final resolution of any dispute by the court, and will not use or reveal the substance of any such data unless permitted to do so by the court.**

2004 Comment

Standard 32 deals with privilege and work product (collectively, “privilege”) concerns. It applies in the common situation in which electronic data must be extracted for production by an information technology (IT) expert not employed by the producing party. This scenario by definition raises a risk of waiver because privileged documents are being exposed to persons outside the privilege. Standard 32 sets forth three methods to ameliorate the risk of waiver. Each would be implemented by entry of a stipulated court order.

Subdivision (a). Subdivision (a) suggests that the parties consider having the court appoint a mutually-agreed IT consultant as a special master, referee, or other officer of the court, so that the consultant’s extraction and review of privileged electronic data will not effect a waiver. This approach would allow the third party consultant to pull and have access to privileged material (which may be included in any mass extraction of data) without risk that the holder of the privilege will have effected a waiver by permitting the third party to review them. Following extraction, the parties are then free to specify whatever protocol they prefer with respect to review of the data. This is addressed in subdivision (d).

Subdivision (b). Subdivision (b) addresses what is sometimes known as the “quick peek” approach to electronic discovery. Under the quick-peek scenario envisioned by subdivisions (b) and (d)(ii), the requesting party may have sufficient resources to perform or pay for the extraction, and the producing party may be inclined to allow its opponent to incur all expenses associated with doing so. At the same time, the producing party has no interest in waiving privilege. The parties therefore agree that the data will be turned over to the requesting party without review by the producing party; the requesting party will identify which documents it is interested in, and the producing party will then conduct a privilege review. Subdivision (b) captures the court order necessary to permit this procedure to proceed.

Under subdivision (b), the parties stipulate to an order providing that production of privileged electronic data will not effect a waiver. Note that this is different from the customary agreed order, which provides that inadvertent production will not effect a waiver, because parties using the subdivision (b) approach may know or be fairly certain that privileged material is contained in the mass of data to be extracted. Like that order, however, there is some question as to the effectiveness of such an order *vis-à-vis* a third party who subsequently seeks the disclosed data. Accordingly, there is an appropriate caution in the text of this subdivision and in subdivision (d)(ii).

Subdivision (c). Subdivision (c) is similar to subdivision (a) in that it envisions the use of an agreed third-party consultant. Under subdivision (c), unlike subdivision (a), that consultant is not appointed as a special master or other court officer. The court, for example, may not be inclined to appoint the consultant as a master or the parties may prefer to control the consultant directly. Subdivision (c) is also similar to subdivision (b) in that it envisions the entry of an order providing that review of intentionally-produced privileged data will not effect a waiver. But the reviewing party under subdivision (c) is an agreed-on consultant, not the opposition. As under both subdivisions (a) and (b), under subdivision (c) the parties are free to specify whatever protocol they prefer with respect to review of the data, following extraction. This is addressed in subdivision (d).

As observed in the comment to subdivision (b), *supra*, in current practice, there is no assurance that a stipulated order providing that inadvertent production does not effect a waiver will be effective against a claim of waiver asserted by a third party. Precisely the same risk is posed by the order envisaged by subdivision (c). Accordingly, it is imperative that litigants following either of these routes also have in place a confidentiality order as a second line of defense against inquisitive third parties. It is equally important that the litigants develop a protocol for, or otherwise instruct, the consultant to minimize the likelihood that the consultant will actually review (as opposed to extract) privileged material.

Subdivision (d). Subdivision (d) sets forth a pair of alternative procedures for the parties to consider with respect to the review of the data once the data have been extracted. Subdivision (d)(i) states that traditional approach, in which the extracted data are furnished to the producing party, who then conducts a review for responsiveness and privilege, and makes production of the data together with a privilege log.

Subdivision (d)(ii) identifies an unconventional approach that some parties prefer for financial reasons, as where there is an enormous amount of electronic data, little of it is likely to be either responsive or privileged, and little of that will fall in both categories. Under the (d)(ii) approach, the requesting party first reviews the data for responsiveness and provides to the producing party all data in which it is interested. The producing party then determines if any of the data in question are privileged. If so, the requesting party may not maintain copies of the privileged material unless and until a court sustains its objections to the claim of privilege. This procedure raises the risk of waiver of privilege identified in the comment to subdivision (b). Accordingly, the text of subdivision (d)(ii)(B) contains substantially the same caution as that set forth in subdivision (b).

Subdivision (e). Subdivision (e) suggests a reasonable precaution — that any IT consultant employed by the parties be required to execute an affidavit confirming that it will keep no copy of any data and will not disclose any data provided other than pursuant to the court's order or parties' agreement.

Subdivision (f). Subdivision (f) provides that, before receiving the data pursuant to subdivision (d)(ii), the requesting party is to execute an affidavit stating that it will keep no copy of data deemed by the producing party to be privileged, subject to final resolution of any dispute by the court. This precaution is appropriate in light of the trust that the producing party reposes in the requesting party under the quick-peek approach captured in subdivisions (b) and (d)(ii).

**33. Technological Advances. To the extent that information may be contained or stored in a data compilation in a form other than electronic or paper, it is intended that Standards 29-32 may be consulted with respect to discovery of such information, with appropriate modifications for the difference in storage medium.**

2004 Comment

Standard 33 recognizes the impracticability of keeping pace with technological change. New, non-electronic media may emerge for the creation or retention of electronic data. This Standard suggests that Standards 29-32 be consulted with respect to discovery of such data, subject to common sense modifications.