Best Practices in eDiscovery

June 24, 2025 @ 9:00 am – 12:15 pm

Moderated by: Richard Herrmann, Esq. and I. Connor Bifferato, Esq.

Panelists:
The Honorable Travis Laster – Delaware Court of Chancery
Ryan Newell, Esquire – Young Conaway Stargatt & Taylor
Ian McCauley, Esquire- Bayard PA
Joseph Leonard, Esquire – Morris James LLP
Tara Emory, Esquire – Covington & Burling LLP

Check-in: **8:30 a.m. – 9:00 a.m.**

9:00 – 10:30 a.m.

Prior to Litigation

- Best Practices is the preservation of evidence once litigation is reasonably anticipated. What to preserve? Who needs to preserve it? When does the obligation to preserve attach?
- What are the elements of early case assessments? What are the expectations of the clients and how does the law firm make it work?
- Should the process of data collection begin prior to litigation and if it does, when should it start and who should be involved?

Break: **10:30 – 10:45**

10:45 – 12:15

The eDiscovery meet and confer:

- What are the expectations of the Court and are they different than the marching orders from the client?
- The Discovery Process: How to ask for it, when to request it, and what to expect?
- When you don't get what you expect, how to move for it, when to do it and how to anticipate the "glass house" response?

- Special eDiscovery Masters: Do you want one? How to respect the process and how to avoid being exploited?
- Sanctions: Ensuring it is the “other guy” and how bad it can get.

This seminar offers 3.0 substantive credits to Delaware and Pennsylvania Attorneys. Live location available in Wilmington, livestream options in Georgetown, Dover and Seaford.

Resources for Best Practices in eDiscovery

DSBA CLE at Wilmington University

June 24, 2025

In re Facebook Inc. Derivative Litigation, 2025 WL 262194 (2025)

Daniel Jaiyong An v. Archblock, Inc., letter opinion regarding use of Generative AI (2025)

Goldstein v. Denner, 2024 WL 776033. (2024)

Goldstein v. Denner, 310 A.3d 548 (2024)

DANIEL JAIYONG AN v. ARCHBLOCK, INC., ORDER REQUIRING CERTIFICATION ON USE OF GENERATIVE AI, attached (2024)

Berger v. Graf Acquisition, LLC, et al., letter opinion (2024)

HUNTSMAN INTERNATIONAL, LLC v. DOW BENELUX N.V., opinion (2024)

WILLIAM J. BROWN, v. MATTERPORT, INC., memorandum opinion (2022)

THERMO FISHER SCIENTIFIC PSG CORPORATION, v. ARRANTA BIO MA, LLC,, opinion (2022)

In re Facebook, Inc., 2016 WL 7235222 (2016)

DR Distributors, LLC v. 21 Century Smoking, Inc., 513 F. Supp. 3d 839, 860 (N.D. Ill. 2021)

Mechel Bluestone, Inc. v. James C. Justice Companies, Inc., 2014 WL 7011195 (2014)

Klig v. Deloitte LLP, 2010 WL 3489735 (2010)

<u>Additional Materials</u>

Sedona Principles Third Edition

Orders of appointment/reference for special magistrates in Chancery and the CCLD (*Theranos; Tyson*)

Orders of appointment/reference for discovery facilitators in Chancery and the CCLD (*Facebook*; *KBranch*)

A Delaware Law Review article on the use of third-party neutrals like magistrates and facilitators

The Academy of Court Appointed Neutrals handbook on Appointing Masters and Other Judicial Adjuncts

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DANIEL JAIYONG AN,	)	
	)	
Petitioner,	)	
	)	
v.	)	C.A. No. 2024-0102-LWW
	)	
ARCHBLOCK, INC.,	)	
	)	
Respondent.	)	

ORDER REQUIRING CERTIFICATION ON USE OF GENERATIVE AI

WHEREAS, the petitioner filed a motion to compel discovery (Dkt. 25; the "Motion") that cites false legal authority and/or miscites legal authority;

WHEREAS, on April 4, 2025, this court issued a letter opinion explaining that the Motion was denied because the petitioner put forward false citations, presumably due to his use of generative artificial intelligence ("GenAI") in preparing the Motion;

WHEREAS, for purposes of this Order, GenAI means models or tools that generate new content, including text, based upon machine learning from existing data. GenAI includes, but is not limited to, ChatGPT, Google Gemini, Microsoft Copilot, Meta AI, and Thomson Reuters CoCounsel.

IT IS HEREBY ORDERED this 4th day of April, 2025, that:

1. The Motion is denied.

2. Any future court filings in this case by the petitioner that are prepared using GenAI must be accompanied by a certification, with a sworn statement by the petitioner, that:

   a. Confirms GenAI was used to prepare the court filing;

   b. Identifies the GenAI tool, model, or platform used;

   c. Identifies the specific pages, paragraphs, and/or sections of the court filing that were created using GenAI; and

   d. Confirms that any text in the court filing prepared using GenAI has undergone a human review for accuracy and completeness. This includes confirming that any citation to legal authority is accurate and that the authority stands for the cited proposition.

3. Failure to abide by this Order may lead to the issuance of sanctions.

/s/ Lori W. Will
Vice Chancellor Will

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

LORI W. WILL
VICE CHANCELLOR

LEONARD L. WILLIAMS JUSTICE CENTER
500 N. KING STREET, SUITE 11400
WILMINGTON, DELAWARE 19801-3734

April 4, 2025

Daniel Jaiyong An
27 Calle Orta 3D Apt.
Cond Los Nardos A
San Juan, Puerto Rico 00907

A. Thompson Bayliss, Esquire
Ben Lucy, Esquire
Abrams & Bayliss LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807

RE: *Daniel Jaiyong An v. Archblock, Inc.*,
C.A. No. 2024-0102-LWW

Dear Counsel and Mr. An:

I write regarding the petitioner's motion to compel discovery from the respondent (the "Motion").[1] There are several incorrect citations to case law in the Motion.[2] Some of the authorities do not stand for the cited propositions. Others are quoted for statements they do not contain.

For example:

- The Motion cites *Terramar Retail Centers, LLC v. Marion #2-Seaport Trust U/A/D/ June 21, 2002* to explain that "[t]he Court has broad discretion in resolving discovery disputes and fashioning appropriate

[1] Pet.'s Mot. to Compel Discovery (Dkt. 25) ("Mot.").

[2] The defendants likewise observe that the Motion "fabricates authority that does not exist." *See* Defs.' Opp'n to Pet.'s Mot. to Compel (Dkt. 26) ¶ 43.

remedies."[3] But *Terramar* addressed a motion to dismiss under Rule 12(b)(2). It did not make the point that the petitioner offers it for—or even involve discovery.

- The Motion twice cites *Deutsch v. ZST Digital Networks, Inc.* for the idea that the Court of Chancery disfavors parties' attempts to impose unilateral discovery stays.[4] It attributes the following quote to *Deutsch*: "A party cannot unilaterally decide to stay discovery."[5] That quote is not in *Deutsch*, which addressed a receiver's request for an arrest warrant for contempt. In fact, I am unable to find any case—in Delaware or elsewhere—with that quote.[6]

- The Motion cites *Production Resources Group, LLC v. NCT Group, Inc.* to support the argument that the Court of Chancery interprets Rule 26 "broadly to facilitate the free flow of information between parties."[7] It attributes the following quote to the decision: "Delaware courts have traditionally construed the scope of permissible discovery liberally."[8] That quote is not in *NCT Group*, or any other case I can find.[9]

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[3] Mot. ¶ 12 (purportedly citing *Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr. U/A/D/ June 21, 2002*, 2017 WL 3575712 (Del. Ch. Aug. 18, 2017)).

[4] *Id.* ¶¶ 20, 29 (purportedly citing *Deutsch v. ZST Digit. Networks, Inc.*, 2018 WL 3005822, at *3 (Del. Ch. June 14, 2018)).

[5] *Id.* ¶ 29 (purportedly quoting *Deutsch*, 2018 WL 3005822, at *3).

[6] I searched Westlaw's "All State & Federal" database for this quote. The only hit returned was the petitioner's own motion to compel. Interestingly, though, when prompted to find a Delaware decision with this quote, ChatGPT directed me to the *Terramar* decision for a similar cite.

[7] Mot. ¶ 11 (purportedly citing *Prod. Res. Grp., LLC v. NCT Grp.*, 863 A.2d 772, 802 (Del. Ch. 2004)).

[8] *Id.* (purportedly quoting *NCT Grp.*, 863 A.2d at 802).

[9] As with *Deutsch*, I searched Westlaw's "All State & Federal" database for the quoted text. The only hit was the motion at issue here. *See supra* note 6.

Based on these miscites, I suspect that the petitioner used generative artificial intelligence ("GenAI") to prepare his Motion, and that the program may have "hallucinated."[10]

The use of GenAI in legal work is not inherently problematic. It can benefit litigants and courts alike. GenAI streamlines legal research, assists in drafting documents, and supports efficient document review and summarization.[11] By enhancing the accessibility of legal services, GenAI can lower barriers to justice.

Still, GenAI carries significant risks to the legal system if it is used carelessly. The Motion exemplifies the potential downsides. Specifically, the petitioner failed to ensure the accuracy of material prepared with GenAI and submitted to the court. "Quite obviously, many harms flow from such deception—including wasting the opposing party's time and money, the Court's time and resources, and reputational harm to the legal system (to name a few)."[12]

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[10] "AI hallucination is a phenomenon wherein a large language model (LLM)—often a generative AI chatbot or computer vision tool—perceives patterns or objects that are nonexistent or imperceptible to human observers, creating outputs that are nonsensical or altogether inaccurate." *Harris as Next Friend of RNH v. Adams*, --- F. Supp. 3d. ---, 2024 WL 4843837, at *1 n.3 (D. Mass. Nov. 20, 2024) (quoting *What are Hallucinations?*, IBM, https://www.imb.com/topics/ai-hallucinations).

[11] *See, e.g.*, *Berger v. Graf Acquisition, LLC*, 2024 WL 4541011, at *2 (Del. Ch. Oct. 21, 2024) (discussing the efficiencies of technology-assisted document review).

[12] *Morgan v. Cmty. Against Violence*, 2023 WL 6976510, at *8 (D.N.M. Oct. 23, 2023); *see also Park v. Kim*, 91 F.4th 610, 615 (2d Cir. 2004) (recognizing that relying on "non-existent precedent generated by" AI is "an abuse of the adversary system" (citation

The petitioner's submission of a filing with fictitious citations is sanctionable.[13] "[I]t is improper and unacceptable for litigants—including pro se litigants—to submit 'non-existent judicial opinions with fake quotes and citations.'"[14] At the same time, "Delaware judges traditionally (and naturally) treat self-represented individuals with some degree of latitude" so long as the party's pro se status does not "impose[] on the party opponent in a material way."[15]

Mindful of these interests, I would have been inclined to deny the Motion without prejudice if the petitioner had been forthright. In his reply, however, the petitioner doubled down. He insists that though "some of the quoted language [in his cites] was paraphrased rather than verbatim, the principles from the cited cases

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omitted)); *Mata v. Avianca, Inc.*, 678 F.Supp.3d 443, 448-49 (S.D.N.Y. 2023) (discussing "harms flow[ing] from the submission of fake opinions").

[13] *Anon. v. New York City Dep't of Educ.*, 2024 WL 3460049, at *7 (S.D.N.Y. July 18, 2024) ("Sanctions may be imposed for submitting false and nonexistent legal authority to the Court." (citations omitted)).

[14] *Id.* (quoting *Mata*, 678 F. Supp. 3d at 448); *Morgan*, 2023 WL 6976510, at *7 ("Although courts 'make some allowances for the *pro se* [p]laintiff's failure to cite to proper legal authority,' courts do not make allowances for a [party] who cites to fake, nonexistent, misleading authorities." (quoting *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013))).

[15] *Govette v. Elec. Referral Manager, Inc.*, 2021 WL 2311956, at *2 (Del. Ch. June 7, 2021).

are directly relevant and on point."[16] That is untrue, as I explained above.[17] The Motion is therefore denied with prejudice.

The petitioner should consider himself warned.[18] Although I am not sanctioning the petitioner today, he must ensure that every future filing satisfies his obligations to this court, including that the filing is truthful, accurate, and cites to legitimate authorities.[19] Any future filing must also include the certification required by the order accompanying this letter opinion, which addresses the use of GenAI.[20] The petitioner's failure to comply with these requirements may result in sanctions, including monetary penalties, stricken filings, or the dismissal of this suit.

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[16] Pet.'s Reply in Supp. of Mot. to Compel Discovery (Dkt. 27) ¶ 27.

[17] *See supra* notes 3-9 and accompanying text (discussing cited cases).

[18] *Cf. Anon.*, 2024 WL 3460049, at *7 (declining to sanction a pro se litigant for citing fake authorities but warning that "the Court will not look kindly on similar infractions in the future"); *Transamerica Life Ins. Co. v. Williams*, 2024 WL 4108005, at *2 n.3 (D. Ariz. Sept. 6, 2024) (reminding a pro se litigant that she must comply with procedural rules and that "future filings with citations to nonexistent cases may result in sanctions such as dismissal of her claims"); *Dukuray v. Experian Info. Sols.*, 2024 WL 3812259, at *11 (S.D.N.Y. July 26, 2024) (acknowledging the possibility that a pro se plaintiff was "not aware of the risk that ChatGPT and similar AI programs are capable of generating fake case citations" but "warning" the plaintiff that "further filings with citations to nonexistence cases may result in sanctions").

[19] He must also abide by his meet and confer obligation before filing a discovery motion and understand that this court is inclined to enter a confidentiality order in advance of any discovery.

[20] *See* Order Requiring Certification on Use Of Generative AI (Dkt. 39). This order is based upon a thoughtful precedent authored by Judge Brennan in the Superior Court. *See Lillard v. Offit Kurman, P.A.*, 2025 WL 800833 (Del. Super. Mar. 12, 2025) (ORDER).

III. CONCLUSION

The petitioner's Motion is denied. Similar misconduct by the petitioner in the future will yield sanctions. Any future filing must include the requisite certification on GenAI usage, as set out in the order accompanying this letter opinion.

Sincerely yours,

/s/ Lori W. Will

Lori W. Will
Vice Chancellor



Appointing Masters

and

Other Judicial Adjuncts

A Benchbook for Judges and Lawyers

2020 Edition

APPOINTING MASTERS AND OTHER JUDICIAL ADJUNCTS

A Benchbook for Judges and Lawyers

Table of Contents

Acknowledgements

Introduction

Section 1: Types of Appointments

1.1 Settlement Master
1.2 Discovery Master
1.3 Privilege Review Master
1.4 Electronic Discovery Master
1.5 Coordinating Master
1.6 Trial Master
1.7 Expert Advisor
1.8 Technology Master
1.9 Monitor
1.10 Class Action Master
1.11 Claims Administrator
1.12 Auditor/Accountant
1.13 Receiver
1.14 Criminal Case Master
1.15 Conference Judicial Adjunct
1.16 Ethics Master
1.17 Supreme Court Master
1.18 Appellate Master
1.19 Specialized Masters

Section 2. Appointment Orders
2.1 Order of Appointment
2.2 Checklist of Provisions
2.3 Contents of Order
2.4 Sample Form Master Model
2.5 Affidavit of Masters

Section 3. Ethical Issues and Practical Concerns
3.1 Sources of Ethical Rules for Judicial Adjuncts
3.2 Basic Ethical Rules for Judicial Adjuncts
Rule 1: Dignity and Integrity of the Court
Rule 2: Competence and Diligence
Rule 3: Propriety
Rule 4: Neutrality/Absence of Conflict or Appearance of Conflict
Rule 5: Disqualification
Rule 6: Confidentiality
Rule 7: Compensation/Time-keeping/Gifts and Favors
3.3 Checklist: Ethical Rules to Consider for Specific Circumstances

Section 4. Managing the Unmanageable: Special Masters—A Special Solution
An Article on the ABA Guidelines and Report for the Appointment and Use of Special Masters in Federal and State Civil Litigation

Section 5. Table of State Court Provisions Governing Judicial Adjuncts

Section 6. Articles, Books, Websites, and Literature About Masters

Appendices

Appendix 1 Sample Master Appointment Orders
Appendix 2 ABA Guidelines/Report for Special Masters in Civil Litigation
Appendix 3 Fed. R. Civ. P. 53
Appendix 4 28 U.S.C. § 455 Disqualification of Judge
Appendix 5 Model Rule of Professional Conduct Rule 1.12
Appendix 6 Code of Conduct for United States Judges
Appendix 7 Code of Conduct for Judicial Employees
Appendix 8 The Code of Ethics for Arbitrators in Commercial Disputes
Appendix 9 Forum Code of Conduct for Arbitrators
Appendix 10 JAMS Arbitrators Ethics Guidelines
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Contact Roger.Haydock@MitchellHamline.edu or
rhaydock@gmail.com (952.906.9700)

Acknowledgements

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We first acknowledge the federal and state court judges and magistrates who pioneered the use of masters and who presently appoint them to serve in many cases. The following judges and magistrates have been leaders in the use of masters: Michael J. Davis, Paul L. Friedman, Ronald Hedges, Lamar Pickard, Sam C. Pointer, Jr., Manuel Real, Lee Rosenthal, Barbara Jacobs Rothstein, Shira Scheindlin, and Jack B. Weinstein.

Other important contributors include Sol Schreiber, Frances McGovern, and Kenneth R. Feinberg, who have each served as special masters in many groundbreaking cases and who have given generously of their time to teach and write about special master work.

This book was originally written by several members of the publications committee of the Academy of Court-Appointed Masters (ACAM). The authors and editors included: Roger Haydock, David Cohen, Martin Quinn, and Randi Ilyse Roth. Cynthia Gilbertson and Ann Pagel Newman provided editing assistance. Other members of the initial ACAM publications committee included: David Ferleger, Mike Frascogna, Rick Grauer, Greg Miller, Gale "Pete" Peterson, and Clarence Sundram.

Subsequent editions were revised and edited by members of the Publication Committee including Roger Haydock, Cary Ichter, David Tenner, David Cohen, and Howard Marsee. Additional ACAM masters contributed to the development of this book including A.J. Nichols and members of the Board of Directors: Martin Quinn, Lewis Remele, Richard Levie, David Herr, Margaret Farrell, Francis McGovern, Patrick Juneau, John Upchurch, and Sherry Wetsch. Staff and students of the Mitchell Hamline College of Law and the Mitchell Hamline Journal of Law and Practice also contributed to this edition, including Neal Axton, Mary Ann Archer, Cal Bonde, Andrew Haugen, Nathan Swanson, Ann Gennell, and Jessica Martin.

The first National Conference for Special Masters was held in October 2004 at the William Mitchell College of Law, with assistance from the Federal Judicial Center and the Forum. That conference led to the creation of ACAM and subsequently to the development of this book.

Academy of Court-Appointed Masters

Introduction

This book provides invaluable information to judges and lawyers regarding the best use of masters. Our civil justice system needs the services that judicial adjuncts can provide courts, parties, and the public. This benchbook explains how masters can be used to fulfill our mission to provide a just, speedy, and inexpensive determination for all disputes.

This reference book is designed to help federal and state court judges and lawyers: (1) decide whether and when to appoint a master; (2) draft effective appointment orders; and (3) anticipate and effectively address ethical issues and practical concerns that arise in master work. These materials may also be helpful to prospective judicial adjuncts and to parties considering whether to request the appointment of an adjunct.

Sections of this book comprise an invaluable resource regarding master practice. These sections include a summary of Federal Rule 53 and the rules or statutes authorizing masters and judicial adjuncts in every state. Another section includes a description of legal articles and literature on masters. These unique resources are timely updated and provide a comprehensive research source.

All courts have the power to appoint a master or other type of judicial adjunct to assist with civil and criminal cases. Rule 53 of the Federal Rules of Civil Procedure governs the appointment of masters in federal court. In state courts, various procedural rules or state statutes empower judges to obtain assistance. State court judicial officers may be designated as special masters, masters, referees, commissioners, magistrates, or another name for a judicial adjunct.

Many federal and state court judges use masters, and more will do so in the future. Because of their substantial caseloads, many judges and magistrate judges do not have sufficient time for the tasks inherent in the administration of complex, multi-party, and class action cases. Judges need to conserve and preserve their time to rule on pretrial matters and to try cases. And, with demanding dockets and diminishing court budgets, judges are looking for places to turn for help.

Judicial adjuncts can provide courts, parties, and lawyers with essential services without tapping into court resources. Masters can act as mediators and settle civil and criminal cases away from the courthouse; they can monitor discovery and resolve time-consuming disputes; they can help with the growing burden on courts caused by electronically stored information (ESI) discovery problems; they can be assigned trial duties; they can testify as expert witnesses, especially in cases involving technical and specialized issues; they can help coordinate multi-party, multi-jurisdictional, and multi-district litigation (MDL) cases; they can administer settlement claims; and they can monitor compliance with a court order or settlement agreement; they can serve in criminal cases.

An adjunct can markedly reduce the burden on a judge, the judge's staff, and the court's administrative staff. Parties and lawyers recognize that the appointment of a master can save them substantial fees and costs, and can lead to a much quicker resolution of their disputes. Judges who use professional and experienced masters know how valuable they can be to case handling and resolution.

Section 1 of this book summarizes the various roles judicial adjuncts can serve.

Section 2 covers appointment orders. It explains the rules that govern appointment orders and provides a detailed checklist of items to include in an appointment order and includes a checklist.

Section 3 covers ethical issues and practical concerns. It explains the sources of authority for ethics rules that govern judicial adjuncts, gives an overview of the rules, and provides a checklist for judges to review with their adjuncts early in the appointment.

The checklists provided in Sections 2 and 3 focuses on key issues in the appointment process. Although the checklists are tailored to federal rules, they are also relevant in state courts because of the substantial similarity between state and federal rules, and because the same practical issues will arise in all jurisdictions.

Section 4 includes an article about the newly established *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Litigation*. The Guidelines and the Report appear in Appendix 2.

Section 5 details provisions of Federal Rule 53 and the respective rules and statutes empowering masters and judicial adjuncts for every state. These provisions permit comparative reviews among various procedural and substantive master regulations.

Section 6 contains citations and concise descriptions of articles, books, websites, and literature about the use of masters.

Finally, several appendices provide sample appointment orders, Federal Rule 53 with Comments, and codes of professional conduct

The goal of the Academy of Court-Appointed Masters (ACAM) is to assist the courts in providing all parties with a fair, affordable, and speedy resolution of litigation. ACAM members are available to serve as masters and as other types of judicial adjuncts. ACAM's website provides information about the Academy and links to contact information and credentials for our members: http://www.courtappointedmasters.org. ACAM is very pleased to provide judges and lawyers with this book. We hope that you find it to be a practical, easy-to-use reference.

Academy of Court-Appointed Masters

Section 1
Types of Appointments

Judicial adjuncts can take on several roles. Often—but not exclusively—these roles arise in multi-district litigation (MDL) cases, class actions, or other complex or multi-party litigation. Judicial adjuncts appointed pursuant to Rule 53 of the Federal Rules of Civil Procedure are referred to as "masters." Other adjuncts can have titles that reflect the nature of their role, such as monitor, mediator, facilitator, or arbitrator. Sometimes one adjunct will play multiple roles throughout the lifetime of a complex case. Experienced masters may also be appointed to assist with non-litigation cases, involving community, social, or governmental disputes. Generally, masters and other judicial adjuncts serve in one or more of the following roles.

1.1 Settlement Master

The use of settlement masters to reach global settlements in large-scale tort litigation dates back at least to the Dalkon Shield litigation and Agent Orange litigation beginning in the late 1980s. Courts have come to realize that the appointment of a neutral third-party who is granted quasi-judicial authority to act as a facilitator between the court and the parties can provide a useful approach to reaching a settlement. This is especially true in complex litigation involving numerous parties, or when the dispute has matured and individual settlements become repetitive and time-consuming.

1.2 Discovery Master

The use of discovery masters to manage and supervise complex cases is relatively commonplace. The discovery master can manage a discovery plan, issue orders resolving discovery disputes, make recommendations to the judge, and monitor ongoing discovery. Sometimes a discovery master will sit in on depositions that are particularly contentious. Because the authority of the master is limited to managing discovery, the courts and parties often view the discovery master's role as less judicial and more managerial in nature.

1.3 Privilege Review Master

A related type of discovery master specializes in reviewing documents and data that contain or likely contain privileged information. These masters review the potentially relevant discovery *in camera* and provide the court with findings or recommendations regarding the legal status and factual nature of the information.

1.4 Electronic Discovery Master

Modern cases typically deal with electronically stored information (ESI) issues. Recent amendments to the discovery rules contain provisions regarding how best judges and lawyers can resolve problems that arise from determining what information is readily accessible or recoverable, what is an appropriate native format, and whether meta data needs to be disclosed. A master experienced in both discovery procedures and computer systems and software can be an invaluable help to a court and the parties. Substantial time and money can be saved by the use of a master to help resolve ESI disputes.

1.5 Coordinating Master

The term 'coordinating master' includes masters whose work requires them to coordinate activities in a variety of ways. For example, they may meet and confer with lawyers to develop proposed orders to submit to the judge; they may chair a liaison committee of lawyers; or they may work on other aspects of complex cases or the claims administration of class action settlements. They may also coordinate events in cases that are filed in both state and federal courts to provide uniform and efficient procedures.

1.6 Trial Master

Masters may be assigned trial duties. Parties may agree to have their dispute heard by a master, either for final decision or for findings and recommendations subject to review by the court. Trial masters may also compile and interpret technical or complex evidence or voluminous data. The need for a trial master may arise in trade secret suits, particularly to deal with confidentiality matters. In patent suits, an experienced patent attorney may be asked to assist with or conduct a *Markman* hearing and prepare findings and recommendations on disputed claim terms.

1.7 Expert Advisor

It has long been considered within a court's inherent authority to engage the help of an expert advisor. An expert advisor can act as a judicial tutor, providing guidance on complex or specialized subjects. Foreign law cases may create a need for an expert advisor. When an advisor is utilized, the trial court conducts the trial with support from the advisor.

1.8 Technology Master

In cases intertwined with technological, scientific, or complex issues, masters with technical expertise can be very helpful. Adjuncts who are experts in civil procedure as well as experts in a technical field can provide the courts and parties with the expertise necessary to understand and

resolve problems. Lawyers who retain their own experts also benefit from the contributions made by these independent court appointed experts.

1.9 Monitor

Masters can be helpful after the case is resolved to ensure that a court's order or settlement agreement is implemented properly and complied with over time. In civil cases, masters are often appointed to monitor compliance with structural injunctions, especially those involving employment or other organizational change, those involving accommodation facilities, or those requiring reform in government agencies. By surveying the defendant's remedial efforts, the master can facilitate judicial evaluation of compliance with equitable relief.

1.10 Class Action Master

Masters assisting in a class action may perform a variety of tasks specific to this context, including drafting or implementing a notice to the class or supervising settlement fairness hearings under Fed. R. Civ. P. 23.

1.11 Claims Administrator

Claims administration masters can be used to administer the settlement of class action claims or to distribute money damages to a class of deserving recipients. These masters can help select, work with, and monitor the claims administration organization that administers and manages the details of the settlement. This function has become more commonplace as modern litigation comprises federal and state cases requiring this work.

1.12 Auditor/Accountant

A judicial adjunct can assist the court by providing an accounting of complex financial information. For example, a court might ask an adjunct to sort out a plaintiff's claims of damage or a defendant's ability to pay.

1.13 Receiver

An adjunct can be asked by the court to function as a receiver. As a receiver, the adjunct would hold and preserve property until a dispute is resolved. A receiver can be given quite extensive responsibilities. In some cases, they have been appointed to run government or business entities.

1.14 Criminal Case Master

In criminal cases, masters can assist the court in administering the resolution of cases. They can assist the prosecution and the defense in negotiating plea bargains while preserving and protecting the interest of the public and the constitutional rights of the defendant. Judicial adjuncts may also help in administering or monitoring non-jail sentencing terms and conditions. A master may accompany a peace officer who is conducting a search for documents in the possession of certain professionals, such as attorneys or clergy. The master's role is to review sensitive documents and secure them until a court determines if the items are privileged.

1.15 Conference Judicial Adjunct

A settlement master in a criminal case is sometimes referred to as a conference judicial adjunct. These masters help to settle cases, often employing a community approach that involves the prosecutor, defendant, victim, and their families. Witnesses such as police officers sometimes participate. Conference judges are often able to obtain results that are more creative and more beneficial to the victims and their families than a typical plea bargain.

1.16 Ethics Master

A state court may appoint a Master to review evidence in connection with ethics complaints against attorneys. These Masters will recommend whether disciplinary action against an attorney is appropriate, and if so, what sort. This process may supplement the work done by an ethics board.

1.17 Supreme Court Master

The United States Supreme Court and state Supreme Courts have original jurisdiction over certain types of cases—for example, election disputes, or boundary disputes between states. Because these cases are outside of the Supreme Court's normal appellate function, courts will often appoint a Master to secure and review an initial evidentiary record, manage discovery and motion practice as would a trial court, and recommend a final disposition.

1.18 Appellate Master

Masters may be appointed to assist appellate parties and courts regarding appropriate matters that need resolution, including motions, procedural issues, and final settlement.

1.19 Specialized Masters

An expert master may also be appointed in situations other than litigation. The skills masters employ in judicial cases also apply to non-litigation matters. Masters have been appointed by governors, mayors, governmental officials, non-profit organizations, and private entities to solve problems. Congress and legislatures have also referred significant social problems to experienced masters. These experts can: work with groups and individuals to resolve disputes; distribute funds contributed in response to tragedies, and use master expertise in other types of controversies. Often, masters provide pro bono services in these situations.

Academy of Court-Appointed Masters

Section 2
Appointment Orders

2.1 Order of Appointment

The appointment order is the fundamental document that establishes the judicial adjunct's powers, limits, and responsibilities. This order is often referred to as an "order of reference." Section 2 of this book provides a checklist of the items that should be included in an appointment order (specifying which items are mandatory under the federal rules) and explains each item in detail. This form may also be used use in state court cases, modified as necessary to conform to the applicable state provisions.

In all jurisdictions, a court has the authority to appoint master if the parties consent. In some jurisdictions or in some cases, the court may only appoint a master to perform specific duties if all the parties consent. The issue of whether consent is necessary may depend upon the applicable law and what specific services the master will provide.

Federal Rule 53(a)(1)(a) empowers a judge to appoint a master to perform duties consented to by the parties. Rule 53(a)(1)(b) allows for an appointment of a master to conduct appropriate trial proceedings or to recommend findings of fact if an exceptional condition exists or there is a need to perform an accounting to resolve a difficult damage computation. And Rule 53(a)(1)(c) permits a master appointment to address pretrial and post-trial matters in certain circumstances. Neither of the latter two subsections requires the consent of the parties, although a court may seek their agreement to an appointment, and many judges prefer to do so.

In state court cases, the applicable law may or may not require consent, or an appellate decision may have decided whether consent is needed. A court usually has the power by applicable rule, statute, or judicial decision to appoint a master. If a party does object, the duties of the master can be limited to those that are appropriate under the circumstances. If all parties object, the court may reconsider the appointment.

Federal Rule 53(b)(1) requires the judge to give notice to the parties and an opportunity to be heard about the appointment of a master. This subsection implies that the court may appoint a master even if the parties object as long as the appointment does not conflict with the provisions of Rule 53(a) explained above. Court decisions that review the propriety of appointment orders, approve appointments that serve the interests of the court and the parties,

that do not deny a party rights, and that do not cost an unreasonable amount. In cases involving a government party, sovereign immunity may prevent a court from requiring the government to pay a master's fee.

2.2 Checklist of Provisions

Rule 53 of the Federal Rules of Civil Procedure currently prescribes a number of specific items an appointment order must include and suggests others that should be included. A copy of Rule 53 appears at Appendix 3, along with the relevant Advisory Committee Notes published with the Amendments. The Notes deserve attention because they elaborate on many of the issues addressed in the rule.

The following checklist summarizes the information provided in this Chapter. Some of the optional provisions appear in state court master appointment orders.

Table 1. Checklist of Items to Include in Appointment Orders

✓	Step	Provision for Appointment Order	Section of Rule 53	Mandatory to Include in Appointment Order According to Federal Rules?
☐	1	Direct master to "proceed with all reasonable diligence"	Rule 53(b)(2)	Yes
☐	2	Identify the master's duties	Rule 53(b)(2)(A)	Yes
☐	3	Identify when *ex parte* communication may occur	Rule 53(b)(2)(B)	Yes
☐	4	Identify what records the master must maintain	Rule 53(b)(2)(C)	Yes
☐	5	Describe how the master's rulings will be received and reviewed	Rule 53(b)(2)(D)	Yes
☐	6	Describe clearly how the master will be compensated	Rule 53(b)(2)(E)	Yes
☐	7	Statement that appoint-ment of a master is appropriate	Rule 53(a)(l)	No, but good practice
☐	8	Identify source of authority for appointment (Rule 53, or other source)		No, but good practice

✓	Step	Provision for Appointment Order	Section of Rule 53	Mandatory to Include in Appointment Order According to Federal Rules?
☐	9	Modify master's authority to impose sanctions for failure to cooperate	*See* Rule 53(c)	No, but default standard set out in Rule 53(c) will apply unless modified.
☐	10	List hearing procedures and location, including a possible initial meeting with the master	Optional	Optional
☐	11	Describe how documents submitted by parties/ lawyers may be provided to master	Optional	Optional
☐	12	Describe scope of discretion and authority of master not previously covered in Step 2	Optional	Optional
☐	13	Certification, Oath, or Bond may need to be included under state law	Optional	Optional
☐	14	Include any stipulations agreed to by parties and approved by court relating to the master	Optional	May be included in separate Order
☐	15	Include disclosure affidavit	Rule 53(b)(3)	No, but the rule requires that an affidavit be filed. It is good practice to either attach the affidavit to the appointment order or reference it's filing in the appointment order.

2.3 Contents of Order

This section explains the major contents of an appointment order.

- **1. An appointment order must include the "magic words" directing the master to proceed with all reasonable diligence.**

  An appointment order must specifically "direct the master to proceed with all reasonable diligence." Fed. R. Civ. P. 53(b)(2). Some states require the master to proceed with due diligence and with the least practicable delay.

- **2. An appointment order must identify the master'sduties.**

  Rule 53 provides that the order appointing a master must state "the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c)." Fed. R. Civ. P. 53(b)(2)(A). The rule adds that the court

also appoint a master to "perform duties consented to by the parties." Fed. R. Civ. P. 53(a)(1)(A).

An appointment order could simply contain a broad clause stating that the master may "perform any and all duties assigned to the master by the court (as well as any ancillary acts required to fully carry out those duties) as permitted by both the Federal Rules of Civil Procedure and Article III of the Constitution." But a more specific order would help ensure that the court, the master, and the parties have a common understanding of the master's role. Where appropriate, the order language may also establish timetables and deadlines for performance of the master's duties.

A master's duties and responsibilities might include:

a. Case-management duties

- Assisting with preparation for attorney conferences (including formulating agendas), court scheduling, and negotiating changes to case management orders.
- Establishing discovery and other schedules; reviewing and attempting to resolve informally any discovery conflicts (including issues such as privilege, confidentiality, and access to documents and records); and supervising discovery.
- Overseeing the management of docketing, including the identification and processing of matters requiring court rulings.
- Compiling data and assisting with the interpretation of scientific and technical evidence or making findings and recommendations with regard to such evidence.
- Helping to coordinate federal, state, and international litigation.
- Chairing committees of lawyers regarding issues of common interest.
- Working with lawyers to draft and submit proposed orders to the judge.

b. Discovery-Related Responsibilities

- Coordinating disclosure and discovery schedules with the lawyers.
- Resolving motions and disputes related to discovery and disclosures.
- Assisting with the formulation of a discovery plan to be submitted to the court.
- Establishing discovery schedules as needed and resolving time, method, and other conflicts.
- Assisting with issues raised by electronically stored information, native formats, meta data, and related matters.
- Monitoring depositions.

c. Settlement-related duties

- Serving as arbitrator, mediator, or neutral in the context of a settlement.

- Proposing structures and strategies for settlement negotiations on the merits and on any subsidiary issues, and evaluating class and individual claims.
- Administering alternative dispute procedures such as summary jury trials, mini-trials, and settlement conferences.

d. Decision-making duties

- Assisting with legal analysis of motions or other submissions, whether made before, during, or after trials, and making recommended findings of fact and conclusions of law and proposed orders.
- Resolving non-dispositive motions, including motions related to discovery and disclosures.
- Interpreting any agreements reached by the parties.
- Issuing reports and recommendations.
- Holding trial proceedings and making or recommending findings of fact on issues to be decided by the court without a jury, if warranted by the conditions set out in Rule 53(a)(1)(B) & (C).
- Pursuing investigative or quasi-prosecutorial roles.
- Recommending that sanctions be imposed on a party or lawyer for wrongdoing.

e. Post-trial duties

- Proposing structures and strategies for attorney's fee issues and fee settlement negotiations, reviewing fee applications, and evaluating individual claims for fees (*see also* Fed. R. Civ. P. 54(d)(2)(D)).
- Administering, allocating, and distributing funds and other relief.
- Adjudicating eligibility and entitlement to funds and other relief.
- Monitoring or enforcing compliance with structural injunctions.
- Directing, supervising, monitoring, and reporting on implementation and compliance with the court's orders, and making findings and recommendations on remedial action if required.

f. Duties that might arise in any role

- Assisting with responses to media and legislative inquiries.
- Making formal or informal recommendations and reports to the parties, and making recommendations and reports to the court, regarding any matter pertinent to the proceedings.
- Communicating with parties and attorneys as necessary in order to permit the full and efficient performance of the master's duties.

❑ 3. An appointment order must identify when *ex parte* communication may occur.

Rule 53 directs the court to set forth "the circumstances—if any—in which the master may communicate *ex parte* with the court or a party." Fed. R. Civ. P. 53(b)(2)(B). The propriety of a master's *ex parte* communication with the court or a party depends on the duties the master is assigned and on the language in a court order governing *ex parte* communications. For example, if the master's duties include settlement negotiations, *ex parte* communication with a party will be necessary and appropriate. *Ex parte* communication with the court may be necessary and appropriate if the master's duties include assisting the court with legal analysis or providing the court with technical expertise. Where a master performs multiple roles, *ex parte* communication with the court might be appropriate concerning some topics but not others. The order might permit *ex parte* communication with the court about one type of matter but not another type. Where a master plays a settlement role, the appointment order should spell out clearly the extent to which the master may report to the court on the progress of settlement discussions. The formula adopted should accommodate the court's need to know the progress of the mediation, and the parties' need to negotiate in confidence. One court adopted the following approach:

> The Mediator shall periodically report to the Court the status of the Mediation process, but those reports should be limited to matters general to the Mediation and its progress and not to specifics or to the merits of the Mediation or to the respective parties' positions or statements made during the course of the proceedings. The Mediator shall not, without the prior written consent of both parties, disclose to the Court any matters which are disclosed to him by either of the parties or any matters which otherwise relate to the Mediation.

In re Propulsid Prods. Liab. Litig., MDL No. 1355, 2002 WL 32156066 (E.D. La. Aug. 28, 2002).

The court should modify any restrictions on *ex parte* communications as needed if the master's duties change over time. *See, e.g., id.* (after the master received additional mediation duties, the scope of *ex parte* communications with the parties and the court changed).

Ex parte communication may be appropriate in the following circumstances:

a. With the court

- To assist the court with legal analysis of the parties' submissions;
- To assist the court with procedural matters, such as apprising the court regarding logistics, the nature of the master's activities, and management of the litigation;

- To assist the court's understanding of highly specialized matters;
- To inform the court of matters that may affect the progress of the case or the court's docket.

b. With the parties

- To arrange scheduling matters;
- To ensure the efficient administration and management of the litigation;
- To resolve privilege or similar questions, and in connection with *in camera* inspections;
- To discuss the merits of a particular dispute, for the purpose of resolving that dispute, but only with the prior permission of the opposing counsel involved;
- To work with subcommittees consisting of a subset of the lawyers in a case;
- To obtain information from lawyers regarding scheduling and hearing agendas; and
- To discuss other matters with the permission of the lead lawyers.

❑ 4. An appointment order must identify what records the master should maintain.

Rule 53 states that the court must define "the nature of the materials to be preserved and filed as the record of the master's activities." Fed. R. Civ. P. 53(b)(2)(C). The court may not want to obligate the master to maintain certain records and can specify in an appointment order that certain records need *not* be maintained. The court may amend the record requirements if the master's role changes. *See, e.g., In re: Propulsid Prods. Liab. Litig.,* MDL No. 1355, 2004 WL 1541922 (E.D. La. June 25, 2004) (setting out additional record-keeping requirements after the master was charged with new duties of administering a settlement program). Rule 53 also specifies that the order must state the "method of filing the record." Fed. R. Civ. P. 53(b)(2)(D).

The following are examples of records that a master might be ordered to maintain or file with the court, under seal or by regular filing:

- Normal billing records of time spent on the matter, with reasonably detailed descriptions of activities and matters worked on.
- Formal written reports or recommendations regarding any matter.
- Informal notes regarding any matter.
- Documents created by the master that are docketed in any court.
- Documents received by the master from counsel or parties.

- A complete record of the evidence considered by the master in making or recommending findings of fact.

The Advisory Committee Notes to the 2003 Amendments recommend that appointment orders "routinely" require masters to maintain a record of evidence considered unless there is no prospect that the master will make or recommend evidence-based findings of fact.

❑ 5. An appointment order must describe how the master's rulings will be received and reviewed.

Rule 53 directs the court to state "the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations." Fed. R. Civ. P. 53(b)(2)(D). Rule 53 also provides for how and when parties may object to the master's rulings, and prescribes the default standard of review. Fed. R. Civ. P. 53(f). Specifically, the order should include:

- The mechanism the master should use to file and serve any formal order, finding, report, or recommendation (*e.g.*, whether the master will receive assistance from the clerk of court).
- A reference to Rule 53(f)(2), explaining that a party may file an objection to a master's order, finding, report, or recommendation no later than 21 days after a copy is served (under the Federal Rule). The order may set out a different time period.
- The consequences of failure to timely object to a master's ruling (*e.g.*, permanent waiver of any objection to the master's orders, findings, reports, or recommendations, such that they are deemed approved, accepted, and ordered by the court).
- The standard of review the court will employ if a party objects to a master's finding or conclusion, as set out in Rule 53(f) (3, 4, 5). The default standard under the rule is *de novo* for findings of fact and conclusions of law, and abuse of discretion for procedural matters. The parties may consent otherwise regarding the standard of review for findings of fact or procedural matters; however, the *de novo* standard of review for conclusions of law may not be changed by agreement of the parties.
- Whether and under what circumstances the parties consent to a different standard of review or waive the right to object to the master's findings or conclusions.

❑ 6. An appointment order must clearly describe how the master will be compensated.

Rule 53 states that the court must set forth "the basis, terms, and procedure for fixing the master's compensation." Fed. R. Civ. P. 53(b)(2)(E). Rule 53(g)(3) also refers to related issues, such as how payment obligations will be allocated between the parties.

In setting forth the basis, terms, and procedures for compensation, the order should address some or all of the following:

- Include an explicit statement that the court has "consider[ed] the fairness of imposing the likely expenses on the parties" and has taken steps to "protect against unreasonable expense or delay." Fed. R. Civ. P. 53(a)(3).
- Identify the master's hourly rate or an index that will be used to determine it (e.g., the Laffey Index, available at the Department of Justice web site, http://www.laffeymatrix.com/see.html
- Identify the sorts of expenses the master may and may not charge to the parties (*e.g.*, travel, overhead).
- Describe how the parties will allocate the cost of the master, and whether this allocation will change (*e.g.*, whether a re-allocation will be made after a verdict or settlement is reached).
- Specify whether the master's appointment is for a term certain (*e.g.*, a given number of hours, or until a certain task is completed), and how and whether that term may be renewed.
- Address whether the master will receive a one-time or continuing retainer.
- Address when and to whom the master must submit an itemized statement of fees and expenses.
- Address whether the master should provide only summary fee statements to the parties and provide complete statements to the court under seal (because itemized statements might reveal proper confidential communications).
- Establish deadlines for the payment to the master by the parties of their share of any amounts owed.
- Establish the payment mechanism (e.g., whether payments are made directly to the master or deposited into the court registry for later disbursement).
- Address whether the master may hire, and obtain reimbursement or compensation for, support personnel (e.g., assistants, accountants, IT consultants, attorneys).

- **7. An appointment order should include a section establishing that appointment of a master is appropriate.**

  Rule 53 does not require that the appointment order state that appointment of a master is appropriate—but it is good practice to make that statement and specify why it is

appropriate. Rule 53 provides that masters are appropriate only in limited circumstances. Unless a statute provides otherwise, a court may appoint a master to:

a. Perform duties consented to by the parties;

b. Hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by

   (1) Some exceptional condition, or
   (2) The need to perform an accounting or resolve a difficult computation of damages; or

c. Address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

Fed. R. Civ. P. 53(a)(1).

In the context of pretrial conferences, Rule 16 further states that "the court may take appropriate action, with respect to … the advisability of referring matters to a magistrate judge or master" and with respect to "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." Fed. R. Civ. P. 16(c)(2) (H, L). In summary, if the court needs help because a case presents difficult, complex, or labor-intensive issues, appointment of a master is appropriate. *See also* Fed. R. Civ. P. 54(d)(2)(D) (regarding the use of masters to determine attorney fees).

In various appointment orders, judges have used the language set out below to establish that appointment of a master is appropriate in a specific case.

- The presence of multiple parties requires extra administrative work.
- The legal or factual issues will be complicated or protracted.
- There will be discovery or evidentiary problems requiring continued oversight.
- There will be management and communication issues necessitating supervision.
- Matters between and among the parties and lawyers need to be coordinated.
- A mediator is needed to assist with the potential settlement of some or all issues.
- There will be hearings that need to be conducted.
- Proposed findings of fact and conclusions of law need to be recommended.
- Resolution of issues will require specialized or technical knowledge, or a detailed understanding of foreign law.
- To fully understand and oversee the dispute, the court will need the help of expert advisors or consultants.

- Timely or expedited decisions on masses of individual claims cannot be made without additional resources.
- The case entails complicated or detailed computations or accountings.
- The case will require a high degree of coordination with other lawsuits or courts.
- The case will involve lengthy oversight and administration of settlement funds.
- The case will require the monitoring of complex injunctive relief.
- The criminal case necessitates the assistance of a judicial adjunct.

❑ 8. An appointment order should identify the source of authority for the appointment.

Rule 53 does not require that the appointment order specify the source of authority for the appointment, but specifying the source of authority is good practice. Authority for the appointment could come from a variety of sources, including:

- Federal Rule of Civil Procedure 53, or analogous state rule;
- A statute, or legislative or governmental enactment;
- The inherent authority of the court; or
- Consent of the parties.

"Beyond the provisions of [Rule 53] for appointing and making references to Masters, a Federal District Court has `the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.'" *Schwimmer v. United States,* 232 F.2d 855, 865 (8th Cir. 1956) (quoting *In re Peterson,* 253 U.S. 300, 312 (1920)); *see Ruiz v. Estelle,* 679 F.2d 1115, 116 n.240 (5th Cir. 1982) (same), *amended in part, vacated in part,* 688 F.2d 266 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1983) (same); *Reed v. Cleveland Bd. of Educ.,* 607 F.2d 737, 746 (6th Cir. 1979) (noting that the authority to appoint "expert advisors or consultants" derives from either Rule 53 or the court's inherent power). The court's inherent power to appoint a master, however, is not without limits. *See Cobell v. Norton,* 334 F.3d 1128, 1142 (D.C. Cir. 2003) (stating that in the absence of consent by the parties, the inherent authority of the court does not extend to allow appointment of a master to exercise "wide-ranging extrajudicial duties" such as "investigative, quasi-inquisitorial, quasi-prosecutorial role[s]").

❑ 9. An appointment order should include a provision restating or modifying the master's authority to impose sanctions for failure to cooperate.

It is expected that parties and lawyers will cooperate with a master, nevertheless, they may engage in inappropriate behavior. Rule 53 addresses this possibility: if appropriate, a master may "impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a

nonparty." Fed. R. Civ. P. 53(c). It is good practice to state this authority explicitly in the appointment order and provide that the master shall have the full cooperation of the parties and their counsel, including making available appropriate agents, employees, and personnel and access to facilities, files, databases, or documents the master requires to fulfill all functions.

- ❑ **10. An appointment order may include information relating to hearings the master may conduct.**

  There are a variety of hearings a master may preside over. Some will be informal, while others will resemble trial proceedings. It may be advisable to include in the order rules and procedures that govern these hearings or that may be established by the master, the location of a hearing if it is to occur in a place different than the court location, and related matters.

  The prior Rule 53 required an initial meeting with the master. Many found such a meeting to be a productive start to working with the master and the court may consider requiring or suggesting such a meeting in the appointment order.

- ❑ **11. An appointment order may specify how parties and lawyers may submit documents and information to a master.**

  A master may obtain a copy of documents filed with the clerk or administrator of the court; or it may be more efficient for a master to receive submissions from the parties without those documents having to be formally filed. The nature and purpose of the materials may determine the method of submission. Masters can readily receive information and documents by email or other form of electronic messaging, and these methods can be listed in the order.

- ❑ **12. An appointment order may include provisions regarding the discretion and authority of a master.**

  The scope of a master's discretion and authority may be included in the previous portion of the order detailing the duties of a master. Or it may be advisable or necessary to add additional and further descriptions regarding the general or specific responsibilities of the master. Some state court orders provide that: The Master shall have the discretion to determine the appropriate procedures for the completion of the Master's duties and shall have the authority to take all appropriate measures to perform the assigned duties.

- ❑ **13. An appointment order may include references to a certification, oath or bond.**

  State statutes or rules may require a master to provide a certification or oath which states, in summary, that the master is familiar with the applicable standards and grounds for conflicts of interest and disqualification, and that nothing known to the master disqualifies the master. Or a master may need to procure a surety bond for the benefit of the parties, especially if the master is performing receivership or accounting duties.

❑ 14. An appointment order may include any stipulations regarding the master.

The parties may have agreed to provisions and procedures regarding the role of the master which the court has approved. It may be wise to include these stipulations in the appointment order to avoid any later confusion caused by parties and lawyers entering the case after the appointment order takes effect.

❑ 15. An appointment order should include or reference a disclosure affidavit.

Rule 53(b)(3) provides that the court may enter an appointment order "only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455." *See also* Rule 53(a)(2) (discussing grounds for disqualification). It is good practice to attach the affidavit to the appointment order, or make reference in the appointment order to the affidavit's separate filing. While the court and the master should review § 455 very carefully to ensure there are no grounds for disqualification, or that all such grounds have been disclosed to the parties, the key averment in the master's affidavit could directly state:

> I have thoroughly familiarized myself with the issues involved in this case. As a result of my knowledge of the case, I can attest and affirm that I know of no non-disclosed grounds for disqualification under 28 U.S.C. § 455 that would prevent me from serving as the master in the captioned matter.

In addition to thinking carefully about the items to include in the appointment order, the judge and the master should give advance consideration to ethical issues and practical concerns that may arise during the course of the appointment. Section 3 explains these considerations and concerns.

2.4 Sample Form Master Appointment Order

The following form provides an example of a model appointment form. It includes language to fit most cases. It will be need to be tailored to meet the specific needs of each case.

MASTER APPOINTMENT ORDER

This matter was submitted to the undersigned upon *[choose one:* the joint request of the parties / the consent of the parties / the motion of _____ / the Court's own initiative].
Counsel appearances were:
Based upon the *[recite in some detail the basis of the Court's authority for appointment, such as the consent of the parties, the press of business, the needs of the case, or other demanding circumstances], and having given the parties notice and an opportunity to be heard:*

IT IS HEREBY ORDERED:

1. Authority for and Scope of the Appointment. [Name of Master] of [Address] is appointed pursuant to [insert appropriate Rule citation] as Master for the purpose of *[specify scope of roles and duties in detail - options include the following]:*

a. Directing, managing, and facilitating settlement negotiations among the parties. *[Settlement Master]*
b. Managing and supervising discovery and resolving all issues related to arising out discovery disputes or disputes concerning disclosures. *[Discovery Master]*
c. Coordinating activity on the case as follows _____. *[Coordinating Master]*
d. Hearing evidence on [specify issue(s)] and issuing [choose one: findings and recommendations / a final decision NOTE*: The second option is available only with the consent of the parties]. [Trial Master]*
e. Compiling and interpreting *[specify the technical, voluminous, or complex evidence that is in need of review]* and issuing findings and recommendations for the Court regarding _____. *[Hearing Master]*
f. Advising the Court on the subject of_____. *[Expert Master]*
g. Managing and supervising issues involving electronic information or data. *[Technology Master]*
h. Serving as Monitor as described in paragraph _ of [*choose one:* The Consent Decree / this Court's Order dated _____]. *[Monitor]*
i [Drafting / implementing] a notice to the class. *[Notice Master]*
j. Supervising a hearing regarding the fairness of the Settlement Agreement to the class and issuing findings and recommendations for the Court. *[Class Action Master]*
k. Administering the distribution of [settlement / damage] payments to Plaintiffs. *[Claims Administrator]*
l. Providing an accounting of *[specific evidence]. [Auditor]*
m. Acting as a receiver for *[identify the subject of the receivership]* pending the resolution of this dispute. *[Receiver]*

In addition, the Master may perform any duties consented to by the parties [pursuant to Rule 53(a)(1)(a)].

[The following provision is required in federal court:] The Master is directed to proceed with all reasonable diligence to complete the tasks assigned by this order.

2. Master's Duties and Authority. [Master's Name] shall have the sole discretion to determine the appropriate procedures for resolution of all assigned matters and shall have the authority to take all appropriate measures to perform the assigned duties. The Master shall have all of the authority provided to masters set forth in [Federal Rule 53 (c)]. The Master may by order impose upon a party any sanction other than contempt and may recommend a contempt sanction against a party and contempt or any other sanction against a non-party.

3. Ex Parte Communications.

(a) With the Court. The Master may have ex parte communications with the Court regarding *[describe]* [Examples - 1) whether or not a particular dispute or motion is subject to the scope of the Master's duties; 2) assisting the Court with procedural matters, such as apprising the Court regarding logistics, the nature of the Master's activities, and management of the litigation; 3) any matter upon which the parties or their counsel have consented; 4) the application of Rule 53; and 5) any matter, the subject of which is properly initiated by the Court.]

(b) With the Parties and Counsel. The Master may have ex parte communications with the parties or counsel regarding *[describe]* [Examples - 1) purely procedural or scheduling matters; 2) resolution of privilege or similar questions, in connection with *in camera* inspections, upon notice to the other parties; and 3) any matter upon which the parties or their counsel have consented.] [Example - The Master shall be allowed to engage in ex parte conversations with counsel for the parties relating to settlement efforts and/or conferences.]

4. Materials to be Preserved and Filed as the Record of the Master's Activities. [Example - The parties shall file with the Clerk all papers filed for consideration by the Master. The Master shall also file with the Clerk all reports or other communications with the undersigned. [Fed. R. Civ. P. 53(b)(2)(C)]. [Example - All orders of the Master shall be filed with the Court, unless the parties or their counsel have agreed otherwise. It shall be the duty of the parties and counsel, not the Master, to provide for any record of proceedings with the Master, as approved by the Master. The Master shall not be responsible for maintaining any records of the Master's activities other than billing records. In the event of any hearing where evidence is taken, it shall be the duty of the parties and counsel to preserve any exhibits tendered or rejected at the hearing.]

5. Review of Master's Reports, Orders or Recommendations. Any party seeking review of any ruling of the Master shall [*specify appeal procedure and timing, and in the absence of special considerations, the default procedures of Rule 53(g) may be implemented, either by reference to the rule or incorporation*]:

5a. Alternative 1: comply with the procedures and within the time limits specified in Fed. R. Civ. P. 53(g).

5b. Alternative 2: be deemed to have stipulated that findings of fact made by the Master will be final [shall be reviewed for clear error], except for a party who objects to this portion of

the Order, in writing and filed with the Court, within 7 days of the date of this Order.

6. Compensation. The Master shall be paid $ ____ per hour for work done pursuant to this Order, and shall be reimbursed for all reasonable expenses incurred. The Master shall bill the parties on a monthly basis for fees and disbursements, and those bills shall be promptly paid [50% by the plaintiffs and 50% by the defendants / *or identify an alternative arrangement]*. As to any particular portion of the proceedings necessitated by the conduct of one party or group of parties, the Master can assess the costs of that portion of the proceedings to the responsible party or parties. The Court will determine at the conclusion of this litigation whether the amounts paid to the Master will be borne on the 50/50 basis or will be reallocated. Upon the failure of a party to timely pay the Master's fees, the Court may enter a judgment in favor of the Master and against the non-paying party.

7. The Master is authorized to hire _____ to assist in completion of the matters referred to the Master by this Order. The reasonable fees of _____ shall be paid by the parties in accord with the procedure set forth in Paragraph 6, above.

8. Master's Affidavit. The Master's Affidavit required by F.R.C.P. 53(b)(3)(A) has been executed and has been filed. *(See following form affidavit).*

Dated this ____day of _____, 20___. Judge_____

2.5 Affidavit of Master

AFFIDAVIT OF [NAME]

TENDERED PURSUANT TO FED. R. CIV. P. 53

STATE OF _____)
) ss. AFFIDAVIT
COUNTY OF _____)

[Name], being first duly sworn according to law, states the following:

1. I am an attorney at law, duly licensed to practice law in the States of [____]. My bar admissions are as follows:
   [list]

2. I have thoroughly familiarized myself with the issues involved in the case captioned [__]. As a result of my knowledge of that case, I can attest and affirm that there are no non-disclosed grounds for disqualification under 28 U.S.C. §455 that would prevent me from serving as the Master in the captioned matter.

_____

Sworn to before me and subscribed in my presence this day of _____, 20__.

_____
Notary Public

AFFIDAVIT DECLARATION OF [NAME]

STATE OF _____)
) ss. AFFIDAVIT
COUNTY OF _____)

[Name] declares under penalty of perjury that:

I have thoroughly familiarized myself with the issues involved in the case captioned above. As a result of my knowledge of this case, I can attest and affirm that there are no non-disclosed grounds for disqualification under 28 U.S.C. §455 that would prevent me from serving as the Master in this matter.

Date_____ Name_____

Academy of Court-Appointed Masters

Section 3
Ethical Issues and Practical Concerns

This Section specifies the sources of ethical rules for judicial adjuncts, posits a set of basic ethics rules that apply to masters, and provides a checklist of difficult situations the master may face in the course of the appointment.

What are the rules that should govern the master's behavior? The first rule, of course, is that the master should work with the judge to understand how the judge would like particular situations handled. Beyond that, what codes govern a master's conduct? What impact do ethical rules and norms have a master's work?

The conduct of a master or other judicial adjunct reflects significantly on the judge. Regardless of restrictions on *ex parte* conversations between the judge and the master, the parties (and the world) will likely believe that, to some extent, the master is able to speak for the judge and is informed by the judge's thinking. Parties read volumes into what the master says, does, and even hints at. In high-profile litigation, even the master's political, social, and religious activity might come under scrutiny. The press, legislative entities, and regulatory entities that cannot contact the judge about the case may try to contact the master about the case, hoping that the master will answer questions the judge will not answer.

3.1 Sources of Ethical Rules for Judicial Adjuncts

Several different types of rules and codes of professional responsibility apply or can be construed to apply to a judicial adjunct's conduct, including:

a. **Applicable State Rules of Professional Responsibility.** If the judicial adjunct is a lawyer, the master is governed directly by these rules. The state equivalent of Rule 1.12 of the Model Rules of Professional Responsibility may be particularly relevant to a lawyer serving as a judicial adjunct. (Rule 1.12 of the Model Rules of Professional Responsibility can be found at Appendix 6 or at: http://www.abanet.org/cpr/mrpc/mrpc_toc.html.)

b. **Code of Conduct for United States Judges ("CCUSJ"), 28 U.S.C.S. app. (2005).** The Compliance section of this Code makes it binding on federal court-appointed special masters, except for the limitations on: certain financial dealings; certain fiduciary activities; the practice of law; participation in political, civic, charitable, and legal organizations; and

limitations on the receipt of gifts. (CCUSJ can be found at Appendix 7 or at: http://www.uscourts.gov/library/conduct.html.

c. **Code of Conduct for Judicial Employees ("CCJE").** Judicial adjuncts ordinarily are not judicial "employees." However, the CCJE states that:

> Contractors and other nonemployees who serve the Judiciary are not covered by this code, but appointing authorities may impose these or similar ethical standards on such nonemployees, as appropriate.

A judge may choose to impose portions of this code on a master or other judicial adjunct. *See* CCJE, Introduction If 2. (CCJE can be found at Appendix 8 or at: https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges

d. **28 U.S.C. § 455.** This statute governs the disqualification of federal judges. In addition, Federal Rule of Civil Procedure 53(b)(3) states that a court may appoint a master "only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455." (Section 455 can be found at Appendix 5 or at: http://codes.lp.findlaw.com/uscode/28/I/21/455.)

e. **Federal Rules of Civil Procedure.** Rule 53 directly governs masters. (Rule 53, along with the Advisory Committee Notes, can be found at Appendix 4 and at: http://www.uscourts.gove/rules/.

f. **Codes of Conduct for ADR organizations such as FORUM, JAMS, and AAA.** Several alternative dispute resolution (ADR) organizations have their own ethical guidelines for their neutrals. *See, e.g.*:

> ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes, particularly Canons I-VII, available at Appendix 9 and at: https://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/code_annotated_updated_feb_2013.authcheckdam.pdf
>
> Forum's Code of Conduct for Arbitrators, available at Appendix 10 and at: https://www.adrforum.com
>
> Forum's Code of Procedure, particularly Part IV "Arbitrators," Rules 20-24, available at: https://www.adrforum.com/assets/resources
>
> JAMS Arbitrators Ethics Guidelines, particularly Guidelines I-IX, available at Appendix 11 and at: http://www.jamsadr.com/arbitrators-ethics/

JAMS Comprehensive Arbitration Rules and Procedures, particularly Rule 30, available at: http://www.jamsadr.com/rules-comprehensive-arbitration/#Rule%2030

g. **Applicable state court statutes and regulations.** There may be additional statutes or regulations in a given state that could serve as a source for ethical guidelines.

Which ethical code(s) govern a judicial adjunct's conduct depends on the nature of the appointment and on the rules that the judge has chosen to impose. To some extent, this is uncharted territory, and overlapping rules from several different codes may apply to some situations. For example, Rule 53 of the Federal Rules of Civil Procedure governs certain special masters, but may not govern monitors or other adjuncts not appointed explicitly under Rule 53. Moreover, depending on the situation, a judge may choose to impose certain provisions of the Federal Code of Conduct for Judicial Employees on a master in one case but not in another case.

Table 2 summarizes the potentially applicable codes.

Table 2: Codes that Govern the Conduct of Judicial Adjuncts

Code	Acronym	Applicability	Notes
State Rules of Professional Responsibility		All lawyers	If case is venued in jurisdiction in which adjunct is not licensed, which states' rules apply?
Code of Conduct for United States Judges	CCUSJ	See Compliance Section—except for a few specified exceptions, this code applies to special masters in federal court	
Code of Conduct for Judicial Employees	CCJE	Federal judges may impose these or similar standards on non-employee judicial adjuncts	
28 U.S.C. § 455	Disqualification Statute	Fed. R. Civ. P. 53(b)(3) makes this binding on special masters in federal court	

Code	Acronym	Applicability	Notes
Rule 53 of the Federal Rules of Civil Procedure	Rule 53	Binding on special masters in federal court	Unclear to what extent: (1) 2003 amendments to the rule apply to masters who were appointed before the rule was amended; and (2) the rule applies to adjuncts who are not "special masters."
Rules of specific organizations like the American Bar Association, American Arbitration Association, JAMS, and Forum	ABA, AAA, JAMS, FORUM	Applies to neutrals who work for those organizations	
State rules			There may be specific state rules that govern the conduct of judicial adjuncts in that state

3.2 Ethical Rules for Judicial Adjuncts

The basic ethical rules listed below draw on all of the sources of authority explained above. This list is intended to serve as a common-sense guide for the appointing judge and the judicial adjunct to review together when the adjunct's appointment begins and refer to later as necessary.

The basic rules for judicial adjuncts are summarized in the following table.

Table 3: Basic Rules for Judicial Adjuncts

	Rule	Sources of Authority
Rule 1	Preserve Dignity and Integrity of the Court	CCUSJ, Canon 1; CCJE, Canon 1
Rule 2	Competence and Diligence	Fed. R. Civ. P. 53(b)(2); CCUSJ, Canon 3.A (1)-(5); CCJE, Canons 3.B and C; JAMS Guidelines, II; ABA/AAA Code, Canons I.B and IV.
Rule 3	Propriety	CCUSJ, Canon 2; CCJE, Canons 2, 3 and 4; ABAIAAA Code, Canon I.A.

Rule 4	Neutrality/Absence of Conflict or Appearance of Conflict	Fed. R. Civ. P. 53(a)(2) and (b)(3); CCUSJ, Canon 3.C; CCJE, Canon 3.F; ABA/AAA Code, Canons I and II; JAMS Guidelines, V.
Rule 5	Disqualification	28 U.S.C. § 455; CCUSJ, Canon 3.C; ABA/AAA Code, Canons I.H and I; JAMS Guidelines, VII.

Rule 1: Dignity and Integrity of the Court

Judicial adjuncts should observe high standards of conduct so as to preserve the integrity, dignity, and independence of the appointing court and judicial system.

Sources: CCUSJ, Canon 1; CCJE, Canon 1.

Rule 2: Competence and Diligence

2A. A judicial adjunct should accept only assignments: (1) for which the adjunct is suited by education, training, and experience; (2) that the adjunct is able to undertake and complete in a competent, professional, and timely fashion; and (3) as to which the adjunct is physically and mentally able to meet the reasonable expectations of the parties and the appointing court.

2B. A judicial adjunct must maintain professional competence and diligently discharge assigned responsibilities in a prompt, fair, nondiscriminatory, and professional manner.

2C. A judicial adjunct must be patient, dignified, respectful, and courteous; apply an even-handed and unbiased process; and treat all parties with respect.

2D. A judicial adjunct must maintain order and decorum in judicial proceedings.

Sources: Fed. R. Civ. P. 53(b)(2); CCUSJ, Canon 3.A(1)-(5); CCJE, Canons 3.B and C; ABA/AAA Code, Canons I.B and IV.

Rule 3: Propriety

3A. A judicial adjunct should respect and comply with the law and should at all times act in a manner that promotes public confidence in the integrity and impartiality of the adjunct and the judiciary.

3B. A judicial adjunct should not engage in any activities that would call into question the propriety of the adjunct's conduct in carrying out the responsibilities assigned by the appointing court.

3C. A judicial adjunct should not allow family, social, or other relationships to influence official conduct or judgment, nor should an adjunct use the prestige of the office for private gain or to advance or appear to advance the private interests of others.

3D. A judicial adjunct should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

Comment: Whether an organization practices invidious discrimination is often a complex question to which judicial adjuncts should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather depends on factors such as how the organization selects members; whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members; and whether it is in fact an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. [CCUSJ, comment to Canon 2C]

Sources: CCUSJ, Canon 2; CCJE, Canons 2, 3 and 4; ABA/AAA Code, Canon LA.

Rule 4: Neutrality/Absence of Conflict or Appearance of Conflict

4A. A judicial adjunct should avoid conflicts of interest in the performance of official duties. A conflict of interest arises when a master knows that the master or a close relative might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts would question the adjunct's ability to properly perform the assigned responsibilities.

4A. Before an appointment, a judicial adjunct should disclose to the appointing court and the parties all matters required by applicable law, any actual or potential conflict of interest or relationship, or other information of which the adjunct is aware that reasonably could lead a person to question the adjunct's impartiality. This duty of disclosure continues throughout the assignment and requires the prompt disclosure of any interest or relationship that arises that the party recalls or discovers.

Sources: Fed. R. Civ. P. 53(a)(2) and (b)(3); CCUSJ, Canon 3.C; CCJE, Canon IF; ABAIAAA Code, Canons I and II

Rule 5: Disqualification

5A. Federal: A master may not have a relationship with the parties, counsel, action, or appointing court that would require disqualification of a judge under 28 U.S.C. § 455, unless waived by the parties with the court's approval after full disclosure of any potential grounds for disqualification.

5B. State: A judicial adjunct shall comply with the applicable state statutes and court rules governing disclosures, conflicts of interest, and disqualification.

5C. Financial interest: A judicial adjunct may not own a legal or equitable interest, however small, in a party, nor have a relationship with a party such as serving as its director or advisor.

Note: Some exceptions to this rule include: *de minimus* ownership of mutual funds that hold a party's securities, unless the judicial adjunct participates in management; holding office in an educational, religious, or similar organization that owns securities; and similar exceptions for government securities, mutual insurance companies, depositors in mutual savings associations, or similar associations, unless the outcome of a proceeding could substantially affect the value of the securities.

Sources: 28 U.S.C. Section 455; CCUSJ, Canon 3.C; ABAIAAA Code, Canons I.H and I

Rule 6: Confidentiality

6A. A judicial adjunct should avoid making public comment on the merits of a pending action, except as appropriate in the course of official duties.

6B. A judicial adjunct should never disclose confidential information received in the course of official duties, except as required in the performance of those duties.

6C. These restrictions on disclosure continue to apply after the conclusion of the judicial adjunct's service, unless modified by the appointing judge.

Sources: CCUSJ, Canon 3.A(6); CCJE, Canon 3.D; ABAIAAA Code, Canon VI.B

Rule 7: Compensation/Time-keeping/Gifts and Favors

7A. A judicial adjunct's compensation for official duties shall be determined by the appointing court.

7B. Reimbursement for expenses incurred in the course of service as a judicial adjunct or for outside activities shall be clearly disclosed and shall be limited to the actual costs and overhead the judicial adjunct reasonably incurs.

7C. A judicial adjunct should not solicit or accept anything of greater than *de minimus* value from anyone doing business with the judicial adjunct or with the appointing court, or from anyone whose interest may be substantially affected by the performance of the adjunct's official duties. Upon completion of an assignment, a judicial adjunct may not accept gifts of any kind until a period of time has elapsed sufficient to negate any appearance of a conflict of interest.

Note: A federal special master is explicitly exempt from the limitations on receipt of gifts that apply to judges. The Compliance section of the CCUSJ makes Canon 5.C.4 relating to gifts inapplicable to special masters. Nonetheless, good practice in dealing with proffered gifts, meals, trips, and favors is to decline them.

Sources: Rule 53(h); CCUSJ, Compliance Section (B); CCJE, 4.E; ABAIAAA Code, Canon VII

3.3 Checklist: Ethical Rules to Consider for Specific Master Roles

The general ethics rules discussed above have very different practical applications in different types of adjunct appointments. In some cases, the judge may have strong concerns about the adjunct's outside political activity or interactions with the press, while in other cases these concerns may be minimal.

The judge and judicial adjunct should meet at the beginning of the appointment to consider the items on the following checklist. Each item on this list may require a particularized interpretation of the general ethical rules, depending on the circumstances of the case. This list is based on practical problems that have arisen in actual adjuncts' work.

Table 4. Checklist of Ethical Considerations and Practical Concerns

✓	Step	Issue
☐	1	Conflicts of Interest
☐	2	Relationship With the Judge
☐	3	Relationship With the Parties
☐	4	Relationships Among Neutrals
☐	5	Gifts and Favors
☐	6	Interactions With Media
☐	7	Interactions With Legislative and Investigative Bodies
☐	8	Political Activity
☐	9	Timekeeping and Compensation
☐	10	Outside Work

The following section lists questions that the judge and the adjunct should discuss about each of the items listed above. The judge and adjunct should consider these issues as they apply not only to the adjunct but also the adjunct's staff.

❑ 1. Conflicts of Interest

Are there any potential conflict issues that the adjunct should disclose?

- Has the adjunct ever been involved in litigation with either party, or with any subsidiary of either party?
- Does the adjunct have any ownership interest in either party?
- Does the adjunct sit on any boards or advisory committees that might have any jurisdiction over or connection to either party or the matter at issue?
- Is there any reason that the adjunct could not be fair and impartial to all parties?

❑ 2. Relationship With the Judge

a. What are the circumstances under which the judge and the adjunct should or should not be allowed to communicate *ex parte?*

- Regarding scheduling?
- Regarding the overall progress of any negotiations?
- Regarding the progress of the adjunct's work?
- Regarding the parties' positions in any disputes?
- Regarding legal matters pending before the judge?
- Regarding other matters?

b. What rules will govern the adjunct's relationship with the judge's law clerk? In a complex case that lasts many years, will the adjunct help orient each successive law clerk to the history and posture of the case?

c. How will these rules about the adjunct's *ex parte* communication with the judge be conveyed to the parties?

d. Are there any concerns about social relationships between the adjunct and the judge?

❑ 3. Relationship With the Parties

a. What are the circumstances under which the parties and the adjunct should or should not be allowed to communicate *ex parte?*

- Are there negotiating roles in which *ex parte* communications are appropriate?
- Are there adjudicative roles in which *ex parte* communications should be prohibited?
- Given the adjunct's multiple roles, how can the adjunct properly isolate confidential information received through *ex parte* communications? For example, can the adjunct have *ex parte* conversations while wearing one hat, and then effectively function as a neutral fact-finder while wearing a different hat?

b. Are there any concerns about social relationships between the adjunct and a party?

❑ 4. Relationships Among Neutrals

a. To what extent may multiple adjuncts assigned to the same case discuss confidential aspects of the case with each other?

b. Do additional ethical considerations arise where one neutral serves as an "appellate" entity reviewing the work of another neutral?

❑ 5. Gifts and Favors

a. What rule will the judge impose about gifts and favors?

- Are *de minimus* gifts allowed from the parties to the adjunct?
- If yes, what is the definition of *"de minimus?"*
- Should the rule be stricter if the government is a party?

b. Are *de minimus* gifts allowed between neutrals?

c. Are there any types of potential "favors" that the adjunct would need to discuss with the judge before accepting?

d. If the adjunct's fees are used to pay vendors (such as a class action administration firm), are there restrictions on gifts and favors that the adjunct may accept from the vendors?

❑ 6. Interactions With the Media

a. Reactive Media

- How should the adjunct respond to calls from the media about the case?
- May the adjunct comment about the case to the extent that information is in the public domain, or solely to explain procedural issues?
- May the adjunct talk with the media about the case to a greater extent than the appointing judge would talk with the media?

b. Proactive Media

- If media reports about the case are inaccurate, may the adjunct, for example, write an op-ed piece to try to correct the reporting?
- May the adjunct work through the media to create a better public perception of the case?
- Would the answer be different if the parties agree to the adjunct taking on this work?

❑ 7. Interactions With Legislative and Investigative Bodies

a. May the adjunct respond to inquiries about the case from legislators?

- May the adjunct say more to legislators than the appointing judge would say?

b. May the adjunct appear and testify before a legislative committee if asked to do so?

- If so, what are the types of questions that the adjunct must refuse to answer?
- For each category of refusal, what privilege will be claimed?

c. If the Government Accountability Office (GAO), for example, investigates the case, should the adjunct cooperate in the investigation?

- What types of materials should the adjunct provide?
- What materials are privileged? And what is the source of the privilege?

❑ 8. Restrictions on Political Activity and Other Outside Activities

Unlike a federal judge or judicial employee, a federal court-appointed master is not automatically required to refrain from partisan or non-partisan political activity. CCUSJ, Compliance section, B (1). But when a master's role will be highly public, the master and appointing judge should consider whether it is necessary to limit the master's group memberships, political activity, and fiscal relationships to ensure actual and apparent neutrality. As mentioned above, a federal judge may choose to impose such restrictions. CCJE, Introduction ¶ 2.

a. Should the adjunct's partisan or non-partisan political activity be restricted?

b. If yes, should the activity of the adjunct's staff be similarly restricted?

❑ 9. Timekeeping and Compensation

a. How should the adjunct record his or her time?

- Should the descriptions include confidential information?
- Should itemized bills be submitted only to the court and under seal?
- What time block should be used? (1/10 hour segments?)

b. To what extent may the adjunct charge for staff salaries and expenses?

c. May the adjunct charge an "overhead" rate in addition to actual expenses?

d. What will the process be for constructing and obtaining court approval of budgets and invoices?

❑ 10. Other Work

a. May the adjunct accept other work, or is this appointment considered to be "full-time" work?

b. May the adjunct work on another case with or against an overlapping party? After disclosure and consent?

Academy of Court-Appointed Masters
Section 4

Managing the Unmanageable: Special Masters
A Special Solution

An Article on the ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation

The ABA recently approved Guidelines for the Appointment and Use of Special Masters, recognizing that the use of special masters should become a more common part of the litigation process. The ABA Report that accompanied the Guidelines concluded that the use of special masters enhanced the litigation process by:

- Enabling faster and more efficient resolution of disputes.
- Relieving burdens on limited judicial resources.
- Allowing for specialized expertise in any field that assists judicial administration.
- Allowing for creative and adaptable problem solving.
- Serving in roles that judges are not, or may not be, in a position to perform.
- Facilitating the development of a diverse and experienced pool of neutrals by introducing an expanded universe of practitioners to work as neutrals.
- Helping courts to monitor implementation of orders and decrees.

These Guidelines and Conclusions recognize the growing acceptance in practice of masters. Those of us who serve as masters reflect the value we provide to our justice system. In our conversations with lawyers and our debriefing of parties after the conclusion of cases, we have learned how masters provided efficient, effective, and affordable services and results.

Empirical research is hard to come by in the world of litigation, and it is always difficult to perform a comparative analysis of the path taken and the bypassed path. For that reason, empirical analysis of the benefits that special masters visit upon litigation is difficult to come by—particularly given the infrequency of published judicial opinions regarding masters. But the research that has been performed, anecdotal, as much of it may be, strongly points to the fact that the use of masters brings efficacy to the litigation process and generally enhances the quality of litigation outcomes.

For all these reasons, the Guidelines provide that, in all appropriate cases, courts should consider the appointment of masters. We, as members of the Academy dedicated to the use of masters, wholeheartedly agree.

The History of the ABA Guidelines

A few years ago, the Lawyers Conference of the ABA Judicial Division formed a Committee on Special Masters to encourage and promote research and education concerning masters and to make proposals concerning their appointment and use. The Committee concluded

that one of the difficulties faced by both courts and practitioners is the lack of standardization in connection with the appointment and use of masters.

To address this lack of standardization and to urge greater use of this valuable resource, the Committee brought together stakeholders from diverse segments of the ABA to propose best practices in using special masters. The ABA formed a Working Group in the fall of 2017 and included representatives of the Judicial Division (including three of its conferences – the National Conference of Federal Trial Judges, the National Conference of State Trial Judges and the Lawyers Conference), the ABA Standing Committee on the American Judicial System, and the ABA's Section of Litigation, Business Law Section, Section of Dispute Resolution, Section of Intellectual Property Law, Tort Trial and Insurance Practice Section, and Section of Antitrust. The membership included current and former federal and state judges, members of the Academy of Court Appointed Masters (ACAM), ADR professionals, academics, and litigators who represent plaintiffs, defendants, or both in numerous fields.

The Working Group also gathered information from a wide variety of interested and knowledgeable agencies, organizations, and individuals, including the Federal Judicial Center (FJC), federal and state judges, court ADR program administrators, private dispute resolution professionals, representatives of a number of state bar associations, the academic community, professional groups (including ACAM), litigators, and in-house counsel.

This Working Group produced a set of Guidelines, appearing in Appendix 2, which were adopted by the ABA House of Delegates in 2019, declaring that the use of special masters should be considered at the outset of litigation in all complex litigation and in cases involving facts or situations that would make the use of a master advantageous to the court and the parties. The Guidelines also recite many of the functions that can be performed by masters to make litigation more cost-effective and efficient. The Guidelines also encouraged courts to develop rules and practices for selecting, training and evaluating masters and encouraged courts and, where appropriate, legislatures to make changes to laws and rules to effectuate the purposes of the Guidelines.

The Rationale for Using Masters: Solutions to Problems

In addition, the Working Group's presentation to the House of Delegates included a detailed discussion of the rationale for the Guidelines and for the expanded use of special masters in civil litigation, referred to herein as the "Report." As the Report noted, none of the rules that govern litigation and litigants are self-executing. Ensuring that parties will not gain an advantage by unreasonable conduct or delay requires judicial case management, which is possible only where adequate resources are available to implement strategies designed to minimize the likelihood of unnecessary disputes, to facilitate the resolution of disputes that do arise, and to focus the attention of the parties on fairly resolving the issues in controversy.

The appointment of a special master to manage the pretrial process can relieve courts of the burden of reviewing voluminous discovery materials or information withheld as privileged or proprietary, or addressing other disputes, allowing courts to focus on merits-based resolution of issues on a concise record. Where a case warrants this type of assistance, masters have the time that judges do not. The goal of these guidelines is not to detract in any way from the role of judges,

including magistrate judges. It is to assist them and serve the ends of justice.

The Report discusses issues the courts can face in providing effective case management, particularly in complex and highly resource-consuming matters. For example, courts often lack sufficient resources to manage certain cases–particularly complex commercial cases--or the practical ability to increase resources when such cases are encountered. Resources allocated to a single case can consume resources that would otherwise be available for other cases. Masters can offer the time and attention complex cases require without diverting judicial time and attention from other cases.

Additionally, certain cases benefit from specialized expertise. This is particularly true in federal multidistrict litigation ("MDL"), which accounts for nearly forty percent of the federal case load, excluding prisoner and social security cases.[1] Managing those cases oftentimes requires a diverse set of skills (e.g., managing discovery, reviewing materials withheld as privileged or proprietary, facilitating settlement of pretrial issues or the entire case, addressing issues related to expert qualifications and opinions, resolving internecine disputes among plaintiff and/or defense counsel, allocating settlement funds or awards, evaluating fee petitions, or providing other needed expertise).

Judges in MDLs and other large, complex cases are called upon to bear knowledge about many fields, including, for example, science, medicine, accounting, insurance, management information systems, business, economics, engineering, epidemiology, operations management, statistics, cybersecurity, sociology, and psychology. No one person can be an expert in all these fields. Special masters who have specialized expertise in relevant fields can provide a practical resource to courts in cases that would benefit from subject-matter expertise.

Finally, the judicial role limits the involvement courts can have in some aspects of the litigation process. Judicial ethics limit the ability of judges to facilitate informal resolutions of issues and cases, particularly if the process requires *ex parte* meetings with parties or proposing resolutions of issues on which the court may eventually need to rule.

Everyone Sometimes Needs a Nudge

Despite the considerable assistance special masters can offer, appointing masters has historically been viewed as a special measure to be employed only on necessary occasions. This view appears to have stemmed from concerns regarding the delegation of judicial authority and the costs that the parties will incur. But neither concern justifies limiting the consideration of using masters in appropriate cases.

A concern about delegating authority should apply only to situations where the special master is asked to perform an adjudicative role, and unless the parties agree otherwise, a master's

[1] Andrew D. Bradt, "The Long Arm of Multidistrict Litigation," 59 WM. & MARY L. REV. 1, 2 (2017); Elizabeth Chamblee Burch, "Monopolies in Multidistrict Litigation," 70 VAND. L. REV. 67, 72 (2017). The Judicial Panel on Multidistrict litigations reports that, as of April 16, 2018, 123,293 cases were part of pending MDL actions. http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-April-16-2018.pdf

"adjudication" is merely a report and recommendation that can be appealed to the trial court as a matter of right. The ultimate decision-making authority continues to reside with the court.

Effective special masters reduce costs by dealing with issues before they evolve into disputes and by swiftly and efficiently disposing of disputes that do arise. There is broad consensus that anticipating and preventing disputes before they arise or resolving them quickly as they emerge significantly improves the effectiveness and efficiency of dispute resolution. Masters can also inculcate a culture of compliance with procedural rules by strictly monitoring compliance by the parties and lawyers with the rules and ensuring that no one gains leverage or advantages from non-compliance.

The failure to consider using special masters in appropriate cases may disserve the goal of securing "a just, speedy, and inexpensive determination." This failure has also led to appointments being made without systems or structures to support selection, appointment, or the use of masters and, frequently, after cases have already experienced management problems. Reliable evidence indicates that courts and parties are generally satisfied with their experiences with special masters. courts and commentators will continue to thoroughly address basic issues, such as: what qualifications masters should possess, how those qualifications reflect the role the master is performing, what best practices for masters should be, and what ethical rules should govern the conduct of masters. The Guidelines take an initial step in addressing these issues and encourage other stakeholders to continue to work on the adoption of standards for the appointment of masters. As the court use masters on a more consistent and regular basis, there will be greater opportunities for research and analysis on ways to make the work of masters more efficient and effective.

Acknowledgements

If every moving thing has at least one source of propulsion, the source of propulsion for this initiative and the Work Group was the Group's Covener, Merril Hirsh. It is fair to say that Mr. Hirsh was not only the Group's leader and official task master, he was also the driving force the brought about a successful end to the Group's work. We all owe him our heartfelt thanks.

The Working Group itself was comprised of representatives from the Judicial Division (Hon. J. Michelle Childs; Hon. David Thomson; Merril Hirsh (Convener); Cary Ichter (Reporter); Christopher G. Browning; David Ferleger and Mark O'Halloran); the ABA Standing Committee on the American Judicial System (Hon. Shira A. Scheindlin (ret.)); the Business Law Section (William Johnston (convener, policy subgroup); Hon. Clifton Newman; Richard L. Renck; Hon. Henry duPont Ridgely (ret.); Hon J. Stephen Schuster; and Hon. Joseph R. Slights III); the Section of Litigation (Mazda Antia, John M. Barkett, David W. Clark, Koji Fukumura and Lorelie S. Masters); the Section of Dispute Resolution (Hon. Bruce Meyerson (ret.); Prof. Nancy Welsh); the Section of Intellectual Property Law (David L. Newman; Scott Partridge; Gale R. ("Pete") Peterson); the Section of Antitrust Law (Howard Feller, James A. Wilson) and the Tort Trial and Insurance Practice Section (Sarah E. Worley). The members also wish to thank Hon. Frank J. Bailey and his staff, and ABA Staff members Amanda Banninga, Denise Cardman, Julianna Peacock, and Tori Wible for their assistance. We also owe than our deep appreciation.

Academy of Court-Appointed Masters
Section 5

Table of State Court Authorities Governing Judicial Adjuncts

This Section contains the state rules and provisions governing the appointment of masters. There are various alternative names some states use for a judicial adjunct instead of master. This Section also compares state provisions with Federal Rule 53.

State	Authorities and Comparison to FED. R. CIV. P. Rule 53
Alabama	ALA. R. CIV. P. WITH DIST. CT. MODIFICATIONS 53 Adopts pre-2003 amended version of the federal rule but state rule does not apply to state district courts.
Alaska	ALASKA R. CIV. P. 53 ALASKA CT. R., CHILD IN NEED OF AID 4 ALASKA CT. R., DELINQUENCY 4
Arizona	16 PART 1, A.R.S. RULES OF F CIV. PROC., RULE 53 ARIZ. R. SUPER. CT. 96(e) (granting presiding judge in Superior Court power to appoint Court Commissioners with agreement of each party) Adopts pre-2003 amended version of the federal rule.
Arkansas	ARK. R. CIV. P. 53 Modeled after pre-2003 amended version of the federal rule but limited to non-jury actions.
California	CAL CIV. PROC. CODE §§ 638-639 (West 2004) Requires agreement of the parties.
Colorado	COLO. C. C.P.R. 53 Adopts pre-2003 amended version of federal rule.
Connecticut	CONN. R. SUPER. CT. PROC. FAMILY MATTERS § 25-53 Limited scope—only applies to family law matters. Pilot program established for civil/family discovery masters and civil matter settlement conferences scheduled to end 12/31/2004.
Delaware	DEL. S. CT. R. 43(B)(V) DEL. CT. CH. R. 135–47 DEL. FAM. CT. C.P.R. 53 DEL. SUPER. CT. CRIM. R. 5 Limited to hearing issues of fact.

State	Authorities and Comparison to FED. R. CIV. P. Rule 53
District of Columbia	D.C. SUPER. CT. R. CIV. P. 53 D.C. SUPER. CT. R. DOM. REL. 53 D.C. SUPER. CT. R. CRIM. P. 117 Adopts pre-2003 amended version of the federal rule.
Florida	FLA. STAT. ANN. R.C.P. RULE 1.490 (West 2004 & Supp. 2005) Florida Family Law Rule 12.492 Florida Probate Rule 5.697 All require consent with the possible exception of Probate Rule 5.697.
Georgia	GA. CODE ANN. §§ 9-7-1 to -6 (1982 & Supp. 2004)
Hawaii	HAW. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Idaho	IDAHO R. CIV. P. 53 IDAHO CRIM. R. 2.2 Adopts pre-2003 amended version of federal rule.
Illinois	Illinois does not use fee officials.[2]
Indiana	IND. R. TRIAL P. 53 Adopts pre-2003 amended version of federal rule.
Iowa	IOWA R. CIV. P. 1.935 Adopts pre-2003 amended version of federal rule.
Kansas	KAN. STAT. ANN. § 60-253 (1994 & Supp. 2002) When parties consent, any issue can be referred to a special master. Contains language where without the parties' consent, the court can only refer a case to a master when justice will be measurably advanced, or to cases that will be tried to a jury when they involve examination of complex or voluminous accounts.
Kentucky	KY. R. CIV. P. 53.01 When appointed to matters other than judicial sales, settlement, receivership, and bills of discovery assets of judgment debtors, appointment requires that the matter involve complex calculations, multiplicity of claims, or other exceptional circumstances.
Louisiana	LA. REV. STAT. ANN. § 13:4165 (West Supp. 2004) Court can appoint in any civil action with parties' consent if there is a complicated issue or when exceptional circumstances exist.
Maine	ME. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.

[2] *Mullaney, Wells & Co. v. Savage*, 282 N.E.2d 536, 538 (Ill. App. Ct. 1972).

State	Authorities and Comparison to FED. R. CIV. P. Rule 53
Maryland	MD. CIR. CT. R. CIV. P. 2-541 Limited to non-jury matters.
Massachusetts	MASS. R. CIV. P. 53 MASS. R. CRIM. P. 47 Adopts pre-2003 amended version of federal rule but also requires assent of all parties prior to special master appointment.
Michigan	MICH. CT. RULES PRAC. R. 3.913 Applies to probate and juvenile court. Can conduct preliminary inquiries and can preside at hearings other than a jury trial or preliminary examination.
Minnesota	MINN. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Mississippi	MISS. R. CIV. P. 53 Can refer any issue to a special master with the written consent of the parties, otherwise appointment requires an exceptional condition.
Missouri	MO. R. CIV. P. 68.01 Adopts pre-2003 amended version of federal rule.
Montana	MONT. CODE ANN. § 25-20-R. 53 (2003) Adopts pre-2003 amended version of federal rule.
Nebraska	NEB. REV. STAT. §§ 25-1129 to -1137 (2004) Appointment requires written consent of the parties.
Nevada	NEV. R. CIV. P. 53 NEV. 1ST JUD. DIST. CT. R. 5 Adopts pre-2003 amended version of federal rule.
New Hampshire	N.H. R. SUPER. CT. 85-A Appointment requires parties' written consent.
New Jersey	N.J. CONST. art. 11, § 4, ¶ 7 N.J. R. CIV. PRAC. 4:41 Appointment requires parties' consent.
New Mexico	N.M. R. CIV. P. 1-053 Adopts pre-2003 amended version of federal rule.
New York	N.Y. UNIF. TRIAL CT. R. § 202.14 Chief Administrator of courts has power of appointment.

State	Authorities and Comparison to FED. R. CIV. P. Rule 53
North Carolina	N.C. GEN. STAT. § IA-1, R. 53 (2003) Modeled after pre-2003 amended version of federal rule. Certain actions require parties' consent prior to appointment.
North Dakota	N.D. R. CIV. P. 53 Amendment effective March 2011, amended in response to the December 1, 2007 revision of the Federal Rules of Civil Procedure.
Ohio	OHIO REV. CODE ANN. CIV. R. 53 OHIO REV. CODE ANN. CRIM. R. 19 OHIO REV. CODE ANN. JUV. R. 40 Modeled after pre-2003 amended version of federal rule. Does include pre-trial and post-trial matters, or matters where the parties consent.
Oklahoma	OKLA. STAT. ANN. tit. 12, §§ 612-619 (West 2000) Can appoint to any civil action with the parties' written consent.
Oregon	OR. R. CIV. P. 65 Appointment requires parties' written consent; without consent of the parties, appointment requires an exceptional condition.
Pennsylvania	42 PA. CONST. STAT. ANN. § 1126; PA. R. CIV. P. 1558, 1920.51 Court can appoint at any time after the preliminary conference and master can hear any issue or the entire matter.
Rhode Island	R.I. R. CIV. P. 53 R.I. R. PROC. DOM. REL. 53 Adopts pre-2003 amended version of federal rule but also provides greater latitude in appointing a special master; special master may be appointed to any issue where the parties agree.
South Carolina	S.C. R. CIV. P. 53 Allows appointment when the parties' consent.
South Dakota	S.D. CODIFIED LAWS § 15-6-53 (West 2004) Adopts pre-2003 amended version of federal rule.
Tennessee	TENN. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Texas	TEX. R. CIV. P. 171 Adopts pre-2003 amended version of federal rule but requires parties' consent to appointment of a master. Other modifications include that the case must be an "exceptional one" and there must be "good cause" for appointment of a master. Texas also uses masters in tax cases.

State	Authorities and Comparison to FED. R. CIV. P. Rule 53
Utah	UTAH R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Vermont	VT. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule with minor modifications. State rule is narrower because for actions to be tried by a jury, appointment is only made when the action requires investigation of accounts or examination of vouchers.
Virginia	VA. S. CT. R. 3:23 A court decree refers a matter to a "commissioner in chancery."
Washington	WASH. SUPER. CT. CIV. R. 53.3 Adopts rule that is broader than the pre-2003 amended version of federal rule. State rule allows appointment for "good cause" and allows appointment of special master to discovery matters.
West Virginia	W. VA. R. CIV. P. 53
Wisconsin	WIS. STAT. § 805.06 (1994) Adopts pre-2003 amended version of federal rule with minor modifications, i.e. "referee" used in place of "special master."
Wyoming	WYO. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.

Section 6
Articles, Books, Websites, and Literature About Masters

A variety of sources contain information and materials on special masters. The following resources contain references to the use of masters, or explain their roles, or describe their work. Please contact ACAM to include other sources not listed in this Section. See Table of Contents.

BOOKS

1. **David Herr and Roger Haydock, *Fundamentals of Litigation Practice*, Chapter 6 (Thomson Reuters).**

2. **Roger S. Haydock and David F. Herr, *Discovery Practice,* Chapter 2 (Wolters Kluwer).**

3. **David F. Herr and Roger S. Haydock, *Motion Practice*, Chapter 2 (Wolters Kluwer).**

4. **Roger Haydock and John Sonsteng, *Trial Advocacy: Before Judges, Jurors, and Arbitrators*, Chapter 3 (West Academic).**

5. **Roger S. Haydock and Peter B. Knapp, *Lawyering: Practice and Planning*, Chapter 1 (West Academic).**

6. **Roger Haydock, David Herr, and Jeffrey Stempel, *Fundamentals of Pretrial Litigation,* Chapter 1 (West Academic).**

ARTICLES

7. ***2004 Special Masters Conference: Transcript of Proceedings,* 31 WM. MITCHELL L. REV. 1193 (2005), *available at* https://www.courtappointedmasters.org/acam/assets/file/public/articles/SpecialMastersTranscript.pdf**

   Westlaw Abstract: A historic gathering of special masters occurred on October 15th and 16th, 2004 in Saint Paul, Minnesota. Federal and state court-appointed masters from around the country met for the first time to share their experiences as special masters and to form a national association of court appointed masters. This issue of the William Mitchell Law Review contains articles presented at the conference and the transcript of faculty presentations.

Citing Reference:

Francis E. McGovern, Appointing Special Masters and Other Judicial Adjuncts: A Handbook for Judges (2007) (ALI-ABA & Federal Judicial Center Continuing Legal Education Course of Study, materials available on Westlaw as SN009 ALI-ABA 1911)

> Westlaw Abstract: This bench book is designed to help federal and state court judges: (1) decide whether and when to appoint a master; (2) draft effective appointment orders; and (3) anticipate and effectively address ethical issues and practical concerns that arise in special master work. These materials may also be helpful to prospective adjuncts and to parties considering whether to request the appointment of a judicial adjunct. All courts have the power to appoint a special master or other type of judicial adjunct to assist with civil and criminal cases. Rule 53 of the Federal Rules of Civil Procedure governs the appointment of masters in federal court. In state courts, various procedural rules or state statutes empower judges to obtain assistance.
>
> Many federal and state court judges use masters…Judicial adjuncts can provide courts, parties, and lawyers with essential services without tapping into court resources. Masters can act as mediators and settle civil and criminal cases away from the courthouse; they can monitor discovery and resolve time-consuming disputes; they can be assigned trial duties; they can testify as expert witnesses, especially in cases involving technical and specialized issues; they can help coordinate multi-party, multi-jurisdictional, and multi-district litigation (MDL) cases; they can administer settlement claims; and they can monitor compliance with a court order or settlement agreement. An adjunct can markedly reduce the burden on a judge, the judge's staff, and even the court's administrative staff. Parties and lawyers recognize that in some cases the appointment of a master can save them substantial fees and costs, and can lead to a much quicker resolution of their disputes. Judges who use professional and experienced masters know how valuable they can be to case handling and resolution.
>
> Section 1 of this bench book summarizes the various roles judicial adjuncts can serve. Section 2 covers appointment orders…several appendices provide checklists, sample appointment orders, listings of court decisions relevant to the use of judicial adjuncts, and a bibliography of academic articles about the use of judicial adjuncts. Finally, additional appendices contain the texts of various statutes, codes, and other rules that may govern the conduct of judicial adjuncts.

See also Academy of Court-Appointed Masters, Appointing Special Masters and Other Judicial Adjuncts: A Handbook for Judges (2006), available free online at: https://www.courtappointedmasters.org/benchbook/appointing-masters-handbook/(This appears to be an earlier version of the same document above) (No abstract available).

8. **Richard H. Agins, Comment: An Argument for Expanding the Application of Rule 53(b) to Facilitate Reference of the Special Master in Electronic Data Discovery, 23 PACE L. REV. 689 (2003).**

Westlaw Abstract: The volume and volatility of computer-generated data present novel problems of evidentiary discovery, requiring the employment of a neutral party with the requisite technical, legal, and business experience to provide effective oversight and management. A special master, referred to serve as an impartial officer of the court pursuant to Rule 53 of the Federal Rules of Civil Procedure, can bring a greater level of specialized knowledge, flexibility, involvement, and efficiency to pretrial discovery of electronically generated and stored data ("electronic data") than can most trial court judges burdened with managing a full docket.

Citing References:

David Herr, Ann. Manual Complex Lit. § 13.1 Trial Judge's Role: Use of Special Masters (2009).

David Ferleger, Special Masters under Rule 53: A Welcome Evolution, ABA-ALI CLE, available on Westlaw as SN040 ALI-ABA 1 (2007).

> From Article Introduction: In recent years, and increasingly since the amendment of Rule 53 in 2003, courts turn to special masters in constitutional, commercial, mass tort and other litigation for assistance at all stages in the adjudication process. Masters may be appointed pre-trial, to preside over trials, and in the post-trial monitoring and compliance phases of a suit. The use of masters has been constructive and beneficial to litigants and to the courts. Few administrative difficulties have been reported.
>
> Federal Rule of Civil Procedure 53 has been a primary support for this approach. However, even post-amendment, courts continue to declare their inherent authority to appoint masters "beyond the provisions" of Rule 53. Pre-amendment, appointment of a master was reserved to the "exceptional case" and there was significant dispute in particular instances over whether a case was sufficiently exceptional to warrant a master. The 2003 rule in effect abandoned the notion that appointment of a master is disfavored, and many features of the rule are now designed to facilitate expanded use of masters. This article describes the early use of masters, the functions to which courts have put masters, and a selection of issues regarding the appointment and operation of masters. [Westlaw]

Lynn Jokela & David Herr, Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool, 31 Wm. Mitchell L. Rev. 1299 (2005).

> Abstract from article: This article examines the role masters have played in litigation and explores the benefits that might be obtained from the greater use of masters in the future. The FJC survey of federal judges appointing special masters concluded that special masters were "extremely or very effective." The FJC study is an empirical survey of the effectiveness of special masters, and it includes commentary from judges regarding their experience after appointing special masters. These benefits include better, faster, and fairer resolution of litigation in the cases in which masters are used, as well as an easing of the burdens these cases place on the judiciary. This article also analyzes the barriers to the use of masters and how they might be removed.

9. **Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725.**

LexisNexis Abstract: The court's powers to enforce a consent decree include interpreting the decree, issuing injunctions to implement the decree, granting supplemental relief, delegating authority to a special master, and holding a party in contempt of court. ... A court emphasizes the contractual nature of consent decrees when it undertakes to resolve disputes over the meaning of certain provisions. ... The actual experiences of attorneys, judges, and monitors in the research cases reveal a pervasive pattern of [non-adjudicative] techniques for making consent decrees work; reported cases rarely reveal such techniques. ... Written reports would have been helpful because they would have provided the parties a clear record upon which to determine in what areas defendants were not complying and how the parties had resolved various issues. ... One way the monitor responded to this situation was simply to order upper-level mental health agency officials to attend meetings to discuss areas of noncompliance. ... A lenient judicial posture toward requests for substantive modification would introduce uncertainty and therefore discourage voluntary settlement and increase litigation over implementing consent decrees. ... The economy improved, a newly elected administration was strongly committed to implementation of the decree, and the legislature fully funded all the community programs.

Citing Reference:

Ellen E. Deason, Managing the Managerial Expert, 1998 U. Ill. L. Rev. 341

> Westlaw Abstract: While most lawyers think of court-appointed experts as witnesses, judges increasingly appoint experts for managerial roles. For instance, court-appointed experts evaluate pretrial discovery; they play key roles in encouraging settlements and helping judges decide whether or not those settlements should be approved; they determine complex damages; they advise judges on remedial orders and monitor compliance and implementation. Professor Deason analyzes the proliferation of court-appointed experts for these indispensable functions in the absence of any explicit authority or procedures for their appointment. She argues that the current Federal Rules of Evidence and Federal Rules of Civil Procedure do not contemplate managerial functions for court-appointed expert witnesses or special masters and hence their limitations on appointments and their procedures are inadequate. Moreover, the other source of appointment authority, inherent judicial power, has ambiguous boundaries and offers courts little guidance. Thus, Professor Deason suggests the development of new appointment authority tailored to the legitimate needs of the courts for managerial assistance, designed to encourage the maximum effectiveness in the use of experts, and constructed to prevent unnecessary interference with party autonomy.

10. **Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1 (2006).**

Lexis Abstract: Less than two weeks after the collapse of the World Trade Center, a unified Congress passed the Air Transportation Safety and System Stabilization Act (ATSSSA, or "the Act"), a bill intended to help stabilize the economy by protecting the airlines from an avalanche of litigation. ... As noted above, the Act provides the airline industry with a range of benefits, including federal loan guarantees of up to ten billion dollars; compensation of up to five billion dollars for "direct losses incurred ... as a result of any Federal ground stop order;" compensation for "incremental losses" from September 11 to December 31, 2001; reimbursement for any increase in the cost of insurance through October 1, 2002; and a cash flow benefit from the deferral of the deposit of excise taxes. ... The architecture of the Fund was based in part on the Agent Orange settlement compensation scheme, and the Special Master was based on the Agent Orange court-appointed Special Master. Before Congress enacted the ATSSSA, David Crane, one of Senator Trent Lott's congressional staffers, drafted a model of the Special Master which Congress soon incorporated into the statute. ... A comparison with other victim compensation funds emphasizes the failure of the ATSSSA to provide for a suitable tort option. ... Suddenly, any Fund-eligible parties considering the tort option would find themselves vying to litigate with a host of new parties.

Citing References:

Judge John G. Farrell, Administrative Alternatives to Judicial Branch Congestion, 27 J. Nat'l Assn Admin. L. Judiciary 1 (Spring 2007)

> Lexis Summary: ... Workers' Compensation Law (originally called "Workmen's Compensation Law") involved a new legal concept: liability without fault. ... Many more workers were assured a recovery for a work accident than were assured under the tort litigation system. ... In addition to providing compensation to the victims, the legislation was also intended to save the airline industry from bankruptcy and the U.S. economy from collapse. ... Under the legislation, a monetary fund was created and the attorney general appointed a special master, Kenneth Feinberg, a respected attorney with considerable experience with giant class-action lawsuits. ... There are some very limited exceptions which allow certain tort actions in court. ... Strictly speaking, I note that adoption of such programs is not always motivated solely to relieve judicial congestion or delays. ... I believe that both emerging technologies of nanotechnology and biotechnology are extremely likely to bring with them environmental risks which could result in injuries and illnesses with long latency periods and difficult causation issues, involving multiple plaintiffs, all of which are problematic under traditional common law tort schemes. ... It is my belief that carefully crafted administrative alternatives in these areas could help to provide fair and rapid relief to the victims. [LexisNexis]

11. Samuel J. Brakel, *Special Masters in Institutional Litigation*, 1979 AM. B. FOUND. RES. J. 543 (1979).

Wiley Abstract: Litigation concerning conditions in institutions such as prisons or mental hospitals does not stop at the issuance of a remedial decree. Steps must be taken to assure implementation. Increasingly, the courts are resorting to special masters to assist them in implementing such institutional reform. While the use of masters by courts is a firmly

established tradition, the role assigned to masters in the institutional context is often an extraordinarily broad and intrusive one. As a result, serious questions have arisen about this new extra-traditional master role and about the applicability, the sufficiency, of the traditional rationales and restraints. This article is among the first in a small but developing body of literature that begins to examine the new master role and the questions concerning it. [Wiley Inter Science - http://bit.ly/1LFKfL]

12. Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?* 53 U. CHI. L. REV. 394 (1986).

Westlaw Abstract: In recent years, courts have used special masters to help manage complex civil cases. But this use has raised serious questions of efficacy and ethics. This paper first identifies the needs and ambitions that inspire courts to appoint masters, in order to demonstrate why recourse to this tool can be so rich in potential yet so controversial. Then, in describing some recent roles masters have played, it assays their potential contributions as well as the risks attending their use. It concludes that as masters are used more ambitiously, the potential benefits and risks increase. Masters can bring significant new skills and flexibility to bear on cases whose complexity threatens to overwhelm our traditional system. However, a correlative danger exists that using masters will fundamentally alter that system in ways we find troubling: by making adjudication too informal, by removing it from public scrutiny and challenge, and by encouraging judges to rely on masters to a degree incompatible with appropriate exercise of the judicial function. [Westlaw]

Citing References:

Jeffrey W. Stempel, New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform, 59 Brook. L. Rev. 659 (Fall 1993)

> Introduction: This Article assesses the landscape of litigation reform activity and the current political tension between continuing commitment to open access to the courts and a desire for faster, less expensive dispute resolution. It will also examine the state of the reform process but refrain from evaluating specific proposals. Part I describes major recent and current activities affecting American litigation. Part II then analyzes current debates about litigation by identifying the leading schools of thought on both litigation practice and litigation reform. It attempts to situate current litigation issues in a broader inquiry: whether the perceived post-1938 consensus attending adjudicatory procedure and civil litigation reform has merely come unglued (in whole or in part) or, rather, whether it has been supplanted by a new consensus, a "new paradigm," reflecting an altered vision of the litigation process. Finally, Part III proposes a more integrated and deliberate method to govern civil litigation reform as a means of thwarting troublesome recent tendencies. [Westlaw]

Irving R. Kaufman, Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts, 59 Fordham L. Rev. 1 (October 1990).

> Introduction: Many observers see the courts on the verge of buckling under the strain; one view from the trenches sees the problem of delay as "'beyond the crisis stage.'" The problem is not merely one of harried judges. Litigants, people with grievances, are being denied meaningful access to the courts. Delay prevents the courts from doing their job—resolving people's disputes at reasonable costs so that they may return to their normal lives... Flexibility, experimentation and a willingness to innovate are essential if the administration of justice is to keep up with the society we serve. What follows is a brief examination of proposed changes in judicial administration, stressing those that hold the greatest promise to reduce the major costs of justice—expense and delay. [Westlaw]

13. Wayne D. Brazil, *Special Masters in the Pre-trial Development of Big Cases: Potential and Problems*, 1982 AM. B. FOUND. RES. J. 289 (1982).

Abstract: This article explores the advantages and disadvantages of referring discovery matters in complex cases to special masters. In the first section Brazil explains how the results of his earlier research into the discovery system exposed problems that the appointment of masters might help solve. He then describes the kinds of pretrial tasks and roles federal courts have assigned to special masters and the ways that using a master can expedite and rationalize the case development process. In the second half of the article, the author assesses the major objections to delegating judicial responsibilities to masters and the problems that frequent appointments might cause. Along the way, Brazil offers practical suggestions to judges about how to avoid potential difficulties and how to maximize the effectiveness of this increasingly popular procedure. [Wiley InterScience.

14. Wayne D. Brazil, Geoffrey C. Hazard Jr. & Paul R. Rice, *Managing Complex Litigation: A Practical Guide to the Use of Special Masters*, American Bar Foundation (1983).

Abstract from 63 Tex. L. Rev. 721: Professors Geoffrey Hazard and Paul Rice provide an illuminating case study of the management techniques that worked for them as special masters in the massive United States v. ... The purposes of pretrial conferences as stated in the new rule include concerns for efficiency such as "establishing early and continuing control so that the case will not be protracted because of lack of management," "discouraging wasteful pretrial activities," "improving the quality of the trial through more thorough preparation," and facilitating settlement. ... They believe that a full-time position is not likely to offer the pay and status needed to attract persons whose mastery of the subject and intellectual prowess will enable them to work well with the able and aggressive attorneys usually involved in complex cases. Instead, the authors recommend the use of co-special masters, one with day-to-day management functions and the other with duties related to subject matter expertise. ... Judges should hold a conference with counsel and the master to discuss the tasks and powers being delegated and the procedures to be followed. ... Brazil, Hazard, and Rice's Proposals The Brazil-Hazard-Rice book is concerned primarily with discovery management and addresses these administrative matters in much more detail than does Schwarzer. ... In that case, all discovery demands were required to be filed with the masters, thus rejecting the Federal

Rules' view that the attorneys should generally conduct discovery without court involvement. ... According to Hazard and Rice, "The end product was a combined narrative stipulation, pretrial order of issues in dispute, and a tentative order of proof."

15. Victoria E. Brieant, *Techniques and Potential Conflicts in the Handling of Depositions*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and States Courts, Chicago, Ill. 2005.

Abstract: Part 1 of this article addressed the use of depositions in the United States and the rules that govern them. Topics included deposition techniques, sanctions, the limitations of depositions, objections, instructions not to answer, Rule 30(c)(2), special masters and magistrate judges, discovery of documents reviewed by deponents, videotaped depositions, the form of questions, witness preparation, non-party subpoenas, and authentication of electronic evidence. These topics are, however, of utility only when you can actually take the deposition. Getting to take a deposition is the United States is relatively easy. Despite variations in rules among the states, the fundamentals tend to be consistent. Taking the deposition of non-citizens or outside the U.S., on the other hand, can pose some serious problems.

16. Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625 (2002).

Lexis Abstract: However, the arcane procedures and delegations of authority used by the Court in executing its original jurisdiction—where the Supreme Court functions as a trial court—have garnered newfound attention of late. ... The precedent that guides the Special Master, particularly in boundary dispute cases, is a fragile body of specialized federal common law, pasted together from international law treatises, property concepts, contract law, and sovereignty principles... " New Jersey initiated the first boundary dispute with New York in 1829, a suit in which New Jersey conceded that New York had obtained jurisdiction over Ellis Island, Staten Island, and neighboring islands by adverse possession. ... Other possible solutions include creating a specialized federal court, establishing concurrent original jurisdiction in the federal district courts, delineating procedures applicable to original jurisdiction cases, and institutionalizing the prior practice of appointing senior or retired Article III judges... Third, a specialized court likely would be better equipped to standardize the procedures applicable to original jurisdiction cases, given their continued exposure to cases raising similar procedural difficulties. ... The United States Court of Federal Claims and the United States Tax Court are specialized Article I courts; the United States bankruptcy courts are specialized federal courts, but they are considered "units" of the federal district courts, and their judges are not subject to the appointment provisions or protections of Article III. [LexisNexis]

Citing References:

Amalia D. Kessler, Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial, 90 Cornell L. Rev. 1181 (July 2005)

> Westlaw Abstract: Professor Kessler suggests… that some of the worst abuses of modern litigation--and, in particular, our discovery practice--can be traced to the ill-considered way in which inquisitorial devices were imported into a common-law-based adversarial framework. By rediscovering our lost inquisitorial history, she argues, we can learn how our botched marriage of inquisitorial and adversarial traditions resulted in much of the inefficiency and unfairness of modern civil litigation, and we can begin self-consciously and systematically to develop the inquisitorial framework necessary to remedy our adversarial excesses.
>
> To facilitate procedural reform, Professor Kessler challenges our conception of inquisitorial procedure as alien to and incompatible with our commitment to due process.. this transformation in equity procedures led in the early twentieth century to a reconfiguring of the inquisitorial master as a trial master. She suggests that the subsequent rise of increasingly complex litigation during the second half of the twentieth century, and especially the structural injunction suit of the Civil Rights era, led to a re-emergence of the master's inquisitorial role, but that scholars have mistakenly viewed this role as a new phenomenon. Professor Kessler then posits that much of the inefficiency and unfairness of modern civil litigation--and, most especially, of the pretrial discovery process--results from integrating equity procedures into an adversarial context that permits parties to abuse powerful devices that were once controlled by the courts. Finally, she points to recent French procedural reforms to suggest that we can adopt more inquisitorial procedures without violating the core values of due process. [Westlaw]

17. Frank M. Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CAL. L. REV. 983 (1979).

Abstract from 1983 Duke L.J. 1265: The proposals are those made by Judge Frank M. Coffin, who has suggested major procedural changes to accommodate the exigencies of organizational change litigation. [135] He is prepared to permit an "outside expert judge" to sit in on the remedial phase, since ex parte "influence would not seem to be of as much concern at the remedial stage as when liability is at issue." [136] Judge Coffin also recommends that appellate judges "sit in on critical arguments [in the trial court], absorb the atmosphere, gain a better appreciation of the problem, and help inform the court of appeals so that it could play a more sensitive role." [137] Likewise, Judge Coffin would sanction conferences between trial and appellate judges before the trial judge decides on a remedy, [138] and he advocates the participation of the trial judge as "a resource person" [*1302] at the appellate argument. [139] He is ready to adapt existing institutions in dramatic ways to make possible inquisitorial procedures by trial judges and to make available to them "the help of proven experts." [140] Frustration with the inadequacy of the courts to cope with organizational change litigation has thus generated a willingness to tinker with procedure in quite fundamental ways, with very little awareness that such changes might redound to the disadvantage of the system as a whole.

18. James S. DeGraw, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800 (1991).

Abstract: In addition to performing traditional trial-stage tasks, masters often participate extensively in the pretrial phase by overseeing discovery proceedings and conducting settlement conferences. ... By contrast, if the order of reference appointing a special master to implement a remedial decree is unclear, she has little guidance. ... A court may use its inherent authority or its authority under Rule 53 to appoint an expert as a special master to advise the court. ... Despite the appointment of an expert special master, the *Lanzaro* court retained substantial responsibility for the ultimate resolution of the case. ... The appointment of a biased special master thus restricts the court's inquiry even further and escalates exponentially the potential for abuse when accompanied by the ability to proceed ex parte, the authority to conduct broad discovery, and a deferential standard of review. ... For example, in *Toussaint v. McCarthy,* the order of reference granted the special master broad discovery and ex parte powers as well as the power "[t]o review the placement and retention of prisoners in segregation, and to require the release of prisoners assigned to segregation without sufficient basis, in accordance with the provisions of . . . the Permanent Injunction." ... When stated in the order of reference, the master shall have the ability to monitor the defendant's compliance with the court's decree. ... [LexisNexis]

Citing References:

Thomas L. Creel & Thomas McGahren, Use of Special Masters in Patent Litigation: A Special Master's Perspective, 26 AIPLA Q.J. 109 (Spring 1998).

> Introduction: Are there unique aspects of patent infringement trials that make the use of a special master of particular benefit to the judge and the litigants? Yes, is the answer from many judges who have used them. The unanimous decision of the Supreme Court in Markman v. Westview Instruments, Inc. lends credence to the use of special masters. In Markman, the Supreme Court stated that claim construction is exclusively for the court in a jury trial. Thus, the judge is to construe the claim for the jury much like a statute, and the jury then decides infringement of the claim so construed. Because claim construction is a matter of law, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") reviews the construction under a de novo, not clearly erroneous, standard. As a result, a judge who is untutored in the science of the patented invention and in the vagaries of patent law is required to make a claim construction that can be reversed without regard to findings of fact. Such a reversal could negate a potentially lengthy trial and necessitate a re-trial. A judge may wish for help in making this cornerstone decision… This paper also explores the legal and practical requirements for the appointment and use of special masters. For example, Rule 53 of the Federal Rules of Civil Procedure only allows the appointment of a special master in non-jury trials in "exceptional conditions" and in jury trials where the issues are "complicated."

Alexis C. Fox, Using Special Masters to Advance the Goals of Animal Protection Laws, 15 Animal L. 87 (2008)

> Westlaw Abstract: This article suggests that courts should appoint special masters to large-scale animal abuse cases. The work of special masters in two recent high profile cases, Sarah v. PPI and Vick, demonstrate that special masters can help advance the goals of the animal protection movement in three ways. First, special masters can ensure that individual animal victims are cared for once they are rescued from large-scale abuse situations. Second, court orders that appoint special masters to large-scale animal abuse cases insert a best-interest-of-the-animal analysis into formal court proceeding. Finally, court appointed special masters may encourage better enforcement of animal protection laws by taking responsibility for animal victims from local officials. In addition to advocating for special master appointments in large-scale animal abuse cases, this article discusses some of the possible barriers courts and advocates might face when appointing special masters to large-scale animal abuse cases.

R. Spencer Clift, III, Should the Federal Rules of Bankruptcy Procedure Be Amended to Expressly Authorize United States District and Bankruptcy Courts to Appoint a Special Master in an Appropriate and Rare Bankruptcy Case or Proceeding?, 31 U. Mem. L. Rev. 353 (Winter 2001)

> From Article Introduction: This article attempts to justify the utilization and appointment of special masters in appropriate and rare bankruptcy cases and proceedings by explaining the unique case management role special masters contribute in exceptional circumstances. Specifically, this article calls for an amendment to the Federal Rules of Bankruptcy Procedure to provide expressly that United States district and bankruptcy courts may appoint a special master in a highly complex and rare bankruptcy case or proceeding. Notwithstanding the appropriateness of the appointment of a special master, Federal Rule of Bankruptcy Procedure 9031, a procedural rule, currently prohibits the appointment of a special master by both the United States district and bankruptcy courts in any "case" under the Bankruptcy Code ("Code"). This article focuses on the distinctive need for special masters to be appointed and authorized to participate in appropriate and rare bankruptcy "cases" and "proceedings." … Concomitantly, this article respectfully suggests that the Federal Rules of Bankruptcy Procedure should be amended pursuant to the Rules Enabling Act to expressly authorize the appointment of a special master by United States district and bankruptcy courts in appropriate and rare bankruptcy cases and proceedings. This article also respectfully requests the current United States Judicial Conference Advisory Committee on Bankruptcy Rules to reconsider its two prior declinations and thereafter recommend and transmit to the United States Judicial Conference Standing Committee on Rules of Practice and Procedure a proposed amendment to the Federal Rules of Bankruptcy Procedure providing that United States bankruptcy and district courts have the express authority to appoint special masters in highly complex and rare bankruptcy cases and proceedings.

Allison Glade Behjani, Delegation of Judicial Authority to Experts: Professional and Constitutional Implications of Special Masters in Child-Custody Proceedings, 2007 Utah L. Rev. 823 (2007).

> From Article Introduction: Child-custody proceedings are an intricate, dramatic, and multi-faceted area of the family law system… judges increasingly appoint mental-health professionals as special masters and delegate to them fact-finding authority in order to inform their determination of the child's best interests. Use of special masters, however, may be problematic. Special masters in custody cases contribute to efficiency and provide family courts with psychological insights. Yet, the lack of professional and educational guidelines coupled with the power such an expert can wield over the court might ultimately harm the fragile nature of child-custody proceedings. To avoid this negative outcome, courts need clearer professional and judicial guidelines to ensure that special masters can continue to provide valuable assistance to family courts.

The Sanction of Special Masters: In Search of a Functional Standard, SN040 American Law Institute-American Bar Association 35 (2007)

> Introduction: Under amended Rule 53, Masters are required to perform their duties in accordance with judicial standards of conduct -- even though the Rule permits courts to authorize masters to perform tasks, such as conduct investigations, and adopt procedures, such as ex parte communications, in which judges themselves could not engage. This article examines the use of special masters in complex litigation and concludes that consideration needs to be given to the appropriateness of standards to which masters are held when they carry out different functions -- adjudication, investigation, administration or mediation -- and the consequences of violating those standards. It finds that it may be untenable to hold masters to judicial standards of conduct when they are not full-time judges and perform non-judicial functions. Further, it notes that masters need more clarity about their accountability to the appointing courts, the litigants, third parties, and the bar. Finally, it concludes that the range of remedies imposed to redress excessive or problematic conduct -- reversal, removal, disbarment, damages, injunction, etc. --needs to be examined for proportionality, their effect on other interested parties and their fairness to masters. [Westlaw]

19. Margaret G. Farrell, *Special Masters in the Federal Courts under Revised Rule 53: Designer Roles*, ALA-ABA Course of Study: The Art and Science of Special Masters, Chicago, Ill. (2005).

Lexis Abstract: The federal courts are overburdened and understaffed. The continued expansion of federal caseloads, the technological complexity of the subject matters presented to federal courts, the vast amounts of information available (often as a result of sophisticated computer technology), the number of claimants and the amounts of money involved have all put heavy burdens on the federal judiciary. In response, judges have increased their use of "para-judicials", or judicial assistants, to perform some of the functions usually performed by judges as well as some functions not usually performed by judges. Federal Rule of Civil Procedure 53 has been revised to support these efforts by legitimating many of the roles and

responsibilities given to special masters in the past and clarifying the array of prerogatives that may be given them in the future. [LexisNexis]

20. Margaret G. Farrell, *Amended Rule 53 and the Use of Special Masters in Alternative Dispute Resolution*, SJ034 ALI-ABA 261 (2003).

Lexis Abstract: Rule 53 of the Federal Rule of Civil Procedure, which permits the appointment of special masters, has been completely replaced by an amended rule that will become effective December 1, 2003. This paper explores the ways in which the new rule may or may not facilitate the use of alternative dispute resolution techniques in the federal courts. Faced with growing dockets, more complex litigation and the information explosion, federal judges have urgently sought ways to enhance their effectiveness. Their efforts have given rise to at least two developments. First, judges have increased their appointments of special masters under Rule 53 to assist in complex litigation, including class actions; and second they have fostered the growth of alternative dispute resolution as encouraged by Congress, to reduce the number of cases going to trial. This paper examines the convergency of these trends. [LexisNexis]

21. Margaret G. Farrell, *The Role of Special Masters in Federal Litigation*, ALI-ABA Course of Study: Civil Practice and Litigation Technique in the Federal Courts, SG046 ALI-ABA 1005 (2002).

Lexis Abstract: In the last decade, judges have increasingly sought the assistance of special masters in handling complex litigation. The expansion of federal caseloads, the technological complexity of the subject matters presented, the vast amounts of information available (often as a result of computer technology), and the number of claimants and amounts of money involved have put heavy burdens on the federal judiciary. The appointment of special masters is one of several procedures, including the use of magistrates, court appointed experts and technical advisors, available to judges to extend their effectiveness. [LexisNexis]

22. Margaret G. Farrell, *Experts Testify on Expert Testimony*, Civil Justice Reform 213 (Larry Kramer & Linda Silberman eds., 1996) (No Abstract Available).

23. Margaret G. Farrell, *The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts*, 2 WIDENER L. SYMPOSIUM J. 235 (1997).

Westlaw Abstract: This article… describes one rationalizing technique employed by federal judges to assist them in managing complex mass toxic tort litigation, the appointment of special masters under Rule 53(b) of the Federal Rules of Civil Procedure. Moreover, it evaluates the ability of special masters to efficiently and fairly meet the extraordinary managerial challenges presented by such lawsuits and their ability to humanize the process. Finally, it argues that the flexibility and diversity of special master practice is legitimate in its conformance with the basic constitutional values expressed in Article III and the Due Process Clause of the United States Constitution. [Westlaw]

Citing References:

Alexis C. Fox, Using Special Masters to Advance the Goals of Animal Protection Laws, 15 Animal L. 87 (2008).

> Abstract: This article suggests that courts should appoint special masters to large-scale animal abuse cases. The work of special masters in two recent high-profile cases, Sarah v. PPI and Vick, demonstrate that special masters can help advance the goals of the animal protection movement in three ways. First, special masters can ensure that individual animal victims are cared for once they are rescued from large-scale abuse situations. Second, court orders that appoint special masters to large-scale animal abuse cases insert a best-interest-of-the-animal analysis into formal court proceeding. Finally, court appointed special masters may encourage better enforcement of animal protection laws by taking responsibility for animal victims from local officials. In addition to advocating for special master appointments in large-scale animal abuse cases, this article discusses some of the possible barriers courts and advocates might face when appointing special masters to large-scale animal abuse cases.

Clayton Gillette, Appointing Special Masters to Evaluate the Suggestiveness of a Child-Witness Interview: A Simple Solution to a Complex Problem, 49 St. Louis U. L.J. 499 (2005) (No abstract available).

Elizabeth Berkowitz, The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund, 24 Yale L. &. Pol'y Rev. 1 (2006) (No abstract available).

Francis E. McGovern, Appointing Special Masters and Other Judicial Adjuncts: A Handbook for Judges, ALI-ABA Course of Study: Civil Practice and Litigation Techniques in Federal and State Courts, SN009 ALI-ABA 1911 (2007).

Michael Dore, Special Problems in Toxic Tort Discovery: Use of Special Masters, 2 Law of Toxic Torts § 22:25 (2009) (No abstract available).

24. Margaret G. Farrell, *The Judicial Alternative: Special Masters in Federal Practice*, 1994 Practical Litigator 37 (ABA-ALI, 1994) (No abstract available).

25. Margaret G. Farrell, *Extraordinary Procedures: Special Masters, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, The Federal Judicial Center (1994) (No abstract available).

26. Margaret G. Farrell, *Coping with Scientific Evidence: The Use of Special Masters*, 43 EMORY L.J. 927 (1994).

Lexis Abstract: As discussed in Part III, the use of masters to provide scientific expertise to our generalist judges deviates significantly from each of the major elements of our traditional adversary model. ... In order to illustrate ways in which masters have been helpful in meeting the needs of judges for expert scientific assistance, the following discussion characterizes

masters with reference to both their tasks and the stage of litigation at which they are appointed. ... While most settlement masters fulfill their function through informal procedures, some hold more formal hearings in the form of [mini-trials] used to evaluate claims for purposes of settlement negotiations. Thus, it provides that in actions involving complicated issues tried before a jury or exceptional conditions in bench trials, masters may require the production of evidence, hold formal hearings in which the rules of evidence apply, issue subpoenas, administer oaths, and create a record for review. ... Finally, like masters appointed to recommend remedial decrees, some court monitors were authorized to seek out scientific and technical experts and make findings of fact based on their own viewings of institutional conditions and ex parte interviews with party and nonparty witnesses. ... Some expert masters, like some lay masters, saw themselves as knowledgeable facilitators, not [decision makers], who moved the parties to find areas of agreement about scientific and technical facts and develop agreed upon procedures for settling their factual disputes. ... Thus, issues which go to the propriety of the appointment itself--conflicts of interest, ex parte communications, scope of authority--might well be addressed expressly in the order of reference, while more procedural issues--the discovery process, the appointment of experts, formal hearing procedures--might be left to negotiation between the master and the parties after the appointment. ... When masters perform these same functions, it is believed they, too, may engage properly in ex parte communications. ... Some masters and judges feel that time-limited appointments, particularly before liability is determined, help promote negotiations and settlement, since the parties are aware that failure to settle will result in the expense of a trial. [LexisNexis]

Citing References:

United States v. Hines, 55 F.Supp.2d 62 (1999).

> Lexis abstract: Handwriting analysis testimony was admissible as to similarities or dissimilarities but could not extend to an ultimate conclusion, and accuracy of cross-racial identification was a relevant issue. Defendant, charged with bank robbery, moved to exclude expert testimony comparing his handwriting to the robbery note. The prosecution moved to exclude expert testimony on the subject of cross-racial identification. The court granted defendant's motion in part because the field of handwriting analysis was not sufficiently reliable to permit an expert to render an ultimate opinion as to authorship. Handwriting analysis evidence was admissible for the limited purpose of assisting the jury in evaluating similarities, if any. The court denied the prosecution's motion, holding that because a witness of another race identified defendant, expert testimony citing scientific studies of decreased accuracy of cross-racial identification would provide the jury with relevant and useful information.

Joe S. Cecil and Thomas E. Willging, The Randolph W. Thrower Symposium: Scientific and Technological Evidence: Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity, 43 Emory L.J. 995 (1994).

> From the article introduction: In brief, we found that much of the uneasiness with court-appointed experts arises from the difficulty in accommodating such experts in a court

system that values, and generally anticipates, adversarial presentation of evidence. Even judges who have appointed experts view such appointments as an extraordinary activity that is appropriate only in rare instances in which the traditional adversarial process has failed to permit an informed assessment of the facts. Section IV discusses the problems that arise in identifying and appointing a suitable expert. Parties rarely suggest appointing an expert and typically do not participate in the nomination of appointed experts. As a result, judges may not recognize the need for such assistance until the eve of trial and may have difficulty identifying and instructing an expert without disrupting the trial schedule. Section V discusses communication with the appointed experts. Communication between the judge and the expert is sometimes inhibited, especially in instances in which ex parte communication with the expert is sought by the judge. Also, we found that the testimony or report presented by an appointed expert exerts a strong influence on the resolution of the issue addressed by the expert. Section VI discusses sources of compensation of appointed experts and the problems that arise when one party is indigent. Finally, in Section VII we suggest possible changes to Rule 706 and outline a pretrial procedure that facilitates the early identification of disputed issues arising from scientific and technical evidence, clarifies and narrows disputes, and eases appointment of an expert when an independent source of information is necessary for a principled resolution of a conflict.

Clayton Gillette, Appointing Special Masters to Evaluate the Suggestiveness of a Child-Witness Interview: A Simple Solution to a Complex Problem, 49 St. Louis U. L.J. 499 (2005).

From the Article: Deciding if [a child witness] interview was so suggestive that the child's memory is irreparably distorted and the child should not be allowed to testify in court is a difficult decision that will often turn on a multitude of subtle technical issues. A special master, trained in these issues, is better equipped to decide, and should decide, such an issue when so much hangs in the balance. The possibility exists that an untrained judge might exclude a valid interview based on the testimony from an expert for the defense or that an untrained judge might admit into evidence an interview conducted suggestively. Part II of this Comment consists of background information and a historical overview of the problem of the suggestibility of children in the investigative setting. Part III details the psychological research in the area of suggestibility of children during interviews. Part III also sets forth real-world examples of the effects of suggestive questioning of children. Part IV provides an analysis of the various proposed solutions to the problem of suggestibility of children, including the response of psychological scholars and courts. Part V concludes that New Jersey's solution of taint hearings should be conducted by specially trained adjudicators. Part V also outlines the procedure that should be followed for the appointment of such an adjudicator.

27. Kenneth R. Feinberg, *What is Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11*, Public Affairs (2005).

Abstract: As head of the 9/11 Victim Compensation Fund, Kenneth Feinberg was asked to do the impossible: calculate the dollar value of over 5,000 dead and injured as a result of the 9/11 terrorist attacks. Just days after September 11, 2001, Kenneth Feinberg was appointed to

administer the federal 9/11 Victim Compensation Fund, a unique, unprecedented fund established by Congress to compensate families who lost a loved one on 9/11 and survivors who were physically injured in the attacks. Those who participated in the Fund were required to waive their right to sue the airlines involved in the attacks, as well as other potentially responsible entities. When the program was launched, many families criticized it as a brazen, tight-fisted attempt to protect the airlines from lawsuits. The Fund was also attacked as attempting to put insulting dollar values on the lives of lost loved ones. The families were in pain. And they were angry.

Over the course of the next three years, Feinberg spent almost all of his time meeting with the families, convincing them of the generosity and compassion of the program, and calculating appropriate awards for each and every claim. The Fund proved to be a dramatic success with over 97% of eligible families participating. It also provided important lessons for Feinberg, who became the filter, the arbitrator, and the target of family suffering. Feinberg learned about the enduring power of family grief, love, fear, faith, frustration, and courage. Most importantly, he learned that no check, no matter how large, could make the families and victims of 9/11 whole again. [Public Affairs - https:/www.law.upenn.edu/live/files/5012-feinberg-what-is-life-worth-151-191pdf

Kenneth R. Feinberg, *Creative Use of ADR: The Court-Appointed Special Settlement Master*, 59 ALB. L. REV. 881 (1996).

Lexis Abstract: ... In disputes involving protracted mass torts, such as asbestos, DES, and the Dalkon Shield, as well as in many environmental insurance coverage disputes, Special Masters can enter the fray and efficiently resolve trial-ready disputes by coordinating settlement negotiations using case values long recognized by the parties themselves. ... After each of the co-defendant companies and plaintiff class counsel argued their cases separately to the Special Master, all parties agreed to ask the court for its view concerning final settlement terms. ... In analyzing the role of court-appointed Special Settlement Masters, it is useful to highlight other functions which are often overlooked once settlement is achieved. ... In mass tort litigation such as the "Agent Orange" and Dalkon Shield cases, resolution between plaintiffs and defendants is only the first step, and the serious obstacle of determining eligibility criteria for payment of limited amounts to a wide variety of plaintiffs claiming a wide-ranging series of illnesses and adverse medical conditions remains to be dealt with. ... Docket control requires innovative case management techniques and the court-appointed Special Settlement Master is one example of innovative use of limited judicial resources. [LexisNexis]

Citing References:

Elizabeth Berkowitz, The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund, 24 Yale L. &. Pol'y Rev. 1 (2006).

> From the article: As authorized by the [Air Transportation Safety and System Stabilization Act], the Special Master singlehandedly controls all operations of the Fund, wields broad power to create procedural and substantive rules, adjudicates claims exempt

from judicial or administrative review, and manages an unlimited budget with no cap on expenditures. Congress failed to set bright-line rules, enunciate exclusionary definitions, or articulate a principled system of compensation. There is simply no "rationale, restraint, ethic or coherence" in the definition of awards, leaving the Special Master unilaterally responsible for filling in nearly every detail of the program.

In certain respects, the power the Act entrusts to the Special Master is sensible. Significant judicial review or congressional oversight generally slows the process of compensation. Furthermore, a single individual, especially one with expertise like the Special Master, is better suited to issue appropriate awards through a uniformly administered compensation scheme and can promptly construct a reliable and efficient procedure providing more immediate closure to the victims. Notwithstanding these benefits, the role granted to the Special Master is highly problematic and represents a significant defect in the Act. The ATSSSA's Special Master is a powerful decision maker vested with unfettered discretion to craft and run the Fund. All of our traditions, constitutional, doctrinal, and otherwise, militate against such authority being concentrated in a single individual. Moreover, previous congressional experience with national compensation schemes warns against the vesting of such discretion in a single individual. "The September 11th Fund will remain controversial because the source of the definition of its awards-- however able and committed--is not in any sense democratic."

More disconcerting is the effect the Fund might have on future policy. Some argue that because the Fund was a unique response to a national crisis of extraordinary proportions, the Fund will not shape succeeding compensation schemes, and the role of the Special Master will not present a model for the future.

28. Kenneth R. Feinberg, *The Dalkon Shield Claimant Trusts*, 53 LAW & CONTEMP. PROB. 79 (1990).

Westlaw Abstract: The purpose of this article is to examine such methods of resolving mass tort litigation. It is intended as a road map of issues that must be considered in attempting an aggregate settlement of a mass tort litigation and in developing a viable, efficient administrative system for delivering compensation.

The remainder of the article is divided into three sections. The first section discusses the issues involved in attempting a comprehensive, aggregate settlement in the mass tort context. The second section examines the development of a mechanism for distributing funds to individual plaintiffs. The article concludes with a case history of the Dalkon Shield litigation, which provides an illustrative example of the issues involved in aggregating claims and of various options for distributing compensation through an administrative mechanism.
In each of these areas, the intent of this article is to raise the various issues that will arise in attempting an aggregate settlement of a mass tort controversy and, where appropriate, to offer some options that might be considered in addressing these issues. Although each case will present new and unique issues, it is hoped that this article will help guide parties who find themselves embroiled in such a controversy to a fair and effective resolution of the matter. [Westlaw]

29. Stuart P. Feldman, *Curbing the Recalcitrant Polluter: Post-Decree Judicial Agents in Environmental Litigation*, 18 B.C. ENVTL. AFF. L. REV. 809 (1991).

Lexis Abstract: The Court limited the sulphur content percentage permitted in defendant's waste fumes and specified the maximum allowable amount of emissions. ... Historically, the special master was a frequently employed agent of the equity courts. ... Traditionally, the special master was the most benign of an equity court's agents. Appointed by nineteenth-century courts to relieve the judge of the courts' most routine duties, the special master originally performed clerical functions. ... Judge La Buy had appointed a special master to make both factual determinations and conclusions of law in resolving two antitrust actions. ... Another plaintiff, a citizens' action committee, requested that a special master examine the factual circumstances surrounding the defendant's admittedly noncompliant activities. ... By its terms, Rule 53 allows a reference to a special master in an "exceptional condition." ... [LexisNexis]

Citing References:

United States v. Alisal Water Corp., 326 F. Supp. 2d 1010, 2002 U.S. Dist. LEXIS 27504 (N.D. Cal. 2002).

> Lexis Overview: The court found that the adjudicated violations were serious and included falsification of records designed to protect public health under 42 U.S.C.S. § 300g-3(b), and that defendants had a decade long history of such violations. The court further observed that defendants had adopted an inordinately combative stance against legitimate regulatory oversight and had repeatedly failed to accept responsibility for their conduct, seeking to shift blame to others including the regulators themselves. Specifically, the court found that defendants not only failed to monitor and report results of water samples, but also reported numerous false results, at best with gross negligence and at worst with conscious intent to deceive. The court added that defendants lacked the managerial competence to operate compliant drinking water systems and lacked access to the significant financial resources to operate compliant drinking water systems. Accordingly, the court found that the usual remedies were inadequate and that imposition of an equitable receivership was necessary to manage defendants' water systems consistent with the objective of providing maximum feasible protection of the public health.

Charles M. Haar, The 1991 Bellagio Conference on U.S.-U.S.S.R. Environmental Protection Institution: Boston Harbor: A Case Study, 19 B.C. Envtl. Aff. L. Rev. 641 (1992).

> Lexis Summary: These conditions have made it harder than ever to develop and implement solutions for the widespread environmental degradation that is one of the most enduring legacies of the Soviet state. ... The Boston Harbor litigation was unusual even in the United States and is of interest chiefly for its innovative use of a special master. ... THE POLLUTION OF BOSTON HARBOR: HISTORY AND LITIGATION ... Nonetheless, for years the agencies responsible for environmental protection in Massachusetts failed to take effective action to address this pollution. ... Some Soviet

environmental law experts have recognized that the introduction of citizen suit provisions and a judicial system capable of responding meaningfully to such suits is a necessity for the continued development of environmental protection in the new republics. ... In determining the causes of the pollution in Boston Harbor and the measures necessary to alleviate it and then preparing his report, the special master consulted many scientific and other experts. ... The case demonstrates that the courts cannot replace the legislature in dealing with environmental protection, nor should they, but that problems such as the Boston Harbor, which require complex and long-term solutions, can benefit from the courts and the legislature working together. ... Even now, the problems of the pollution of Boston Harbor are far from solved...

Elizabeth F. Mason, Comment: Contribution, Contribution Protection, and Nonsettlor Liability Under Cercla: Following Laskin's Lead, 19 B.C. Envtl. Aff. L. Rev. 73 (1991).

Lexis Summary: In reality, courts using the comparative fault approach in CERCLA cases have not first allocated PRP fault according to proportional share of the harm, then imposed joint and several liability, and then allowed contribution actions based on the court's initial allocation of fault. ... The EPA incorporated the UCATA approach into its 1985 settlement policy in order to enable the government to settle with some of the PRPs at a site and then pursue the nonsettling PRPs for the balance of the cleanup costs, even if that amount exceeded the nonsettlors' "fair share" of the cleanup costs. ... Second, according to the Rohm & Haas court, the UCFA approach is inconsistent with SARA's goals of minimizing litigation and promoting voluntary settlements.

Jason Feingold, Comment: The Case for Imposing Equitable Receiverships Upon Recalcitrant Polluters, 12 UCLA J. Envtl. L. & Pol'y 207 (1993).

Lexis Summary: As a result of the attorney general's actions, the widget factory pays a substantial fine and pledges to bring its facility into compliance with the terms of its pollution discharge permit. ... In Langdell, the attorney general secures environmental compliance without threatening the viability of the defendant's enterprise. ... The authority of a court of equity to impose a remedial receivership on a recalcitrant polluter is "founded in the broad range of equitable powers available to [a] court to enforce and effectuate its orders and judgements." ... The importance to the community of preserving the enterprise can also be characterized as supporting the advisability of imposing receivership, since persistent noncompliance is likely to inflict severe harm on the defendant in the form of cumulative environmental fines, contempt penalties, and civil judgements. ... However, if environmental receivership is viewed as primarily a remedial, rather than punitive, measure, the goal of achieving environmental compliance will be well served by imposing receivership in cases lacking bad faith, if the defendant exhibits persistent inability to comply with the law. ... Another tactic for avoiding losses during the receivership is to restrict the receiver's powers to only those aspects of the enterprise which affect environmental compliance.

Michael B. Gerrard et al., 2-7 Environmental Impact Review in New York §7.17 (2008)(No abstract available).

30. Mark A. Fellows & Roger S. Haydock*, Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269 (2005), *available at* https://www.courtappointedmasters.org/acam/assets/file/public/articles/FellowsHaydock.pdf

Lexis Abstract: The need for their services will continue to increase, making special master appointments more common and important in the years ahead. ... " Courts provided a strict interpretation of exceptional conditions, making it clear that neither the congestion of the court docket nor the complexity of the litigated issues were sufficient to justify a special master appointment. ... As a response, the revised rule delineates three specific roles to be filled by a special master appointment: pre-trial masters, post-trial masters, and consent masters. ... Even in the era of the restrictive La Buy exceptional condition standard for special master appointments, reference of the management and supervision of discovery in complex cases was relatively uncontroversial. ... It is clear that the order of appointment should prescribe ex parte communication guidelines for the settlement master that both facilitate settlement processes and preserve an unbiased forum for judicial dispute resolution. ... Such guidelines would alert judges, parties and masters to possible future conflict situations and help judges prescribe appropriate ex parte communications rules in special master appointment orders. ... Support staff reductions above a certain level clearly could reduce judicial capacity to handle increased caseloads - especially complex cases with a large load of filings. [LexisNexis]

Citing References:

Jeffrey W. Stempel, F. Hodge O'Neal Corporate and Securities Law Symposium: Mutual Funds, Hedge Funds, and Institutional Investors: Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes, 83 Wash. U. L. Q. 1127 (2005)

> From the article: The type of hearing master/special master use I advocate has been common as part of class action or mass tort settlements. Agent Orange, asbestos, discrimination, and securities claims all provide examples. In my view, this approach has worked well, so well that we should not insist on settlement as a prerequisite to such use of judicial adjuncts to make preliminary fact finding on individual damages questions within a class. To be sure, incorporation of this approach in a settlement has certain advantages because the parties can agree to be bound by the master's findings, thereby eliminating the additional cost and uncertainty of de novo challenge to the master's work. But if the master-managed damages processing is done well, de novo challenges (or at least de novo challenges that are taken very far) should be relatively few in number. This appears to have been the experience with court-annexed arbitration, where litigants appear either to accept their awards or to file for de novo trial only to have some negotiating leverage, eventually resolving the matter well short of trial.

31. David Ferleger, *Masters in Complex Litigation & Amended Rule 53* (2005), *available at* https://www.courtappointedmasters.org/acam/assets/file/public/articles/Ferleger.pdf

Abstract: This article is in three parts, the first two of which appear here. Part 1 reviews the functions of special masters in complex and structural litigation, including extensive citation resources intended to assist practitioners and courts. Part 2 details the new landscape established by the 2003 revision to Federal Rule of Civil Procedure 53. Part 3 will focus on challenging questions which arise when courts utilize masters such as overlap of the master role with the expert witness role, whether masters may be called as witnesses, ex parte communication between masters and the court or parties.

32. David Ferleger, *Masters in Disability Litigation & Amended Rule 53*, 29 MENTAL & Physical DISABILITY L. REP. 157 (American Bar Association 2005).

In the past 25 years, many court orders enforcing the rights of people with physical and mental disabilities have been managed for courts by judicial adjuncts who, in the federal system, are typically special masters appointed by the responsible court. These include cases involving such issues as community placements from institutions,[1] special education,[2] early childhood screening,[3] annuities,[4] prison mental health care,[5] hospital barrier removal,[6] housing access,[7] and employment.[8]

Disability litigation often results in "structural injunctions,"[9] which are highly complex; require development of multiple plans and establishment of policies, procedures, and safeguards; and typically necessitate mid-course refinements. Such litigation may involve years of active post-judgment oversight by the court. Sometimes, defendant government officials "succumb to political pressures to shirk their constitutional responsibilities."[10] Commitments in consent decrees or court-approved plans may not be met. Individual cases may also involve sufficiently diverse tasks to be appropriate for use of a master to conserve judicial resources.

Courts typically do not have the time or expertise to oversee decrees without the assistance of an adjunct. For vulnerable people with disabilities, it is often a matter of some urgency when they turn to the court for relief under existing injunctions. In such situations, a master's availability may be essential to affording adequate and timely relief. As one court observed, "time is of the essence with these motions. When the physical or emotional health and safety of a [disabled] child is threatened, the matter cannot wait for the Court's calendar to clear."[11]

This article describes the variety of functions that masters perform and explains the major changes wrought by the recent amendment to the federal rule on masters. The extensive endnotes may serve as a resource for courts and counsel considering the use of masters.

[Hein Online – http://www.heinonline.org.proxy.wmitchell.edu/HOL/Page?handle=hein.journals/menphydis29&id=1&size=2&collection=journals&index=journals/menphydis]

33. Clayton Gillette, *Appointing Special Masters to Evaluate the Suggestiveness of a Child-Witness Interview: A Simple Solution to a Complex Problem*, 49 ST. LOUIS. U. L.J. 499 (2005).

Abstract: ... While this may be a "cute" phenomenon among children in everyday life, it is certainly not "cute" when the child is a witness to a serious crime or is alleged to be a witness to a serious crime. ... However, it would be virtually impossible to eliminate the researcher's and child's awareness of the reason for the encounter. ... There are obviously extremes on either side of the false positive/false negative argument. ... The Supreme Court of New Jersey addressed the issue of whether or not a particular interview (or battery of interviews) of a child (or children) was suggestive in Michaels, holding that a pretrial taint hearing should be conducted wherein the trial court can make a ruling on the suggestiveness of the interview and thereby decide if the transcript of the interview (and other evidence of the interview) should be excluded from trial and even if the child should be excluded from testifying at trial. ... " The Court based this decision to exclude, in part, on the suggestive interview techniques used by the interviewer. ... Appointment of a court-appointed expert will lead to undue delay during a taint hearing because the expert will need to take the time to educate a judge on the issues, while a special master could simply decide the issues based on the technical knowledge already possessed by the special master. ... [MLV: LexisNexis]

Citing References:

Gregory M. Bassi, Comment: Invasive, Inconclusive, and Unnecessary: Precluding the Use of Court-Ordered Psychological Examinations in Child Sexual Abuse Cases, 102 Nw. U.L. Rev. 1441 (2002).

> Lexis Summary: ... Before we can answer this question, we must examine the legal history of compelled psychological examinations, the empirical research regarding the effectiveness of children as witnesses, and the role of mental health experts in child sexual abuse cases. ... Osgood, the Supreme Court of South Dakota listed a series of factors: 1 The victim's age; 2 the nature of the examination requested and whether it might further traumatize the victim; 3 whether the prosecution employed a similar expert; 4 whether the evidence already available to the defendant suffices for the purpose sought in the examination; 5 whether there is a reasonable basis for believing that the child's mental or emotional state may have affected the child's veracity; 6 whether evidence of the crime has little or no corroboration beyond the testimony of the victim; 7 whether there is other evidence available for the defendant's use; and 8 whether the child will testify live at the trial. ... Bruck and Ceci's amicus brief used the extreme facts of the investigation in Michaels's case to highlight weaknesses in the reliability of child victim witnesses. ... In addition to evidence of previous false allegations, the defendant may also impeach the credibility of the witness by providing the jury with existing records of the victim's previous medical and psychological examinations, supplemented by expert testimony to explain their contents. ... Such a special standard for child victims of sex crimes places those victims in a significantly subordinate legal position to victims of other crimes. ... In sum, a categorical ban on compelled psychological examinations of complainant witnesses in child sex abuse cases would give effect to strong public policies

that favor victims' welfare and rights. ... Abbott and Nobrega exemplify the divide among jurisdictions regarding how to balance the victim's welfare and right to be free of burdensome discovery techniques against the defendant's right to a fair trial.

Tamar R. Birckhead, The Age of the Child: Interrogating Juveniles After Roper v. Simmons, 65 Wash & Lee L. Rev. 385 (2008).

Lexis Summary: ... It explains how Simmons can inform a new approach by both law enforcement and the courts to the questioning of juvenile suspects, one that is consistent with what recent studies have revealed about the ways in which adolescent's experience interrogation and is also consistent with the law's approach to the questioning of minors who are witnesses or alleged victims of crime. ... That Kennedy began the opinion by recounting the rather harrowing facts of the murder of Shirley Crook speaks to the question of whether capital jurors should have the discretion to decide which juvenile offenders should be executed as well as to the matter of the proper weight that a defendant's youth should be given in the death penalty calculus. ... In order to demonstrate Simmons's applicability to the questioning of adolescent suspects, it is necessary first to explain how interviewer bias combines with the Reid Technique, the widely utilized interrogation strategy of police investigators, to produce statements from suspects that are false or inaccurate. ... Simmons for why juveniles could not be classified among the worst offenders in the context of capital punishment also serve to explain, at least in part, why children and adolescents are particularly vulnerable in the context of interrogation. ... Alvarado: Privileging "Objective" Standards Pre-Simmons As discussed in Part II, one of the most significant aspects of Justice Kennedy's opinion in Roper v. ... Relying on past precedent-from cases in which the suspects were adults, not juveniles-Kennedy found that seventeen-year-old Michael Alvarado was not in custody when he confessed to the murder of a truck driver after two hours of interrogation without Miranda warnings.

34. Ronald J. Hedges, *Discovery of Digital Information*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005(No abstract available).

35. Ronald J. Hedges, *Complex Case Management*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

36. Ronald J. Hedges, *Mediation Developments and Trends*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

37. Ronald J. Hedges, *Punitive Damages*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

38. Lonny S. Hoffman, *November 2005 Caselaw Update (to Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction*), ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

39. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L. J. 1265.

Abstract from Lexis: ... The defendants have been such governmental bodies as school systems, prison officials, welfare administrations, mental hospital officials, and public housing authorities. ... The decree that purports to reform a public institution often injects the courts into the public budgeting process. ... In institutional reform cases, the operational meaning of the American equity tradition is to legitimize detailed affirmative decrees having a long life, in the name of insuring that equity does not suffer a wrong without a remedy. ... Underlying these developments is a growing recognition that institutional reform litigation has requirements different from those of earlier, more conventional, if protracted, litigation, requirements that justify extraordinary procedural flexibility. ... Just as institutional reform litigation comprises a small but highly significant minority of cases on the federal docket, so judges who have engaged in attempts to supervise organizational change comprise only an important minority of all federal judges. ... Institutional reform litigation may be different, and it may be difficult, but it is not impossible. ... The assumptions carried by the traditional model into institutional reform litigation are easily stated. ... Among the more common devices is appointment of a special master, a monitor, a review committee, or, in more extreme cases, a receiver to take over administration of the agency. ... In a Rhode Island prison case, a master was empowered to monitor compliance with the decree.

Citing References:

Chris H. Miller, The Adaptive American Judiciary: From Classical Adjudication to Class Action Litigation, 72 Alb. L. Rev. 117 (2009).

> Lexis Abstract: Unless the expected return from the classed mass tort claims, net of the costs of litigating ... exceeds the return expected from competing sporadic claims, plaintiff attorneys would admit the sporadic and exclude the mass tort claims from the system... Indeed, nearly all legal models have normative underpinnings and their authors frequently articulate normative reactions and prescriptive suggestions to those models. ... They also accounted for important changes by revising inherited models to more accurately reflect contemporary features of the legal system and provide an adequate framework for understanding and describing legal issues and processes... Also, although Chayes briefly gestures at "outsiders" as a common feature of public law litigation, for Horowitz, Federal Rule 53's provision of a special master is "the most significant procedural device" recently applied by the courts. ... At any rate, the underlying similar, and at times identical, features of the two models describe essentially the same transitional phenomenon - the judicial movement from adjudication of private disputes to ongoing and widespread relief of government entitlement failures. ... In this respect, legal scholars have probably overstated the degree of difference present in the transition from

Chayes' public law litigation to Horowitz and Resnik's managerial litigation. ... Other critics challenge alternative forms of adjudication on grounds that they violate the constitutional separation-of-powers doctrine and argue that judicial policymaking encroaches on the policymaking responsibilities of the legislature.

40. Johnson, *Equitable Remedies: An Analysis of Judicial Neoreceiverships to Implement Large Scale Institutional Change*, 1976 WIS. L. REV. 1161 (1976).

This comment deals with the problems posed by recent applications of neoreceiverships. Because current use of receiverships involves substantial shifts from earlier applications, the law of receivership is best understood developmentally. Thus, this comment traces the development of receivership law through three major phases. Initially, receivers were used to protect private property for the benefit of one party to the litigation: for example, the creditor or the trustee.[11] Section Two of this comment[12] illustrates the use of receiverships to protect private property and outlines the particular equitable characteristics which made the remedy functional. Second, receivership was used to protect private property interests where such protection was essential to preserve the public welfare: for example, in railroad reorganization[13] and in municipal default.[14] Section Three of the comment[15] illustrates that the American experience with use of receiverships to preserve the public welfare has centered on two specific equitable characteristics of the remedy: its inherent flexibility and its coercive potential. The final phase of receivership development involves abandonment of the protection of property interest as a requirement for using equitable powers and extends receiverships to protection of constitutional rights of private individuals. Section Four of the comment[16] discusses the expansion of the traditional receivership concept to include protection of nonproperty rights and argues for the legitimacy of such expansion. Section Five[17] addresses further the problems surrounding the current application of neoreceiverships, focusing on implementation procedure, remedial propriety, receivership duties, and other related problems. This section illustrates that the remedy is favored where extraordinary circumstances exist and where remedial adaptation to these conditions is essential because other forms of relief are impractical, unavailable, or unsuccessful. Furthermore, this remedy is favored where control of a local institution is mandated, requiring specific administrative and supervisory skills in order to effectuate internal organizational change, or where judicial coercion is essential to accomplish a particular result.

11. SMITH, *supra* note 3, at § 4(a)-(d).
12. *See* text accompanying notes 18-45 *infra*.
13. See T. FINLETTER, PRINCIPLES OF CORPORATE REORGANIZATION IN BANKRUPTCY (1937) [hereinafter cited as FINLETTER] for a general history of corporate reorganization; *see also* Rosenberg, *Reorganization—The Next Step*, 22 COLUM. L. REV. 14 (1922); Glenn, *The Basis of the Federal Receivership*, 25 COLUM. L. REV. 434 (1925); Finletter, *Federal Consent Receiverships*, 15 PA. B. ASS'N. Q. 1 (1933); Note, *Equity Jurisdiction in the United States Courts with Reference to Consent Receiverships*, 19 IOWA L. REV. 540 (1934); MOORE, FEDERAL PRACTICE § 66.06[2], for specific applications to railroads.
14. See C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES VOL. VI: RECONSTRUCTION AND REUNION 1864-88 chs. 12, 13 (P. Freund ed. 1971) for a detailed history of federal court involvement in municipal bond disputes.
15. *See* text accompanying notes 46-90 *infra*.
16. *See* text accompanying notes 91-207 *infra*.
17. *See* text accompanying notes 208-74 *infra*.

[HeinOnline (Right from the Text)]

41. Frank. M. Johnson, Jr., *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271 (1981)(No abstract available).

42. Lynn Jokela & David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299 (2005), *available at* http://www.courtappointedmasters.org/resource_articles.asp.

Abstract: This article examines the role masters have played in litigation and explores the benefits that might be obtained from the greater use of masters in the future. The FJC survey of federal judges appointing special masters concluded that special masters were "extremely or very effective." The FJC study is an empirical survey of the effectiveness of special masters, and it includes commentary from judges regarding their experience after appointing special masters. These benefits include better, faster, and fairer resolution of litigation in the cases in which masters are used, as well as an easing of the burdens these cases place on the judiciary. This article also analyzes the barriers to the use of masters and how they might be removed.

Citing References:

Scott Paetty, Complex Litigation in California and Beyond: Classless not Clueless: A Comparison of Case Management Mechanisms for Non-Class-Based Complex Litigation in California and Federal Courts, 41 Loy. L.A. L. Rev. 845 (2008).

> Lexis Abstract: Ultimately, the flexibility of federal summary judgment procedures, which allow judges to dispense with individual issues in a cause of action, better serves the principles of effective case management than CCCS summary judgment procedures, which only permit summary judgment on entire causes of action. ... For example, the Northridge Earthquake litigation highlighted the CCCS's successful resolution of thousands of insurance claims brought in the wake of the 1994 disaster. ... Given the inherent complexity of cases in the CCCS, the need to "get it right" in the initial determination of coordination is of paramount importance. ... While the use of special masters has not disappeared, CCCS judges tend to limit them to provisionally complex cases or construction defect actions where complicated discovery issues necessitate special care... This Part provides a brief overview of the different definitions of consolidation, describes the various rules that govern consolidation in the CCCS and the federal courts, and shows the ways that coordination and consolidation blend when discussing complex case management... CCCS judges can dispense with the actions by settlement, dismissal with prejudice, summary judgment, judgment after trial, or remand of individual cases to their original courts.... After pretrial proceedings are concluded, however, the transferee judge sends the case back to the MDL Panel for remand to the court from which it was first transferred.... If our hypothetical case were filed in the CCCS, the judge could order counsel for Joe Writer and BYDA to propose jury instructions on an element of the cause of action two weeks into proceedings.

43. Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452 (1958) (No abstract available).

44. Ron Kilgard, Discovery Masters: When They Help – and When They Don't, 40 ARIZ. ATT'Y 30 (2004).

Abstract: The use of discovery masters in civil cases is a practice, like mediation, that has grown gradually, not because of any top-down directive from the judiciary or the legislature, but because of the necessities of actual cases. Like mediation 10 years ago, discovery masters are largely unregulated by rule or statute: The current rule on masters, Rule 53, has nothing to say about discovery masters. And discovery masters are the subject of few cases. This article takes a look at these neglected creatures.

45. David I. Levine, *Calculating Fees of Special Masters*, 37 HASTINGS L. J. 141 (1985).

Lexis Abstract: ... The Article discusses four standards that federal courts have recently considered for setting masters' fees: First, unbounded discretion of the trial court; second, application of a test, developed by the Supreme Court of the United States in 1922, that compensation should be "liberal but not exorbitant"; third, basing the fee on one-half of the prevailing rates for commercial attorneys; and fourth, basing the fee on some variation of the lodestar method of setting attorney's fees. ... Retiring masters collaborated with the Lord Chancellor, who actually made the appointments, to obtain payments from the new master in exchange for the appointment. ... Calculating Masters' Fees for Work Done as Special Master From the preceding discussion, four different approaches to the problem of calculating special masters' fees can be discerned, particularly in the institutional reform setting: first, unbounded discretion of the trial court; second, application of a test, developed by the Supreme Court in Newton, that compensation should be "liberal but not exorbitant"; third, the Hart/Reed II & IV method of basing the fee on one-half of the prevailing rates for commercial attorneys; and fourth, the Reed III approach of basing the fee on some variation of the lodestar method of setting attorney's fees. ... Thus, an academic institution does not expect a professor to perform outside work that will generate income for the institution; the institution encourages and supports faculty public service endeavors by a variety of services and overhead expenses, such as office space, secretarial and student research assistance, library books, stationery, and telephone service. ... It is not clear, however, if all of these modified Johnson factors should apply to a special master who is compensated using a lodestar rate. [LexisNexis]

Citing References:

Jackson v. Nassau County Bd. Of Supervisors, 157 F.R.D. 612 (E.D.N.Y. 1994).

> The court considered Fed. R. Civ. P. 53(a) and the award of attorney fees determined by the lodestar method and other methods. The court found that a computer print-out delineating the time charges submitted by the special master adequately set forth the amount of time spent by the special master and certain attorneys working on this case. The only specific dollar objections by the county that the court found valid were the arithmetic errors in the tabulation of daily time records, which amounted to an overcharge of 3.75 hours in the sum of $ 937.50, a specific entry for 2.75 hours of work, in the sum of $ 269.50, that did not describe what was performed during that time, and the time

charged for time spent at meals. The court excluded the time and costs of meals. Further, the rates charged for the work of summer interns, paralegals and other support staff were excessive. The court rejected the county's objections regarding the fees and disbursements of a doctor. Because of the nature of the case, namely, one involving public institutional relief and service to the public, a twenty-five percent reduction of the special master's fee application was appropriate.

Cordoza v. Pac. States Steel Corp., 320 F.3d 989 (9th Cir. 2003).

Lexis Overview: The appellate court lacked jurisdiction to consider the appeal because even though the special master had a right to appeal a district court order setting his compensation, the district court orders at issue were not final judgments under 28 U.S.C.S. § 1291. The district court's orders disqualifying the special master and ordering disgorgement were intertwined with the corpus of the litigation in that they determined what share of an existing pool of money went to him and what share went to the plaintiffs in the underlying litigation. Although the compensation issue was important to the special master, his interest was not weightier than the societal interest in a final judgment in the underlying litigation. Treating the request as a mandamus petition, the special master was not entitled to relief as the trial judge had not abused her discretion in entering the orders. Mandamus was also not warranted under 28 U.S.C.S. § 455 because the trial judge's evaluation of the special master's performance of his duties was part and parcel of her supervisory duties and her receipt of limited information ex parte was done in order to preserve the integrity of the judicial process.

LeRoy L. Kondo, Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases, 2002 UCLA J.L. & Tech. 1 (2002).

Lexis Summary: Topics for discussion include (1) the specialist/generalist court debate over increased specialization within the judiciary; (2) the effects of specialization within the federal court system on uniformity, determinacy, accuracy, precision, and predictability of judgment--with particular focus placed upon the Federal Circuit, a stabilizing semi-specialized tribunal; (3) criticisms of the Federal Circuit and federal courts for indeterminacy due to "panel dependency," doctrinal vagueness in claim interpretation, and inexperienced lay jury panels; (4) the impact of specialization in prevention of forum shopping through the uniformity of nationwide application of intellectual property law; (5) judicial efficiency and economy resulting from specialization in attempts to relieve the crisis in volume plaguing the federal courts; and (6) the effects of a more specialized judiciary on the protection of American business interests, promotion of research and development, with discussion of countervailing policy considerations. ... The Federal Circuit's Impact On Patent Law Policy Transformation And The CAFC's Role In Protection Of United States' Business Interests Notwithstanding its lack of specific expertise, the Federal Circuit has significantly advanced the delineation of patent law doctrine over the past three decades, due, at least in part, to its semi-specialized jurisdiction and focus. ... ICANN effectively utilizes its authority and URDP policies to resolve domain name disputes at low cost and within a

short two-month time frame. ... Since federal courts have historically deployed primarily generalist judges, and since specialized judges have primarily resided in state courts (e.g., family court, drug court) having lower status and compensation, specialization has been unfairly stigmatized as being inferior. ... Thus, specialized judges, with technical training and calendars dedicated to intellectual property matters, would possess both the ability and time to become "expert judges" in the intricacies, nuances and subtleties of complex areas of law. ... Lack of uniformity of application of patent laws historically led to rampant forum shopping, with bitterly fought battles in the circuits over patent infringement cases. ... § 1835, experts under Rule 706, and special masters under Rule 53 to permit greater comprehension of complex technical/legal issues; (2) the Federal Circuit's own use of technical advisors in its appellate review of PTO and District Court decisions; (3) recommended court reform thorough increased use of specialist judges and adjudicators in the Federal Circuit, PTO, and federal district courts; (4) establishment of specialized divisions within the Federal Circuit, PTO, or District court; (5) the deployment of professional or educated "blue ribbon" juries in the resolution of complex issues of fact, with discussion of the shortcomings of the existing lay jury system in high technology cases; and (6) establishment of federal high technology judicial or administrative courts. ... Rich, the "elder statesman of the patent bar" recently died, Richard Linn, a former patent attorney from Foley & Lardner, replaced him as the newest appointment to the twelve-member Federal Circuit. ... Another progressive specialization proposal would be to establish the Federal Circuit as an entirely specialized high technology court staffed by panels of specialized adjudicators, attorneys and juries that would hear cases involving their respective fields of specialization, such as biotechnology, engineering, telecommunications, computer science, business methods, and Internet law. ... However, high technology proponents, such as those in Internet and other newly evolving arenas, may look optimistically towards increased specialization in the federal courts and in international forums as a means for solving the complexity problem--at least in part.

46. David I. Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753 (1984).

The issues in the debate over the authority to appoint remedial special masters can be briefly summarized. First, does rule 53, with its prominent references to trial-stage appointments of special masters, give courts that have already decided upon the liability of the defendants authority to appoint special masters to perform complex tasks up to and including running a state institution such as a prison or a mental hospital? Second, does rule 70, with its language referring to the appointment of "some other person" to perform specific acts on behalf of a party, authorize courts to appoint remedial special masters to perform complex tasks? The term "master" does not even appear in the rule, and the rule expressly mentions only limited tasks such as conveyances of property. Finally, do courts have inherent power to appoint remedial special masters and, if so, what is the relationship between that power and these two rules, which may fully regulate those appointments?

This Article discusses the ongoing controversy over the adequacy of these sources of authority, which federal courts have used to appoint special masters to assist in the development and implementation of institutional reform decrees.[10] Each source of authority will be discussed in light of an important but largely unknown and unpublished primary source concerning the intent of the original Advisory Committee on Rules for Civil Procedure, the drafters of the Federal Rules of Civil Procedure.[11] This source is the extensive collection of papers maintained by Charles E. Clark, then Dean of the Yale Law School and Reporter for the original Advisory Committee. To understand fully the intent of the drafters, which was to preserve existing tradition and practice, this Article then discusses, in the context of rules 53 and 70, the use of special masters for remedial purposes in the period prior to the promulgation in 1938 of the Federal Rules of Civil Procedure.[12] This Article draws the implications of this history for the appointment of remedial special masters in modern institutional reform cases.[13] Finally, to preserve expressly the clear intent of the drafters, this Article proposes some clarifying amendments to rules 53 and 70 to confirm the authority of the courts under the federal rules to appoint remedial special masters.[14]

Diagnostic Clinic, Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir. 1984) (en banc); Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983).

[10] *See infra* text accompanying notes 15-43, 107-15.

[11] *See infra* text accompanying notes 63-89, 116-30.

[12] *See infra* text accompanying notes 94-106, 131-38.

[13] *See infra* text accompanying notes 198-242.

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Citing References:

Vikramaditya Khanna & Timothy L. Dickinson, The Corporate Monitor: The New Corporate Czar?, 105 Mich. L. Rev. 1713 (2007).

> Lexis Summary: Following the recent spate of corporate scandals, government enforcement authorities have increasingly relied upon corporate monitors to help ensure law compliance and reduce the number of future violations. ... The corporate monitor of today can be traced to the special masters of the past... As these enforcement methods developed, regulators began to experiment with various types of settlements leading to the landmark 1994 Prudential Securities case in which the government provided for the first modern appointment of an independent expert whose role was to monitor

compliance of the company as per a DPA. ... Monitors often have more expertise than management on compliance matters (indeed, this is an important raison d'etre for a monitor), and this results in benefits for the firm to balance against the costs of a monitor. ... A large cash fine could induce a firm to hire an expert to consult on compliance issues (like a monitor), thereby reducing wrongdoing and avoiding the large cash fines. ... However, for recidivist corporations, the monitor-advisor may be less valuable than the influential monitor... Reliance on fiduciary duty places courts as the monitor of monitors, whereas agency monitoring places the agency as the monitor of monitors.

47. Michael K. Lewis, *The Special Master as Mediator*, 12 SETON-HALL LEGIS. J. 75 (1988).

THE SPECIAL MASTER AS MEDIATOR

Michael K. Lewis

Introduction

Courts have increasingly begun to use special masters to aid in the implementation of complex institutional reform orders or consent decrees as well as to aid in the settlement process. The use of special masters in either circumstance raises significant questions. This paper discusses some of those questions and focuses on those issues peculiar to the special master as mediator.

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48. Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867 (2000).

Lexis Abstract: In the national mass tort context, "cooperation" has more often been a euphemism for a case management strategy of aggregating and centralizing litigation and encouraging state trial judges to defer to a federal multidistrict transferee judge in resolving litigation. ... These efforts have focused upon the problems of excessive transaction costs, delayed access to courts, lack of horizontal equity in outcomes, and the overall challenges to the legitimacy of the judicial process in the resolution of mass torts. ... The institutional cooperative strategy is thus a hybrid approach, attempting to accentuate the strengths of the case-by-case model of litigation and federalism, while minimizing the model's inefficiencies and inequities. ... Finally, there is a small group of law firms capable of pursuing any strategy - boutique, class action, or wholesale - depending upon the opportunities presented by each mass tort. ... If the MDL panel made it explicit that the transferee judge is not to engage in aggregation other than discovery until the mass tort matured in the marketplace of state court litigation, there would still be some duplicative discovery. ... A strategy of cooperation at the institutional level - taking advantage of the state courts to create a marketplace of litigation and the federal courts to coordinate discovery and promote a national settlement - can create otherwise unobtainable joint gains.

From Article's Introduction: "Judges are now players in the mass tort game. Whatever approach any judge takes in managing a mass tort, judicial input is a critical factor in the ultimate progress of the litigation. To certify or not to certify, for example, is a question that must be answered with profound results for the outcome of the mass tort. Recognizing the role

of judges, recent legal literature has suggested that the ubiquity and massness of the tort should lead to cooperation among judges. Through cooperation, judges can promote efficiency and horizontal equity in the adjudication.

"Cooperation" among judges has been promoted in multiple and often confusing forms; "cooperation" has varyingly meant communication, coordination, collaboration, or cooperation in the negotiation sense of seeking joint gains. In the national mass tort context, "cooperation" has more often been a euphemism for a case management strategy of aggregating and centralizing litigation and encouraging state trial judges to defer to a federal multidistrict transferee judge in resolving litigation. This strategy has critical weaknesses that limit its ultimate value. It has behavioral, structural, and political impediments; it can conflict with an appreciation of the maturity and elasticity of mass torts, and it may run contrary to recent Supreme Court jurisprudence. There is an alternative cooperative strategy that has significantly more potential for benefiting judges, litigants, and the legal system as a whole. The alternative strategy can be implemented de jure or de facto and focuses at the institutional, rather than individual, level and suggests complimentary, rather than competing, roles for state and federal courts.

Citing References:

Beko Reblitz-Richardson, Lockheed Martin and California's Limits on Class Treatment for Medical Monitoring Claims, 31 Ecology L.Q. 615 (2004).

> From the article: In Lockheed Martin, the court considered class certification for individuals seeking medical monitoring damages based on exposure to harmful chemicals in their local water source... This Note focuses on the question of whether or not medical monitoring claims, and more specifically the chemical exposure claims at issue in Lockheed Martin, are suitable for class treatment. ... In Lockheed Martin, the court not only considered class certification for medical monitoring claims, but did so with environmental pollution claims... A medical monitoring program nonetheless places certain burdens on the court. For example, a court implementing a medical monitoring program will need to appoint a commission or a special master to determine who is covered, how payments should be made, and the scope of the program. Monitoring programs require an ongoing involvement by the court in the administration of the fund, a level of judicial involvement distinct from traditional models of compensation. In response to these considerations, different jurisdictions have embraced or rejected such medical monitoring claims.

49. Gregory P. Miller, *How to Develop a Special Master Practice*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

50. Vincent M. Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 U. TOL.L.REV. 419 (1979).

The purpose of this article is to explore the developing use of masters by federal courts in institutional reform litigation. It commences with a review of the sources of authority for the appointment of such an agent. While it is generally recognized that masters may be appointed pursuant to the provisions of Rule 53 of the Federal Rules of Civil Procedure, one of the theses of this article is that this rule is not the sole source of the appointing court's authority; nor are all functions assigned to masters contemplated by Rule 53. Indeed, it will be urged that such appointments may be made under Rule 70 of the Federal Rules of Civil Procedure, in accordance with the Federal Magistrates Act, and, in spite of the adoption of Rule 53, through the exercise of the inherent power that resides in federal courts. The author then will move to a consideration of the authority and precedent for the appointment of a master in the specific context of institutional litigation. Within this setting, the advantages and disadvantages of a reference, the objectives of the court in appointing a master, and issues relating to the selection of such an agent, his powers, and the ethical and professional constraints upon his activities will be discussed. The article concludes with an examination of the effectiveness of the reference technique in the setting of institutional reform litigation.

The sources of authority for the appointment of a master. Historically

[HeinOnline (directly from the text)]

51. Martin Quinn, *Outline of Ethical Issues for a Special Master*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

52. Randi I. Roth, *Monitor Work in* Pigford v. Johanns: *Lessons Learned About Claims Processing Judicial Adjunct Work*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

53. Jerry Sandel & Sherry Wetsch, *Mediation of Criminal Disputes in the 278th Judicial District*, 25 IN CHAMBERS 3 (1998).

From the Article: Alternative dispute resolution (ADR) mechanisms – mediation and arbitration – often offer a quicker, less expensive, and more conciliatory way to settle a dispute than litigation. Potential litigants are using these alternatives more, particularly to resolve family law, consumer law, personal injury, and employment law disputes. Many state and federal laws and policies now promote or even mandate ADR.

Resorting to arbitration or mediation is faster and costs less than traditional litigation methods. In addition, litigation is public, while ADR mechanisms generally enable the parties to preserve their privacy. Although it usually helps to have a lawyer present during arbitration or mediation, it is not uncommon for parties to represent themselves, because the procedures are much more informal and flexible than those used in a court hearing. Alternative dispute resolution can produce better and more creative results for the parties, and possibly even

preserve an amicable relationship between them. On low dollar and simple cases, the parties may consider a telephone hearing.

Legal assistance attorneys are finding that mandatory mediation or arbitration provisions are often embedded in many contracts, including standard consumer purchase agreements, credit card contracts, insurance contracts, leases, utility contracts, and contracts involving securities. These clauses are also commonly included in employment contracts.4 Many contractual arbitration clauses specify binding arbitration as the only means to resolve any future disputes arising out of the contracts.

Almost any kind of dispute may be suitable for ADR, and legal assistance practitioners may find it advantageous for their clients to affirmatively seek out ADR services, particularly in divorce, child custody, or other family disputes. This article offers a practical introduction to mediation and arbitration and identifies several web resources. In addition, it includes some useful observations and insights into ADR from an experienced neutral. [Copy available at: http://adr.navy.mil/docs/jun2000talwetsch.pdf]

54. Shira A. Scheindlin & Jonathan M. Redgrave, *The Evolution and Impact of the New Federal Rule Governing Special Masters*, 51 FED. LAW. 34 (Feb. 2004).

From the Article: The modern practice and use of special masters gradually evolved from a strict and limited role for trial assistance prescribed by Rule 53 to a more expanded view, with duties and responsibilities of masters extending to every stage of litigation. Recognizing that practice had stretched beyond the language of the long-standing rule, the Advisory Committee on Civil Rules undertook an effort to conform the rule to practice. The result is a new rule (effective Dec. 1, 2003) that differs markedly from its predecessor and sets forth precise guidelines for the appointment of special masters in the modern context. [Westlaw]

Citing References:

Frederick B. Lacey & Jay G. Safer, Magistrate Judges and Special Masters: The Authority, Roles, Responsibilities, and Utilization of Special Masters, 3 Bus. & Com. Litig. Fed. Cts. § 28:33 (2d ed.) 2008.

> Summary: Fed. R. Civ. P. 53 generally governs the appointment and compensation of special masters, references to special masters, powers of special masters, proceedings before special masters and reports of special masters, when the appointment of the special master is made under Rule 53. The full text of Rule 53 is set out at the end of this section.

William L. McAdams & Sherry R. Wetsch, Alternative Dispute Resolution of Criminal Disputes in the 12th Judicial District, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, San Francisco, CA 2006 (No abstract available).

Margaret G. Farrell, The Sanction of Special Masters: In Search of a Functional Standard, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Washington, D.C., 2007.s

> From the Article: Under amended Rule 53, Masters are required to perform their duties in accordance with judicial standards of conduct -- even though the Rule permits courts to authorize masters to perform tasks, such as conduct investigations, and adopt procedures, such as ex parte communications, in which judges themselves could not engage. This article examines the use of special masters in complex litigation and concludes that consideration needs to be given to the appropriateness of standards to which masters are held when they carry out different functions -- adjudication, investigation, administration or mediation -- and the consequences of violating those standards. It finds that it may be untenable to hold masters to judicial standards of conduct when they are not full time judges and perform non-judicial functions. Further, it notes that masters need more clarity about their accountability to the appointing courts, the litigants, third parties, and the bar. Finally, it concludes that the range of remedies imposed to redress excessive or problematic conduct -- reversal, removal, disbarment, damages, injunction, etc. --needs to be examined for proportionality, their effect on other interested parties and their fairness to masters.

55. Shira A. Scheindlin & Jonathan M. Redgrave, *Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation*, 76 N.Y. St. B.J. 18 (Jan. 2004).

From the Article: The modern practice and use of special masters in federal courts gradually evolved from a strict and limited role for trial assistance prescribed by Federal Rule of Civil Procedure 53 to a more expanded view, with duties and responsibilities of masters extending to every stage of litigation. Recognizing that practice had stretched beyond the language of the long-standing rule, the Advisory Committee on Civil Rules undertook an effort to conform the rule to practice.

The result is a new rule, effective as of December 1, 2003, that differs markedly from its predecessor and sets forth precise guidelines for the appointment of special masters in the modern context. In general, the changes provide more flexibility in the use of special masters, permitting them to be used on an as-needed basis with the parties' consent or by court order when exceptional conditions apply.

This article reviews the history of Rule 53, the evolution of the use of special masters in practice, and the significant new provisions of Rule 53. [Westlaw]

56. Shira A. Scheindlin & Jonathan M. Redgrave, *Mastering Rule 53: The Evolution and Impact of the New Federal Rule Governing Special Masters*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005 (No abstract available).

57. James K. Sebenius, Ehud Eiran, Kenneth R. Feinberg, Michael Cernea, and Francis McGovern, *Compensation Schemes and Dispute Resolution Mechanisms: Beyond the Obvious*, 21 NEGOTIATION J. 231 (Apr. 2005).

Wiley Abstract: Because compensation and dispute resolution lie at the core of most resettlement proposals, this panel had two main objectives: to get an accurate grasp of the current Israeli approach to these challenges and to glean insights from relevant experiences in other settings. Before reading our panelists' presentations, one might be forgiven for reasonably thinking that "compensation equals cash" and "dispute resolution equals court." As our panelists discussed, however, such a straightforward view is simply inadequate to the needs of the resettlement problem — a much richer view of compensation and dispute resolution is required. [From http://www3.interscience.wiley.com/journal/118656713/abstract]

58. Linda J. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131 (1989).

From the article: This birthday celebration of the Federal Rules is a time to marvel at the enduring character of the 1938 Federal Rules of Civil Procedure. Given the dramatic changes that have taken place in litigation over these decades, it is no surprise that the proponents of the philosophy of uniform and trans-substantive rules believe that time has proved their case. I want to suggest, however, as indeed others already have, [FN1] that trans-substantive rulemaking in fact has been eroded and replaced by ad hoc versions of specialized rules. One clear example of such ad hoc proceduralism comes via the increased number of judicial adjuncts, who customize procedure for particular and individual cases. This example supports those who call for a different approach to federal rulemaking.

The judicial adjuncts to whom I refer are primarily masters and magistrates. There are also the newly created arbitrators in court-annexed arbitration used in a number of districts, but that experience is relatively new, and I bypass them for purposes of present discussion. There is no doubt that the use of judicial adjuncts has been extremely valuable in processing our expanding and complicated contemporary litigation caseload, and thus I intend my comments less as an attack on the use of masters and magistrates than as an example of why more dramatic procedural reform is in order. In short, I think delegations of judicial power to masters and magistrates have become the substitute for a more precise and specialized procedural code. To some extent then, the debate can be seen as one between those who are satisfied with an individual case-by-case customized procedure put in place by judicial adjuncts versus those who advocate more formal rules that do not slavishly adhere to a uniform and trans-substantive format. These divisions are also not as sharp as I first described them because I think the development and customization of specialized procedures under the present judicial adjunct models actually provide some of the building blocks on which a more formal system of particularistic rules can be erected.

Thus, the case study I present has a two-fold purpose. First, I make the claim that a close examination of modern judicial adjuncts exposes the myth that there is in fact a single set of 'federal rules of civil procedure,' and I advocate establishing formal alternative procedural tracks for processing different types of cases. Second, and on a less ambitious note, I believe that given the way special masters are now being used, specific revisions in Rule 53 itself are necessary. Because both of these proposals have more to do with the use of special masters than magistrates, my emphasis will be on the use of special masters. But it is worth looking at both models for points of contrast. [Westlaw]

Citing References:

Edward V. Di Lello, Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level, 93 Colum. L. Rev. 473 (1993).

> Westlaw Abstract: It is by now a common complaint that litigation in federal court takes too long and costs too much. The sheer number of parties and the complexity of their relationships in large cases have, in themselves, created new administrative problems. Court calendars are backlogged and trial judges are burdened today in ways never imagined a generation ago. Technical expert testimony is a major cause of this delay, cost, and complexity, and as scientific advances and new technologies find their way into the courtroom with increasing frequency, these trends will worsen. Recognizing the need to expedite, de-mystify, and where necessary curb or eliminate so-called "battles of experts" involving technical subject matter, this Note proposes the creation of a new adjunct judicial office for magistrate judges who are specialists in technical fields, and the adoption of certain related procedural reforms. Annexed to federal district courts, these judicial adjuncts would bring about better, faster, more efficient and less expensive adjudication of factual issues involving technical evidence. Empowering expert magistrate judges to perform a number of flexible adjudicative functions would induce litigants to reduce their reliance on expert evidence and to focus and improve its presentation. Part I of this Note examines the problems associated with technical expert testimony and argues that such testimony is unreliable, costly, time-consuming, confusing and of questionable admissibility. Part II analyzes currently available methods of dealing with these problems--special masters and court-appointed experts--and exposes their short-comings. Part III examines the historical evolution of the Court of Appeals for the Federal Circuit, a court with specialized jurisdiction in a small number of legal areas, as an example of the expertise that accrues to judges and the judicial system as a result of specialization. Part IV proposes the creation of a new federal judicial office bearing the title "Magistrate Judge (Expert)" ("MJE") and explores adjunct judicial functions MJEs could perform to make possible more efficient and effective determinations of fact in technical cases. This Part also anticipates possible criticisms and examines the feasibility of the proposal.

Samuel H. Jackson, Technical Advisors Deserve Equal Billing with Court Appointed Experts in Novel and Complex Scientific Cases: Does the Federal Judicial Center Agree?, 28 ENVTL. L. 431 (1998).

> Westlaw Introduction: In the wake of the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., courts are struggling to understand the full scope of their new role as "gatekeepers" of good science. In particular, the debate over the appropriate use of scientific experts under Federal Rules of Evidence 706, and the use of court-appointed experts under the courts' inherent power, has been renewed by recent developments in product liability, toxic tort, and environmental cases. This Comment explores the historical development of court-appointed expert witnesses and technical advisors culminating in the Federal Judicial Center's recently drafted Reference Manual on Scientific Evidence. Mr. Jackson uses this historical framework to discuss appropriate

applications of these increasingly necessary judicial resources. Several procedural safeguards are discussed in addressing the concerns that have been expressed by critics of these resources. Mr. Jackson concludes that in many cases, technical advisors are equally valid, and possibly more effective, alternatives to court-appointed experts in dealing with the exceedingly complex scientific issues presented in current litigation trends. Two recent cases in the Ninth Circuit are discussed as models for the appropriate use of such experts.

Jay Tidmarsh, Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power, 60 Geo. Wash. L. Rev. 1683 (1992).

From the Article: The burden of this Article, therefore, is to demonstrate that an inquiry into the form of complex litigation provides a useful perspective on the hydra-headed problem of complex litigation. Part I begins the inquiry by describing the practical and theoretical factors that have led various courts and commentators to label particular types of litigation "complex." Although all the definitions provide important data about the nature of complex litigation, none capture its full breadth. Thus, the task of the Article's next two Parts is to develop a formal and inclusive definition. Part II builds the theoretical framework for the definition by describing the form of adjudication and the positive assumptions of modern civil litigation. Next, Part III demonstrates that complex litigation arises from the friction between the real-world problems outlined in Part I and the theoretical framework developed in Part II. Part III argues that all complex cases initially involve at least one of four different modes of complexity: the attorneys have difficulty in amassing, formulating, or presenting relevant information to the decision maker; the factfinder has difficulty in arriving at an acceptably rational decision; the remedy is difficult to implement; or there exist procedural and ethical impediments to joinder. The unifying attribute of these four modes is that the dispute can be resolved rationally only through the accretion to the federal judiciary of powers traditionally assumed by the other "actors" (parties, lawyers, jurors, and state courts) in the litigation enterprise. This attribute alone, however, constitutes an overbroad definition of complex litigation; such cases, although "complicated," are not truly complex. Complex litigation also contains a second fundamental attribute: The increase in judicial power needed to deal with these complications threatens to overrun the deep-seated assumption of modern civil litigation that similarly situated claims, parties, and legal theories should be treated in procedurally similar ways. … Part IV applies the insights gained from Part III to the future of civil procedure. Complex litigation stands in the crossroads of the thorniest issues in modern civil procedure: case management; trans-substantivism; adversarialism; the wisdom of equitably based procedural codes; the relationship between procedure and the law and economics movement; and the involvement of courts in politically charged controversies. Part IV demonstrates that these issues, and consequently the direction of procedural reform, can be understood only against the backdrop of the four categories of cases (routine, complicated, complex, and polycentric) developed from the definition of complex litigation.

Patrick E. Longan, Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators, 73 Neb. L. Rev. 712 (1994).

> Westlaw Abstract: Many federal judges do not have time for their civil dockets. The amount of time the average district judge devotes to civil trials has declined steadily in the last ten years. Simultaneously, the criminal dockets have grown too large and become too complex for the district judges to spend sufficient time tending to civil cases which by law have lower priority. Congress continues to create more federal crimes despite urgent entreaties not to do so. The President and Senate have moved slowly to fill district court vacancies, and many believe that adding more judges is an unacceptable solution. The ever-increasing pressures on the district judges have resulted in two trends in the handling of civil cases. The first is the increasing use of judicial "adjuncts" such as magistrates, bankruptcy judges, law clerks, staff attorneys, interns, externs, and the other ingredients of "bureaucratic justice." The second development, more aptly called a movement, has been to direct civil cases away from adjudication to alternative forms of dispute resolution such as arbitration, mediation, early neutral evaluation, and summary jury trials… The two developments converge when judicial adjuncts, particularly magistrates, mediate civil cases.…The trend toward using magistrates as mediators is no accident. To understand why, one must first understand what prevents parties from settling without assistance. Part II of this Article examines this question and concludes that parties increasingly need more information than the attorneys can provide. In addition, the parties also need a more satisfying and structured forum than lawyer-to-lawyer negotiation. One must then compare different forms of mediation to see how each meets those needs. Part III makes those comparisons with respect to mediation by private lawyers, trial judges, and magistrates. It concludes that magistrates are being used to mediate cases more because they are in a unique position to do so effectively…. This Article explains why magistrates can and should mediate more civil cases.

Lois Bloom & Helen Hershkoff, Federal Courts, Magistrate Judges, and the Pro Se Plaintiff, 16 Notre Dame J. L. Ethics & Pub. Pol'y 475 (2002).\

> From the Article: In Part I, we explore what one commentator calls "the flood of unrepresented litigants" in courts nationwide and the various approaches that federal courts have taken to deal with the pressures that pro se cases generate. In Part II, we focus on the Eastern District of New York and its decision to designate a special magistrate judge to oversee pro se matters. In Part III, we examine the advantages and disadvantages of the single magistrate judge approach for the processing and disposition of pro se matters, recognizing that the work of this office is still at an early stage of institutional development and that additional lessons will be learned with experience and practice.

R. Lawrence Dessem, The Role of the Federal Magistrate Judge in Civil Justice Reform, 67 St. John's L. Rev. 799 (1993).

> From the Article: This Article considers the role of the United States magistrate judge in civil justice reform and, more specifically, the role that the early implementation districts

envision for magistrate judges within their own districts. Part I briefly considers the evolution of the office of magistrate judge prior to the enactment of the Judicial Improvements Act of 1990.

Richard A. Posner, Coping with the Caseload: A Comment on Magistrates and Masters, 137 U. Pa. L. Rev. 2215 (1989).

From the article: Linda Silberman's paper for this conference [discusses two methods by which the federal court system and Congress have tried to cope with the enormous increase in the federal judicial caseload in recent times]. The first is the expanded use of magistrates; the second is the expanded use of special masters. Silberman is more sanguine about the former than about the latter, in major part because the use of magistrates is more regularized by statute than the use of special masters. Regarding magistrates, she is concerned mainly that their availability to supervise pre-trial discovery makes it easier for that monster to flourish; hard-pressed district judges would perforce rein it in more. Regarding special masters, she is concerned about expense, potential conflicts of interest, lack of clear rules governing their use, and lack of institutional commitment (special masters are ad hoc recruits from private practice, not employees of the judicial branch). I, too, am concerned about the growing use by the federal courts of judicial adjuncts, including magistrates and masters.

Margaret G. Farrell, The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts, 2-Fall Widener L. Symp. J. 235, (1997).

From the article: This article… describes one rationalizing technique employed by federal judges to assist them in managing complex mass toxic tort litigation, the appointment of special masters under Rule 53(b) of the Federal Rules of Civil Procedure. Moreover, it evaluates the ability of special masters to efficiently and fairly meet the extraordinary managerial challenges presented by such lawsuits and their ability to humanize the process. Finally, it argues that the flexibility and diversity of special master practice is legitimate in its conformance with the basic constitutional values expressed in Article III and the Due Process Clause of the United States Constitution.

Not surprisingly, special masters do not function today as they did before the new demands engendered by technology were made upon them. The actual practice of modern special masters differs dramatically from the hearing masters anticipated when Rule 53 of the Federal Rules of Civil Procedure ("Rule 53") was enacted in 1938… To carry out many of these assignments, courts need flexibility, expertise, informality, investigative authority, administrative capacity, and time, which are qualities usually associated with administrative agencies. Some of these capacities have been provided to courts through the appointment of special masters. Without them, courts would be required to perform their quasi-legislative role in mass toxic tort and other complex litigation without the assistance that legislatures have created in the form of administrative agencies.'

Today, masters are appointed to play a number of different roles. They serve as surrogate judge, facilitator, mediator, monitor, investigator and claims processor. In playing these roles, masters perform a variety of traditional, passive judicial functions….

The article concludes that masters should be appointed to put a more intimate face on mass justice and to perfect procedural reforms that better use and cope with technology. In many of their roles, masters function like administrative agencies within the judiciary, appointed to carry out the new tasks we give to courts. Like administrative agencies, they are justified by their expertise, efficiency and availability. Yet, answerable only to the judges who appoint them, special masters are not bound by an Administrative Procedures Act and are not accountable to the electorate through either the legislative or executive branches. They lack the longevity of agencies and leave no public law legacy in the form of regulations or precedent. Rather, the legitimacy of the use of special masters, as it is described in this article, lies in their embodiment of the efficiency and fairness values that are part of the jurisprudence of Article III of the United States Constitution, and their ability to humanize modern legal process. The article recommends that special master practice be allowed to evolve unrestrained by rigid limitations on the process they use. In doing so, we can rely on the supervision, discretion and integrity of the district court judges with whom they work, as well as review by the courts of appeals, and the rigors of the adversarial process to curb the potential for abuse.

59. Clarence J. Sundram, *Exit Planning and Phased Conclusion in the Remedial Phase of Systems Reform Litigation*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005.

From the article: You have become the Special Master in the remedial phase of a lawsuit requiring structural reform of the complex governmental activity and are now responsible for supervising the implementation of a series of court orders requiring significant changes in the way in which governmental services are delivered. The services in question may involve the operation of state institutions like prisons, mental hospitals, or mental retardation facilities; they may involve services delivered by private organizations which are licensed, certified, supervised or funded one or more government agencies; they may involve some aspect of a public service like housing or education.

While each of these areas present their own subject matter complexity, in the remedial phase of the litigation they present some common challenges to a special Master. One of the most common is a long and unsuccessful history of implementation efforts to comply with the court orders, a history which has probably necessitated the appointment of the Special Master in the first place. I have been involved in a number of these cases over the years, including the Wyatt litigation in Alabama, originally commenced in 1970; the Willowbrook litigation in New York commenced in 1972; Gary W. in Louisiana in the 1980s; Evans v. Williams in Washington DC, which has been going on since the mid-1970s and CAB v. Nicholas in Maine which is about the same age.

In examining a number of such cases, which have been open for a long time, it seems that they all run through a fairly typical lifecycle. I don't know if this is true of commercial litigation as well. [Westlaw: SL083 ALI-ABA 753]

60. Clarence J. Sundram, *Memorandum Regarding Certification of Compliance Process*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005.

From the article: The following documents may be useful to an understanding of how the process of certification of compliance works.

1. Certification Procedure – This document sets out a fairly "bare-bones" procedure for the Defendant's to certify compliance with discrete provisions of the Court Orders, along with a summary of the supporting evidence. It provides the plaintiffs with access to the evidence as well as further discovery, if needed. It lays out a process for resolving factual disputes about the status of compliance before the Special Master prepares a report and recommendation to the Court.
2. Certification Document regarding ISCs. This is an example of the type of certification expected from the Defendant and the specific factual issues the certification should address.
3. Special Master's Report and Recommendation to the Court regarding Compliance. (This document, when filed with the Court, is accompanied by Exhibits containing the supporting evidence *766 submitted by both parties, and the record of the case before the Special Master.)
4. The Court Order accepting the Special Master's report and endorsing the recommendations. [Westlaw: SL083 ALI-ABA 763]

61. George M. Vairo, *Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction: Supplemental Jurisdictions; Diversity Jurisdiction; Removal; Preemption; Venue; Transfer of Venue; Personal Jurisdiction; Abstention and the All Writs Act*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005 (No abstract available).

62. Thomas E. Willging, Laura L. Hooper, Marie Leary, Dean Miletich, Robert Timothy Reagan, John Shapard, *Special Masters' Incidence and Activity* (Federal Judicial Center 2000), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/SpecMast.pdf/$file/SpecMast.pdf.

Executive Summary: This report examines how pretrial and post trial special master activity can take place under a rule designed to limit special master appointments to trial-related fact-finding in exceptional cases.8 In commissioning the Federal Judicial Center to conduct this study, the Judicial Conference Advisory Committee on Civil Rules' Subcommittee on Special Masters indicated its awareness that special master activity had expanded beyond its traditional boundaries. The subcommittee expressed an interest in learning how that phenomenon occurred in the face of a static and restrictive rule.

More specifically, the subcommittee wanted to know how often and under what authority judges appointed special masters to serve at the pretrial and post trial stages of litigation, whether any special problems arose in using special masters, how courts' use of special masters compared with their use of magistrate judges, and whether rule changes are needed. We responded to the subcommittee's request by examining docket entries and documents in a random national sample of closed cases in which appointment of a special master was considered. We followed up with interviews of judges, attorneys, and special masters in a select subset of that sample.

Citing References:

Georgene Vairo, Why Me? The Role of Private Trustees in Complex Claims Resolution, 57 Stan. L. Rev. 1391 (2005).

> Westlaw Abstract: This Article explores whether private persons, as opposed to a judge or, perhaps, another governmental official, should have the authority to exercise a high degree of discretion in developing standards for compensation and determining compensation awards for claimants. It is important to look directly at this issue because the question whether administrative trusts are an appropriate alternative to litigation cannot be answered without a discussion about the private persons who develop the compensation standards and administer an administrative trust and how they should be selected.

WEBSITES

63. Wikipedia on Special Masters: This entry explains the roles of special masters and refers to the Academy of Court Appointed Masters.

ACADEMY OF COURT-APPOINTED MASTERS

Appointing Special Masters and Other Judicial Adjuncts

Appendices

Appendix 1: Sample Appointment Orders

Appendix 2: ABA Guidelines/Report for Special Masters in Civil Litigation

Appendix 3: Federal Rules of Civil Procedure, Rule 53, Masters

Appendix 4: 28 U.S.C. § 455, Disqualification of justice, judge, or magistrate judge

Appendix 5: Model Rules of Professional Conduct, Rule 1.12

Appendix 6: Code of Conduct for United States Judges

Appendix 7: Code of Conduct for Judicial Employees

Appendix 8: American Bar Association/American Arbitration Association, "The Code of Ethics for Arbitrators in Commercial Disputes"

Appendix 9: Forum Code of Conduct for Arbitrators

Appendix 10: JAMS, Arbitrators Ethics Guidelines

Appendix 1
Sample Appointment Orders

Sample 1: Where Special Master Will Serve as Mediator and Was Previously Serving as Mediator Through an ADR Administrator

Sample 2: Where Master Will Supervise Discovery in a Criminal Case

Sample 3: Where Master Will Serve as Monitor in a Class Action

Pigford v. Glickman, No. 97-1978 (D.D.C. Jan. 4, 2000)
(available at https://casetext.com/case/pigford-v-glickman-6

Sample 4: Where Master Will Serve as a Conference Judge in a Criminal Case

Sample 5: Where Master Will Serve Various Roles in Multi-District Litigation

In re: Welding Rod Prods. Liab. Litig., 2004 WL 3711622 (N.D. Ohio Nov. 10, 2004).

Sample Appointment Order 1:
Where Special Master Will Serve as Mediator and Was Previously Serving as Mediator Through an ADR Administrator

After reviewing the progress of mediation in this action before _____, and with the consent of all parties, this Court finds that the appointment of a Special Master for purposes of further mediation and settlement is justified and necessary.

Pursuant to Federal Rule of Civil Procedure 53 it is **ORDERED** that the current mediator, _____, is appointed as Special Master for purposes of mediation and settlement.

The Special Master shall have the following authority, which he shall exercise with all reasonable diligence in accordance with Rule 53:

1. To direct and facilitate the settlement negotiations among the parties and their insurers.
2. To schedule mediation sessions, telephone conference calls, and other forms of communication among the parties, and to require the parties, counsel, expert consultants, and insurers to attend and participate in mediation sessions and/or other communications. The Special Master will make reasonable efforts to take into consideration the convenience of attendees when selecting locations for mediation sessions.
3. To require that parties and their insurers appear at and participate in mediation sessions with full authority to negotiate in a good faith effort to reach a settlement.
4. To take all appropriate measures to perform fairly and efficiently the responsibilities of a mediator in an effort to effectuate a complete settlement of this action.
5. To report to the Court at regularly scheduled status conferences the progress and status of the settlement negotiations.

[ADR administrator] shall charge $__/hour for _____'s services as Special Master, plus the normal [ADR administrator] administrative fee of 10% of the professional charges. [Add details about what the master will/will not charge for.]

Pursuant to the parties' agreement, the parties shall pay the charge for the Special Master's service [add details about how the parties will share responsibility for paying these charges.] If any party is added to or removed from the case, the pro rata shares shall be reallocated as the parties agree or by order of the Court. At the request of any party, the Court shall review and approve the charges for the Special Master's services.

The parties may have *ex parte* communications with the Special Master as to all matters related in any way to the mediation process. The Special Master may communicate *ex parte* with the Court as he and the Court deem necessary concerning the status of the mediation process, but shall not disclose to the Court the specifics of any party's settlement position without the consent of that party.

The Special Master need not preserve any record of his activities.

The clerk is directed to add Special Master _____to the court's electronic service list at _____.

IT IS SO ORDERED.

Sample Appointment Order 2:
Where Master Will Supervise Discovery in a Criminal Case

Upon consideration of [motions, objections, etc.], it is hereby:

1. ORDERED, that _____, a member of the bar of _____, is hereby appointed a Special Master; and it is

2. FURTHER ORDERED, that, in the execution of this reference the Special Master shall possess and may exercise all powers conferred upon Special Masters in like cases; shall likewise possess and may exercise, to the extent permitted by law and the Constitution, all powers conferred upon U.S. Magistrate Judges by 28 U.S.C. § 636; including all powers to make such orders as may be necessary and appropriate to fulfill the duties assigned to the Special Master under this Order, subject to review by the Court; and it is

3. FURTHER ORDERED, that the Special Master shall supervise and issue orders and reports appropriate and necessary to resolve all discovery disputes in this case, including but not limited to: _____ [include itemized list, where appropriate] (all referred to as "discovery"); and it is

4. FURTHER ORDERED, that the Special Master shall take all steps necessary, including issuing scheduling orders, issuing orders to compel, holding periodic hearings, and recommending sanctions as may be appropriate, to ensure that discovery in this case is thorough and complete in accordance with all the requirements of the Rules of Criminal Procedure, the Orders of this Court, and the law; and it is

5. FURTHER ORDERED, that the Special Master shall report to the Court on all matters within his or her jurisdiction within 60 days of the date of this Order, and shall periodically report to the Court on the progress of discovery in this case; and it is

6. [For cases involving a Protective Order:] FURTHER ORDERED, that the Special Master shall apply to and be processed by the Court Security Officer for the necessary security clearance, shall sign the Memorandum of Understanding and be bound by the Court's Protective Order. Upon fulfilling these requirements, the Special Master shall be provided with and shall review any classified portions of the pleadings of each party filed with the Court and shall review the underlying documents submitted therewith to determine whether those documents or any portion thereof are properly discoverable under either Federal Rule of Criminal Procedure 16 or *Brady;* and it is

7. FURTHER ORDERED, that the Government shall submit to the Special Master any other relevant classified documents, to the extent they are not submitted directly to the defendants. The Special Master shall review those classified documents and determine the extent to which those classified documents are to be provided to the defendants, including the appropriateness and adequacy of any substitutions or redactions proposed by the Government; and it is

8. FURTHER ORDERED, that within 30 days of the date of this Order, the Government shall provide to the defendants all materials that the defendants have requested under *Brady* as well as any other materials that fall within the ambit of *Brady.* If there is any question as to whether particular materials fall within the ambit of *Brady,* those materials are to be submitted to the Special Master within 30 days of this Order for the Special Master's review and recommendation as to whether those documents are to be produced to the defendants. In

addition, if the Government, after the initial production of materials to the defendants or the Special Master under this section of this Order, comes into possession of materials or determines that any materials that have not been previously produced may fall within the ambit *of Brady,* it shall provide those materials to the defendants or the Special Master, as is appropriate, immediately after such acquisition or determination is made. The Special Master shall review any documents so provided and determine, within 30 days of the submission, whether they contain material properly discoverable by the defendants under *Brady;* and it is

9. FURTHER ORDERED, that any party may object to any order or report issued by the Special Master by filing such objection with the Court within 7 days of the issuance of such order or report. Any response to such objection must be filed within 7 days of the filing of the objection. The Court will determine whether, based on the reasons provided in the party's objection, it is appropriate to review the Special Master's orders or report under a *de novo* or other appropriate standard, and whether the objection is well founded; and it is

10. FURTHER ORDERED, that this referral is limited to the duties specified herein unless the Court shall expand the Special Master's duties. This reference shall terminate upon submission by the Special Master of his Final Report, unless extended by further order of the Court; and it is

11. FURTHER ORDERED, that the Special Master shall receive compensation for his services herein at the hourly rate of $ _____. The Special Master's fee and other costs incurred by the Special Master in connection with this reference shall be borne by the Government pursuant to United States Attorneys Manual § 3-8.400; and it is

FURTHER ORDERED, that this Order is subject to amendment by the Court *sua sponte,* or upon application of the parties or the Special Master. Jurisdiction of this action is retained by the Court.

IT IS SO ORDERED.

Sample Appointment Order 3:
Where Master Will Serve as Monitor in a Class Action

The Consent Decree entered in this case on [date], provided for the appointment of an Independent Monitor to carry out certain enumerated duties. Those duties are listed in paragraph ___ of the Consent Decree. The Consent Decree, negotiated by the parties, provides a limited, clearly defined role for the Monitor. On [date], this Court issued an Order appointing [name] as the Independent Monitor in this case.

In accordance with the terms of the Consent Decree and its remedial purposes, [and any other grounds], and pursuant to the Court's inherent power, it is hereby

ORDERED that the Monitor, as an agent and officer of the Court, shall have the responsibilities, powers, and protections as set forth in the Consent Decree and in this Order of Reference; it is

FURTHER ORDERED that the Monitor shall have the full cooperation of the parties, their counsel, and the Facilitator, Adjudicator and Arbitrator, who shall promptly provide any and all documentation and information requested by the Monitor, whether requested orally or in writing, and in whatever form requested, provided that the Monitor is authorized to request only non-privileged materials that are not otherwise prohibited from disclosure and that are necessary to enable her to perform her duties; and it is

FURTHER ORDERED that:

1. The Monitor shall have *ex parte* access to this Court without prior notice to or consultation with the parties.

2. The Monitor shall have the right to confer and conduct confidential working sessions informally and on an *ex parte* basis with the parties and with the Facilitator, Adjudicator and Arbitrator on matters affecting the discharge of the Monitor's duties and the implementation of the Consent Decree.

3. The Monitor shall have authority to make informal suggestions to the parties in whatever form the Monitor deems appropriate in order to facilitate and aid implementation of the Consent Decree and compliance with Orders of the Court and shall have the authority to make recommendations to the Court.

4. As an agent and officer of the Court, the Monitor shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal judicial adjuncts performing similar functions.

5. In addition to the power and authority granted elsewhere in this Order, the Monitor shall have all the responsibilities and powers enumerated in the Consent Decree. Specifically, as set forth in paragraph 12 of the Consent Decree, the Monitor shall:

   a. Make periodic written reports (not less than every six months) to the Court, the Secretary of Agriculture, Class Counsel, and Government Counsel on the good faith implementation of the Consent Decree;

   b. Attempt to resolve any problems that any class member may have with respect to any aspect of the Consent Decree;

   c. Direct the Facilitator, Adjudicator, or Arbitrator to reexamine a claim where the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice; and

d. Be available to class members and the public through a toll-free telephone number in order to facilitate the lodging of any Consent Decree complaints and to expedite their resolution.

If the Monitor is unable within thirty (30) days to resolve a problem brought to her attention pursuant to subparagraph (b), above, she may file a report with the parties' counsel, any of whom may, in turn, seek enforcement of the Consent Decree pursuant to paragraph 13 of the Decree.

6. In carrying out her duties under paragraph l2(b)(i) of the Consent Decree (issuance of written reports), the Monitor shall make such reports available to the public upon request. The Monitor shall not include in her reports any information that is prohibited from disclosure by the Privacy Act.

7. In carrying out her duties under paragraph 12(b)(ii) of the Consent Decree (resolving class members' problems), the Monitor has broad authority to work with claimants [and any others] through correspondence, by telephone, and, if necessary, in person to attempt to resolve class members' problems, including problems involving injunctive relief (defined in paragraph ____ of the Consent Decree) [and any other specifically enumerated problems]. To fully carry out her duties, the Monitor is encouraged to establish a mechanism through which her office can meet with claimants personally when necessary.

In carrying out her duties under paragraph ____ of the Consent Decree (directing reexamination of claims), upon the filing of a Petition for Monitor Review, the Monitor shall review relevant materials and decide whether to order reexamination in accordance with the following procedures:

a. Standard of Review. Pursuant to paragraph 12(b)(iii) of the Consent Decree, the Monitor may direct reexamination only when the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice.

b. Reexamination Only. When the Monitor finds that the standard noted above has been met, the Monitor may direct the Facilitator, Adjudicator, or Arbitrator to reexamine the claim. The Monitor does not have the power to reverse any decision.

c. Filing of Petitions. Claimants or the government may file Petitions for Monitor Review by sending the Monitor a letter that explains why the Petitioner believes that the decision of the Facilitator, Adjudicator, or Arbitrator is in error. With respect to Track A claims only, claimants or the government may include with the Petition for Monitor Review any documents that help the Petitioner to explain or establish that an error occurred. Petitions for Monitor Review should be sent to the following address:

[address]

Claimants are encouraged to seek the assistance of counsel in preparing their Petitions for Monitor Review, but they are not required to have the assistance of counsel. Claimants may obtain such assistance at no charge from Class Counsel. Claimants may contact Class Counsel by writing or telephoning:

[name & address]

Petitions must be filed in writing, and the Monitor's review of the Petition will be a paper-only review, that is, it will not be supplemented by a personal or telephone interview.

d. Filing of Responses to Petitions. The non-petitioning party may file a response to any Petition for Monitor Review and, with respect to petitions regarding Track A

claims, the non-petitioning party may include documents as described in paragraph 8(e)(i), below. The Monitor shall establish a system for notifying the non-petitioning party of the pendency of the Petition and for forwarding to the non-petitioning party copies of the Petition and any additional materials submitted by the Petitioner. The non-petitioning party shall have thirty (30) days to file a response, after which the right to file a response shall be waived.

e. Materials Constituting Basis of Monitor Review. Generally, the Monitor's review will be based only on the Petition for Monitor Review, any response thereto, the record that was before the Facilitator, Adjudicator or Arbitrator, and the decision that is the subject of the Petition for Monitor Review.

(i) Review of Track A Claims. The Monitor may consider additional materials submitted by the claimant or by the government with a Petition for Monitor Review of a Track A claim or with a response to such a Petition only when such materials address a potential flaw or mistake in the claims process that in the Monitor's opinion would result in a fundamental miscarriage of justice if left unaddressed. The decision to consider additional materials regarding this flaw or mistake and to permit those materials to be made part of the record for review upon reexamination by the Facilitator or Adjudicator is within the discretion of the Monitor.

(ii) Review of Track B Claims. The Consent Decree provides for the development of a more comprehensive record in Track B than is possible Track A. Therefore, in Track B claims, the Monitor will not be permitted to consider additional materials on review or to supplement the record for review upon reexamination.

(f) Communication Regarding Reexamination. When the Monitor directs the Facilitator, Adjudicator, or Arbitrator to reexamine a claim, the Monitor shall send to the Facilitator, Adjudicator or Arbitrator a brief written explanation of the basis of her decision to direct reexamination (reexamination letters), which shall be attached to the Petition for Monitor Review. The explanation will clearly specify the error(s) identified by the Monitor. The Monitor will promptly forward to the claimant (and his or her counsel, if any) and to USDA copies of all reexamination letters with the attached Petitions for Monitor Review and any additional materials admitted into the record by the Monitor pursuant to paragraph 8(e)(i). These materials will become part of the record for purposes of the Facilitator's, Adjudicator's or Arbitrator's reexamination.

9. Contacting the Monitor. In carrying out her duties under paragraph ____ of the Consent Decree, the Monitor will be available to class members and to the public through the following toll-free telephone number: _____.

10. Where to Direct Communications. Inquiries, petitions and pleadings in this case should be directed as follows:

a. Inquiries regarding the status of Track A adjudication claims and regarding the timing of payments of approved claims should be directed to the Claims Facilitator at _____.

b. Motions seeking review of non-final rulings by an arbitration panelist, including issues relating to discovery and scheduling, should be directed to _____.

c. Petitions for Monitor Review of final decisions in both Track A and Track B claims should be directed to the Monitor's office as explained in paragraph 8(c) above.

d. Inquiries regarding problems with injunctive relief or with other aspects of the Consent Decree should be directed to the Monitor's office as explained in paragraph 9 above.

e. Pleadings regarding attorneys' fees should be directed to the Court. None of the matters described in subparagraphs (a) - (d), above, shall be filed with, or otherwise presented to, the Court.

11. Monitor Staff. The Monitor shall have the authority to employ and/or contract with all necessary attorney, paralegal, administrative, and clerical staff within a budget cap approved by the Court. The staff and contractors of the Office of the Monitor shall have whatever access to records and documents the Monitor believes is necessary to fulfill the staff or contracting role; however, the staff and contractors shall be given access only to non-privileged materials that are not otherwise prohibited from disclosure and that are necessary to enable the Monitor to perform her duties under the Consent Decree.

12. Fees and Expenses. Pursuant to paragraph 12(a) of the Consent Decree, the United States Department of Agriculture ("USDA") shall pay the fees and expenses of the Monitor and the salaries of her staff.

13. Approval of Budgets. The Monitor shall submit budgets to the Court for approval. Each budget shall cover a period of at least three (3) months but not more than twelve (12) months. Copies of each budget shall be made available to USDA and class counsel, who will have a period of ten (10) working days from their receipt of the budget within which they may file with the Court, with copies to the Monitor and the opposing party, written objections to the budget. Any party that does not object to a budget within these ten (10) days shall be deemed to have waived any objection permanently. At the end of the ten (10) days, the Court will enter an order approving a total budget amount for the relevant time period.

14. Timing of Budget Submissions. The Monitor generally will submit proposed budgets to the Court one (1) month in advance of the beginning of the budget period.

15. Invoicing. The Monitor shall submit a statement to the Court approximately monthly for approval of her fees and expenses with copies to counsel for both parties. Objections to the statement shall be filed with the Court, with copies to the Monitor and to the opposing party, within ten (10) days of the submission of the statement. Any party that does not object to a fee statement within ten (10) days of its submission shall be deemed to have waived any objection permanently. At the conclusion of the 10-day period, the Court will enter an order directing payment of any sums approved. Any sum approved by the Court shall be paid within fifteen (15) days unless otherwise ordered or agreed upon.

16. Records. The Monitor shall keep a complete record of all of her fees and expenses, which shall be made available at the Court's or the parties' request for their inspection.

17. Payment into Court Registry. Within fifteen (15) days after the Court's approval of the first budget, USDA shall deposit with the Clerk of Court, United States District Court for the District of Columbia, the pro-rata portion of the approved budget for the month of April 2000. Within the first fifteen (15) days of May 2000, and within the first fifteen (15) days of each month thereafter during the Monitor's tenure, USDA shall deposit with the Clerk of Court a sum equal to a pro-rata month's portion of the approved budget. All deposits made by USDA shall be placed by the Clerk of Court in an interest-bearing account. Any monies on deposit with the Clerk of Court that are unspent in a given month shall be carried over and applied to payment of future fees and expenses of the Monitor.

18. Refund of Surplus. At such point as the Monitor's duties are completed, surplus funds on deposit with the Clerk's Office will be refunded to USDA. If the Court determines at any time that the Monitor will require supplemental funds, the Court may so order USDA to make additional deposits.

Sample Appointment Order 4:
Where Master Will Serve as a Conference Judge in a Criminal Case

The Court, having considered this cause appropriate for referral to an Alternative Dispute Resolution (ADR) process pursuant to [relevant Rules or Code, if any], ORDERS that the case be so referred for an ADR process to be conducted with [name of adjunct], a dispute resolution organization as defined in [relevant rules] (if necessary), and that [name of adjunct] is appointed as an impartial third party to conduct the ADR process and to facilitate settlement negotiations among the parties.

Unless written objections to this order are filed in accordance with [relevant rules], the parties are directed to communicate with [name of adjunct], located at [address] within ten (10) days from the date of this order to make arrangements regarding: (1) the payment of the expenses of the proceeding; and (2) the date, time, and place the proceeding will be conducted. Unless the parties otherwise agree, all fees and expenses shall be borne equally by the parties. [Or: The fees of [name of adjunct] shall be paid by the Court as Court Costs subject to reimbursement by the defendant.]

All counsel and all parties (or their duly authorized representatives with settlement authority) are directed to attend and participate in the proceeding.

The Court recognizes that Defendant has the right to remain silent and relies on his 5th Amendment Rights under the United States Constitution against self-incrimination even though he will participate in this process. It is therefore ORDERED, ADJUDGED, AND DECREED that no statement, utterance, or conduct of Defendant during the proceeding will be used at any subsequent trial against him.

Unless the parties agree in writing to waive their right of confidentiality, all matters, including the conduct and the demeanor of the parties and their counsel during the settlement process, will remain confidential and will not be disclosed to anyone, including this Court. Upon completion of this proceeding, the conference judge is directed to advise the Court when the process was conducted, whether the parties and their counsel appeared as ordered, and whether a settlement resulted.

Sample Appointment Order 5:
Where Special Master Will Serve Various Roles in Multi-District Litigation

On [date], [parties] in this matter filed a motion for appointment of a Special Master. The parties having had notice and an opportunity to be heard, that motion is GRANTED and, with the advice and consent of the parties, the Court now APPOINTS as Special Master [name and address].

This appointment is made pursuant to Fed. R. Civ. P. 53 and the inherent authority of the Court.[1] As Rule 53 requires, the Court sets out below the duties and terms of the Special Master and reasons for appointment, and ORDERS the Special Master to "proceed with all reasonable diligence," Rule 53(b)(2).

I. BACKGROUND.

[Description of how Multi-District Litigation came into being and the specific reasons that appointment of a Special Master is appropriate].

It is clear that this MDL presents many difficult issues and will require an inordinate amount of attention and oversight from the Court. Other MDL courts, facing similar challenges, have easily concluded that appointment of a Special Master was appropriate to help the Court with various pretrial, trial, and post-trial tasks.[2] Indeed, the appointment of a Special Master in

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[1] "Beyond the provisions of [Fed. R. Civ. P. 53] for appointing and making references to Masters, a Federal District Court has `the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.'" *Schwimmer v. United States,* 232 F.2d 855, 865 (8th Cit. 1956) *(quoting In re: Peterson,* 253 U.S. 300, 311 (1920)); *see Ruiz v. Estelle,* 679 F.2d 1115, 1161 n.240 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1983) (same); *Reed v. Cleveland Bd of Edu.*, 607 F.2d 737, 746 (6th Cir. 1979) (the authority to appoint "expert advisors or consultants" derives from either Rule 53 or the Court's inherent power). The Court's inherent power to appoint a Special Master, however, is not without limits. *See Cobell v. Norton,* 334 F.3d 1128, 1 142 (D.C. Cir. 2003) (in the absence of consent by the parties, the inherent authority of the court does extend to allow appointment of Special Master to exercise "wide-ranging extrajudicial duties" such as "investigative, quasi-inquisitorial, quasi-prosecutorial role[s]").

This Court first discussed with the parties the advisability of appointing a Special Master during a case management conference on [date]. *See* Fed. R. Civ. P. 16(c)(8, 12) ("At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . . (8) the advisability of referring matters to a magistrate judge or master; [or] . . . (12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems").

[2] *See, e.g., In re: Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liab. Litig.,* 1999 WL 782560 at *2 (E.D. Pa. Sept. 27, 1999) (MDL No. 1203) (noting that the court had earlier appointed a Special Master to oversee discovery matters and "facilitate the timely remand of individual civil actions to their respective transferor courts;" the court later broadened the Special Master's duties to include oversight and administration of the settlement trust funds); *In re: Bridgestone/Firestone Inc., ATX, ATX II, and Wilderness Tires Products Liab. Litig.,* Order at 3-5, docket no. 14 (MDL No. 1373) (S.D. Ind. Nov. 1, 2000) (available at www.insd.uscourts.gov/Firestone) (appointing a Special Master to assist the court with all phases of the litigation, from "formulating a governance structure of [the] MDL" in its earliest stage to assisting with "attorneys fees" issues and "settlement negotiations" during the latter stages of the litigation); *In re: Baycol Products Liab. Litig.,* 2004 WL 32156072 (D. Minn. Mar. 25, 2002) (MDL No. 1431) (appointing a Special Master early in the case and assigning him all available "rights, powers, and duties provided in Rule 53;" the court has since appointed two additional masters to assist the first Special Master); *In re: Propulsid Products Liab. Litig_,* 2004 WL 1541922 (E.D. La. June 25, 2004) (MDL No. 1355) (appointing a Special

cases such as this is common. The 2003 amendments to Rule 53 specifically recognize the pretrial, trial, and post-trial functions of masters in contemporary litigation. Thus, the Court agrees with the parties that appointment of a Special Master to assist the Court in both effectively and expeditiously resolving their disputes.

II. RULE 53(B)(2).

Rule 53 was amended on December 1, 2003, and now requires an order of appointment to include certain contents. *See* Fed. R. Civ. P. 53(b)(2). The following discussion sets forth the matters required.

A. Master's Duties.

Rule 53(a)(1)(A) states that the Court may appoint a master to "perform duties consented to by the parties." [If applicable: The parties in this case consented to having a Special Master: 1) assist the Court with legal analysis of the parties' submissions; and 2) perform any and all other duties assigned to him by the Court (as well as any ancillary acts required to fully carry out those duties) as permitted by both the Federal Rules of Civil Procedure and Article III of the Constitution. The parties [further] request, however, that the Court retain sole authority to issue final rulings on matters formally submitted for adjudication. Motion for appointment at 2.][3] The Court has reviewed recent legal authority addressing the duties of a Special Master that are permitted under the "Federal Rules of Civil Procedure and Article III of the Constitution."[4] Consonant with this legal authority, the currently-anticipated needs of the court, and the parties' broad consent, the Court states that the Special Master in these proceedings shall have the authority to:[5]

1. assist with preparation for attorney conferences (including formulating agendas), court scheduling, and negotiating changes to the case management order;
2. establish discovery and other schedules, review and attempt to resolve informally any discovery conflicts (including issues such as privilege, confidentiality, and access to medical and other records), and supervise discovery;
3. oversee management of docketing, including the identification and processing of matters requiring court rulings;

Master and setting out a variety of duties).

[3] In addition, the Court may appoint a master to: (1) "address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district;" and (2) "hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury," if warranted by certain conditions. Rule 53(a)(1)(B, C).

[4] *See, e.g.,* Fed. R. Civ. P. 53, advisory committee's notes (discussing the range of duties and authority of the Special Master). *See also* Mark Fellows & Roger Haydock, *Federal Courts Special Masters: A Resource in the Era of Complex Litigation*, 31 Wm. Mitchell L. Rev.1269 (2005); David Ferleger, *Masters in Complex Litigation and Amended Rule 53,* Special Masters Conference 2004 Course Materials (Nat'l Arbitr. Forum ed., 2004) (unpublished); Margaret Farrell, *Special Masters in the Federal Courts Under Revised Rule 53: Designer Roles,* Special Masters Conference 2004 Course Materials (Nat'l Arbitr. Forum ed., 2004) (unpublished). These three articles, written by federal-court-appointed Special Masters, note the increasing use and need for such appointments, and discuss the range of duties and limits of appointment. The articles are on file with the Advanced Dispute Resolution Institute at the William Mitchell College of Law, and are contained in reference materials distributed at the October, 2004 National Special Masters Conference.

[5] This list is meant to be illustrative, not comprehensive.

4. compile data and assist with, or make findings and recommendations with regard to, interpretation of scientific and technical evidence;
5. assist with legal analysis of the parties' motions or other submissions, whether made before, during, or after trials, and make recommended findings of fact and conclusions of law;
6. assist with responses to media inquiries;
7. help to coordinate federal, state and international litigation;
8. direct, supervise, monitor, and report upon implementation and compliance with the Court's Orders, and make findings and recommendations on remedial action if required;
9. interpret any agreements reached by the parties;
10. propose structures and strategies for settlement negotiations on the merits, and on any subsidiary issues, and evaluate parties' class and individual claims, as may become necessary;
11. propose structures and strategies for attorney's fee issues and fee settlement negotiations, review fee applications, and evaluate parties' individual claims for fees, as may become necessary;
12. administer, allocate, and distribute funds and other relief, as may become necessary;
13. adjudicate eligibility and entitlement to funds and other relief, as may become necessary;
14. monitor compliance with structural injunctions, as may become necessary;
15. make formal or informal recommendations and reports to the parties, and make recommendations and reports to the Court, regarding any matter pertinent to these proceedings; and
16. communicate with parties and attorneys as needs may arise in order to permit the full and efficient performance of these duties. *See* discussion below.

B. Communications with the Parties and the Court.

Rule 53(b)(2)(B) directs the Court to set forth "the circumstances—if any—in which the master may communicate ex parte with the court or a party." The Special Master may communicate ex parte with the Court at the Special Master's discretion, without providing notice to the parties, in order to "assist the Court with legal analysis of the parties' admissions" (e.g., the parties' motions). Motion for appointment at 2. The Special Master may also communicate ex parte with the Court, without providing notice to the parties, regarding logistics, the nature of his activities, management of the litigation, and other appropriate procedural matters. The Court may later limit the Special Master's ex parte communications with the Court with respect to certain functions, if the role of the Special Master changes.[6]

[6] If, for example, the Court later finds it desirable to use the Special Master as a mediator regarding the merits of a particular dispute, which mediation would require disclosure of information by the parties to the Special Master that the parties would prefer to keep from a final adjudicator, the Court may redefine the scope of allowed ex parte communications with the Court regarding that dispute. *See, e.g., In re: Propulsid Products Liab. Litig.,* 2002 WL 32156066 (E.D. La. Aug. 28, 2002) (after the Special Master was given additional mediation duties, the scope of his ex parte communications with the parties and the Court, as well as his record-keeping obligations, changed); Rule 53(b)(4) (noting that an order of appointment may be amended). On the other hand, such imposition of different limits

The Special Master may communicate ex parte with any party or his attorney, as the Special Master deems appropriate, for the purposes of ensuring the efficient administration and management of this MDL, including the making of informal suggestions to the parties to facilitate compliance with Orders of the Court; such ex parte communications may, for example, address discovery or other procedural issues. Such ex parte communications shall not, however, address the merits of any substantive issue, except that, if the parties seek assistance from the Special Master in resolving a dispute regarding a substantive issue, the Special Master may engage in ex parte communications with a party or his attorney regarding the merits of the particular dispute, only with the prior permission of those opposing counsel who are pertinent to the particular dispute.[7]

C. Master's Record.

Rule 53(b)(2)(c) states that the Court must define "the nature of the materials to be preserved and filed as a record of the master's activities." The Special Master shall maintain normal billing records of his time spent on this matter, with reasonably detailed descriptions of his activities and matters worked upon. See also section II.E of this Order, below. If the Court asks the Special Master to submit a formal report or recommendation regarding any matter, the Special Master shall either submit such report or recommendation in writing, for electronic filing on the case docket. The Special Master need not preserve for the record any documents created by the Special Master that are docketed in this or any other court, nor any documents received by the Special Master from counsel or parties in this case. The Court may later amend the requirements for the Special Master's record if the role of the Special Master changes.[8]

D. Review of the Special Master's Orders.

Rule 53(b)(2)(D) directs the Court to state "the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations." The Special Master shall either: (1) reduce any formal order, finding, report, or recommendation to writing and file it electronically on the case docket via Electronic Case Filing ("ECF"); or (2) issue any formal order, finding, report, or recommendation on the record, before a court reporter. Pursuant to Rule 53(g)(2), any party may file an objection to an order, finding, report, or recommendation by the Special Master within 14 calendar days of the date it was electronically filed; failure to meet this deadline results in permanent waiver of any objection to the Special Master's orders, findings, reports, or recommendations.[9] Absent timely

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on ex parte communications does not necessarily require amendment of this Order.

[7] To the extent it may be considered a "substantive issue," the Special Master may engage in ex parte communications with a party or counsel, without first obtaining the prior permission of opposing counsel, to resolve privilege or similar questions and in connection with in camera inspections.

[8] *See, e.g., In re: Propulsid Products Liab. Litig.,* 2004 WL 1541922 (E.D. La. June 25, 2004) (setting out additional record-keeping requirements after the Special Master was charged with new duties of administering a settlement program).

[9] Rule 53(g)(2) provides that parties may file objections "no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time." The Court chooses to set a period of 14 calendar days (NOT business days) in order to expedite final resolution of matters formally reported upon by the Special Master. Motions for extensions of time to file objections will not normally be granted unless good cause is shown. The Special Master may, however, provide in his order, finding, report, or recommendation that the period for filing objections to that particular document is some period longer than 14 calendar days, if a longer period appears warranted.

objection, the orders, findings, reports, and recommendations of the Special Master shall be deemed approved, accepted, and ordered by the Court, unless the Court explicitly provides otherwise.

As provided in Rule 53(g)(4, 5), the Court shall decide de novo all objections to conclusions of law made or recommended by the Special Master; and the Court shall set aside a ruling by the Special Master on a procedural matter only for an abuse of discretion. The Court shall retain sole authority to issue final rulings on matters formally submitted for adjudication, unless otherwise agreed by the parties, and subject to waiver of objection to written orders or recommendations as noted above. To the extent the Special Master enters an order, finding, report, or recommendation regarding an issue of fact, the Court shall review such issue de novo, if any party timely objects pursuant to the Rules and within the 14 calendar day time period set forth herein; see Rule 53(g)(3). Failure to meet this deadline results in permanent waiver of any objection to the Special Master's findings of fact.

E. Compensation.

Rule 53(b)(2)(E) states that the Court must set forth "the basis, terms, and procedure for fixing the master's compensation;" see also Rule 53(h) (addressing compensation). The Special Master shall be compensated at the rate of [$ per hour], with the parties bearing this cost equally (50% by the plaintiffs and 50% by the defendants). The Special Master shall incur only such fees and expenses as may be reasonably necessary to fulfill his duties under this Order, or such other Orders as the Court may issue. Within 14 days of the date of this Order, the parties shall **REMIT** to the Special Master an initial, one-time retainer of [$____] (50% by the plaintiffs and 50% by the defendants); the Court will not order additional payments by the parties to the Special Master until the retainer is fully earned. The Court has "consider[ed] the fairness of imposing the likely expenses on the parties and [has taken steps to] protect against unreasonable expense or delay." Rule 53(a)(3).

From time to time, on approximately a monthly basis, the Special Master shall submit to the Court an Itemized Statement of fees and expenses, which the Court will inspect carefully for regularity and reasonableness. Given that, at this juncture in the litigation, one of the duties of the Special Master is to assist the Court with legal analysis of the parties' submissions, the Court expects these Itemized Statements will reveal confidential communications between the Special Master and the Court. Accordingly, the Court shall maintain these Itemized Statements under seal, and they shall not be made available to the public or counsel. The Special Master shall attach to each Itemized Statement a Summary Statement, which shall not reflect any confidential information and shall contain a signature line for the Court, accompanied by the statement "approved for disbursement." If the Court determines the Itemized Statement is regular and reasonable, the Court will sign the corresponding Summary Statement and transmit it to the parties. The parties shall then remit to the Special Master their half-share of any Court-approved amount, within 20 calendar days of Court approval.[10]

Finally, the Special Master shall not seek or obtain reimbursement or compensation for support personnel, absent approval by the Court.[11]

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[10] The Court adopts this procedure from Judge Sarah Evans Barker, who used it in *In re: Bridgestone/Firestone. See* www.insd.uscourts.gov/Firestone/, docket no. 593 ("Entry concerning fees of Special Master").

[11] *Cf. Triple Five of Minnesota, Inc. v. Simon,* 2003 WL 22859834 at *2 (D. Minn. Dec. 1, 2003) (authorizing the Special Master to "hire accountants, real estate consultants, attorneys, or others as necessary to assist him in carrying out his duties under this Order" and further stating: "The special master shall be compensated at the rate of $400.00

F. Other Matters.

1. Affidavit.

Rule 53(b)(3) notes that the Court may enter an Order of appointment "only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. §455." See also Rule 53(a)(2) (discussing grounds for disqualification). Attached to this Order is the affidavit earlier submitted to the Court by the Special Master.

2. Cooperation.

The Special Master shall have the full cooperation of the parties and their counsel. Pursuant to Rule 53(c), the Special Master may, if appropriate, "impose upon a party ny noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty." As an agent and officer of the Court, the Special Master shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal judicial adjuncts performing similar functions.[12] The parties will make readily available to the Special Master any and all facilities, files, databases, and documents which are necessary to fulfill the Special Master's functions under this Order.

IT IS SO ORDERED.

per hour. Additionally, the parties shall pay the usual and customary rates for work which the special master delegates to others.."). In light of the complexity of this litigation, and depending on how it proceeds, it may become appropriate for the Special Master to retain consultants or otherwise obtain assistance.

[12] *See Atkinson-Baker & Associates, Inc. v. Kolts,* 7 F.3d 1452, 1454-55 (9th Cir. 1993) (applying the doctrine of absolute quasi-judicial immunity to a Special Master).

Appendix 2

ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation

The Guidelines are located at:

https://www.americanbar.org/content/dam/aba/directories/policy/mid-year-2019/100-midyear-2019.pdf

AMERICAN BAR ASSOCIATION ADOPTED BY THE HOUSE OF DELEGATES JANUARY 28, 2019 RESOLUTION

RESOLVED, That the American Bar Association adopts the *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation*, dated January 2019.

FURTHER RESOLVED, That Bankruptcy Rule 9031 should be amended to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation

Consistent with the Federal Rules of Civil Procedure or applicable state court rules:

1. **(1) It should be an accepted part of judicial administration in complex litigation (and in other cases that create particular needs that a special master might satisfy), for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation.**
2. **(2) In considering the possible use of a special master, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform and roles that a special master might serve.**
3. **(3) In determining whether a case merits appointment of a special master, courts should weigh the expected benefit of using the special master, including reduction of the litigants' costs, against the anticipated cost of the special master's services, in order to make the special master's work efficient and cost effective.**

4. **(4) Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial functions, but assist them. Among the functions special masters have performed are:**

   a. discovery oversight and management, and coordination of cases in multiple jurisdictions;

   2. **Facilitating resolution of disputes between or among co-parties;**
   3. **Pretrial case management;**
   4. **advice and assistance requiring technical expertise;**
   5. **conducting or reviewing auditing or accounting;**
   6. **conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;**
   7. **conducting trials or mini-trials upon the consent of the parties;**
   8. **settlement administration;**
   9. **claims administration; and**
   10. **receivership and real property inspection.**

   In these capacities special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.

5. **(5) Courts should develop local rules and practices for selecting, training, and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates.**

(6) Courts should choose special masters with due regard for the court's needs and the parties' preferences and in a manner that promotes confidence in the selection process by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.

6. **(7) The referral order appointing the special master should describe the scope of the engagement, including, but not limited to, the special master's duties and powers, the roles the special master may serve, the rates and manner in which the special master will be compensated, power to conduct hearings or to facilitate settlement, requirements for issuing decisions and reporting to the court, and the extent of permissible ex parte contact with the court and the parties. Any changes to the scope of the referral should be made by a modification to the referral order.**
7. **(8) Courts and the bar should develop educational programs to increase awareness of the role of special masters and to promote the acquisition and dissemination of information concerning the effectiveness of special masters.**

8. **(9) Courts and, where applicable, legislatures should make whatever modifications to laws, rules, or practices that are necessary to effectuate these ends.**

REPORT Introduction

The American Bar Association ("ABA") has long advanced the use of dispute resolution tools to promote efficiency in the administration of justice. Thirty years ago, the ABA was a leading voice in favor of various forms of alternative dispute resolution ("ADR"). Today, there is an underutilized dispute resolution tool that could aid in the "just, speedy and inexpensive" resolution of cases: appointment of special masters.

In 2016, the Lawyers Conference of the ABA Judicial Division formed a Committee on Special Masters to promote research and education concerning special masters and to make proposals concerning using their use.[1] This Committee concluded that one of the difficulties faced by both courts and practitioners is the lack of a methodical and consistent approach to the appointment and use of special masters.[2]

To address this lack of standardization and to urge greater use of this valuable resource, the Committee brought together stakeholders from diverse segments of the ABA to propose best practices in using special masters. The ABA formed a Working Group in the fall of 2017 and included representatives of the Judicial Division (including three of its conferences – the National Conference of Federal Trial Judges, the National Conference of State Trial Judges and the Lawyers Conference), the ABA Standing Committee on the American Judicial System, and the ABA's Section of Litigation, Business Law Section, Section of Dispute Resolution, Section of Intellectual Property Law, Tort Trial and Insurance Practice Section, and Section of Antitrust. The membership

[1] Currently, 49 states have rules or statutes that provide for the appointment of court adjuncts to assist courts in the administration of justice. *See* Lynn Jokela and David F. Herr "Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool," WILLIAM MITCHELL LAW REVIEW, Vol. 31, No. 3, Art. (2005) "In fact, Illinois is the only state that does not have any mechanism governing appointment of special masters." *Id.* Courts have also recognized their inherent power to appoint special masters to assist judges in case management. *See id*. at 1302 n. 18. *See also* n.30, *infra.*

[2] Even the name for these judicial adjuncts is a source of confusion. These Guidelines use the term employed by Rule 53 of the Federal Rules of Civil Procedure – "special master" – to refer to any adjunct a court determines to be necessary and appropriate to appoint to serve any case-management function or to manage or supervise some aspect of a case. The term applies to persons appointed by any court to serve any of a wide variety of functions, regardless of whether statute, rules or practice have described these persons with other titles, such as "master," "discovery master," "settlement master," "trial master," "referee," "monitor," "technical advisor," "auditor," "administrator." Even states whose rules mirror the Federal Rules, use different titles to describe the court adjunct's officers. For example, a Rule 53 adjunct in Maine is a "referee." *See* Maine R. Civ. P. 53. States using the pre-2003 version of the Federal Rules often refer to a "master" as "any person, however designated, who is appointed by the court to hear evidence in connection with any action and report facts," suggesting more of a trial function than a pretrial role. *See* e.g., Mass. R. Civ. P. 53. *See also* 2006 Kan. Code § 60-253 (" may suggest a more limited function").

included current and former federal and state judges, ADR professionals and academics, and litigators who represent plaintiffs, defendants, or both in numerous fields.[3]

The Working Group also obtained information from other interested and knowledgeable agencies, organizations, and individuals, including the Federal Judicial Center ("FJC"), federal and state judges, court ADR program administrators, private dispute resolution professionals, representatives of a number of state bar associations, the academic community, professional groups (including the Academy of Court Appointed Masters ("ACAM")), litigators, and in-house counsel. The Group has also benefitted from discussions among judges and stakeholders organized by the Emory Law School Institute for Complex Litigation and Mass Claims, which has worked with the FJC to explore ways of improving the administration of multidistrict and class action litigation.

Based upon the recommendation of federal and state judges both within and outside the Judicial Division and the Working Group's analysis, and consistent with the best practices described below, the ABA encourages courts to make greater and more systematic use of special masters to assist in civil litigation in accordance with these Guidelines.

Discussion and Rationale for the Guidelines

Courts and parties have long recognized that, in far too many cases, civil litigation takes too long and costs too much. Since 1938, Rule 1 of the Federal Rules of Civil Procedure has declared (in a principle echoed in many state rules) that the Rules are intended to deliver "a just, speedy, and inexpensive determination of every action and proceeding." Since December 1, 2015, the Rules have declared that they are to be "employed by the court and the parties to secure" that end. Indeed, virtually every amendment to the Federal Rules over the past thirty-five years has been intended, at least in part, to address concerns regarding the expense and duration of civil litigation.[4]

[3] The Working Group comprises representatives from the Judicial Division (Hon. J. Michelle Childs; Hon. David Thomson; Merril Hirsh (Convener); Cary Ichter (Reporter); Christopher G. Browning; David Ferleger and Mark O'Halloran); the ABA Standing Committee on the American Judicial System (Hon. Shira A. Scheindlin (ret.)); the Business Law Section (William Johnston (convener, policy subgroup); Hon. Clifton Newman; Richard L. Renck; Hon. Henry duPont Ridgely (ret.); Hon J. Stephen Schuster; and Hon. Joseph R. Slights III); the Section of Litigation (Mazda Antia, John M. Barkett, David W. Clark, Koji Fukumura and Lorelie S. Masters); the Section of Dispute Resolution (Hon. Bruce Meyerson (ret.); Prof. Nancy Welsh); the Section of Intellectual Property Law (David L. Newman; Scott Partridge; Gale R. ("Pete") Peterson); the Section of Antitrust Law (Howard Feller, James A. Wilson) and the Tort Trial and Insurance Practice Section (Sarah E. Worley). The members also wish to thank Hon. Frank J. Bailey and his staff, and ABA Staff members Amanda Banninga, Denise Cardman, Julianna Peacock, and Tori Wible for their assistance.

[4] *See, e.g.*, Fed. R. Civ. P. 26 Advisory Committee Note: "There has been widespread criticism of abuse of discovery"; 1983: the "first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information"; Rule 26(g) "provides a deterrent to both excessive discovery and

evasion"; 1993: "A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner

All too often, however, modifications to procedural rules intended to make the litigation process more efficient have merely changed the subject of the dispute: for example, limiting the number of interrogatories can lead to conflict over how to count interrogatories and subparts.[5] Unfortunately, the Rules are not self-executing.

Ensuring that parties will not gain an advantage by unreasonable conduct or delay requires a proportionate level of judicial case management. This case management is possible only where adequate resources are available to implement strategies designed to minimize the likelihood of unnecessary disputes, to facilitate the resolution of disputes that do arise, and to focus the parties on fairly resolving the issues in controversy.[6]

Judges, including magistrate judges, must dedicate the time needed to manage the pretrial process, and it is important to use their time most effectively. When warranted, appointment of a special master to manage the pretrial process can relieve courts of the burden of reviewing voluminous discovery materials or information withheld as privileged or proprietary, or addressing other disputes, allowing courts to focus on merits-based resolution of issues on a concise record. Where a case warrants this type of assistance, special masters have time that courts do not. The goal of these guidelines is not to detract in any way from the role of judges, including magistrate judges. It is to assist them.[7]

Courts at all levels face three particularly significant obstacles to effective case management. First, courts often lack sufficient resources to manage certain cases–particularly complex commercial cases or the practical ability to increase resources when

to achieve those objectives"; 2006: Rule 26(b)(2) is amended to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information and to regulate discovery from sources "that are accessible only by incurring substantial burdens or costs." 2015: Amendments that, among other things, expressly limit discovery to be "proportional to the needs of the case"; clarify when sanctions are appropriate for failure to preserve e-discovery; and specify that the rules not only be "construed," but also "administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

[5] *See* Merril Hirsh, James M. Rhodes and Karl Bayer, "Special Masters: A Different Answer to a Perennial Problem, JUDGES JOURNAL, v. 55, No. 2 at 28 (Spring 2016).
[6] *See id.* at 29-31; Merril Hirsh, "Special Masters: How to Help Judges Extend Their Reach ... And Exceed Their Grasp," ALTERNATIVES (June 2017), available at http://altnewsletter.com/sample-articles/special-masters--how-to-help-judges--extend-their-reach--and-exceed-their-grasp.aspx

[7] Appointed masters are also used in other settings. Courts have appointed special masters in criminal cases, for example, to consider *Brady* obligations, *see, e.g., United States v. McDonnell Douglas*, 99-CR-353 (D.D.C.), or to shield investigators from privileged documents that might be obtained through warrants executed at attorney offices, *see, e.g., United States v. Stewart*, No. 02 CR. 396 JGK, 2002 WL 1300059 (S.D.N.Y. June 11, 2002); United States Attorneys Manual § 9–13.420, at § F, available at

https://famguardian.org/Publications/USAttyManual/title9/13mcrm.htm#9-13.420. Masters are also appointed in non-judicial contexts (for example, by legislation, such as the appointment to administer the September 11 Victims Compensation Fund; by private entities to administer settlement funds designed to compensate injured parties in mass disasters, such as the BP Deep Water Horizon fund; and by government agencies to investigate and make recommendations, as with the special master appointed to investigate the student loan crisis). Many agencies and entities also use ombudsman to serve numerous functions, including avoiding and resolving disputes and facilitating communication among stakeholders. These roles illustrate the utility and flexibility of using neutrals as a tool. A thorough discussion of appointments outside the civil litigation context, however, is beyond the scope of these Guidelines.

such a case is filed. In the federal system and in some state courts, magistrate judges are available; in others they are not. In some courts, a few complex cases, or a single, particularly complex case, can strain a docket. Resources allocated to one case can consume resources that would otherwise be available for other cases. Special masters can offer the time and attention complex cases require without diverting judicial time and attention from other cases.

Second, some cases benefit from specialized expertise. This is particularly true in federal multidistrict litigation ("MDL"), which accounts for nearly forty percent of the federal case load, excluding prisoner and social security cases.[8] Managing those cases oftentimes requires a diverse set of skills (e.g., managing discovery, reviewing materials withheld as privileged or proprietary, facilitating settlement of pretrial issues or the entire case, addressing issues related to expert qualifications and opinions, resolving internecine disputes among plaintiff and/or defense counsel, allocating settlement funds or awards, evaluating fee petitions, or providing other needed expertise).

Judges in MDLs and other large, complex cases are called upon to bring to bear knowledge of many fields, including, for example, science, medicine, accounting, insurance, management information systems, business, economics, engineering, epidemiology, operations management, statistics, cybersecurity, sociology, and psychology. No one person can be an expert in all these fields. Special masters who have specialized expertise in relevant fields can provide a practical resource to courts in cases that would benefit from subject-matter expertise.

Third, the judicial role limits the involvement judges can have in some aspects of the litigation process. Judicial ethics limit the ability of judges to facilitate informal resolutions of issues and cases, particularly if the process requires *ex parte* meetings with parties or proposing resolutions of issues on which the court may eventually need to rule.[9]

Federal Rule 16(c)(2)(H) and certain state rules provide that "[a]t any pretrial conference, the court may consider and take appropriate action on...referring matters to a magistrate judge or a master...." As previously noted,[10] however, the experience of the Working Group suggests that it is rare for courts to make use of this provision, especially when compared to the use made of other settlement procedures described in Rule 16(c)(2)(I).[11] Few courts have a practice of regularly considering the appointment of a

[8] Andrew D. Bradt, "The Long Arm of Multidistrict Litigation," 59 WM. & MARY L. REV. 1, 2 (2017); Elizabeth Chamblee Burch, "Monopolies in Multidistrict Litigation," 70 VAND. L. REV. 67, 72 (2017). The Judicial Panel on Multidistrict litigations reports that, as of April 16, 2018, 123,293 cases were part of pending MDL actions. http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-April-16-2018.pdf

[9] *See* Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 Ohio St. L. J. 73, 105-127 (2018) (describing the ethical, due process and decision-making difficulties that arise when a judge plays both an adjudicative and settlement role in a case); Nancy A. Welsh, *Magistrate Judges, Settlement and Procedural Justice*, 16 Nev. L. J. 983, 1004-1014, 1018-1023, 1028-35 (2016).

[10] *See supra* nn.5-6 and accompanying text.
[11] Rule 16(c)(2)(I) provides as follow: "At any pretrial conference, the court may consider and take appropriate action on... settling the case and using specialized procedures to assist in resolving the dispute when authorized by statute or local rule."

special master when they are preparing a scheduling order.[12]

Despite the considerable assistance special masters can offer, appointing special masters has historically been viewed as an extraordinary measure to be employed only on rare occasions.[13] This view appears to have stemmed from concerns regarding delegation of judicial authority and the costs that the parties will incur. But neither concern justifies limiting consideration of using masters to "rare occasions."

The Supreme Court has long used special masters in original jurisdiction cases and has vested in those individuals extraordinarily broad powers, including the responsibility to conduct trials on the merits. Thus, at least at the federal level, if the use of special masters were an improper delegation of judicial power, courts would be barred from using them, and obviously they are not.[14]

Moreover, as a matter of logic, a concern about delegating authority should apply only to situations where the special master is asked to perform an adjudicative role. And, unless the parties agree otherwise, a special master's "adjudication" is merely a report and recommendation that can be appealed to the trial court as a matter of right. The ultimate decision-making authority continues to reside with the court.

Cost concerns actually animate these Guidelines. Effective special masters reduce costs by dealing with issues before they evolve into disputes and by swiftly and efficiently disposing of disputes that do arise. Although no scientific study has empirically established that special masters reduce the cost of litigation, there is broad consensus that anticipating and preventing disputes before they arise or resolving them quickly as they emerge significantly improves the effectiveness and efficiency of dispute resolution.[15] Special masters can also inculcate a culture of compliance with procedural

[12] There are exceptions. *See infra* n.25.
[13] *See, e.g.*, 2003 Advisory Committee Note to Fed. R. Civ. P. 53 (noting, even as it revised the rule "extensively to reflect changing practices in using masters" for a broader array of functions that "[t]he core of the original [1938] Rule 53 remains, including its prescription that appointment of a master must be the exception not the rule"); Manual for Complex Litigation 4th, §10.14 at 14 (2004) ("Referral of pretrial

management to a special master (not a magistrate judge) is not advisable for several reasons. Rule 53(a)(1) permits referrals for trial proceedings only in nonjury cases involving "some exceptional conditions" or in an accounting or difficult computation of damages. Because pretrial management calls for the exercise of judicial authority, its exercise by someone other than a district or magistrate judge is particularly inappropriate. The additional expense imposed on parties also militates strongly against such appointment. Appointment of a special master (or of an expert under Federal Rule of Evidence 706) for limited purposes requiring special expertise may sometimes be appropriate (e.g., when a complex program for settlement needs to be devised)").

[14] *See* n.30 *infra* (discussing inherent authority of courts to appoint special masters to assist their judicial administration). *See also Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015) ("The entitlement to an Article III adjudicator is 'a personal right' and thus ordinarily 'subject to waiver.' ... But allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process").

[15] *See* Thomas D. Barton and James P. Groton, "The Votes Are In: Focus on Preventing and Limiting Conflicts, DISPUTE RESOLUTION, v. 24 n.3, 9, 10 (Spring 2018). Barton and Groton report that a Global Pound Conference survey of more than 2,000 business leaders, in-house counsel, outside counsel or advisors,

rules by strictly monitoring the parties' compliance with the rules and ensuring that parties do not gain leverage or time from non-compliance.

Special masters may be particularly helpful in assisting parties to implement the December 2015 Amendments to the Federal Rules of Civil Procedure. Those amendments were designed to make litigation more efficient by, among other things, requiring discovery to be "proportional to the needs of the case"[16] and requiring objections to "state whether any responsive materials are being withheld on the basis of that objection."[17] Having a special master work with the parties in appropriate cases to apply these requirements as they propound or respond to discovery requests should promote cooperation and efficiency. Those benefits from using special masters do not detract from judicial administration; they enhance it.

A significant purpose of the 2015 Amendments was to use more proactive case management to prevent problems from arising or solving problems before they become needlessly expensive and time-consuming. Where warranted, if parties are unable to resolve disputes that have the potential to multiply, having a special master assist in the resolution helps to fulfill that goal and frees judicial resources for substantive decision-making and case resolution.

Hence, in all appropriate cases, the court should assess whether appointment of a special master will contribute to a fair and efficient outcome. Special masters can make those contributions by:

- Enabling faster and more efficient resolution of disputes.
- Relieving burdens on limited judicial resources.
- Allowing for specialized expertise in any field that assists judicial administration.
- Allowing for creative and adaptable problem solving.
- Serving in roles that judges are not, or may not be, in a position to perform.
- Facilitating the development of a diverse and experienced pool of neutrals by

introducing an expanded universe of practitioners to work as neutrals.

- Helping courts to monitor implementation of orders and decrees.

It is unclear whether the failure to use masters arises from hostility toward the concept or the unfamiliarity borne of under-utilization, or both. Indeed, the use of (or even consideration of using) special masters is so rare that the very idea is alien to many judges and lawyers. Other barriers to use include:

academics, members of the judiciary and government and dispute resolution providers concluded that, by far, the step that should be prioritized to achieve effective dispute resolution is to employ processes to resolve matters pre-dispute or pre-escalation. Although the survey focused on preventing disputes before litigation begins, there is no reason why the same principle would not apply to preventing disputes within litigation before they start or escalate. *See also* *http://globalpound.org/wp-content/uploads/2017/11/2017- 09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf* at 42

[16] Fed. R. Civ. P. 26(b)(1) (2015).
[17] Fed. R. Civ. P. 34(b)(2)(C) (2015).

- A general lack of awareness among courts, counsel and parties about special masters and the ways in which they can be used.
- A concern among parties and their counsel of losing control of the litigation.
- A lack in many courts of structures and procedures for vetting, selecting, employing, and evaluating special masters (either as a matter of court

administration or as a practice of individual judges).

- Increased cost and delay.
- The introduction of another layer between the court and counsel.

Regardless of the reason, the failure to consider using special masters in appropriate cases may disserve the goal of securing “a just, speedy, and inexpensive determination.” This failure has also led to appointments being made without systems or structures to support selection, appointment, or use of special masters and, frequently, after cases have already experienced management problems. Although anecdotal evidence indicates that courts and parties are satisfied with their experiences with special masters,[18] the *ad hoc* nature of appointments can lead to inconsistent results and perceptions that undercut the legitimacy of appointees. Moreover, because special masters are rarely used, courts and academicians have not thoroughly addressed such basic issues as what qualifications special masters should possess, how those qualifications should vary based upon the role the special master is performing, what the best practices for special masters should be, and what ethical rules should govern the conduct of special masters. Adopting standards for the appointment of special masters and making their use more common will allow for more research into

ways to make the process more predictable and the work of special masters more effective.

Highlights of Specific Recommendations

(1) It should be an accepted part of judicial administration in complex litigation and in other cases that create particular needs that a special master might satisfy, for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation.

Because courts do not typically consider appointing a special master at the outset of cases, special masters are most frequently appointed after case-management issues have emerged. Although special masters can be of use in these situations, this timing prevents courts and stakeholders from obtaining early case management that often eliminates the need for dispute resolution.

A special master can, for example, address discovery issues and privilege issues before discovery responses are due, thereby preventing disputes before they arise. While conferences that deal with discovery issues before the parties resort to costly motion

[18] Barbara Meierhoefer, "Special Master Case Studies" (2018) available at

https://www.americanbar.org/content/dam/aba/publications/judicial_division/2018lc-specialmasterscasestudy.authcheckdam.pdf

practice is useful, intervening before parties serve responses would be even more efficient and could reduce conflicts among counsel and costs to the parties.

(2) In considering the possible use of a special master, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform and roles that a special master might serve.

The suggestions offered here on how special masters might be used to assist in civil litigation are meant to be illustrative, not exhaustive. Indeed, it is not possible to list every conceivable role a special master can play. Courts, counsel, and parties are encouraged to consider creative approaches to integrating special masters into case management for the benefit of all participants.

Moreover, there are often different ways to serve the judicial process. For example, a special master charged with assisting in resolving discovery disputes could adjudicate issues relating to pending discovery motions or could assist counsel in working through discovery needs and obligations without motion practice, or both.

Special masters can address motions dealing with the admissibility of opinion testimony based upon the qualifications of a proposed expert or the soundness of the opinion expressed or methodology employed in reaching it. Special masters can also perform an advisory function, providing information and guidance to the court or the parties in areas that require technical expertise.

Special masters can also provide information to the court. For example, a special master could conduct a privilege review,[19] analyze damages calculations, or summarize and report on the content of voluminous records to prepare the court for a hearing or trial. Special masters can perform these functions in different ways from a court-appointed expert (for example, providing adjudication and not merely an opinion), using different procedures (for example, in a process that does not contemplate party-appointed experts or depositions of the independent adjunct). Rather than the parties and the court bearing the expense associated with several experts, there would be only one special master and challenges would be made by objection to the special master's rulings.

Special masters can productively serve as a flexible resource to address a range of problems. The order of appointment should describe the issues the master is to address and the powers afforded the master to do so. Once the court finds a need, the only practical limit that should constrain the decision to use special masters is whether the appointment of a master would impose a cost that outweighs the benefit.

[19] *See, e.g., In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E. D. La. 2007). 8

(3) In determining whether a case merits appointment of a special master, courts should weigh the expected benefit of using the special master, including reduction of the litigants' costs, against the anticipated cost of the special master's services, and with the view of making the special master's work efficient and cost effective.

The appointment of a special master must justify the cost. In most instances, the potential for disputes is a function of the amount of money at stake, the number of parties involved, the number of issues and their factual or legal complexity, the number of lawyers representing the parties, and the level of contentiousness between or among the parties or counsel. In many, if not most, of those cases, the cost of procedural skirmishes vastly outstrips the costs of paying a special master to deter, settle, or quickly dispose of issues when they arise.

The benefits of a special master cannot always be measured entirely in dollars. The value of special masters to courts and stakeholders lies in the extraordinary flexibility their use offers to import resources, expertise, and processes that can be flexibly adapted to the needs of each case. In some cases, particularly those involving non-financial concerns, using a special master may be justified if the master adds a

resource, expertise, or process that enhances the effective administration of justice. Determining whether that value outweighs the cost requires a case-by-case assessment.

(4) Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial functions, but assist it. Among the functions special masters have performed are:

a. discovery oversight and management, coordination of cases in multiple jurisdictions;

2. **Facilitating resolution of disputes between or among co-parties;**
3. **Pretrial case management;**
4. **advice and assistance requiring technical expertise;**
5. **conducting or reviewing auditing or accounting;**
6. **conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;**
7. **conducting trials or mini-trials upon the consent of the parties;**
8. **settlement administration;**
9. **claims administration; and**
10. **receivership and real property inspection.**

In these capacities special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.

Special masters can be used creatively and thoughtfully in a wide array of situations. It is not possible to identify all the ways in which special masters could be used, however, the functions that special masters have performed include:

- Discovery oversight and management.
- Coordinating cases in multiple jurisdictions or between state and federal courts.
- Facilitating resolution of disputes between co-parties and/or their counsel in multi-plaintiff and/or multi-defendant settings.
- Providing technical advice and assistance for example in managing patent claim construction disputes in patent infringement litigation.
- Auditing/Accounting.
- Serving as a firewall that allows the benefit of neutral involvement while

avoiding exchanges of information or *ex parte* contacts between the judge and stakeholders in a way that might otherwise be perceived as unfair.

- Addressing class action administration and related issues.
- Real property inspections.
- Mediating or facilitating settlement.
- Trial administration.[20]
- Monitoring and claims administration.
- Receivership.

Depending upon the function(s) the special master is performing, the special master may serve in different types of roles, including:

□ Adjudicative. □ Facilitative. □ Advisory.
□ Informatory. □ Liaison.[21]

The role a special master performs in a case is subject to ethical and legal constraints, the court's control, and, in some instances, the consent of the parties. For example, a special master serving as a mediator may be subject to mediation-specific statutory or ethical obligations, such as confidentiality or a mediation privilege, and these mediation-specific obligations could be inconsistent with other roles the special master is required to play, particularly adjudicative or informatory roles.[22]

These Guidelines do not direct any particular use of special masters or identify all the legal or ethical obligations that might apply to their activities. Rather, they seek to help courts and parties by increasing awareness of the potential for using special masters creatively and effectively, while highlighting some of the legal or ethical obligations that

[20] In some jurisdictions, if the parties consent, special masters are empowered to oversee trials, or to conduct "mini-trials" of specific, perhaps technical, issues. These proceeding differ from arbitrations in a number of ways and often, for example, are subject to review in ways that arbitrations usually are not.

[21] "Liaison" refers to situations in which a special master is being used as go-between to provide information to the court while insulating it from matters such as settlement discussions or privileged information.

[22] *See* n.9 *supra*. Fed. R. Civ. P. 53(a)(2), and accompanying Advisory Committee Notes (2003). The considerations may be different in the discovery context. As the parties sort through discovery issues with the special master acting as an adjudicator, opportunities often arise for the parties and the master to discuss and explore together voluntary solutions to discovery disputes.

might apply. As discussed under Point 8 below, one advantage of a greater acceptance of special masters is that experience will foster creativity and promote understanding of the appropriate legal and ethical obligations that apply to special masters.

(5) Courts should choose special masters with due regard for the court's needs and the parties' preferences and in a manner that promotes confidence in the process and the choice by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.

The choice of who is to serve as a special master, like the issue of what function and role the special master is to perform, requires careful consideration. Courts need to ensure that the selection and use of special masters is fair.

Courts should afford parties the opportunity to propose acceptable special master candidates.[23] As discussed below, *see* Point 7, by maintaining rosters, courts can assist the parties and identify a pool of candidates who bring a diverse range of experience. Courts should always give serious consideration to any candidate identified by the parties, although the court should also always vet candidates to ensure that they have the time, qualifications, and independence to discharge their special-master duties. Involving the parties in the selection process should minimize the parties' perception that a candidate was forced upon them by the court and should eliminate any possible concern of bias.

(6) The referral order appointing the special master should describe the scope of the engagement, including, but not limited to, the special master's duties and powers, the roles the special master may serve, the rates and manner in which the special master will be compensated, power to conduct hearings or to facilitate settlement, requirements for issuing decisions and reporting to the court, and the extent of permissible ex parte contact with the court and the parties. Any changes to the scope of the referral should be made by a modification to the referral order.

Federal Rule of Civil Procedure 53(b)(2) and similar state rules require that the appointing order "direct the master to proceed with all reasonable diligence" and state:

1. (A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);
2. (B) the circumstances, if any, in which the master may communicate *ex parte* with the court or a party;
3. (C) the nature of the materials to be preserved and filed as the record of the master's activities;
4. (D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

[23] *See* Fed. R. Civ. P. 53(b)(1) ("Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment").

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

The Court should consider adapting these terms (or adding others) consistent with the special master's role in the case. For example, the Court is empowered to align the incentives with the process, for example, by making compensation in a particular case hourly, fixed or a mixture of both and providing for review of billing afterwards.[24]

(7) Courts should develop local rules and practices for selecting, training and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates.

Few courts have adopted a system for the selection, vetting, or training of special masters. As a consequence, court decisions and available relevant literature do not extensively examine special masters' qualifications or how those qualifications should vary depending upon the role the special master is performing.[25]

Depending on the appointing court's circumstances, local custom, and preferences, courts may wish to consider and adapt the following processes:

- Develop a list of the roles special masters will be expected to perform.
- Adopt and notify the bar of the considerations for selection of special masters, including a commitment to diversity and inclusivity.
- Sponsor interactive discussions on the use of special masters.
- Adopt a method to ensure confidentiality during the appointment process.
- Develop a public (or, if the court prefers, an internal) database/list of qualified, screened individuals who meet basic criteria for consideration as special masters.
- Create an application and confidential vetting process that recognizes the needed functions and ensures that that a diverse spectrum of qualified candidates (including first-time special master candidates) may be included.
- Designate administrators to be responsible for implementing the program and assisting judges and/or parties in identifying matches for particular cases.
- Develop methods for evaluation, feedback and discipline.[26]

[24] The website of the Academy of Court Appointed Masters includes a Bench Book with guidance and examples of form orders that address additional issues raised by the appointment of special

masters. *See http://www.courtappointedmasters.org/resource-center/appointing-masters-handbook*. *See also* Advisory Committee Notes to Fed. R. Civ. P. 53(b) (discussing ethical issues in appointing special masters).

[25] The Indiana Commercial Courts Pilot Project and the Western District of Pennsylvania E-Discovery Special Masters Pilot Program are exceptions that offer guidance on developing rules. The United States District Court for the District of Delaware has a standing order under which special masters serve 4-year terms at the pleasure of the judges of the Court. The Court notifies the Bar when it is considering appointing new Panel members, allowing bar members to submit background information. http://www.ded.uscourts.gov/sites/default/files/forms/SpecialMastersOrder2014.pdf *See also* https://www.discoverypilot.com/ (Seventh Circuit eDiscovery pilot program incorporating neutral mediation). [26] For a discussion of how state and federal courts have enabled feedback, *see* Nancy A. Welsh, Magistrate

While exploring the different systems and structures for appointing and training special masters is beyond the scope of these Guidelines, some suggestions include: inviting applicants to self-nominate; creating and implementing qualifications criteria; establishing a diverse roster of approved masters; establishing a performance review component; and adopting training programs for masters.

Developing rosters of special master candidates could facilitate vetting, qualifying, and training candidates to help ensure quality and confidence in the legitimacy of the choice. Vetting could also recognize and assist in implementing existing ABA guidance on increasing diversity among those who serve as special masters.[27]

Whether in designing a roster system or in making individual selections, some factors the court should consider include:

Developing a diverse pool of persons who qualify for appointment.
Ensuring the process is properly calibrated to the functions and roles special masters perform.
Ensuring candidates make appropriate disclosures and have no conflicts of interest with the parties or issues being addressed.
Ensuring the process properly assesses candidates' talents and experience.
Determining whether subject matter expertise is necessary.
Ensuring the ability of the prospective master to be fair and impartial and to engage with the parties and others with courtesy and civility.

Courts and the bar should develop educational programs to increase awareness of the role of special masters and to promote the acquisition and dissemination of information concerning the effectiveness and appropriate use of special masters.

Because special masters are appointed infrequently, many counsel have had no experience working with a special master.[28] Promulgating local rules and procedures to systematize the consideration and use of special masters would assist in familiarizing practitioners with the appointment process and how masters are used. When parties are

aware that courts intend to make more effective use of special masters, the parties will be more likely to inform themselves about the selection process, potential candidates, and the role the special masters will play in the process. It is also important that the legal community develop educational programs available to both bench and bar on the use of special masters. Greater use of special masters will also assist the advancement of

Judges, Settlement and Procedural Justice, 16 NEVADA LAW JOURNAL 983 (2016) and Nancy A. Welsh, Donna Stienstra & Bobbi McAdoo, *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, *in* THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (Tania Sourdin and Archie Zariski, eds., 2013).

[27] *See* American Bar Association Resolution 17M (urging the United States Supreme Court to consider racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the process for selecting *amicus curiae*, special masters, and other counsel).
[28] *See, e.g.*, David R. Cohen, "The Judge, the Special Master, and You," LITIGATION v. 20, No. 1 (2015).

appropriate professional standards for the multiple roles they perform.

Courts should have regular mechanisms to monitor the quality of special masters' work. An appointing court could require that the master make periodic progress reports on issues that have been addressed and resolved, the procedural posture of the case, and when the case will be trial ready. Courts should also identify mechanisms that allow the parties to provide feedback and, if applicable, raise concerns regarding their experience with, and the performance of, the special master.[29]

Monitoring special master performance and stakeholder satisfaction will allow courts to identify and correct problems. If a special master proves inappropriate, the court can replace the special master with a more suitable candidate. If tasks are too much for one special master to handle, the court can consider dividing tasks among more than one master. If the process is ineffective, the court could consider vacating the appointment.

When cases conclude, it should be a regular practice for participants to complete a brief confidential survey concerning the special master's work. These surveys would provide, for the first time, a source of data researchers can use to assess the use of special masters and make recommendations for improvement.

(9) Courts and, where applicable, legislatures should make whatever modifications to laws, rules or practices that are necessary to effectuate these ends, including amending Bankruptcy Rule 9031 to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

Federal Rule 53 and many state rules and authority on inherent judicial power, appear sufficiently flexible to allow for more effective use of special masters. However, depending on the jurisdiction, rule or statutory changes may be necessary or desirable.

In addition, where the rules of civil procedure permit, courts should consider whether it is appropriate to adopt local procedures calling for more extensive, flexible, and systematic vetting, selection, use and evaluation of special masters. Rule-making bodies should also consider whether particular aspects of existing rules, including terms used, should be modified to promote uniformity and the effective use of special master.

Bankruptcy Rule 9031 should be amended to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

Bankruptcy Rule 9031 states that Federal Rule of Civil Procedure 53 “does not apply in cases under the [Bankruptcy] Code.” This rule is confusing. The 1983 Advisory Committee comments state that Bankruptcy Rule 9031 “precludes the appointment of masters in cases and proceedings under the Code”; but the rule purports to instead preclude application of Federal Rule of Civil Procedure 53. Rule 53 is not the sole or

[29] *See supra* n.26, supra for methods of feedback.

ultimate source of authority for appointing special masters; it addresses the manner in which courts exercise their *inherent* power to appoint special masters as a part of case management.[30]

Moreover, if Rule 9031 actually precluded the use of special masters for cases “under the Code,” it would not be limited to bankruptcy judges. It would operate on the inherent authority of Article III judges when they decide cases under the Bankruptcy Code, as opposed to any other statute.[31] However, the only other published official explanation for Rule 9031 says otherwise. The Advisory Committee on Bankruptcy Rules' preface to the then proposed Rules of Bankruptcy Procedure states that "[t]here does not appear to be any need for the appointment of special masters in bankruptcy cases *by bankruptcy judges*.” (Emphasis added) [32]

In any event, there is no justification today for a rule that assumes that bankruptcy judges can never make effective use of special masters. Bankruptcy dockets include many especially complex cases in which special masters could be of great utility. Depriving court of equity of the ability to use special masters, disserves the goal of achieving a “just, speedy and inexpensive determination of every case and proceeding,” which is the mandate of Bankruptcy Rule 1001, just as it is the mandate of Federal Rule 1.[33] Amending Rule 9031 to eliminate this confusing limitation serves this end.

Conclusion

Courts should make more effective and systematic use of special masters to assist in civil litigation. The ABA is available to assist courts in implementing these recommendations.

[30] It "is well-settled that" federal "courts have inherent authority to appoint Special Masters to assist in managing litigation." *United States v. Black*, No. 16-20032-JAR, 2016 WL 6967120, at *3 (D. Kan. Nov. 29, 2016) (*citing Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) *(quoting In re: Peterson, 253 U.S. 300, 311 (1920)); see also, e.g., Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979) (the authority to appoint "expert advisors or consultants" derives from either Rule 53 or the Court's inherent power); *Regents of the Univ. of Cal. v. Micro Therapeutics, Inc.,* No. C 03-05669 JW, 2006 WL 1469698, at *1 (N.D. Cal. May 26, 2006) (to similar effect). Courts have relied on this authority, for example, to appoint special masters in criminal cases even though the Federal Rules of Criminal Procedure have no analog to Rule 53. Indeed, the power to appoint special masters has existed long before the Federal Rules (from at least eighteenth century in the United States and perhaps even in Roman law). Paulette J. Delk, "Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031," 67 MO. L. REV. 29, 30-31 (Winter 2002). [31] *See* Paulette J. Delk, *supra.* n.30, 67 MO. L. REV. at 40-41 & nn.60-62.

[32] *See* Paulette J. Delk, *supra.* n.30, 67 MO. L. REV. at 41-42 & nn.64-65.

[33] *See* Paulette J. Delk, *supra.* n.30, 67 MO. L. REV. at 41-42 & nn.65-

Appendix 3
Fed. R. Civ. P. 53

FEDERAL RULES OF CIVIL PROCEDURE
VI. TRIALS

Rule 53. Masters

(a) APPOINTMENT.

(1) *Scope.* Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

(2) *Disqualification.* A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(3) *Possible Expense or Delay.* In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) ORDER APPOINTING MASTER.

(1) *Notice.* Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

(2) *Contents.* The appointing order must direct the master to proceed with all reasonable diligence and must state:

(A) The master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

(3) *Issuing.* The court may issue the order only after:

(A) the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(4) *Amending.* The order may be amended at any time after notice to the parties and an opportunity to be heard.

(c) MASTER'S AUTHORITY.

(1) *In General.* Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) *Sanctions.* The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) MASTER'S ORDERS. A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.

(e) MASTER'S REPORTS. A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.

(f) ACTION ON THE MASTER'S ORDER, REPORT, OR RECOMMENDATIONS.

(1) *Opportunity for a Hearing; Action in General.* In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(2) *Time to Object or Move to Adopt or Modify.* A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than 21days after a copy is served, unless the court sets a different time.

(3) *Reviewing Factual Findings.* The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) *Reviewing Legal Conclusions.* The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) *Reviewing Procedural Matters.* Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(g) COMPENSATION.

(1) *Fixing Compensation.* Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(2) *Payment.* The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) *Allocating Payment.* The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(h) APPOINTING A MAGISTRATE JUDGE. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

HISTORY:

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 30, 2007, eff. Dec. 1, 2007.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. *Subdivision (a).* This is a modification of former Equity Rule 68 (Appointment and Compensation of Masters).

Subdivision (b). This is substantially the first sentence of former Equity Rule 59 Reference to Master—Exceptional, Not Usual) extended to actions formerly legal. See *Ex parte Peterson,* 253 US 300, 40 S Ct 543, 64 L Ed 919 (1920).

Subdivision (c). This is former Equity Rules 62 (Powers of Master) and 65 (Claimants before Master Examinable by Him) with slight modifications. Compare former Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 51 (Evidence Taken Before Examiners, Etc.).

Subdivision (d). (1) This is substantially a combination of the second sentence of former Equity Rule 59 (Reference to Master—Exceptional, Not Usual) and former Equity Rule 60 (Proceedings Before Master). Compare former Equity Rule 53 (Notice of Taking Testimony Before Examiner, Etc.).

(2) This is substantially former Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

(3) This is substantially former Equity Rule 63 (Form of Accounts Before Master).

Subdivision (e). This contains the substance of former Equity Rules 61 (Master's Report--Documents Identified but not Set Forth), 61 1/2 (Master's Report--Presumption as to Correctness--Review), and 66 (Return of Master's Report--Exceptions--Hearing), with modifications as to the form and effect of the report and for inclusion of reports by auditors, referees, and examiners, and references in actions formerly legal. Compare former Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 67 (Costs on Exceptions to Master's Report). See *Camden v Stuart,* 144 US 104, 12 S Ct 585, 36 L Ed 363 (1892); *Ex parte Peterson,* 253 US 300, 40 S Ct 543, 64 L Ed 919 (1920).

Notes of Advisory Committee on 1966 amendments. These changes are designed to preserve the admiralty practice whereby difficult computations are referred to a commissioner or assessor, especially after an interlocutory judgment determining liability. As to separation of issues for trial see Rule 42(b).

Notes of Advisory Committee on 1983 amendments. *Subdivision (a).* The creation of full-time magistrates, who serve at government expense and have no nonjudicial duties competing for their time, eliminates the need to appoint standing masters. Thus the prior

provision in Rule 53(a) authorizing the appointment of standing masters is deleted. Additionally, the definition of "master" in subdivision (a) now eliminates the superseded office of commissioner.

The term "special master" is retained in Rule 53 in order to maintain conformity with *28 U.S.C. § 636(b)(2),* authorizing a judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States District Courts." Obviously, when a magistrate serves as a special master, the provisions for compensation of masters are inapplicable, and the amendment to subdivision (a) so provides.

Although the existence of magistrates may make the appointment of outside masters unnecessary in many instances, see, e.g., *Gautreaux v. Chicago Housing Authority,* 384 F. Supp. 37 (N.D. Ill. 1974), mandamus denied sub nom., *Chicago Housing Authority v. Austin,* 511 F.2d 82 (7th Cir. 1975); *Avco Corp. v. American Tel. & Tel. Co.,* 68 F.R.D. 532 (S.D. Ohio 1975), such masters may prove useful when some special expertise is desired or when a magistrate is unavailable for lengthy and detailed supervision of a case.

Subdivision (b). The provisions of 28 U.S.C. § 636(6)(2) not only permit magistrates to serve as masters under Rule 53(b) but also eliminate the exceptional condition requirement of Rule 53(b) when the reference is made with the consent of the parties. The amendment to subdivision (b) brings Rule 53 into harmony with the statute by exempting magistrates, appointed with the consent of the parties, from the general requirement that some exceptional condition requires the reference. It should be noted that subdivision (b) does not address the question, raised in recent decisional law and commentary, as to whether the exceptional condition requirement is applicable when private masters who are not magistrates are appointed with the consent of the parties. See Silberman, Masters and Magistrates Part II: The American Analogue, 50 N.Y.U. L.Rev. 1297, 1354 (1975).

Subdivision (c). The amendment recognizes the abrogation of Federal Rule 43(c) by the Federal Rules of Evidence.

Subdivision (f). The new subdivision responds to confusion flowing from the dual authority for references of pretrial matters to magistrates. Such references can be made, with or without the consent of the parties, pursuant to Rule 53 or under *28 U.S.C. § 636(b)(I)(A)* and (b)(1)(B). There are a number of distinctions between references made under the statute and under the rule. For example, under the statute nondispositive pretrial matters may be referred to a magistrate, without consent, for final determination with reconsideration by the district judge if the magistrate's order is clearly erroneous or contrary to law. Under the rule, however, the appointment of a master, without consent of the parties, to supervise discovery would require some exceptional condition (Rule 53(b)) and would subject the proceedings to the report procedures of Rule 53(e). If an order of reference does not clearly articulate the source of the court's authority the resulting proceedings could be subject to attack on grounds of the magistrate's noncompliance with the provisions of Rule 53. This subdivision therefore establishes a presumption that the limitations of Rule 53 are not applicable unless the reference is specifically made subject to Rule 53.

A magistrate serving as a special master under 28 U.S.C. § 636(b)(2) is governed by the provisions of Rule 53, with the exceptional condition requirement lifted in the case of a consensual reference.

Notes of Advisory Committee on 1987 amendments. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1991 amendment. The purpose of the revision is to expedite proceedings before a master. The former rule required only a filing of the master's report, with the clerk then notifying the parties of the filing. To receive a copy, a party would then be required to secure it from the clerk. By transmitting directly to the parties, the master can save some efforts of counsel. Some local rules have previously required such action by the master.

Notes of Advisory Committee on 1993 amendments. This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

Notes of Advisory Committee on 2003 amendments. Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform a variety of pretrial and post-trial functions. See Winging, Hooper, Leary, Miletich, Reagan, & Shapard, Special Masters' Incidence and Activity (FJC 2000). This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, but permits appointment of a trial master in an action to be tried to a jury only if the parties consent. The new rule clarifies the provisions that govern the appointment and function of masters for all purposes. Rule 53(g) also changes the standard of review for findings of fact made or recommended by a master. The core of the original Rule 53 remains, including its prescription that appointment of a master must be the exception and not the rule.

Special masters are appointed in many circumstances outside the Civil Rules. Rule 53 applies only to proceedings that Rule 1 brings within its reach.

Subdivision (a)(1). District judges bear primary responsibility for the work of their courts. A master should be appointed only in limited circumstances. Subdivision (a)(1) describes three different standards, relating to appointments by consent of the parties, appointments for trial duties, and appointments for pretrial or posttrial duties.

Consent Masters. Subparagraph (a)(1)(A) authorizes appointment of a master with the parties' consent. Party consent does not require that the court make the appointment; the court retains unfettered discretion to refuse appointment.

Trial Masters. Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of subparagraph (a)(1)(B) that restrict appointments to exercise trial functions. The Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co.,* 352 U.S. 249 (1957); earlier roots are sketched in *Los Angeles Brush Mfg. Corp. v. James,* 272 U.S. 701 [1 L. Ed. 2d 290] (1927). As to nonjury trials, this trend has developed through elaboration of the "exceptional condition" requirement in present Rule 53(b). This phrase is retained, and will continue to have the same force as it has developed. Although the provision that a reference "shall be the exception and not the rule" is deleted, its meaning is embraced for this setting by the exceptional condition requirement.

Subparagraph (a)(1)(B)(ii) carries forward the approach of present Rule 53(b), which exempts from the "exceptional condition" requirement "matters of account and of difficult computation of damages." This approach is justified only as to essentially ministerial determinations that require mastery of much detailed information but that do not require extensive determinations of credibility. Evaluations of witness credibility should only be assigned to a trial master when justified by an exceptional condition.

The use of a trial master without party consent is abolished as to matters to be decided by a jury unless a statute provides for this practice.

Abolition of the direct power to appoint a trial master as to issues to be decided by a jury leaves the way free to appoint a trial master with the consent of all parties. A trial master should be appointed in a jury case, with consent of the parties and concurrence of the court, only if the parties waive jury trial with respect to the issues submitted to the master or if the master's findings are to be submitted to the jury as evidence in the manner provided by former Rule 53(e)(3). In no circumstance may a master be appointed to preside at a jury trial.

The central function of a trial master is to preside over an evidentiary hearing on the merits of the claims or defenses in the action. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master. The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master might conduct evidentiary hearings on questions of compliance.

Rule 53 has long provided authority to report the evidence without recommendations in nonjury trials. This authority is omitted from Rule 53(a)(1)(B). In some circumstances a master may be appointed under Rule 53(a)(1)(A) or (C) to take evidence and report without recommendations.

For nonjury cases, a master also may be appointed to assist the court in discharging trial duties other than conducting an evidentiary hearing.

Pretrial and Post-Trial Masters. Subparagraph (a)(1)(C) authorizes appointment of a master to address pretrial or post-trial matters. Appointment is limited to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge of the district. A master's pretrial or posttrial duties may include matters that could be addressed by a judge, such as reviewing discovery documents for privilege, or duties that might not be suitable for a judge. Some forms of settlement negotiations, investigations, or administration of an organization are familiar examples of duties that a judge might not feel free to undertake.

Magistrate Judges. Particular attention should be paid to the prospect that a magistrate judge may be available for special assignments. United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(6)(1). Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge.

There is statutory authority to appoint a magistrate judge as special master. 28 U.S.C. § 636(b)(2). In special circumstances, or when expressly authorized by a statute other than § 636(b)(2), it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). There is no apparent reason to appoint a magistrate judge to perform as master duties that could be performed in the role of magistrate judge. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be undercut by resort to Rule 53 unless specifically authorized by statute; see 42 U.S.C. § 2000e-5(f)(5).

Pretrial Masters. The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation. This practice is not well regulated by present Rule 53, which focuses on masters as trial participants. Rule 53 is amended to confirm the authority to appoint and to regulate the use of pretrial masters.

A pretrial master should be appointed only when the need is clear. Direct judicial performance of judicial functions may be particularly important in cases that involve important public issues or many parties. At the extreme, a broad delegation of pretrial responsibility as well as a delegation of trial responsibilities can run afoul of Article III.

A master also may be appointed to address matters that blur the divide between pretrial and trial functions. The court's responsibility to interpret patent claims as a matter of law, for example, may be greatly assisted by appointing a master who has expert knowledge of the field in which the patent operates. Review of the master's findings will be de novo under Rule 53(g)(4), but the advantages of initial determination by a master may make the process more effective and timely than disposition by the judge acting alone. Determination of foreign law may present comparable difficulties. The decision whether to appoint a master to address such matters is governed by subdivision (a)(1)(C), not the trial-master provisions of subdivision (a)(1)(B).

Post-Trial Masters. Courts have come to rely on masters to assist in framing and enforcing complex decrees. Present Rule 53 does not directly address this practice. Amended Rule 53 authorizes appointment of post-trial masters for these and similar purposes. The constraint of subdivision (a)(l)(C) limits this practice to cases in which the master's duties cannot be performed effectively and in a timely fashion by an available district judge or magistrate judge of the district.

Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC,* 478 U.S. 421, 481-482 [92 L. Ed. 2d 344, 391-392] (1986). The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system.

Expert Witness Overlap. This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court-appointed expert witness under Evidence Rule 706. Whatever combination of functions is involved, the Rule 53(a)(1)(B) limit that confines trial masters to issues to be decided by the court does not apply to a person who also is appointed as an expert witness under Evidence Rule 706.

Subdivision (a)(2), and (3). Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master. The standard of disqualification is established by 28 U.S.C. § 455. The affidavit required by Rule 53(b)(3) provides an important source of information about possible grounds for disqualification, but careful inquiry should be made at the time of making the initial appointment. The disqualification standards established by § 455 are strict. Because a master is not a public judicial officer, it may be appropriate to permit the parties to consent to appointment of a particular person as master in circumstances that would require disqualification of a judge. The judge must be careful to ensure that no party feels any pressure to consent, but with such assurances and with the judge's own determination that there is no troubling conflict of interests or disquieting appearance of impropriety-consent may justify an otherwise barred appointment.

One potential disqualification issue is peculiar to the master's role. It may happen that a master who is an attorney represents a client whose litigation is assigned to the judge who appointed the attorney as master. Other parties to the litigation may fear that the attorney-master will gain special respect from the judge. A flat prohibition on appearance before the appointing

judge during the time of service as master, however, might in some circumstances unduly limit the opportunity to make a desirable appointment. These matters may be regulated to some extent by state rules of professional responsibility. The question of present conflicts, and the possibility of future conflicts, can be considered at the time of appointment. Depending on the circumstances, the judge may consider it appropriate to impose a non-appearance condition on the lawyer master, and perhaps on the master's firm as well.

Subdivision (b). The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and authority. Care must be taken to make the order as precise as possible. The parties must be given notice and opportunity to be heard on the question whether a master should be appointed and on the terms of the appointment. To the extent possible, the notice should describe the master's proposed duties, time to complete the duties, standards of review, and compensation. Often it will be useful to engage the parties in the process of identifying the master, inviting nominations, and reviewing potential candidates. Party involvement may be particularly useful if a pretrial master is expected to promote settlement.

The hearing requirement of Rule 53(b)(1) can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

Rule 53(b)(2) requires precise designation of the master's duties and authority. Clear identification of any investigating or enforcement duties is particularly important. Clear delineation of topics for any reports or recommendations is also an important part of this process. And it is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties.

Ex parte communications between a master and the court present troubling questions. Ordinarily the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications between master and court also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that will not be shared with the court. Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications with the court. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exchanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court exercise its discretion and address the topic in the order of appointment.

Similarly difficult questions surround ex parte communications between a master and the parties. Ex parte communications may be essential in seeking to advance settlement. Ex parte communications also may prove useful in other settings, as with in camera review of documents to resolve privilege questions. In most settings, however, ex parte communications with the parties should be discouraged or prohibited. The rule requires that the court address the topic in the order of appointment.

Subdivision (b)(2)(C) provides that the appointment order must state the nature of the materials to be preserved and filed as the record of the master's activities, and (b)(2)(D) requires that the order state the method of filing the record. It is not feasible to prescribe the nature of the record without regard to the nature of the master's duties. The records appropriate to discovery duties may be different from those appropriate to encouraging settlement, investigating possible violations of a complex decree, or making recommendations for trial findings. A basic requirement, however, is that the master must make and file a complete record of the evidence

considered in making or recommending findings of fact on the basis of evidence. The order of appointment should routinely include this requirement unless the nature of the appointment precludes any prospect that the master will make or recommend evidence-based findings of fact. In some circumstances it may be appropriate for a party to file materials directly with the court as provided by Rule 5(e), but in many circumstances filing with the court may be inappropriate. Confidentiality is important with respect to many materials that may properly be considered by a master. Materials in the record can be transmitted to the court, and filed, in connection with review of a master's order, report, or recommendations under subdivisions (f) and (g). Independently of review proceedings, the court may direct filing of any materials that it wishes to make part of the public record.

The provision in subdivision (b)(2)(D) that the order must state the standards for reviewing the master's orders, findings, and recommendations is a reminder of the provisions of subdivision (g)(3) that recognize stipulations for review less searching than the presumptive requirement of de novo decision by the court. Subdivision (b)(2)(D) does not authorize the court to supersede the limits of subdivision (g)(3).

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guidelines to control total expense. The court has power under subdivision (h) to change the basis and terms for determining compensation after notice to the parties.

Subdivision (b)(3) permits entry of the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 *U.S.C. § 455*. If the affidavit discloses a possible ground for disqualification, the order can enter only if the court determines that there is no ground for disqualification or if the parties, knowing of the ground for disqualification, consent with the court's approval to waive the disqualification.

The provision in Rule 53(b)(4) for amending the order of appointment is as important as the provisions for the initial order. Anything that could be done in the initial order can be done by amendment. The hearing requirement can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

Subdivision (c). Subdivision (c) is a simplification of the provisions scattered throughout present Rule 53. It is intended to provide the broad and flexible authority necessary to discharge the master's responsibilities. The most important delineation of a master's authority and duties is provided by the Rule 53(b) appointing order.

Subdivision (d). The subdivision (d) provisions for evidentiary hearings are reduced from the extensive provisions in current Rule 53. This simplification of the rule is not intended to diminish the authority that may be delegated to a master. Reliance is placed on the broad and general terms of subdivision (c).

Subdivision (e). Subdivision (e) provides that a master's order must be filed and entered on the docket. It must be promptly served on the parties, a task ordinarily accomplished by mailing or other means as permitted by Rule 5(b). In some circumstances it may be appropriate to have the clerk's office assist the master in mailing the order to the parties.

Subdivision (f). Subdivision (f) restates some of the provisions of present Rule 53(e)(1). The report is the master's primary means of communication with the court. The materials to be provided to support review of the report will depend on the nature of the report. The master should provide all portions of the record preserved under Rule 53(b)(2)(C) that the master deems relevant to the report. The parties may designate additional materials from the record, and may seek permission to supplement the record with evidence. The court may direct that additional materials from the record be provided and filed. Given the wide array of tasks that may be

assigned to a pretrial master, there may be circumstances that justify sealing a report or review record against public access—a report on continuing or failed settlement efforts is the most likely example. A post-trial master may be assigned duties in formulating a decree that deserve similar protection. Such circumstances may even justify denying access to the report or review materials by the parties, although this step should be taken only for the most compelling reasons. Sealing is much less likely to be appropriate with respect to a trial master's report.

Before formally making an order, report, or recommendations, a master may find it helpful to circulate a draft to the parties for review and comment. The usefulness of this practice depends on the nature of the master's proposed action.

Subdivision (g). The provisions of subdivision (g)(1), describing the court's powers to afford a hearing, take evidence, and act on a master's order, report, or recommendations are drawn from present Rule 53(e)(2), but are not limited, as present Rule 53(e)(2) is limited, to the report of a trial master in a nonjury action. The requirement that the court must afford an opportunity to be heard can be satisfied by taking written submissions when the court acts on the report without taking live testimony.

The subdivision (g)(2) time limits for objecting to- or seeking adoption or modification of—a master's order, report, or recommendations, are important. They are not jurisdictional. Although a court may properly refuse to entertain untimely review proceedings, the court may excuse the failure to seek timely review. The basic time period is lengthened to 20 days because the present 10-day period may be too short to permit thorough study and response to a complex report dealing with complex litigation. If no party asks the court to act on a master's report, the court is free to adopt the master's action or to disregard it at any relevant point in the proceedings.

Subdivision (g)(3) establishes the standards of review for a master's findings of fact or recommended findings of fact. The court must decide de novo all objections to findings of fact made or recommended by the master unless the parties stipulate, with the court's consent, that the findings will be reviewed for clear error or—with respect to a master appointed on the parties' consent or appointed to address pretrial or post-trial matters that the findings will be final. Clear-error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses, such as findings of fact bearing on a privilege objection to a discovery request. Even if no objection is made, the court is free to decide the facts de novo; to review for clear error if an earlier approved stipulation provided clear-error review; or to withdraw its consent to a stipulation for clear-error review or finality, and then to decide de novo. If the court withdraws its consent to a stipulation for finality or clear-error review, it may or reopen the opportunity to object.

Under Rule 53(g)(4), the court must decide de novo all objections to conclusions of law made or recommended by a master. As with findings of fact, the court also may decide conclusions of law de novo when no objection is made.

Apart from factual and legal questions, masters often make determinations that, when made by a trial court, would be treated as matters of procedural discretion. The court may set a standard for review of such matters in the order of appointment, and may amend the order to establish the standard. If no standard is set by the original or amended order appointing the master, review of procedural matters is for abuse of discretion. The subordinate role of the master means that the trial court's review for abuse of discretion may be more searching than the review that an appellate court makes of a trial court.

If a master makes a recommendation on any matter that does not fall within Rule 53(g)(3), (4), or (5), the court may act on the recommendation under Rule 53(g)(1).

Subdivision (h). The need to pay compensation is a substantial reason for care in appointing private persons as masters.

Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. The amount in controversy and the means of the parties may provide some guidance in making the allocation. The nature of the dispute also may be important--parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case.

The basis and terms for fixing compensation should be stated in the order of appointment. The court retains power to alter the initial basis and terms, after notice and an opportunity to be heard, but should protect the parties against unfair surprise.

The provision of former Rule 53(a) that the "provision for compensation shall not apply when a United States Magistrate Judge is designated to serve as a master" is deleted as unnecessary. Other provisions of law preclude compensation.

Subdivision (i). Rule 53(i) carries forward unchanged former Rule 53(f).

NOTES:

Related Statutes & Rules:

Clerks of courts being ineligible to appointment as masters, 28 USCS § 957.

Appointment of master by single judge in three judge court, 28 USCS § 2284.

Pretrial determination as to preliminary reference, USCS Federal Rules of Civil Procedure, Rule 16.

Adoption of master's findings by court, USCS Federal Rules of Civil Procedure, Rule 52(a).

Judgment not being required to recite report, USCS Federal Rules of Civil Procedure, Rule 54(a).

Appendix 4

28 U.S.C. § 455
Disqualification of Justice, Judge, or Magistrate Judge

Section 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Appendix 5
Model Rule of Professional Conduct
Rule 1.12

CLIENT-LAWYER RELATIONSHIP
RULE 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Appendix 6
Code of Conduct for United States Judges

CODE OF CONDUCT
FOR UNITED STATES JUDGES[1]
(Effective July 1, 2009)

Introduction

This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges. Certain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section. The Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions about this Code only when requested by a judge to whom this Code applies. Requests for opinions and other questions[2] concerning this Code and its applicability should be addressed to the Chair of the Committee on Codes of Conduct by email or as follows:

Chair, Committee on Codes of Conduct
c/o General Counsel
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

202-502-1100

[1] The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973, and was known as the "Code of Judicial Conduct for United States Judges." Since then, the Judicial Conference has made the following changes to the Code:

March 1987: deleted the word "Judicial" from the name of the Code;
September 1992: adopted substantial revisions to the Code;
March 1996: revised part C of the Compliance section, immediately following the Code;
September 1996: revised Canons 3C(3)(a) and 5C(4);
September 1999: revised Canon 3C(1)(c);
September 2000: clarified the Compliance section;
March 2009: adopted substantial revisions to the Code

[2] Procedural questions may be addressed to: Office of the General Counsel, Administrative Office of the United States Courts, Thurgood Marshall Federal Judiciary Building, Washington, D.C., 20544, 202-502-1100.

CANON 1: A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor. Although judges should be independent, they must comply with the law and should comply with this Code. Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this Code diminishes public confidence in the judiciary and injures our system of government under law.

The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances. The Code is to be construed so it does not impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and nominees for judicial office. It may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351-364). Not every violation of the Code should lead to disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the improper activity, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the restrictions in the Code are necessarily cast in general terms, and judges may reasonably differ in their interpretation. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution. Finally, the Code is not intended to be used for tactical advantage.

CANON 2: A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A. *Respect for Law.* A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. *Outside Influence.* A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

C. *Nondiscriminatory Membership.* A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

COMMENTARY

Canon 2A. An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

Canon 2B. Testimony as a character witness injects the prestige of the judicial office into the proceeding in which the judge testifies and may be perceived as an official testimonial. A judge should discourage a party from requiring the judge to testify as a character witness except in unusual circumstances when the demands of justice require. This Canon does not create a privilege against testifying in response to an official summons.

A judge should avoid lending the prestige of judicial office to advance the private interests of the judge or others. For example, a judge should not use the judge's judicial position or title to gain advantage in litigation involving a friend or a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office.

A judge should be sensitive to possible abuse of the prestige of office. A judge should not initiate communications to a sentencing judge or a probation or corrections officer but may provide information to such persons in response to a formal request. Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship.

Canon 2C. Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely

private organization whose membership limitations could not be constitutionally prohibited. *See New York State Club Ass'n. Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

Although Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any invidiously discriminatory membership practices prohibited by applicable law violates Canons 2 and 2A and gives the appearance of impropriety. In addition, it would be a violation of Canons 2 and 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to use such a club regularly. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A.

When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization.

CANON 3: A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE FAIRLY, IMPARTIALLY, AND DILIGENTLY

The duties of judicial office take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

A. *Adjudicative Responsibilities.*

(1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

B. *Administrative Responsibilities.*

(1) A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court personnel.

(2) A judge should not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when that conduct would contravene the Code if undertaken by the judge.

(3) A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

(4) A judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively.

(5) A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.

C. *Disqualification.*

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the judge's knowledge likely to be a material witness in the proceeding;

(e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material

witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge's spouse or minor child) divests the interest that provides the grounds for disqualification.

D. *Remittal of Disqualification.* Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

COMMENTARY

Canon 3A(3). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.

Canon 3A(4). The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participants in the proceeding. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. A judge should make reasonable efforts to ensure that law clerks and other court personnel comply with this provision.

A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.

Canon 3A(5). In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court personnel, litigants, and their lawyers cooperate with the judge to that end.

Canon 3A(6). The admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A. A judge may comment publicly on proceedings in which the judge is a

litigant in a personal capacity, but not on mandamus proceedings when the judge is a litigant in an official capacity (but the judge may respond in accordance with Fed. R. App. P. 21(b)).

Canon 3B(3). A judge's appointees include assigned counsel, officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as law clerks, secretaries, and judicial assistants. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

Canon 3B(5). Appropriate action may include direct communication with the judge or lawyer, other direct action if available, reporting the conduct to the appropriate authorities, or, when the judge believes that a judge's or lawyer's conduct is caused by drugs, alcohol, or a medical condition, making a confidential referral to an assistance program. Appropriate action may also include responding to a subpoena to testify or otherwise participating in judicial or lawyer disciplinary proceedings; a judge should be candid and honest with disciplinary authorities.

Canon 3C. Recusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship.

Canon 3C(1)(c). In a criminal proceeding, a victim entitled to restitution is not, within the meaning of this Canon, a party to the proceeding or the subject matter in controversy. A judge who has a financial interest in the victim of a crime is not required by Canon 3C(1)(c) to disqualify from the criminal proceeding, but the judge must do so if the judge's impartiality might reasonably be questioned under Canon 3C(1) or if the judge has an interest that could be substantially affected by the outcome of the proceeding under Canon 3C(1)(d)(iii).

Canon 3C(1)(d)(ii). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. However, if "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii), the judge's disqualification is required.

CANON 4: A JUDGE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES THAT ARE CONSISTENT WITH THE OBLIGATIONS OF JUDICIAL OFFICE

A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.

A. *Law-related Activities.*

(1) *Speaking, Writing, and Teaching.* A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

(2) *Consultation.* A judge may consult with or appear at a public hearing before an executive or legislative body or official:

(a) on matters concerning the law, the legal system, or the administration of justice;

(b) to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area; or

(c) when the judge is acting pro se in a matter involving the judge or the judge's interest.

(3) *Organizations.* A judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization devoted to the law, the legal system, or the administration of justice and may assist such an organization in the management and investment of funds. A judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.

(4) *Arbitration and Mediation.* A judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law.

(5) *Practice of Law.* A judge should not practice law and should not serve as a family member's lawyer in any forum. A judge may, however, act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

B. *Civic and Charitable Activities.* A judge may participate in and serve as an officer, director, trustee, or nonlegal advisor of a nonprofit civic, charitable, educational, religious, or social organization, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the judge or be regularly engaged in adversary proceedings in any court.

(2) A judge should not give investment advice to such an organization but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. *Fund Raising.* A judge may assist nonprofit law-related, civic, charitable, educational, religious, or social organizations in planning fund-raising activities and may be listed as an officer, director, or trustee. A judge may solicit funds for such an organization from judges over whom the judge does not exercise supervisory or appellate authority and from members of the judge's family. Otherwise, a judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

D. *Financial Activities.*

(1) A judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may serve as an officer, director, active partner, manager, advisor, or employee of a business only if the business is closely held and controlled by members of the judge's family. For this purpose, "members of the judge's family" means persons related to the judge or the judge's spouse within the third degree of relationship as defined in Canon 3C(3)(a), any other relative with whom the judge or the judge's spouse maintains a close familial relationship, and the spouse of any of the foregoing.

(3) As soon as the judge can do so without serious financial detriment, the judge should divest investments and other financial interests that might require frequent disqualification.

(4) A judge should comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Gift Regulations. A judge should endeavor to prevent any member of the judge's family residing in the household from soliciting or accepting a gift except to the extent that a judge would be permitted to do so by the Judicial Conference Gift Regulations. A "member of the judge's family" means any relative of a judge by blood, adoption, or marriage, or any person treated by a judge as a member of the judge's family.

(5) A judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties.

E. *Fiduciary Activities.* A judge may serve as the executor, administrator, trustee, guardian, or other fiduciary only for the estate, trust, or person of a member of the judge's family as defined in Canon 4D(4). As a family fiduciary a judge is subject to the following restrictions:

(1) The judge should not serve if it is likely that as a fiduciary the judge would be engaged in proceedings that would ordinarily come before the judge or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary, a judge is subject to the same restrictions on financial activities that apply to the judge in a personal capacity.

F. *Governmental Appointments.* A judge may accept appointment to a governmental committee, commission, or other position only if it is one that concerns the law, the legal system, or the administration of justice, or if appointment of a judge is required by federal statute. A judge should not, in any event, accept such an appointment if the judge's governmental duties would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent the judge's country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

G. *Chambers, Resources, and Staff.* A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon.

H. *Compensation, Reimbursement, and Financial Reporting.* A judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(1) Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

(2) Expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative. Any additional payment is compensation.

(3) A judge should make required financial disclosures, including disclosures of gifts and other things of value, in compliance with applicable statutes and Judicial Conference regulations and directives.

COMMENTARY

Canon 4. Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization

dedicated to the law. Subject to the same limitations, judges may also engage in a wide range of non-law-related activities.

Within the boundaries of applicable law (*see, e.g.*, 18 U.S.C. § 953) a judge may express opposition to the persecution of lawyers and judges anywhere in the world if the judge has ascertained, after reasonable inquiry, that the persecution is occasioned by conflict between the professional responsibilities of the persecuted judge or lawyer and the policies or practices of the relevant government.

A person other than a spouse with whom the judge maintains both a household and an intimate relationship should be considered a member of the judge's family for purposes of legal assistance under Canon 4A(5), fund raising under Canon 4C, and family business activities under Canon 4D(2).

Canon 4A. Teaching and serving on the board of a law school are permissible, but in the case of a for-profit law school, board service is limited to a nongoverning advisory board. Consistent with this Canon, a judge may encourage lawyers to provide pro bono legal services.

Canon 4A(4). This Canon generally prohibits a judge from mediating a state court matter, except in unusual circumstances (*e.g.*, when a judge is mediating a federal matter that cannot be resolved effectively without addressing the related state court matter).

Canon 4A(5). A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. In so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family.

Canon 4B. The changing nature of some organizations and their exposure to litigation make it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if the judge's continued association is appropriate. For example, in many jurisdictions, charitable hospitals are in court more often now than in the past.

Canon 4C. A judge may attend fund-raising events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event. Use of a judge's name, position in the organization, and judicial designation on an organization's letterhead, including when used for fund raising or soliciting members, does not violate Canon 4C if comparable information and designations are listed for others.

Canon 4D(1), (2), and (3). Canon 3 requires disqualification of a judge in any proceeding in which the judge has a financial interest, however small. Canon 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of the judge's judicial duties. Canon 4H requires a judge to report compensation received for activities outside the judicial office. A judge has the rights of an ordinary citizen with respect to financial affairs, except for limitations required to safeguard the proper performance of the judge's duties. A judge's participation in a closely held family

business, while generally permissible, may be prohibited if it takes too much time or involves misuse of judicial prestige or if the business is likely to come before the court on which the judge serves. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

Canon 4D(5). The restriction on using nonpublic information is not intended to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

Canon 4E. Mere residence in the judge's household does not by itself make a person a member of the judge's family for purposes of this Canon. The person must be treated by the judge as a member of the judge's family.

The Applicable Date of Compliance provision of this Code addresses continued service as a fiduciary.

A judge's obligation under this Code and the judge's obligation as a fiduciary may come into conflict. For example, a judge should resign as a trustee if it would result in detriment to the trust to divest holdings whose retention would require frequent disqualification of the judge in violation of Canon 4D(3).

Canon 4F. The appropriateness of accepting extrajudicial assignments must be assessed in light of the demands on judicial resources and the need to protect the courts from involvement in matters that may prove to be controversial. Judges should not accept governmental appointments that could interfere with the effectiveness and independence of the judiciary, interfere with the performance of the judge's judicial responsibilities, or tend to undermine public confidence in the judiciary.

Canon 4H. A judge is not required by this Code to disclose income, debts, or investments, except as provided in this Canon. The Ethics Reform Act of 1989 and implementing regulations promulgated by the Judicial Conference impose additional restrictions on judges' receipt of compensation. That Act and those regulations should be consulted before a judge enters into any arrangement involving the receipt of compensation. The restrictions so imposed include but are not limited to: (1) a prohibition against receiving "honoraria" (defined as anything of value received for a speech, appearance, or article), (2) a prohibition against receiving compensation for service as a director, trustee, or officer of a profit or nonprofit organization, (3) a requirement that compensated teaching activities receive prior approval, and (4) a limitation on the receipt of "outside earned income."

CANON 5: A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY

A. *General Prohibitions.* A judge should not:

(1) act as a leader or hold any office in a political organization;

(2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or

(3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.

B. *Resignation upon Candidacy.* A judge should resign the judicial office if the judge becomes a candidate in a primary or general election for any office.

C. *Other Political Activity.* A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.

COMMENTARY

The term "political organization" refers to a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office.

COMPLIANCE WITH THE CODE OF CONDUCT

Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. *Part-time Judge.* A part-time judge is a judge who serves part-time, whether continuously or periodically, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4E, 4F, or 4H(3);

(2) except as provided in the Conflict-of-Interest Rules for Part-time Magistrate Judges, should not practice law in the court on which the judge serves or in any court subject to that court's appellate jurisdiction, or act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

B. *Judge Pro Tempore.* A judge pro tempore is a person who is appointed to act temporarily as a judge or as a special master.

(1) While acting in this capacity, a judge pro tempore is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4D(3), 4E, 4F, or 4H(3); further, one who acts solely as a special master is not required to comply with Canons 4A(3), 4B, 4C, 4D(4), or 5.

(2) A person who has been a judge pro tempore should not act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

C. *Retired Judge.* A judge who is retired under 28 U.S.C. § 371(b) or § 372(a), or who is subject to recall under § 178(d), or who is recalled to judicial service, should comply with all the provisions of this Code except Canon 4F, but the judge should refrain from judicial service during the period of an extrajudicial appointment not sanctioned by Canon 4F. All other retired judges who are eligible for recall to judicial service (except those in U.S. territories and possessions) should comply with the provisions of this Code governing part-time judges. A senior judge in the territories and possessions must comply with this Code as prescribed by 28 U.S.C. §§ 373(c)(5) and (d).

APPLICABLE DATE OF COMPLIANCE

Persons to whom this Code applies should arrange their financial and fiduciary affairs as soon as reasonably possible to comply with it and should do so in any event within one year after appointment. If, however, the demands on the person's time and the possibility of conflicts of interest are not substantial, such a person may continue to act, without compensation, as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of the person's family if terminating the relationship would unnecessarily jeopardize any substantial interest of the estate or person and if the judicial council of the circuit approves.

Appendix 7
Code of Conduct for Judicial Employees*

CHAPTER II. CODES OF CONDUCT FOR JUDICIAL EMPLOYEES

A. Code of Conduct for Judicial Employees.

Introduction

This Code of Conduct applies to all employees of the Judicial Branch except Justices; judges; and employees of the United States Supreme Court, the Administrative Office of the United States Courts, the Federal Judicial Center, the Sentencing Commission, and Federal Public Defender offices.[1] As used in this code in canons 3F(2)(b), 3F(5), 4B(2), 4C(l), and 5B, a member of a judge's personal staff means a judge's secretary, a judge's law clerk, and a courtroom deputy clerk or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff.[2]

Contractors and other nonemployees who serve the Judiciary are not covered by this code, but appointing authorities may impose these or similar ethical standards on such nonemployees, as appropriate.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions concerning the application and interpretation of this code. Employees should consult with their supervisor and/or appointing authority for guidance on questions concerning this code and its applicability before a request for an advisory opinion is made to the Committee on Codes of Conduct. In assessing the propriety of one's proposed conduct, a judicial employee should take care to consider all relevant canons in this code, the Ethics Reform Act, and other applicable statutes and regulations[3] (e.g., receipt of a gift may implicate canon 2 as well as canon 4C(2) and the Ethics Reform Act gift regulations). Should a question remain after this consultation, the affected judicial employee, or the chief judge, supervisor, or appointing authority of such employee, may request an advisory opinion from the Committee. Requests for advisory opinions may be addressed to the Chairman of the Committee on Codes of Conduct in care of the General Counsel, Administrative Office of the United States Courts, One Columbus Circle, N.E., Washington, D.C. 20544.

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* U.S. Courts, http://www.uscourts.gov/guide/vol2/ch2a.html.

1 Justices and employees of the Supreme Court are subject to standards established by the Justices of that Court. Judges are subject to the Code of Conduct for United States Judges. Employees of the AO and the FJC are subject to their respective agency codes. Employees of the Sentencing Commission are subject to standards established by the Commission. Federal public defender employees are subject to the Code of Conduct for Federal Public Defender Employees. When Actually Employed (WAE) employees are subject to canons 1, 2, and 3 and such other provisions of this code as may be determined by the appointing authority.

2 Employees who occupy positions with functions and responsibilities similar to those for a particular position identified in this code should be guided by the standards applicable to that position, even if the position title differs. When in doubt, employees may seek an advisory opinion as to the applicability of specific code provisions.

3 *See Guide to Judiciary Policies and Procedures,* Volume II, Chapter VI, Statutory and Regulatory Provisions Relating to the Conduct of Judges and Judicial Employees.

Adopted September 19, 1995
by the Judicial Conference of the United States
Effective January 1, 1996[4]

CANON 1 A JUDICIAL EMPLOYEE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY AND OF THE JUDICIAL EMPLOYEE'S OFFICE

An independent and honorable Judiciary is indispensable to justice in our society. A judicial employee should personally observe high standards of conduct so that the integrity and independence of the Judiciary are preserved and the judicial employee's office reflects a devotion to serving the public. Judicial employees should require adherence to such standards by personnel subject to their direction and control. The provisions of this code should be construed and applied to further these objectives. The standards of this code shall not affect or preclude other more stringent standards required by law, by court order, or by the appointing authority.

CANON 2: A JUDICIAL EMPLOYEE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A judicial employee should not engage in any activities that would put into question the propriety of the judicial employee's conduct in carrying out the duties of the office. A judicial employee should not allow family, social, or other relationships to influence official conduct or judgment. A judicial employee should not lend the prestige of the office to advance or to appear to advance the private interests of others. A judicial employee should not use public office for private gain.

CANON 3: A JUDICIAL EMPLOYEE SHOULD ADHERE TO APPROPRIATE STANDARDS IN PERFORMING THE DUTIES OF THE OFFICE

In performing the duties prescribed by law, by resolution of the Judicial Conference of the United States, by court order, or by the judicial employee's appointing authority, the following standards apply:

A. A judicial employee should respect and comply with the law and these canons. A judicial employee should report to the appropriate supervising authority any attempt to induce the judicial employee to violate these canons.

Note: A number of criminal statutes of general applicability govern federal employees' performance of official duties. These include:

18 U.S.C. § 201 (bribery of public officials and witnesses);
18 U.S.C. § 211 (acceptance or solicitation to obtain appointive public office);
18 U.S.C. § 285 (taking or using papers relating to government claims);
18 U.S.C. § 287 (false, fictitious, or fraudulent claims against the government);
18 U.S.C. § 508 (counterfeiting or forging transportation requests);
18 U.S.C. § 641 (embezzlement or conversion of government money, property, or records);
18 U.S.C. § 643 (failing to account for public money);
18 U.S.C. § 798 and 50 U.S.C. § 783 (disclosure of classified information);
18 U.S.C. § 1001 (fraud or false statements in a government matter);

[4] Canon 3F(4) was revised at the March 2001 Judicial Conference.

18 U.S.C. § 1719 (misuse of franking privilege);
18 U.S.C. § 2071 (concealing, removing, or mutilating a public record);
31 U.S.C.§ 1344 (misuse of government vehicle);
31 U.S.C. § 3729 (false claims against the government).

In addition, provisions of specific applicability to court officers include:
18 U.S.C. §§ 153, 154 (court officers embezzling or purchasing property from bankruptcy estate);

18 U.S.C. § 645 (embezzlement and theft by court officers);
18 U.S.C. § 646 (court officers failing to deposit registry moneys);
18 U.S.C. § 647 (receiving loans from registry moneys from court officer).

This is not a comprehensive listing but sets forth some of the more significant provisions with which judicial employees should be familiar.

B. A judicial employee should be faithful to professional standards and maintain competence in the judicial employee's profession.

C. A judicial employee should be patient, dignified, respectful, and courteous to all persons with whom the judicial employee deals in an official capacity, including the general public, and should require similar conduct of personnel subject to the judicial employee's direction and control. A judicial employee should diligently discharge the responsibilities of the office in a prompt, efficient, nondiscriminatory, fair, and professional manner. A judicial employee should never influence or attempt to influence the assignment of cases, or perform any discretionary or ministerial function of the court in a manner that improperly favors any litigant or attorney, nor should a judicial employee imply that he or she is in a position to do so.

D. A judicial employee should avoid making public comment on the merits of a pending or impending action and should require similar restraint by personnel subject to the judicial employee's direction and control. This proscription does not extend to public statements made in the course of official duties or to the explanation of court procedures. A judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties, nor should a judicial employee employ such information for personal gain. A former judicial employee should observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority.

E. A judicial employee should not engage in nepotism prohibited by law.

Note: See also 5 U.S.C. § 3110 (employment of relatives); 28 U.S.C. § 458 (employment of judges' relatives).

F. Conflicts of Interest.

(1) A judicial employee should avoid conflicts of interest in the performance of official duties. A conflict of interest arises when a judicial employee knows that he or she (or the spouse, minor child residing in the judicial employee's household, or other close relative of the judicial employee) might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts would question the judicial employee's ability properly to perform official duties in an impartial manner.

(2) Certain judicial employees, because of their relationship to a judge or the nature of their duties, are subject to the following additional restrictions:

(a) A staff attorney or law clerk should not perform any official duties in any matter with respect to which such staff attorney or law clerk knows that:

(i) he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(ii) he or she served as lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law had served (during such association) as a lawyer concerning the matter, or he, she, or such lawyer has been a material witness;

(iii) he or she, individually or as a fiduciary, or the spouse or minor child residing in his or her household, has a financial interest in the subject matter in controversy or in a party to the proceeding;

(iv) he or she, a spouse, or a person related to either within the third degree of relationship,[5] or the spouse of such person (A) is a party to the proceeding, or an officer, director, or trustee of a party; (B) is acting as a lawyer in the proceeding; (C) has an interest that could be substantially affected by the outcome of the proceeding; or (D) is likely to be a material witness in the proceeding;

(v) he or she has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(b) A secretary to a judge, or a courtroom deputy or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff, should not perform any official duties in any matter with respect to which such secretary, courtroom deputy, or court reporter knows that he or she, a spouse, or a person related to either within the third degree of relationship, or the spouse of such person (i) is a party to the proceeding, or an officer, director, or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) has an interest that could be substantially affected by the outcome of the proceeding; or (iv) is likely to be a material witness in the proceeding; provided, however, that when the foregoing restriction presents undue hardship, the judge may authorize the secretary, courtroom deputy, or court reporter to participate in the matter if no reasonable alternative exists and adequate safeguards are in place to ensure that official duties are properly performed. In the event the secretary, courtroom deputy, or court reporter possesses any of the foregoing characteristics and so advises the judge, the judge should also consider whether the Code of Conduct for United States Judges may require the judge to recuse.

(c) A probation or pretrial services officer should not perform any official duties in any matter with respect to which the probation or pretrial services officer knows that:

(i) he or she has a personal bias or prejudice concerning a party;

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[5] As used in this code, the third degree of relationship is calculated according to the civil law system to include the following relatives: parent, child, grandparent, grandchild, great grandparent, great grandchild, brother, sister, aunt, uncle, niece and nephew.

(ii) he or she is related within the third degree of relationship to a party to the proceeding, or to an officer, director, or trustee of a party, or to a lawyer in the proceeding;

(iii) he or she, or a relative within the third degree of relationship, has an interest that could be substantially affected by the outcome of the proceeding.

(3) When a judicial employee knows that a conflict of interest may be presented, the judicial employee should promptly inform his or her appointing authority. The appointing authority, after determining that a conflict or the appearance of a conflict of interest exists, should take appropriate steps to restrict the judicial employee's performance of official duties in such matter so as to avoid a conflict or the appearance of a conflict of interest. A judicial employee should observe any restrictions imposed by his or her appointing authority in this regard.

(4) A judicial employee who is subject to canon 3F(2) should keep informed about his or her personal, financial and fiduciary interests and make a reasonable effort to keep informed about such interests of a spouse or minor child residing in the judicial employee's household. For purposes of this canon, "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the employee participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(5) A member of a judge's personal staff should inform the appointing judge of any circumstance or activity of the staff member that might serve as a basis for disqualification of either the staff member or the judge, in a matter pending before the judge.

CANON 4: IN ENGAGING IN OUTSIDE ACTIVITIES, A JUDICIAL EMPLOYEE SHOULD AVOID THE RISK OF CONFLICT WITH OFFICIAL DUTIES, SHOULD AVOID THE APPEARANCE OF IMPROPRIETY, AND SHOULD COMPLY WITH DISCLOSURE REQUIREMENTS

A. Outside Activities. A judicial employee's activities outside of official duties should not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or office the judicial employee serves. Subject to the foregoing standards and the other provisions of this code, a judicial employee may engage in such activities as civic, charitable, religious, professional, educational, cultural, avocational, social, fraternal, and recreational activities, and may speak, write, lecture, and teach. If such outside activities concern the law, the legal system, or the administration of justice, the

judicial employee should first consult with the appointing authority to determine whether the proposed activities are consistent with the foregoing standards and the other provisions of this code.

B. Solicitation of Funds. A judicial employee may solicit funds in connection with outside activities, subject to the following limitations:

(1) A judicial employee should not use or permit the use of the prestige of the office in the solicitation of funds.

(2) A judicial employee should not solicit subordinates to contribute funds to any such activity but may provide information to them about a general fund-raising campaign. A member of a judge's personal staff should not solicit any court personnel to contribute funds to any such activity under circumstances where the staff member's close relationship to the judge could reasonably be construed to give undue weight to the solicitation.

(3) A judicial employee should not solicit or accept funds from lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, except as an incident to a general fund-raising activity.

C. Financial Activities.

(1) A judicial employee should refrain from outside financial and business dealings that tend to detract from the dignity of the court, interfere with the proper performance of official duties, exploit the position, or associate the judicial employee in a substantial financial manner with lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, provided, however, that court reporters are not prohibited from providing reporting services for compensation to the extent permitted by statute and by the court. A member of a judge's personal staff should consult with the appointing judge concerning any financial and business activities that might reasonably be interpreted as violating this code and should refrain from any activities that fail to conform to the foregoing standards or that the judge concludes may otherwise give rise to an appearance of impropriety.

(2) A judicial employee should not solicit or accept a gift from anyone seeking official action from or doing business with the court or other entity served by the judicial employee, or from anyone whose interests may be substantially affected by the performance or nonperformance of official duties; except that a judicial employee may accept a gift as permitted by the Ethics Reform Act of 1989 and the Judicial Conference regulations thereunder. A judicial employee should endeavor to prevent a member of a judicial employee's family residing in the household from soliciting or accepting any such gift except to the extent that a judicial employee would be permitted to do so by the Ethics Reform Act of 1989 and the Judicial Conference regulations thereunder.

Note: See 5 U.S.C. § 7353 (gifts to federal employees). See also 5 U.S.C. § 7342 (foreign gifts); 5 U.S.C. § 7351 (gifts to superiors).

(3) A judicial employee should report the value of gifts to the extent a report is required by the Ethics Reform Act, other applicable law, or the Judicial Conference of the United States.

Note: See 5 U.S.C. App. §§ 101 to 111 (Ethics Reform Act financial disclosure provisions).

(4) During judicial employment, a law clerk or staff attorney may seek and obtain employment to commence after the completion of the judicial employment. However, the law clerk or staff attorney should first consult with the appointing authority and observe any restrictions imposed by the appointing authority. If any law firm, lawyer, or entity with whom a law clerk or staff attorney has been employed or is seeking or has obtained future employment appears in any matter pending before the appointing authority, the law clerk or staff attorney should promptly bring this fact to the attention of the appointing authority.

D. Practice of Law. A judicial employee should not engage in the practice of law except that a judicial employee may act pro se, may perform routine legal work incident to the management of the personal affairs of the judicial employee or a member of the judicial employee's family, and may provide pro bono legal services in civil matters, so long as such pro se, family, or pro bono legal work does not present an appearance of impropriety, does not take place while on duty or in the judicial employee's workplace, and does not interfere with the judicial employee's primary responsibility to the office in which the judicial employee serves, and further provided that:

(1) in the case of pro se legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule in probate proceedings);

(2) in the case of family legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule in probate proceedings) and does not involve the entry of an appearance in a federal court;

(3) in the case of pro bono legal services, such work (a) is done without compensation; (b) does not involve the entry of an appearance in any federal, state, or local court or administrative agency; (c) does not involve a matter of public controversy, an issue likely to come before the judicial employee's court, or litigation against federal, state or local government; and (d) is reviewed in advance with the appointing authority to determine whether the proposed services are consistent with the foregoing standards and the other provisions of this code.

Judicial employees may also serve as uncompensated mediators or arbitrators for nonprofit organizations, subject to the standards applicable to pro bono practice of law, as set forth above, and the other provisions of this code.

A judicial employee should ascertain any limitations imposed by the appointing judge or the court on which the appointing judge serves concerning the practice of law by a former judicial employee before the judge or the court and should observe such limitations after leaving such employment.

Note: See also 18 U.S.C. § 203 (representation in matters involving the United States); 18 U.S.C. § 205 (claims against the United States); 28 U.S.C. § 955 (restriction on clerks of court practicing law).

E. Compensation and Reimbursement. A judicial employee may receive compensation and reimbursement of expenses for outside activities provided that receipt of such compensation and reimbursement is not prohibited or restricted by this code, the Ethics Reform Act, and other applicable law, and provided that the source or amount of such payments does not influence or give the appearance of influencing the judicial employee in the performance of official duties or otherwise give the appearance of impropriety. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incur[r]ed by a judicial employee and, where

appropriate to the occasion, by the judicial employee's spouse or relative. Any payment in excess of such an amount is compensation.

A judicial employee should make and file reports of compensation and reimbursement for outside activities to the extent prescribed by the Ethics Reform Act, other applicable law, or the Judicial Conference of the United States.

Notwithstanding the above, a judicial employee should not receive any salary, or any supplementation of salary, as compensation for official government services from any source other than the United States, provided, however, that court reporters are not prohibited from receiving compensation for reporting services to the extent permitted by statute and by the court.

Note: See 5 U.S.C. App. §§ 101 to 111 (Ethics Reform Act financial disclosure provisions); 28 U.S.C. § 753 (court reporter compensation). See also 5 U.S.C. App. §§ 501 to 505 (outside earned income and employment).

CANON 5: A JUDICIAL EMPLOYEE SHOULD REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY

A. Partisan Political Activity. A judicial employee should refrain from partisan political activity; should not act as a leader or hold any office in a partisan political organization; should not make speeches for or publicly endorse or oppose a partisan political organization or candidate; should not solicit funds for or contribute to a partisan political organization, candidate, or event; should not become a candidate for partisan political office; and should not otherwise actively engage in partisan political activities.

B. Nonpartisan Political Activity. A member of a judge's personal staff, clerk of court, chief probation officer, chief pretrial services officer, circuit executive, and district court executive should refrain from nonpartisan political activity such as campaigning for or publicly endorsing or opposing a nonpartisan political candidate; soliciting funds for or contributing to a nonpartisan political candidate or event; and becoming a candidate for nonpartisan political office. Other judicial employees may engage in nonpartisan political activity only if such activity does not tend to reflect adversely on the dignity or impartiality of the court or office and does not interfere with the proper performance of official duties. A judicial employee may not engage in such activity while on duty or in the judicial employee's workplace and may not utilize any federal resources in connection with any such activity.

Note: See also 18 U.S.C. Chapter 29 (elections and political activities).

Appendix 8

The Code of Ethics for Arbitrators in Commercial Disputes

American Bar Association/American Arbitration Association

Approved by the American Bar Association House of Delegates on February 9, 2004
Approved by the Executive Committee of the Board of Directors of the AAA

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA. Both the original 1977 Code and the 2003Revision have been approved and recommended by both organizations.

Preamble

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called “arbitrators,” although in some types of proceeding they might be called “umpires,” “referees,” “neutrals,” or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

Note on Neutrality

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a "party-appointed arbitrator") and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should *serve* as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

Note on Construction

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X

from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.

CANON I. AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS.

A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.

B. One should accept appointment as an arbitrator only if fully satisfied:

(1) that he or she can serve impartially;
(2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;
(3) that he or she is competent to serve; and
(4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.

D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.

E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.

F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.

H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

Comment to Canon I

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

CANON II. AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY.

A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

(1) Any known direct or indirect financial or personal interest in the outcome of the arbitration;
(2) Any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose

any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;

(3) The nature and extent of any prior knowledge they may have of the dispute; and

(4) Any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.

C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.

E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.

G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:

(1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or

(2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.

H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:

(1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or

(2) Withdraw.

CANON III. AN ARBITRATOR SHOULD AVOID IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY IN COMMUNICATING WITH PARTIES.

A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.

B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in *any* of the following circumstances:

(1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:
   (a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and
   (b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

(2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;

(3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;

(4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;

(5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or

(6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.

C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the

case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

CANON IV. AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY.

A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.

B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.

C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.

D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.

E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.

F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.

G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

Comment to paragraph G

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude ex parte requests for interim relief.

CANON V. AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.

A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.

B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

C., An arbitrator should not delegate the duty to decide to any other person.

D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

CANON VI. AN ARBITRATOR SHOULD BE FAITHFUL TO THE RELATIONSHIP OF TRUST AND CONFIDENTIALITY INHERENT IN THAT OFFICE.

A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.

C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.

D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

CANON VII. AN ARBITRATOR SHOULD ADHERE TO STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES.

A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.

B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

(1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for

arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established.

(2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and

(3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

CANON VIII. AN ARBITRATOR MAY ENGAGE IN ADVERTISING OR PROMOTION OF ARBITRAL SERVICES WHICH IS TRUTHFUL AND ACCURATE.

A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.

B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

Comment to Canon VIII

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

CANON IX. ARBITRATORS APPOINTED BY ONE PARTY HAVE A DUTY TO DETERMINE AND DISCLOSE THEIR STATUS AND TO COMPLY WITH THIS CODE, EXCEPT AS EXEMPTED BY CANON X.

A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.

B. Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.

C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:

(1) Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;
(2) Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and
(3) Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.

D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

CANON X. EXEMPTIONS FOR ARBITRATORS APPOINTED BY ONE PARTY WHO ARE NOT SUBJECT TO RULES OF NEUTRALITY.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

A. *Obligations under Canon I* Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

(1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and
(2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

B. *Obligations under Canon II*

(1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and
(2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

C. *Obligations under Canon III* Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

(1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;
(2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3).
(3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;
(4) Canon X arbitrators may not at any time during the arbitration:
    (a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;
    (b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or
    (c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.
(5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;
(6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and

7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations under Canon IV* Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations under Canon V* Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations under Canon VI* Canon X arbitrators should observe all of the obligations of Canon VI.

G. *Obligations Under Canon VII* Canon X arbitrators should observe all of the obligations of Canon VII.

H. *Obligations Under Canon VIII* Canon X arbitrators should observe all of the obligations of Canon VIII.

I. *Obligations Under Canon IX* The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

Appendix 9
Forum
Code of Conduct for Arbitrators

Portions of this Code have been modeled after or taken from the Code of Ethics for Arbitrators in Commercial Disputes, prepared, approved and recommended by a Special Committee of the American Bar Association.

PREAMBLE

This Code of Conduct applies to all the Forum proceedings in which disputes or claims are submitted to one or more Arbitrators. The Forum expects its Arbitrators to observe fundamental standards of ethical conduct. Various aspects of the conduct of Arbitrators, including some matters covered by this Code of Conduct, may be governed by agreements of the parties, by rules to which the parties have agreed or by applicable law. This Code of Conduct does not take the place of, or supersede, any such agreements, rules, and laws, and does not establish any new or additional grounds for judicial review of arbitration awards. While this Code of Conduct is intended to provide ethical guidelines, it does not form part of the arbitration rules or the Code of Procedure of the Forum or of any other organization.

CANON ONE

An Arbitrator should uphold the integrity and fairness of the dispute resolution process.

A. An Arbitrator should recognize a responsibility to the parties whose rights will be decided, to other participants in the proceeding, to the integrity and fairness of the process itself, and to the public.

B. An Arbitrator should perform duties diligently, conduct a proceeding as effectively and economically as possible, and conclude a case as efficiently and promptly as the circumstances reasonably permit. Arbitrators should treat all parties equally and conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, by public clamor, by fear of criticism or by self interest.

C. An Arbitrator should be patient and courteous to the parties, to their lawyers and to the participants, and should encourage similar conduct by all participants in the proceedings.

D. An Arbitrator should comply with applicable procedures and rules, and should neither exceed authority nor do less than is required to exercise authority completely.

E. An Arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties by other participants or other abuses or disruption of the process.

F. The ethical obligations of an Arbitrator begin upon appointment and continue throughout all stages of the proceeding.

CANON TWO

An Arbitrator should disclose any interest or relationship which affects impartiality or which creates an unfavorable appearance of partiality or bias.

A. An Arbitrator should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, which adversely affects impartiality or which might reasonably create the unfavorable appearance of partiality or bias. For a reasonable period of time after a case, Arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the unfavorable appearance that they had been influenced by the anticipation or expectation of the relationship or interest.

B. Persons who are requested to serve as Arbitrators should, before accepting, disclose:

(1) Any financial, personal or material interest in the outcome of the arbitration;

(2) Any existing or past material, financial, business, professional, family or social relationships which affect impartiality or which might reasonably create an unfavorable appearance of partiality or bias. Persons requested to serve as Arbitrators should disclose any such relationships which they personally have with any Party or lawyers, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving immediate members of their families or their current employers, partners or business associates.

C. Arbitrators should make a reasonable effort to inform themselves of any interests or relationships described above.

D. The obligation to disclose interests or relationships described above is a continuing duty which requires an Arbitrator to disclose, at any stage of the proceeding, any such interests or relationships which may arise, or which are recalled or discovered.

E. Disclosure should be made to all parties and to any other Arbitrator.

F. In the event that an Arbitrator is requested by all parties to withdraw because of prejudice or bias, the Arbitrator should do so. In the event that an Arbitrator is requested to withdraw by fewer than all of the parties because of prejudice or bias, the Arbitrator should withdraw unless either of the following circumstances exists:

(1) Other applicable rules exist determining challenges; or

(2) If the Arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, that the Arbitrator can act and decide the case impartially and fairly, and that withdrawal would cause unfair delay or expense to another Party or would be contrary to the ends of justice.

CANON THREE

An Arbitrator in communicating with the parties should avoid impropriety or the appearance of impropriety.

A. An Arbitrator should not discuss a case with any Party in the absence of each other Party, except in any of the following circumstances

(1) Discussions may be had with a Party concerning such matters as setting the time and place of proceedings or making other arrangements for the conduct of the proceedings or procedural questions. The Arbitrator should not make any final determination concerning the matter discussed before giving each absent Party an opportunity to respond.

(2) If a Party fails to be present at a proceeding after having been given due notice, the Arbitrator may discuss the case with any Party who is present.

(3) If all parties request or consent that such discussion take place.

(4) Unless otherwise provided in applicable rules or in an agreement of the parties.

B. Whenever an Arbitrator communicates in writing with one Party, the Arbitrator should at the same time send a copy of the communication to each other Party.

CANON FOUR

An Arbitrator should be honest and trustworthy and maintain confidentiality.

A. An Arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. Unless otherwise agreed by the parties, or required by applicable rules or law, an Arbitrator shall keep confidential all matters relating to the proceedings and shall not disclose to anyone except the parties at any time confidential awards or settlements.

C. Arbitrators should avoid bargaining with parties over the amount of payments or engaging in negotiations concerning payments which would create an appearance of coercion or other impropriety. Matters concerning fees should be handled by the Director.

CANON FIVE

An Arbitrator should make decisions in a just, independent, and deliberate manner.

A. An Arbitrator should, after careful deliberation, decide all issues submitted for determination and not other issues.

B. An Arbitrator should not delegate the duty to decide to any other person.

C. In the event that all parties agree upon a settlement of the issues in dispute and request an Arbitrator to embody that agreement in an award, an Arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of the agreement. Whenever an Arbitrator embodies a settlement by the parties in an award, the Arbitrator should state in the award that it is based on an agreement of the parties.

Appendix 10
JAMS
Arbitrators Ethics Guidelines

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Introduction

A. The purpose of these Ethics Guidelines is to provide basic guidance to JAMS Arbitrators regarding ethical issues that may arise during or related to the Arbitration process. Arbitration is an adjudicative dispute resolution procedure in which a neutral decision maker issues an Award. Parties are often represented by counsel who argue the case before a single Arbitrator or a panel of three Arbitrators, who adjudicate, or judge, the matter based on the evidence presented.

B. Arbitration – either entered into voluntarily after a dispute has occurred, or as agreed to in a pre-dispute contract clause – is generally binding. By entering into the Arbitration process, the Parties have agreed to accept an Arbitrator's decision as final. There are instances when an Arbitrator's decision may be modified or vacated, but they are extremely rare. The Parties in an Arbitration trade the right to full review for a speedier, less expensive and private process in which it is certain there will be an appropriately expeditious resolution.

C. Other sets of ethics guidelines for Arbitrators exist, such as those promulgated by the National Academy of Arbitrators and jointly by the American Arbitration Association and the American Bar Association. An Arbitrator may wish to review these for informational purposes.

D. These Guidelines are national in scope and are necessarily general. They are not intended to supplant applicable state or local law or rules. An Arbitrator should be aware of applicable state statutes or court rules, such as laws concerning disclosure that may apply to the Arbitrations being conducted. In the event that these Guidelines are inconsistent with such statutes or rules, an Arbitrator must comply with the applicable law.

E. In addition, most states have promulgated codes of ethics for judges and other public judicial officers. In some instances, these codes apply to certain activities of private judges, such as court-ordered Arbitrations. Arbitrators should comply with codes that are specifically applicable to them or to their activities. Where the codes do not specifically apply, an Arbitrator may choose to comply voluntarily with the requirements of such codes.

F. The ethical obligations of an Arbitrator begin as soon as the Arbitrator becomes aware of potential selection by the Parties and continue even after the decision in the case has been rendered. JAMS strongly encourages Arbitrators to address ethical issues that may arise in their cases as soon as an issue becomes apparent, and where appropriate to seek advice on how to resolve such issues from the Forum Committee.

G. The Guidelines in Articles I through IX apply to neutral Arbitrators regardless of the method by which they may have been selected. Article X is intended to apply to Party-appointed

Arbitrators who are non-neutral. Many Arbitration agreements provide for the appointment of an Arbitrator by each Party and the appointment of the third Arbitrator by the two Party-appointed Arbitrators. Party-appointed Arbitrators should be presumed to be neutral, unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise.

1. Where the Party-appointed Arbitrator is expected to be non-neutral, some of the Guidelines applicable to neutral Arbitrators do not apply or are altered to suit this process. For example, while non-neutral Arbitrators must disclose any matters that might affect their independence, the opposing Party ordinarily may not disqualify such person from service as an Arbitrator.

2. It is appropriate for the party appointed arbitrators to address the status of their service with the party that appointed them, with each other and with the neutral arbitrator and to determine whether the Parties would prefer that they act in a neutral capacity.

3. *Note regarding international Arbitrations.* Tripartite Arbitrations in which the Parties each appoint one Arbitrator are common in international disputes; however, all Arbitrators, by whomever appointed, are expected to be independent of the Parties and to be neutral. They are sometimes expected to communicate *ex parte* with the Party that appointed them solely for purposes of the selection of the chairman and not otherwise.

H. These Guidelines do not establish new or additional grounds for judicial review of Arbitration Awards.

GUIDELINES

I. ARBITRATOR SHOULD UPHOLD THE DIGNITY AND INTEGRITY OF THE OFFICE OF THE ARBITRATION PROCESS.

An Arbitrator has a responsibility to the Parties, to other participants in the proceeding, and to the profession. An Arbitrator should seek to discern and refuse to lend approval or consent to any attempt by a Party of its representative to use Arbitration for a purpose other than the fair and efficient resolution of a dispute.

II. AN ARBITRATOR SHOULD BE COMPETENT TO ARBITRATE THE PARTICULAR MATTER.

An Arbitrator should accept an appointment only if the Arbitrator meets the Parties' stated requirements in the agreement to arbitrate regarding professional qualifications. An Arbitrator should prepare before the Arbitration by reviewing any statements or documents submitted by the Parties. An Arbitrator should refuse to serve or should withdraw from the Arbitration if the Arbitrator becomes physically or mentally unable to meet the reasonable expectations of the Parties.

III. AN ARBITRATOR SHOULD INFORM ALL PARTIES OF THE ROLE OF THE ARBITRATOR AND THE RULES OF THE ARBITRATION PROCESS.

A. An Arbitrator should ensure that all Parties understand the Arbitration process, the Arbitrator's role in that process, and the relationship of the Parties to the Arbitrator.

B. An Arbitrator may encourage the Parties to mediate their dispute but should not suggest that the Arbitrator serve as the mediator. In the event that, prior to or during the Arbitration, all Parties request an Arbitrator to participate in discussions of settlement or to combine the Arbitration with another dispute resolution process, the Arbitrator should explain how the Arbitrator's role and relationship to the Parties may be altered, including the impact such a shift may have on the willingness of the Parties to disclose certain information to the Arbitrator serving in the settlement-related role. Nothing in these Guidelines is intended to prevent an Arbitrator from acting as a neutral in another dispute resolution process in the same case, if requested to do so by all Parties and if an appropriate written waiver is obtained. The Parties should, however, be given the opportunity to select another neutral to conduct any such process.

IV. AN ARBITRATOR SHOULD MAINTAIN CONFIDENTIALITY APPROPRIATE TO THE PROCESS.

A. Unless otherwise agreed by the Parties, or required by applicable rules or law, an Arbitrator should keep confidential all matters relating to the Arbitration proceedings and decisions.

B. An Arbitrator should not discuss a case with persons not involved directly in the Arbitration unless the identity of the Parties and details of the case are sufficiently obscured to eliminate any realistic probability of identification.

C. An Arbitrator may discuss a case with another member of the Arbitration panel hearing that case, whether or not all panel members are present.

D. An Arbitrator should not use confidential information acquired during the Arbitration proceeding to gain personal advantage or advantage of others, or to affect adversely the interest of another. An Arbitrator should not inform anyone of the decision in advance of giving it to all Parties. Where there is more than one Arbitrator, an Arbitrator should not disclose to anyone the deliberations of the Arbitrators.

E. An Arbitrator should not participate in post-Award proceedings, except (1) if requested to make a correction to or clarification of an Award, (2) if required by law or (3) if requested by all Parties to participate in a subsequent dispute resolution procedure in the same case.

V. AN ARBITRATOR SHOULD ENSURE THAT HE OR SHE HAS NO KNOWN CONFLICT OF INTEREST REGARDING THE CASE, AND SHOULD ENDEAVOR TO AVOID ANY APPEARANCE OF A CONFLICT OF INTEREST.

A. An Arbitrator should promptly disclose, or cause to be disclosed all matters required by applicable law and any actual or potential conflict of interest or relationship or other

information, of which the Arbitrator is aware, that reasonably could lead a Party to question the Arbitrator's impartiality.

B. An Arbitrator may establish social or professional relationships with lawyers and members of other professions. There should be no attempt to be secretive about such relationships but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.

C. An Arbitrator should not proceed with the process unless all Parties have acknowledged and waived any actual or potential conflict of interest. If the conflict of interest casts serious doubt on the integrity of the process, an Arbitrator should withdraw, notwithstanding receipt of a full waiver.

D. An Arbitrator's disclosure obligations continue throughout the course of the Arbitration and require the Arbitrator to disclose, at any stage of the Arbitration, any such interest or relationship that may arise, or that is recalled or discovered. Disclosure should be made to all Parties, and the Arbitrator should accept such work only where the Arbitrator believes it can be undertaken without an actual or apparent conflict of interest and after a written waiver of conflict has been obtained from the other Parties to the pending Arbitration. Where more than one Arbitrator is appointed, each should inform the others of the interests and relationships that have been disclosed.

E. An Arbitrator should avoid conflicts of interest in recommending the services of other professionals. If an Arbitrator is unable to make a personal recommendation without creating a potential or actual conflict of interest, the Arbitrator should so advise the Parties and refer them to a professional service, provider or association.

F. After an Award or decision is rendered in an Arbitration, an Arbitrator should refrain from any conduct involving a Party, insurer or counsel to a Party to the Arbitration that would cast reasonable doubt on the integrity of the Arbitration process, absent disclosure to and consent by all the Parties to the Arbitration. This does not preclude an Arbitrator from serving as an Arbitrator or in another neutral capacity with a Party, insurer or counsel involved in the prior Arbitration, provided that appropriate disclosures are made about the prior Arbitration to the Parties to the new matter.

G. Other than agreed fee and expense reimbursement, an Arbitrator should not accept a gift or item of value from a Party, insurer or counsel to a pending Arbitration. Unless a period of time has elapsed sufficient to negate any appearance of a conflict of interest, an Arbitrator should not accept a gift or item of value from a Party to a completed Arbitration, except that this provision does not preclude an Arbitrator from engaging in normal, social interaction with a Party, insurer or counsel to an Arbitration once the Arbitration is completed.

H. Where relevant state or local rule or statute is more specific than these Guidelines as to Arbitrator disclosure, it should be followed.

VI. AN ARBITRATOR SHOULD ENDEAVOR TO PROVIDE AN EVENHANDED AND UNBIASED PROCESS AND TO TREAT ALL PARTIES WITH RESPECT AT ALL STAGES OF THE PROCEEDINGS.

A. An Arbitrator should remain impartial throughout the course of the Arbitration. Impartiality means freedom from favoritism either by word or action. The Arbitrator should be aware of and avoid the potential for bias based on the Parties' backgrounds, personal attributes or conduct during the Arbitration, or based on the Arbitrator's pre-existing knowledge of or opinion about the merits of the dispute being arbitrated. An Arbitrator should not permit any social or professional relationship with a Party, insurer or counsel to a Party to an Arbitration to affect his or her decision-making. If an Arbitrator becomes incapable of maintaining impartiality, the Arbitrator should withdraw.

B. An Arbitrator should perform duties diligently and conclude the case as promptly as the circumstances reasonably permit. An Arbitrator should be courteous to the Parties, to their representatives and to the witnesses, and should encourage similar conduct by all participants in the proceedings. An Arbitrator should make all reasonable efforts to prevent the Parties, their representatives, or other participants from engaging in delaying tactics, harassment of Parties or other participants, or other abuse or disruption of the Arbitration process.

C. Unless otherwise provided in an agreement of the Parties, (1) an Arbitrator should not discuss a case with any Party in the absence of every other Party, except that if a Party fails to appear at a hearing after having been given due notice, the Arbitrator may discuss the case with any Party who is present; and (2) whenever an Arbitrator communicates in writing with one Party, the Arbitrator should, at the same time, send a copy of the communication to every other Party. Whenever an Arbitrator receives a written communication concerning the case from one Party that has not already been sent to each Party, the Arbitrator should do so.

D. When there is more than one Arbitrator, the Arbitrators should afford each other full opportunity to participate in all aspects of the Arbitration proceedings.

VII. AN ARBITRATOR SHOULD WITHDRAW UNDER CERTAIN CIRCUMSTANCES.

A. An Arbitrator should withdraw from the process if the Arbitration is being used to further criminal conduct, or for any of the reasons set forth above - insufficient knowledge of relevant procedural or substantive issues, a conflict of interest that has not been or cannot be waived, the Arbitrator's inability to maintain impartiality, or the Arbitrator's physical or mental disability. In addition, an Arbitrator should be aware of the potential need to withdraw from the case if procedural or substantive unfairness appears to have irrevocably undermined the integrity of the Arbitration process.

B. Except where an Arbitrator is obligated to withdraw or where all Parties request withdrawal, an Arbitrator should continue to serve in the matter.

VIII. AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.

A. An Arbitrator should, after careful deliberation and exercising independent judgment, promptly or otherwise within the time period agreed to by the Parties or by JAMS Rules, decide all issues submitted for determination and issue an Award. An Arbitrator's Award should not be influenced by fear or criticism or by any interest in potential future case referrals by any of the Parties or counsel, nor should an Arbitrator issue an Award that reflects a compromise position in order to achieve such acceptability. An Arbitrator should not delegate the duty to decide to any other person.

B. If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator should comply with such request unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she may inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

IX. AN ARBITRATOR SHOULD UPHOLD THE DIGNITY AND INTEGRITY OF THE ARBITRATION PROCESS IN MATTERS RELATING TO MARKETING AND COMPENSATION.

An Arbitrator should avoid marketing that is misleading or that compromises impartiality. An Arbitrator should ensure that any advertising or other marketing to the public conducted on the Arbitrator's behalf is truthful. An Arbitrator may discuss issues relating to compensation with the Parties but should not engage in such discussions if they create an appearance of coercion or other impropriety and should not engage in *ex parte* communications regarding compensation.

X. ETHICAL GUIDELINES APPLICABLE TO NON-NEUTRAL ARBITRATORS.

These Guidelines are applicable to non-neutral Arbitrators, except as follows:

Guideline III: A non-neutral Arbitrator should ensure that all Parties and other Arbitrators are aware of his or her non-neutral status.

Guideline V: A non-neutral Arbitrator is obligated to make disclosures of any actual or potential conflicts of interest, although a non-neutral Arbitrator is not obligated to withdraw if requested to do so only by the party who did not appoint him or her.

Guideline VI:

1. A non-neutral Arbitrator may be predisposed toward the Party who appointed him or her but in all other respects is obligated to act in good faith and with integrity and fairness.

2. A non-neutral Arbitrator may engage in *ex parte* communication with the Party that appointed him or her, but should disclose to the Parties and the other Arbitrators the fact that such communications are occurring and should honor any agreement

reached with the Parties and the other Arbitrators regarding the timing and nature of such communications.

Guideline IX: The compensation arrangements between a non-neutral Arbitrator and the Party that appointed him or her usually is treated as confidential but may be disclosed in connection with any fee application in the Arbitration proceeding.



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COURT OF CHANCERY
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LORI W. WILL
VICE CHANCELLOR

LEONARD L. WILLIAMS JUSTICE CENTER
500 N. KING STREET, SUITE 11400
WILMINGTON, DELAWARE 19801-3734

October 21, 2024

Kimberly A. Evans, Esquire
Lindsey K. Faccenda, Esquire
Irene R. Lax, Esquire
Robert Erikson, Esquire
Block & Leviton LLP
3801 Kennett Pike, Suite C-305
Wilmington, Delaware 19807

S. Michael Sirkin, Esquire
Benjamin M. Whitney, Esquire
Ross Aronstam & Moritz LLP
1313 North Market Street, Suite 1001
Wilmington, Delaware 19801

RE: *Berger v. Graf Acquisition, LLC, et al.*,
C.A. No. 2023-0873-LWW

Dear Counsel:

I write regarding the plaintiff's motion to compel.[1] The motion seeks additional document productions and an interrogatory response from former directors and officers of Graf Industrial Corp.—a special purpose acquisition company. The motion is granted in part and denied in part, as outlined below.

I. RELEVANT BACKGROUND

This putative class action is brought by a former stockholder of Graf Industrial who asserts that the defendants impaired his redemption right in connection with a

[1] Pl.'s Mot. to Compel the Indiv. Defs. to Produce Docs. and Respond to Interrogs. (Dkt. 54) ("Mot.").

September 2020 de-SPAC merger.[2] He invokes the entire fairness standard of review due to the lucrative founder shares awarded to the defendants, which allegedly created misaligned incentives.[3] He asserts that the defendants sought to minimize redemptions in order to close a value-destructive transaction with Velodyne Lidar, Inc. They did so through disclosures that allegedly left public stockholders' redemption decisions uninformed.[4]

The defendants have answered the plaintiff's complaint, and the case is in discovery. Several motions to compel have been filed; all have been resolved, save one.[5] At issue in the remaining motion are the plaintiff's first set of requests for production and first set of interrogatories, which were served on the individual defendants.[6] Though some discovery has been provided, the parties are at an impasse on whether more is warranted.

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[2] *See* Verified Am. Class Action Compl. (Dkt. 1) ("Compl.") ¶¶ 11, 131-45.

[3] *See In re MultiPlan Corp. S'holder Litig.*, 268 A.3d 784, 792 (Del. Ch. 2022) (outlining how founder shares without redemption and liquidation rights created "mismatched incentives" in the context of a value-destructive business combination relative to public stockholder who had liquidation and redemption rights).

[4] Compl. ¶ 9.

[5] *E.g.*, Dkts. 53, 55.

[6] Mot. Exs. 3-4.

II. ANALYSIS

Court of Chancery Rule 26(b) states that "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."[7] "Although the scope of discovery is broad, it is not limitless."[8] This court has the discretion to set limits on discovery and address the "annoyance, embarrassment, oppression or undue burden or expense" placed on a party.[9]

I first apply these concepts to the plaintiff's requests for document production. Although I conclude that the documents sought are relevant, the defendants may employ measures—including technology—to limit the cost and burden associated with reviewing them. I next consider the plaintiff's interrogatory request and conclude that it is overly intrusive.

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[7] Ct. Ch. R. 26(b)(1).

[8] *Brown v. Matterport*, 2023 WL 3830501, at *1 (Del. Ch. June 5, 2023).

[9] *Fitzgerald v. Cantor*, 1998 WL 780129, at *1 (Del. Ch. Oct. 23, 1998) (explaining that the scope of discovery "is within this Court's discretion"); *see also In re Tyson Foods Inc.*, 2007 WL 2685011, at *3 (Del. Ch. Sept. 11, 2007) ("[T]his Court may exercise its sound discretion in delineating the appropriate scope of discovery.").

A. Document Production

The plaintiff seeks documents from two periods: (1) June 16, 2018 through January 1, 2020 (the "Pre-2020 Documents"); and (2) January 1, 2020 through March 31, 2021 (the "2020-2021 Documents").[10] I take them in reverse.

1. 2020-2021 Documents

The defendants generally agree that the 2020-2021 Documents are relevant.[11] They insist that the plaintiff's proposed search criteria, which would require the review of 125,000 documents, is burdensome and disproportionate to the needs of this case.[12] The search terms alone support their argument. They include unlimited terms like "Dee" (80,053 hits with family), "Velodyne" (41,182 hits with family), and "grafcq.com" (77,573 hits with family).[13] But the defendants' counterproposal went too far. It eliminated terms relating to important issues such as Velodyne's

[10] Mot. ¶¶ 8, 11.

[11] *See* Indiv. Defs.' Opp'n to Pl.'s Mot. to Compel the Indiv. Defs.' to Produce Docs. and Respond to Interrogs. ¶¶ 3-5 (Dkt. 65) ("Opp'n"); *see also* Mot. Ex. 10 at 2.

[12] Opp'n ¶ 3. The defendants also raise several merits-based damages arguments that have little bearing on my resolution of this motion. *See Fox v. Paine*, 2010 WL 2163148, at *1 (Del. Ch. May 20, 2010) ("I must resolve the discovery dispute as a discovery dispute before parties can complete additional briefing and I can examine the claims and their merits.").

[13] Mot. Ex. 10.

products and Graf Industrial founder shares, and it applied extensive proximity limiters to other terms.[14]

Fortunately, the defendants also propose a reasonable means to address their burden concerns: a technology assisted review (TAR).[15] That is, the defendants are willing to review the universe of documents captured by the plaintiff's broad search terms so long as they can employ a TAR protocol. But the plaintiff rejected this offer and insists that the defendants conduct a manual review instead.[16]

TAR, or predictive coding, leverages machine learning techniques with the guidance of attorneys to facilitate the document review process.[17] The TAR system is trained with a representative seed set of documents selected and reviewed by attorneys for relevance.[18] The system ingests this initial set of documents and

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[14] *See* Mot. Exs. 10-11.

[15] Mot. Ex. 12.

[16] Mot. ¶ 19 n.23.

[17] *See* Paul E. Burns & Mindy M. Morton, *Technology-Assisted Review: The Judicial Pioneers*, 15 Sedona Conf. J. 35, 36 (2014) (defining TAR as "a computerized system that harnesses human judgments . . . on a smaller set of [d]ocuments and then extrapolates those judgments to the remaining [d]ocument [c]ollection" and predictive coding as an industry-specific term for the TAR process); *see also* Thomson Reuters, *How to make the e-discovery process more efficient with predictive coding*, https://legal.thomsonreuters.com/en/insights/articles/how-predictive-coding-makes-e-discovery-more-efficient (last visited October 21, 2024); Wallis M. Hampton, *Predictive Coding: It's Here to Stay*, Skadden, Arps Discovery Bulletin, https://www.skadden.com/media/files/publications/2014/06/lit_junejuly14_ediscoverybulletin.pdf (last visited October 21, 2024).

[18] *See Moore v. Publicis Groupe*, 287 F.R.D. 182, 185 (S.D.N.Y. 2012) (explaining the process of training TAR software systems).

undergoes iterative rounds of sampling and manual review, during which it learns and improves.[19] Human reviewers remain involved in quality control, including by reviewing and running keyword searches over documents coded by the program as non-responsive.[20]

TAR promotes efficiency in the discovery process in several meaningful ways.[21] First, with appropriate quality control and system training, TAR reduces the document set for human review and limits it to documents more likely to be responsive.[22] Second, TAR processes apply a more uniform relevance standard than

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[19] *See id.*; Robert M. Abrahams & Scott S. Balber, *Technology-assisted review—Predictive coding,* 4 New York Practice, Commercial Litigation in New York State Courts § 30:40 (Robert L. Haig ed., 5th ed. 2024), Westlaw (database updated October 2024) (describing the iterative training process for TAR programs).

[20] *See Moore*, 287 F.R.D. at 184 (describing a quality control review of the TAR software); *see also Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 128-29 (S.D.N.Y. 2015) (same).

[21] *See Hyles v. New York City*, 2016 WL 4077114, at *3 (S.D.N.Y. Aug. 1, 2016) (opining that "TAR is the best and most efficient search tool").

[22] *See Chen-Oster v. Goldman, Sachs & Co.*, 2014 WL 716521, at *1 (S.D.N.Y. Feb. 18, 2014) ("This approach essentially elides the search process with the substantive determination of relevance, and it has the advantage of saving resources for the producing party, which need not conduct a further review for responsiveness."); *see also* The Sedona Conf., *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1, 166 (2018) ("Courts should encourage and promote the use of technology and processes to . . . ensure that the costs and burdens associated with the . . . production of responsive ESI is proportional to the needs of the case.").

manual document review using keyword searches.[23] Third, and relatedly, a more manageable document set for manual review means lower costs for litigants.[24]

TAR can also yield superior results. The plaintiff fears that TAR has "the potential [to] exclud[e] responsive documents from the review process."[25] But this is a risk in any document review—including by human reviewers. "[S]tatistics clearly show that computerized searches are at least as accurate, if not more so, than manual review."[26]

TAR provides a balanced solution to the conflict between a requesting party's desire for broad discovery and a producing party's incentives to limit burden and resource depletion. Whether to employ it is a matter for the producing party to decide since it is "best situated to evaluate the procedures, methodologies, and

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[23] *See Moore*, 287 F.R.D. at 190-91 (noting that keyword searches often operate like "the child's game of 'Go Fish'" and result in "large numbers of irrelevant documents"); *see also* Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 12 Rich J.L. Tech. 1 (2011) (discussing computer-assisted review as an available alternative to address inefficiencies in keywords searches).

[24] *See Moore*, 287 F.R.D. at 193 (observing that computer-assisted review may result in lower legal fees for both parties); The Sedona Conf., *Commentary on Proportionality in Electronic Discovery*, 18 Sedona Conf. J. 141, 173 (2017) (discussing "significant cost savings in furtherance of proportionality").

[25] Mot. ¶ 19 n.23.

[26] *Moore*, 287 F.R.D. at 190 (citing Herbert L. Roitblatt et al., *Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review*, 61 J. Am. Soc'y for Info. Sci. & Tech. 70, 79 (2010)).

technologies appropriate for producing [its] own electronically stored information."[27] It is not up to the requesting party to block TAR if the producing party prefers it. Nor is it necessarily a matter for the court to dictate.[28] "[W]here a producing party wants to utilize TAR for document review, courts will permit it."[29]

Thus, the defendants may use TAR to reduce their discovery burden, so long as they are transparent with the plaintiff about their computer-assisted review process.[30] Delaware counsel must remain closely involved in the review and

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[27] *In re Mercedes-Benz Emissions Litig.*, 2020 WL 103975, at *1 (D.N.J. Jan. 9, 2020) (citing The Sedona Conf., *The Sedona Principles, Second Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* (Sedona Conf. Working Gp. Series, Phx., Ariz.) June 2007, at 38 (available at https://thesedonaconference.org/publication/The_Sedona_Principles)).

[28] *See Dynamo Hldgs. v. Comm'r of Internal Revenue*, 143 T.C. 183, 188-89 (2014) ("[T]he Court is not normally in the business of dictating to parties the process that they should use when responding to discovery. If our focus were on paper discovery, we would not (for example) be dictating to a party the manner in which it should review documents for responsiveness or privilege, such as whether that review should be done by a paralegal, a junior attorney, or a senior attorney. Yet that is, in essence, what the parties are asking the Court to consider—whether document review should be done by humans or with the assistance of computers."); *cf. Hyles*, 2016 WL 4077116, at *4 (explaining that it is "not up to the Court, or the requesting party" to force the responding party to use TAR).

[29] The Sedona Conf., *supra* note 22, at 118 (recognizing that each party should be able to "fulfill[] . . . its obligations without direction from the court or opposing counsel . . . unless a specific deficiency is shown in a party's production"); *see also Rio Tinto*, 306 F.R.D. at 127-28 (collecting cases).

[30] *Moore*, 287 F.R.D. at 192 ("[S]uch transparency allows the opposing counsel (and the Court) to be more comfortable with computer-assisted review, reducing fears about the so-called 'black box' of the technology. This Court highly recommends that counsel in future cases be willing to at least discuss, if not agree to, such transparency in the computer-assisted review process.").

sampling process for the TAR review. If the plaintiff believes that the defendants' response is deficient, it may seek relief from this court.

2. Pre-2020 Documents

As to the Pre-2020 Documents, relevance is in dispute. The plaintiff requests documents predating the SPAC's initial public offering. He asserts that these documents relate to potential conflicts of interest—specifically, the award of founder shares to the individual defendants.[31] The defendants counter that the requests are designed to shore up a baseless theory and are disproportionate to the needs of the case.[32]

The plaintiff's requests are generally relevant under Rule 26.[33] The financial incentives created by the founder shares could create a motive to withhold material information that would make public stockholders more likely to redeem. The plaintiff's request, however, would have the defendants undertake extensive electronic discovery to address a narrow topic. Limits must be applied to reduce the disproportionate burden posted by these requests.[34]

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[31] *See* Mot. ¶ 26; Pl.'s Reply in Supp. of Mot. to Compel the Indiv. Defs.' to Produce Docs. and Respond to Interrogs. (Dkt. 66) ¶ 18.

[32] *See* Opp'n ¶¶ 28-31.

[33] Ch. Ct. R. 26(b)(1).

[34] *See Plaza Sec. Co. v. Office*, 1986 WL 14417, at *5 (Del. Ch. Dec. 15, 1986) (noting that "considerations of subject matter, time, and space are important to confine the scope

It would be vexatious to require the defendants to collect eighteen months of data from six document custodians so that a hit report can prove the obvious: the requests are overbroad.[35] A more proportionate approach can uncover the desired information. The individual defendants can provide documents sufficient to show their compensation arrangements for service as directors or officers of the SPAC and (if different) their receipt of founder shares. If there are any similarly discrete topics in the pre-2020 period still in dispute, the plaintiff should identify them and the parties can meet and confer on a similarly targeted production.

B. Written Discovery

The plaintiff's Interrogatory No. 17 asks that the individual defendants "[s]tate [their] net worth and [their] annual income in each of 2020 and 2021."[36] The defendants objected on relevance grounds.[37] The plaintiff asks that I compel responses.

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of discovery to those matters that are truly relevant and to prevent discovery from evolving into a fishing expedition").

[35] *See Fortis Advisors v. Johnson & Johnson*, 2021 WL 4314115, at *3 (Del. Ch. Sept. 21, 2021) (observing that it is "no small task" to provide search term reports, which requires a party to "interview the potential custodian, identify the locations of documents, collect documents from all potential sources (often including cell phones), load the data into a review database, deduplicate it, and then run search terms"); *see also* Edward P. Welch et al., *Mergers & Acquisitions Deal Litigation* § 8.02[D] (2020) (describing the document collection process).

[36] Mot. Ex. 3.

[37] Mot. Ex. 6.

It is hard to say that this information is irrelevant under Delaware law. A director's economic circumstances may put in context the materiality of relevant financial interests.[38] If the value of founder shares were material to a director, for example, it may bear on her incentives in making disclosures that might affect public stockholders' redemption decisions.

At the same time, one's net worth and income are deeply personal. The plaintiff's unsupported and untested allegations are insufficient to require the provision of this sensitive information in narrative form. There are less intrusive ways to convey it.[39]

The parties are to meet and confer about a more measured way for the individual defendants to provide general information. Such means may include documents, deposition testimony, or written discovery aimed at the materiality of the founder shares in the context of the director's approximate financial

[38] *See, e.g.*, *Orman v. Cullman*, 794 A.2d 5, 30 (Del. Ch. 2002) (finding that there is "no bright-line dollar amount" for material benefit, and a reasonable inference of materiality can be based on context in which the benefit was received); *Kahn v. Portnoy*, 2008 WL 5197164, at *2 (Del. Ch. Dec. 11, 2008) (finding allegations of materiality sufficient based on dollar amount alone).

[39] *See* Ct. Ch. R. 26(c) (authorizing the court to protect against discovery causing "annoyance, embarrassment, oppression, or undue burden" where "good cause" exists); *see Sokol Hldgs. v. Dorsey & Whitney, LLP*, 2009 WL 2501542, at *9 (Del. Ch. Aug. 5, 2009) ("[M]inor relevance does not justify invading the privacy of [a party].").

circumstances.[40] The plaintiff's request for an order requiring the individual defendants to convey detailed financial information in an interrogatory response is denied.

III. CONCLUSION

The plaintiff's motion to compel is granted insofar as the 2020-2021 Documents may be reviewed using a TAR protocol and the Pre-2020 Documents sufficient to show the nature of the individual defendants' compensation must be produced. It is denied as to Interrogatory No. 17, except that the parties must confer on a less intrusive way for general information to be provided. The motion is otherwise denied.[41] IT IS SO ORDERED.

Sincerely yours,

/s/ Lori W. Will

Lori W. Will
Vice Chancellor

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[40] *Cf. Seaford Funding v. M&M Assocs.*, 1996 WL 255886, at *2 (Del. Ch. Apr. 9, 1996) ("[T]ax returns are not discoverable when the information sought is readily available from other sources or if disclosure of some portion of the return would be sufficient." (citing *Cleveland v. Cleveland*, 1985 WL 21135, at *1 (Del. Ch. June 26, 1985))); *Walbert v. C.F. Schwartz Motor Co.*, 1987 WL 9609, at *2 (Del. Super. 1987) (noting, in the context of assessing the defendant's ability to pay damages, that "[r]equests aimed at ascertaining a defendant's net worth 'must be reasonable and should only disclose [the d]efendant's general financial condition with some detail when essential'").

[41] On October 18, the plaintiff wrote a letter raising additional issues concerning his motion. After reviewing this decision, the parties are to inform the court by joint letter of any remaining matters on which the parties are at an impasse after meeting and conferring.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WILLIAM J. BROWN, Plaintiff, v. MATTERPORT, INC., MATTERPORT OPERATING, LLC, R.J. PITTMAN, DAVID GAUSEBECK, MATT BELL, PETER HEBERT, JASON KRIKORIAN, CARLOS KOKRON, AND MICHAEL GUSTAFSON, Defendants.	)	C.A. No. 2021-0595-LWW

MEMORANDUM OPINION

Date Submitted: December 21, 2021
Date Decided: January 10, 2022

Thomas A. Uebler and Joseph Christensen, MCCOLLOM D'EMILIO SMITH UEBLER LLC, Wilmington, Delaware; Edward D. Totino and Benjamin W. Turner, BAKER MCKENZIE LLP, Los Angeles, California; *Counsel for Plaintiff William J. Brown*

Robert L. Burns and Daniel E. Kaprow, RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; Michele Johnson and Kristin Murphy, LATHAM & WATKINS LLP, Costa Mesa, California; Colleen Smith, LATHAM & WATKINS LLP, San Diego, California; *Counsel for Defendants Matterport, Inc., Matterport Operating LLC, R.J. Pittman, David Gausebeck, Matt Bell, Peter Hebert, Jason Krikorian, Carlos Kokron, and Michael Gustafson*

WILL, Vice Chancellor

This matter concerns trading restrictions adopted in connection with a transaction between defendant Matterport Operating, LLC ("Legacy Matterport") and a special purpose acquisition company (or SPAC). The SPAC adopted amended bylaws imposing the restrictions before the business combination closed. The plaintiff, a former officer of Legacy Matterport, contends that the restrictions were adopted without his consent in violation of Section 202(b) of the Delaware General Corporation Law. He also asserts that the challenged bylaw provision does not apply to him by its plain terms. In addition to seeking declaratory relief as to the validity of the restrictions, the plaintiff brings breach of fiduciary claims against Legacy Matterport's former directors.

The matter was bifurcated so that the question of whether the plaintiff is bound by the transfer restrictions could be resolved before they expire in mid-January 2022. An expedited trial was held on that limited issue and is resolved by this decision. I find that the plaintiff has proven by a preponderance of evidence that he owns unrestricted shares in defendant Matterport, Inc. ("Matterport"), the entity that survived the de-SPAC transaction. Accordingly, the plaintiff may freely trade his Matterport shares. The remaining claims and issues will be addressed in a subsequent stage of the proceeding.

I. RELEVANT BACKGROUND[1]

Plaintiff William J. Brown served as the Chief Executive Officer of Legacy Matterport, a privately held spatial data company, from November 2013 to December 2018.[2] Over his five years at Legacy Matterport, Brown received equity compensation in the form of stock options, granting him the right to purchase 1,350,000 shares of Legacy Matterport. He also purchased 37,000 restricted shares as a bonus in 2014.[3] Brown exercised all of his options on October 6, 2020.[4]

Gores Holding VI, Inc. ("Gores"), a special purpose acquisition company, and Legacy Matterport agreed to a business combination (or de-SPAC merger) on February 7, 2021.[5] Following a series of transactions, Gores—to be renamed Matterport upon closing—would be the surviving entity and Legacy Matterport would become a wholly owned subsidiary of Matterport.[6] Legacy Matterport stockholders would be given the right to receive consideration of 4.1183 shares of

[1] Unless otherwise noted, the facts described in this section were stipulated to by the parties or proven by a preponderance of the evidence. To the extent that any conflicting evidence was presented, I have weighed it and made findings of fact accordingly. Given the limited focus of this decision, the discussion of certain peripheral facts is abbreviated. Where facts are drawn from exhibits jointly submitted by the parties at trial, they are referred to according to the numbers provided on the parties' joint exhibit list (cited as "JX __") unless defined.

[2] Pre-Trial Stipulation & Order ("PTO") ¶¶ 10-12 (Dkt. 93).

[3] *See id.* ¶¶ 16, 22, 25.

[4] *Id.* ¶ 27.

[5] *Id.* ¶ 29.

[6] *See id.* ¶¶ 11-12, 29; JX 101 ("Merger Agreement").

Matterport Class A common stock per share of Legacy Matterport owned.[7] The merger agreement provided that the transaction would be conditioned upon, among other things, Gores adopting amended bylaws "[p]rior to the consummation of the Transactions."[8]

On July 21, 2021, Gores adopted Amended and Restated Bylaws (the "A&R Bylaws") in anticipation of the business combination.[9] Section 7.10(a) of the A&R Bylaws imposed transfer restrictions on certain shares of Matterport Class A common stock:

> [T]he holders (the "Lockup Holders") of shares of Class A common stock . . . of the Corporation issued (i) as consideration under that certain Agreement and Plan of Merger, dated as of February 7, 2021 . . . or (ii) to directors, officers and employees of the Corporation and other individuals upon the settlement or exercise of restricted stock units, options or other equity awards outstanding immediately following the closing of the Business Combination Transaction in respect of awards of [Legacy Matterport] outstanding immediately prior to the closing of the Business Combination Transaction . . . may not Transfer any Lockup Shares until the end of the Lockup Period . . . .[10]

[7] PTO ¶¶ 37-38; *see* Merger Agreement § 3.01.

[8] PTO ¶ 44; Merger Agreement § 8.10.

[9] PTO ¶ 54; *see* JX 197. The A&R Bylaws were adopted on July 21, 2021 but did not go into effect until the next day. A near-identical version of the bylaws, which only differed in the naming of the SPAC, was adopted simultaneously with the A&R Bylaws and was effective in the interim. *See* JX 197.

[10] JX 211 ("A&R Bylaws") § 7.10(a).

Section 7.10(d) of the A&R Bylaws defined "Lockup Shares," in relevant part, as "shares of Class A common stock held by the Lockup Holders immediately following the closing of the Business Combination Transaction."[11] The transfer restrictions were set to expire 180 days after the closing of the business combination.[12]

Brown filed his Verified Complaint on July 13, 2021, along with a motion for a temporary restraining order and a motion to expedite.[13] On July 19, 2021, I denied the former because of laches and granted the latter.[14] I observed that the case should be heard and decided before the expiration of the transfer restrictions, given "the plaintiff's concerns about market risk" and the "potential for selling pressure."[15]

On July 22, 2021, the A&R Bylaws became effective when Gores filed an amended certificate of incorporation and the transaction was completed.[16] Legacy Matterport stockholders did not automatically become Matterport stockholders. Instead, Matterport's transfer agent would issue Matterport Class A common shares

[11] *Id.* § 7.10(d)(ii).

[12] PTO ¶ 56; A&R Bylaws § 7.10(d)(i).

[13] Dkts. 1, 2, 3.

[14] Dkts. 26, 27.

[15] Dkt. 29 at 42-43.

[16] PTO ¶¶ 60-62.

to Legacy Matterport stockholders upon receipt of a letter of transmittal surrendering their Legacy Matterport shares.[17]

On September 3, 2021, Brown filed an Amended Verified Complaint (the "Complaint").[18] The Complaint advances three claims, but only Count I warranted expedited adjudication.[19] In Count I, Brown seeks a declaration that "Section 7.10 of the [A&R] Bylaws is unenforceable as to Brown" and that he "may freely transfer shares in Matterport and/or conduct derivative trading involving securities in Matterport, without restrictions."[20]

[17] PTO ¶ 39; Merger Agreement § 3.04(b).

[18] Dkt. 38 ("Compl."). Brown also filed a Verified Second Amended Complaint on November 17, 2021, but it did not amend Count I and the defendants contest whether Brown could amend his previous Complaint as a matter of right. *See* Dkt. 81; Entity Defs.' Post-Trial Br. 40 n.12 (Dkt. 108).

[19] Count II seeks a declaratory judgment regarding the equitable validity of the transfer restrictions, including under Section 202, and seeks monetary damages. Compl. ¶¶ 93-101. Count III asserts claims for breach of fiduciary duty against the individual defendants. *Id.* ¶¶ 102-06.

[20] *Id.* ¶ 88.

Trial on Count I was held on December 1 and 2, 2021.[21] The parties submitted post-trial briefing,[22] and I heard post-trial argument on December 21, 2021.[23] The transfer restrictions will expire on or around January 18, 2022.

II. LEGAL ANALYSIS

Brown has proven, by a preponderance of the evidence, that he is not subject to the transfer restrictions in Section 7.10 of the A&R Bylaws. He does not own Lockup Shares as defined in that provision.

When construing a corporation's bylaws, the court is bound by the principles of contract interpretation.[24] Words are "given their commonly accepted meaning

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[21] Much of the evidence presented at trial, including expert testimony, addressed the validity of the restrictions under Section 202(b) of the Delaware General Corporation Law. Because I find that Brown's shares are not subject to the transfer restrictions, I need not reach the question of whether the restrictions are valid under Section 202 in this decision. *See* Dkt. 121 at 9-10 (plaintiff's counsel asserting that if the court concludes Brown's shares are not Lockup Shares, that would be dispositive on Count I). The evidence and testimony presented will not, however, be wasted. I believe that they may prove relevant in the second phase of this action. In that regard, I decline to exclude the opinions and testimony of the defendants' rebuttal experts and of the plaintiff's proposed expert. *See* Pl.'s Post-Trial Opening Br. 26-31 (Dkt. 103); Entity Defs.' Post-Trial Br. 18-19 (Dkt. 108). Instead, they are admitted and will be given the appropriate weight. *See S. Muoio & Co. v. Hallmark Ent. Invs. Co.*, 2010 WL 3611404, at *2-3 (Del. Ch. Sept. 16, 2010) (declining to exclude expert and rebuttal testimony and reports in favor of admitting them and affording them the proper weight).

[22] Dkts. 103, 108, 113.

[23] Dkt. 121.

[24] *See BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd.*, 224 A.3d 964, 977 (Del. 2020) ("Because corporate charters and bylaws are contracts, our rules of contract interpretation apply." (quoting *Hill Int'l Inc. v. Opportunity P'rs L.P.*, 119 A.3d 30, 38 (Del. 2015))).

unless the context clearly requires a different one or unless legal phrases having a special meaning are used."[25] When a "bylaw's language is unambiguous, the court need not interpret it or search for the parties' intent."[26]

The A&R Bylaws define Lockup Shares as "the shares of Class A common stock *held* by the Lock-up Holders *immediately following* the Business Combination Transaction."[27] I do not find that language ambiguous.[28] I therefore look to the plain language of the provision, which is straightforward. "Held" is the past tense of

[25] *Hill*, 119 A.3d at 38 (quoting *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188).

[26] *Saba*, 224 A.3d at 977 (quoting *Hill*, 119 A.3d at 38); *see also PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1070 (Del. 2011) ("If [a contract] is unambiguous, then there is no room for judicial interpretation and 'the plain meaning . . . controls.'" (quoting *LeVan v. Indep. Mall, Inc.*, 940 A.2d 929, 933 (Del. 2007))).

[27] A&R Bylaws § 7.10(d)(ii) (emphasis added).

[28] Language in the bylaws of certain other post-de-SPAC corporations clearly restricts all shares issued to the targets' stockholders. See the bylaws of 23andMe Holding Co., for example: "'Lockup Shares' means the shares of common stock received by the stockholders of the Corporation after the date of the adoption of these Bylaws as consideration in the [de-SPAC transaction]." JX 294 § 7.7(c)(iii).

"hold," which means "to have possession or ownership."[29] "Immediately" means "without delay."[30] "Following" means "being next in order or time."[31]

Brown argues that these restrictions do not apply to him because he "h[e]ld" no Matterport shares "immediately following" the July 22, 2021 de-SPAC transaction's closing.[32] The defendants assert that Brown's reading of the provision would "nullify" the transfer restrictions because "no Legacy Matterport stockholder received Matterport shares" instantly after the transaction closed.[33] Delaware law rejects "unreasonable" contractual interpretations that lead to an "absurd result."[34] But the evidence demonstrates that some Legacy Matterport stockholders would

[29] *Held*, Merriam-Webster, https://www.merriam-webster.com/dictionary/held (last visited Jan. 9, 2022); *Hold*, Merriam-Webster, https://www.merriam-webster.com/dictionary/hold (last visited Jan. 9, 2022).

[30] *Immediately*, Merriam-Webster, https://www.merriam-webster.com/dictionary/immediately (last visited Jan. 9, 2022); *see Black's Law Dictionary* 764 (11th ed. 2019) (defining "immediate" as "[o]ccuring without delay"). Elsewhere, the word "immediately" was used by Gores to mean exactly that. *See, e.g.*, JX 197 at 5 ("[T]he Board has determined that it is in the best interests of the Company and its stockholder for the Company to amend and restate the Existing Bylaws . . . to become effectively immediately upon the execution of this Unanimous Written Consent . . . .").

[31] *Following,* Merriam-Webster, https://www.merriam-webster.com/dictionary/following (last visited Jan. 10, 2022).

[32] Pl.'s Post-Trial Opening Br. 7, 55-64.

[33] *See* Entity Defs.' Post-Trial Br. 58.

[34] *Manti Hldgs., LLC v. Authentix Acq. Co.*, 261 A.3d 1199, 1208 (Del. 2021).

have received their Matterport shares within a few days of closing.[35] That timing could be viewed as consistent with a plain reading of the bylaw.

It is unnecessary to define the precise time period that the "immediately following" language covers. The only question presently before the court is how (and whether) the transfer restrictions apply to the plaintiff. I agree with the plaintiff's interpretation of the bylaw as it concerns Brown's shares. The evidence demonstrates that Brown did not hold Matterport Class A shares "immediately following" the transaction under any commonly accepted meaning of that phrase.[36]

The business combination closed on July 22, 2021.[37] Brown held only the right to receive Matterport Class A common shares at that time.[38] The evidence

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[35] The Merger Agreement provides that letters of transmittal were to be distributed on the day the proxy statement was issued. Merger Agreement § 3.04(a). Matterport Chief Financial Officer, James Fay, testified in his deposition that some Legacy Matterport stockholders returned their executed letters of transmittal before July 29, 2021. JX 265 at 78-79. The plaintiff has argued that the court should generally disregard Fay's testimony. Pl.'s Post-Trial Opening Br. 17, 26. I find no reason to doubt Fay's credibility on this matter. *See Towerview LLC v. Cox Radio, Inc.*, 2013 WL 3316186, at *1 (Del. Ch. June 28, 2013) ("The Court will consider the evidence adduced by the parties and will attribute to it the weight the Court deems appropriate based on the credibility of the source and the relevance and probative value of the evidence.").

[36] The defendants' argument that "immediately" should be read to mean "within a reasonable time, in view of the circumstances of the case," see Entity Defs.' Post-Trial Br. 56-57 (quoting *Liberty Mut. Ins. Co. v. Bob Roberts & Co.*, 357 So.2d 978, 970 (Ala. 1978))—even if true—is therefore irrelevant.

[37] *See* PTO ¶¶ 59-62.

[38] This is established by evidence in the record and the defendants' own representations. *See, e.g.*, Merger Agreement § 3.04(b) ("Until surrendered . . . each share of [Legacy Matterport] Stock shall be deemed, from and after the Effective Time, to represent only the right to receive, upon such surrender, the Per Share Company Common Stock

demonstrates that Brown was not issued Matterport shares until at least November 5 and 19, 2021—after he sent executed letters of transmittal to Matterport's transfer agent.[39] Roughly three and a half months elapsed between the business combination closing and the date Brown possessed any Matterport shares. Obtaining shares over 100 days after closing is not "immediately."

Accordingly, I find that Brown does not hold Lockup Shares subject to the transfer restrictions in Section 7.10. This conclusion is the natural consequence of the "deliberate and knowing selection of words for inclusion" in the A&R Bylaws, which the court will not rewrite.[40]

The defendants maintain that Brown cannot prevail on this basis because he did not specifically allege in his Complaint that his shares are not Lockup Shares. Instead, they argue, Brown "waived" that contention because he first articulated an argument about the interpretation of Section 7.10 in his pre-trial brief. I disagree.

Consideration . . . ."); JX 284 at 19 (defendants' expert confirming that it is his "view" that "unless the letter of transmittal is executed, Legacy Matterport shareholders do not hold any Matterport stock"); Entity Defs.' Pre-Trial Br. 30-31 (Dkt. 96) (stating that "Legacy Matterport stockholders did not simultaneously [with the close of the business combination] receive Matterport shares" but instead "their Legacy Matterport shares were converted into '*the right to receive*' Matterport shares issued as merger consideration").

[39] JX 276; JX 311; Dkt. 105 at 30-31 (Brown testifying that he submitted his letters of transmittal "either November 4th or November 5th of 2021" for certain shares and "on November 19, 2021" for the "remainder of his shares").

[40] *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 1984 WL 478415, at *8 (Del. Ch. June 6, 1984), *rev'd on other grounds*, *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108 (Del. 1985).

Brown could not have waived an argument about the meaning of the very contractual language upon which he sought declaratory relief.[41]

Court of Chancery Rule 8(a)(1) only requires the plaintiff to provide a "short and plain statement of the claim showing that [he] is entitled to relief."[42] Brown's Complaint (both initial and amended) put the defendants on notice that the language of Section 7.10, as applied to Brown, was at issue. Both iterations of the Complaint quote Section 7.10 of the A&R Bylaws at length.[43] And Count I of the Complaint seeks "a declaration that: (1) Section 7.10 of the [A&R] Bylaws is unenforceable as to Brown."[44] This court's liberal notice pleading standard has been met.[45] Brown was not required to "set out a legal theory" for Count I in his Complaint to satisfy the standard.[46]

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[41] The defendants assert that they would have taken discovery on "Brown's reasons for delaying submitting his letters of transmittal, and Brown's understanding of the value of the merger consideration he received," had he raised this argument sooner. Entity Defs.' Post-Trial Br. 48. In my view, neither issue would change the outcome of this decision, as neither affects the A&R Bylaws' text.

[42] Ct. Ch. R. 8(a)(1).

[43] *See, e.g.*, Dkt. 1 ¶¶ 59-61; Compl. ¶¶ 60-62.

[44] Compl. ¶ 88.

[45] *See Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 897 (Del. 2002).

[46] *Dow Chem. Co. v. Organik Kimya Hldg. A.S.*, 2018 WL 2382802, at *4 (Del. Ch. May 25, 2018) (discussing how "Delaware's approach" to this aspect of notice pleading "mirrors the federal rules").

III. CONCLUSION

The court finds that Brown's Matterport shares are not Lockup Shares under Section 7.10 of the A&R Bylaws. He may therefore freely trade his Matterport shares and enter into derivative transactions with respect to those shares, without restriction. All other relevant issues remain for the second phase of this litigation.

310 A.3d 548
Court of Chancery of Delaware.

Stewart N. GOLDSTEIN, M.D., individually and on behalf of all others similarly situated, Plaintiff,
v.
Alexander J. DENNER, Sarissa Capital Management, L.P., Sarissa Capital Domestic Fund LP, Sarissa Capital Offshore Master Fund LP, and Sarissa Capital Management GP LLC, Defendants.

C.A. No. 2020-1061-JTL
|
Date Submitted: January 16, 2024
|
Date Decided: January 26, 2024

Synopsis

Background: In corporate shareholder's action alleging that principal of activist hedge fund, who was director of acquired corporation, breached his fiduciary duties by engaging in insider trading in corporation's stock, relating to acquiror's proposed acquisition of corporation, shareholder filed motion for discovery sanctions for spoliation, based on failure to preserve electronically stored information (ESI), i.e., text messages from personal mobile devices of principal, fund's general counsel, fund's head trader, and principal's personal assistant.

Holdings: The Court of Chancery, J. Travis Laster, Vice Chancellor, held that:

duty to preserve ESI from personal mobile devices of principal and general counsel arose when general counsel circulated litigation hold in response to subpoena served by Securities and Exchange Commission (SEC) for all documents concerning trading in corporation's stock;

duty to preserve ESI from personal mobile devices of principal's personal assistant by imaging them, and to turn off auto-delete function on head trader's smartphone, arose when principal received litigation hold notice, from acquired corporation's general counsel, for putative class action challenging sufficiency of proxy statement for proposed acquisition of corporation;

principal and fund failed to take reasonable steps to preserve text messages;

shareholder was prejudiced by spoliation of ESI;

to remedy prejudice to shareholder's affirmative case, at trial it would be rebuttably presumed that fund traded on basis of non-public approach from acquiror of corporation and that fund's trading caused sale process to fall outside a range of reasonableness;

to remedy prejudice to shareholder's ability to cross-examine and impeach witnesses, defendants' standard of proof would be raised by one level; and

principal and fund's general counsel acted recklessly in failing to preserve ESI.

Motion granted.

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Procedural Posture(s): Motion for Sanctions (Discovery).

Attorneys and Law Firms

***556** Kevin H. Davenport, John G. Day, Jason W. Rigby, PRICKETT, JONES & ELLIOTT P.A., Wilmington, Delaware; R. Bruce McNew, COOCH & TAYLOR P.A., Wilmington, Delaware; Christopher H. Lyons, ROBBINS GELLER RUDMAN & DOWD LLP, Wilmington, Delaware; Randall J. Baron, Rick T. Atwood, ROBBINS GELLER RUDMAN & DOWD LLP, San Diego, California; Brett Middleton, JOHNSON FISTEL, LLP, San Diego, California; Attorneys for Plaintiff.

Stephen E. Jenkins, Richard D. Heins, ASHBY & GEDDES, P.A., Wilmington, Delaware; Tariq Mundiya, Sameer Advani, Richard Li, M. Annie Houghton-Larsen, WILLKIE FARR & GALLAGHER LLP, New York, New York; Attorneys for Defendants Alexander J. Denner, Sarissa Capital Management L.P., Sarissa Capital Domestic Fund LP, Sarissa Capital Offshore Master Fund LP, and Sarissa Capital Management GP LLC.

OPINION IMPOSING SANCTIONS FOR FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION

LASTER, V.C.

The plaintiff contends that the principal of an activist hedge fund breached his fiduciary duties by engaging in insider trading. The plaintiff has moved for sanctions based on the defendants' failure to preserve electronically stored information ("ESI").

The plaintiff served document requests that asked for the hedge fund principal's texts. The defendants did not produce any texts and averred that texting was contrary ***557** to the fund's business policies. When other parties produced texts with the hedge fund principal, the plaintiff pressed the issue. After concluding that the hedge fund and its principal had spoliated evidence, the plaintiff filed a motion for sanctions for failing to preserve ESI.

The hedge fund principal received three litigation hold notices that instructed him to take affirmative steps to preserve texts on his personal devices. The hedge fund principal did nothing. He now posits that his texts were lost in October 2021, when he upgraded to a new iPhone. Even the defendants admit his explanation makes no sense, because Apple backs up iMessages and other data to the cloud. The hedge fund principal has not suggested that other data was lost, such as pictures, applications, or contacts. Rather than remembering a devastating loss of all his data, he barely recalls the event. The iPhone upgrade thus not only uncharacteristically resulted in a loss of data, but strangely resulted only in the loss of texts.

The plaintiff then asked for texts from other key hedge fund personnel. Eight months later, the hedge fund responded that its general counsel had no texts and couldn't explain why. He now posits that his texts disappeared in early October 2020. He recalls that he was personally cleaning his swimming pool when he accidentally dropped his phone

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into the water. He sent the phone to be repaired, and he thinks the repair must have caused his texts to be lost. Like the hedge fund principal, the general counsel does not recall a painful disappearance of all his data, including treasured pictures, his applications, and contacts. He only dredged an insignificant event from memory after finding a receipt for the repair.

For purposes of this litigation, the disappearance of the hedge fund principal's texts proved serendipitous. The plaintiff had just served a comprehensive document request. Weeks later, the defendants moved to stay discovery, where they argued carefully that a stay would not prejudice the plaintiff because no *then-existing* evidence would be lost. The court denied the stay.

The hedge fund's head trader also has no texts. But in lieu of a third suspiciously flukey data loss, he admits setting his iPhone to delete texts after thirty days. Even after receiving a litigation hold, he never changed that setting.

Court of Chancery Rule 37(e) governs when a requesting party can obtain sanctions for a responding party's failure to preserve ESI. To obtain sanctions, the requesting party must show (i) the responding party had a duty to preserve the ESI, (ii) the ESI is lost, (iii) the loss is attributable to the responding party's failure to take reasonable steps to preserve the ESI, and (iv) the requesting party suffered prejudice. To obtain a presumption or a default judgment, the requesting party must show that the responding party acted recklessly or with the intention of preventing another party from using the evidence in litigation.

The plaintiff made each showing. The hedge fund and its principal had a duty to preserve ESI. That duty arose at least as early as February 2018, when the hedge fund principal received the first litigation hold notice. The hedge fund and its principal failed to take reasonable steps to preserve texts, most notably by not imaging any personal devices. The texts were lost due to that failure.

The plaintiff suffered twofold prejudice from the loss. The plaintiff cannot use the evidence to prove its affirmative case. The plaintiff also cannot use the evidence to cross-examine the hedge fund principal and other defense witnesses when they attempt to prove their defenses.

***558** To remedy the first category of prejudice, the court will presume at trial that the hedge fund traded on the basis of a non-public approach from an acquiror. The court also will presume that the hedge fund's trading caused the sale process to fall outside a range of reasonableness.

To remedy the second category of evidence, the court will require the defendants to meet a burden of proof that is increased by one level. Rather than rebutting the presumptions or proving issues by a preponderance of the evidence, the defendants will have to adduce clear and convincing evidence.

The plaintiff also has been prejudiced by having to spend time and resources on this issue. The defendants must pay all of the fees and expenses that the plaintiff incurred. That includes not only the motion itself, but also the

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time required to pin down the defendants on their positions and to confirm that the ESI was not available from other sources.

I. FACTUAL BACKGROUND

The facts are drawn from the parties' submissions in connection with the motion seeking sanctions for spoliation.[1] The court has also considered other documents of record.

A. Denner, Bioverativ, and Sanofi

Defendant Alexander J. Denner is the founder and controlling principal of Sarissa Capital, an activist hedge fund. Four of his affiliates are defendants (collectively, "Sarissa").

In 2017, Denner was a director of Bioverativ, Inc., a publicly traded biotechnology company. In May, Sanofi S.A. approached Denner and another director, Brian S. Posner. Sanofi expressed interest in acquiring Bioverativ for $90 per share. Bioverativ's common stock closed that day at $54.86 per share, so the proposal represented a 64% premium to market.

Denner and Posner told Sanofi that the time was not right for an acquisition. The discovery record to date indicates that Posner reported Sanofi's interest to Bioverativ's other directors, but did not mention the price. There are no contemporaneous documents evidencing board consideration or acknowledgement of the offer, and there was no board vote on a response. All of the Bioverativ directors testified that they knew about Sanofi's approach. Except for Posner and Denner, none recalled knowing the price. A contemporaneous email from Posner to outside counsel references the Sanofi approach without mentioning the price. DX 14.

B. Sarissa Buys Stock.

Just days after Denner's meeting with Sanofi, Sarissa's head trader began purchasing Bioverativ stock.

- On May 24, 2017, Sarissa purchased 340,000 shares.
- On May 25, 2017, Sarissa purchased 130,000 shares.
- On May 26, 2017, Sarissa purchased 450,000 shares.
- On May 30, 2017, Sarissa purchased 90,000 shares.

There is no contemporaneous evidence of any prior plan to rapidly acquire such a large position. The only written communication relating to the trades is an email in which Denner tells the head trader to "Keep going." PX 3.

***559** Before those purchases, Sarissa only owned 155,000 shares. Within a week after Denner's meeting with Sanofi, Sarissa had purchased 1,010,000 shares for $56.3 million. Bioverativ stock went from 3.3% of Sarissa's portfolio to 27.7%.

Before Sarissa's first purchase, its general counsel (Mark DiPaolo) emailed Bioverativ's general counsel (Andrea DiFabio) to ask if she was aware of any material non-public information that could limit Sarissa's ability to trade. DiPaolo did not mention Sanofi's $90 per

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share offer, and DiFabio testified that she did not know about it. She therefore told DiPaolo that she did not know of anything.

Posner was the only other Bioverativ director who knew about the price. He bought 2,000 shares for approximately $53.80 per share, representing a total investment of $107,600. No one has suggested that the other Bioverativ directors suddenly purchased shares.

C. Denner Strings Sanofi Along.

Sarissa stood to make massive profits if Sanofi acquired Bioverativ, but Section 16(b) of the Securities Exchange Act of 1934 loomed as an impediment. That statute requires that an insider disgorge short-swing profits from any sale that takes place less than six months after the purchase. Denner's solution was to delay any engagement with Sanofi so that the sale would take place after the short-swing period closed.

When Sanofi reapproached in June 2017 and again in September 2017, Denner responded that Bioverativ was not for sale. The discovery record indicates that he did not report those contacts to the board. *See* PX 11.

D. Bioverativ Agrees To A Sale.

By October 2017, the short-swing period was about to expire. This time, when Sanofi came calling, Denner proposed a single-bidder process. The board knew nothing about that inquiry.

Several weeks later, in late November 2017, Sanofi offered to acquire Bioverativ for $98.50 per share. Bioverativ's management team and its financial advisors valued the company at more than $150 per share. After receiving Sanofi's offer, the directors asked for a higher bid, and Sanofi increased its offer to $101.50. At that point, the directors countered at $105 per share, almost one-third below the standalone valuation. Sanofi accepted.

Denner led the negotiations for Bioverativ. Stephen Sands, a Lazard banker, led the negotiations for Sanofi. Denner and Sands had known each other professionally for over a decade. The discovery record reveals that they texted during the negotiations. None of those texts exist.

E. The Bioverativ Hold

On January 21, 2018, the companies announced the transaction. On February 8, 2018, Bioverativ filed its proxy statement.

Stockholders filed putative class actions challenging the sufficiency of the proxy statement. On February 21, 2018, Bioverativ's general counsel circulated a litigation hold. PX 12 (the "Bioverativ Hold"). Denner received it.

The Bioverativ Hold informed its recipients that "Bioverativ and its employees are under an obligation to hold on to any and all information and documents (including electronically-stored information, such as emails) within their possession, custody or control that may relate to Bioverativ's acquisition by Sanofi." *Id.* The Bioverativ Hold instructed recipients to take affirmative steps to preserve documents. Under a ***560** heading titled, "What do I need to do?" it stated:

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> You must take affirmative steps to prevent any alteration, deletion, destruction, or modification of any information or documents you possess now or in the future that could be related to the hold
>
> To be clear, this legal hold applies to documents and information within Bioverativ's possession, custody or control or your individual or future possession, custody or control.

Id.

The Bioverativ Hold expressly extended to texts. Under a heading titled, "Other than email, what items do I need to hold on to?" the notice stated:

> Please review the list below. You must hold on to any information, documents and data stored in or on any medium—paper, electronic, or other—that may be relevant to Bioverativ's acquisition by Sanofi even if you keep it on your mobile device or on your home computer. This includes but is not limited to: ...
>
> • SMS or text messages; ...
>
> • Documents and information stored in a cloud environment.
>
> To be clear, any and all documents, data and information that may relate to Bioverativ's acquisition by Sanofi should be preserved regardless of whether they are favorable or unfavorable to Bioverativ, or whether they appear unimportant or trivial.

Id. The Bioverativ Hold extended explicitly to "personally-owned computers or devices (including cell phones, tablets, etc.)." *Id.*

There is no evidence Denner took any action in response to the Bioverativ Hold. There is no evidence that Sarissa took any action either. If they had, the lost texts would have been preserved.

F. The Sanofi Hold

On March 15, 2018, Sanofi issued a litigation hold. PX 13 (the "Sanofi Hold"). Denner received it.

The Sanofi Hold specifically called out texts on smart phones. Under the heading "**YOU MUST PRESERVE BOTH DOCUMENTS AND ELECTRONICALLY STORED INFORMATION**," it stated:

> You must retain paper documents and ESI regardless of location or media format. For example, you must retain relevant ESI on computers and external storage devices such as cell phones, smartphones, iPads, tablets, and removable media such as USB drives. ...
>
> **Examples of ESI:** ... text messages ... on any personal devices.

Id.

The Sanofi Hold specifically identified the need to take affirmative steps to preserve ESI. Under a heading titled, "**DO NOT DELETE RELEVANT INFORMATION**," the Sanofi Hold stated:

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> Do not delete e-mail or ESI that relates to this matter ... If you are aware of any other documents or information that may relate to this Matter that are stored in any other format or location where they are likely to be modified or deleted (either due to automatic or manual processes), you must take affirmative actions to preserve these documents and information.

Id.

There is no evidence that Denner took any action in response to Sanofi Hold. There is no evidence that Sarissa took any action either. If they had, the lost texts would have been preserved.

G. The Sarissa Hold

On September 4, 2019, the Securities and Exchange Commission ("SEC") served ***561** subpoenas on Denner and Sarissa seeking "All Documents Concerning [Bioverativ] or trading in the securities of [Bioverativ]," "All Communications with Sanofi," and "All Communications with Denner Concerning Sanofi, [Bioverativ], or trading in the securities of [Bioverativ]." Dkt. 212, Ex. A at Request Nos. 3–5 & Ex. B at Request Nos. 3, 5. On September 5, 2019, Sarissa's general counsel (DiPaolo) circulated a litigation hold to "All staff." PX 15 (the "Sarissa Hold").

The Sarissa Hold instructed all staff to "preserve any and all documents and/or communications with, concerning, relating to, or in any way discussing or mentioning Bioverativ, Inc. or Sanofi S.A." *Id.* It continued: "**Until otherwise notified, do not discard, delete, alter or destroy any such materials in your possession or under your control even if such documents would otherwise be routinely discarded or destroyed in the ordinary course of your business.**" *Id.*

The Sarissa Hold expressly encompassed texts on personal devices:

> You must preserve all potentially responsive documents now in existence or that may be created in the future, whether in hard-copy form or stored electronically, including electronic documents stored on or in any form of media, including, but not limited to, the following: mobile devices, whether firm issued or personal (including iPhones, Androids, and Blackberries), ... iPads, tablet devices, PDAs, ... and information available in the "cloud" or on social media websites .... **All destruction or recycling programs, protocols and routines that would otherwise apply to the documents**

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being preserved must be suspended immediately.

Id.; *accord id.* (defining "document" to include "text messages").

After circulating the Sarissa Hold, DiPaolo consulted with outside counsel about how to implement it.[2] Outside counsel asked DiPaolo about texts. DiPaolo responded that he did not text for business and that he did not believe Denner did either, but he would verify that. DiPaolo and outside counsel decided they would not collect text messages at that time, but outside counsel asked that Sarissa's users preserve text messages and check with counsel before buying a new phone and transferring data to a new device.

DiPaolo avers that he personally went through Denner's phone looking for text messages relating to "Sarissa's purchases of Bioverativ securities." DiPaolo Aff. ¶ 6. The scope of the SEC subpoenas was much broader: They sought "All Communications with Denner Concerning Sanofi, [Bioverativ], or trading in the securities of [Bioverativ]." Dkt. 212, Ex A at Request No. 4.

DiPaolo claims he did not find any responsive texts. In this action, other parties have produced texts from Denner relating to Bioverativ. There are also emails referring to texts from Denner relating to Bioverativ. DiPaolo either applied his narrow definition to exclude them, missed them inadvertently, or consciously ignored them. The latter is a concern, because to the extent that Denner texted about Sarissa's trading, he likely texted with DiPaolo. Allowing DiPaolo to review Denner's texts meant DiPaolo was looking for texts that could implicate himself.

At a follow-up meeting with outside counsel, DiPaolo reported that Sarissa's ***562** policies prohibited the use of text for business purposes. He reiterated that he had no recollection of texting himself. He said that he had reviewed Denner's texts and found nothing.

Based on DiPaolo's representations, outside counsel agreed to "table any collection of mobile data/text messages at this time but asked [Denner] to preserve this data." Outside counsel also asked Denner to contact counsel "for guidance should he want to buy a new device or discard the current device."

There is no evidence that any steps were taken to preserve Denner's data. There is no evidence that Denner contacted anyone for guidance before replacing his phone.

Because the Sarissa Hold went to all staff, it inferably went to Pat Garofalo, Sarissa's head trader. He had his phone set to delete texts after thirty days. He did not turn off that setting after receiving the Sarissa Hold. He did nothing to preserve his texts.

DiPaolo sent the Sarissa Hold, so he necessarily knew about it. He did nothing to preserve his texts either.

The three custodians for the SEC collection ended up being Denner, DiPaolo, and Denner's former personal assistant, who had left Sarissa in September 2018. No one collected her cell phone before she left. The SEC collection

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thus did not involve *any* collection of texts, nor *any* imaging of phones to preserve ESI. DiPaolo conducted the only search for texts by reviewing Denner's phone. That was a manual self-collection by an inferably interested party.

H. The Pool Incident

After the SEC collection, DiPaolo was personally cleaning his swimming pool when he accidentally dropped his phone into the water. He has a receipt showing he had the phone repaired on September 28, 2020.

DiPaolo believes that he lost his texts when the phone was repaired. Strangely, the repair seems to have affected his texts and nothing else. DiPaolo has not suggested that he lost other data, such as pictures, applications, or contacts. Rather than recalling a traumatic event involving the disappearance of treasured photos and the hassle of rebuilding his contacts and restoring other information, DiPaolo barely remembers the incident. Only the repair receipt jogged his memory.

Nor do the dates work. DiPaolo believes he lost his texts as a result of the repair, yet the missing texts are not tied to September 28, 2020. He has no texts from before October 9, 2020. It would be strange for a repair to cause the loss of texts sent during the twelve days after the repair took place.

I. This Lawsuit

On December 15, 2020, the plaintiff filed this lawsuit. Based on Sarissa's stock purchases, the plaintiff asserts a claim against Denner for breach of fiduciary duty, plus a claim against Sarissa for aiding and abetting Denner's breaches. In substance, the plaintiff asserts that Denner and Sarissa engaged in insider trading. The plaintiff also asserted claims against other defendants that have been settled.

Denner and Sarissa moved to dismiss the claims against them under Rule 12(b)(6). After completing briefing, the plaintiff served document requests on September 27, 2021. Dkt. 44.

The defendants responded by moving to stay discovery. They relied on a line of Court of Chancery decisions that freely grant stays of discovery pending resolution of motions to dismiss. *See* Dkt. 47. Those rulings presume that a stay will not prejudice ***563** the plaintiff because the defendants will preserve potentially relevant evidence. Citing those precedents, the defendants argued that the plaintiff would not suffer prejudice in this case due to the absence of "any serious risk of currently-available information becoming unavailable while the Court considers the pending Motions to Dismiss." *Id.* ¶ 17. In reply, the defendants reiterated that the plaintiff did not face any risk of prejudice from his "professed concerns" about failures to preserve evidence. Dkt. 52 ¶ 17. Although not conspicuous at the time, the defendants' reference to "currently-available information becoming unavailable" now seems carefully worded.

On November 18, 2021, the court issued an order that denied the defendants' motion for a stay, explaining:

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> As the plaintiffs' authorities recount, defendants are not entitled to an automatic stay of discovery pending disposition of a pleading-stage motion. There must be good reason to grant the stay. Here, the court has reviewed the pleading-stage record, and it appears highly unlikely that the motion to dismiss will be granted, much less dispose of the case in its entirety. It is perhaps possible that a limited aspect of the complaint might be dismissed, but the probability is sufficiently low that discovery should not be stayed pending the outcome of the defendants' pleading-stage motion.

Dkt. 55.

J. The Defendants Belatedly Take Steps To Identify And Preserve Evidence.

It was only after the court's order that defense counsel began thinking about what sources of evidence would be responsive and should be identified, preserved, collected, reviewed, and potentially produced. That was too late. The plaintiff filed the case in December 2020. Defense counsel should have started taking steps to identify and preserve information by at least then.

Defense counsel acted too late in another sense as well. To repeat, the plaintiff served document requests in September 2021. Soon after, for reasons that no one has been able to explain, Denner lost all of his texts from before an as-yet unidentified date in October 2021. Denner recalls upgrading his iPhone to a new model, and he thinks the upgrade caused the loss. That would be bizarre, because Apple facilitates upgrades by transferring data to the new iPhone from the cloud. No one on the defendants' side has been able to explain why Denner's iPhone upgrade could have caused the loss of his texts.

There is no evidence that Denner consulted with anyone before replacing his iPhone. The litigation holds told him to do that. Outside counsel asked him to do that.

Like DiPaolo, Denner has not suggested that he lost other data, such as pictures, applications, or contacts. Denner also does not vividly recall discovering that he had lost cherished photos, nor does he rue the burdens of restoring his data from other sources. He barely remembers it. Like DiPaolo's pool mishap, the atypical iPhone upgrade seems to have affected his texts and nothing else.

K. The Defendants Fail To Produce Any Texts.

As noted, defense counsel only began to consider their preservation and collection responsibilities after the court denied the defendants' motion to stay discovery. For their baseline document collection, defense counsel decided to use the documents gathered in response to the SEC subpoenas in September 2019. Defense counsel did not take any

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affirmative steps to identify custodians or sources.

***564** In January 2022, defense counsel proposed to the plaintiff that Denner be the only custodian. The plaintiff initially did not ask for more custodians. The plaintiff did ask for confirmation that the production would include Denner's personal email, Sarissa email, other business email, instant message, mobile devices, laptops and desktops, cloud storage, and shared network drives. At that point, defense counsel compared those data sources with what had been gathered for the SEC collection and identified additional data that needed to be secured, including potentially text messages, nonbusiness email addresses, cloud-based data, and paper documents. Once again, defense counsel did not act independently or take initiative. They did not fulfill their own responsibilities to identify data sources; they merely considered what the plaintiff identified.

To learn about texts, defense counsel consulted with Sarissa's general counsel (DiPaolo). He repeated his mantra that Sarissa had a policy against using text messages for business purpose and that he did not believe that Denner had any responsive text messages. Rather than imaging Denner's phone or reviewing his text messages themselves, defense counsel asked Denner's assistant to search his texts.

The plaintiff had requested documents from Denner for months in 2016 that were outside the scope of the SEC collection. In February 2022, defense counsel collected additional documents from Denner's email account. Later that month, the plaintiff and defense counsel agreed on a search protocol for Denner's emails, and the plaintiff agreed that Sarissa did not need to run searches on any other Sarissa personnel. Defense counsel ran the agreed-upon search terms and reviewed the hits for responsiveness, then produced those documents on a rolling basis.

In March 2022, Denner's assistant reported to defense counsel that no text messages from 2017 to 2018 existed on Denner's phone and that the earliest text messages were from October 2021. Denner's assistant also said that Denner did not have any messages available in iCloud. Defense counsel asked for the first time about Denner's iPad and was told no text messages from 2017 to 2018 existed there either. No one told the plaintiff.

In June 2022, the court issued a decision that largely denied Denner and Sarissa's motion. *Goldstein v. Denner*, 2022 WL 1797224 (Del. Ch. June 2, 2022). That decision found it "reasonable to infer that Denner bought the shares with the expectation that Sarissa would profit from a near-term sale of [Bioverativ]" and "reasonably conceivable that the conduct giving rise to the Insider Trading Claims tainted the sale process." *Id.* at *9, *12. The decision noted that discovery would play an important role in supporting or refuting those inferences and that on a developed record, the court might reject or question whether the defendants had traded based on inside information. For example, discovery might show that Denner "would have increased Sarissa's equity position after the Spinoff in any event." *Id.* at *9 n. 5.

L. The Plaintiff Questions The Lack Of Texts.

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Although Denner and Sarissa's production did not contain any texts, other parties produced texts from Denner. Two directors produced forty-five texts, including texts sent during board meetings in which Denner complained about management's opposition to the Sanofi transaction. *See* PX 1.

On June 14, 2022, the plaintiff informed defense counsel that Denner appeared to have texted for business purposes. The plaintiff asked defense counsel to add the ***565** following custodians to the search protocol: Sarissa's general counsel (DiPaolo), Sarissa's Chief Compliance Officer Patrice (Patrice Bonfiglio), and Sarissa's head trader (Pat Garofalo). The plaintiff's counsel also asked to add Denner's assistant.

At this point, defense counsel finally had one of its lawyers inspect Denner's devices. The inspection confirmed that Denner did not have any text messages from before October 2021. Counsel checked Denner's iPad and saw text messages from March 2020, but not earlier. Denner reported that he had not intentionally deleted any text messages relevant to this action and said he did not understand why his text messages from the 2017-2018 time period were missing. Denner suggested that he had upgraded his iPhone and then provided his old phone to one of his sons. Later that month, DiPaolo reported that Denner's sons had newer devices acquired after the Bioverativ-Sanofi transaction.

Defense counsel discussed the issue of texts with Sarissa's general counsel (DiPaolo) and its chief compliance officer (Bonfiglio), but did not conduct any formal custodian interviews. DiPaolo and Bonfiglio each represented that they adhered to Sarissa's policy of not texting for business. Defense counsel accepted that representation and decided again against imaging phones.

In October 2022, defense counsel finally answered the plaintiff's interrogatories, which included a question about whether the defendants had preserved potentially responsive information. Seven months after learning that Denner had no texts from before October 2021, defense counsel served an interrogatory response that stated the following:

> [O]n or around October 2021, Alex Denner replaced his iPhone solely for the purposes of upgrading the device, a process which the Sarissa Defendants believe inadvertently caused his text messages prior to that date to no longer be accessible or retrievable from his current device. By way of further response, the Sarissa Defendants state that, in the Sarissa Capital Management LP Compliance Manual and Code of Ethics, Sarissa employees are not permitted to use text messages for official business correspondence (see SAR-BIVVID00000183). The Sarissa Defendants have sought to obtain iCloud

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> backups, have contacted Verizon, have conducted searches of Denner's current iPhone and iPad devices for backup phone data (including with the assistance of Sarissa's outside counsel ...), and have been unable to identify any means of recovering any text messages during the relevant time period agreed-to by the parties.

PX 17 at Interrogatory No. 27.

The defendants thus asserted that Denner lost his texts on some unidentified date in October 2021, one year before. *Id.* To reiterate, that was after Denner had received three litigation hold notices, after this litigation began, after the plaintiff served discovery requests seeking texts, and just before the defendants moved to stay discovery.

The plaintiff understandably viewed Denner's upgrade story as inherently suspicious. During an upgrade, data is transferred to the new iPhone.[3] Denner and Sarissa's representation that they contacted Verizon also did not help. When texting on his iPhone, Denner likely used iMessage, ***566** which is an over-the-top ("OTT") messaging service that operates through the web. Unlike SMS texts, OTT messages do not run through a cellular carrier's system, so the carrier has no record of them.

Denner and Sarissa thus offered an explanation for lost texts that made no sense and took steps to locate texts that did not help. Denner and Sarissa also sought to minimize the import of the loss by representing that under Sarissa's Compliance Manual and Code of Ethics, "Sarissa employees are not permitted to use text messages for official business correspondence." *Id.* That reference implied that there were no texts to lose.

Equally important, the defendants' response was misleadingly incomplete. The response said nothing about DiPaolo's prior loss of all of his texts due to the post-swimming-pool repair.

The defendants also provided an incomplete response to another interrogatory. The plaintiff asked defendants to "Identify and describe the methods and/or processes that You used to search for, Identify, collect and review Documents and Communications." PX 17 at Interrogatory No. 28. The response said nothing about the SEC subpoenas, the self-review of Denner's phone in 2019, or almost anything we now know about defense counsel's collection efforts.

On November 14, 2022, Sarissa's Chief Compliance Officer (Bonfiglio) circulated an email to all staff informing them that the Sarissa Hold, "initially circulated September 5, 2019, is still in effect, as litigation surrounding the Bioverativ/Sanofi transaction remains pending." PX 18. In other words, there was never a time after September 5, 2019, when Sarissa personnel were released from their obligation to retain ESI, including texts.

M. The Plaintiff Tries To Obtain Texts From Other Sources.

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The plaintiff made efforts to obtain Denner's texts from other sources. They subpoenaed Verizon themselves, but Verizon responded that it did not maintain records of Denner's texts. That makes sense for texts from an OTT messaging application.

The plaintiff also subpoenaed Lazard, which advised Sanofi on the transaction. Recall that Sands was the primary Lazard banker, and he had known Denner for a decade. PX 21 at 12. The two had a friendly relationship, and Lazard emails reference Denner and Sands texting each other. *See* PX 5, 7, 10. But Lazard could not produce any texts either. Lazard represented that Sands "no longer has the phone that he used during the relevant time period" and "his current phone does not have any text messages dating back to the relevant period." PX 16.

N. More Issues With Texts

On December 7, 2022, during deposition preparation, Sarissa's head trader (Garofalo) informed defense counsel that he recalled using texts to communicate with Denner. But he said he had no recollection of any text messages relating to Bioverativ.

Based on this disclosure, defense counsel finally collected cell phones from DiPaolo, Bonfiglio, and Garofalo.

- DiPaolo's phone had no messages from before October 9, 2020. He claimed not to know why.

- Garofalo's phone had no messages. It was set to delete text message data routinely every thirty days.

- Bonfiglio's device contained 116,868 text messages. The earliest text message was dated January 30, 2014. None of the search terms hit on any texts. In addition, defense counsel reviewed all ***567** of the texts and determined that none were responsive.

In short, none of the additional custodians had responsive texts.

In February 2023, the plaintiff pushed for more information about the defendants' failure to produce texts. DX 32. Defense counsel responded with a letter plus a declaration from Denner. In both documents, they stuck to Denner's story about losing his texts when he upgraded his iPhone. At the same time, they seemed to know that the story did not make sense. *See* PX 19. The defendants also reported for the first time that DiPaolo, Garofalo, and Bonfiglio did not possess any responsive texts. And they reported for the first time that Denner's assistant during the relevant period had left Sarissa in September 2018 and that no one had collected her phone.

O. The Motion For Sanctions

On November 14, 2023, the plaintiff moved for sanctions for spoliating evidence. The parties briefed the motion, and the court held a hearing on January 4, 2024. During the hearing, defense counsel was unable to answer basic questions about the collection process. To ensure that the defendants had the opportunity to document what they had done, the court directed the defendants to file an affidavit describing their preservation and collection plan and how they carried it out.

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The defendants filed two affidavits. Defense counsel submitted an affidavit detailing their collection efforts. DiPaolo submitted a separate affidavit in which he recounted the swimming pool story for the first time. DiPaolo also reported that he had notes documenting the advice defense counsel gave for collecting and preserving documents in response to the SEC subpoenas. Sarissa offered to produce the notes under a Rule 510(f) order. The court entered a Rule 510(f) order and authorized the plaintiff to file a sur-reply.

DiPaolo did not address in his affidavit whether any of his data was backed up to the cloud or whether counsel had made any efforts to check his other devices. The court directed defense counsel to file a supplemental affidavit "explaining whether any efforts were made to examine DiPaolo's other devices, the cloud, or other sources for texts after the ... swimming pool incident." Dkt. 213.

Defense counsel reported that no data was backed up to the cloud or available from other devices. Defense counsel did not say what they did, or when, to make this determination. Their silence suggests that they only took those steps after the court asked. In any event, the failure to provide any detail beyond a clipped response is a further example of defense counsel's lack of transparency and parsimony regarding the release of information. That approach has undermined their credibility on the spoliation issues.

II. LEGAL ANALYSIS

The plaintiff seeks sanctions for spoliating text messages. Spoliation is the destruction or significant alteration of evidence, the failure to preserve evidence properly for another's use, or the improper concealment of evidence. [4]

The plaintiff sought texts, which "fit comfortably within the scope of materials that a party may request under Rule 34." [5] Text messages are a form of ESI. [6]

***568** Court of Chancery Rule 37(e) addresses sanctions for failure to preserve ESI. It states:

> If ESI that should have been preserved in the reasonable anticipation of or actual notice of imminent litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted recklessly or with the intent to deprive another party of the information's use in the litigation, may, among other things:
>
> (A) presume that the lost information was unfavorable to the party; or
>
> (B) dismiss the action or enter a default judgment.

Ct. Ch. R. 37(e).

Rule 37(e) reflects longstanding public policies. Seven decades ago, the Delaware

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Supreme Court cited the maxim that "everything will be presumed against the despoiler" and explained that it is "the duty of a court ... to adopt a view of the facts as unfavorable to the wrongdoer as the known circumstances will reasonably admit." *Equitable Tr. Co. v. Gallagher*, 34 Del.Ch. 249, 102 A.2d 538, 541 (1954). Imposing sanctions for spoliation embodies the more general policy that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188, 190 (1889).

Court of Chancery Rule 37(e) closely resembles Federal Rule of Civil Procedure 37(e), as amended in 2015, but with changes to conform to Delaware law and Chancery practice. The federal rules first addressed the preservation of ESI in 2006, but that version of Rule 37(e) proved unsatisfactory. Different federal courts reached different conclusions "about how to determine when sanctions were warranted, what standards of culpability should apply to different kinds of sanctions, and what types of sanctions should be ordered." Tanya Pierce, *Righting the Ship: What Courts Are Still Getting Wrong About Electronic Discovery,* 72 SMU L. Rev. 785, 787 (2019).

The federal rules were amended in 2015 to provide a clearer and more consistent standard for the federal courts. Federal Rule 37(e) now states:

> If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> ***569** (C) dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e). The Advisory Committee notes offer extended commentary to guide its interpretation and application. *See* Fed. R. Civ. P. 37(e) advisory committee's notes [hereinafter AC Notes].

There are two differences between current Court of Chancery Rule 37(e) and current Federal Rule 37(e). One is that Court of Chancery Rule 37(e) omits the reference to instructing a jury that it "may or must presume the information was unfavorable," for the obvious reason that the Court of Chancery does not have juries. [7] The federal rule nevertheless provides insight into the types of inferences that a court can draw. First, the court might hold that when acting as factfinder, it *may* presume the information was unfavorable to

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the party when considering evidence at trial. Alternatively, a court might hold that when acting as factfinder, it *will* presume that the information was unfavorable to the party when considering evidence at trial.

The other difference between current Court of Chancery Rule 37(e) and current Federal Rule 37(e) is the mental state required for imposing the identified sanctions. The Delaware Supreme Court held in 2006 that a court must make an evidence-based "finding of intentional or reckless destruction of evidence as a predicate to an adverse inference ...." *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 550 (Del. 2006). Consistent with *Sears*, Court of Chancery Rule 37(e) authorizes the court to impose sanctions requiring a culpable mental state if the party "acted recklessly or with the intent to deprive another party of the information's use in the litigation." Ct. Ch. R. 37(e)(2). The federal version requires that the party have acted "with the intent to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e)(2).

A. The Threshold Issue Of Timing

Before considering the motion on its merits, the defendants have raised a threshold question of timing. They argue that the court should not consider the motion now, maintaining that the Court of Chancery generally makes spoliation findings just before or after trial. The defendants have collected examples to support ***570** that contention,[8] but their examples are just that. They do not establish a general rule, much less a requirement.

As part of its case management authority, a trial court has discretion regarding when to address motions. "Delaware trial courts have inherent power to control their dockets." *Solow v. Aspect Res., LLC*, 46 A.3d 1074, 1075 (Del. 2012). That authority includes determining how to proceed for the "orderly adjudication of claims." *Unbound P'rs Ltd. P'ship v. Invoy Hldgs. Inc.*, 251 A.3d 1016, 1030 (Del. Super. 2021) (cleaned up). Rule 1 instructs the members of this court that the rules "shall be construed, administered, and employed by the Court and the parties, to secure the just, speedy and inexpensive determination of every proceeding." Ct. Ch. R. 1. Commenting on the sibling federal rule, a leading treatise states that "[t]here probably is no provision in the federal rules that is more important than this mandate. It reflects the spirit in which the rules were conceived and written, and in which they should be interpreted." 4 Charles Alan Wright, Arthur R. Miller & Adam N. Steinman, *Federal Practice and Procedure* § 1029 (4th ed.), Westlaw (database updated Apr. 2023).

Court of Chancery Rule 16(a) similarly contemplates that a court may take steps to "formulat[e] and simplif[y] .... the issues" and to address "[s]uch other matters as may aid in the disposition of the action." Ct. Ch. R. 16(a)(1), (5). The same authoritative treatise explains that "case management [is] an express goal of pretrial procedure." 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1521 (3d ed.), Westlaw (database updated Apr. 2023). To that end, the Advisory Committee's note to the federal rule emphasizes the need for "a process of judicial management that embraces

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the entire pretrial phase." Fed. R. Civ. P. 16 advisory committee's note to 1983 amendment. The commentary recognizes that "[t]he timing of any attempt at issue formulation is a matter of judicial discretion." *Id.*

Rule 37 "does not contain any specific reference to the timing of the filing of a motion seeking spoliation sanctions." *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 506 (D. Md. 2009). A review of federal decisions suggests that federal courts primarily encounter the problem of parties raising spoliation issues too late, rather than too early. [9] For that to be a ***571** major concern undercuts the defendants' argument that spoliation issues should wait until trial.

When to address a spoliation issue depends on a variety of factors, including the nature of the issue, the stage of the case, the court's ability to provide case-specific relief, and any scheduling order that might apply. [10] If a party seeks an order compelling the defendants to provide additional discovery or to pay for the movant to conduct additional discovery, then it would be foolish to defer the motion until trial. If a ruling on the motion will help the parties prepare for trial or limit the issues to be addressed at trial, then it often will make sense to address the motion before trial. If the motion turns on evidentiary issues that the court will evaluate at trial, then it will make sense to defer the motion until trial. Ultimately, the decision rests in the discretion of the court based on the facts of each case.

Here, the plaintiff seeks sanctions that will frame the issues for trial. The plaintiff asks for a combination of adverse inferences and preclusion orders. Whether the court grants the requested sanctions or imposes others will determine how the parties plan for trial and present evidence. The proper time to consider the plaintiff's motion is now.

B. The Rule 37(e) Analysis

The federal courts have established a step-by-step framework for analyzing spoliation issues under Rule 37(e). *See* Thomas J. Joyce, *Finding Prejudice from Lost ESI: An Analysis of Courts' Standards Under Amended Federal Rule of Civil Procedure 37(e)*, 71 Okla. L. Rev. 979, 980–81 (2019) (collecting cases). This decision adopts and applies that framework.

1. Was There A Duty To Preserve The Texts?

The first question is whether the ESI "should have been preserved." Ct. Ch. R. 37(e). "Rule 37(e) does not apply ... when information or evidence is lost before a duty to preserve attaches." *Living Color*, 2016 WL 1105297, at *4.

"A party in litigation has an affirmative duty to preserve potentially relevant evidence." *Shawe v. Elting*, 157 A.3d 142, 150 (Del. 2017). A party also must preserve potentially relevant evidence as soon as the party either actually anticipates litigation [11] or reasonably should have anticipated litigation. [12] The ***572** latter inquiry is an objective one: "[W]hether a reasonable party in the same factual circumstances would have reasonably foreseen litigation." *The Sedona Conference Commentary on Legal Holds, Second Edition: The Trigger & The Process* 354 (2019) (quoting

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Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311, 1320 (Fed. Cir. 2011)). "The duty to preserve relevant evidence must be viewed from the perspective of the party with control of the evidence." *Ala. Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730, 740 (N.D. Ala. 2017). The Advisory Committee notes to Federal Rule 37(e) explain that the duty to preserve arises when litigation is "reasonably foreseeable." AC Notes. They observe that "[a] variety of events may alert a party to the prospect of litigation." *Id.*

The reasonably foreseeable standard turns on the prospect of litigation, not the specific case or claims that ended up being filed. The reasonable anticipation of one lawsuit may trigger a preservation obligation, which may then continue because of other lawsuits. [13]

Once the duty to preserve evidence applies, the party "must not destroy unique, relevant evidence that might be useful to an adversary." *Zubulake IV*, 220 F.R.D. at 217.

> While a litigant is under no duty to keep or retain every document in its possession it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.

Id. (cleaned up). "The duty to preserve extends to those employees likely to have relevant information—the 'key players' in ***573** the case." *Id.* at 218. An organization's decision to circulate a litigation hold notice is a strong indication that a duty to preserve evidence exists, because it shows that the organization subjectively anticipated litigation. [14]

In this case, at a minimum, Denner and Sarissa had a duty to preserve evidence starting on February 21, 2018, when Bioverativ's general counsel circulated the Bioverativ Hold. The duty undoubtedly arose much earlier, because litigation involving M&A transactions is sufficiently common that Denner and Sarissa should have reasonably anticipated litigation challenging the Bioverativ-Sanofi transaction well before that. It would be easy to find that Denner and Sarissa's duty to preserve evidence arose in May 2017, when Denner caused Sarissa to rapidly accumulate a large position in Bioverativ's stock after Sanofi approached Denner and Posner about buying Bioverativ at a price of $90 per share. But such a finding is not necessary to resolve the issues in the case. Relying on the Bioverativ Hold is sufficient. [15]

The duty to preserve evidence extended to all of the Sarissa custodians at issue on this motion. Four of the custodians were obviously key players in Sarissa's accumulation of stock: Denner himself, Sarissa's general counsel (DiPaolo), Sarissa's head trader (Garofalo), and Sarissa's Chief Compliance Officer (Bonfilglio). Another obvious custodian was

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Denner's personal assistant, who would possess many of Denner's documents.

The duty to preserve evidence extended to the ESI at issue on this motion. The preservation obligation extended to evidence in Denner or Sarissa's possession, custody, or control. ESI on Denner's personal devices was plainly within his possession, custody, or control. Business-related texts on employee personal devices are likewise within an organization's possession, custody, or control. [16]

***574** Eliminating any doubt, the Bioverativ Hold, the Sanofi Hold, and the Sarissa Hold explicitly encompassed texts and expressly extended to personal devices as well as company-issued devices. When outside counsel advised DiPaolo about how to implement the Sarissa Hold, they specifically discussed texts and personal devices.

Denner and Sarissa therefore had an obligation to preserve the lost texts starting at least as early as February 21, 2018 (though undoubtedly that duty arose much earlier). That satisfies the first element of the Rule 37(e) test.

2. Are The Texts Lost?

The second issue is whether the ESI "is lost" and "cannot be restored or replaced through additional discovery." Ct. Ch. R. 37(e). "Information is lost for purposes of Rule 37(e) only if it is irretrievable from another source, including other custodians." [17] "Because [ESI] often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere." AC Notes.

The plaintiff has not shown that Bonfiglio's texts are lost. Her device contained 116,868 text messages going back to January 30, 2014. Defense counsel has determined that none of her texts are responsive, but that is a different issue than spoliation. There was no failure to preserve Bonfiglio's texts, so this decision does not discuss her further.

Everyone agrees that the other custodians' texts are lost. The defendants do not argue that the plaintiff could obtain their texts from other sources. The plaintiff does not contend that the defendants could recover their texts by engaging in remedial efforts such as by restoring backup tapes or searching unstructured data. Denner and Sarissa might have avoided or mitigated a sanctions ruling by coming forward with other locations where the texts might be found. Given how thoroughly iMessage backs up texts to the cloud and synchs across devices, it is hard to believe that Denner, DiPaolo, and Garofalo successfully deleted all texts across all devices. But everyone agrees that they achieved that feat.

This is also not a case where discovery from other parties can fill the gap. After learning that Sarissa could not produce any responsive texts, the plaintiff subpoenaed Verizon, Denner's cell phone provider. Verizon responded that it did not maintain records of Denner's texts. To reiterate, a cellular provider will not have records for an OTT application like iMessage.

***575** The plaintiff also subpoenaed Lazard, but Lazard could not produce any texts either. Lazard represented that Sands "no longer has the phone that he used during the relevant time

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period" and "his current phone does not have any text messages dating back to the relevant period." PX 16.

Deposition testimony is not a sufficient substitute. Occasionally an alleged spoliator can testify with a sufficient degree of specificity that deposition testimony will suffice to replace the lost information. *E.g.*, *Floeter v. City of Orlando*, 2007 WL 486633, at *6 (M.D. Fla. Feb. 9, 2007) (denying sanctions where spoliator testified in such detail about the type, number, and content of lost emails that the trier of fact did not need to see the emails to understand their contents). That is the exception, not the rule. When custodians cannot recall the details of the texts, whom they texted, or other key information, then depositions do not remedy the loss of evidence. *Skanska USA*, 340 F.R.D. at 187.

During his deposition, Denner's memory repeatedly failed him.

- He had no memory of any phone calls with Sands of Lazard in early May of 2017 about Sanofi's interest in Bioverativ. PX 21 at 6.
- He had no recollection of Sanofi making its initial expression of interest at about a 66% premium to market. *Id.* at 9.
- He had no recollection of telling anyone to begin accumulating a position in Bioverativ stock. *Id.* at 10–11.
- He could not recall a meeting with Sands of Lazard in May 2017. *Id.* at 20. Nor could he recall generally meeting with Sands during that period. *Id.* at 21–22.
- He could not recall calls a series of calls with Sands during May 2017. *Id.* at 28–35, 50.
- He did not recall any discussions with anyone about the short-swing profit rule. *Id.* at 56–57.
- He did not recall a meeting with Sands in October 2017. *Id.* at 63.
- He did not recall any substantive conversations with Sands during October 2017. *Id.* at 64–65.
- He could not recall whether "us" meant "Sarissa" or "Bioverativ" and "them" meant "Sanofi." *Id.* at 66.
- He did not recall discussions with Sands in January 2018. *Id.* at 78–79.
- He did not recall attempting to revise the proxy statement to assert that Posner reported to each director about Sanofi's original offer. *Id.* at 87.

Add to this that the defendants have provided information about the spoliation belatedly and begrudgingly. Testimony from defense witnesses will not suffice.

The texts are well and truly lost. That satisfies the second element under Rule 37(e).

3. Were The Texts Lost Due To A Failure To Take Reasonable Steps To Preserve Them?

The third question is whether the ESI was lost "because a party failed to take reasonable steps to preserve it." Ct. Ch. R. 37(e). ESI

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discovery involves five fundamental steps: (1) identification, (2) preservation, (3) collection, (4) review, and (5) production. *DR Distribs., LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 923 (N.D. Ill. 2021). [18] The issues here are identification and preservation.

***576** When a duty to preserve evidence arises, a party must act reasonably to preserve the information that it knows, or reasonably should know, could be relevant to the litigation, including what an opposing party is likely to request. [19] The standard is reasonableness. Parties need not "preserve every shred of paper, every email or electronic document, and every backup tape." *Zubulake IV*, 220 F.R.D. at 217.

Taking reasonable steps to preserve evidence requires first taking reasonable steps to identify the information that should be collected and preserved. *See Skanska USA*, 340 F.R.D. at 186. That process requires "locating the relevant people and the locations and types of ESI." *DR Distribs.*, 513 F. Supp.3d at 927. "The relevant people are the individuals who have custody of the relevant ESI or the ability to obtain the ESI. Counsel must interview them to learn the relevant facts regarding ESI and to identify, preserve, collect, and produce the relevant ESI." *Id.* "The relevant locations are those places where the ESI can be found so that it can be both (a) preserved and (b) collected and produced. Although both are necessary, preserving ESI is distinct from collecting and producing ESI." *Id.*

Identifying custodians and locations requires an intentional and systematic approach that includes custodian interviews. *Id.* at 924.

> As with an initial client interview, a reasonable custodian interview can require counsel to cross-examine the client and test the accuracy of the client's response to document requests to ensure that all appropriate sources of data have been searched and that responsive ESI has been collected—and eventually reviewed and produced. Simply relying on a client's say so may not be reasonable. And like an initial client interview, the custodian interview can be an iterative process, requiring follow up.

Id. at 927 (citations omitted). "[T]he custodian interview is not merely a theoretical best practice. Instead, like the initial client interview, a proper and thorough custodian interview is mandated by the Federal Rules of Civil Procedure and the Rules of Professional Conduct." *Id.* at 926–27. The same is true under this Court's rules.

After identifying the reasonably likely sources of information, the party must take reasonable steps to collect and preserve it. "Though a party need not preserve all documents in its possession—again, perfection is not the standard—it must preserve what it knows and reasonably ought to know is relevant to

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possible litigation and is in its possession, custody, or control." *Id.* at 929. When considering what is reasonable, a court "should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation." AC Notes.

For an organization, simply circulating ***577** a litigation hold is not enough.[20] The organization must take steps to ensure that the recipients of the hold understand what it means and abide by it.[21] The organization also must suspend or modify routine document retention or document destruction policies so that evidence is not lost.[22]

Individuals must take similar steps. Pertinent to this case, they must disable auto-delete functions that otherwise would destroy emails or texts.[23] "It takes, at most, only a few minutes to disengage the auto-delete function on a cell phone." *Paisley Park*, 330 F.R.D. at 233. They also must back up data from personal devices before disposing of them.[24] Failing to either disengage ***578** the auto-delete setting or to back up messages before deleting them "is sufficient to show" that a defendant "acted unreasonably."[25]

An individual cannot claim ignorance. After receiving a litigation hold, an individual must take steps to determine what is necessary to comply. That obligation includes learning of systems "to prevent destruction or automatic deletion." *Youngevity*, 2020 WL 7048687, at *2. As one court explained:

> Defendant Kormanis reasonably should have investigated (or asked his counsel, who received the letter, to investigate) (a) what text messages his iPhone held, and (b) whether any setting on his iPhone might cause the deletion of existing or future text messages. Defendant Kormanis did not take that basic step and his unreasonable failure to do so led to the loss of text messages he should have preserved. Next, ... Defendant Kormanis should have obtained appropriate advice about saving backup copies of his text messages ....

NuVasive, Inc. v. Kormanis, 2019 WL 1171486, at *8 (M.D. N.C. Mar. 13, 2019), *report and recommendation adopted*, 2019 WL 1418145 (M.D. N.C. Mar. 29, 2019).

Put simply, "in cases involving ESI, to satisfy their preservation duties, parties must investigate and disable autodelete functions on email accounts (client and webbased) at the onset of litigation if those accounts reasonably contain relevant information and it is reasonable under the circumstances of the case to do so." *DR Distribs.*, 513 F. Supp. 3d at 931. The same duties apply to text messages or other types of messaging applications.

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Counsel's role in this process is essential. The obligation to preserve evidence "runs first to counsel, who has a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction." *Orbit One Commc'ns., Inc. v. Numerex Corp.*, 271 F.R.D. 429, 437 (S.D.N.Y. 2010) (cleaned up).

a. The Failure To Take Reasonable Steps In Response To The Bioverativ Hold

Under these principles, Denner and Sarissa failed to take reasonable steps to preserve ESI after receiving the Bioverativ Hold. Starting on February 21, 2018, Denner and Sarissa had a legal duty to preserve evidence, including ESI, relating to the Bioverativ-Sanofi transaction. As a highly sophisticated party and the principal of an activist hedge fund, Denner was obligated to consult with counsel about his preservation obligations, identify likely sources of information, and take steps to preserve them.

***579** After Denner received the Bioverativ Hold, he should have met with DiPaolo to identify the key individuals at Sarissa who were involved with the transaction, including Sarissa's trading in Bioverativ stock. At a minimum, those individuals would have included Denner himself, DiPaolo, and Garofalo, the head trader who carried out Sarissa's purchases. They logically should have considered Bonfiglio as Chief Compliance Officer, but her omission was not-consequential.

Denner and DiPaolo also should have identified the key locations where data could be kept. Through that evaluation, they should have identified Denner's assistant as a custodian. Eighteen months later, Denner and DiPaolo identified Denner's assistant as a custodian in response to the SEC subpoenas. They should have figured that out in February 2018.

After identifying those five custodians, Denner and Sarissa should have taken steps to preserve ESI, including by imaging phones or backing up their data. The Bioverativ Hold expressly extended to ESI on personal phones. In a world where people primarily communicate using personal devices, it will almost always be necessary to image or backup data from phones.

If Denner and Sarissa had proceeded in that fashion, they would have learned that Garofalo had set his phone to delete texts automatically after thirty days and could have instructed him to turn off that function and take steps to preserve his data. Texts from before the date he turned off the auto-delete function would have been lost, but Denner and Sarissa would have known about the lost texts in February 2018 and could have investigated what other sources of data were available at that time. Perhaps they would have come to the same conclusion that they reached in December 2022, when they finally looked at Garofalo's phone, and decided his texts were irretrievably lost. If they had acted earlier, they would have had more alternatives.

If Denner and Sarissa had proceeded in that fashion, they would now have data from the phones belonging to Denner, his assistant, and DiPaolo. Those texts were lost because Denner

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and Sarissa failed to take reasonable steps to identify and preserve ESI in response to the Bioverativ Hold.

b. The Failure To Take Reasonable Steps In Response To The Sanofi Hold

Just as Denner and Sarissa failed to take reasonable steps to preserve ESI after receiving the Bioverativ Hold, they also failed to take reasonable steps to preserve ESI after receiving the Sanofi Hold on March 15, 2018. The steps that should have been taken after the Sanofi Hold are identical to the steps that should have been taken after the Bioverativ Hold, with the additional qualifier that the second hold should have made the necessity of those steps all the more apparent.

If Denner and Sarissa had taken those reasonable steps, it would not have made a difference for the texts on Garofalo's phone. It would have made a difference for the phones belonging to Denner, his assistant, and DiPaolo, where the texts would have been preserved. Those texts were lost because Denner and Sarissa also failed to take reasonable steps to identify and preserve ESI in response to the Sanofi Hold.

c. The Failure To Take Reasonable Steps To Implement The Sarissa Hold

In addition to failing to take reasonable steps to preserve ESI after the Bioverativ Hold and the Sanofi Hold, Denner and Sarissa failed to take reasonable steps to implement the Sarissa Hold. DiPaolo issued ***580** the Sarissa Hold on September 5, 2019, after Sarissa received the SEC subpoenas on September 4. DiPaolo consulted with outside counsel about implementing the hold, yet DiPaolo and outside counsel failed to take reasonable steps to implement the hold.

If Denner and Sarissa had fulfilled their preservation obligation after the Bioverativ and Sanofi Holds, then Sarissa already would have had images of, or backed up data from, those phones and could have continued to preserve them. They also would have already had an image of, or backed up data from, Denner's assistant's phone, which they could have continued to preserve. Denner and Sarissa's failures to respond to the earlier holds prevented them from responding properly to the Sarissa hold.

Taking the Sarissa Hold in isolation, Denner and Sarissa would not have breached their preservation obligations as to Denner's assistant's phone, because she left Sarissa in September 2018. One year later, her phone was no longer in Denner or Sarissa's possession, custody, or control, so they did not have an obligation to preserve it. That does not mean that Denner and Sarissa had no obligation to identify and preserve other sources where the assistant's data might have been maintained. They had an obligation to preserve ESI then in existence. But they did not have a duty, at that point, to secure the phone of an employee who had departed one year before.

For purposes of Garofalo, the analysis of the Sarissa Hold is the same as the Bioverativ and Sanofi Holds. Denner and Sarissa breached their preservation obligations

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by not identifying Garofalo, not instructing him to turn off his auto-delete function, not taking steps to image his phone or preserve his data, and not looking for other sources where his lost data could have been preserved.

Most significantly, Denner and Sarissa failed to fulfill their preservation obligation by not imaging or backing up data from Denner's and DiPaolo's phones. That occurred because DiPaolo seems to have pushed outside counsel to "table" the collection and imaging of personal devices by stressing that Sarissa's policies prohibited using texts for business and by representing that he reviewed Denner's phone and did not identify responsive texts.

To fulfill their own obligations, outside counsel needed to be more assertive. "Relying solely on the client to identify the universe of relevant information, without reasonable inquiry to verify that the client accurately captured that universe, can lead to sources of information being overlooked."[26] "An attorney may not simply rely on custodian self-collection of ESI. Instead, counsel must test the accuracy of the client's response to document requests to ensure that all appropriate sources of data have been searched and that responsive ESI has been collected—and ***581** eventually reviewed and produced."[27] Self-collection of documents is particularly risky, because clients may not remember or understand where ESI can be located, may not collect ESI correctly, or may not find or provide counsel with all responsive documents. *See DR Distribs.*, 513 F. Supp. 3d at 935–36. Self-collection also puts an interested party in charge of the effort, which may result in the conscious or subconscious omission of damaging documents. *Id.* at 936. And clients may not fully document how they conducted their collections, which is necessary to defend a collection and preservation process when challenges arise. *Id.* at 937.

Outside counsel should have given little weight to DiPaolo's representation that no one used texts because it was contrary to Sarissa policy. Outside counsel should have reviewed both Denner's phone and DiPaolo's phone. A reasonable preservation effort would have resulted in counsel imaging or backing up both phones. By failing to take these steps, Denner and Sarissa breached their duty to preserve evidence.

Denner and DiPaolo also breached their preservation obligation by failing to follow outside counsel's instructions about preserving evidence. Despite mistakenly tabling the collection and imaging of personal devices, outside counsel gave DiPaolo and Sarissa explicit advice about preserving texts. At two successive meetings, outside counsel asked for users to preserve text messages and check with counsel before buying a new phone and transferring data to a new device. There is no evidence that anyone did that.

If Denner and Sarissa had taken those reasonable steps, texts from Denner and DiPaolo would still exist. Those texts were lost because Denner and Sarissa failed to take reasonable steps to identify and preserve ESI in response to the Sarissa Hold.

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d. The Failure To Take Reasonable Steps To Preserve Documents In Response To This Litigation

Finally, Denner and Sarissa failed to take reasonable steps to preserve documents in response to this litigation. The plaintiff filed this case in December 2020. Denner and Sarissa did not do anything to identify and preserve sources of ESI until November 2021, after the court denied the defendants' motion to stay discovery. Serendipitously for Denner, his texts disappeared just weeks before.

After the plaintiff filed this litigation, all of the defendants had an obligation to identify potential sources of evidence and take steps to preserve them. For Denner and Sarissa, that meant reviewing what had already been collected, evaluating what else should be collected, and taking steps to preserve that evidence.

As part of that process, defense counsel should have imaged or backed up Denner's and DiPaolo's phones. That did not happen. The affidavits that DiPaolo and defense counsel submitted show no meaningful efforts to identify and preserve potential sources of evidence until November 2021, after the court denied the defendants' motion to stay. At that point, defense counsel checked what existed from the SEC collection in 2019, but otherwise remained passive. Rather than taking affirmative ***582** steps to identify custodians and locations, Defense counsel waited for the plaintiff to identify sources.

If defense counsel had acted when the plaintiff filed this litigation, they would have determined that no one ever imaged Denner and DiPaolo's phones as part of the SEC production. Defense counsel should have promptly informed the plaintiff about the loss of DiPaolo's data and taken steps to image Denner's phone. Working collaboratively, the parties might have agreed on other steps to preserve data and avoid another mishap like DiPaolo's errant repair after the pool cleaning incident. Denner's data would have been preserved well before October 2021, when his texts—but seemingly no other data—were permanently and irretrievably lost. In short, texts were lost because Denner and Sarissa failed to take reasonable steps to identify and preserve ESI after this litigation was filed.

e. The Failure To Provide Timely Disclosure

When defending their conduct, the defendants and their counsel have stressed what they did after November 2021, when they began considering their discovery obligations. They have also stressed the efforts they took after the plaintiff informed the defendants in June 2022 that Denner sent texts relating to Bioverativ. That was too late and too little.

In their post-November 2021 and post-June 2022 efforts, the defendants were reactive. Instead of seeking to fulfill their discovery obligations, they sought to respond to the plaintiff's inquiries. The defendants had an independent obligation to identify and preserve evidence. They did not take reasonable steps to fulfill it.

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In their post-November 2021 and post-June 2022 efforts, defense counsel failed to provide timely and candid information to the plaintiff. It was not until October 2022 that defense counsel revealed how Denner had lost his texts. That information should have been provided shortly after March 2022, when defense counsel determined that Denner had no texts on any of his devices from before October 2021.

Defense counsel was all the more dilatory in providing information about other custodians. In June 2022, the plaintiff asked about DiPaolo, Garofalo, Bonfiglio, and Denner's assistant. It took until February 2023—eight months later—for defense counsel to provide any information about those custodians, and at that point defense counsel offered no explanation for DiPaolo not having any texts. Even in January 2024, when the court held a hearing on the sanctions motion, defense counsel could not provide any explanation the absence of DiPaolo's texts. No one addressed that issue until the court ordered defense counsel to provide an affidavit describing their collection efforts. Defense counsel described what they had done, and DiPaolo provided a separate affidavit in which he described the swimming pool incident and subsequent repair gone wrong.

"Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI." *William A. Gross Const. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009); *see Beard Rsch.*, 981 A.2d at 1187 (calling for "early and, if necessary, frequent communications among counsel" regarding ESI). A problem like spoliation rapidly festers. Defense counsel should have disclosed it earlier and with greater candor.

4. Determining The Appropriate Sanction

The final issue is the appropriate sanction. Like its federal counterpart, Court of Chancery Rule 37(e) authorizes sanctions ***583** to cure prejudice, then conditions an adverse inference or a default judgment on a culpable mental state. The Advisory Notes to the federal rule observe that sanctions for curing prejudice should not include or have the same effect as an adverse inference or a default judgment unless the requisite mental state is shown.

Rule 37(e) establishes a framework for ESI-related sanctions that requires prejudice before sanctions can be imposed. Rule 37(e)(i) does not identify the possible sanctions that could be warranted, but the Advisory Notes to the federal rule refer to orders forbidding a party from putting on certain evidence, permitting other parties to present evidence, or authorizing arguments to the factfinder about the loss of evidence. Delaware decisions have identified additional possibilities, including orders establishing certain facts as true, precluding the use of certain evidence, striking particular pleadings or claims, modifying the burden of proof for particular issues, allowing additional discovery, entering default judgments, or awarding attorneys' fees and costs. *See* Ct. Ch. R. 37(b); *Fortis Advisors, LLC v. Dematic Corp.*, 2020 WL 6784129, at *3–4 (Del. Super. Nov. 18, 2020); *Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr. U/*

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A/D June 21, 2002, 2018 WL 6331622, at *14 (Del. Ch. Dec. 4, 2018).

Rule 37(e)(2) specifies a mental culpability requirement for two sanctions. Under that rule, a court may only presume that the lost information was unfavorable or enter a default judgment if a party "acted recklessly or with the intent to deprive another party of the information's use in the litigation." Ct. Ch. R. 37(e)(2).

Here, the plaintiff asks that the court to:

- presume Denner's stock purchases were motivated by Sanofi's initial expression of interest;
- preclude any testimony, from fact witnesses or experts, that would disavow scienter;
- preclude any testimony about alternative reasons for Sarissa's trades, such as a preexisting plan;
- infer that the destroyed texts would have supported plaintiff's argument that the sale process fell outside the range of reasonableness because Denner maneuvered to secure a near-term sale that would lock in the profits from his insider trading.

These sanctions are sufficiently significant to require both prejudice and a culpable mental state.

a. Prejudice

Rule 37(e)(1) requires that a party have suffered prejudice before a court will impose sanctions for failing to preserve ESI. Prejudice exists when spoliation prevents a party from obtaining and potentially using relevant evidence. *See Paisley Park*, 330 F.R.D. at 236. Proving that lost evidence is relevant, however, can be difficult, precisely because the evidence no longer exists.

Like its federal counterpart, Court of Chancery Rule 37(e) does not allocate the burden of proving or disproving prejudice to one party or the other. Instead, "[t]he rule leaves judges with discretion to determine how best to assess prejudice in particular cases." AC Notes. Federal courts have taken different positions when allocating the burden of showing prejudice. There are three broad positions: (1) the requesting party generally has the burden to show prejudice; (2) the spoliating party generally has the burden of proof to show lack of prejudice; or (3) the spoliating party bears the burden to show non-prejudice if it acted with a culpable state of mind. Joyce, *supra*, at 982.

***584** The majority rule imposes some level of burden on the requesting party, but decisions vary in the level of burden imposed. All strive not to make the burden too heavy. Joyce, *supra*, at 983–87 (collecting cases). In a case involving the loss of an entire hard drive, a court required only that the plaintiff explain how the lost evidence could have been relevant to the case. *Core Labs. LP v. Spectrum Tracer Servs., L.L.C.*, 2016 WL 879324, at *2 (W.D. Okla. Mar. 7, 2016). Another line of cases requires "plausible, concrete suggestions" about what the lost evidence could have shown.[28] A more demanding requirement calls for "some evidence regarding the particular nature of

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the missing ESI ....” *Eshelman v. Puma Biotechnology, Inc.*, 2017 WL 2483800, at *5 (E.D. N.C. June 7, 2017).

A minority of district courts place the burden on the non-producing party to show a lack of prejudice. Joyce, *supra*, at 987. The rationale for the burden shift is that the spoliating party is better positioned to know what evidence was destroyed and “should not be able to benefit from its wrongdoing.” Joyce, *supra*, at 987–88. That approach also comports with the Advisory Committee notes to the federal rule, which suggest it is reasonable for the requesting party to bear the burden when the nature of the lost information is self-evident, the information seems relatively unimportant, or the remaining preserved information appears sufficient to meet all parties’ needs. As a general rule, the Advisory Committee observes that “[d]etermining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair.” AC Notes.

A small number of courts, including the District of Delaware, have analyzed the non-producing party's mental state first. Joyce, *supra*, at 990, 992. If there is evidence that the non-producing party destroyed evidence intentionally, then the court may infer that the evidence was unfavorable, shifting the burden of proof to the non-producing party to show lack of prejudice.[29] “The primary justifications for this approach are that only the party engaged in the destruction of evidence can know how much prejudice was caused by the spoliation, and it is unlikely that the nonspoliating party will be able to prove what was contained within the destroyed information.” Joyce, *supra*, at 990. That is the same rationale for shifting the burden to the non-producing party in the first place, but the additional requirement of showing bad faith narrows the situations when the burden shifts.

Based on how Delaware approaches disputes over relevance, a plaintiff seeking to establish prejudice under Rule 37(e) must provide a plausible explanation as to why the evidence could have been relevant such that the failure to preserve is prejudicial. When a party seeks discovery under Rule 26(b)(1), the party bears an initial burden to “provide some minimal explanation as to why the discovery satisfies the requirements of relevance and conditional admissibility.” *In re Appraisal of Dole Food Co., Inc.*, 114 A.3d 541, 551 (Del. Ch. 2014) (collecting authorities). ***585** The party opposing discovery then must “show that the explanation is erroneous and that the Rule 26(b)(1) standard has not been met.” *Id.*

Likewise, when showing prejudice from spoliation, the requesting party must provide some minimal explanation as to why the lost ESI could have been relevant and either admissible in its own right or reasonably likely to lead to the discovery of admissible evidence. At that point, the party that failed to preserve the ESI must convince the court that the lost material could not have been relevant, would not have been admissible or potentially have led to the discovery of admissible evidence, or otherwise could not have been used by the requesting party to its advantage.

In this case, the plaintiff has shown prejudice. The extant record is virtually devoid of

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contemporaneous documents about Sarissa's purchases, yet someone at Sarissa approved them, someone informed DiPaolo so that he could reach out to Bioverativ's general counsel to ask about them, and someone told the head trader to start and stop buying. There are no substantive internal Sarissa emails about the purchases. The only email that references the purchases involved Denner encouraging the head trader to "[k]eep going." PX 3. There are no communications about *why* Sarissa octupled its stake so rapidly, but in internal Lazard notes, the bankers expressed the view that Denner turned down a high offer outright in May 2017 because "Denner would like to build up a stake in the firm prior to selling." PX 2. Lazard later reported that Sanofi viewed Sarissa's massive purchases of stock in May 2017 as "a positive for the deal" from Sanofi's perspective. PX 4. The no-longer extant texts plausibly could have shed light on all of those issues.

The extant record is also virtually devoid of contemporaneous documents from within Sarissa about Sanofi's acquisition of Bioverativ. The only substantive internal emails from Sarissa about the acquisition involve Denner and DiPaolo discussing the Schedule 14D-9, after the deal was signed. The no-longer-extant texts inferably would have included exchanges between Denner and Sands about Sanofi's attempts to engage. They also inferably would have included exchanges about the negotiations that Denner led on behalf of Bioverativ after October 2017. *See* PXs 5, 7, 23 at '15827.

If the texts existed, the plaintiff could use them to prove their affirmative case. But that is not the only harm the plaintiff has suffered. Denner and Sarissa intend to present testimony at trial about a preexisting plan to purchase stock, such that the timing of Sarissa's sudden and significant investment was unrelated to Sanofi's offer. If the plaintiff had access to contemporaneous texts, the plaintiff could have used the texts to cross-examine the defense witnesses and impeach their story.

Denner and Sarissa lack any credible response. The plaintiff has pointed to prejudice, and the defendants have not shown that it does not exist.

b. The Sanctions Necessary To Cure The Prejudice

Rule 37(e)(1) authorizes the court to impose sanctions as necessary to cure the prejudice. For sanctions to alleviate the harm in this case, they must address both of its dimensions. They must address the lack of evidence that the plaintiff has to prove its affirmative case and compensate for the greater ability of the defendants to testify with impunity.

To address the first issue, the court will presume at trial that Denner and Sarissa traded based on Sanofi's initial approach. The court also will presume ***586** at trial that the lost texts would have supported plaintiff's position that the sale process fell outside the range of reasonableness because Denner maneuvered to secure a near-term sale that would lock in the profits from his insider trading.

Both presumptions are rebuttable. Under Delaware Rule of Evidence 301, "[i]n a civil case, unless a statute or these Rules provide otherwise, the party against whom

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a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than the existence of the presumed fact." D.R.E. 301; *see Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 418 n. 19 (Del. 2010) ("Delaware law does not embrace the 'bursting bubble' rule adopted by the Federal Rules of Evidence.").

This is a meaningful sanction. Although Delaware decisions assert that presumptions and their close cousin—the burden of proof by a preponderance of the evidence—merely determine how a judge rules when the evidence is precisely in equipoise,[30] that is an incomplete description of their effect. Far more often, they determine what happens if there is no credible evidence on a topic, or if there is some credible evidence, but not enough that either side could carry a burden by a preponderance. In each of those common situations, the party favored by the presumption prevails. The party with the burden loses.[31]

In this case, the presumption could be outcome-determinative. The plaintiff has ***587** represented that no contemporaneous evidence exists on particular topics. If so, and if the court discredits the testimony of Sarissa's witnesses, then neither party could carry a burden. The side with the burden loses; the side with the presumption wins. Because the defendants spoliated evidence, the plaintiff should prevail in that setting.

The presumption thus helps remedy the problem created by the absence of evidence, but it does not remedy the difficulties that the plaintiff will face cross-examining Sarissa's witnesses without contemporaneous documents. To address that issue, the plaintiff asks for preclusion orders, but the court will not go that far.

Instead, the court will impose a sanction that this court previously deployed when a party engaged in spoliation: raising that party's standard of proof by one level on any issue where that party has the burden. *TR Invs., LLC v. Genger*, 2010 WL 541687, at *2 (Del. Ch. Feb. 3, 2010). By way of example, if the defendants would have to prevail by a preponderance of the evidence, they will instead have to prevail at trial by producing clear and convincing evidence.

In *Genger*, the court went further and held that because the spoliator's conduct called his credibility into question, he "will be unable to prevail on any material factual issue if the only evidence in support of his position is his own testimony." *Id.* Under that ruling, "[a]bsent corroborating testimony or documents, [the spoliator's] mere word will be insufficient to meet his burden of persuasion." *Id.* Although the court could take that additional step in this case, the court will consider the testimony of Sarissa witnesses and give it the weight due, taking into account when the testimony is uncorroborated.

Finally, the plaintiff is awarded the reasonable attorneys' fees and expenses incurred pursing the spoliation issue, including the correspondence relating to that issue, the subpoena issued to Verizon, and the briefing of the motion. The parties will exchange information about their respective attorneys' fees and costs and attempt to reach accord in

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good faith. If they cannot agree, the plaintiff may file an application.

c. A Culpable Mental State

To remedy the prejudice that the failure to preserve ESI caused in this case, the court has awarded sanctions under Rule 37(e)(1) that include presumptions that are adverse to the defendants. Because of the significance of the presumptions, it seems likely that the court only can impose them only if Denner and Sarissa acted recklessly or intentionally. They at least acted recklessly, so that standard is met.

Under Delaware law, "[i]ntentional conduct means conduct that a person undertook with a knowing desire or with a conscious objective or purpose." *Urb. Concepts LLC v. Gruber*, 2023 WL 4423978, at *4 (Del. Super. July 7, 2023) (cleaned up). "Reckless conduct reflects a knowing disregard of a substantial and unjustifiable risk. It amounts to an 'I don't care' attitude." *Id.* (cleaned up). For purposes of spoliation, a court can find recklessness when,

> an actor is under a duty to preserve evidence and takes part in the destruction of evidence while being consciously aware of a risk that he or she will cause or allow evidence to be spoiled by action or inaction and that risk would be deemed substantial and unjustifiable by a reasonable person.

Beard Rsch., 981 A.2d at 1192.

i. Denner and DiPaolo

Based on the current record, the court could find that Denner and DiPaolo acted ***588** intentionally in not preserving ESI. At a minimum, they were reckless.

A party can prove a culpable mental state through either direct or circumstantial evidence. *See Skanska USA*, 340 F.R.D. at 188; *E*Trade Sec., LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 590 (D. Minn. 2005). A court ultimately looks for evidence of a "serious and specific sort of culpability regarding the loss of relevant ESI." *Paisley Park*, 330 F.R.D. at 236 (cleaned up). This court previously found that a party "was at least reckless" in failing to preserve ESI on a personal phone where the party (i) moved to stay discovery and represented that no potentially relevant information would be in jeopardy, (ii) subsequently lost his phone, (iii) never identified any actions taken to preserve the contents of the phone—or to even consider that issue—after the duty to preserve arose and before the phone was lost, (iv) initially represented that he had no text messages and claimed that he generally did not text for business purposes. *Kan-Di-Ki, LLC v. Suer*, 2015 WL 4503210, at *29 (Del. Ch. July 22, 2015).

Here, Denner and DiPaolo engaged in comparable conduct. Both knew about their obligation to preserve texts on their personal devices. Denner received three litigation hold

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notices: the Bioverativ Hold, the Sanofi Hold, and the Sarissa Hold. DiPaolo issued the Sarissa Hold. Each litigation hold discussed the need to take affirmative steps to preserve texts on personal devices.

For the Sarissa Hold, outside counsel gave DiPaolo specific advice about preserving texts. DiPaolo induced outside counsel to defer gathering texts from personal phones by representing (incorrectly) that Denner did not text and claiming that he had personally reviewed Denner's texts and not found any relating to Bioverativ. The limited texts that the plaintiff has been able to obtain disprove that.

Outside counsel nevertheless instructed DiPaolo that Sarissa employees needed to preserve their texts and to consult with counsel before upgrading their phone. There is no evidence that anyone took any steps to implement that instruction.

DiPaolo lost his texts in October 2020. That was after he had personally issued the Sarissa Hold and received instructions from outside counsel on how to preserve texts.

Denner lost his texts in October 2021. That was just after the plaintiff served a document request seeking texts and just before the defendants moved to stay discovery based in part on the assertion that the plaintiff would not suffer any prejudice.

Both Denner and DiPaolo lost their texts through inexplicable failures of their phones to back up their texts from the cloud. For Denner, that supposedly happened when he upgraded his iPhone, but everyone agrees that an iPhone upgrade does not have that effect. For DiPaolo, that supposedly happened after he was personally cleaning his swimming pool, dropped the phone in the water, and then sent it to be repaired.

No one has suggested that Denner or DiPaolo lost other data from their phones. Neither have described emotionally crushing losses of beloved family photos. Neither have suggested that they had to rebuild their contacts from other sources or repurchase all of their applications. The strange failure to transfer data to their new phones seems only to have affected their texts.

That is a lot to believe, particularly when neither explanation is credible, and when Denner and DiPaolo claim merely to be speculating about how their texts could ***589** have been lost. This court previously found a party to be reckless where the party took no steps to preserve devices and "threw up his hands up in bewilderment as to what happened to them." *Triton*, 2009 WL 1387115, at *8. That is basically what Denner and DiPaolo have done.

Both Denner and DiPaolo have averred that they never intentionally deleted any texts. The objective facts speak more loudly. Denner's failures to recall anything about more memorable issues provide reason to question whether he would accurately remember intentionally deleting texts. DiPaolo's failure to identify texts on Denner's phone about Bioverativ, when we now know Denner sent them, provides additional reason to question whether he would acknowledge intentionally deleted texts.

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Denner and DiPaolo had ample motive to delete their texts. The texts violated Sarissa's internal policies and federal record keeping laws. They could have (i) subjected the defendants to fines, (ii) incriminated them in an SEC investigation, (iii) supported the plaintiff's claims, or (iv) undermined the defendants' explanations. Denner and DiPaolo also had the opportunity and ability to delete their texts, because their devices were never imaged or backed up.

For purposes of sanctions under Rule 37(e)(2), recklessness is sufficient. For now, the court finds only that Denner and DiPaolo acted recklessly. Both sides may present evidence regarding spoliation at trial. As part of its post-trial findings, the court may revisit this issue and evaluate whether Denner and DiPaolo's conduct went beyond recklessness to reach the level of intentionality.

ii. Sarissa

Just as the court could find that Denner and DiPaolo acted intentionally, the court could reach the same finding regarding Sarissa. Here again, the court finds only that Sarissa was at least reckless.

There are multiple paths to finding Sarissa acted with culpable intent. The most straightforward is imputation. When senior officers of an investment firm act with a particular state of mind, Delaware law imputes that knowledge to the firm.[32] Denner is the founder and principal of Sarissa; DiPaolo is its general counsel. When they acted recklessly, at a minimum, to spoliate evidence in a case brought against both Denner and Sarissa, their culpable state of mind is imputed to Sarissa for purposes of the spoliation motion.

Garofalo's actions in failing to turn off his auto-delete function are also attributable to Sarissa. This court has found that the failure to turn off an auto-delete feature "was at least reckless." ***590** *Gener8*, 2023 WL 6381635, at *15. Federal decisions reach the same conclusion. *See, e.g.*, *Skanska USA*, 340 F.R.D. at 185. Garofalo was Sarissa's head trader, and Sarissa had an obligation to preserve his texts. For purposes of the sanctions motion, Garofalo's recklessness is attributable to Sarissa.

iii. Culpability Requirement Met

The findings regarding recklessness satisfy the requirements of Rule 37(e)(2) for purposes of the sanctions that the court finds necessary to cure the plaintiff's prejudice. The court therefore need not search for alternative sanctions that would be less well suited to the harm the plaintiff suffered.

III. CONCLUSION

The motion for sanctions based on the failure to preserve ESI is granted. The allocation of burdens and presentation of evidence at trial will conform to the rulings in this decision.

All Citations

310 A.3d 548

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Footnotes

1 Citations in the form “PX __” refer to exhibits the plaintiff submitted by affidavit Dkts. 195, 204. Citations in the form “DX __” refer to exhibits the defendants submitted by affidavit. Dkt. 199.

2 Sarissa produced notes from two meetings subject to a Rule 510(f) order. Neither the production of the evidence nor this decision's reference to it waives any privilege that otherwise might attach to the documents.

3 *Moving to a New iPhone or iPad*, Apple Device Support Tutorials, Apple, https://ittraining.apple.com/tutorials/support/sup010 (last visited Jan. 26, 2024). Defense counsel agrees. *See* PX 19 at 3 (“I have personally replaced my own iPhones twice over the years, and to the best of my knowledge did not lose any data.”).

4 *See West v. Goodyear Tire & Rubber Co.,* 167 F.3d 776, 779 (2d Cir. 1999); *Matter of In re Skanska USA Civ. Se. Inc.*, 340 F.R.D. 180, 184 (N.D. Fla. 2021).

5 *Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226, 234 (D. Minn. 2019); *accord Flagg v. City of Detroit*, 252 F.R.D. 346, 352–53 (E.D. Mich. 2008).

6 *Living Color Enters., Inc. v. New Era Aquaculture, Ltd.*, 2016 WL 1105297, at *3 (S.D. Fla. Mar. 22, 2016).

7 Technically, that is an overstatement. The Court of Chancery has the discretionary authority to empanel a jury to try discrete factual issues. 10 *Del. C.* § 369 (“When matters of fact, proper to be tried by a jury, arise in any cause depending in Chancery, the Court of Chancery may order such facts to trial by issues at the Bar of the Superior Court.”). Today, that power is largely vestigial. *See Preston Hollow Cap. LLC v. Nuveen LLC*, 216 A.3d 1, 11 n. 64 (Del. Ch. 2019) (“[T]o the extent a jury in the Court of Chancery is not extinct, it is a vestigial structure, more evocative of the human appendix or coccyx than that vital organ, the Superior Court petit jury.”); *Getty Ref. & Mktg. Co. v. Park Oil, Inc.,* 385 A.2d 147, 151 (Del. Ch. 1978), ***aff'd***, 407 A.2d 533 (Del. 1979) (observing that “[t]he old procedure of framing of issues by the Court of Chancery for jury trial is now probably outmoded and this Court is certainly not equipped to hold jury trials itself even if permissible.”). Furthermore, “[a] jury trial in Chancery is advisory only. An advisory jury verdict which may be disregarded by the Chancery judge is not entirely equivalent to a jury verdict at law.” *Getty*, 385 A.2d at 151; *accord Scotton v. Wright*, 122 A. 541, 542 (Del. Ch. 1923) (“[T]he verdict of the jury on an issue sent by the Court of Chancery to be tried at the bar of the Superior Court, is not binding on the Chancellor; [ ] the verdict of the jury is only advisory ....”). Presumably in a hypothetical case where the Court of Chancery

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empowered an advisory jury, the court would have the inherent authority to grant the type of instruction contemplated by Federal Rule 37(e)(2)(B). Given the cosmic rarity of this possibility, Chancery Rule 37(e)(2) streamlines practice by omitting it.

8 *See, e.g.*, *Fortis Advisors LLC v. Johnson & Johnson*, C.A. No. 2020-0881-LWW, at 61–62, 78, 129–36 (Del. Ch. June 5, 2023) (TRANSCRIPT) (deferring ruling on spoliation motion until trial or a separate evidentiary hearing because the court "can't possibly make credibility determinations or assess [the custodian's] state of mind on the record that I have before me right now."); *Twitter, Inc. v. Musk*, 2022 WL 5078278, at *5 (Del. Ch. Oct. 5, 2022) (reserving ruling on a motion for adverse inference "pending post-trial briefing, when I have a fuller understanding of the record."); *Kan-Di-Ki v. Suer*, C.A. No. 7937-VCP, at 52–55 (Del. Ch. Sept. 24, 2014) (TRANSCRIPT) (deferring resolution of motion for sanctions at pre-trial conference); *Williams Companies, Inc. v. Energy Transfer LP*, 2020 WL 3581095, at *22 (Del. Ch. July 2, 2020) (ruling that the motion for sanctions at issue "should be dealt with at trial or a separate evidentiary hearing.").

9 *See GMS Indus. Supply, Inc. v. G&S Supply, LLC*, 2022 WL 853626, at *4 (E.D. Va. Mar. 22, 2022) (analyzing whether motion was filed late); *McEachron v. Glans*, 1999 WL 33601543, at *2 (N.D.N.Y. June 8, 1999) (collecting authorities). In those settings, courts have acknowledged that "spoliation sanctions motions often follow only where extensive ESI recovery efforts have failed, or after forensic review gives the movant a much better idea of the quantity and nature of unproduced, deleted ESI." *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 327 F.R.D. 96, 108 (E.D. Va. 2018); *accord GMS Indus.*, 2022 WL 853626, at *4.

10 *See Gruenstein v. Browning*, 2022 WL 3213261, at *3 (N.D. Ill. June 21, 2022) (listing factors); *GMS Indus.*, 2022 WL 853626, at *4 (same).

11 *See, e.g.*, *Gener8*, *LLC v. Castanon*, 2023 WL 6381635, at *17 (Del. Ch. Sept. 29, 2023) (tying duty of preservation to defendant's subjective anticipation of litigation while noting that the duty arguably arose earlier); *Beard Rsch., Inc. v. Kates*, 981 A.2d 1175, 1185 (Del. Ch. 2009) (same). For federal cases, *see, e.g.*, *Paisley Park*, 330 F.R.D. at 233.

12 *See, e.g.*, *Gener8*, 2023 WL 6381635, at *14 ("A party in litigation or who has reason to anticipate litigation has an affirmative duty to preserve evidence that might be relevant to the issues in the lawsuit." (quoting *TR Inv'rs, LLC v. Genger*, 2009 WL 4696062, at *17 (Del. Ch. Dec. 9, 2009)); *Beard Rsch.*, 981 A.2d at 1185 ("A party in litigation or who has reason to anticipate litigation has an affirmative duty to preserve evidence that might be relevant to the issues in the lawsuit."); *Triton Const. Co., Inc. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *8 (Del. Ch. May 18,

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2009) (“An affirmative duty to preserve evidence attaches upon the discovery of facts and circumstances that would lead to a conclusion that litigation is imminent or should otherwise be expected.”). For federal precedent, *see, e.g.*, *Gruenstein v. Browning*, 2022 WL 3213261, at *6 (“A duty to preserve evidence can arise before litigation starts, and Rule 37(e), which applies to ESI ‘that should have been preserved in the anticipation or conduct of litigation,’ expressly contemplates this scenario.”); *Hollis v. CEVA Logistics U.S., Inc.*, 603 F. Supp. 3d 611, 619 (N.D. Ill. 2022) (“The duty to preserve under Rule 37(e) is based on the common law, and so is triggered when litigation is commenced or reasonably anticipated.”); *Eshelman v. Puma Biotechnology, Inc.*, 2017 WL 2483800, at *4 (E.D.N.C. June 7, 2017) (acknowledging that the duty to preserve evidence arises not just during litigation but also before litigation when it is reasonably anticipated); *Core Labs. LP v. Spectrum Tracer Servs., L.L.C.*, 2016 WL 879324, at *1 (W.D. Okla. Mar. 7, 2016) (recognizing a duty to preserve evidence when a party knew or reasonably should have known that litigation is imminent); *Zubulake v. UBS Warburg LLC* (*Zubulake IV*), 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (“The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.” (quoting *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)).

13 *E.g.*, *Stinson v. City of New York*, 2016 WL 54684, at *4 (S.D.N.Y. Jan. 5, 2016) (finding that “summons quotas were a major issue in ... an earlier challenge to the NYPD's ‘stop and frisk’ program. Since the existence of an alleged quota was a ‘[h]otly contested’ issue in [the earlier case] and that case continued up to and beyond the filing of the Complaint in the instant litigation, the City has been on notice that evidence relating to an alleged summons quota is relevant to litigation since at least ... the date of the filing of the Complaint in [the earlier case], which contained significant quota-related allegations. The duty to preserve evidence therefore arose on that date.”) (internal citations omitted); *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1070 (N.D. Cal. 2006) (“[The defendant] should have remained on notice that litigation against them was probable even after the [initial] suit was dismissed. [The defendant] had already been sued once, and there were several indicators that they would be sued again .... Accordingly, [the defendant] had a continuing duty to preserve documents after the [initial] lawsuit was dismissed.”). *See generally The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* 44–47 (2007).

14 *E.g.*, *Skanska USA*, 340 F.R.D. at 186. So is a demand letter threatening litigation. *E.g.*, *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008) (tying preservation obligation to receipt of demand letter); *Does 1–5 v. City of Chicago*, 2019 WL 2994532, at *4 (N.D. Ill. July 9, 2019) (“A demand letter threatening

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litigation may trigger the duty to preserve documents within its scope."); *Stevenson v. City & Cty. of San Francisco*, 2015 WL 6177363, at *4 (N.D. Cal. Oct. 21, 2015) ("Before litigation begins, courts agree that the receipt of a demand letter, a request for evidence preservation, a threat of litigation, or a decision to pursue a claim will all trigger the duty to preserve evidence." (quoting *In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 299 F.R.D. 502, 512 (S.D. W.V. 2014) (citing cases)).

15 For the obligation to preserve Denner and DiPaolo's texts, the Sarissa Hold is sufficient. The earlier Bioverativ and Sanofi Holds only matter for the imaging of Denner's assistant's phone and for turning off the head trader's autodelete function.

16 *E.g.*, *Miramontes v. Peraton, Inc.*, 2023 WL 3855603, at *5 (N.D. Tex. June 6, 2023) (rejecting argument that the defendant did not need to preserve text messages because they were located on custodian's personal phone and holding "the Court finds persuasive Miramontes' evidence that Peraton did not issue company cell phones and Peraton employees regularly conducted business on their cell phones. Under these circumstances, the Court finds Peraton had control over the text messages ...."); *Colonies P'rs, L.P. v. Cty. of San Bernardino*, 2020 WL 1496444 (C.D. Cal. Feb. 27, 2020) (holding that the defendant had a duty to preserve employee's personal emails and text messages and stating "[a]dditionally, although the County did not necessarily have direct access to the personal emails and text messages, Ramos was an employee of the County engaging in County business and business that implicated Plaintiffs on his devices and campaign email. Additionally, as a Defendant in the case, and defending Ramos—an employee—and responsible for any potential judgment in Plaintiffs' favor, a duty to preserve ESI can be imputed to the County."), *report and recommendation adopted*, 2020 WL 1491339 (C.D. Cal. Mar. 27, 2020); *see also Alter v. Rocky Point Sch. Dist.*, 2014 WL 4966119, at *10 (E.D.N.Y. Sept. 30, 2014) ("Finally, Defendants claim that they were not obliged to preserve work-related ESI which employees such as Defendant Superintendent Ring utilized on their personal computers. However, to the extent that the School District employees had documents related to this matter, the information should have been preserved on whatever devices contained the information (*e.g.*[,] laptops, cellphones, and any personal digital devices capable of ESI storage."). *See generally The Sedona Conference Commentary on BYOD: Principles and Guidance for Developing Policies and Meeting Discovery Obligations*, 19 Sedona Conf. J. 495, 528 (2018) ("It should come as no surprise that ESI that falls within the scope of discovery is often stored on mobile devices. Organizations cannot ignore their discovery obligations merely because a device containing unique, relevant ESI is also used for personal purposes.");

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17 *Steves & Sons*, 327 F.R.D. at 107; *accord Agility Pub. Warehousing Co. K.S.C. v. Dep't of Def.*, 2017 WL 1214424, at *2 (D.D.C. Mar. 30, 2017).

18 Judge Iain Johnston's decision in *DR Distributors* takes a deep dive into the discovery process with a particular focus on ESI and attendant obligations. It also provides helpful citations to authoritative treatises and other sources. The analysis in *DR Distributors* is spot on for Delaware cases.

19 *See In re Shawe & Elting LLC*, 2016 WL 3951339, at *16 (Del. Ch. July 20, 2016), *aff'd sub nom. Shawe v. Elting*, 157 A.3d 142 (Del. 2017); *accord Steves & Sons*, 327 F.R.D. at 107 ("Once a party reasonably anticipates litigation, it must preserve what it knows, or reasonably should know, is relevant in the anticipated action, is reasonably calculated to lead to the discovery of admissible evidence, or is reasonably likely to be requested during discovery.") (cleaned up).

20 *DR Distribs.*, 513 F. Supp.3d at 933 ("The issuance of a litigation hold does not end counsel's duty in preserving ESI .... They must continue to monitor and supervise or participate in a party's efforts to comply with the duty to preserve.") (citations omitted)); *see Youngevity Int'l v. Smith*, 2020 WL 7048687, at *3 (S.D. Cal. July 28, 2020) (finding that litigation hold consisting of a conference call with unidentified defendants was insufficient where custodians "took no affirmative steps to preserve text messages, resulting in their deletion."); *CrossFit, Inc. v. Nat'l Strength & Conditioning Ass'n*, 2019 WL 6527951, at *9 (holding retention policies under litigation hold remained unreasonable); *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 983 (N.D. Cal. 2012) (finding steps taken to implement litigation hold were insufficient); *see also Procaps, S.A. v. Patheon, Inc.*, 2014 WL 800468, at *2 (S.D. Fla. Feb. 28, 2014) (awarding attorneys' fees, in part, because counsel "failed to realize that its client never actually implemented the litigation hold ....").

21 *See Skanska USA*, 340 F.R.D. at 186 ("[N]ot only did Skanska fail to collect the cell phone data when the litigation hold was put in place, but Skanska failed to ensure its employees, particularly those who had any role to play with regard to securing the barges or preparing for Hurricane Sally, understood its litigation hold."); *Alter*, 2014 WL 4966119, at *10 (finding it "troubling" that the litigation hold was not communicated to key players and holding overwriting backup drives constituted a breach of obligation).

22 *Steves & Sons*, 327 F.R.D. at 108 (observing that a party generally must "suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents.") (cleaned up)); *Zubulake IV*, 220 F.R.D. at 218 (same); *see Skanska USA*, 340 F.R.D. at 186 (finding that organization failed to meet its preservation obligations where it "failed [to] suspend its routine

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document destruction policies, which allowed employees to delete text messages, and did not require cell phone data to be backed up.").

23 *See Gener8*, 2023 WL 6381635, at *14 (finding that individual acted unreasonably when "[h]e did not disable the auto-delete function on his email" and "never stopped deleting his texts ...."). Many federal cases stand for the same proposition. *E.g.*, *Youngevity*, 2020 WL 7048687, at *2 ("The Relevant Defendants' failure to prevent destruction by backing up their phones' contents or disabling automatic deletion functions was not reasonable because they had control over their text messages and should have taken affirmative steps to prevent their destruction when they became aware of their potential relevance."); *CrossFit*, 2019 WL 6527951, at *8 (S.D. Cal. Dec. 4, 2019) (holding failure to modify default settings to prevent destruction of emails was not reasonable because the party was on notice of their duty to preserve); *Paisley Park*, 330 F.R.D. at 233–35 (finding spoliating party failed to take reasonable steps to preserve text messages when multiple defendants failed to suspend autodelete function on their phones).

24 *E.g.*, *Freeman v. Giuliani*, 2023 WL 5600316, at *13 (D.D.C. Aug. 30, 2023) ("With respect to preserving ESI on phones or other electronic devices, courts have normally held that litigants must prevent destruction of ESI on such devices by backing up the data to that device's cloud network."); *Youngevity*, 2020 WL 7048687, at *2 ("The Relevant Defendants' failure to prevent destruction by backing up their phones' contents or disabling automatic deletion functions was not reasonable because they had control over their text messages and should have taken affirmative steps to prevent their destruction when they became aware of their potential relevance."); *Laub v. Horbaczewski*, 2020 WL 9066078, at *4 (C.D. Cal. July 22, 2020) (finding plaintiff failed to take reasonable steps when he "chose not to backup his text messages that were stored on his iPhone."); *Paisley Park*, 330 F.R.D. at 233 (finding parties failed to take reasonable steps when they did not use the "relatively simple options to ensure that their text messages were backed up to cloud storage."); *Brewer v. Leprino Foods Co., Inc.*, 2019 WL 356657, at *10 (E.D. Cal. Jan. 29, 2019) (finding party failed to take reasonable steps where the was "no effort to back-up or preserve the Galaxy S3 prior to its loss ...."); (cleaned up); *Gaina v. Northridge Hosp. Med. Ctr.*, 2018 WL 6258895, at *5 (C.D. Cal. Nov. 21, 2018) (similar).

25 *Paisley Park*, 330 F.R.D. at 233; *accord Mod. Remodeling, Inc. v. Tripod Hldgs., LLC*, 2021 WL 3852323, at *10 (D. Md. Aug. 27, 2021); *see Steves & Son.*, 327 F.R.D. at 108–09 (explaining that to suspend an automatic delete policy would "at worst" clutter a party's inbox, which is a "reasonable burden to assume" in the context of litigation).

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26 *DR Distributors*, 513, F.Supp.3d at 935; *see Bd. of Regents of the Univ. of Neb. v. BASF Corp.*, 2007 WL 3342423, at *2, *6 (D. Neb. Nov. 5, 2007) (imposing sanctions where counsel simply relied on employees' representations about where responsive evidence could be found); *Tarlton v. Cumberland Cty. Corr. Facility*, 192 F.R.D. 165, 170 (D. N.J. 2000) ("[Defense c]ounsel had a duty to explain to their client what types of information would be relevant and responsive to discovery requests and ask how and where relevant documents may be maintained. ... It was not their option to simply react to plaintiff's fortuitous discovery of the existence of relevant documents by making disjointed searches, each time coming up with a few more documents, and each time representing that was all they had.").

27 *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 569 F. Supp. 3d 626, 636 (E.D. Mich. 2021) (cleaned up); *see Auriga Cap. Corp. v. Gatz Props. LLC*, 40 A.3d 839, 881 (Del. Ch. 2012) (noting that "[defendant] and his counsel also created evidentiary uncertainty by leaving to [the defendant] himself the primary role of collecting responsive documents, and having had [the defendant], who appears not to have been adequately counseled by his legal advisors, delete relevant documents while litigation was either pending or highly likely.") (footnotes omitted), *aff'd*, 59 A.3d 1206 (Del. 2012).

28 *Matthew Enter., Inc. v. Chrysler Grp. LLC*, 2016 WL 2957133, at *4 (N.D. Cal. May 23, 2016); *accord TLS Mgmt. & Mktg. Servs. LLC v. Rodriguez-Toledo*, 2017 WL 1155743, *1 (D.P.R. 2017); *Hynix Semiconductor Inc. v. Rambus Inc.*, 897 F. Supp. 2d 939, 981 (N.D. Cal. 2012) (quoting *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1328 (Fed. Cir. 2011)).

29 *E.g.*, *Ala. Aircraft*, 319 F.R.D. at 743–44; *GN Netcom, Inc. v. Plantronics, Inc.*, 2016 WL 3792833, at *9 (D. Del. July 12, 2016).

30 *See In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 792 (Del. Ch. 2011) (asserting that "the burden becomes relevant only when a judge is rooted on the fence post and thus in equipoise ...."), *aff'd sub nom. Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012); *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 548 (Del. Ch. 2003) (asserting that the practical effect of shifting the burden of persuasion under a preponderance standard "is slight" because "the outcome of very few cases hinges on what happens if ... the evidence is in equipoise."). If allocating the burden of proof was such a non-issue, then it would be strange for it to be an issue of law that warrants reversal when mis-imposed. *Compare State Farm Mut. Auto. Ins. Co. v. Spine Care Del., LLC*, 238 A.3d 850, 858–60 (Del. 2020) (reversing trial court for misallocating burden of proof), *with Jud. Watch, Inc. v. Univ.*

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of Del., 267 A.3d 996, 1008 (Del. 2021) (rejecting request for reversal based on misallocation of burden of proof).

31 For a concrete example of the latter scenario, assume three equally likely scenarios. With each one-third likely, none prevails by a preponderance. For a concrete example of the former scenario, recall the debates over appraisal arbitrage and the inability of anyone to prove under the federally imposed system of immobilized record ownership how individual shares were voted. Whoever bore the burden of proof would lose. If an investor bought shares in the public market after the record date, no one could match the shares to a proxy and determine how the shares were voted. If the investor bore the burden of proving that those shares were not voted in favor of the merger, then the investor could not seek appraisal. *See In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 WL 1378345, at *1–2 (Del. Ch. May 2, 2007).

For a more recent example, consider the problem of proving whether a dispositive number of stockholders relied on a material misstatement or omission for purposes of establishing damages for a disclosure claim. As a practical matter, it is impossible to gather first-hand evidence about whether thousands of stockholders relied on a particular misstatement or omission. If a class plaintiff bears the burden of proving reliance, then class claims for damages from disclosure claims cannot succeed. *See In re Columbia Pipeline Grp., Merger Litig.*, 299 A.3d 393, 494 (Del. Ch. 2023) ("The only reasonable takeaway from the Dismissal Decision was that the plaintiffs would have to prove reliance, causation, and quantifiable damages. TransCanada's post-trial argument called attention to the implications of such a rule—a practical impossibility to recover class-wide compensatory damages for breaches of the duty of disclosure.").

32 *See In re PLX Tech. Inc. S'holders Litig.* 2018 WL 5018535, at *49 (Del. Ch. Oct. 16, 2018) ("In this case, Singer was a co-managing member of Potomac and its agent, and his knowledge is imputed to Potomac in those capacities."), *aff'd*, 211 A.3d 137 (Del. 2019); *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 642–43 (Del. Ch. 2013) (imputing knowledge of fund principals to investment funds for purposes of "knowing participation" element of aiding and abetting claim), *abrogated in part on other grounds by El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016) (rejecting analysis of dilution claim as having both direct and derivative dimensions) *see also Metro. Life Ins. Co. v. Tremont Gp. Hldgs., Inc.*, 2012 WL 6632681, at *19 (Del. Ch. Dec. 20, 2012); *Khanna v. McMinn*, 2006 WL 1388744, at *27 (Del. Ch. May 9, 2006); *Carlson v. Hallinan*, 925 A.2d 506, 542 (Del. Ch. 2006). *Cf. Forsythe v. ESC Fund Mgmt. Co., Inc.*, 2007 WL 2982247, at *13 (Del. Ch. Oct. 9, 2007) ("These investment decisions form the basis of the plaintiffs'

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breach of fiduciary duty claims. Therefore, the court may infer CIBC's knowledge of the Special Limited Partner's and Investment Advisor's breaches of fiduciary duty.”).

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UNPUBLISHED OPINION. CHECK
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Court of Chancery of Delaware.

Stewart N. GOLDSTEIN, M.D.,
individually and on behalf of all
others similarly situated, Plaintiff,
v.
Alexander J. DENNER, Sarissa Capital
Management, L.P., Sarissa Capital
Domestic Fund LP, Sarissa Capital
Offshore Master Fund LP, and Sarissa
Capital Management GP LLC, Defendants.

C.A. No. 2020-1061-JTL
|
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Attorneys and Law Firms

Kevin H. Davenport, John G. Day, Jason W. Rigby, Kirsten M. Valania, PRICKETT, JONES & ELLIOTT, P.A., Wilmington, Delaware; R. Bruce McNew, COOCH & TAYLOR P.A., Wilmington, Delaware; Christopher H. Lyons, ROBBINS GELLER RUDMAN & DOWD LLP, Wilmington, Delaware; Randall J. Baron, Rick T. Atwood, ROBBINS GELLER RUDMAN & DOWD LLP, San Diego, California; Brett Middleton, JOHNSON FISTEL, LLP, San Diego, California; Attorneys for Plaintiff.

Stephen E. Jenkins, Richard D. Heins, ASHBY & GEDDES, P.A., Wilmington, Delaware; Tariq Mundiya, Sameer Advani, Richard Li, M. Annie Houghton-Larsen, WILLKIE FARR & GALLAGHER LLP, New York, New York; Attorneys for Defendants Alexander J. Denner, Sarissa Capital Management L.P., Sarissa Capital Domestic Fund LP, Sarissa Capital Offshore Master Fund LP, and Sarissa Capital Management GP LLC.

MEMORANDUM OPINION DENYING CERTIFICATION OF INTERLOCUTORY APPEAL

LASTER, V.C.

***1** Defendant Alexander Denner is the principal of Sarissa Capital, an activist hedge fund.[1] In 2017, he was also a director of Bioverativ, Inc., a publicly traded biopharmaceutical company. The plaintiff contends that Denner and Sarissa engaged in insider trading after Sanofi S.A. approached Denner about acquiring Bioverativ.

After the close of discovery, the plaintiff moved for sanctions (the "Sanctions Motion"). The Sanctions Motion invoked Court of Chancery Rule 37(e) and argued that the defendants failed to preserve electronically stored information ("ESI").

The defendants did not dispute the operative facts:

- None of the Sarissa custodians had any responsive texts.

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- Denner does not know when he lost his texts. He thinks he may have lost them when he upgraded his phone in October 2021, after the plaintiff served his document requests in this action.

- Mark DiPaolo, Sarissa's general counsel, also does not know when he lost his texts. He thinks he may have lost them when he had his phone repaired in October 2020, after dropping it into a swimming pool.

- In 2018, Denner received two litigation holds instructing him to take affirmative steps to preserve his texts.

- In 2019, the SEC served Denner's hedge fund with two subpoenas that encompassed the events now at issue in this action.

- In response to the SEC subpoenas, DiPaolo issued a litigation hold instructing hedge fund personnel, including Denner, to take affirmative steps to preserve their texts.

- Denner and DiPaolo did not take affirmative steps to preserve their texts.

- Other hedge fund personnel did not take affirmative steps to preserve their texts.

- Sarissa's outside counsel asked Denner to consult with them before replacing his phone.

- Denner replaced his phone in October 2021 without consulting with outside counsel.

- In 2022, other parties produced texts that Denner sent between 2017 and 2018.

By opinion dated January 26, 2024, the court granted the Sanctions Motion (the "Opinion").[2] The Opinion found that ESI had been lost. The Opinion found that the defendants had not taken any affirmative steps to preserve their texts in response to the litigation holds. No one collected the defendants' texts. No one backed up their texts. Denner and DiPaolo did not preserve their phones. No one imaged any devices to preserve the data.

The Opinion found that the failure to preserve the texts caused prejudice to the plaintiff. The texts that other parties produced showed that Denner texted about Bioverativ during the relevant time period. That made it probable that Denner texted about other Bioverativ-related events, such as Sanofi's approach and Sarissa's trading. The failure to preserve the texts meant the plaintiff could not use them affirmatively. The plaintiff also could not use them defensively to impeach the testimony of Sarissa's witnesses.

***2** As sanctions, the plaintiff asked the court to:

- presume that when Denner and Sarissa purchased stock, they were motivated by Sanofi's initial expression of interest;

- preclude the defendants from offering any fact or expert testimony that would disavow *scienter*;

- preclude the defendants from offering any fact or expert testimony about alternative reasons for Sarissa's trades, such as a preexisting plan;

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- presume that the destroyed texts would have supported the plaintiff's argument that the sale process fell outside the range of reasonableness because Denner maneuvered to secure a near-term sale that would lock in the profits from his insider trading.

Under Rule 37(e), those sanctions required either a finding of intentional non-preservation or recklessness.

The Opinion held that the defendants had acted recklessly. Denner and DiPaolo submitted affidavits in which they claimed they had not acted recklessly, but those assertions only reflected their subjective beliefs. The three litigation holds established that they knew about their preservation obligations, yet they did nothing to preserve their texts. Outside counsel told Denner to consult with them before replacing his phone, but he did not do that.

The Opinion did not grant all of the sanctions that the plaintiff requested. The Opinion granted the two adverse inferences that the plaintiff sought. The court did not grant either of the requested preclusion orders. Instead, the Opinion increased the defendants' burden of proof by one level, from a preponderance of the evidence to clear and convincing evidence.

The defendants have asked the court to certify an interlocutory appeal (the "Application"). The Application badly mischaracterizes the Opinion. In their zeal to appeal, the defendants "emulate[ ] populist pundits from the extremes of the political spectrum who score points with their base by misleadingly reducing meaningful issues to simplistic sound bites."[3]

This memorandum opinion denies the Application. It is lengthy because, as Chief Justice Strine observed while serving on this court, "it is more time-consuming to clean up the pizza thrown at the wall than it is to throw it."[4] The Application splatters a lot of accusations across the wall that need cleaning up.

At bottom, the Opinion does not meet the substantial issue requirement. The Opinion also does not warrant appellate review now. Trial is scheduled to begin in April 2024, just two months from now. The defendants could prevail at trial, which would render the current dispute about the Sanctions Opinion moot. The proper time for appellate review is after a final order has been entered.

I. FACTUAL BACKGROUND

The facts are drawn from the Opinion, which drew on the record presented in connection with the Sanctions Motion. Just as some understanding of the underlying case was necessary for the ruling on the Sanctions Motion, some understanding of the underlying case is necessary for the ruling on the Application.

***3** In their effort to portray the Opinion as an outlier that warrants immediate reversal, the defendants repeatedly assert that the court made erroneous findings of fact.[5] That is not true. A discovery ruling does not make findings of fact. It describes the record as it exists for purposes of the discovery motion.[6] The

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Opinion did not make any findings on the merits that could be law of the case for trial.

Based on their misunderstanding that the Opinion made findings of fact, the defendants attack the Opinion for failing to recognize that they should win on the merits. They insist that,

> Defendants filed documentary evidence flatly contradicting any insider trading allegations: Defendants received an email from Bioverativ's chairman that the Sanofi matter was "closed," confirmed that fact with Bioverativ's outside counsel, pre-cleared their trades with Bioverativ's inside counsel, and then disclosed those trades publicly through contemporaneous Form 4s. [7]

The defendants then proceed to criticize the Opinion for not accepting their assertions. But the plaintiff has responses to each point, and the issues remain contested. While the defendants may ultimately prevail, the Opinion was not deciding the merits. It was deciding the Sanctions Motion. A court does not decide a discovery motion based on who will win at trial. A court decides a discovery motion based on what happened during discovery.

***4** The defendants' factual attacks on the Opinion are thus generally misplaced. The following account includes more specific responses to those attacks.

A. Sanofi's Approach

In May 2017, Sanofi approached Denner and Brian S. Posner, another director of Bioverativ. Sanofi expressed interest in acquiring Bioverativ for $90 per share. Bioverativ's stock closed that day at $54.86 per share, so the proposal represented a 64% premium to market. Denner and Posner told Sanofi that the time was not right for an acquisition. No one disputes this.

There are factual disputes about what happened next. The record for the Sanctions Motion indicated that Posner reported to the Board about Sanofi's interest. But the record did not include any contemporaneous documents evidencing that he shared the price. The deposition testimony that the parties submitted showed that except for Posner and Denner, none of the Bioverativ directors recalled knowing the price. The plaintiff contends that Posner did not share the price.

The Opinion described the record as it existed for purposes of the Sanctions Motion. It stated:

> Denner and Posner told Sanofi that the time was not right for an acquisition. The discovery record to date indicates that Posner reported Sanofi's interest to Bioverativ's other directors, but did not mention the price. There

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> are no contemporaneous documents evidencing board consideration or acknowledgement of the offer, and there was no board vote on a response. All of the Bioverativ directors testified that they knew about Sanofi's approach. Except for Posner and Denner, none recalled knowing the price. A contemporaneous email from Posner to outside counsel references the Sanofi approach without mentioning the price. [8]

That was an accurate description. The evidence at trial may show something different.

B. Sarissa Buys Stock.

Just days after Denner's meeting with Sanofi, Sarissa's head trader began purchasing Bioverativ stock.

- On May 24, 2017, Sarissa purchased 340,000 shares.
- On May 25, 2017, Sarissa purchased 130,000 shares.
- On May 26, 2017, Sarissa purchased 450,000 shares.
- On May 30, 2017, Sarissa purchased 90,000 shares.

Before those purchases, Sarissa only owned 155,000 shares. Within a week after Denner's meeting with Sanofi, Sarissa had purchased 1,010,000 shares for $56.3 million. Bioverativ went from being 3.3% of Sarissa's portfolio to 27.7%.

No one disputes this. Instead, the critical issue in the case is whether by engaging in those trades, Denner breached his fiduciary duties to Bioverativ and its stockholders. Not surprisingly, there are factual disputes about what various participants knew or believed when Denner and Sarissa made those trades.

1. The Dispute Over DiFabio's Pre-Clearance Of The Trades

One of the defendants' arguments on the merits is that DiPaolo asked Andrea DiFabio, the general counsel of Bioverativ, whether Sarissa could trade and that DiFabio gave Sarissa the go-ahead. The defendants contend that the Opinion "omits crucial discussions where DiFabio (who will testify at trial) consulted Posner and outside counsel *before* responding to DiPaolo." [9]

In the Sanctions Motion, the plaintiff argued that DiPaolo did not mention Sanofi's $90 per share offer in the email he sent to DiFabio, and DiFabio testified that she did not know about it. [10] Thus, while it is true that DiFabio told DiPaolo that she did not know of anything that would bar Sarissa from trading, it is not clear that she was in a position to clear Sarissa's trades.

***5** The Opinion described the record as it existed for purposes of the Sanctions Motion. It stated:

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> Before Sarissa's first purchase, its general counsel (Mark DiPaolo) emailed Bioverativ's general counsel (Andrea DiFabio) to ask if she was aware of any material non-public information that could limit Sarissa's ability to trade. DiPaolo did not mention Sanofi's $90 per share offer, and DiFabio testified that she did not know about it. She therefore told DiPaolo that she did not know of anything. [11]

That was an accurate description of what the record showed. The evidence at trial may show something different.

2. Factual Disputes Related To Sarissa's Intent

One of the issues at trial will be whether Denner and Sarissa acted with *scienter* by trading based on what they knew about Sanofi's approach. There are several disputes of fact that are relevant to a finding of intent. The Opinion did not resolve any of them.

a. Whether There Was A Pre-Existing Plan

One issue pertinent to intent is whether Denner and Sarissa had already planned to rapidly accumulate a massive position in Bioverativ stock such that Sanofi's approach had nothing to do with it. The Opinion stated: "There is no contemporaneous evidence of any prior plan to rapidly acquire such a large position." [12] That is what the record on the Sanctions Motion showed.

The defendants now complain that the court made this observation "even though Defendants' business model includes acquiring shares during open trading windows ...." [13] A business model may well be relevant to whether the defendants had such a plan, but it is not contemporaneous evidence of such a plan.

The defendants also complain that "contemporaneous evidence shows that Paglia and Posner (who will testify at trial) were aware of Defendants' desire to increase their position." [14] One of the documents the defendants cite is a joking email sent three months before Sanofi's approach. Denner said he was ill and Paglia responds, "You are sick because BIVV keeps rising and you cannot buy it!! Feel better." [15] The other exhibits relate to the trading that Sarissa engaged in. None reflect a prior plan to rapidly acquire Bioverativ stock.

The Opinion thus correctly described the record for purposes of the Sanctions Motion. There was no contemporaneous evidence of a plan to buy such a large block of Bioverativ stock. The record also did not include any internal Sarissa communications about such a plan. The one exception was an email in which Denner told the head trader to "Keep going." [16] The defendants now say that they "produced numerous emails relating to the trades—which

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would have been part of the trial record."[17] Thirteen of the twenty-one were not included with the Sanctions Motion.[18] Most are external communications with Bioverativ or internal communications within Bioverativ. Only three are internal communications within Sarissa.[19] Two are "FYI" emails about communications with Bioverativ.[20] None contain instructions to start buying. None express or allude to a rationale for buying. None set parameters for the purchases. None provide a rationale for the size of the individual or total purchases. None contain instructions to stop buying.

***6** The Opinion thus correctly stated: "There is no contemporaneous evidence of any prior plan to rapidly acquire such a large position."[21] The defendants may well prove otherwise at trial, but that is what the record on the Sanctions Motion showed.

b. Whether Sanofi Was Likely To Come Back

Another fact pertinent to intent is whether Sanofi was likely to come back. If not, then it becomes less likely that Sanofi's approach motived Denner and Sarissa's trading.

In the Application the defendants twice observe that Posner circulated an email in which he reported that he had spoken with Sanofi's Chairman and that the Chairman said he viewed the discussions as "closed."[22] They complain that the Opinion did not focus on this exchange.

Posner's email supports the defendants' position. But the record shows that Sanofi did not act like the discussions were closed and did in fact come back. Moreover, what matters is not what Posner said (although that is relevant evidence), but what Denner knew. The Opinion did not make any factual findings on those points. They remain disputed issues for trial.

c. Who Else Traded

A third intent-related fact is whether anyone else traded after Sanofi's approach. If the only individuals who knew about the price were Denner and Posner, and if they behaved differently than the other directors, then that could support an inference of intent.

The Opinion stated: "Posner was the only other Bioverativ director who knew about the price. He bought 2,000 shares for approximately $53.80 per share, representing a total investment of $107,600. No one has suggested that the other Bioverativ directors suddenly purchased shares."[23]

On this point, the Opinion was mistaken. Paglia also purchased 2,000 shares during the trading window for approximately $57.76 per share.

That error did not affect the outcome in the Opinion. The defendants are free to emphasize Paglia's trading at trial. If they wish, they can remind the court that the Opinion got that point wrong. After trial, when determining whether the defendants acted with *scienter*, the court will take into account Paglia's trading.

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d. The Fact That The Defendants' Disclosed Their Trades

In the Application, the defendants stress that they disclosed their trades on Form 4s.[24] They made similar points in response to the Sanctions Motion.[25] They seem to think that the filings are relevant to their lack of intent.

At some point, the defendants will have to explain how disclosure of their trades fits into their theory of the case. The federal securities laws required that the defendants disclose their trades. If they had not disclosed their trades, they would have had another legal problem, in addition to the legal problem that the plaintiff contends they had. This case is not about whether they disclosed their trades. This case is about what they knew when they made their trades.

This is another issue that the defendants can address at trial. It had no bearing on the Opinion.

e. The Dispute Over The Role Of Section 16

A final intent-related issue is the role of potential liability for short-swing profits under Section 16 of the federal securities laws. One of the defendants' arguments on the merits is that the timing of Bioverativ's re-engagement with Sanofi, just over six months after Sanofi first approached Denner, had nothing to do with the short-swing profit period under Section 16. The plaintiff, by contrast, has contended from the outset that Section 16 applies and affected the timing Bioverativ's re-engagement.[26]

***7** The Opinion described this issue as follows:

> Sarissa stood to make massive profits if Sanofi acquired Bioverativ, but Section 16(b) of the Securities Exchange Act of 1934 loomed as an impediment. That statute requires that an insider disgorge short-swing profits from any sale that takes place less than six months after the purchase. Denner's solution was to delay any engagement with Sanofi so that the sale would take place after the short-swing period closed.
>
> When Sanofi reapproached in June 2017 and again in September 2017, Denner responded that Bioverativ was not for sale. The discovery record indicates that he did not report those contacts to the board. *See* PX 11.
>
> By October 2017, the short-swing period was about to expire. This time, when Sanofi came calling, Denner proposed a single-bidder process. The board knew nothing about that inquiry.
>
> Several weeks later, in late November 2017, Sanofi offered to acquire Bioverativ for $98.50 per share. Bioverativ's management team and its financial advisors valued the company at more than $150 per share. After receiving Sanofi's offer, the directors asked for a higher bid, and Sanofi increased its offer to $101.50. At that point, the directors countered at $105 per share, almost one-third below the standalone valuation. Sanofi accepted.[27]

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No one disputes the timing or substance of these events. No one disputes that "Sarissa stood to make massive profits if Sanofi acquired Bioverativ."[28]

To attack the Opinion, the defendants say that Section 16 "does not apply to the Sanofi transaction as a matter of law."[29] The Opinion did not rule on a motion for summary judgment. It ruled on the Sanctions Motion. The defendants are free to raise what they seem to think is a case-dispositive legal argument in their post-trial briefing.

The defendants also attack the Opinion by contending that "[t]here is zero evidence showing that the Denner [sic] was motivated by the Section 16 short-swing period ...."[30] Circumstantial evidence is evidence, and the timing and substance of how events transpired is circumstantial evidence.

Regardless, the Opinion did not make a factual finding about Denner's intent. The defendants are free to present their evidence at trial on that issue.

C. The Negotiations

The record on the Sanctions Motion indicated that Denner led the negotiations for Bioverativ. His counterpart for Sanofi was Stephen Sands, a Lazard banker. Denner and Sands had known each other professionally for over a decade. No one disputes this.

The record on the Sanctions Motion showed that Denner and Sands texted during the negotiations. As the Opinion stated: "None of those texts exist."[31]

Now, the defendants claim otherwise, but in a way that confirms the point. They say: "Sands testified that he copies his substantive texts into his emails, which included a text with Denner."[32] In other words, none of the texts exist as texts, but the substance of one text has survived as an email. Even non-substantive texts are important for establishing timelines and revealing when communications occurred. The Opinion correctly observed that, "[n]one of those texts exist."[33]

D. The Three Litigation Holds

***8** Now comes the part of the factual story where the defendants have no responses. Over the next two years, Denner and Sarissa received three litigation holds that instructed them to preserve their texts. No one disputes this.

1. The Bioverativ Hold

On January 21, 2018, Bioverativ and Sanofi announced their transaction. On February 8, 2018, Bioverativ filed its proxy statement.

Stockholders filed putative class actions challenging the sufficiency of the proxy statement. On February 21, 2018, Bioverativ's general counsel circulated a litigation hold (the "Bioverativ Hold"). The Bioverativ Hold instructed recipients to take steps to preserve ESI. The Bioverativ Hold expressly extended to text messages. No one disputes this.

Denner received the Bioverativ Hold. When briefing the Sanctions Motion, Sarissa did not

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submit any evidence suggesting that Denner took any action in response to the Bioverativ Hold. They did not submit any evidence suggesting that Sarissa took any action, either. The Opinion noted both facts and observed that if they had taken any action, then the lost text messages would have been preserved. [34]

2. The Sanofi Hold

On March 15, 2018, Sanofi issued a litigation hold (the "Sanofi Hold"). The Sanofi Hold specifically called out text messages on smart phones. It also specifically identified the need to take affirmative steps to preserve ESI. No one disputes this.

Denner received the Sanofi Hold. When briefing the Sanctions Motion, the defendants did not submit any evidence suggesting that Denner took any action in response to the Sanofi Hold. They did not submit any evidence suggesting that Sarissa took any action, either. The Opinion noted both facts and observed that if they had taken any action, then the lost text messages would have been preserved. [35]

3. The Sarissa Hold

On September 4, 2019, the SEC served subpoenas on Denner and Sarissa. They sought: "All Documents Concerning [Bioverativ] or trading in the securities of [Bioverativ]," "All Communications with Sanofi," and "All Communications with Denner Concerning Sanofi, [Bioverativ], or trading in the securities of [Bioverativ]." [36] On September 5, 2019, DiPaolo circulated a litigation hold (the "Sarissa Hold") to "All staff." [37]

The Sarissa Hold instructed all staff to "preserve any and all documents and/or communications with, concerning, relating to, or in any way discussing or mentioning Bioverativ, Inc. or Sanofi S.A." [38] It continued: "**Until otherwise notified, do not discard, delete, alter or destroy any such materials in your possession or under your control even if such documents would otherwise be routinely discarded or destroyed in the ordinary course of your business.**" [39] The Sarissa Hold expressly encompassed texts on personal devices. No one disputes this.

After circulating the Sarissa Hold, DiPaolo consulted with outside counsel about how to implement it. Outside counsel asked DiPaolo about texts. DiPaolo responded that he did not text for business and that he did not believe Denner did either, but he would verify that. DiPaolo and outside counsel decided not to collect texts at that time, but outside counsel asked that Sarissa's users preserve texts and check with counsel before buying a new phone and transferring data to a new device.

***9** DiPaolo averred in an affidavit that he personally went through Denner's phone looking for text messages relating to "Sarissa's purchases of Bioverativ securities." [40] The Opinion noted that the scope of the SEC subpoenas was much broader: It sought "[a]ll Communications with Denner Concerning Sanofi, [Bioverativ], or trading in the securities of [Bioverativ]." [41]

DiPaolo claims he did not find any responsive text messages. In this action, other parties have produced text messages from Denner

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relating to Bioverativ. There are also emails referring to text messages from Denner relating to Bioverativ.

At a follow-up meeting with outside counsel, DiPaolo reported that Sarissa's policies prohibited texting for business purposes. He reiterated that he had no recollection of texting himself. He said that he had reviewed Denner's texts and found nothing.

Based on DiPaolo's representations, outside counsel agreed to "table any collection of mobile data/text messages at this time but asked [Denner] to preserve this data."[42] Outside counsel asked Denner to contact counsel "for guidance should he want to buy a new device or discard the current device."[43]

When briefing the Sanctions Motion, the defendants did not submit any evidence suggesting that Denner took any action to preserve his data. There was also no evidence that Denner contacted anyone for guidance before replacing his phone. The Opinion stated: "There is no evidence that any steps were taken to preserve Denner's data. There is no evidence that Denner contacted anyone for guidance before replacing his phone."[44] No one disputes this.

DiPaolo sent the Sarissa Hold, so he necessarily knew about it. When briefing the Sanctions Motion, the defendants did not submit any evidence indicating that he did anything to preserve his data.[45] No one disputes this.

E. The Pool Incident

After the conclusion of briefing on the Sanctions Motion, and after an oral argument in which the defendants' counsel could not answer basic questions about their collection efforts, the court asked the defendants to provide additional documentation regarding what they did to preserve and collect documents. At that point, DiPaolo submitted an affidavit in which he described for the first time how he thought he lost his texts. He averred that he was personally cleaning his swimming pool when he accidentally dropped his phone into the water. He has a receipt showing he had the phone repaired on September 28, 2020.[46]

DiPaolo's affidavit did not suggest that he lost other data, such as pictures, applications, or contacts. The Opinion noted that he did not seem to have suffered a traumatic event involving the loss of treasured photos or the hassle of restoring data from other sources. Instead, DiPaolo barely remembered the incident.[47] The defendants now take umbrage at these observations, which the Application describes as "scathing remarks."[48] In the Application, the defendants now say that a family member has since reminded DiPaolo that he had indeed lost photos of his deceased brother.[49] That is the type of information that the defendants should have provided in connection with the Sanctions Motion. They did not, but they can present that evidence at trial. It is relevant to whether DiPaolo acted intentionally, and the court will consider it for that purpose. It is not relevant to whether he recklessly failed to preserve his texts.

***10** The Opinion also observed that DiPaolo believed he lost his texts as a result of the

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repair, yet the missing text messages are not tied to September 28, 2020.[50] He has no text messages from before October 9, 2020. The Opinion noted that it would be strange for a repair to cause the loss of text messages sent during the twelve days after the repair took place.[51] The Application does not address that discontinuity.

F. This Lawsuit

On December 15, 2020, the plaintiff filed this lawsuit. Based on Sarissa's stock purchases, the plaintiff asserts a claim against Denner for breach of fiduciary duty, plus a claim against Sarissa for aiding and abetting Denner's breaches. In substance, the plaintiff asserts that Denner and Sarissa engaged in insider trading. The plaintiff also contended that Denner and the other directors breached their fiduciary duties by engaging in a sale process for Bioverativ that fell outside the range of reasonableness.

Denner and Sarissa moved to dismiss the claims against them under Rule 12(b)(6). After completing briefing, the plaintiff served document requests in September 2021. The defendants responded by moving to stay discovery. On November 18, 2021, the court denied the defendants' motion for a stay.[52]

It was only after the court's order that defense counsel began thinking about what sources of evidence would be responsive and should be identified, preserved, collected, reviewed, and potentially produced. The Opinion observed, "[t]hat was too late."[53] A duty to preserve evidence attaches when a party reasonably anticipates litigation. No one disputes that.

The Opinion noted that defense counsel was too late in another, more specific sense, because a second incident had occurred involving lost ESI:

> To repeat, the plaintiff served document requests in September 2021. Soon after, for reasons that no one has been able to explain, Denner lost all of his texts from before an as-yet unidentified date in October 2021. Denner recalls upgrading his iPhone to a new model, and he thinks the upgrade caused the loss. That would be bizarre, because Apple facilitates upgrades by transferring data to the new iPhone from the cloud. No one on the defendants' side has been able to explain why Denner's iPhone upgrade could have caused the loss of his texts.
>
> There is no evidence that Denner consulted with anyone before replacing his iPhone. The litigation holds told him to do that. Outside counsel asked him to do that.[54]

The Opinion observed that like DiPaolo, Denner has not suggested that he lost other data, such as pictures, applications, or contacts. Like DiPaolo, Denner barely remembered. Based on the record presented in connection with the Sanctions Motion, both DiPaolo's pool mishap and Denner's atypical iPhone upgrade seemed to have affected their text messages and nothing else.

G. The Rulings On The Motions To Dismiss

In May 2022, the court issued a decision that denied the defendants motion to dismiss the sale process claims (the "Sale Process Decision").[55] In June, the court issued a

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decision that denied the defendants' motion to dismiss the insider trading claims (the "Insider Trading Decision"). [56]

The Application takes gratuitous shots at the Insider Trading Decision. It asserts that "Plaintiff's *Brophy* claim never should have survived dismissal [because] Plaintiff lacks post-closing derivative standing under *Morris v. Spectra Energy Partners*, 246 A.3d 121, 134 (Del. 2021)," and it claims that the Insider Trading Decision "created a new test conferring standing on Plaintiff ...." [57]

***11** That is not correct. As the Insider Trading Decision explained, the Delaware Supreme Court held in *Parnes* [58] that a plaintiff has standing to challenge the fairness of a merger if it is reasonably conceivable that the pending derivative claim (or the conduct that otherwise would support a derivative claim) affected *either* (i) the fairness of the merger price *or* (ii) the fairness of the process that led to the merger. [59] The Insider Trading Decision noted that "the weight of Delaware authority has interpreted *Parnes* as recognizing that a stockholder can assert a direct claim challenging a merger based on process challenges alone." [60] In other words, "standing exists to assert a direct claim when a plaintiff alleges breaches of fiduciary duty that resulted in either an unfair price or an unfair process." [61]

The *Morris* decision that the defendants cite formalized the test for the first *Parnes* path; it did not rule out the second. [62] The Insider Trading Decision found it reasonably conceivable that the second path gave the plaintiff standing to challenge the merger. [63] That was not a "new test" that conflicted with *Morris*. It was an application of *Parnes* that *Morris* left open.

As the defendants concede, the Application does not seek to appeal the Insider Trading Decision. [64] The defendants' passing shot at the Insider Trading Decision is part of the pizza sauce splattered on the wall.

H. The Defendants Fail To Produce Any Texts.

After the denial of the motions to dismiss, the parties proceeded with discovery. Denner and Sarissa's production did not contain any texts. Other parties produced texts from Denner. Two directors produced forty-five texts, including texts sent during board meetings in which Denner complained about management's opposition to the Sanofi transaction.

The defendants assert that "[n]one of the texts produced in the litigation are 'favorable' to Plaintiff." [65] In a strict sense, that's true. But they show that Denner texted about Bioverativ during the negotiations with Sanofi, contrary to Denner and DiPaolo's assertions. No one will ever know what other texts might have shown or how helpful they could have been, because the defendants did not preserve them. As the defendants correctly point out, "there is no evidence that any missing texts would have helped Plaintiff." [66] That is unfortunately correct, and it is only correct because the defendants did not preserve any of their texts.

On June 14, 2022, the plaintiff informed defense counsel that Denner appeared to have

texted for business purposes. The plaintiff asked defense counsel to add DiPaolo to the search protocol. They also asked to add Sarissa's Chief Compliance Officer (Patrice Bonfiglio), Sarissa's head trader (Pat Garofalo), and Denner's assistant.

At this point, defense counsel finally had one of its lawyers inspect Denner's devices. The inspection confirmed that Denner did not have any texts from before October 2021. Counsel checked Denner's iPad and saw texts from March 2020, but not earlier. Denner reported that he had not intentionally deleted any texts relevant to this action and said he did not understand why his text messages from the 2017–2018 time period were missing. Denner suggested that he had upgraded his iPhone and then provided his old phone to one of his sons. Later that month, DiPaolo reported that Denner's sons had newer devices that were not in existence at the time of the Bioverativ-Sanofi transaction.

Defense counsel discussed the issue of texts with DiPaolo and Bonfiglio, but did not conduct any formal custodian interviews. DiPaolo and Bonfiglio each represented that they had adhered to Sarissa's policy of not texting for business. Defense counsel accepted that representation and decided again against imaging Denner and Bonfiglio's phones or taking any other action to preserve text messages.

***12** In October 2022, defense counsel finally answered the plaintiff's interrogatories, which included a question about whether the defendants had preserved potentially responsive information. Seven months after learning that Denner had no texts from before October 2021, defense counsel served the following response:

> [O]n or around October 2021, Alex Denner replaced his iPhone solely for the purposes of upgrading the device, a process which the Sarissa Defendants believe inadvertently caused his text messages prior to that date to no longer be accessible or retrievable from his current device. By way of further response, the Sarissa Defendants state that, in the Sarissa Capital Management LP Compliance Manual and Code of Ethics, Sarissa employees are not permitted to use text messages for official business correspondence (see SAR-BIVVID00000183). The Sarissa Defendants have sought to obtain iCloud backups, have contacted Verizon, have conducted searches of Denner's current iPhone and iPad devices for backup phone data (including with the assistance of Sarissa's outside counsel ...), and have been unable to identify any means of recovering any text messages during the relevant

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> time period agreed-to by the parties. [67]

The defendants thus asserted that Denner lost his text messages on some unidentified date in October 2021, one year before. That was after Denner had received three litigation hold notices, after this litigation began, after the plaintiff served discovery requests seeking texts, and just before the defendants moved to stay discovery.

The plaintiff understandably viewed Denner's upgrade story as inherently suspicious. During an upgrade, data is transferred to the new iPhone. Denner and Sarissa thus offered an explanation for his lost texts that made no sense.

Equally important, the defendants' response was misleadingly incomplete. The response said nothing about DiPaolo's prior loss of all of his texts due to the post-swimming-pool-incident repair.

I. More Issues With Texts

On December 7, 2022, during deposition preparation, Sarissa's head trader (Garofalo) informed defense counsel that he recalled using texts to communicate with Denner. But he said he had no recollection of any texts relating to Bioverativ.

Based on this disclosure, defense counsel finally reviewed DiPaolo, Bonfiglio, and Garofalo's phones.

- DiPaolo's phone had no texts from before October 9, 2020. He claimed not to know why at that time.
- Garofalo's phone had no texts. It was set to delete texts automatically after thirty days.
- Bonfiglio's device contained 116,868 texts. The earliest text was dated January 30, 2014. None of the search terms hit on any texts. In addition, defense counsel reviewed all of the texts and determined that none are responsive.

In short, none of the additional custodians had responsive texts.

In February 2023, the plaintiff pushed for more information about the defendants' failure to produce texts. Defense counsel responded with a letter plus a declaration from Denner. In both documents, they stuck to Denner's story about losing his texts when he upgraded his iPhone. At the same time, they seemed to know that the story did not make sense. The defendants also reported for the first time that DiPaolo, Garofalo, and Bonfiglio did not possess any responsive text.

J. The Sanctions Motion

***13** On November 14, 2023, the plaintiff filed the Sanctions Motion. The parties briefed it, and the court held a hearing on January 4, 2024. During the hearing, defense counsel could not answer basic questions about the collection process. To ensure that the defendants had the opportunity to document what they had done, the court directed the defendants to file

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an affidavit describing their preservation and collection plan and how they carried it out.

The defendants filed two affidavits. Defense counsel submitted an affidavit detailing their collection efforts. DiPaolo submitted a separate affidavit in which, among other things, he described the swimming pool incident for the first time.

DiPaolo did not address in his affidavit whether any of his data was backed up to the cloud or whether counsel had made any efforts to check his other devices. The court directed defense counsel to file a supplemental affidavit "explaining whether any efforts were made to examine DiPaolo's other devices, the cloud, or other sources for text messages after the ... swimming pool incident." [68]

Defense counsel reported that no data was backed up to the cloud or available from other devices. Defense counsel did not say what they did, or when, to make those determinations. The Opinion observed that defense counsel's silence suggested "that they only took those steps after the court asked." [69] The court regarded "the failure to provide any detail beyond a clipped response [as] a further example of defense counsel's lack of transparency and parsimony regarding the release of information. That approach has undermined their credibility on the spoliation issues." [70]

K. The Opinion

On January 26, 2024, the court issued the Opinion. The court found that the defendants had failed to preserve ESI in the form of their texts, that the texts were irretrievably lost, and that failure to preserve ESI caused prejudice to the plaintiff. [71] The court also found that the failure to preserve texts had been reckless. [72] The court deferred ruling on intentionality until after trial. [73]

As a curative sanction, the court held that it would presume at trial that Sarissa traded on the basis of Sanofi's approach. [74] The court also held that it would presume that the hedge fund's trading caused the sale process to fall outside the range of reasonableness. [75] Presumptions are inherently rebuttable. [76] Nevertheless, the court emphasized that both presumptions can be rebutted. [77] Because the defendants' spoliation deprived the plaintiff of evidence that they could use to impeach the defendants' testimony, the court held that the rebuttal of the presumptions would need to be by clear and convincing evidence.

On February 5, 2024, the defendants filed the Application.

II. LEGAL ANALYSIS

Supreme Court Rule 42 governs the certification of an interlocutory appeal. "[T]he purpose of Rule 42 is to prevent wasteful piecemeal litigation from overwhelming the docket of the Supreme Court." [78]

Rule 42 cautions that "[i]nterlocutory appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce

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party and judicial resources."[79] Certification is "generally not favored."[80] Thus, an application for interlocutory appeal "requires a strict analysis by the trial court."[81]

***14** Rule 42 states that "[n]o interlocutory appeal will be certified by the trial court or accepted by this Court unless the order of the trial court decides a substantial issue of material importance that merits appellate review before a final judgment."[82] If the "substantial issue" requirement is met, then the trial court will analyze whether "there are substantial benefits that will outweigh the certain costs that accompany an interlocutory appeal."[83] The rule identifies eight factors relevant to the assessment.[84]

A. Whether The Opinion Decided A Substantial Issue Of Material Importance

The first requirement for interlocutory review is the existence of a decision that decided a substantial issue of material importance. The Opinion does not meet that standard.

1. The Opinion Is A Discovery Ruling.

"The 'substantial issue' requirement is met when an interlocutory order decides a main question of law which relates to the merits of the case, and not to collateral matters."[85] Under this standard, discovery rulings are generally not suitable for interlocutory appeal.[86] Discovery is entrusted to the trial court's discretion, and the Supreme Court "will not disturb a trial court's decision regarding sanctions imposed for discovery violations absent an abuse of that discretion."[87]

The Opinion is a discovery ruling. It did not decide a main question of law which relates to the merits of the case. It therefore did not decide a substantial issue.

2. The Defendants' Due Process Argument

The defendants do not argue directly that the Opinion decided a substantial issue. There is no section in the Application that expressly addresses the substantial issue test. But the defendants do assert that the substantial issue requirement is met when "an interlocutory order raises due process concerns affecting trial," and they assert that "[d]iscovery issues may constitute a substantial issue."[88] The Application then jumps to arguing about the eight factors that can support certification, albeit under a heading titled, "The Opinion Deprives Defendants Of Due Process."[89] Read charitably, the Application contends that the Opinion decided a substantial issue because it raises due process concerns affecting trial.[90]

a. The Defendants' Two Precedents

***15** The defendants are undoubtedly correct that a sufficiently significant discovery ruling could constitute a ruling on a substantial issue suitable for interlocutory appeal. But the defendants have not identified any support for the notion that the Opinion is the type of discovery ruling that clears the bar. The two decisions that the Application cites during its terse discussion of the substantial issue requirement—*Forescout*[91] and *Pepsico*[92]—

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involved quite different issues. And in *Pepsico*, the Delaware Supreme Court rejected the interlocutory appeal.

In *Forescout*, during the early days of the COVID-19 pandemic, the defendants sought interlocutory appeal on three issues: (1) whether a witness could appear at trial virtually, (2) whether a witness could be compelled to testify live during the pandemic, and (3) the whether the court erred by denying the defendants' motion to continue trial in light of the pandemic.[93] The court certified the first two issues because the defendants had "raised due process concerns regarding the right to live cross-examination, because [the witness] is a key Plaintiff witness, and because the overarching issue presented—whether a decision to take trial testimony remotely is consistent with due process and within the trial court's discretion—is one of first impression ...."[94] The court did not certify the third issue.[95]

The defendants act as if *Forescout* gives litigants license to seek interlocutory appeal whenever a ruling could affect how trial will proceed, but *Forescout* is far narrower. *Forescout* involved novel issues presented by the COVID-19 pandemic that restricted the use of live testimony at trial. The Opinion is a discovery-related sanctions ruling that does not limit the defendants' ability to introduce evidence at trial. It does not limit any defendant's ability to testify at trial. It does not affect the defendants' ability to issue trial subpoenas for witnesses to appear at trial. The Opinion only addresses the allocation of the burden of proof (because the presumptions shift the burden to the defendants on two issues) and the standard of proof that the defendants must meet (clear and convincing rather than a preponderance of the evidence). Those are issues that the Delaware Supreme Court can review after a final judgment.[96]

***16** In *Pepsico*, the Delaware Supreme Court acknowledged that interlocutory review might be warranted for "a discovery order involving matters such as privilege, self-incrimination, privacy, or trade secrets" or when the discovery ordered was "so burdensome as to be ruinous to the party, and so disproportionate to the amount in controversy as to amount to deprivation of due process, thus involving substantive rights and issues."[97] None of those scenarios apply here. The Opinion did not order any discovery. It drew adverse inferences on two issues and increased the defendants' burden of proof by one level. Again, those are issues that the Delaware Supreme Court can review after a final judgment.

The defendants' only two authorities thus do not support their implied assertion that the Opinion decided a substantial issue. That is because the Opinion is a discovery ruling that does not warrant interlocutory review.

b. The Defendants' Due Process Argument

Moving beyond their citations to *Forescout* and *Pepsico*, the defendants appear to argue that the Opinion decided a substantial issue because they think the sanctions the court imposed "guaranteed that Defendants will be deprived of a full and fair trial."[98] They also say that "[t]he tone of the Opinion makes clear

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that, even without testimony, the Court has concluded that Defendants were lying, thus rendering trial moot." [99]

Neither is true. The defendants will have a full and fair opportunity to present evidence at trial. The whole point of the Opinion was to ensure a fair trial despite the defendants' spoliation.

The Opinion did not make findings about credibility, nor did the Opinion make any findings on any issue touching on the merits of the case. Whether the defendants acted recklessly in failing to preserve texts is a different issue than whether they acted with *scienter* when trading in Bioverativ stock. The court has not addressed the latter issue, nor has the court reached any conclusions about it. The Opinion was not about the merits, and the trial is not moot.

Yes, the Opinion questioned the iPhone-upgrade explanation and the post-pool-incident-repair explanation. Those explanations had serious problems. An iPhone upgrade does not cause the loss of texts, the timing coincided with the plaintiff's document requests, and Denner had not consulted with outside counsel before the upgrade, as they had instructed him to do. DiPaolo's pool incident was disclosed belatedly, after full briefing and argument on the Sanctions Motion. It also involved a temporal disconnect: the repair ostensibly happened around September 28, 2020, yet he has no texts from before October 9, 2020. As the Opinion noted, it would be strange for a repair to cause the loss of text messages sent during the twelve days after the repair took place. [100] Finally, neither Denner nor DiPaolo suggested at that time that any other data had been lost. Losing all your data, contacts, and pictures is a hassle, yet they barely remembered the incidents. [101] Those are all fair criticisms.

Ultimately, the problems with Denner and DiPaolo's stories did not drive the outcome of the Opinion. The court reached only the issue of recklessness, not intentionality. For recklessness, the key fact was that Denner and DiPaolo lost their texts and did not know how. The reality-plagued explanations they offered were after-the-fact efforts to reconstruct what might have happened, and the plaintiff poked holes in those explanations. For purposes of recklessness, knowledge of their duty to preserve texts coupled with the loss of texts and the lack of any explanation was dispositive. [102]

***17** The sanctions that the Opinion imposed also do not deny defendants of a fair trial. The Opinion granted the plaintiff's requests for rebuttable presumptions but rejected their requests for preclusion orders. Instead, the court increased the standard of proof that the defendants must meet to rebut those presumptions. At trial, the Court will "consider the testimony of Sarissa witnesses and give it the weight due ...." [103] If the defendants' witnesses are credible, they will win.

Finally, the defendants claim that the Opinion "radically expand[ed] trial" by requiring the defendants "to prove that the sale fell within a range of reasonableness, even though those *Revlon* claims were ***settled and released***." [104] That is only partially true. The true part is that the plaintiff released the sale process claims when they settled Counts I and II, and released all of the defendants, including Sarissa and

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Denner. But the reasonableness of the sale remained in the case because of the basis for the plaintiff's standing. [105] The Opinion did not alter what the trial would address.

3. No Substantial Issue

The substantial issue requirement is therefore not satisfied. The court could deny the Application on that basis alone. But because the Supreme Court, not this court, has the final say on whether to accept the defendants' interlocutory appeal, the court will address the other aspects of the Rule 42 inquiry.

B. Whether The Opinion Merits Appellate Review Before A Final Judgment

A ruling addressing a substantial issue is a necessary but not sufficient condition for the certification of an interlocutory appeal. The trial court's ruling also must "merit[ ] appellate review before a final judgment." [106] When analyzing that issue, Rule 42(b)(iii) instructs trial courts to consider eight factors. The defendants rely on three.

1. Whether Decisions Of The Trial Courts Conflict

As their lead argument, the defendants seem to rely on factor (B), which supports certification when "[t]he decisions of the trial courts are conflicting upon the question of law." [107] Technically the defendants do not frame their argument in those terms. Instead, they assert that the Opinion "conflicts with Delaware law." [108] They advance three reasons why that is supposedly so. None establish an actual conflict.

a. The Supposed Requirement To Hear Live Testimony

The defendants argue that "awarding adverse inferences without a full record conflicts with Delaware law ...." [109] By that, they mean that before ruling on a sanctions motion seeking adverse inferences, a Delaware court must hear live testimony from the parties accused of spoliation, either by (i) deferring the motion until after trial, or (ii) holding an evidentiary hearing at which the accused spoliators testify. No such requirement exists.

Neither Rule 37 generally nor Rule 37(e) specifically requires an evidentiary hearing on discovery motions. Yet according to the defendants, the Court of Chancery "has previously only adjudicated motions for adverse inferences for spoliation with a full record or an evidentiary hearing." [110] In support of that proposition, they cite cases where the court has followed that course. But that does not mean that the court *must* follow that course. Contrary to the defendants' assertion, Delaware courts have previously imposed adverse inferences before trial and without an evidentiary hearing. [111]

***18** The defendants also claim that "[f]ederal courts are in accord, and hold evidentiary hearings when credibility is disputed." [112] In support of that proposition, they cite three decisions. One of them—*Wakefield*—rejected a spoliation motion on timeliness grounds, without holding a hearing. [113] That leaves two.

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The second case—*Gold King*—shows that an evidentiary hearing may be required for complex spoliation issues. The plaintiff in that case sought sanctions against the federal government based on wide-ranging failures to preserve documents.[114] After reviewing over 400 pages of briefing, the court asked for still more briefing.[115] Then, when the federal government moved to establish a briefing schedule, the court denied the motion and decided to hold an evidentiary hearing, citing the complexity of the alleged spoliation and the need "to evaluate the credibility of the witnesses."[116] The case supports holding an evidentiary hearing when warranted, but not much else.

The third case is similar. In *Bernholt*, the court scheduled an evidentiary hearing where the parties were "at loggerheads as to [the] nature of any documents destroyed" and had submitted conflicting declarations about what happened.[117] On those facts, scheduling a hearing made sense. In this case, no one disputed the critical facts.

In contrast to the defendants' sparse and terse authorities, a host of federal decisions state expressly that a trial court has discretion regarding whether to hold an evidentiary hearing before imposing sanctions for spoliation, even when intent is at issue.[118] That is what the Opinion said too.[119]

***19** The Opinion then explained how different considerations could affect how a court proceeded regarding a Rule 37(e) motion:

> When to address a spoliation issue depends on a variety of factors, including the nature of the issue, the stage of the case, the court's ability to provide case-specific relief, and any scheduling order that might apply. If a party seeks an order compelling the defendants to provide additional discovery or to pay for the movant to conduct additional discovery, then it would be foolish to defer the motion until trial. If a ruling on the motion will help the parties prepare for trial or limit the issues to be addressed at trial, then it often will make sense to address the motion before trial. If the motion turns on evidentiary issues that the court will evaluate at trial, then it will make sense to defer the motion until trial. Ultimately, the decision rests in the discretion of the court based on the facts of each case.[120]

The Opinion also cited two federal decisions that identified similar considerations.[121]

After considering these factors, the Opinion concluded that ruling on the Sanctions Motion

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was warranted because the outcome would affect "how the parties plan for trial and present evidence." [122] If the court had waited and imposed similar sanctions after trial, the defendants likely would have argued that their due process rights were violated because they did not have advance notice that the court would draw adverse inferences or impose a heightened evidentiary burden.

The defendants denigrate the discretionary considerations inherent in determining how to proceed on a sanctions motion. They assert boldly that the requirement to hold an evidentiary hearing "is not a matter of 'timing.' ***It is a matter of due process.***" [123] Not so.

Federal courts of appeals have specifically addressed this question and rejected the defendants' position. One stated:

> When necessary, the district court may hold an evidentiary hearing on a motion for sanctions. Hence, the district court has the discretion, but is not required, to hold an evidentiary hearing prior to imposing sanctions on a party. Indeed, in cases in which the sanctioned party argued that it was deprived of due process because the district court failed to conduct an evidentiary hearing, ... we have held that the opportunity to brief the issue fully satisfies due process requirements. [124]

***20** Another explained:

> The opportunity to be heard does not necessarily entitle the subject of a motion for sanctions to an evidentiary hearing. An evidentiary hearing serves as a forum for finding facts; as such, its need can be obviated when there is no disputed question of fact or when sanctions are based entirely on an established record. [125]

That reasoning comports with "the fundamental requirement of due process," which is "the opportunity to be heard at a meaningful time and in a meaningful manner ...." [126]

Here, the plaintiff filed the Sanctions Motion on November 14, 2023. [127] That motion put the defendants on notice of what they faced. On November 29, the defendants submitted a 2,998-word opposition, supported by a transmittal affidavit that attached thirty-six exhibits covering 309 pages. [128] After the plaintiff filed their reply, the court held a hearing at which two lawyers presented argument for the defendants. [129] When defense counsel could not answer basic questions

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about their document collection process, the court instructed the defendants to submit an affidavit so that they "had the opportunity to document what they had done."[130] In total, the defendants submitted three post-hearing affidavits, a letter, and two more exhibits.[131] After receiving and considering those documents, the court issued the Opinion. That is not a lack of due process. That is a lot of due process.

When making their due process pitch, the defendants turn to a transcript ruling and a letter ruling to argue that Delaware law always requires an evidentiary hearing on pain of a due process violation. In the transcript ruling, Vice Chancellor Will stated that as to one party charged with spoliation, "I can't possibly make credibility determinations or assess his state of mind on the record that I have before me right now."[132] That was a case-specific ruling, not a quasi-legislative determination that an evidentiary hearing is always required. Confirming that, she noted that "our courts *often* make spoliation findings just before or after trial, on a better-developed evidentiary record, or at least at an evidentiary hearing."[133] Often. Not always.

The defendants also rely on one of Chancellor McCormick's many letter rulings in the highly expedited *Twitter* case. In their seventh discovery motion, the plaintiff sought an adverse inference that Elon Musk had recklessly or intentionally withheld damaging text messages.[134] Based on the paper record that the parties submitted, the Chancellor found it "likely that Defendants' custodians permitted the automatic deletion of responsive Signal communications between them and possibly others, and that those communications are irretrievably lost."[135] But she could not determine whether the defendants were under a duty to preserve evidence at that point. She held that "[i]f Defendants deleted documents after they were under a duty to preserve, some remedy is appropriate, but the appropriate remedy is unclear to me at this stage. I will reserve my ruling regarding Plaintiff's request for sanctions, including adverse inferences, pending post-trial briefing, when I have a fuller understanding of the record."[136]

***21** If the Chancellor had been able to determine from the paper record whether a duty to preserve existed, and if she had been confident in the appropriate remedy, then her ruling indicates that she would have imposed one based on the paper record. The undisputed facts of this case enabled the Opinion to do just that.

As further support for its mandatory-evidentiary-hearing argument, the Application states incorrectly that "[t]he sole case the Court cites for finding recklessness was issued after trial."[137] For starters, that was not the sole case on which the Opinion relied when finding recklessness; the Opinion cited at least six others.[138] And while it is true that *Triton* was a post-trial decision, the court's finding of recklessness turned on the fact that the spoliator "presented no evidence that he took any steps to preserve the thumb drive or home computer[, but rather] effectively threw up his hands in bewilderment as to what happened to them."[139] That is what Denner and DiPaolo did. They did not know how they lost their

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texts, and the explanations they offered did not make sense.

The weight of authority thus establishes that an evidentiary hearing is not required as a matter of law, on pain of a due process violation. But doubtless a court could abuse its discretion by not holding an evidentiary hearing when one was plainly required.

On the facts of this case, holding an evidentiary hearing was not required. True, "Defendants submitted sworn attestations that they did not act intentionally or recklessly." [140] But the Opinion did not hold that Denner and DiPaolo intentionally deleted texts. The court deferred that issue to trial, just as the defendants wanted.

The Opinion instead held that Denner and DiPaolo acted recklessly by not preserving their texts. On that issue, if Denner or DiPaolo had been in a position to testify about what they did to preserve their texts and how they nevertheless lost them, then an evidentiary hearing might have been warranted. But it was undisputed that Denner had no texts from before October 2021, that he took no action to preserve them, and that that he does not know how or why his texts were lost. It was also undisputed that DiPaolo had no texts from before October 2020, that he took no action to preserve them, and that he does not know how or why his texts were lost.

The defendants stress in the Application that DiPaolo thinks that "it is possible that he lost [his texts] before this litigation began." [141] That is true. It is also irrelevant. What matters is whether DiPaolo lost them after he had an obligation to preserve them, which he did. [142] And what matters for purposes of recklessness is whether DiPaolo knew he was obligated to preserve them and consciously ignored that obligation. [143] He plainly knew he was obligated to preserve them, because he sent the Sarissa Hold. He then did nothing to comply with the obligation he knew he owed.

***22** Finally, the Application asserts that "DiPaolo is an attorney who respectfully requested the opportunity to testify fully in a sworn affidavit, and the Court should have heard his testimony before discrediting him out of hand." [144] Justice should not vary depending on who a person is or what professional qualifications they have. A person's status as an attorney does not excuse them from submitting evidence to support their positions. On the issue of recklessness, DiPaolo did nothing to preserve his texts and had no idea how he lost them. He could only speculate about the swimming pool incident, yet the dates for explanation did not match up. The court did not "discredit[ ] him out of hand." The court carefully considered the evidence that the parties submitted. [145]

The question at hand is whether the Opinion conflicts with other decisions from the trial courts such that an interlocutory appeal is warranted under factor (B) of Rule 42. There is no conflict as to the court's discretionary determination that an evidentiary hearing was not required.

b. The Supposed Conflict Over A "Helpfulness" Requirement

In a second effort to create a conflict among trial court decisions, the defendants argue that the court should have analyzed whether any missing documents would have been helpful to the plaintiff.[146] They claim that the Opinion's analysis conflicts with *TR Investors, LLC v. Genger*, which stated that the aggrieved party "must show a reasonable possibility, based on concrete evidence rather than a fertile imagination that access to the lost material would have produced evidence favorable to his cause."[147]

The defendants did not argue this point in their opposition to the Sanctions Motion. Their only citation to *Genger* appeared in the midst of a footnoted string cite, where they described the case as "granting sanctions for authorizing an agent to destroy evidence identified by his own counsel as responsive."[148] Their opposition to the Sanctions Motion also did not cite *Happy Child*, a decision that quoted *Genger*.[149]

The court engaged with this issue because Rule 37(e) now requires a finding of prejudice. The *Genger* decision was issued before the adoption of Rule 37(e). The *Happy Child* ruling post-dated the adoption of Rule 37(e), but its brief discussion of why no spoliation had occurred did not touch on Rule 37(e).

When addressing the element of prejudice, the Opinion held that "when showing prejudice from spoliation, the requesting party must provide some minimal explanation as to why the lost ESI could have been relevant and either admissible in its own right or reasonably likely to lead to the discovery of admissible evidence."[150] If the movant meets this standard, then the party that failed to preserve the ESI "must convince the court that the lost material could not have been relevant, would not have been admissible or potentially have led to the discovery of admissible evidence, or otherwise could not have been used by the requesting party to its advantage."[151]

That standard is functionally the same as the *Genger* case. Setting aside the *Genger* court's reference to a "fertile imagination," both *Genger* and the Opinion contemplate that the party seeking sanctions must initially come forward with some reason why the lost ESI would have been helpful. If the movant makes that showing, then the respondent must show otherwise. The main semantic distinction is that the Opinion used the phrase "minimal explanation," whereas *Genger* says, "reasonable possibility." That is not a meaningful divergence. An unreasonable possibility would not rise to the level of a minimal explanation. Nor would an explanation based on impossibility. A minimal explanation requires a reasonable possibility.

***23** Here, the plaintiff pointed to ESI that was specifically known to exist. Based on texts that other parties produced, the plaintiff established that Denner texted about the Bioverativ-Sanofi deal process. There is also no dispute that the texts were lost. The plaintiff provided a reasonable explanation that Denner's texts would have shown what he was doing and when during the critical time period after Sanofi's initial approach and through the trading window when Sarissa accumulated its block of shares.

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Nothing more is required. Precisely because the texts were lost, the plaintiff can't point to the specific wording of a specific text sent on a specific day. If the plaintiff had that information, then that text would not have been lost for purposes of Rule 37(e).

Once again, the question at hand is whether the Opinion conflicts with other decisions from the trial courts such that an interlocutory appeal is warranted under factor (B) of Rule 42. There is no conflict as to the test that the Opinion articulated.

c. The Supposed Conflict Over The Sanctions Imposed

In their third effort to create a conflict between trial court decisions, the defendants argue that "the sanctions are disproportionate." [152] A discretionary decision to impose sanctions on the facts of one case does not create a conflict with a discretionary decision to impose different sanctions on the facts of a different case.

As the foundation of their disproportionate sanctions argument, the defendants claim that the court "has issued the most severe sanctions available short of a default judgment." [153] That is demonstrably incorrect. The court could have issued evidentiary preclusion orders, which Rule 37(b)(2)(B) contemplates and the plaintiff requested. The court could have found facts contrary to the defendants' position, as Rule 37(b)(2)(A) permits. The court could have stricken defenses, as Rule 37(b)(2)(C) allows. Instead, the court granted the rebuttable inferences that the plaintiff requested. In lieu of granting the evidence preclusion orders that the plaintiff sought, the court elevated the defendants' burden of proof by one level. Now, rather than having to rebut the inferences by a mere preponderance of the evidence, the defendants will have to offer clear and convincing evidence.

The defendants say that the Opinion "applies the same sanctions as *Genger*." [154] That is also demonstrably incorrect. The *Genger* court imposed two additional sanctions. The court held that "because Genger has diminished the evidence base that would otherwise be available to the Trump Group, ... he must produce relevant documents to which he may have otherwise made a claim of privilege." [155] The Opinion did not do that.

The *Genger* court also required corroborating evidence for any testimony by the sanctioned party, holding that

> because Genger's conduct leaves me with severe doubts about his credibility, Genger will be unable to prevail on any material factual issue if the only evidence in support of his position is his own testimony. Absent corroborating testimony or documents, his mere word will be insufficient to meet his burden of persuasion. [156]

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The Opinion did not do that either.

Contrary to the defendants' assertion, the Opinion imposed lesser sanctions than *Genger*, as warranted by the case's different facts. The sanctions are reasonable and proportionate in light of the defendants' loss of their texts. The defendants intend to rely extensively at trial on witness testimony; there are very few contemporaneous documents. In that setting, placing the burden on the defendants to rebut two inferences and elevating their standard of proof by one level is a moderate consequence. The case is likely to come down to witness credibility. If the defendants' witnesses testify credibly, then they will win.

d. No Conflict Among Trial Court Decisions

***24** As noted, the defendants ground their principal argument for interlocutory review on the supposed existence of a conflict between the Opinion and other trial court rulings. There is no conflict. Factor (B) does not provide a basis for certification.

2. Whether The Opinion Involves A Question Of First Impression

The defendants next turn to factor (A) of Rule 42, which asks whether the "[i]nterlocutory order involves a question of law resolved for the first time in this State."[157] The defendants contend that "awarding adverse inferences without a full record ... presents a question of first impression."[158] They also contend that the Opinion adopted a "new discovery rule" that "warrants interlocutory review."[159]

The argument about adverse inferences without a full record is a rehash of the defendants' first argument under factor (A). There is no need to repeat that discussion, except to note again that the Opinion is not the first decision to have done it.[160]

The contention that the Opinion adopted a new discovery rule is equally misguided. The defendants set up a strawman by mispresenting the Opinion. They claim that,

> [t]he Opinion imposed new, difficult-to-impossible discovery standards, and penalized Defendants for not satisfying them. The Court held that Defendants acted ***recklessly*** by not imaging employee phones upon receipt of a litigation hold in February 2018—almost three years before this action commenced. The Opinion requires every ***potential*** litigant in Delaware to undergo the costly and invasive process of creating full forensic images of every potential custodian's phones every time they anticipate litigation. To do otherwise constitutes

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> recklessness warranting adverse inferences. [161]

That is not a fair characterization.

Nothing about the Opinion was new. The court applied Court of Chancery Rule 37(e), which is an existing rule governing preservation of ESI. [162] The common law principles against spoliation date back over seven decades. [163] The Delaware Supreme Court held that recklessness was sufficient to support adverse inferences in 2006. [164]

The Opinion did not announce a blanket rule that "every potential litigant in Delaware [must] undergo the costly and invasive process of creating full forensic images of every potential custodian's phones every time they anticipate litigation." [165] The Opinion reiterated the longstanding rule that (i) a party who anticipates litigation has a duty to preserve potentially relevant information —including text messages—and (ii) reckless noncompliance with that duty can lead to sanctions. As the Opinion explained, a party meets this duty by acting "reasonably to preserve the information that it knows, or reasonably should know, could be relevant to the litigation, including what an opposing party is likely to request." [166]

***25** Contrary to the defendants' alarmist framing, the Opinion did not hold that everyone who might be a custodian in a Delaware action must image their phones immediately after receiving a litigation hold. Yes, the Opinion states that the defendants, "should have taken steps to preserve ESI, including by imaging phones or backing up their data.... In a world where people primarily communicate using personal devices, it will almost always be necessary to image or backup data from phones." [167] But the defendants seem not to understand the disjunctive conjunction "or." The sentence that the defendants pick out spoke of *either* making an image *or* backing up data. [168]

***26** The Opinion did not establish a rigid checklist or bright line rule. It reiterated that parties must take reasonable steps to preserve evidence in a world where texts are often a source of evidence. A party can image or back-up a device to ensure there is no data loss. Or a party could turn off auto-delete features and let the texts accumulate. Or a party could just collect the text messages.

Nothing about that is novel. In holding that the duty to preserve evidence extends to texts, the court cited a rage of authorities dating back two decades to the seminal decision commonly known as *Zubulake IV*. [169] The Opinion explained how parties and their counsel can meet the reasonableness standard by following the well-understood steps of a document discovery process: (1) identification, (2) preservation, (3) collection, (4) review, and (5) production. [170]

In this case, the defendants blew it on the first two steps. They did not identify key custodians, and they did not take reasonable steps to preserve evidence. Despite receiving three litigation holds, they did not take any concrete steps to identify sources, preserve

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ESI, or collect text messages until one year into the case. Defense counsel did not conduct custodian interviews of potential custodians. Denner and DiPaolo did not take steps to back up the data on their phones. Denner switched phones without consulting counsel, despite counsel's instruction to the contrary. Another custodian never turned off his auto-delete setting. And counsel failed to timely investigate whether any of the defendants' custodians had relevant texts.

The defendants close with a nice rhetorical flourish that they tie to their due process theme. They say:

> To make matters worse, the Court applied its new rule as proof of Defendants' recklessness. But Defendants did not know in 2018 that the Court would decree—six years later—that failure to image phones was reckless. The Court's retroactive application of its new discovery rule violates Defendants' due process [sic]. [171]

This criticism rests on a false premise. The Opinion did not adopt a new rule, much less the rule that the defendants posit.

The Opinion did not decide a question of first impression. It applied existing law to the facts. Factor (A) does not apply.

3. Whether Review Would Serve Considerations Of Justice

As their final basis for interlocutory appeal, the defendants invoke factor (H), which asks whether "[r]eview of the interlocutory order may serve considerations of justice." [172] That factor does not apply either.

Under this heading, the defendants reprise their other arguments. They reiterate their incorrect claim that the Opinion "issued the most severe sanctions available short of a default judgment." [173] For the reasons already discussed, the Opinion did not do that. They also reiterate their claim that the court prejudged the defendants' credibility and "essentially guaranteed that Defendants will be deprived of a full and fair trial." [174] For the reasons already discussed, the Opinion did not do that either. And they reiterate their assertion that the court expanded the scope of trial by granting an inference on the reasonableness of the sale process. [175] As discussed previously, that issue remains relevant for purposes of the plaintiff's standing. The defendants do not face any liability on a sale process claim. If they are content not to contest the plaintiff's standing, they can ignore the sale process.

***27** The defendants even reprise their contentions about a failure of due process. This time, however, they introduce a new case: *Rogal v. American Broadcast Companies*. [176] That decision does not help them.

In *Rogal*, the United States Court of Appeals for the Third Circuit reversed

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an order imposing monetary sanctions on the plaintiff for testifying falsely at trial because the district court did not hold a separate evidentiary hearing on the defendants' sanctions motion.[177] The trial court did not believe an additional hearing was necessary because the judge had witnessed the false testimony first hand and the parties went through two rounds of briefing.[178] The appellate court reaffirmed the absence of "any rigid rule" as to whether an evidentiary hearing is required.[179] The appellate court nevertheless held that on the facts of the case, an evidentiary hearing was necessary because the plaintiff "did not have the same incentive at trial to try to clear up all of the apparent contradictions and inconsistencies in his testimony or to try to show his good faith as he would have had at an evidentiary hearing on the question of sanctions."[180] The appellate court emphasized that its "holding [was] a narrow one and depend[ed] heavily on the specific nature of [the plaintiff's] alleged misrepresentations and the relationship of each instance of contradictory or inconsistent testimony to the central issues of the litigation."[181]

In this case, the question of sanctions was not bound up with a trial on the merits; it was the only issue the defendants needed to address. And the defendants had ample opportunity. The plaintiff filed the Sanctions Motion, which spelled out the conduct and identified the sanctions sought. The defendants opposed the Sanctions Motion and submitted documentary evidence. The court held a hearing and asked questions of counsel, then gave counsel the opportunity to submit affidavits. The defendants submitted three post-hearing affidavits, a letter, and two additional exhibits. The defendants had every incentive to justify their conduct and clear up any apparent contradictions and inconsistencies. Instead, they kept digging themselves deeper. The *Rogal* decision does not suggest that an evidentiary hearing was necessary.

The defendants' arguments do not fare any better when repeated under factor (H). Considerations of justice will not be served by certifying an interlocutory appeal. The catchall factor does not apply.

C. The Balancing

As a final step, Rule 42 directs the trial court to engage in balancing:

> After considering [the eight] factors and its own assessment of the most efficient and just schedule to resolve the case, the trial court should identify whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice. If the balance is uncertain, the trial court should refuse to certify the interlocutory appeal.[182]

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***28** There must be "substantial benefits that will outweigh the certain costs that accompany an interlocutory appeal."[183]

Recognizing that the decision is ultimately up to the Delaware Supreme Court, the court does not see any benefit to an interlocutory appeal at this stage. A five-day trial is set for April 29, 2024 through May 3, 2024, just two months away. It seems unlikely that an interlocutory appeal could be resolved in the roughly two months before the start of trial without significant burden on the Delaware Supreme Court. Granting an interlocutory appeal would likely result in a postponement of trial.

Not only that, but the defendants may well prevail at trial. Although the lead defense lawyer now seems to have lost confidence in his case, he previously argued that "I think you will find Mr. DiPaolo a very credible witness."[184] He also stressed that the defendants would present evidence from Denner and Scott Barshay, a partner at Paul Weiss. If the court finds their testimony credible, then the defendants will win. If that happens, then the current dispute over adverse inferences and an increased standard of proof will be moot.

By contrast, if the plaintiff wins at trial, then the defendants can appeal on a complete record, and they can raise all of their points of error at once. This is not a case where an interlocutory appeal will result in a trial of different claims or the presentation of different evidence.

On balance, the probable costs of an interlocutory appeal outweigh its potential benefits. While it is always helpful to have the Delaware Supreme Court's view on any issue, this is not a situation where interlocutory review is warranted.

III. CONCLUSION

Ultimately, whether to permit an interlocutory appeal lies in the discretion of the Delaware Supreme Court. The justices' views, not the trial court's, determine whether the defendants' request will be granted. This court's role under Rule 42 is to make a recommendation. In this case, that recommendation is for the Delaware Supreme Court to refuse the interlocutory appeal.

All Citations

Not Reported in Atl. Rptr., 2024 WL 776033

Footnotes

1 Four entities in the Sarissa fund complex are defendants. This decision refers to them collectively as "Sarissa."

2 *Goldstein v. Denner*, —— A.3d ——, 2024 WL 303638 (Del. Ch. Jan. 26, 2024).

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3 *Klig v. Deloitte LLP*, 2010 WL 3489735, at *4 (Del. Ch. Sept. 7, 2010).

4 *Auriga Cap. Corp. v. Gatz Props., LLC*, 40 A.3d 839, 882 n. 184 (Del. Ch. 2012).

5 *See, e.g.*, App. ¶ 2 (“The Court granted sweeping adverse inferences based on ... erroneous ‘facts.’ ”); *id.* (“The tone of the Opinion makes clear that, even without testimony, the Court has concluded that Defendants were lying, thus rendering trial moot.”); *id.* at ¶ 5 (“[T]he Opinion ... got facts wrong ....”).

6 *See, e.g.*, *Hyde Park Venture P'rs Fund III, L.P. v. FairXchange, LLC*, 292 A.3d 178, 184–85 (Del. Ch. 2023) (“The facts are drawn from the parties’ submissions in connection with the motion to compel. Given the procedural posture, this decision does not make formal findings of fact. Instead, the following summary reflects how the record appears at this stage of the proceedings for purposes of the discovery ruling.”); *In re Cellular Tel. P'ship Litig.*, 2021 WL 4438046, at *43 (Del. Ch. Sept. 28, 2021) (“A court's factual assessments in a discovery ruling do not constitute factual findings that remain dispositive at later stages of the case. A court's factual assessments in a discovery ruling rather reflect how the evidence appears at that earlier stage of the case for purposes of informing the court's rulings on discovery.”); *Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr. U/A/D June 21, 2002*, 2018 WL 6331622, at *1 (Del. Ch. Dec. 4, 2018) (“Because this is a discovery ruling, the description of events provided in this section does not constitute formal findings of fact. It only represents how the record appears at this preliminary stage.”); *In re Activision Blizzard, Inc.*, 86 A.3d 531, 533 (Del. Ch. 2014) (“What follows are not formal factual findings, but rather how the court views the record for purposes of a discovery ruling.”); *In re Info. Mgmt. Servs., Inc. Deriv. Litig.*, 81 A.3d 278, 282 (Del. Ch. 2013) (“The facts for purposes of the motion to compel are drawn from the allegations in the pleadings and the exhibits and affidavits submitted in connection with the briefing on the motion. What follows are not formal factual findings, but rather how the court views the record for purposes of a discovery ruling. At this stage of the case, the court cannot resolve conflicting factual contentions.”).

7 App. ¶ 1.

8 Op. at *2.

9 App. ¶ 20.

10 Dkt. 204 ¶ 5.

11 Op. at *3.

12 *Id.*

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13 App. ¶ 20.

14 *Id.*

15 *Id.* Ex. E.1.

16 Op. at *3.

17 App. ¶ 20 (citing Exs. E.1–20).

18 *See* App. Exs. E.6–13, E.16–20.

19 *See* App. Exs. E.7, E.13 & E.19.

20 *See* App. Exs. E.13 & E.19.

21 Op. at *3.

22 App. ¶¶ 1, 12.

23 Op. *3.

24 *See* App. ¶¶ 1, 12.

25 *See.* Dkt. 199, ¶¶ 1, 21.

26 *See, e.g.*, Dkt. 1 ¶¶ 5, 105; Dkt. 195 ¶ 2.

27 Op. at *3 (heading omitted).

28 *Id.*

29 App. ¶ 20 (citing *SEC No Action Letter*, 1999 WL 11540 (Jan. 12, 1999)).

30 *Id.*

31 Op. at *3.

32 App. ¶ 20.

33 Op. at *3.

34 *Id.* at *4.

35 *Id.*

36 *Id.* (citation omitted).

37 *Id.*

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38 *Id.* at *5.

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.* at *6.

45 *Id.*

46 *Id.*

47 *Id.*

48 App. ¶ 14.

49 *Id.*

50 Op. at *6.

51 *Id.*

52 Dkt. 55.

53 Op. at *7.

54 *Id.*

55 *See Goldstein v. Denner*, 2022 WL 1671006 (Del. Ch. May 26, 2022).

56 *See Goldstein v. Denner*, 2022 WL 1797224 (Del. Ch. June 2, 2022).

57 App. ¶ 4.

58 *Parnes v. Bally Ent. Corp.*, 722 A.2d 1243 (Del. 1999).

59 *See Insider Trading Decision,* 2022 WL 1797224, at *11.

60 *Id.* at *12 & n.9 (collecting cases).

61 *Id.* at *12.

62 *Morris*, 246 A.3d at 136.

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63 *See Insider Trading Decision*, 2022 WL 1797224, at *12.

64 *See* App. ¶ 4.

65 *Id.* ¶ 12.

66 *Id.*

67 Dkt. 195, Ex. 17 at Interrogatory No. 27.

68 Dkt. 213.

69 Op. at *11.

70 *Id.*

71 *Id.* at *26–28.

72 *Id.* at *30.

73 *Id.* at *31–32.

74 *Id.* at *28.

75 *Id.*

76 D.R.E. 301(a) (“In a civil case, unless a statute or these Rules provide otherwise, the party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than the existence of the presumed fact.”).

77 Op. at *28.

78 *Stein v. Blankfein*, 2019 WL 3311227, at *1 (Del. Ch. July 23, 2019).

79 Supr. Ct. R. 42(b)(ii).

80 *Id.* cmt.

81 *Chemours Co. v. DowDuPont Inc.*, 2019 WL 2404817, at *1 (Del. Ch. June 7, 2019).

82 Supr. Ct. R. 42(b)(i).

83 Supr. Ct. R. 42(b)(ii).

84 Supr. Ct. R. 42(b)(iii)(A)–(H).

85 *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2861717, at *1 (Del. Ch. July 22, 2008); *accord Castaldo v. Pittsburgh–Des Moines Steel Co.*, 301 A.2d 87, 87 (Del. 1973).

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86 *Crowhorn v. Nationwide Mut. Ins. Co.,* 804 A.2d 1065 (Del. 2002) (TABLE); *McCann v. Emgee, Inc.,* 637 A.2d 827 (Del. 1993) (TABLE); *American Centennial Ins. Co. v. Monsanto Co.,* 582 A.2d 934 (Del. 1990) (TABLE); *Huang v. Rochen,* 550 A.2d 35 (Del. 1988) (TABLE); *Levinson v. Conlon,* 385 A.2d 717, 720 (Del. 1978); *Castaldo*, 301 A.2d at 87; *Lummus Co. v. Air Prods. & Chems., Inc.,* 243 A.2d 718, 719 (Del. 1968).

87 *In re Rinehardt*, 575 A.2d 1079, 1082 (Del. 1990).

88 App. ¶ 6.

89 *Id.* at 4 (emphasis removed).

90 Confusingly, the Application argues separately that the court deprived the defendants of due process when issuing the Opinion. But the defendants do not seem to view that alleged error as giving rise to a substantial issue. Rather, the defendants seem to think that issue (i) raises an issue of first impression and (ii) creates a conflict with other trial court decisions. This decision therefore does not address that version of the defendants' due process argument under the substantial-issue heading.

91 *Forescout Tech. v. Ferrari Gp. Hldgs.*, 2020 WL 3971012 (Del. Ch. July 14, 2020).

92 *Pepsico, Inc. v. Pepsi-Cola Bottling Co.*, 261 A.2d 520 (Del. 1969).

93 *Forescout*, 2020 WL 3971012, at *2–3.

94 *Id.* at *3.

95 *Id.*

96 *See, e.g.*, *Am. Mining Corp. v. Theriault*, 51 A.3d 1213, 1218–19 (Del. 2012) (affirming post-trial decision where defendants contended that "the Court of Chancery committed reversible error by failing to determine which party bore the burden of proof before trial. They further claim the Court of Chancery erred by ultimately allocating the burden to the Defendants, because, they submit, the Special Committee was independent, well-functioning, and did not rely on the controlling shareholder for the information that formed the basis for its recommendation."); *Kahn v. Tremont Corp.*, 694 A.2d 422 (Del. 1997) (reversing post-trial decision where plaintiff contended "that the court erred in its burden of proof allocation regarding the entire fairness of the transaction" and holding that "under the circumstances the Special Committee did not operate in an independent or informed manner and therefore, the Court of Chancery erred in shifting the burden of persuasion to [plaintiff]."); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1167

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(Del. 1995) (considering "the precise standard of proof required" for "director interest materiality test").

97 *Pepsico*, 261 A.2d at 521.

98 App. ¶ 31.

99 *Id.* ¶ 2.

100 Op. at *6.

101 *Id.* at *1, *6–7, *31.

102 Relatedly, the Application claims that the Opinion is inconsistent because it (i) recognizes that an iPhone upgrade does not result in the loss of data but (ii) finds that Denner was reckless when he lost texts by upgrading his iPhone. App. ¶ 15. The first point is correct; the second isn't. Denner was reckless because he took no action to preserve his texts despite receiving three litigation holds and being told by outside counsel to consult with them before replacing his phone. No one really thinks that Denner lost his texts in the iPhone upgrade. Even defense counsel doubts that happened. *See* Dkt. 195, Ex. 19 at 2–3. Ultimately, the defendants admit that Denner does not know how he lost his texts. App. ¶ 11. He simply floated that story as a speculative possibility.

103 Op. at *29.

104 Appl ¶ 31.

105 *See Insider Trading Decision,* 2022 WL 1797224, at *11 ("standing exists to assert a direct claim when a plaintiff alleges breaches of fiduciary duty that resulted in either an unfair price or an unfair process.").

106 Supr. Ct. R. 42(b)(i).

107 Supr. Ct. R. 42(b)(iii)(B).

108 App. ¶ 8 ("[A]warding adverse inferences without a full record conflicts with Delaware law ...."); *see id.* ¶ 7 ("Interlocutory appeal is appropriate because the Opinion is inconsistent with Delaware law ...."); *id.* ¶ 16 ("Delaware law does not support making such findings of recklessness on an *ipse dixit* basis, without live testimony.").

109 App. ¶ 8.

110 *Id.* ¶ 10.

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111 *E.g.*, *Beard Rsch., Inc. v. Kates*, 981 A.2d 1175, 1185 (Del. Ch. 2009) ("During the pretrial conference on March 4, 2009, I advised the parties that I would be denying the Motion to the extent it sought entry of a default judgment, but would grant an adverse inference to a limited extent and award Plaintiff their attorneys' fees and expenses in connection with the Motion."); *Fortis Advisors, LLC v. Dematic Corp.*, 2021 WL 2259398, at *2–3 (Del. Super. June 3, 2021) (ORDER) (denying certification of interlocutory appeal of pre-trial imposition of sanctions, including adverse inferences, for failure to produce evidence).

112 App. ¶ 10 (citing *In re Gold King Mine Release*, 2022 WL 741882, at *4 (D.N.M. Feb. 1, 2022); *Bernholt v. Allen*, 2021 WL 2823409, at *4 (D. Neb. 2021); *Wakefield v. ViSalus, Inc.*, 2019 WL 1411127, at *4 (D. Or. March 27, 2019)).

113 *Wakefield*, 2019 WL 1411127, at *1.

114 *Gold King*, 2022 WL 741882, at *1–2.

115 *Id.* at *1.

116 *Id.* at *4

117 2021 WL 2823409, at*4.

118 *See Gypsum Res., LLC v. Clark Cty.*, 2022 WL 16951250, at *3 (D. Nev. Nov. 15, 2022) (noting that a district court "has discretion, but is not required, to hold an evidentiary hearing prior to imposing sanctions" for spoliation); *Off. Comm. of Unsecured Creditors of Exeter Hldgs. Ltd. v. Haltman*, 2016 WL 128154, at *3 (E.D.N.Y. Jan. 12, 2016) ("the decision to hold an evidentiary hearing is discretionary."); *In re Dynex Cap., Inc. Sec. Litig.*, 2011 WL 2581755, at *3 (S.D.N.Y. Apr. 29, 2011) ("[I]t is within the Court's discretion to hold an evidentiary hearing on a sanctions motion, although no such hearing is required."), *report and recommendation adopted*, 2011 WL 2471267 (S.D.N.Y. June 21, 2011); *Stoian v. Colvin*, 2015 WL 13918816, at *3 (C.D. Cal. Nov. 19, 2015) ("In this case, the Court concludes that an evidentiary hearing is not necessary, because the overwhelming evidence demonstrates that Plaintiff willfully, and in bad faith, falsified and fabricated evidence. Moreover, based on this record, even if the Court were to hold an evidentiary hearing, the Court would reject Plaintiff's testimony as not credible."); *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334, 341 (D. Conn. 2009) ("Therefore, the Court concludes that the undisputed evidence shows that Innis Arden breached its duty to preserve its sampling evidence and associated data. Consequently, no evidentiary hearing on Pitney Bowes's state of mind and failure to act, as requested by Innis Arden, is necessary. Given this conclusion, the next question is what sanction, if any, should follow."); *see also Whitten v. Johnson*, 2022

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WL 885773, at *6 (W.D. Va. Mar. 25, 2022) ("[I]f necessary, the court will conduct a pretrial evidentiary hearing to determine whether spoliation of video evidence occurred and, if it did, whether a spoliation sanction is warranted."); *Echavarria v. Am. Valet Parking Mgmt., Inc.*, 2015 WL 12746112, at *3 (S.D. Fla. June 17, 2015) ("An evidentiary hearing on whether spoliation sanctions are appropriate will be set at a later date, if necessary."); *Botell v. United States*, 2013 WL 2106033, at *1 (E.D. Cal. May 14, 2013) ("The court will notify the parties whether an evidentiary hearing regarding the spoliation of evidence as it relates to defendant's discretionary function defense is necessary.") (ORDER). *Cf. Pac. Harbor Cap., Inc. v. Carnival Air Lines, Inc.,* 210 F.3d 1112, 1118 (9th Cir. 2000) (holding when determining whether an attorney has acted in bad faith, due process "does not require an oral or evidentiary hearing on the issue" and that "[t]he opportunity to brief the issue fully satisfies due process requirements."); *Resol. Tr. Corp. v. Dabney*, 73 F.3d 262, 268 (10th Cir. 1995) (same).

119 Op. at *14.

120 *Id.* (footnote omitted).

121 *Id.* at *14 n.10 (first citing *Gruenstein v. Browning*, 2022 WL 3213261, at *3 (N.D. Ill. June 21, 2022); then citing *GMS Indus. Supply, Inc. v. G&S Supply, LLC*, 2022 WL 853626, at *4 (E.D. Va. Mar. 22, 2022)).

The Opinion observed in passing that a review of federal decisions suggests that the principal problem federal courts face involve parties raising spoliation issues too late, rather than too early. Op. at *14 & n.9 (citing *GMS Indus.*, 2022 WL 853626, at *4 (analyzing whether motion was filed late); *McEachron v. Glans*, 1999 WL 33601543, at *2 (N.D.N.Y. June 8, 1999) (collecting authorities); *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 327 F.R.D. 96, 108 (E.D. Va. 2018)). The defendants say that those cases "discuss how a party moving for spoliation may impermissibly prejudice ***the alleged spoliator*** by moving after discovery closes ...." App. ¶ 25. That is not a response. The federal decisions show that a post-trial adjudication of a spoliation issue can be problematic.

122 Op. at *14.

123 App. ¶ 24.

124 *Lambright v. Ryan*, 698 F.3d 808, 825–26 (9th Cir. 2012) (cleaned up); *see Anderson v. BNSF Railway Co.*, —— F.Supp.3d ——, 2023 WL 4418221, at *3–4, *11 (S.D. Iowa July 6, 2023) (rejecting request for evidentiary hearing on sanctions motion, deciding motion without oral argument, and imposing sanctions).

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125 *In re Reed,* 888 F.3d 930, 938 (8th Cir. 2018) (quoting *Schlaifer Nance & Co. v. Est. of Warhol,* 194 F.3d 323, 335 (2d Cir. 1999) (internal citation omitted)).

126 *Kahn v. U.S.,* 753 F.2d 1208, 1218 (3rd Cir. 1985).

127 Dkt. 195.

128 Dkt. 199.

129 Dkt. 231.

130 Op. at *10.

131 Dkts. 212 & 215.

132 *Fortis Advisors, LLC v. Johnson & Johnson,* C.A. No. 2020-0881-LWW, at 132 (Del. Ch. June 5, 2023).

133 *Id.* (emphasis added).

134 *Twitter v. Musk*, 2022 WL 5078278, at *1 (Del. Ch. Oct. 5, 2022).

135 *Id.* at *5.

136 *Id.*

137 App. ¶ 16 (referring to *Triton Const. v. E. Elect. Servs.*, 2009 WL 1387115 (Del. Ch. May 18, 2009)).

138 When stating the standard for recklessness, the court cited *Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1192 (Del. Ch. 2009). Op. at *29–30. For the proposition that a court can rely on either direct or circumstantial evidence to find recklessness, the court cited *In re Skanska USA Civil Southeast, Inc.*, 340 F.R.D. 180, 188 (N.D. Fla. 2021), *E*Trade Sec., LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 590 (D. Minn. 2005), and *Paisley Park Enterprises v. Boxill*, 330 F.R.D. 226, 236 (D. Minn. 2019). Op. at *30. As an example of a Delaware decision finding recklessness, the court cited *Kan-Di-Ki, LLC v. Suer*, 2015 WL 4503210, at *29 (Del. Ch. July 22, 2015). Op. at *30. The court also cited *Gener8 LLC v. Castanon*, 2023 WL 638163, at *15 (Del. Ch. Sept. 29, 2023). Op. at *32.

139 *Triton*, 2009 WL 1387115, at *8.

140 App. ¶ 11.

141 *Id.*

142 *See Twitter*, 2022 WL 5078278, at *5.

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143 *See Beard Rsch.*, 981 A.2d at 1192.

144 *Id.* ¶ 14.

145 *See* Op. at *29–32. Along the same lines, the defendants argue that "Delaware law does not support making such findings of recklessness on an *ipse dixit* basis ...." App. ¶ 16. The court did not make *ipse dixit* findings. The court carefully examined the record. *See* Op. at *29–32. The only *ipse dixit* assertions were Denner and DiPaolo's naked contentions that they were not reckless.

146 App. ¶ 17.

147 2009 WL 4696062, *18 n.73 (Del. Ch. Dec. 9, 2009) (cleaned up), *aff'd*, 26 A.3d 180 (Del. 2011).

148 Dkt. 199 ¶ 31 n.6.

149 *See* App. ¶ 9 (citing *In re Happy Child World*, 2020 WL 5793156, *9 (Del. Ch. Sept. 29, 2020)).

150 Op. at *27.

151 *Id.*

152 App. ¶ 21.

153 *Id.* ¶ 31.

154 App. at ¶ 21.

155 *Genger*, 2009 WL 4696062, at *19.

156 *Id.*

157 Supr. Ct. R. 42(b)(iii)(A).

158 App. ¶ 8; *see id.* ¶¶ 22–25.

159 *Id.* ¶ 26.

160 *See* n.111, *supra.*

161 App. ¶ 3.

162 Op. at *1–2, *11, *14–32.

163 *See Equitable Tr. Co. v. Gallagher*, 102 A.2d 538 (Del. 1954).

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164 *See Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542 (Del. 2006)

165 App. ¶ 3; *accord id.* ¶ 27 ("Now everyone must image their phones—at the latest—upon receiving a litigation hold."); *id.* ¶ 28 ("[T]he Court has mandated forensic imaging every time anyone might anticipate litigation in Delaware.").

166 Op, at *18 & n.19 (collecting cases).

167 Op, at *21.

168 The defendants also do not seem to understand the cases they cite. They assert that "[f]ederal authority disfavors imaging because it is incredibly invasive." App. ¶ 28. But the cases they cite address whether courts should issue orders compelling parties to produce forensic images to their opponents. Those cases do not address the use of imaging as a data preservation technique in which a client's own lawyer or data security consultant makes and retains the image. Those are very different things. *See J.B. v. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008) (discussing the power to compel forensic imaging; noting that "forensic imaging is not uncommon in the course of civil discovery" and that "[a] party may choose on its own to preserve information through forensic imaging," but cautioning that "compelled forensic imaging is not appropriate in all cases, and courts must consider the significant interests implicated by forensic imaging before ordering such procedures."); *Corum v. Wensley*, 2023 WL 6192728, at *4 (E.D. Tenn. July 19, 2023) (denying motion to compel forensic image of phone without prejudice where plaintiff failed to file a reply in support of the motion and the defendant offered the less intrusive method of a subpoena to Facebook to obtain his Facebook messages); *Wright v. Rio Tinto Am.*, 2021 WL 5417037, at *3 (D. Utah Nov. 19, 2021) (denying motion to compel forensic image of phone while ordering production of text messages); *FCA US LLC v. Bullock*, 329 F.R.D. 563, 569 (E.D. Mich. 2019) (denying motion to compel production of a mirror image of defendant's personal devices but requiring the defendant to produce deleted files); *Hardy v. UPS Ground Freight,* 2019 WL 3290346, at *3 (D. Mass. July 22, 2019) (denying motion to compel production of a full forensic image of plaintiff's phone where there were less intrusive methods to obtain information); *Cross by & Through Steele v. XPO Express, Inc.*, 2016 WL 11519221, at *7 (D.S.C. May 3, 2016) (denying motion to compel production of forensic image but ordering defendant to "conduct a search of his laptop to determine whether it contains any responsive documents" and "to confer with Plaintiff as to his search methodology and agree to a specific ESI protocol."). Not only that, but in one of the cases the defendants cite, the court compelled the creation and production of a forensic image of a phone. *See France v. Chippewa Cty.*, 2021 WL 11431784, at *3 (W.D. Mich. Nov. 22, 2021) ("France's motion to

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compel the forensic imaging of Savoie and German's cellular devices is hereby GRANTED."). Doubtless there are other decisions that have granted that relief.

The defendants also refer to the Advisory Committee's notes to the Federal Rules of Civil Procedure, which they say "cautions against" making "forensic examination the default." App. ¶ 28. The operative rule is Rule 37(e), and it was adopted in 2015. The defendants rely on two cases from 2009 that cite the Advisory Committee notes to the 2006 version of Rule 34. *Id.* at ¶ 28 n.6 (first citing *Covad Commc'ns v. Revonet*, 258 F.R.D. 5, 11–12 (D.D.C. 2009); then citing *White v. Graceland Coll. Ctr.*, 2009 WL 722056, *7–8 (D. Kan. 2009)). That set of Advisory Committee's notes addressed the ability of an adverse party to obtain "direct access to a party's electronic information system." Fed. R. Civ. P. 34(a)(1), advisory committee's notes to 2006 amendment. It does not deal with how a party fulfills its preservation obligations. The two cases the defendants cite contain the quotation from the Advisory Committee notes that the defendants like, but the cases actually grant relief to the party seeking direct access to an opposing party's electronic information system. The *Covad* decision ordered a party to make forensic images to preserve the data on particular servers, then also ordered full forensic searches of the servers. 258 F.R.D. at 10, 13. The *White* decision denied a plaintiff's request for a full forensic image, but held that the plaintiff had "shown sufficient circumstances to allow some type of direct access to the [defendants'] computer hard drives ...." 2009 WL 722056, at *7–9. Like the Advisory Committee notes, those authorities are not talking about how a party fulfills its own obligation to preserve evidence.

169 *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

170 Op. at *19–21.

171 App. ¶ 29.

172 Supr. Ct. R. 42(b)(iii)(H).

173 App. ¶ 31 (citing *Genger*, 2009 WL 4696062, at *18).

174 *Id.*

175 *Id.*

176 74 F.3d 40 (3d Cir. 1996).

177 *Id.* at 44.

178 *Id.* at 42–45.

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179 *Id.* at 44 (quoting *Jones v. Pittsburgh Nat. Corp.*, 899 F.2d 1350, 1358 (3d Cir. 1990) (internal quotation marks omitted)).

180 *Id.* at 45.

181 *Id.*

182 Supr. Ct. R. 42(b)(iii).

183 Supr. Ct. R. 42(b)(ii).

184 Dkt. 231 at 34.

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

HUNTSMAN INTERNATIONAL, LLC and HUNTSMAN HOLLAND B.V.,	)	C.A. No. N17C-11-242 MAA CCLD
Plaintiffs/Counterclaim Defendants,	)	
v.	)	
DOW BENELUX N.V. and THE DOW CHEMICAL COMPANY,	)	
Defendants/Counterclaim Plaintiffs.	)	

Submitted: May 23, 2024
Decided: August 13, 2024

Dow's Motion for Sanctions for Spoliation:
GRANTED.

OPINION

Lisa C. McLaughlin, Esquire, of PHILLIPS, MCLAUGHLIN & HALL, P.A., Wilmington, DE, and John N. Scholnick, Esquire (Argued), of ROSS, LLP, Los Angeles, CA, and Lori Sambol Brody, Esquire, of ELLIS GEORGE LLP, Los Angeles, CA, *Attorneys for Plaintiff/Counterclaim Defendants*.

Chad S. C. Stover, Esquire (Argued), of BARNES & THORNBURG LLP, Wilmington, DE, and Matthew B. Barr, Esquire, and Zachary Miller, Esquire, of BARNES & THORNBURG LLP, Indianapolis, IN, *Attorneys for Defendants/Counterclaim Plaintiffs*.

Adams, J.

Civil trials are not trials by surprise. This is especially true with complex commercial matters, where parties (and the lawyers who represent them) spend a significant amount of time and resources on the discovery process. Through the discovery process, adversaries obtain information regarding documents and other evidence for trial. By taking depositions, the parties also learn who will testify at trial and the substance of their testimony. Thus, when the time comes for trial, the parties generally know the universe of facts that will be presented.

This, of course, assumes that each side responds truthfully and fully to discovery requests and does not destroy evidence relevant to the case. Central to this case is the fact that Plaintiffs/Counterclaim Defendants, Huntsman International, LLC and Huntsman Holland B.V. (collectively, "Huntsman" or "Plaintiffs"), never issued a litigation hold notice regarding Defendants/Counterclaim Plaintiffs', Dow Benelux N.V. and The Dow Chemical Company (collectively, "Dow" or "Defendants"), Counterclaim. To this day, Huntsman has never issued a litigation hold relating to the Counterclaim. As a result, key databases were destroyed and unable to be restored. To make matters worse, Huntsman hid this fact from Dow and the Court. Dow subsequently filed a motion for sanctions for spoliation as a

result of Huntsman's conduct. For the following reasons, Dow's motion is **GRANTED.**[1]

I. FACTUAL AND PROCEDURAL HISTORY

A. The Original Complaint

This case has a long and torturous history, dating back to November 2017. The original dispute—and the multiple issues that have since spawned from it—arise out of an asset purchase agreement ("APA") between Huntsman and Dow.[2] Pursuant to the APA, Huntsman acquired assets of Dow's global ethyleneamines and aminoethylethanolamines business, except for Dow's ethyleneamines manufacturing plant in Terneuzen, Zeelandic Flanders, The Netherlands (the "Terneuzen Plant").[3]

The parties subsequently entered into an Amended and Restated Supply Agreement on November 15, 2001 (the "Agreement").[4] Pursuant to the Agreement, Dow would supply, and Huntsman would purchase, the ethyleneamines Dow produced at the Terneuzen Plant.[5] The Agreement provided that Huntsman has the right each year during the term of the Agreement to purchase from Dow up to 30

[1] During the hearing for the sanctions motion, the Court also heard oral arguments on Defendants' Motion to Strike Expert Report of Christopher Norek and Portions of Expert Report of Louis Dudney ("Motion to Strike") concurrently with the pending motion. The Court will issue an opinion as to the Motion to Strike in a separate decision.
[2] Compl. ¶ 10. (D.I. 1).
[3] *Id.*
[4] *Id.* ¶ 13.
[5] *Id.*

million pounds of ethyleneamines, which equaled fifty percent of the Terneuzen Plant's nameplate capacity for ethyleneamines.[6] The Agreement requires Dow to issue to Huntsman Holland an invoice for the product Dow delivered to Huntsman during that quarter.[7]

In January 2014, a barge owned by a third party crashed into a jetty at the Terneuzen facility.[8] Although Dow used that jetty to receive raw materials for use in activities related to the Terneuzen Plant, the barge that hit the jetty was not engaged in an activity related to the Agreement.[9] The parties vehemently dispute what happened next, but it is undisputed that during the fourth quarter of 2014 and the first and third quarters of 2015, Plaintiffs purchased and Dow delivered product and sent quarterly invoices to Huntsman.[10] In November 2015, Dow notified Huntsman about the barge accident by delivering to Huntsman three separate invoices, purporting to allocate and charge costs of the jetty repair to Huntsman.[11]

[6] *Id.* The term of the Agreement is 25 years from the Effective Date, which was February 9, 2001, unless terminated earlier in accordance with the provisions of Article 19 of the Agreement. *Id.* ¶ 14.
[7] *Id.* ¶ 15.
[8] *Id.* ¶ 17.
[9] *Id.*
[10] *Id.* ¶ 20.
[11] *Id.* ¶ 21.

After Huntsman refused to pay for the jetty repair, Dow sent a letter to Huntsman in November 2017 stating its intent to terminate the Agreement due to Huntsman's failure to pay the invoices related to the jetty.[12]

Huntsman filed a one-count claim for Declaratory Judgment, seeking a declaration that Huntsman was "not liable to Dow for payment of the 'jetty repair' invoices because the costs of the jetty repairs are not costs recoverable under the terms and conditions of the Agreement."[13] Dow moved to dismiss, and the Court denied the motion on October 3, 2018.[14]

B. Dow's Answer and Counterclaims

Dow answered the Complaint on May 20, 2019.[15] Huntsman then moved to amend the complaint to add claims for fraud, fraudulent concealment, breach of the implied covenant of good faith and fair dealing, and conversion on October 25, 2019.[16] The Court granted the motion on November 12, 2019 and Huntsman filed the First Amended Complaint on November 14, 2019.[17] Huntsman further sought to recover actual and punitive damages against Dow "for the costs Dow claims it

[12] *Id.* ¶ 24.
[13] *Id.* ¶ 28. The First Amended Complaint contained numerous references to Dow's alleged fraudulent billing practices. *E.g.*, Am. Compl. ¶¶ 4, 5, 54.
[14] Memorandum Opinion, N17C-11-242 WCC CCLD, 2018 WL 4896668 (Del. Super. Oct. 3, 2018). This action was previously assigned to Judge Carpenter. The case was re-assigned to Judge Adams on August 19, 2022 in light of Judge Carpenter's impending retirement.
[15] D.I. 54.
[16] D.I. 60.
[17] D.I. 66, 67.

incurred in repairing the jetty."[18] Dow moved to dismiss the First Amended Complaint based on waiver, statute of limitations, and failure to state a claim, which the Court denied on February 2, 2021.[19]

Dow filed its Answer and Counterclaim on February 16, 2021.[20] Central to the Counterclaim is the requirement that Huntsman forecasts product in "good faith:"

> On or prior to the close of business on the fifth business day of each Quarter . . . Customer shall provide to Supplier a written forecast of the amount . . . and Product Slate of Product Customer intends to have Supplier produce and to purchase from Supplier . . . for each of the next four Quarters . . . The forecast for the third and fourth Quarters contained in each Product Forecast shall be a good faith estimate of the amount of Product and Product Slate Customer intends to have Supplier produce and to purchase from Supplier for each of such Quarters forecasted.[21]

Dow asserts that rather than engaging in good faith, Huntsman "repeatedly submitted bad-faith forecasts and then zeroed them out in later forecasts before they became binding."[22] These changed forecasts tied up Dow's product, and prevented Dow from finding alternative buyers for the products Dow produced and prepared for Huntsman based on Huntsman's bad faith forecasting.[23]

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[18] D.I. 67, Am. Compl. ¶ 3.
[19] Memorandum Opinion, N17C-11-242 WCC CCLD, 2021 WL 509668 (Del. Super. Feb. 2, 2021).
[20] D.I. 105.
[21] Agreement, Article 7.1(c).
[22] Countercl. ¶ 1.
[23] *Id.* ¶ 53.

C. Databases Used by Huntsman for Forecasting

Lauren Lozano currently serves as the Senior Manager for Planning and Fulfillment at Huntsman.[24] Between 2016 and 2020, Ms. Lozano worked as Huntsman's Sales and Operation Planning manager for ethyleneamines.[25] In that role, Ms. Lozano was the employee performing the analysis and making the recommendation for the forecasts of ethyleneamines from Dow's Terneuzen Plant.[26] Ms. Lozano has been deposed twice for this case, once as the 30(b)(6) deponent regarding the ESI at issue in this motion ("Topic 4").[27]

Huntsman had a variety of tools that Ms. Lozano used to generate the firm and estimated Product Forecasts including ESOPT, IBP-A, GMIS, HSIMS, FuturCast,[28] Wave, and C4C. The Court has compiled a detailed description of the databases and Huntsman's use of them based on the record as follows:

- FuturCast/GMIS/HSIMS: FuturCast is a system that holds Huntsman's "historical forecast data, actual sales, and projected sales" for each

[24] Lozano Decl. ¶ 1.
[25] *Id.*
[26] *Id.*
[27] *Id.* ¶ 26 (quoting Topic 4 as "the timing and substance of Huntsman's efforts to preserve, identify, and produce ESI from ESOPT, [FuturCast], and/or Wave, when those platforms were decommissioned, and whether, when, and how forecast-related information in those platforms was deleted or destroyed; and the documents Huntsman has produced since the January 23, 2024 hearing.").
[28] The Court notes that this program is spelled in a variety of ways throughout the pleadings, briefing, affidavits, and exhibits. For consistency, the Court will refer to it as "FuturCast" throughout.

Product for the following 12–18 months.[29] GMIS was used until February 2018 when it was decommissioned and replaced by HSIMS—both programs are report-writing databases.[30] Data from FuturCast was loaded into GMIS, then exported and loaded into HSIMS in 2018.[31]

- ESOPT/IBP-A: Huntsman used ESOPT before 2018 and IBP-A after February 2018.[32] ESOPT and IBP-A are sales and operations planning tools that permitted Ms. Lozano to see and manipulate graphical depictions of data pushed into from GMIS/HSIMS.[33] Data "pushed into IBP-A were 'flat files:' (1) forecasting data from GMIS/HSIMS; (2) production capacity for the Freeport and Aminat plants; (3) data showing actual inventories; and (4) data showing forecast accuracy (a comparison of actual sales against the sales team forecasts) from GMIS/HSIMS."[34]
- WAVE/C4C: Wave, a software program offered by McKinsey Consulting to track potential sales leads, "consisted of a compilation of notes and information about potential sales, coded depending on the potentiality of the sale; the highest three levels were entered into

[29] Lozano Decl. ¶ 3; Scholnick Decl. Ex. 28, at 26:16–27:2, 36:2–9, 37:5–12.
[30] Lozano Decl. ¶ 3; Denson Decl. ¶ 2.
[31] Lozano Decl. ¶ 3.
[32] Barr Decl. Ex. 31.
[33] Scholnick Decl. Ex. 28 at 26:16–27:2, 38:24–39:2; Lozano Decl. Ex. 1.
[34] Pls.' Opp'n at 5 (internal citations omitted); Lozano Decl. ¶¶ 2, 3.

GMIS/HSIMS for the sales forecast."[35] Wave was replaced by C4C around late 2019/early 2020.[36]

- Demand and Supply Reviews: The Supply Reviews contain screenshots of data from WAVE and IBP-A.[37] The Supply Reviews also contain charts from IBP-A concerning inventory and supply forecasted in the future.[38]

According to Ms. Lozano, the data in the tools mentioned above "[are] just one thing" she takes into account in forecasting, as "forecasting is more than just looking at spreadsheets and at these tools."[39] Ms. Lozano's "forecast recommendations" are also based on her "experience and discussions with other Huntsman employees concerning market conditions."[40] Ms. Lozano further considered market conditions when making her forecasts based on "working knowledge [she] had as part of [her] role in the company."[41]

D. Meet and Confers Regarding Discovery at Issue for this Sanctions Motion

After the Court's October 2018 decision on the original motion to dismiss, the parties exchanged various discovery requests. Relevant to this sanctions motion, in

[35] Pls.' Opp'n at 5 (internal citations omitted); Lozano Decl. ¶ 4.
[36] Pls.' Opp'n at 5 (internal citations omitted); Lozano Decl. ¶ 4.
[37] Scholnick Decl. Ex. 29, at 124:8–126:18; Ex. 17, at 3–4.
[38] *Id.*, Ex. 29, at 90:3–91:5, 124:8–126:18; Lozano Decl. ¶¶ 19–21; Exs. 2–4.
[39] Lozano Decl. ¶ 5.
[40] *Id.*
[41] Scholnick Decl. Ex. 28, at 76:2–19.

November 2019, Dow served its Second Set of Interrogatories upon Huntsman.[42] These interrogatories included Interrogatory No. 15, which requested:

> Describe any and all methods You used to determine what amount of Product to take under the Agreement and the reasoning behind such methodologies and determinations.[43]

This interrogatory was not limited in time. On March 2, 2020, Huntsman refused to respond to Interrogatory No. 15, objecting to the interrogatory as not relevant, vague, ambiguous, overly broad, unduly burdensome, and oppressive.[44] Huntsman further objected on the grounds that the interrogatory sought "proprietary, confidential or trade secret information," and on attorney client privilege.[45]

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[42] D.I. 62, Barr Decl. ¶ 3.

[43] Barr Decl. Ex. 1, at No. 15. Huntsman further argued at oral argument on May 23, 2024 (the "Sanctions Hearing") that "forecast" and "take" do not mean the same thing and that Dow's failure to clarify that "take" meant "forecasting" excuses Huntsman's failure to be on notice of the claim. The Sanctions Hearing Tr. [hereinafter "Tr."] 54:8–55:20. Dow quickly disputed this argument noting that Huntsman answered Interrogatory 15 "with forecasting practices and cited these databases that we're talking about today" indicating Huntsman "clearly interpreted it as asking for forecasting information because that's the information they provided in their response to the interrogatory." *Id.* at 65:5–16. The Court also noted that Interrogatory 15 was not limited as to time, either in the request itself or in the instructions. Huntsman did not object to the time frame in its response to the interrogatory, but limited its response in March 2023 to the 2016–2020 time frame; implicitly deciding a time limit. *Id.* at 64:14–65:1.

[44] Barr Decl. Ex. 1, at No. 15. In the Opposition, Huntsman stated that at the time, "the amount of product [Huntsman] requested was irrelevant to Huntsman's claims then at issue." Pls.' Opp'n at 14. This, of course, ignores the fact that *Huntsman's* belief as to relevance is not the standard. Discovery broadly allows for any non-privileged relevant material, regardless of admissibility at trial. Del. Super. Ct. Civ. R. 26(b)(1). The Court notes that "the threshold for relevance is not high." *Woodstock v. Wolf Creek Surgeons, P.A.*, 2017 WL 3727019, at *3 (Del. Super. Aug. 30, 2017). Evidence is relevant if "there is any possibility that the information sought may be relevant to the subject matter of the action." *Boatright v. State Farm Ins. Co.*, 2023 WL 8234528, at *2 (Del. Super. Nov. 28, 2023) (internal citations and quotations omitted). The Court decides the scope of discovery, including what is relevant, not the parties. *See, e.g.*, *Hiller v. Sedgwick Claims Mgmt. Servs., Inc.*, 2023 WL 107389, at *2 (Del. Super. Jan. 4, 2023) (internal citations omitted).

[45] Barr Decl. Ex. 1, at No. 15

On March 16, 2020, Dow's counsel sent Huntsman's counsel a discovery deficiency letter, whereby Dow requested Huntsman withdraw its objections and respond to Interrogatory No. 15.[46] The deficiency letter stated,

> Huntsman's response to these Interrogatories [No. 14 and 15], in which it apparently contends that its quarterly requests for product are not related to this case, rebut Huntsman's theory of broad overbilling. Huntsman's refusal to produce documents or answer questions relating to how much product it requested (and, therefore, how much it should have been billed) severely prejudices Dow's defense against Huntsman's new claims. Please either withdraw Huntsman's objections to these Interrogatories or withdraw the Unbounded Paragraphs in the First Amended Complaint, paragraphs 4–5, 53–55, 79, 81–83, 92–94, and 100–101.[47]

On February 19, 2021, Dow served Huntsman with its Third Set of Requests for Production.[48] This third set of requests included Request for Production No. 32 (seeking production of "[a]ll documents and communications related to Your need and/or requirements for ethyleneamines since 2000") and No. 33 (seeking production of "[a]ll communications, records, forecasts, projections, and other documents related to Your use and/or sale of the Product since 2000"). Huntsman objected to the requests and refused to produce documents in response to these requests.[49]

[46] *Id.*, Ex. 3.
[47] *Id.*
[48] D.I. 106.
[49] Barr Decl. Ex. 2.

On February 16, 2021, Dow filed its Answer and Counterclaim.[50] Dow's Fifth Affirmative Defense specifically mentioned the "bad-faith forecasts:"

> Plaintiffs' claims are barred by their prior breach of the implied covenant of good faith and fair dealing in the Agreement. Specifically, Plaintiffs violated the Agreement's specific implied obligation of good faith by submitting bad-faith forecasts and/or by zeroing out previously forecasted Product amounts as retribution against Dow for pursuing payment of invoices, to gain a competitive advantage, or otherwise in bad faith.

The very first sentence of the Counterclaim cuts right to the point: "This Counterclaim seeks to address Huntsman's acts of submitting bad-faith forecasts for amounts of ethyleneamines ("Product") that Huntsman claimed to intend to purchase from Dow."[51]

On May 14, 2021, after filing the Answer and Counterclaim, Dow's counsel sent another discovery deficiency letter to Huntsman's counsel regarding Huntsman's responses to the Third Requests for Production and Third Set of Interrogatories.[52] Dow stated with respect to Request Nos. 32 and 33:

> Huntsman's objections are incoherent and nonsensical. Dow's interrogatories and RFPs request information and documents highly relevant to Dow's Counterclaim, Huntsman's First Amended Complaint, and Dow's defenses. Huntsman's repeated statement that Dow's counterclaim is "baseless" and "was asserted only to harass and oppress Huntsman" is false. At their core, Huntsman's objections constitute attempts to argue the merits of Dow's Counterclaim in discovery responses. This is improper. Huntsman had the opportunity

[50] D.I. 105.
[51] Countercl. ¶ 1.
[52] Barr Decl. Ex. 4.

to file a motion to dismiss but replied to Dow's counterclaim instead. Huntsman must immediately provide and produce responsive information and documents relevant to Dow's Counterclaim. *See* Del. Super. Ct. R. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]").

. . .

Huntsman's objections to producing documents related to its needs for, and uses of, ethyleneamines (Request Nos. 32 and 33): Request No. 32 seeks all documents and communications related to Huntsman's need and/or requirements for ethyleneamines since 2000, and Request No. 33 seeks all documents related to Huntsman's use/sale of ethyleneamines since 2000. In addition to asserting form objections addressed above, Huntsman states it will not produce responsive documents. It objects to these requests based on relevance, stating the documents sought by the request are irrelevant because the request "asks for all documents concerning Huntsman's use of and world-wide requirements for ethyleneamines for a period of more than twenty years, including, but not limited to, Huntsman's own production of ethyleneamines, its uses, its customers, and market analyses."

Documents related to Huntsman's requirements for and uses of ethyleneamines are directly relevant to the allegations in Dow's Counterclaim—specifically, that Huntsman submitted to Dow forecasts for amounts of ethyleneamines that were not in good faith. In order to determine whether and how often Huntsman failed to submit forecasts to Dow in good faith, Dow is entitled to discover, among other things, the amount of ethyleneamines that Huntsman projected needing each quarter, how much it used, and how much it obtained from other sources, including itself.

Huntsman also objects that the "information requested – Huntsman's' [sic] worldwide customers, prices, markets, analyses – may constitute a violation of the antitrust laws." Yet, designating these documents as "Highly Confidential—Attorneys' Eyes Only" under the Protective Order would avoid any such concerns. Indeed, that was Huntsman's

> position during negotiations of the Protective Order, so Huntsman's contradictory objection now is puzzling. Please withdraw your objections and fully respond to Request No. 32.[53]

Dow further stated with respect to Interrogatory Nos. 14–15:

> These interrogatories, respectively, ask Huntsman to identify and describe any communications or documents relating to Huntsman's elections to take Product under the Agreement, and to describe all methods Huntsman used to determine how much Product to take under the Agreement and the reasoning behind such methodologies and determinations. Huntsman objected to these interrogatories based on relevance. Given the filing of Dow's Counterclaim, Huntsman's relevance and other objections have no basis. Please withdraw your objections and fully supplement your written answers.[54]

In response to Dow's May 14, 2021 letter, Huntsman agreed to supplement its response to Interrogatory No. 15, and expressed a willingness to produce documents (on a narrower basis) responsive to RFP Nos. 32 and 33.[55] Dow narrowed its scope in a July 7, 2021 letter, clarifying that

> it seeks documents and communications related to how much ethyleneamines Huntsman projected it would need for all quarters from 2011 to the present and documents and communications sufficient to show where and how Huntsman planned to source the needed ethyleneamines. Dow, however, has not seen Huntsman's documents and has no knowledge of Huntsman's internal operations. Dow thus requests that Huntsman identify, as part of the meet-and-confer process, the categories of documents Huntsman submits would show the information Dow is seeking in Request Nos. 32 and 33.[56]

[53] *Id.*
[54] *Id.*
[55] *Id.*, Ex. 5.
[56] *Id.*, Ex. 6.

Huntsman responded to Dow's July 7, 2021 letter on August 18, 2021.[57] Huntsman continued to object to RFP Nos. 32 and 33 as overbroad and stated that "it will produce forecast letters, to the extent that they are available, for the length of the contract, and internal communications relating to forecasting product from Terneuzen from November 2015 on . . . ."[58] Dow's counsel responded to Huntsman's August 18 letter, explaining what Dow believed to be the relevance of the documents sought by RFPs No. 32 and 33:

> It is critical to Dow's counterclaim to understand Huntsman's decision making process when forecasting Product amounts to Dow. If Huntsman chose to forecast amounts of Product to Dow while knowing it planned to source Product for those quarters from other sources, those forecasts would have been made in bad faith.[59]

After several further meet and confers, Dow moved to compel, among other things, Huntsman to supplement its answer to Interrogatory No. 15 on January 18, 2022.[60] After a hearing on the motion to compel, the parties continued to attempt to negotiate a resolution without further Court action.[61] This attempt, however, was short-lived, and the Court heard oral argument on January 25, 2023 regarding

[57] *Id.*, Ex. 7.
[58] *Id.*
[59] *Id.*, Ex. 8.
[60] D.I. 139.
[61] D.I. 153. As previously indicated, on August 19, 2022, this action was re-assigned to Judge Adams. D.I. 157.

additional motions to compel.[62] During the hearing, the Court, among other things, ordered Huntsman to supplement its answer to Interrogatory No. 15 within 30 days.[63]

Huntsman served its supplemental responses to Dow's Second Set of Interrogatories on March 7, 2023.[64] In doing so, Huntsman provided a high-level description of what Huntsman employee Lauren Lozano would typically review when preparing the forecasts of Product to Dow, including data from software programs called "FuturCast" and "ESOPT."[65] Dow subsequently served RFP No. 78 on May 25, 2023,[66] requesting Huntsman produce:

> All Documents referenced in Huntsman's Supplemental Response to Interrogatory No. 15 that Huntsman considered, read, reviewed, evaluated, discussed, analyzed, or relied upon in determining how much Product to include in its Product Forecasts (including its Firm Order Forecasts or Good Faith Forecasts) from January 1, 2015 through 2020 . . . ."[67]

Huntsman responded to RFP No. 78 on June 26, 2023 as follows:

> Huntsman has produced responsive, non-privileged documents from 2015 through 2020 that were considered or relied upon for the purpose of determining how much Product to include in its quarterly forecasts, including, *e.g.*, documents identified by Bates ranges in Exhibit B to

[62] D.I. 185.
[63] Barr. Decl. ¶ 16.
[64] *Id.*, Ex. 9.
[65] *Id.* FuturCast is "a system that held historical forecast data, actual sales, and projected sales[.]" Scholnick Decl. ¶ 18. "FuturCast data is exported into GMIS/HSIMS to generate reports." *Id.* Ms. Lozano is the Huntsman employee responsible for performing the analysis for determining the "firm" and estimated forecasts of Product from Terneuzen. *Id.*, Ex. 28, at 20:20–21:3, 24:1–26:8.
[66] D.I. 199.
[67] Barr Decl. Ex. 10.

Huntsman's Supplemental Responses and Objections to Dow's Second Set of Interrogatories, dated March 7, 2023.[68]

Importantly, Huntsman did not indicate that it withheld any responsive documents.[69] The Court details the timing and contents of these discovery matters to indicate Huntsman's knowledge of the information requested, and concurrent failure to inform Dow of the destruction of the databases, and failure to attempt to recover the relevant destroyed data until after the motion to compel hearing requiring disclosure.

E. The 30(b)(6) Depositions Regarding Huntsman's Efforts to Preserve

Dow deposed Huntsman employee Lauren Lozano on September 20, 2023.[70] During Ms. Lozano's deposition, Dow learned for the first time that one of the forecasting tools, ESOPT, was decommissioned sometime during the pandemic.[71] Ms. Lozano further testified that she could not remember the exact date ESOPT became decommissioned, did not know if there was an archive of what was in ESOPT, and that ESOPT was not replaced with anything else.[72]

On October 4, 2023, counsel for Dow demanded the production of materials that Ms. Lozano testified about concerning ESOPT, FuturCast, and Wave that

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[68] *Id.*
[69] Barr Decl. ¶ 20.
[70] *Id.*, Ex. 28.
[71] *Id.* at 39:15–40:9. Ms. Lozano confirmed in her declaration that on September 14, 2021 she informed her IT specialist that she "[c]an confirm that we are no longer using IBP-A and we do not need the data in the system maintained *for any reason*." Lozano Decl. ¶ 32; Ex. 9 (emphasis added).
[72] Barr Decl. Ex. 28, at 39:15–40:9.

Huntsman had not produced.[73] Huntsman's counsel never responded in writing to this request.[74] It appears from Ms. Lozano's Declaration submitted in opposition to the sanctions motion that sometime in October 2023—after Ms. Lozano's deposition—she first began her attempt "to find the underlying data inputs that would be pushed into IBP-A which [she] reviewed in making [her] forecasting recommendations."[75]

On October 5, 2023, Dow's counsel then requested dates for a Rule 30(b)(6) deposition of Huntsman regarding, among other things, Huntsman's ethyleneamines sales and the timing and substance of Huntsman's efforts to preserve, identify, and produce responsive ESI.[76] Dow's request included specifically a person with knowledge to testify about "Huntsman's efforts to preserve, identify, and produce ESI from ESOPT, [FuturCast], and/or Wave, when those platforms were decommissioned, and whether, when, and how forecast-related information in those platforms was deleted or destroyed" ("Topic No. 4").[77] Huntsman objected to Dow's request to produce a person with knowledge regarding ESI on the grounds that

> it is premature as Huntsman is undertaking efforts to recover and/or locate the ESI from its ESOPT, [FuturCast], and/or Wave platforms. Deposing the multiple persons with knowledge concerning these subjects is therefore unnecessary until Huntsman makes its

[73] Barr Decl. ¶ 21; Ex. 11.
[74] Barr Decl. ¶ 21.
[75] Lozano Decl. ¶ 6. Ms. Lozano's attempts to find the missing data are detailed in her declaration at ¶¶ 7–15.
[76] Barr Decl. Exs. 12, 13.
[77] *Id.*, Ex. 12.

> determination as to whether it will be able to produce such data, at which time the parties can determine whether a deposition on this topic is necessary.[78]

On November 16, 2023, lead counsel for Dow, Matthew Barr, and lead counsel for Huntsman, John Scholnick, met in person to discuss Huntsman's objection to the deposition.[79] During this meet and confer, "Mr. Scholnick indicated that Huntsman may recover and produce some materials from ESOPT, FuturCast, and Wave, but he gave no timetable for producing them."[80] Dow's counsel continued to request that Huntsman produce a witness on Topic No. 4, with each time Huntsman's counsel refusing such requests.[81] Dow subsequently moved to compel on the issue.[82]

The Court heard oral argument on January 23, 2024 on Topic No. 4, along with other issues raised by both parties.[83] Among other things, the Court ordered Huntsman to produce a witness on Topic No. 4 by March 1, 2024 and further ordered Huntsman to produce the documents at issue in Topic No. 4 "by the end of the week."[84]

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[78] *Id.*, Ex. 15.
[79] Barr Decl. ¶ 28.
[80] *Id.*
[81] *Id.* ¶¶ 29–32.
[82] *Id.* ¶ 33; D.I. 257.
[83] D.I. 276. On January 23, 2024, January 29, 2024, February 1, 2024, and February 21, 2024, Huntsman produced data from Wave/C4C for the time period of April 13, 2016 to January 19, 2018. Scholnick Decl. ¶¶ 37–38.
[84] Barr Decl. ¶ 34.

Huntsman produced 28 documents by the Court-ordered deadline of January 26, 2024.[85] Huntsman then produced three additional documents on January 30, 2024 and 256 additional documents on February 1, 2024.[86] This prompted Dow to serve its First Amended Notice of Rule 30(b)(6) Deposition with an amended Topic No. 4:

> The timing and substance of Huntsman's efforts to preserve, identify, and produce responsive ESI from its computers, servers, networks, and electronic systems and devices, including, but not limited to, the timing and substance of Huntsman's efforts to preserve, identify, and produce ESI from ESOPT, [FuturCast], and/or Wave, when those platforms were decommissioned, and whether, when, and how forecast-related information in those platforms was deleted or destroyed; and the documents Huntsman has produced since the January 23, 2024 hearing.[87]

On February 20, 2024, Dow deposed Ms. Lozano as Huntsman's corporate representative to testify "when [the] platforms were decommissioned, and whether, when, and how forecast-related information in those platforms was deleted or

[85] *Id.* ¶ 35. The documents produced were part of Huntsman's efforts to obtain the data inputs to IBP-A. These documents from Aminat "show[] the monthly actual and planned production monthly from 2016 to 2019 . . . and data from Freeport that shows the monthly actual and planned production from 2016 to 2024." Scholnick Decl. ¶ 28. Actual inventory had been "found" by Huntsman as of the date of Scholnick's Declaration, on April 26, 2024, but had not been produced and would "be produced to Dow shortly." *Id.* ¶ 30. The Court is unclear on exactly when the actual inventory was turned over, but 58 additional documents were provided on April 29, 2024, and Scholnick represented at oral argument that all documents had been turned over as of that date, on May 23, 2024, so the Court assumes the actual inventory was produced on the April 29, 2024 date. *See* Tr. 45:11–20. Further, "a spreadsheet for actual inventory generated from HSIMS which contained information starting in 2018" was produced on approximately January 26, 2024. Scholnick Decl. ¶ 31.

[86] Barr Decl. ¶ 36.

[87] *Id.*, Ex. 19.

destroyed; and the documents Huntsman has produced since the January 23, 2024 hearing."[88] During Ms. Lozano's February 20, 2024 deposition, Ms. Lozano testified that Huntsman's destruction of documents was far broader than previously indicated, including the loss of data from more than just ESOPT.[89]

During the deposition, Ms. Lozano testified about the history of Huntsman's Internal Forecasting Data, and what, if anything, could still be accessed.[90] Ms. Lozano testified that Huntsman's Internal Forecasting Data was stored in FuturCast, among other databases.[91] FuturCast then fed data into GMIS, and once GMIS was not used anymore, the data was fed into HSIMS.[92] Although FuturCast is still accessible by Huntsman, the database automatically deletes data that is over four years old.[93] As confirmed during the Sanctions Hearing, Huntsman made no effort

[88] Barr Decl. ¶¶ 39–40.
[89] Barr Decl. Ex. 30, at 54:14–55:18.
[90] The Court has endeavored to figure out the information from the databases that Huntsman recovered. Suffice it to say that Huntsman admits it has not been able to recover all information that was lost. *See, e.g.*, *id.* at 55:17–18 ("We have a limited history."); Tr. 43:12–15 ("We took a look at it and it was a snapshot at a point in time just before the decommissioning of the IBP-A in September of 2021. So it was not particularly helpful."); 49:4–11 ("It can't look at visually what [Ms. Lozano] looked at because she looked at this tool, IBP-A, and she was able to have this information on screen showing whatever graphical representation she needed to kind of play around with in order to utilize her skills to make recommendations. That's what's – that's the only thing that's missing.").
[91] Barr Decl. Ex. 30, at 54:19–55:18.
[92] *Id.* at 24:4–17. Ms. Lozano testified she did not know what GMIS or HSIMS stood for. *Id.* at 24:18–22.
[93] *Id.* at 25:11–15; 30:17–31:1. During the Sanctions Hearing, counsel for Huntsman did not rebut Dow's argument that the auto deletion was never stopped. Huntsman's counsel did confirm that as of the date of the Sanctions Hearing, there still had been no litigation hold with respect to the Counterclaim. Tr. 34:7–11.

to preserve or back up data in FuturCast until 2024.[94] Therefore, all data from the relevant 2016–2020 time period has been permanently deleted from FuturCast.[95]

FuturCast data was also deleted from two other sources, GMIS and HSMIS. Huntsman decommissioned and deleted GMIS in December 2021.[96] There is no FuturCast data in GMIS.[97] HSMIS, although still an active database, also automatically deletes four-year-old data.[98] Thus, all data from the relevant 2016–

[94] Barr Decl. Ex. 30, at 31:2–5; 36:13–39:10 (indicating that the data recovered from FuturCast that was loaded into GMIS was first produced in March 29, 2024); 44:16–45:9 (noting that the information produced from Wave in February 2024 was produced so late because "we didn't start to look for any of this, the kind of underlying raw data until we were convinced that we couldn't find it").

[95] *Id.* at 31:2–12; 54:19–55:18; *id.*, Ex. 31 ("FuturCast – data retained for 48 months; data can be pulled from 2/2020; data prior to that is automatically deleted").

[96] *Id.*, Ex. 31 ("12/17/2021 – Huntsman initiates decommission of GMIS, expects completion by 12/31/2021. Not retaining any data from GMIS except parts of GMIS (PNL and customer profitability) were saved in Planning Analytics"). Huntsman made no effort to preserve the data in GMIS. *Id.*, Ex. 30, at 31:2–6. Huntsman subsequently found FuturCast/GMIS raw data from January 2015 to December 2017. Scholnick Decl. ¶ 22. On March 29, 2024, Huntsman produced this "raw" data. Denson Decl. ¶¶ 3–9. "This raw data was contained in text files and contains information including the date the data was loaded, forecast projections for 23 months, the customer code, the material code, and the forecast volume. The data includes all Huntsman products, including ethyleneamines. The data does not contain names of customers or of the homologue; Huntsman provided a 'key' that matched up customer and product names with the codes such that, if the data were pasted into Excel and a LOOKUP function used, the names of the customers and products could be viewed. This would permit Dow to look at forecasting data 6–9 months out, as it desires." Scholnick Decl. ¶ 22 (internal citations omitted). Huntsman's counsel also took steps to take this raw data and create spreadsheets and tables for Dow. *Id.* ¶¶ 22–25.

[97] Barr. Decl. Ex. 30, at 28:16–20.

[98] *Id.* at 29:2–30:10 (testifying that Huntsman did not suspend the auto-delete for HSIMS).

2020 time period has been deleted from HSMIS.[99] Huntsman's counters that its duty to preserve "arose on February 16, 2021 when [the] counterclaim [was] filed."[100]

Huntsman Internal Forecasting Data was also stored, and deleted from, the ESOPT database.[101] In 2018, Huntsman deleted ESOPT and the daily backups of its data and migrated its data to IBP-A.[102] Because Huntsman migrated ESOPT's data to IBP-A, in February 2019, IBP-A held forecasting data back to February 2017.[103] IBP-A, however, automatically deleted two-year data.[104] While Huntsman created daily backups on its servers, IBP-A and its backups were deleted by Huntsman in Q4, 2021.[105] Ms. Lozano personally approved the deletion of IBP-A and its backup on September 14, 2021.[106] Huntsman, again, argues that its duty to preserve did not

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[99] *Id.* at 54:19–55:18; *id.*, Ex. 31 ("HSIMS – data only goes back to 2020"). The Court notes that on August 31, 2022, Huntsman produced 600 forecasting documents from Ms. Lozano's files. Scholnick Decl. ¶ 16. "These forecasting documents included Supply and Demand Reviews, spreadsheets, and other presentation material concerning Terneuzen forecasts." *Id.* Neither party addressed these disclosures at the Sanctions Hearing.

[100] Scholnick Decl. Ex. 32, at 1. Huntsman argues that "[h]ad 4-year autodelete function been turned off, would have had data since February 2017 only, and no data prior to that date (January 2016 to January 2017)." *Id.* On April 19, 2024, Huntsman produced forecasted sales data from HSIMS from 2018–2020 that shows forecasts for 23 months out. Denson Decl. ¶ 10; Lozano Decl. ¶¶ 11, 24; Tr. 41:9–13.

[101] ESOPT had a two year auto delete functionality. Barr Decl. Ex. 30, at 33:6–19. Huntsman counters that ESOPT data was deleted, arguing that "all ESOPT data was migrated into IBP-A." Scholnick Decl. Ex. 32, at 1. While true that ESOPT data was migrated into IBP-A, this does not change the fact that ESOPT had a two year auto-delete functionality that was not suspended. Barr Decl. Ex. 30, at 33:4–13. This argument also ignores the fact that IBP-A data (including data migrated from ESOPT) was deleted in Q4 2021. *Id.* at 35:17–37:1

[102] Barr Decl. Ex. 30, at 32:6–12, 34:15–21.

[103] *Id.* at 35:17–36:2.

[104] *Id.* at 34:1–36:16.

[105] *Id.* at 36:3–16.

[106] *Id.*, Ex. 31 ("9/14/2021 – Lauren Lozano says IBP-A is no longer being used and data doesn't need to be maintained.").

begin until February 16, 2021 when the Counterclaim was filed—notably *before* the IBP-A data was deleted.[107]

Finally, Huntsman Internal Forecasting Data was stored in Wave. Huntsman kept data in Wave until 2018 or 2019, and then stored it in a "C4C" database.[108] Huntsman decommissioned Wave in June 2022.[109] Although some Wava data was stored on Huntsman's SharePoint site, called "the Hub," Ms. Lozano could not find any relevant data stored there.[110] Nonetheless, on January 23, 29, February 1, and 21, 2024, Huntsman produced Wave data from April 2016 to January 2018.[111]

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[107] In response to the Barr Declaration that IBP-A data was deleted, Huntsman's counsel averred that "Huntsman has produced or will produce" certain documents. Scholnick Decl. Ex. 32, at 2. Scholnick details these productions in several bullet points. The Court has endeavored to identify which of these bullet points were produced when, and the best it has been able to do is identify the following: HUNTSMAN21233 and HUNTSMAN21236 were produced on approximately January 26, 2024 (Scholnick Decl. ¶ 28); HUNTSMAN21234 was produced on approximately January 26, 2024 (*Id.* ¶ 31); HUNTSMAN21235 was produced on approximately January 26, 2024 (*Id.* ¶ 34); HUNTSMAN22082–22189 was produced on March 29, 2024 (*Id.* ¶ 11); HUNTSMAN22193–22194 were produced on April 19, 2024 (*Id.* ¶ 25). Several other items are listed without identification in Exhibit 32 so the Court is unable to identify precisely when these documents were produced, if they were produced as described by Scholnick as "will [be] produce[d]" in Exhibit 32.

[108] Barr Decl. Ex. 30, at 41:9–42:7.

[109] *Id.* at 22:6–14 (testifying that Kimberly Matthews approved the decommission of the Wave tool); 44:19–45:14 ("If the time period passed and the Wave was no longer relevant, it would [have] been removed."). The parties only provided the Court with excerpts from depositions, so the Court was unable to identify who Kimberly Matthews is based on the exhibits provided. To the extent it matters, the Court assumes Ms. Matthews is someone with the authority to authorize the decommission of a tool Huntsman was using. The parties did not present otherwise at any point.

[110] *Id.* at 97:10–98:3.

[111] Scholnick Decl. Ex. 32, at 4; Scholnick Decl. ¶ 37. Huntsman further argues that because the duty to preserve did not begin until February 16, 2021, there was no obligation to preserve prior to that time. *Id.*, Ex. 32, at 4. Additionally, "Wave was no longer used by 2019/2020." *Id.*

In sum, Ms. Lozano confirmed during her deposition that Huntsman was unable to obtain documents out of ESOPT, FuturCast, GMIS, HSIMS, or Wave related to the relevant time period.[112] Ms. Lozano confirmed that the information Huntsman obtained was a "limited history," and instead Huntsman produced partial information it obtained from sources other than the databases themselves.[113] Put simply, Huntsman did not preserve relevant documents necessary for Dow to determine whether Huntsman's internal forecast data from 2016–2020 contradicted Huntsman's forecasts to Dow.[114]

On February 21, 2024, one day after Ms. Lozano's deposition, Huntsman produced an additional 97 documents.[115] Huntsman represented in its production of these documents that they were "parts of the deleted data" from Wave, but Dow criticized that "without the ability to depose someone on these documents and get into that level of detail, it's really difficult to tell."[116] Some of the documents were spreadsheets, and other documents were limited data files that would need to be run through particular formulas to identify.[117]

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[112] Barr Decl. Ex. 30, at 54:19–55:2.
[113] *Id.* at 55:3–19.
[114] *Id.* at 79:25–81:5. Huntsman likewise did not preserve the product forecasts that Ms. Lozano manually input into the ESOPT and IBP-A systems. *Id.* at 93:4–23. Huntsman then used the manual inputs to create "scenario plan[s]" from a sales and production perspective. *Id.*, Ex. 28, at 67:9–68:10.
[115] Barr Decl. ¶ 40.
[116] Tr. 20:7–14; 48:1–12.
[117] *Id.* at 20:15–21:12.

On February 27, 2024, Dow deposed Huntsman's General Counsel, David Stryker, as Huntsman's corporate representative to testify about Huntsman's efforts to preserve, identify, and produce responsive ESI.[118] Mr. Stryker testified that the only litigation hold notices Huntsman sent out were litigation hold notices for its own affirmative claims.[119]

Huntsman never sent out a litigation hold after Dow filed its Counterclaim. In fact, Huntsman has never sent out a litigation hold regarding Dow's Counterclaim.[120] Mr. Stryker testified:

> When the counterclaim came in, we did not look at the counterclaim and ask whether additional custodians [were] required to be identified or additional documents [were] required to be preserved. Had we done that, I wouldn't be sitting here today.[121]

[118] Barr Decl. ¶¶ 39–41; *id.*, Ex. 21.
[119] *Id.*, Exs. 33, 34, and 32, at 35:14–17. Both hold notices provided a "Description of Matter" that only described Huntsman's claim for reimbursement of repair costs for the jetty accident at the Terneuzen plant. *Id.*, Ex. 33, at 1; Ex. 34, at 1. Mr. Stryker further testified that custodians who received the two litigation hold notices were required to "acknowledge" it by answering a questionnaire at a link in the notice. *Id.*, Ex. 33, at 2–3; Ex. 34, at 3; Ex. 32, at 29:21–31:16. Huntsman's attorneys were required to follow up with custodians who did not fill out the acknowledgement questionnaire to ensure it was completed. *Id.*, Ex. 32, at 49:2–51:22. Several of the litigation holds, however, were never acknowledged by their custodian; therefore, the custodian likely did not preserve all relevant documents they may have had. *Id.* at 55:17–23. Huntsman avers, however, that certain of the custodians did produce relevant documents even though they did not formally acknowledge the litigation hold letter. Scholnick Decl. ¶ 2.
[120] Tr. 34:9–11.
[121] Barr Decl. Ex. 32, at 92:4–9.

Mr. Stryker agreed that a litigation hold should have been sent out for the Counterclaim "[b]ecause the counterclaim was unrelated in material respects to the original claim[.]"[122]

Mr. Stryker confirmed Huntsman had a process for preserving internal databases, including those that had an auto-delete function.[123] Although not every database had the ability to over-ride an auto-delete function, Huntsman had the ability to pull the data from the database manually.[124] For example, if a discovery request came in, Mr. Stryker could ask an employee "to pull a bunch of records" to make sure that the data is "preserved, pulled, culled, collected, or otherwise aggregated."[125] Mr. Stryker confirmed Huntsman failed to send out litigation hold notices out for Forecasting Data in FuturCast, ESOPT, and Wave.[126]

Following Mr. Stryker's deposition, Dow sent a letter to Huntsman's counsel requesting additional documents related to Huntsman's efforts to preserve, identity, and produce responsive ESI.[127] The parties exchanged meet and confer letters on the issue, and Huntsman refused to produce the documents referenced in Mr.

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[122] *Id.* at 35:18–36:24. ("[T]he folks responsible for [sending out the litigation hold] made a mistake and didn't have one sent out.").
[123] According to Huntsman's Opposition, the ESI at issue was deleted as part of Huntsman's regular decommission process, and not as part of an intentional act to destroy relevant ESI. Pls.' Opp'n at 9–11.
[124] Barr Decl. Ex. 32, at 122:15–123:18.
[125] *Id.*
[126] *Id.* at 145:18–23. "[W]e didn't get hold notices out for these particular tools, which as I said and I'll stand up in court and say it was a mistake for which I am sorry."
[127] Barr Decl. ¶ 41; *id.*, Ex. 21.

Stryker's deposition related to Huntsman's efforts to preserve, identify, and produce responsive ESI.[128] Huntsman subsequently backtracked on this refusal and sent an email to Dow's counsel on March 27, 2024 stating that it "intend[ed] to produce additional documents/data from TotalDiscovery . . . pursuant to the limited waiver of the attorney client privilege and work product doctrine. We will produce these documents as soon as possible."[129] As of Barr's Declaration on March 28, 2024, Dow had not received these additional documents.[130] The parties agree there were at least three more dates of production from Huntsman since March 28, 2024, but neither party identified in briefing or at the Sanctions Hearing whether these particular documents were ever produced on any of those dates.

F. Huntsman's Efforts to Produce Relevant ESI after 30(b)(6) Depositions

According to Huntsman, after Huntsman "learn[ed] of the decommissioned ESI, Huntsman undertook extensive efforts to recreate the underlying documents and/or resurrect the decommissioned systems so the data could be produced to Dow."[131] Huntsman's efforts for each of the databases was described as follows:

- IBP-A: "[S]ince a snapshot of data had been archived, albeit unreadable without the software, Huntsman obtained from Oliver Wight a renewal

[128] Barr Decl. ¶ 42; *id.*, Ex. 22.
[129] Barr Decl. ¶ 42; *id.*, Exs. 21, 22. TotalDiscovery is the software system Huntsman uses to automate its litigation hold process. *Id.*, Ex. 32, at 34:20–25.
[130] Barr. Decl. ¶ 42.
[131] Pls.' Opp'n at 11.

of the IBP-A license, which allowed Huntsman to view but not download the archived data."[132] Huntsman found the following inputs that were uploaded into IBP-A and used for forecasting:

- GMIS/HSIMS forecasted sales data from 2016 to 2020;
- Freeport and Aminat actual and forecasted production from 2016 to 2020;
- Product inventory data;
- Forecast accuracy data from HSIMS from 2018 to 2020, along with a formula for calculating forecast accuracy; and
- Supply Reviews from June 2018 to December 2020.[133]
- Lozano's manual line item inserts into IBP-A concerning Terneuzen were not recovered.[134]

- WAVE: "Huntsman's investigation could not find backup WAVE data, although other WAVE/C4C data was found in the files of Huntsman employees and produced to Dow.[135]
- Extracts from WAVE that were found consisted of "a complete set of WAVE initiatives from April 13, 2016 to January 19, 2018."[136]

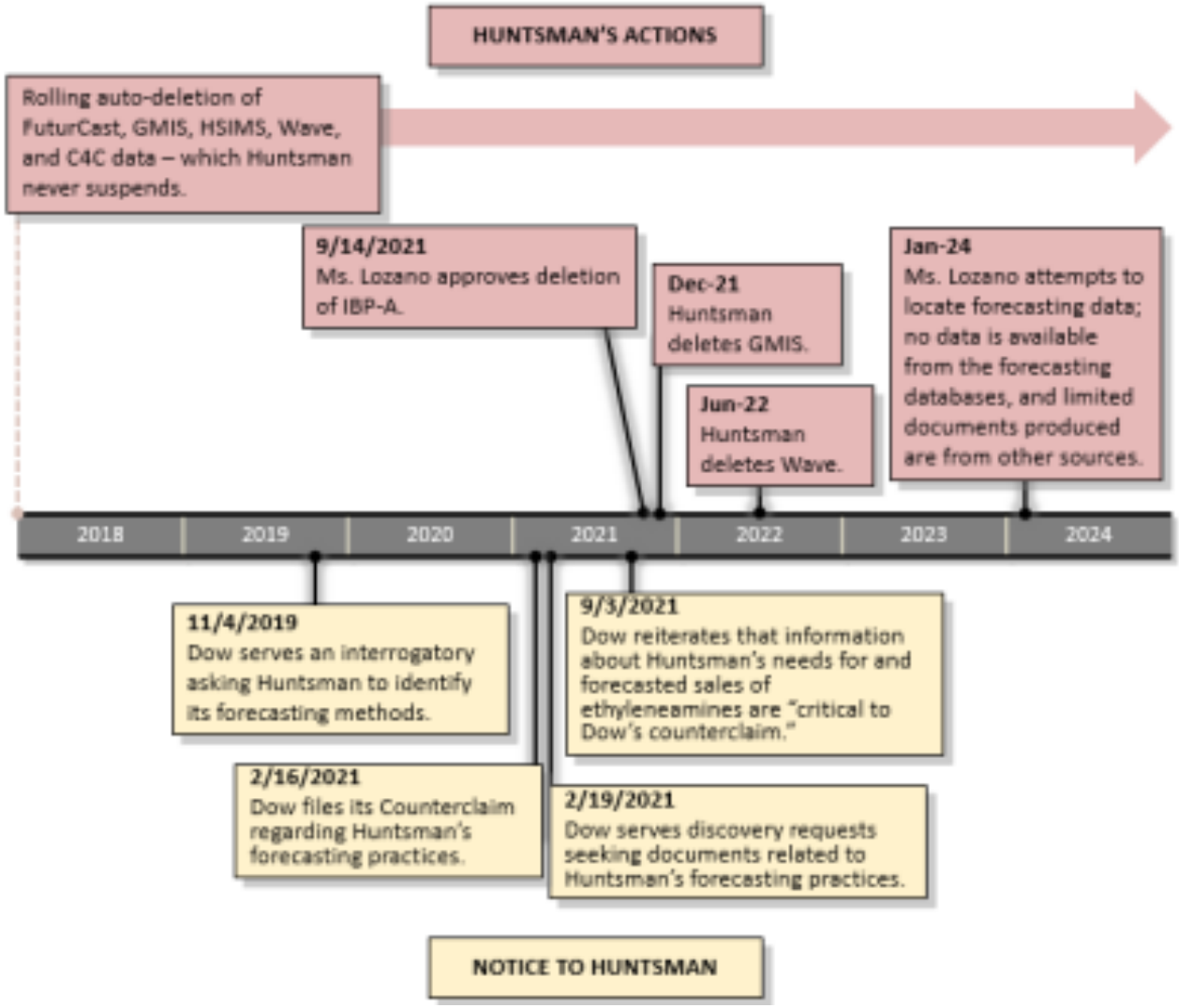
[132] *Id.* at 11–12.
[133] *Id.* at 12.
[134] *Id.*
[135] *Id.* at 13.
[136] *Id.*

Huntsman further argues that Huntsman produced "internal emails concerning the forecasting process," including "[m]ore than 600 forecasting documents . . . from Lozano's files."[137]

Dow provided a helpful chart regarding a timeline of Huntsman's deletion of internal forecasting data:[138]

[137] *Id.* at 16.

[138] Defs.' Br. at 25. The Court notes Huntsman's disagreement with the characterization of the deletion of *all* the data from these data sources and considers the entire record for what precisely was deleted and when. *See, e.g.*, Tr. 35:13–22. This chart is a helpful illustration, not the entirety of the Court's considerations.



II. PROCEDURAL HISTORY

On March 28, 2024, Dow filed its Motion for Sanctions.[139] Huntsman filed its Answering Brief in Opposition to the Motion for Sanctions on April 26, 2024.[140] In support of its Answering Brief, Huntsman filed six declarations from Huntsman employees: Lauren Lozano, Allison McCurdy, Noah Denson, Twila Day, Peter Van

[139] D.I. 308.
[140] D.I. 317.

Rinsum, and Shawn Bates.[141] Prior to filing the Opposition, Huntsman never mentioned Allison McCurdy or Twila Day as potential custodians or individuals with relevant information.[142] Dow filed its Reply in Support of its Motion for Sanctions and Spoliation on May 10, 2024.[143] The Court heard oral argument on May 23, 2024 and took the matter under advisement.

III. STANDARD OF REVIEW

Delaware Superior Court Rule of Civil Procedure 37(b)(2)(F) governs the Court's analysis on a motion for sanctions arising from spoliation of electronically stored information. Rule 37(b)(2)(F) states:[144]

> *Rule 37. Failure to preserve ESI*. If ESI that should have been preserved in the reasonable anticipation of or actual notice of imminent litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> > (1) upon finding prejudice to another party from loss of information, may order measures no greater than necessary to cure the prejudice; or
> >
> > (2) only upon finding that the party acted recklessly or with the intent to deprive another party of the information's use in

[141] D.I. 317.
[142] Defs.' Reply at 4.
[143] D.I. 331.
[144] Superior Court Civil Rule 37(b)(2)(F), Court of Chancery Rule 37(e), and Federal Rules of Civil Procedure Rule 37(e) are all substantially similar. The Court notes that the Chancery Rule 37(e) does not include part (B) of 37(e)(2); this is because there are no jury trials in the Court of Chancery. Thus, all applicable provisions are the same between the Court of Chancery and the Superior Court. It is therefore appropriate for the Court to consider decisions from the Superior Court, the Court of Chancery, and all Federal Courts for its analysis. *See Goldstein v. Denner*, 310 A.3d 548, 568 (Del. Ch. 2024).

> litigation, may, among other things: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.
>
> In lieu of any of the foregoing orders or in addition thereto, the Court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Earlier this year, in *Goldstein v. Denner*,[145] Vice Chancellor Laster adopted the federal courts' "step-by-step framework for analyzing spoliation issues[.]"[146] These steps are: (1) "whether the ESI 'should have been preserved;'" "whether the ESI 'is lost' and 'cannot be restored or replaced through additional discovery;" (3) "whether the ESI was lost 'because a party failed to take reasonable steps to preserve it;'" and (4) determining the appropriate sanction.[147] Given the similarities between Superior Court Civil Rule 37(b)(2)(F), Court of Chancery Rule 37(e), and Federal Rules of Civil Procedure Rule 37(e), this Court will also adopt that approach. The Court addresses each of these elements in turn.

[145] 310 A.3d 548 (Del. Ch. 2024).
[146] *Id.* at 571 (internal citations omitted).
[147] *See generally id.*

IV. ANALYSIS

A. The ESI from the Internal Forecasting Databases "Should Have Been Preserved."

The first question is whether ESI "should have been preserved."[148] The Supreme Court of Delaware has held that "[a] party in litigation has an affirmative duty to preserve potentially relevant evidence."[149] The duty to preserve begins as "as soon as the party either actually anticipates litigation or reasonably should have anticipated litigation."[150] Whether a party "reasonably should have anticipated litigation" is an objective standard: it must be viewed from the perspective of the party in control of the evidence.[151]

Importantly, litigation need not be actually filed for a party to "reasonably anticipate" litigation. "The reasonably foreseeable standard turns on the *prospect* of litigation, not the specific case or claims that ended up being filed."[152] The duty to preserve includes evidence a party "knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a

[148] Del. Super. Ct. Civ. R. 37(b)(2)(F); *Goldstein*, 301 A.3d at 571–72.
[149] *Shawe v. Elting*, 157 A.3d 142, 150 (Del. 2017).
[150] *Goldstein*, 310 A.3d at 571 (internal citations omitted).
[151] *Id.* (internal citations omitted). *See also* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery Second Edition* § 6.06[b], at 6-30–6-31 (2022) ("In light of this foreseeable risk [of needing to collect, review, and produce ESI], entities that might be parties to Delaware litigation can avoid significant disruption and expense by enacting data retention policies that will foster (relatively) inexpensive retrieval.") (internal citations omitted).
[152] *Goldstein*, 310 A.3d at 572 (emphasis added).

pending discovery request."[153] Once the duty to preserve evidence attaches, "the party 'must not destroy unique, relevant evidence that might be useful to an adversary.'"[154]

Huntsman had an affirmative duty to preserve relevant evidence regarding its internal forecasting data on November 4, 2019, when Dow served its Interrogatory requesting Huntsman describe "all methods [it] used to determine what amount of Product to take under the Agreement and the reasoning behind such methodologies and determinations."[155] Even looking at this through an objective lens—that of Huntsman's—Huntsman reasonably should have anticipated litigation regarding its internal forecasting data once it was served with Interrogatory No. 15.

Huntsman argues it was not under an obligation to preserve the ESI regarding internal forecasting until after Dow filed its Counterclaim on February 16, 2021 because "Huntsman did not know, and had no reason to believe, that its product forecasting might be relevant until Dow filed its Counterclaim."[156] This ignores the fact that the filing of litigation is just one—of many—ways that triggers a party's

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[153] *In re Shawe & Elting LLC*, 2016 WL 3951339, at *16 (Del. Ch. July 20, 2016) (internal citations and quotations omitted). *See also* Wolfe & Pittenger, *supra* note 151, §6.06[b], at 6-30 ("In whatever way persons or entities address the aggregation, retention, and destruction of ESI in the ordinary course, they bear a duty to preserve potentially relevant ESI once they are subject to litigation or reasonably anticipate litigation.") (internal citations omitted).
[154] *Goldstein*, 310 A.3d at 572 (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)).
[155] *See* Barr Decl. ¶ 3; *id.*, Ex. 1.
[156] Pls.' Opp'n at 18.

duty to preserve. A discovery request for product forecasting—no matter if Huntsman believed it was relevant at the time—triggered Huntsman's duty to preserve.

The Court also notes Huntsman's robust in-house litigation hold process, which it used for its own claims, but failed to use for Dow's. Huntsman uses an application called "TotalDiscovery" for its litigation hold process which "include[es] automating distribution of legal holds, reminders, and acknowledgements."[157] The litigation holds "are sent to persons identified by the in-house litigation team, IT Compliance (responsible for preserving Microsoft applications as well as other ESI), records management, and site records coordinators."[158]

Huntsman issued two litigation hold notices, on July 11, 2017 (before Huntsman filed this action on November 22, 2017) to seven custodians, and on December 6, 2017 to an additional ten custodians.[159] The fact that Huntsman issued a litigation hold notice *prior to* its own lawsuit belies any argument that Huntsman makes that it was not on notice of a potential claim regarding the internal forecasting data until Dow filed its Counterclaim.[160]

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[157] *Id.* at 6.
[158] *Id.*
[159] *Id.* at 6–7.
[160] It is unclear to the Court what role, if any, Delaware counsel had in the preservation process. "At minimum, parties to Delaware litigation and their counsel are required to develop and oversee a preservation process." Wolfe & Pittenger, *supra* note 151, §6.06[b], at 6-32 (citing Guidelines to Help Lawyers Practice in the Court of Chancery, *available* at https://courts.delaware.gov/forms/download.aspx?id=99468 (last visited August 5, 2024)

Dow filed its Answer and Counterclaim on February 16, 2021. Despite the fact that Huntsman's internal processes "call for its litigation department to assess whether the counterclaim or cross-complaint" would require an additional litigation hold,[161] one was never issued for Dow's Counterclaim.

B. The ESI is Largely Lost and Huntsman's Delayed Attempt to Recreate it does not Amount to it Being "Replaced."

The second issue is whether ESI is "lost" and "cannot be restored or replaced through additional discovery."[162] "Information is lost for purposes of Rule 37[(b)(2)(F)] only if it is irretrievable from another source, including other custodians."[163]

The Court finds the ESI regarding the Internal Forecasting Data is lost. Based on the record evidence for the Sanctions Motion, Huntsman knew as of June 2023 that it had destroyed internal forecasting data, but did nothing to attempt to recover it.[164] Instead, Huntsman sat on its hands for months—until the motion to compel hearing in January 2024—before it attempted to try to recover or recreate data from other locations.[165]

[hereinafter "Chancery Guidelines"], at 20). If Delaware counsel had been more involved with the preservation process, it is likely this entire motion could have been avoided.

[161] Pls.' Opp'n at 8.

[162] Del. Super. Ct. Civ. R. 37(b)(2)(F).

[163] *Goldstein*, 310 A.3d at 574.

[164] Scholnick Decl. ¶ 11 ("Huntsman responded that it produced all documents. What Huntsman meant was that it had produced all documents in its possession, custody, or control.").

[165] See Barr Decl. ¶¶ 20–42 for a detailed outline of the meet-and-confer process between the parties leading to the Motion to Compel heard on January 23, 2024.

Huntsman argues because it was able to recover some of the data from other locations (notably after the deadline for production), the ESI is not "lost."[166] This ignores the fact that it is impossible for anyone, including Huntsman, Dow, or the Court, to know exactly what information is still missing.[167] Also, critically, Huntsman concedes that Ms. Lozano's manual input of expected future purchases of Product from Dow in IBP-A is missing and lost.[168] This alone satisfies the "lost" element for spoliation.[169] Without Ms. Lozano's manual input (along with the other missing ESI), it is impossible for Dow to compare projections of purchases from Dow to the forecasts Dow received from Huntsman.

During the Sanctions Hearing, Huntsman's counsel offered additional depositions, at its expense, as a means of replacing the lost information.[170] Deposition testimony, however, is not a sufficient substitute in this action. Ms.

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[166] *See generally* Pls.' Opp'n at 20–26.

[167] *See TR Invs., LLC v. Genger*, 2009 WL 4696062, at *16 (Del. Ch. Dec. 9, 2009) ("'[N]o harm, no foul' is not a cognizable defense to a contempt allegation."); *Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226, 235 (D. Minn. 2019) ("While it is true that Plaintiffs have obtained text messages that Boxill and other parties sent to or received from Staley and Wilson, that does not mean that all responsive text messages have been recovered or that a complete record of those conversations is available."); *Deerpoint Grp., Inc. v. Agrigenix, LLC*, 2022 WL 16551632, at *12 (E.D. Cal. Oct. 31, 2022) ("It is impossible to know now what ESI was available, but which is now no longer available."). Even counsel for Huntsman is not positive that it has produced all of the data it found: "Huntsman *believes* that it has found *almost* all of the data that would have provided inputs into IBP-A and that was used for forecasting." Scholnick Decl. ¶ 19 (emphasis added). *See also* Van Rinsum Decl. ¶ 3 ("I *believe* that these extracts [from WAVE] contain a complete set of sales upsides from April 13, 2016 to January 19, 2018.") (emphasis added).

[168] Pls.' Opp'n at 12.

[169] *See Jonathan R. v. Justice*, 2024 WL 1339522, at *6 (S.D. W. Va. Mar. 28, 2024) (holding that defendants conceded "that some ESI was lost, satisfying this element.").

[170] Tr. 40:10–41:8.

Lozano has already been deposed twice in this action, where she testified that without Huntsman Internal Forecasting Data, she could not "fairly forecast Huntsman's intent to take product from Dow."[171] Thus, any further deposition of Ms. Lozano (or anyone else) could not remedy the lost data. Huntsman does not have all of the information it once did, and critically, Huntsman does not have all the data Ms. Lozano had when completing her forecasting on Huntsman's behalf. When custodians cannot recall the details of information from ESI, depositions do not remedy the loss of evidence.[172]

C. The ESI Was Lost Because Huntsman Failed to Take Reasonable Steps to Preserve It.

The next question is whether the ESI was lost "because a party failed to take reasonable steps to preserve it."[173] "When a duty to preserve evidence arises, a party must act reasonably to preserve the information that it knows, or reasonably should know, could be relevant to the litigation, including what an opposing party is likely to request."[174] Because ESI is "inherently more susceptible to loss or alternation," it is especially important to take the appropriate steps to preserve this information.[175]

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[171] Barr Decl. Ex. 28, at 87:22–25.
[172] *Goldstein*, 310 A.3d at 575.
[173] Del. Super. Ct. Civ. R. 37(b)(2)(F).
[174] *Goldstein*, 310 A.3d at 576.
[175] Wolfe & Pittenger, *supra* note 151, § 6.06[b], at 6-31, citing Chancery Guidelines at 20, and *Beard Rsch. Inc. v. Kates*, 981 A.2d 1175, 1187 (Del. Ch. 2009) ("It is also well known that absent affirmative steps to preserve it, at least some electronically stored information . . . is likely to be lost during the course of litigation through routine business practices or otherwise.").

An important piece of preserving ESI is the issuance of a litigation hold to preserve relevant documents once a party reasonably anticipates litigation. Once an organization issues a litigation hold, it must also "take steps to ensure that the recipients of the hold understand what it means and abide by it."[176] "The organization also must suspend or modify routine document retention or document destruction policies so that evidence is not lost."[177]

There is no dispute Huntsman did not take reasonable steps to preserve the Internal Forecasting Data in this litigation. According to Huntsman, "[t]his was the result of inadvertence and oversight by Huntsman."[178] In a rare mea culpa, Huntsman's General Counsel, David Stryker, admitted: "My guys made a mistake and they're paying a price for it."[179] More striking to the Court, however, is the fact that despite Huntsman's acknowledgement that it made a "mistake" in not issuing a litigation hold notice regarding the Counterclaims, Huntsman *to this day* has still failed to issue a litigation hold notice. That means that information continues to be lost and/or destroyed, and Huntsman is doing nothing about it.[180]

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[176] *Goldstein*, 310 A.3d at 577 (internal citations omitted).
[177] *Id.* (internal citations omitted).
[178] Pls.' Opp'n at 9.
[179] Scholnick Decl. Ex. 31, at 96:13–14. Similarly, Huntsman's lawyer stated at the Sanctions Hearing: "Huntsman failed to issue a litigation hold following its receipt of the counterclaim. It's regrettable. I apologize to the Court and to Dow for that lapse. This has made our case way more difficult than it should have been had we issued the hold because we wouldn't have been – we would not be in this situation today." Tr. 33:17–34:2.
[180] *See Zubulake*, 220 F.R.D. at 218 (A party generally "must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of

Also troubling to the Court is that Huntsman knew that the Internal Forecasting Data had been deleted in June 2023, but did not inform Dow.[181] In a carefully worded affidavit from Huntsman's counsel submitted in connection with Huntsman's Opposition, Huntsman's counsel averred:

> On or around May 25, 2023, Dow served a Sixth Set of Requests for Production, including Request No. 78, which asked for all documents referenced in Huntsman's responses to Interrogatory No. 15. On June 26, 2023, Huntsman responded that it produced all documents. What Huntsman meant was that it had produced all documents in its possession, custody, or control.[182]

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relevant documents."); *In re Skanska USA Civil Southeast Inc.*, 340 F.R.D 180, 185 (N.D. Fl. 2021) ("This is a text book case of spoliation . . . Despite anticipating litigation, despite issuing a written litigation hold on October 14, 2020, despite Claimants filing their first suit in November 2020, and despite receiving discovery requests in April 2021, Skanska failed to suspend its normal document destruction procedures, failed to collect cell phone data from key custodians, failed to ensure its employees understood the litigation hold, and failed to take any steps to prevent the destruction of cell phone data.").

[181] Tr. 13:5–11. On June 26, 2023, Huntsman served its responses to Dow's Sixth Set of Requests for Production wherein Huntsman stated it had "produced responsive, non-privileged documents from 2015 through 2020 that were considered or relied upon for the purpose of determining how much Product to include in its quarterly forecasts[.]" Barr Decl. ¶ 20. Huntsman in that response did not indicate that it had withheld any responsive documents. As late as November 7, 2023, Huntsman indicated to Dow that Huntsman was "undertaking efforts to recover and/or locate the ESI from its ESOPT, [FuturCast], and/or Wave platforms." *Id.* ¶ 27; *id.*, Ex. 15. While it is not specifically admitted by any Huntsman representative, Mr. Scholnick's strategically worded qualification of Huntsman's responses to Interrogatory No. 15 that Huntsman "meant" to say "it had produced all documents in its possession, custody, or control" indicates to the Court that at that point Huntsman was at the very least aware that it did not have the requested documents in its "possession, custody, or control," but failed to indicate that fact to either Dow or the Court. *See* Scholnick Decl. ¶ 11. Mr. Scholnick did detail the efforts to find and retrieve the information requested by Interrogatory 15, but he notably failed to indicate the dates in which these efforts began, only noting that the IBP-A license was renewed "in or around November 2023." *See id.* ¶¶ 17–19, 21, 26, 27. Ms. Lozano was directed in October of 2023 to find "underlying data" demonstrating that Huntsman first sought Ms. Lozano's help in retrieving the documents in October 2023. *See* Lozano Decl. ¶¶ 6, 27. Ms. Lozano continued searching for documents and underlying data at least as late as March 2024. *Id.* ¶¶ 12, 14, 15, 29, 30.

[182] Scholnick Decl. ¶ 11.

As such, it appears to the Court that Huntsman deliberately withheld this information in an attempt to either hide the information from Dow completely (and hope they would not find out), or put off Dow's discovery of the lost data. Only after Dow moved to compel, and after the Court granted the Dow's motion to compel in January 2024 did Huntsman meaningfully attempt to recover or re-create the databases and begin dripping out documents. Such lack of candor to opposing counsel and the Court is troubling.

D. Determining the Appropriate Sanction

The final issue is the determination of the appropriate sanction. Superior Court Civil Rule 37(b)(2)(F) governs the Court's analysis.[183]

1. Dow Has Suffered Prejudice.

The Court finds that Dow has suffered prejudice as a result of Huntsman's actions. Unavoidable is the initial fact that once Huntsman learned it had destroyed, deleted, or otherwise lost documents relevant to Interrogatory 15, it failed to disclose this to Dow or the Court until months later. The Court deduces from the record available that by June of 2023 at least, if not months before, Huntsman was aware of the missing documents.[184] Huntsman not only hid the fact that it lost data files,

[183] *BDO USA, LLC v. EverGlade Glob., Inc.*, 2023 WL 1371097, at *13–14 (Del. Super. Jan. 31, 2023).
[184] See *supra* note 181 detailing the Court's interpretation of when Huntsman first *knew* the materials were lost.

but, once some of those files were recovered, delayed in producing the information over the course of several months, as late as April of 2024 when the parties are set to go to trial in September of 2024. Not only is this clearly delayed in anticipation of trial and after the agreed-to document discovery deadline, but it was after the Court ordered Huntsman to disclose the relevant documents within a week of the January 2024 motion to compel hearing.[185] Even at the Sanctions Hearing, counsel for Huntsman could not definitively say that all the documents or data that can be found, has been found.[186]

No matter how apologetic Huntsman's counsel may be, there is still no litigation hold notice issued—something the Court can only read as a continued disregard for the harm this has and continues to cause to Dow. Even if Huntsman is convinced it has recovered and disclosed all it can, Huntsman is aware of auto-delete functions on its applications, and has a responsibility to issue a litigation hold and to stop the auto-delete, even if it were to produce no additional documents.

Huntsman instead offers to pay for additional depositions to explain the data they have produced, but as case law, and the record indicates, even if the majority of the information has been recovered and can be detailed by a deponent, Dow has no way of knowing how much is still missing, and if that missing information is key to

[185] *See supra* Section II. E.
[186] Tr. 45:15–23 ("I'm under a total obligation to supplement the discovery responses *if and when* I ever find any more.") (emphasis added).

the Counterclaim. There is simply no way to cure the loss of information, especially when the company that lost the information is not even sure of the substance of what is still unrecovered.

Huntsman's actions, omissions and delays have resulted in Dow's inability to prepare for trial in less than a month from the date of this decision. As noted by Dow in the Sanctions Hearing: "[W]hat about Dow? What about the fact that Dow got the runaround for years on this information? What about the fact that Dow had to move to compel over and over to get to the bottom of this?"[187] The Court cannot ignore that Dow has suffered not only the time and costs of litigating the issue of spoilation, but the ability to sufficiently prepare its Counterclaim in advance of trial.

2. Huntsman Acted Recklessly When It Destroyed the Internal Forecasting Data.

"As a predicate to a sanction of default judgment, Rule 37(b) requires that the court make a finding concerning the offending party's state of mind."[188] Default judgment is "the ultimate sanction for discovery violations and should be used sparingly."[189] Thus, if lesser sanctions would achieve the same result, default judgment is inappropriate.[190] Such lesser sanctions include the presumption "that

[187] Tr. 66:7–15.
[188] *BDO USA*, 2023 WL 1371097, at *14.
[189] *Lehman Cap. v. Lofland*, 906 A.2d 122, 131 (Del. 2006) (internal quotations omitted).
[190] *Beard Rsch.*, 981 A.2d at 1190 (internal citations omitted).

the lost information was unfavorable to the party," or a jury instruction that "the jury . . . may or must presume the information was unfavorable to the party[.]"[191]

Here, the Court finds that the line between whether Huntsman's conduct was intentional or reckless is very difficult to draw. On the one hand, Huntsman intentionally destroyed Internal Forecasting data relevant to this dispute.[192] Most egregiously, Ms. Lozano specifically directed data from IBP-A to be destroyed because it was no longer in use. On the other hand, it does not appear to the Court that Huntsman destroyed the Internal Forecasting data in order to limit the information Dow would have in this litigation.[193]

The Court does find that Huntsman's conduct was reckless. The Delaware Pattern Jury Instructions for Civil Practice provides that "[r]eckless conduct reflects a knowing disregard of a substantial and unjustifiable risk. It amounts to an 'I don't care' attitude."[194] Recklessness also involves a "conscious indifference of others," and requires: "(1) an act; and (2) the foreseeability of harm resulting from the act

[191] Del. Super. Ct. Civ. R. 37(b)(2)(F)(2).
[192] *See Urb. Concepts LLC v. Gruber*, 2023 WL 4423978, at *4 (Del. Super. July 7, 2023) ("Intentional conduct means conduct that a person undertook with a knowing desire or with a conscious objective or purpose.") (internal quotations omitted); *State ex rel. Jennings v. Concrete Tech. Resurfacing & Design, Inc.*, 2022 WL 6609883, at *7 (Del. Super. Oct. 10, 2022) ("Intentional destruction means the spoliator acted 'with purpose.'") (internal citations omitted).
[193] *See TR Invs.*, 2009 WL 4696062, at *17 ("[T]o obtain an adverse inference, the aggrieved party must make some showing that the allegedly destroyed evidence existed and supported the aggrieved party's position.").
[194] Del. P.J.I. Civ. § 5.9.

that the actor perceived or should have perceived."[195] Therefore, "drawing an adverse inference is appropriate when an actor is under a duty to preserve evidence and takes part in the destruction of evidence while being consciously aware of a risk that he or she will cause or allow evidence to be spoiled by action or inaction and that risk would be deemed substantial and unjustifiable by a reasonable person."[196]

Huntsman is a highly sophisticated company with a detailed process in place for litigation holds. Huntsman had a process for issuing a litigation hold which included a required "acknowledgement" of the hold via a questionnaire, and requirements on Huntsman's lawyers to follow up on those who failed to complete the questionnaire. Huntsman additionally had processes to manage its internal databases and preserve information, even for databases with an auto-delete function.[197] Dow relied on Huntsman's sophistication "contrasted with its lack of effort to preserve Huntsman Internal Forecasting Data" as evidence of intent.[198] Huntsman's own General Counsel, David Stryker, indicated that Huntsman has "lots of lawsuits and [has] lots of legal holds."[199] Huntsman detailed in its own briefing

[195] *Urb. Concepts*, 2023 WL 4423978, at *4 (internal quotations omitted).
[196] *Beard Rsch.*, 981 A.2d at 1192.
[197] *See* Defs.' Br. at 16–17 (internal citations omitted).
[198] *Id.* at 25. *See also* Tr. 27:12–19 ("We also think you should take into account that Huntsman's a large, sophisticated corporation. It's a legal department that's been involved in many, many litigations. It has robust practices, but it didn't follow them here for reasons that no one seems to be able to explain. We think that makes the fact that they never sent a hold notice even more egregious.").
[199] Barr. Decl. Ex. 32, at 105:21–24.

in opposition that its in-house litigation team, IT Compliance, is "responsible for preserving Microsoft applications as well as other ESI[.]"[200] Huntsman additionally detailed that its own processes dictate that when a counterclaim or cross-claim is received the litigation department must "assess" if the new filing "requires the identification of additional custodians and additional preservation efforts; if both answers are 'yes,' a new legal hold will be issued."[201]

Huntsman issued two litigation holds for its own affirmative claims, but did not issue a litigation hold for the Counterclaim. If this was the only failure on Huntsman's part, the Court may consider it to be negligent or a "mistake," to take Huntsman's general counsel's words. But it was not. The following non-exhaustive

[200] Pls.' Opp'n at 6.

[201] *Id.* at 8 (internal citations omitted). Huntsman attempts to distinguish from Dow's reliance on *Pajak v. Under Armour, Inc.*, 2023 WL 2755927 (N.D.W. Va. Mar. 31, 2023) by noting that there, the data was deleted by someone who had *actual* notice of the hold, whereas here, despite being a sophisticated, large corporation with a legal department, none of the persons deleting the information had actual notice because of the mistake in failing to issue the hold. *Id.* at 40. Dow argues that the legal team's mistake does not distinguish *Pajak*'s emphasis on holding sophisticated corporation's accountable, and thus, the failure by the sophisticated legal team to issue the hold is circumstantial evidence of intent. Defs.' Reply at 20–21. The Court agrees. Mr. Scholnick acknowledged Huntsman's willingness and ability to issue litigation holds without sufficiently explaining why the Counterclaim hold never happened, outside of a "mistake." *See* Tr. 53:10–18 ("[Y]ou can see that we weren't afraid to issue holds, perfectly happy to issue holds. Wish we had. Had a procedure in place for issuing holds as testified to by Mr. Stryker as the general counsel. Your Honor, I wish we had issued a hold because I would have been happy to have avoided all this stuff that we're doing now if we had gotten a hold out."); 59:10-15 ("I don't think there's been any testimony to the fact that we turned a blind eye to it. We made a mistake and the general counsel of Huntsman has testified about the fact that this was a mistake. Monumental mistake, sure, but a mistake, not intending to hide any information.").

list demonstrates that Huntsman's conduct and failure to preserve the Internal Forecasting Data was reckless:

- Huntsman has never sent a litigation hold notice for the Counterclaim;
- Huntsman consistently pushed back at each step of this litigation—from the first discovery request in 2019 through the beginning of this year—to avoid producing information from the Internal Forecasting Databases;
- Huntsman had a rolling auto deletion functionality in databases that has never been turned off;
- Lauren Lozano approved the deletion of IBP-A data on September 14, 2021, saying Huntsman was "not using IBP-A and the data did not need to be retained;"[202]
- Huntsman's internal legal department and outside counsel knew litigation was ongoing with numerous discovery disputes, but allowed the Internal Forecasting Data to be deleted;
- In June 2023, when Huntsman responded to Dow's document requests regarding the Internal Forecasting Data documents, Huntsman misrepresented that "all" documents had been produced; and

[202] Lozano Decl. ¶ 32.

- After Dow finally became aware of the deleted Databases, *only then* did Huntsman try to do damage control and re-create or attempt to find deleted databases.

The Court finds that the appropriate remedy for Huntsman's conduct is drawing an adverse inference. Because this action is a bench trial, the Court will presume, during trial, that the lost information was unfavorable to Huntsman.[203] The Court will also not permit Huntsman to use any of the documents produced after the Court's deadline in January 2024 related to the Internal Forecasting Data.[204] As noted by Dow, failing to meet the discovery deadlines prevented Dow from being able to question witnesses about the documents belatedly disclosed.[205] A deposition, as Huntsman suggests, at this point would either force Dow to proceed to trial unprepared, or force this Court to push the trial date on a case that has been pending since 2017—two outcomes that are both inappropriate to attempt to rectify the parties' disregard for the Court's deadlines. This Court has authority to issue sanctions for both a punitive and deterrent purpose,[206] and both are relevant here. To allow Huntsman to rely on the documents produced after the Court's deadline would

[203] *See, e.g.*, *Goldstein*, 301 A.3d at 585–86 (imposing a sanction of a presumption that the lost information would have favored the moving party's position).
[204] *See Huntsman v. Dow*, C.A. No. N17C-11-242 CCLD, Motion to Compel (Del. Super. Jan. 23, 2024) Tr. at 61:7–13 (requiring production on the date of the hearing, or at the latest, by the end of that week).
[205] Defs.' Reply at 5.
[206] *See, e.g.*, *In re Rinehardt*, 575 A.2d 1079, 1082 (Del. 1990) (internal citations omitted).

reward their failure to follow Court rules—the Court declines to do so. Preventing Huntsman's reliance on the newly produced documents is necessary to cure the prejudice incurred from Huntsman's conduct.[207]

3. Attorneys' Fees

Pursuant to Superior Court Civil Rule 37(b)(2)(F), the Court finds that Dow is entitled to its attorney's fees in prosecution of the Motion for Sanctions.[208] Spoliation of evidence is an "obvious" example of bad faith conduct which merits fee shifting.[209] Dow shall prepare an affidavit in connection with Superior Court Civil Rule 37(b)(2)(F) regarding its attorney's fees within two weeks and submit to the Court for its approval.

V. CONCLUSION

Huntsman's reckless conduct has put Dow in the unfortunate position of facing a trial by surprise—a situation not appropriate in civil trials, even those conducted as a bench trial. Huntsman had an obligation to preserve ESI at the latest by November 2019 upon receipt of Interrogatory 15, but failed to engage in any efforts to preserve the information. Huntsman further failed to disclose timely the

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[207] *See, e.g.*, *Goldstein*, 310 A.3d at 587 (noting that imposing a sanction must be necessary to cure the prejudice caused).
[208] *See, e.g.*, *BDO USA*, 2023 WL 1371097, at *16–17 (awarding reasonable attorneys' fees and costs incurred in connection with the motion for sanctions, related motions to compel, and all other related discovery processes implicated by the spoliated evidence); *Goldstein*, 310 A.3d at 587 (awarding reasonable attorneys' fees incurred in "pursuing the spoliation issue").
[209] *BDO USA*, 2023 WL 1371097, at *16.

failure to preserve the information to both Dow and the Court, and substantially delayed in seeking to recover the lost and destroyed information. The Court therefore **GRANTS** Dow's Motion for Sanctions for Spoliation Against Huntsman, awarding Dow an adverse inference as to the lost information, prohibiting Huntsman from relying on documents produced after the Court's January 2024 deadline, and awarding attorneys' fees incurred by Dow in pursuing these issues.

IT IS SO ORDERED.

/s/ Meghan A. Adams

Meghan A. Adams, Judge

2016 WL 7235222 (Del.Ch.) (Trial Order)
Chancery Court of Delaware.

In Re: FACEBOOK, INC.

No. 12286-VCL.
December 12, 2016.

Order Regarding Documents Submitted by Goldman, Sachs & Co. for in Camera Review

Laster, Judge.

***1** 1. Mark Zuckerberg, the founder and CEO of Facebook, Inc., proposed that Facebook (i) amend its charter to establish a new class of non-voting stock and (ii) distribute the non-voting shares to its stockholders through a dividend (jointly, the "Reclassification"). The Reclassification would permit Zuckerberg to donate substantial amounts of Facebook stock to charity while preserving his control over the company. Zuckerberg retained Simpson Thacher & Bartlett LLP as his legal advisor and Goldman Sachs & Co. as his financial advisor.

2. In August 2015, the Facebook board of directors (the "Board") appointed a special committee (the "Committee") to negotiate the terms of the Reclassification. On April 14, 2016, the Committee recommended that the Board approve the Reclassification. On April 27, 2016, Facebook announced that the Board had approved the Reclassification.

3. After proposing the concept of the Reclassification, Zuckerberg consulted with Goldman about how it should be structured, as well as regarding other alternatives involving his Facebook stock. Rather than communicating with Goldman directly, Zuckerberg routed his questions through Simpson, predominantly but not exclusively through William Hinman and Jinna Kwak. Goldman's responses also went through Simpson Thacher. Because of this artifice, Zuckerberg claimed privilege for communications between Simpson Thacher and Goldman, claiming that they represented legal advice, and for much of Goldman's underlying analysis, claiming it as conducted at the request of counsel to facilitate the rendition of legal advice.

4. The plaintiffs in this action challenged Zuckerberg's assertions of privilege. By order dated November 16, 2016, this court observed that including a financial advisor in a communication does not break privilege as a matter of law, citing *Jedwab v. MGM Grand Hotels, Inc.*, 1986 WL 3426, at *2 (Del. Ch. Mar. 20, 1986) (Allen, C). *See generally* D.R.E. 502(b). The order noted that the central question for privilege analysis is whether the communication was made and the additional party was present "in furtherance of the rendition of professional legal services." The court directed Goldman to submit documents for in camera review, finding that the plaintiffs identified sufficient cause for concern to think that Zuckerberg was invoking privilege too broadly and would not be able to sustain his burden to establish privilege.

5. The court has reviewed the documents that Goldman submitted for in camera review. Many of the items are copies of the same email chain and incorporate the identical communication.

6. It is clear from the court's review that Goldman was serving in a traditional role of an investment banker, providing standard deal-related advice, modeling various aspects of possible transaction structures, and analyzing the

structures and their business implications. Related to this work, Goldman provided tactical and strategic advice on business issues such as the trading dynamics of Facebook's stock, the capital markets implications of Zuckerberg donating shares, and different ways of structuring the Reclassification.

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***2** 7. The fact that Zuckerberg routed business discussions through attorneys, effectively having Hinman, Kwak, and Simpson serve as high-priced messengers, does not convert these business communications into legal advice. Nor does it convert Goldman's financial and deal-related analysis into materials provided for the rendition of legal advice.

8. An analogy may help. Many readers of this order do not control businesses that could be restructured, but they likely own homes that could be renovated. A major home renovation can involve many professionals: an architect, a general contractor, subcontractors, an interior decorator, and perhaps a real estate lawyer to advise on compliance with zoning codes, deed restrictions, permitting regulations, and the like. Envision, however, that because of concern about litigation (perhaps with a disputatious neighbor), the homeowner makes the lawyer the point person for the project. The lawyer conveys all of the questions to architect, general contractor, subcontractors, and interior decorator, coordinates their responses for the owner, and re-conveys the owner's instructions to the professionals. That maneuver does not transmute the architect's plans into legal advice, nor the contractors' notes and observations, nor the interior decorator's design insights. It likewise does not turn the lawyers' observations about architecture, construction, or interior design into legal advice, simply because a lawyer utters them. Making the lawyer the point person creates a pretext for invoking the attorney-client privilege, but it is only a pretext. In reality, the architect is still architecting, the contractors still building, and the interior designer still designing. This is precisely what happened here when Zuckerberg made Hinman the point person for the Reclassification. Goldman still acted as an investment bank. Zuckerberg gained a pretext for invoking privilege, but it was only a pretext. It was an attempt to use attorneys as go-betweens so as to cloak investment banker analysis with the protections of privilege.

9. Plain as it is from the face of the documents, further evidence of the true nature of the business, strategic, and financial advice that Goldman was providing comes from the nature of the redactions that Zuckerberg's counsel made. Many of these redactions excised small snippets of an email chain that happened to include the question that Hinman or Kwak was conveying or that referred to an attorney by name. Counsel did not redact the related and substantively indistinguishable email chatter among the Goldman bankers about how to analyze the issues or in which they developed the answers to the questions. The portions in which Hinman and Kwak were conveying questions or which refer to them by name do not involve legal advice. Hinman and Kwak were simply the point people for coordinating what was fundamentally a strategic and tactical analysis of the business aspects of a deal. The substantively identical nature of the communications underscores their business aspects.

10. In many other cases, Zuckerberg's counsel redacted documents or withheld as privileged communications about business matters. Non-privileged, deal-related communications for which they invoked privilege include a banker's thoughts about possible deal terms (items 10 & 11), banker's calculations and input regarding deal terms (items 12-31), banker analysis about how to model deal terms (items 123 and 125-127), Zuckerberg's questions to Goldman about deal structure (items 32-51), a banker's assessment of the liquidity of Facebook's stock (item 52), and banker's descriptions of analyses that Goldman conducted (items 53-92 and 94-101). All of the examples in the preceding paragraph are from the first binder of documents that Zuckerberg submitted. The other three binders are replete with similar types of documents.

***3** 11. Virtually all of the documents submitted for *in camera* review do not contain legal advice. All will be produced in their entirety, except as specifically provided below. In addition to producing unredacted (or less redacted) versions of the previously redacted documents, Goldman will produce a set that highlights what was previously redacted. Goldman also will provide a table that matches the newly produced documents to the previously redacted versions by Bates number.

12. Despite the general inadequacy of Zuckerberg's privilege assertions, he met his burden for the following documents or portions thereof:
a. Item 6 will be produced in redacted form. The second sentence of the email from Hinman to Rakesh Mehta that was sent on April 29, 2016 at 2:32 p.m. contains an attorney's high level assessment of the merits of the litigation. It is legal advice and can be redacted. The remainder of the email is logistical information about the fact that a lawsuit has been filed. With the identified redaction, item 6 will be produced. The same analysis applies to items 7 and 8.

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b. Item 79 is privileged.

c. Item 293 will be produced in redacted form. It is a presentation prepared by Simpson. Pages 27-31, 34-35, 37, 39-41, and 58 contain legal advice. These pages shall be produced in redacted form, but leaving visible the title of each page. The remainder of the presentation is not legal advice. For example, Pages 1-25 convey business and strategic advice and discuss precedent transaction scenarios. Any investment bank or any consulting firm or accounting firm with an M&A practice easily could have prepared and provided the same content. The fact that a law firm provided it does not make it privileged. These pages will be produced in their entirety, as will any other pages not specifically called out as privileged in this paragraph. The same analysis applies items 375 and 417 and the attachments in items 334, 335, 406.

d. Item 399 will be produced in redacted form. The second sentence in the third paragraph of Simona Strauss' email dated July 30, 2015, can be redacted. The other material that previously was redacted is a factual description of pending litigation or is non-substantive transmittal information. The same analysis applies to items 400-403.

e. Zuckerberg has carried his burden for the redactions in items 420-427 and 431-442.

13. Item 2 is a litigation hold memorandum. There is authority that supports the invocation of privilege for these types of documents, but it is analytically wooden and formulaic. In my view, the instruction to hold documents is part of the document collection process where transparency is required so that the process can function with integrity. To understand what documents have been collected and whether responsive material is being produced, an adversary needs to understand what documents exist. In an era of electronically stored information, understanding what documents exist requires an understanding of what materials have been retained. The memorandum in this case does not reveal the thoughts or mental impressions of counsel beyond providing instructions as to the categories of document that should be preserved. It does not relate those categories to particular claims or defenses. It does not contain legal reasoning or analysis. It is analogous to an inventory. Item 2 therefore will be produced.

14. The analysis of Item 2 applies equally to Items 3, 4, and 5. These communications are part of the mechanical steps taken by attorneys to preserve and gather documents. They are contemporaneous writings that reflect the substance of the answers that would need to be provided by a Rule 30(b)(6) deponent if one were designated to explain the document collection process. They therefore will be produced.

***4** <<signature>>

Vice Chancellor Laster

Dated: December 12, 2016

End of Document

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Court of Chancery of Delaware.

IN RE FACEBOOK INC.
DERIVATIVE LITIGATION

CONSOLIDATED C.A.
No. 2018-0307-JTL
|
Date Submitted: December 9, 2024
|
Date Decided: January 21, 2025

Attorneys and Law Firms

Justin O. Reliford, SCOTT+SCOTT, Wilmington, Delaware; Maxwell R. Huffman, SCOTT+SCOTT, San Diego, California; Donald A. Broggi, Jing-Li Yu, SCOTT +SCOTT, New York, New York; Geoffrey M. Johnson, SCOTT+SCOTT, Cleveland Heights, Ohio; Co-Lead Counsel and Counsel for Co-Lead Plaintiff City of Birmingham Retirement and Relief System.

Frederic S. Fox, Hae Sung Nam, Donald Hall, Aaron Schwartz, KAPLAN FOX & KILSHEIMER LLP, New York, New York; Co-Lead Counsel and Counsel for Co-Lead Plaintiff California State Teachers' Retirement System and for Plaintiff Firemen's Retirement System of St. Louis.

Kevin H. Davenport, Samuel L. Closic, John G. Day, Stacey A. Greenspan, David C. Skoranski, Kirsten M. Valania, Seth T. Ford, PRICKETT, JONES & ELLIOTT, P.A., Wilmington, Delaware; Co-Lead Counsel and Counsel to Co-Lead Plaintiffs Construction and General Building Laborers' Local Union No. 79 General Fund and City of Birmingham Retirement and Relief System and to Plaintiff Lidia Levy.

Frank R. Schirripa, Daniel B. Rehns, Kurt M. Huciker, Kathryn A. Hettler, Scott R. Jacobsen, HACH ROSE SCHIRRIPA & CHEVERIE LLP, New York, New York, Co-Chair of Executive Committee of Plaintiffs' Counsel and Counsel to Co-Lead Plaintiff Construction and General Building Laborers' Local Union No. 79 General Fund, and Additional Counsel to Plaintiffs.

Thaddeus J. Weaver, DILWORTH PAXSON LLP, Wilmington, Delaware; Co-Chair of Executive Committee of Plaintiffs' Counsel and Counsel to Plaintiff Karen Sbriglio and Additional Plaintiffs.

Catherine Pratsinakis, DILWORTH PAXSON LLP, Philadelphia, Pennsylvania; Co-Chair of Executive Committee of Plaintiffs' Counsel and Counsel to Plaintiff Karen Sbriglio.

Thomas J. McKenna, Gregory M. Egleston, GAINEY McKENNA & EGLESTON, New York, New York; Executive Committee of Plaintiffs' Counsel and Additional Counsel for Plaintiffs.

Peter B. Andrews, Craig J. Springer, David M. Sborz, Jacob D. Jeifa Esq., ANDREWS & SPRINGER, Wilmington, Delaware; Brian J. Robbins, Stephen J. Oddo, Gregory E. Del Gaizo, ROBBINS LLP, San Diego, California;

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Joseph W. Cotchett, Mark Molumphy, Tyson Redenbarger, Gia Jung, COCHETT PITRE & McCARTHY LLP, Burlingame, California; Joseph J. Tabacco, Jr., Daniel E. Barenbaum' BERMAN TABACCO, San Francisco, California; Executive Committee of Plaintiffs' Counsel and Additional Counsel for Plaintiffs.

Kevin R. Shannon, Berton W. Ashman, Jr., Callan R. Jackson, Justin T. Hymes, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; William Savitt, Ryan McLeod, Anitha Reddy, Stephen D. Levandoski, Iliria Camaj, Tobias Kuehne, WACHTELL, LIPTON, ROSEN & KATZ, New York, New York; Attorneys for Defendants Mark Zuckerberg, Sheryl K. Sandberg, Kostantinos Papamiltiadis, Jeffrey D. Zients, Peggy Alford, Kenneth I. Chenault, Peter A. Thiel, Susan D. Desmond-Hellmann, Reed Hastings, Marc L. Andreessen, and Erskine B. Bowles. [1]

MEMORANDUM OPINION IMPOSING SANCTIONS FOR SPOLIATION

LASTER, V.C.

***1** The plaintiffs moved for sanctions against two individual defendants who failed to preserve electronically stored information ("ESI"). The plaintiffs succeeded against the defendant who was a C-suite officer and director. The plaintiffs failed against the defendant who was an outside director.

As a sanction, the officer defendant will only be able to prevail on any issue where she bears the burden of proof if she can carry her burden by clear and convincing evidence. The officer defendant also must pay the expenses plaintiffs incurred pursuing sanctions. [2]

I. FACTUAL BACKGROUND

The facts are drawn from the parties' submissions in connection with the motion seeking sanctions. [3] The court has also considered other documents of record and matters suitable for judicial notice. What follows are not formal factual findings, but rather how the record appears at this stage of the case.

A. The Consent Order

***2** In 2011, the Federal Trade Commission filed an eight-count complaint against Meta Platforms, Inc. ("Meta" or the "Company"), a Delaware corporation. The Company owns and operates social media platforms including Facebook, Messenger, WhatsApp, and Instagram.

The FTC alleged that since 2007, the Company allowed third parties to develop, run, and operate applications on the Facebook platform that enabled third parties to obtain personal information about Facebook users. The complaint explained that the Company generated revenue from the third-party developers. The complaint charged that the Company had "deceived consumers by telling them they could keep their information on Facebook private, and then repeatedly allowing it be shared and made public." [4]

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On July 27, 2012, the Company settled the charges by entering into a consent decree (the "Consent Order"). Its terms required that the Company

- not make "any further deceptive privacy claims";
- "get consumers' approval before it changes the ways it shares their data";
- "obtain periodic assessments of its privacy practices by independent, third-party auditors for the next 20 years";
- not make misrepresentation about the privacy or security of consumers' personal information;
- obtain consumers' affirmative express consent before enacting changes that override their privacy preferences;
- prevent anyone from accessing a user's material more than 30 days after the user has deleted his or her account;
- establish and maintain a comprehensive privacy program designed to address privacy risks associated with the development and management of new and existing products and services, and to protect the privacy and confidentiality of consumers' information; and
- within 180 days, and every 2 years after that for the next 20 years, obtain independent, third-party audits certifying that it has a privacy program in place that meets or exceeds the requirements of the Consent Order, and ensure that the privacy of consumers' information is protected. [5]

Since 2012, foreign governments have charged the Company with violating privacy laws and regulations addressing the same topics as the Consent Order. Those actions include:

- A 2016 fine by a German court for failing to clearly state in the terms and conditions the extent to which Facebook licensed users' intellectual property, such as photos and videos, to third parties. [6]
- A 2017 fine imposed by France's privacy regulator for misusing user data for targeted advertising and for using cookies to illegally track what users did on and off the Company's platforms. [7]
- A 2017 fine imposed by the European Union's antitrust regulator for changing the Company's privacy policy, contrary to a 2014 pledge to segregate WhatsApp data from the Company's other platforms. [8]

B. The Cambridge Analytica Scandal

***3** In March 2018, *The New York Times* reported that Cambridge Analytica, a British data analytics firm, had harvested the private information of more than 50 million Facebook users without their permission. [9] The article reported that Cambridge Analytica paid the Company for information that included users' identities, personal identifying information, friends, and "likes." [10] The Consent Order prohibited those practices.

C. The Legal Hold

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Shortly after the Cambridge Analytica scandal broke, the Company issued a legal hold. [11] It stated:

> Litigation has been filed regarding, and certain U.S. and international governmental bodies and other third parties have indicated that they intend to investigate, events related to Dr. Aleksandr Kogan's use of the Facebook Platform and his and our interactions with Cambridge Analytica (CA), Strategic Communication Laboratories (SLC), Eunoia Technologies, Inc., and Christopher Wylie. [12]

The legal hold instructed its custodians that they "have a legal obligation to preserve and not destroy any pertinent evidence in [their] possession that could be relevant to this matter." [13]

The legal hold specified that the retention obligation applied to

> all hard copy and electronic data and documents (such as files, data tables or logs, notes, memos, spreadsheets, docs stored in Dropbox and Box, Quip, and Google or Zoho Docs), and all correspondence (such as email, instant messages, Skype messages, WhatsApp messages, FB Messages, text messages, FB Group posts, and letters). [14]

The legal hold also identified more specific categories of documents, including:

- "Documents that refer or relate to **Aleksandr Kogan, Aleksandr Spectre, or Global Science Research (GSR), and University of Cambridge**;"
- "Documents that refer or relate to **the app "thisisyourdigitallife" (App ID: 599050663475147)**;"
- "Documents that refer or relate to **Cambridge Analytica (CA), Strategic Communication Group, Strategic Communication Laboratories (SCL), SCL Elections Limited, or Alexander Nix**;"
- "Documents that refer or relate to **Christopher Wylie or Eunoia Technologies, Inc.**;"
- "Documents that refer or relate to **Michael Inzlicht, Daniel Randles, University of Toronto, or Toronto Laboratory for Social Neuroscience**; or"
- "Documents that refer or relate to **developer access to user data via apps integrated with the Facebook Platform.**" [15]

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The legal hold instructed custodians to make certain that they "do not delete or destroy" documents and explained that if custodians were "unsure whether a document is relevant to matters, save it."[16] The legal hold told recipients, "If you create a document in the future that is relevant to the matters, save it."[17]

Sheryl Sandberg, a member of the Company's senior leadership team, received the legal hold. At the time, she served as the Company's Chief Operating Officer, a role she held until August 2022. She also served as a member of the Company's board of directors (the "Board"), a position she held until May 2024.

D. This Litigation

This litigation began on April 25, 2018. As it progressed, the Company reminded the custodians about the legal hold. After Jeffrey Zients joined the Board in 2018, the Company sent him the legal hold.[18] Zients served on a special committee tasked with evaluating and recommending a potential settlement with the FTC.

***4** On July 31, 2018, outside counsel contacted Sandberg and Zients "to discuss document preservation and collection in connection with the Cambridge Analytica-related derivative cases."[19] In November 2018, outside counsel contacted Zients to discuss his preservation obligations.[20]

E. Discovery

On May 10, 2023, the court denied the defendants' motion to dismiss. After that ruling, the parties moved forward with discovery.

Discovery has been extensive. The defendants have collected documents from thirty-two custodians and dozens of unique custodial sources, including business and personal email accounts, messaging platforms, and Meta Workplace communication tools.[21] The defendants have produced over 1.7 million documents containing over 8.9 million pages.

Between November 3, 2023 and March 28, 2024, the plaintiffs asked the defendants about their collection of ESI.[22] On April 3, 2024, the plaintiffs served interrogatories seeking information about the preservation of ESI.[23] In their answers, the defendants disclosed Sandberg's personal Gmail account,[24] maintained under a pseudonym, that she used to "communicate about matters potentially relevant to the claims and defenses in this action."[25] The defendants' disclosed that "Sandberg's Gmail emails were collected and preserved for other litigations" and that counsel was "investigating their availability."[26] Then came the big disclosure: "Prior to this litigation, Defendant Sandberg had a practice of regularly deleting emails from her Gmail account that are over 30 days old."[27]

The defendants similarly disclosed that Zients used a personal email account to "communicate about matters potentially relevant to the claims and defenses in this action."[28] They reported that Zients's account had an "approximately six-month data retention practice during his board tenure."[29] In other words, the account

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deleted older emails. The defendants stated that they were "investigating whether any data from that account was backed up or stored locally and could be recovered."[30]

On May 8, 2024, the plaintiffs asked when Sandberg stopped deleting emails from her Gmail account and the status of her recovery efforts. On June 18, the defendants declined to answer, citing the ongoing nature of their investigation.[31] The plaintiffs asked about Zients's emails. The defendants reported that after an "investigation and consultation with a forensic ediscovery specialist, the individual defendants do not believe that any emails from [Zients's] personal account in the collection period were retained on any local media."[32]

***5** On June 26, 2024 the plaintiffs followed up about Sandberg and Zients's document preservation efforts. The plaintiffs asked again about when Sandberg stopped deleting her Gmail emails. They also asked whether Zients preserved his documents from the final six months of his Board tenure (November 2019 to May 2020). The plaintiffs proposed including Sandberg and Zients's personal email addresses in the ESI search terms.[33] The defendants declined.[34]

On August 9, 2024 the defendants informed the plaintiffs that "there is no specific date in which Ms. Sandberg's email practice was in place with respect to her personal Gmail account. Because there is no specific date, at this time, we cannot provide a specific date at which she ceased the practice."[35] The defendants also reported no one collected "any emails from [Zients's personal] account," and the deleted emails were irretrievably lost.[36]

F. Mitigation Efforts

Having disclosed that Sandberg and Zients failed to preserve ESI, the defendants investigated whether the data could be obtained from other sources. The defendants also examined the ESI that remained in an effort to draw inferences about what the lost ESI might have contained.

For Sandberg, defense counsel reviewed approximately 3,800 emails from her Gmail account plus 300 other documents obtained that her counsel had from other litigation. None were responsive. There were also 57 emails in the record that were also sent to or from Sandberg's Gmail account, so those emails were not lost.

For Zients, defense counsel reviewed over 6,500 documents from Zients's other accounts and identified 415 that were sent to or from his personal account, so those emails were not lost. Defense counsel produced 527 documents in which one of Zients's three email addresses appears in the from, to, cc, or bcc metadata fields.

II. LEGAL ANALYSIS

The plaintiffs moved for curative sanctions for spoliation. "Spoliation is the destruction or significant alteration of evidence, the failure to preserve evidence properly for another's use, or the improper concealment of evidence."[37]

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The plaintiffs contend that Sandberg and Zients spoliated evidence by failing to preserve ESI.

Court of Chancery Rule 37(e) addresses the failure to preserve ESI. It states:

> If ESI that should have been preserved in the reasonable anticipation of or actual notice of imminent litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted recklessly or with the intent to deprive another party of the information's use in the litigation, may, among other things:
>
> (A) presume that the lost information was unfavorable to the party; or
>
> (B) dismiss the action or enter a default judgment.

Emails are a type of ESI, so Rule 37(e) applies. [38]

***6** Under Rule 37(e), to obtain sanctions for a party's failure to preserve ESI, the requesting party must show (i) the responding party had a duty to preserve the ESI, (ii) the ESI is lost, (iii) the loss is attributable to the responding party's failure to take reasonable steps to preserve the ESI, and (iv) the requesting party suffered prejudice. [39] For an adverse inference or case-dispositive sanctions, the plaintiff must show that the responding party acted recklessly or intentionally when failing to preserve ESI. [40]

A. The Threshold Issue of Timing

When considering a motion addressing spoliation, there is always a threshold question about timing. The plaintiffs here moved while discovery was ongoing, rather than just before or after trial. Several Delaware decisions have deferred ruling on spoliation motions until after trial.

"Delaware trial courts have inherent power to control their dockets." [41] That authority includes determining how a case should proceed for the "orderly adjudication of claims." [42]

Determining when to address a spoliation motion "rests in the discretion of the court based on the facts of each case." [43] Pertinent factors include "the nature of the spoliation, the stage of the case, the court's ability to provide case-specific relief, and any scheduling order that might apply." [44] "If a party seeks an order compelling the defendants to provide additional discovery or to pay for the movant to conduct additional discovery, then it would be foolish to defer the motion until trial." [45] Along similar lines, "[i]f a ruling on the motion will help the parties prepare for trial or limit the issues to be addressed at trial, then it often will make sense to address the motion before trial." [46] But "[i]f the motion turns on evidentiary issues that the court will evaluate at trial, then it will make sense to defer the motion until trial." [47]

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Here, the motion rests on undisputed facts regarding the failure to preserve ESI. The motion does not turn on disputed facts that would warrant an evidentiary hearing or post-trial adjudication. Moreover, the plaintiffs seek remedies that would affect how the balance of discovery and pre-trial proceedings unfold. The plaintiffs seek sanctions including (i) preventing Sandberg and Zients from moving for summary judgment, (ii) raising the burden of proof for their affirmative defenses, and (iii) precluding certain testimony at trial. Whether the court grants those sanctions will affect how the parties prepare for trial and present their evidence. The proper time to consider the plaintiff's motion is now.

B. Was There A Duty To Preserve The Emails?

The first question under Rule 37(e) is whether the ESI "should have been preserved."[48] "Rule 37(e) does not apply ... when information or evidence is lost before a duty to preserve attaches."[49]

A party must "preserve potentially relevant evidence as soon as the party either actually anticipates litigation or reasonably should have anticipated litigation."[50] "A party is not obligated to preserve every shred of paper, every e-mail or electronic document."[51] But, a party is obligated to "preserve what it knows, or reasonably should know, is relevant to the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discover and/or is the subject of a pending discovery request."[52]

***7** "The duty to preserve extends to those employees likely to have relevant information —the 'key players' in the case."[53] "An organization's decision to circulate a litigation hold is a strong indication that a duty to preserve evidence exists, because it shows that the organization subjectively anticipates litigation."[54]

Sandberg and Zients do not contest their duty to preserve.[55] In March 2018, the Company issued a legal hold to Sandberg that covered "all correspondence," including emails, concerning "platform policy, data policy/data use/privacy policy, or privacy settings," "compliance with the 2011 FTC Consent Order," "developer access to user data," "Cambridge Analytica," and related topics.[56] In May, the Company notified Zients about the legal hold when he joined the Board.[57] In these communications, the Company instructed Sandberg and Zients that their preservation obligation extended to existing and to-be-created documents, wherever they might exist.[58]

Sandberg and Zients also received "FAQs Regarding Legal Holds."[59] The answers to the FAQs emphasized the obligation to preserve "any information related to the Matter," including information on personal devices and accounts.[60] Zients and Sandberg received frequent reminders about their preservation obligations.[61] And the Company's outside counsel offered to work with Zients to collect potentially responsive materials.[62]

Sandberg and Zients had an affirmative duty to preserve their personal emails as evidence.

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The first prerequisite for sanctions is therefore satisfied.

C. Are The Emails Lost?

The second question in the Rule 37(e) analysis is whether the ESI "is lost."[63] "Information is lost for the purposes of Rule 37(e) only if it is irretrievable from another source, including other custodians."[64] "Because [ESI] often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere."[65]

The defendants argue that messages form Sandberg and Zients's personal accounts should not be considered "lost" for purposes of Rule 37(e) because they would not have been relevant or responsive. The Rule 37(e) inquiry does consider relevance and responsiveness, but as part of the analysis of prejudice. When analyzing whether ESI is lost, the court asks whether it could be obtained from other sources.

Here, the defendants collected some of the otherwise lost ESI from other sources. They located 57 emails sent to or from Sandberg's Gmail account, and they identified 415 emails sent to or from Zients's personal email address. Those emails were not lost and cannot support a spoliation sanction.

Otherwise, the ESI from Sandberg and Zients's personal accounts is lost. It cannot be recovered from their accounts, and it cannot be obtained from other sources.

D. Were The Emails Lost Due To A Failure To Take Reasonable Steps To Preserve Them?

***8** The third question in the Rule 37(e) analysis is whether the ESI was lost "because a party failed to take reasonable steps to preserve it."[66] "ESI discovery involves five fundamental steps: (1) identification, (2) preservation, (3) collection, (4) review, and (5) production."[67] The issues here are identification and preservation.

When a party has a duty to preserve evidence, that "party must act reasonably to preserve the information that it knows, or reasonably should know, could be relevant to the litigation, including what an opposing party is likely to request."[68] "The standard is reasonableness."[69]

The first step in preserving evidence is "taking reasonable steps to identify information that should be collected and preserved."[70] This process requires "locating the relevant people and the locations and types of ESI."[71] The relevant people are those "who have custody of the relevant ESI or the ability to obtain the ESI."[72] Counsel must interview these individuals "to learn the relevant facts regarding ESI and to identify, preserve, collect, and product the relevant ESI."[73] "The relevant locations are those places where the ESI can be found so that it can be both (a) preserved and (b) collected and produced. Although both are necessary, preserving ESI is distinct from collecting and producing ESI."[74]

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After identifying the reasonably likely sources of ESI, "the party must take reasonable steps to collect and preserve it."[75] The party need not preserve all documents in its possession; "it must preserve what it knows and reasonably ought to know is relevant to possible litigation and is in its possession, custody, or control."[76] In determining reasonableness, a court "should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation."[77]

Simply circulating a litigation hold is not sufficient.[78] "The organization must take steps to ensure the recipients of the hold understand what it means and abide by it."[79] "The organization also must suspend or modify routine document retention or document destruction policies so that evidence is not lost."[80]

Individuals must take similar steps. "[T]hey must disable auto-delete functions that would otherwise destroy emails or texts."[81] "They also must back up data from personal devices before disposing of them."[82] Failing to disable the auto-delete setting or back up messages before deletion demonstrates that a defendant acted unreasonably.[83] Individuals may not claim ignorance. "After receiving a litigation hold, an individual must take steps to determine what is necessary to comply."[84] This includes learning what is necessary "to prevent destruction or automatic deletion."[85]

***9** Under these principles, Sandberg failed to take reasonable steps to preserve ESI. Starting on March 22, 2018, Sandberg had a legal duty to preserve evidence, including ESI, relating to the topics identified in the legal hold. Sandberg is a highly sophisticated individual who served as the Company's Chief Operating Officer and as a director during the events in question. She knew what was required, and she could have consulted with Company counsel if she had any doubts.

Sandberg did not take reasonable steps to identify likely sources of ESI. The legal hold told Sandberg to preserve "any pertinent evidence in our possession that could be relevant to the matter."[86] The legal hold specifically referenced "all correspondence (such as email, instant messages, Skype messages, WhatsApp messages, FB Messages, text messages, FB Group posts, and letters)."[87]

Nor did Sandberg's counsel provide transparency when plaintiffs' counsel raised the issue.[88] The plaintiffs asked about possible sources of ESI on November 3, 2023.[89] No one identified Sandberg's Gmail account until May 2024, six months later.[90] It should not have taken that long to respond. And the response counsel gave was confounding. Counsel stated in an interrogatory response that "[p]rior to this litigation, Defendant Sandberg had a practice of regularly deleting emails from her Gmail account that are over 30 days old."[91] That response did not state when the practice began, did not state when it ended, and did not explain whether Sandberg used an autodelete feature or deleted emails selectively. The defendants also failed to respond forthrightly to follow-up

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inquiries that sought to pin down answers.[92] Sandberg had an obligation to preserve the emails in her Gmail account, and her counsel had an obligation to address that issue earlier in the case. Once the plaintiffs asked about Sandberg's Gmail account, counsel had an obligation to provide answers.

Counsel's failure to give a straight answer in Sandberg's interrogatory responses or when answering plaintiffs' questions supports an inference that Sandberg was *not* using an auto-delete function but rather picking and choosing which emails to delete.[93] That practice violated her obligation to produce documents. The fact that the Company preserved some of the emails from Sandberg's Gmail account for other litigations[94] does not mean that Sandberg took reasonable steps to collect and preserve her Gmail communications for this litigation. She plainly didn't.

Zients also failed to take reasonable steps to collect and preserve ESI. Zients received the legal hold after joining the Board in May 2018. Zients relied primarily on non-Meta email accounts for Company-related communications. For the same reasons as Sandberg, Zients failed to take reasonable steps to identify his personal email account as a likely source of ESI.

***10** Zients used an auto-delete function on his personal email that deleted data approximately every six months.[95] On June 18, 2024, the individual defendants represented that "[f]ollowing investigation and consultation with a forensic ediscovery specialist, the individual defendants do not believe that any emails from [Zients's] personal account in the collection period were retained on any local media."[96] On August 9, the individual defendants confirmed that Zients's counsel did not collect any emails from his personal account and that his emails were irretrievably lost.[97] By failing to disable the auto-delete function on his personal email account, Zients lost his emails and did not take reasonable steps to collect and preserve the ESI.

E. Prejudice

The imposition of sanctions for spoliation requires a showing of prejudice. Absent prejudice, the failure to preserve ESI need not be remedied because, by definition, no harm was done.

"Prejudice exists when spoliation prevents a party from obtaining and potentially using relevant evidence."[98] Determining whether prejudice exists is difficult because spoliation creates an evidentiary vacuum. Proving the lost evidence is relevant is difficult "precisely because the evidence no longer exists."[99]

The prejudice analysis starts by requiring that the requesting party "provide some minimal explanation as to why the lost ESI could have been relevant and either admissible in its own right or reasonably likely to lead to the discovery of admissible evidence."[100] The mere fact that evidence is lost in not sufficient to demonstrate prejudice; the requesting party must "provide a plausible explanation as to way evidence could have been relevant such that the failure to preserve is prejudicial."[101]

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Once the party seeking sanctions meets that initial burden, then the party that failed to preserve the ESI must convince the court that the lost ESI did not result in prejudice. Possible reasons include that the material could not have been relevant, would not have been admissible or potentially have led to the discovery of admissible evidence, or otherwise could not have been used by the requesting party to its advantage. [102]

Here, the plaintiffs have made a showing sufficient to demonstrate prejudice. Both Sandberg and Zients regularly used their personal email accounts to communicate about Company business and compliance issues. Both Sandberg and Zients deleted or allowed communications to be deleted after receiving legal holds and reminders. The plaintiffs now lack access to that evidence. They cannot use the emails to question witnesses; they cannot use the emails as affirmative proof; they cannot use the emails to cross examine witnesses. The burden therefore shifts to the spoliators to show a lack of prejudice.

1. Sandberg's ESI

Sandberg failed to make a convincing case against a finding of prejudice.

She argued that no relevant ESI was lost—and hence there could be no prejudice—because she did not use her Gmail account to conduct Company business in a significant way. To justify that claim, Sandberg cites discovery statistics about emails that were preserved and collected from thirty-two custodians and dozens of unique custodial sources. In that collection, there were only fifty-seven emails sent to or from Sandberg's Gmail account. [103] There were 11,576 emails from her Company account. [104] The defendants also reviewed approximately 3,800 emails from Sandberg's Gmail account that were preserved and that hit on the negotiated search terms. The defendants represent that none were responsive. [105]

***11** It does not follow from those statistics that Sandberg did not use her Gmail account for Company business. The defendants admit she did, and the contents of the fifty-seven emails that were preserved shows that she did. Those emails discussed:

- That Facebook users were "feeling fundamentally insecure about protecting themselves;" [106]
- The Company's lagging "trust among FB regular users," [107]
- Regulatory matters involving the "FTC, SEC, [and] state AGs;" [108]
- The "reputational danger" Cambridge Analytica posed to the Company, [109]
- "FB privacy," [110] and
- "US Privacy Legislation." [111]

Because Sandberg selectively deleted items from her Gmail account, it is likely that the most sensitive and probative exchanges are gone.

The record provides a sufficient basis to conclude that Sandberg failed to preserve ESI

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that would have been relevant to this action. The loss of that ESI constitutes prejudice.

2. Zients' ESI

In contrast, Zients demonstrated that his lost ESI was unlikely to be responsive and hence the loss was not prejudicial.

The defendants assert that Zients's "relevant communications were overwhelmingly via official email and board-portal distributions to all of the directors on the board or its committees."[112] They represent that they reviewed over 6,500 documents from Zients's company and business accounts that hit on the search terms.[113] The defendants found 415 emails sent to or from Zients's personal email address.[114] Of these communications, 411 went to the Board, a committee, or also included other Company directors or employees.[115] As with Sandberg, the defendants argue that plaintiffs failed to support an inference that the lost ESI contained emails that were both relevant and unique.

As with Sandberg, it does not follow from those statistics that Zients did not use his personal email account for Company business. Because Zients's emails are lost, there is no way to determine what they could have contained. Nevertheless, in contrast with Sandberg, there is less reason to think that Zients lost relevant ESI.

First, Zients was an outside director, not a C-suite officer, so he logically would have been less immersed in Company operations and likely received communications comparable to what other directors received.

Second, Zients joined the Board after the Company's run of fines and the Cambridge Analytica scandal. He did not participate in those events in real time. Emails relating to those topics would have been in the nature of after-the-fact reviews or efforts to avoid similar problems in the future.

Zients put himself at risk of sanctions by maintaining the auto-delete feature on his personal email account, after receiving a legal hold instructing him to preserve potentially relevant documents, after receiving numerous reminders, and even after consulting with counsel. But the plaintiffs have not made a showing sufficient to support a conclusion that Zients lost responsive ESI. The analysis of Zients's email stops here.

F. The Sanctions Necessary To Cure The Prejudice Sandberg Caused

***12** Rule 37(e) authorizes a range of sanctions to cure prejudice. The court can deem certain facts to be true, preclude the use of certain evidence, strike particular pleadings or claims, modify the burden of proof for particular issues, allow additional discovery, enter default judgment, and award expenses.[116] Before the court can draw an adverse inference or enter default judgment, the court must conclude that the party "acted recklessly or with the intent to deprive another party of the information's use in the litigation."[117]

Here, the plaintiffs ask the court to

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- increase Sandberg and Zients's burden of proof for affirmative defenses to the standard of clear and convincing evidence;
- preclude Sandberg and Zients from testifying about information received through or sent from their personal email accounts as part of any defense in their case in chief;
- prohibit Sandberg and Zients from moving for summary judgment; and
- award plaintiffs their expenses.

None of those sanctions requires a culpable mental state.

In this case, the prejudice arises from the loss of the emails from Sandberg's Gmail account, the plaintiffs' inability to use those materials as evidence, and the defendants' ability to testify with fewer constraints due to the absence of contemporaneous emails from Sandberg's personal account.

To address that prejudice, the court will impose one sanction the plaintiffs have requested: raising Sandberg's standard of proof by one level on any issue where she bears the burden of proof.[118] In *Genger*, the court went further, holding that the spoliator "will be unable to prevail on any material factual issue if the only evidence in support of his own position is his own testimony."[119] Under that ruling, "[a]bsent corroborating testimony or documents, [the spoliator's] mere word will be insufficient to meet his burden of persuasion."[120] In this case, there is other documentary evidence from Sandberg, so the court will consider her testimony and give it the weight due. But the standard of proof required for the affirmative defenses Sandberg raises will be clear and convincing evidence.

This is a meaningful sanction, but does not rise to the level of a burden shift. The burden of proof "determine[s] what happens if there is no credible evidence on a topic, or if there is some credible evidence, but not enough that either side could carry the evidence by a preponderance."[121] In such a case, the party with the burden of proof loses. In a typical civil case, the plaintiff bears the burden of proof. Shifting the burden of proof changes who wins in the absence of sufficient credible evidence.

Increasing the burden of proof does not have the same effect. It does not force Sandberg to carry a burden on issues where she would not otherwise have to come forward with proof. It only affects issues where Sandberg already had the burden of proof, such as her affirmative defenses.

The plaintiffs also asked the court to preclude Sandberg from testifying about information received through or sent from their personal email accounts as a part of their case in chief. Precluding testimony is a more serious sanction and not warranted here. Sandberg's deletions prejudiced the plaintiffs, but the defendants produced many of Sandberg's emails from other sources. The plaintiffs can cross-examine Sandberg on any testimony she gives.

***13** The plaintiffs additionally asked the court to prevent Sandberg from moving for summary judgment. This is a fact-specific case, so it is highly unlikely that summary judgment will be an efficient procedural vehicle for resolving

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part or all of it. If Sandberg moves for summary judgment, and if the plaintiffs believe that emails from her Gmail account would have been relevant to the summary judgment motion, then the court will take that into account when considering the motion. There is no reason at this point to deny summary judgment in advance.

Finally, the plaintiffs are awarded the expenses they incurred pursuing the spoliation issue against Sandberg. The plaintiffs may recover not only the expenses relating to the motion itself, but also expenses for the effort required to pin down Sandberg's positions and confirm that the ESI was not available from other sources. The plaintiffs are not awarded the expenses they incurred pursing the spoliation issue against Zients.

Some of their expenses may overlap. If the plaintiffs would have incurred expenses to pursue the motion against Sandberg, then they can recover those expenses, even if the expenses also related to Zients.

The parties will exchange information about their respective attorneys' fees and costs and attempt to reach accord in good faith. If they cannot agree, the plaintiff may file an application.

III. CONCLUSION

The motion for sanctions is granted in part. Sandberg must prove her affirmative defenses by clear and convincing evidence and plaintiffs are awarded their expenses as set forth in the rulings in this decision. The motion is denied with respect to the sanctions requested against Zients.

All Citations

Not Reported in Atl. Rptr., 2025 WL 262194

Footnotes

1 Sixteen law firms signed the latest joint stipulation governing the case schedule. *See* Dkt. 505. Even more law firms have entered appearances. The counsel listed here are the counsel appearing in the signature blocks of the filings related to the spoliation motion.

2 The term "expenses" refers collectively both to attorneys' fees and amounts paid out of pocket that might be referred to more traditionally and colloquially as expenses. This is how Section 145 of the Delaware General Corporation Law deploys the term. *See, e.g.*, 8 *Del C.* § 145(a) (authorizing a corporation in a proceeding other than one brought by or in the right of the corporation to provide indemnification "against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred"); *id.* § 145(b) (authorizing a corporation

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in a proceeding brought by or in the right of the corporation to provide indemnification "against expenses (including attorneys' fees) actually and reasonably incurred"); *id.* § 145(c) (mandating corporation to indemnify a director or officer who was successful on the merits or otherwise in defending a proceeding "against expenses (including attorneys' fees) actually and reasonably incurred"). The out-of-pocket expenses encompassed by Section 145 are broader than the restricted concept of "costs" in the statute that authorizes the recovery of court costs in the Court of Chancery. *See* 10 *Del. C.* § 5106; *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 686–88 (Del. 2013).

3 Citations in the form "Compl. ¶ ____" refer to the paragraphs of the operative complaint. Citations in the form "Mot. ¶ ____" refer to paragraphs of Plaintiff's Motion for Curative Relief And Sanctions Against Defendants Sheryl Sandberg and Jeffrey Zients. Citations in the form "DOB ¶ ____" refer to paragraphs of Defendants' Opposition To Plaintiffs' Motion For Curative Relief And Sanctions Against Sheryl Sandberg And Jeffrey Zients, and citations in the form "Readinger Aff. ¶ ____" refer to paragraphs in the Affidavit of Laura G. Readinger in support of that brief. Citations in the form "PRB at ____" refer to the Plaintiffs' Reply Brief in support of their motion, and citations in the form "Huffman Aff. ¶ ____" refer to paragraphs in Affidavit of Maxwell R. Huffman in support of their reply. Citations in the form "Ex. [number] at ____" refer to plaintiffs' exhibits submitted in connection with their motion and reply brief.

4 Compl. ¶ 81 (internal quotations marks omitted).

5 Compl. ¶ 89.

6 Compl. ¶ 302 (citing Reuters Staff, *German Court Fines Facebook $109,000 in Dispute Over IP License Clause*, REUTERS (Feb. 29, 2016), https://www.reuters.com/article/us-facebook-germany/german-court-fines-facebook-109000-in-dispute-over-ip-license-clause-idUSKCN0W21W4).

7 Compl. ¶ 303 (citing Samuel Gibbs, *Facebook Facing Privacy Actions Across Europe as France Fines Firm €150k*, THE GUARDIAN (May 16, 2017), https://www.theguardian.com/technology/2017/may/16/facebook-facing-privacy-actions-across-europe-as-france-fines-firm-150k).

8 Compl. ¶ 304 (citing Reuters Staff, *EU Fines Facebook 110 Million Euros Over WhatsApp Deal*, REUTERS (May 18, 2017), https://www.reuters.com/article/us-eu-facebook-antitrust/eu-fines-facebook-110-million-euros-over-whatsapp-deal-idUSKCN18E0LA).

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9 Matthew Rosenberg, et al., *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES (Mar. 17, 2018), https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html.

10 *Id.*

11 *See* Ex. 1.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* (original emphasis).

16 *Id.*

17 *Id.*

18 Mot. ¶ 4; DOB ¶ 6.

19 Ex. 5.

20 Ex. 6.

21 DOB ¶ 8; Readinger Aff. ¶ 3.

22 Mot. ¶ 7.

23 Ex. 14.

24 Ex. 15 at 8. Defendants maintain Sandberg "communicated about business through her company email account," and that "[s]he also maintained a personal Gmail account, but avoided using it for company matters." DOB ¶ 5. Defendants argue that Sandberg "could not control the address at which others emailed her," accepting that emails involving business matters sometimes went to her Gmail account. *Id.*

25 Ex. 15 at 8.

26 *Id.* at 9.

27 *Id.*

28 *Id.* at 10. Defendants agree that "Zients used three email accounts to communicate about Meta-related matters: a company account, a business account, and a

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personal account." DOB ¶ 6. Zients's company email account and business email account were fully preserved. *Id.*

29 Ex. 15 at 10.

30 *Id.*

31 Ex. 17.

32 *Id.*

33 Ex. 19 (June 26, 2024 email from A. Schwartz to C. Jackson).

34 Ex. 21. (July 16, 2024 email from C. Jackson to J. Day).

35 *Id.* (August 9, 2024 email from C. Jackson to A. Schwartz).

36 *Id.* While emails from Sandberg and Zients's personal accounts are lost, the documentary record contains at least 11,576 communications involving Sandberg and at least 527 communications involving Zients. DOB Readinger Aff. ¶ 3.

37 *Goldstein v. Denner*, 310 A.3d 548, 567 (Del. Ch. 2024).

38 *See KT4 P'rs LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 751 (Del. 2019) (" 'Emails,' of course, are a type of 'electronic document.' ").

39 *Goldstein*, 310 A.3d at 557.

40 *Id.* at 583.

41 *Solow v. Aspect Res., LLC*, 46 A.3d 1074, 1075 (Del. 2012).

42 *Unbound P'rs Ltd. P'ship v. Invoy Hldgs. Inc.*, 251 A.3d 1016, 1030 (Del. Super. 2021) (cleaned up).

43 *Goldstein*, 310 A.3d at 571.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 Ct. Ch. R. 37(e)

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49 *Goldstein*, 310 A.3d at 571 (quoting *Living Color Enter., Inc. v. New Era Aquaculture, Ltd.*, 2016 WL 1105297, at *4 (S.D. Fla. Mar. 22, 2016)).

50 *Id.*; *see also Beard Rsch., Inc. v. Kates*, 981 A.2d 1175, 1187 (Del. Ch. 2009).

51 *Seibold v. Camulos P'rs LP*, 2012 WL 4076182, at *23 (Del. Ch. Sept. 17, 2012).

52 *Id.*

53 *Goldstein*, 310 A.3d at 572–73 (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)).

54 *Id.* at 573.

55 DOB ¶ 13.

56 Ex. 1.

57 Mot. ¶ 16; DOB ¶ 6.

58 Mot. ¶ 16; Ex. 3–4 (Sept. 16, 2019 and March 27, 2019 FAQs for the legal hold).

59 Mot. ¶ 17.

60 Ex. 4 (Mar. 27, 2019 FAQs for the legal hold).

61 Mot. ¶ 17; Ex. 23–27 (“REMINDER” notices from July 3, 2018, February 7, 2019, August 16, 2019, September 2, 2019, and September 16, 2019).

62 Ex. 6.

63 Ct. Ch. R. 37(e).

64 *Goldstein*, 310 A.3d at 574.

65 *Id.* (quoting Fed. R. Civ. P. 37(e) advisory committee's notes).

66 Ct. Ch. R. 37(e).

67 *Goldstein*, 310 A.3d at 575 (quoting *DR Distribs., LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 923 (N.D. Ill. 2021)).

68 *Goldstein*, 310 A.3d at 575.

69 *Id.*

70 *Id.*

71 *Id.* (internal quotations marks omitted).

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72 *Id.* (internal quotations marks omitted).

73 *Id.* (internal quotations marks omitted).

74 *Id.* (internal quotations marks omitted).

75 *Id.* at 576.

76 *Id.* (internal quotations marks omitted).

77 *Id.* (internal quotations marks omitted).

78 *Id.* at 577.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *See id.*

84 *Id.*

85 *Id.*

86 Ex. 1.

87 *Id.*

88 *See, e.g.,* Ex. 8 at 6–7 (Nov. 3, 2023 email from S. Greenspan to G. Rice, J. Cree, and J. Hymes); Ex. 8 at 1 (Nov. 14, 2023 email from J. Hymes to G. Rice, R. Smith, and S. Greenspan); Ex. 9 at 6–8; Ex. 10; Ex. 11; Ex. 12; Ex. 13. Between November 3, 2023 and March 28, 2024, plaintiffs' counsel repeatedly inquired about the individual defendants' collection of non-Meta ESI. Defense counsel gave vague updates on the progress of this collection.

89 *See* Ex. 8.

90 Ex. 15.

91 *Id.*

92 *Id.*

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93 Sandberg's interrogatory responses simply stated: “Prior to this litigation, Defendant Sandberg had a practice of regularly deleting her emails from her Gmail account that are over 30 days old.” Ex. 15 at 9.

94 Ex. 15 at 9.

95 *Id.* at 10.

96 Ex. 17.

97 Ex. 21.

98 *Goldstein*, 310 A.3d at 583.

99 *Id.*

100 *Goldstein*, 310 A.3d at 585.

101 *Id.* at 584.

102 *Id.* at 585.

103 Defendants cited fifty-six emails in their opposition brief. At the time of the hearing, defendants updated the number to fifty-seven. *See* Hearing Tr. at 28.

104 DOB ¶ 15; Readinger Aff. ¶ 6.

105 Readinger Aff. ¶ 6; Ex. 21 at 1. While defendants produced and reviewed a large number of documents, 93% of their production consisted of re-producing documents from other privacy-related litigation. Huffman Aff. ¶ 2. Only 1.1% of the documents the Company produced are from Sandberg's custodial files; none are from Zients's custodial files. *Id.*

106 Ex. 28 at 3.

107 Ex. 39.

108 Ex. 29.

109 Ex. 30.

110 Ex 38.

111 *Id.*

112 DOB ¶ 17.

113 *Id.*; Readinger Aff. ¶ 11.

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114 Readinger Aff. ¶ 12.

115 *Id.* Defendants' counsel represents that the "remaining four documents are emails between Zients and a fellow director." *Id.*

116 *See* Ct. Ch. R. 37(b); *Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr. U/A/D June 21, 2002*, 2018 WL 6331622, at *14 (Del. Ch. Dec. 4, 2018).

117 Ct. Ch. R. 37(e)(2).

118 *TR Invs., LLC v. Genger*, 2010 WL 541687, at *2 (Del. Ch. Feb. 3, 2010).

119 *Id.*

120 *Id.*

121 *Goldstein*, 310 A.3d at 586 (discussing how presumptions and burdens operate).

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2010 WL 3489735
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

Steven E. KLIG, Plaintiff,

v.

DELOITTE LLP, Deloitte Tax LLP and Deloitte & Touche LLP, each a Delaware Limited Liability Partnership, Defendants.

C.A. No. 4993–VCL.
|
Submitted: Aug. 16, 2010.
|
Decided: Sept. 7, 2010.

West KeySummary

1 **Appeal and Error** Relating to witnesses, depositions, evidence, or discovery

In employee's action against employer seeking damages for wrongful disassociation, trial court's discovery ruling directing employer to produce documents listed on its privilege log did not determine a substantial issue or establish a legal right, and thus interlocutory review of the discovery ruling was not available. Contrary to employer's characterization, the trial court did not announce a new, broadly applicable rule, rather its ruling rested on the facts of the case: employer made no good faith attempt to describe documents sufficiently in the privilege log to allow an examination of the basis for the claim of privilege, and therefore they had to disclose the documents. It was settled that any claim of privilege, no matter how well-founded, had to be adequately described.

17 Cases that cite this headnote

Attorneys and Law Firms

Richard R. Wier, Jr., Michele D. Allen, Weir & Allen, P.A., Wilmington, Delaware; Attorneys for Plaintiff.

Paul J. Lockwood, Michelle L. Green, Skadden, Arps, Slate, Meagher & Flom LLP, Wilmington, Delaware; Attorneys for Defendants.

MEMORANDUM OPINION

LASTER, Vice Chancellor.

***1** In a bench ruling and implementing order dated August 6, 2010, I directed the defendants to produce documents listed on their privilege log (the "Discovery Ruling"). The defendants ask me to certify the Discovery Ruling for interlocutory appeal. Only the Delaware Supreme Court can determine whether to accept an interlocutory appeal. Nevertheless, Supreme Court Rule 42 tasks this Court with initially assessing whether interlocutory review is warranted. Guided by the language of Rule 42 and a consistent line of Supreme Court precedent rejecting interlocutory appeals from discovery rulings, I conclude that certification is not appropriate.

The defendants also ask for a stay of the Discovery Ruling pending the outcome of an appeal. Either this Court or the Delaware Supreme Court can grant a stay. Applying the factors set forth in *Kirpat, Inc. v. Delaware Alcoholic Beverage Control Commission,* 741 A.2d 356, 357–58 (Del.1998), I conclude that a stay is not warranted.

I previously stayed the effectiveness of the Discovery Ruling pending the issuance of this decision. Recognizing that it is within the discretion of the Delaware Supreme Court to view either the certification or the stay issue differently, the temporary stay shall remain in place for an additional 20 calendar days to facilitate appellate review. During that time, the defendants can pursue a further stay with the Delaware Supreme Court.

I. FACTUAL BACKGROUND

The underlying claims in this case concern efforts by plaintiff Steven E. Klig to return to active practice as a tax advisor with defendants Deloitte LLP, Deloitte Tax LLP, and Deloitte &

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Touche LLP (collectively, "Deloitte"). In January 2009, the FBI arrested Klig and charged him with multiple felonies. The salacious details of the charges generated significant media coverage. Deloitte and Klig agreed that he would take a voluntary, paid leave of absence.

In September 2009, with his legal problems still unresolved, Klig sought to return to active employment and resume his counseling practice. Deloitte senior management rejected Klig's proposal and determined that he would remain on leave. Because Klig was still a partner, Deloitte continued to pay him his seven-figure compensation.

Klig responded by filing this action. He primarily contends that the Deloitte executives who placed him on leave lacked the requisite authority under the limited partnership agreements that govern the Deloitte entities. Although he originally sought injunctive relief compelling Deloitte to permit him to return to work, he now seeks damages for wrongful disassociation.

The far narrower matter addressed by the Discovery Ruling concerned the adequacy of Deloitte's privilege log. On February 4, 2010, Klig served his first requests for production of documents. On March 8, Deloitte served its responses. Later that month, Deloitte began a rolling production of documents.

On June 8, 2010, Deloitte produced its privilege log. The 35–page document identified 348 privileged documents. All but 6 documents were withheld on grounds of attorney-client privilege. For 332 of those 342 documents, the log repeated verbatim under the heading "Description" one of five identical phrases:

***2** "Communication reflecting the legal advice of counsel regarding Klig matter."

"Communication requesting the legal advice of counsel regarding Klig matter."

"Redacted communication reflecting the legal advice of counsel regarding the Klig matter."

"Redacted communication requesting the legal advice of counsel regarding the Klig matter."

"Document subject of requested legal advice regarding Klig matter."

The descriptions for 97% of the purportedly privilege documents thus did not provide any document-specific description at all. Someone simply used a word processor's copy and paste functions to replicate the five phrases.

The five phrases duplicated information already provided by other columns on the log. The log contained a column entitled "Document Type," which described each document as an "Email," "Redacted email," "Email attachment," or "Redacted Document." The log contained a column entitled "Reason For Withholding," which stated "Attorney–Client Privilege" for each of the 342 documents. Delaware Rule of Evidence 502 defines the attorney-client privilege as extending to "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." By designating the document as protected by the "Attorney–Client Privilege," Deloitte represented that the communication met this standard. So before ever getting to the "Description" column, a reviewer of the log knew that the entry purportedly concerned a communication made for the purpose of rendering legal services. For Deloitte to describe the entry as, for example, a "[c]ommunication reflecting the legal advice of counsel regarding Klig matter" offered no incremental information at all. As important, the description afforded Klig no way to assess the propriety of the assertion of privilege. And with the same five descriptions replicated 332 times, I am confident that was precisely Deloitte's intent.

By focusing on the 332 entries that mindlessly repeated one of the five phrases, I do not mean to imply that the other descriptions were any better. Two entries were described as "[d]raft communication prepared at the request of the Office of General Counsel." Two others were described as "[d]raft communication reflecting the legal advice of counsel regarding the Klig matter." Two more were described as "[d]raft communication reflecting the legal advice of counsel regarding Klig matter." One was "[d]ocument reflecting legal advice of counsel regarding Klig matter." Another was "[d]ocument prepared for Office of General Counsel." Another was "[d]ocument reflecting the legal advice of counsel regarding partner matters." The last was "[e]mail forwarding communication reflecting the legal advice of counsel regarding Klig matter." Although not technically identical to the rote five phrases, the remaining ten offered equally insubstantial fluff.

Deloitte's log did not even identify which of the people named on the log were attorneys. There was no "Esq.," asterisk, different type, or other marking that might signify attorney status. Deloitte did not bother to provide anyone's

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title or professional affiliation. Solely because the log was so deficient, the minor alternation in Deloitte's descriptions between the verbal phrase "reflecting the legal advice" and "requesting the legal advice" actually acquired some marginal informational content: it suggested whether or not the author of the communication was a lawyer. That is not a redeeming feature. It shows how little information the log provided.

***3** By letter dated June 21, 2010, Klig's counsel pointed out deficiencies in Deloitte's log and asked Deloitte's counsel to address them. By letter dated June 24, 2010, Deloitte's counsel refused.

Klig then moved to compel. He advanced a number of arguments, including that the log did not adequately describe the purportedly privileged documents.

Deloitte responded with a cross-motion. In its July 15, 2010, opposition to Klig's motion and opening brief in support of its own motion, Deloitte finally provided a list of the attorneys who appeared on its log. Deloitte claimed the list was provided "in response to Klig's request for a legend that identifies the persons listed on the log who are attorneys...." Defendants' Answering Brief in Opposition to Plaintiff's Motion to Compel and Opening Brief in Support of Defendants' Cross–Motion to Compel ("DAB") at 4. Deloitte did not explain why it decided to accede to Klig's request in its opposition, since just three weeks earlier Deloitte saw no need to supplement its log in any way.

During a hearing on August 6, 2010, I issued the Discovery Ruling. With respect to Deloitte's log, I ruled as follows:

> Now, the Deloitte log is also inadequate, although for different reasons. They at least listed documents on a document-by-document basis. But you don't just get to send over a list of documents and not say who people are. I know you guys then gave this list as Exhibit C, but that came too late. You also had these descriptions on here that are conclusory in the extreme. The vast majority of the documents on the log say communication reflecting the legal advice of counsel regarding Klig matter. Some of them say [”]communication requesting the legal advice of counsel regarding the Klig matter.[”] So from that, someone looking at this log can discern that one is a [question], the other is an answer. That's it. You can't tell whether this relates to Mr. Klig's resignation, Mr.—the partnership vote, you know, what his compensation would be, what the settlement would be. A description has to be sufficiently detailed so that someone can actually assess whether it makes sense to challenge the document. This is cutting and pasting the same description for every single entry.
>
> Now, I exaggerate a bit. There are a couple entries on here later on where there are some slight variations, such as [”]draft communication reflecting the legal advice of counsel regarding the Klig matter.[”]
>
> What this does is, it simply cuts and pastes one aspect of the attorney-client privilege standard—*i.e.,* [”]reflecting legal advice[”] again and again and again. It would not constitute anything remotely approaching waiver to say, for example, communication regarding potential partnership vote expelling Mr. Klig. Then at least someone reviewing this log would have some clue as to what this was talking about and what these entries were.
>
> ...
>
> Now, I know that in the past this Court has shown remarkable willingness to allow practitioners who provide an inadequate log to get a do-over and do it right. I think that's a terrible idea. I think that the privilege [law] out there is clear. A summer associate can find it in approximately an hour. There is no reward for doing a good privilege log. It's painful. It results in these huge documents. No one has any incentive to be responsible [on] a privilege log as opposed to [being] overinclusive. Junior associates or paralegals get tasked with it. They screw up if they don't log a document, not if they come to the partner and say, "Really, this one shouldn't be logged."
>
> ***4** Because of those incentives, people have ample reason to be, again, overinclusive, not to describe documents meaningfully and hope that the other side won't challenge them. It's particularly a win-upside-no-downside scenario, if the only thing that happens when you then get challenged on it is you actually have to go back and do what you ... should have done in the first place. So I'm not going to play that game. An improperly asserted claim of privilege is no claim at all. It's waived. So as to those documents on the log, they're being ordered to be produced. So both sides, both logs, you blew it....

Discovery Ruling at 5–8. Later on August 6, I entered an order requiring that the inadequately described documents be produced.

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II. LEGAL ANALYSIS

Supreme Court Rule 42 governs the certification of interlocutory appeals. Rule 42(b) provides: "No interlocutory appeal will be certified by the trial court or accepted by [the Supreme Court of Delaware] unless the order of the trial court determines a substantial issue, establishes a legal right and meets 1 or more of the following criteria...." The identified criteria include "[a]ny of the criteria applicable to certification of questions of law set forth in Rule 41." Supr. Ct. R. 42(b)(i). Under Rule 41(b), reasons to certify a question of law include:

> (i) *Original question of law.* The question of law is of first instance in this State;
>
> (ii) *Conflicting decisions.* The decisions of the trial courts are conflicting upon the question of law;
>
> (iii) *Unsettled question.* The question of law relates to the constitutionality, construction, or application of a statute of this State which has not been, but should be, settled by the Court.

Supr. Ct. R. 41(b).

A. Deloitte Mischaracterizes The Discovery Ruling.

Deloitte contends that certification is warranted because the Discovery Ruling conflicts with other trial court decisions. In making this argument, Deloitte emulates populist pundits from the extremes of the political spectrum who score points with their base by misleadingly reducing meaningful issues to simplistic sound bites. Deloitte thus re-casts the Discovery Order as follows:

> In its August 6, 2010 bench ruling, the Court created a new one-strike-and-you're-out rule for parties asserting privileges in the Court of Chancery: the party waives its attorney-client privilege if the Court perceives any aspect of a privilege log to be "inadequate." The Court also made clear in its Ruling that it will apply this harsh rule in all cases going forward—it will not provide counsel with a "do-over" on a privilege log. In all cases going forward, "[a]n improperly asserted claim of privilege is no claim at all. It's waived."

Defendant's Memorandum of Law in Support of Their Application for Certification of Interlocutory Appeal of the August 6, 2010 Ruling and Request for Stay Pending Appeal ("Application" or "App.") at 1. This is not a fair characterization of the Discovery Ruling.

***5** Nothing about the Discovery Ruling was "new." Admittedly I did not dilate at length on the law governing privilege logs. In small part this was because the law in this area is so readily established and easily available. In larger part it was because (at least prior to the current Application) both sides agreed on the operative legal principles. Deloitte's answering brief in opposition to Klig's motion to compel stated: "Deloitte agrees that a party must include information on its privilege log identifying 'the subject [matter] of the communication sufficient to show why the privilege applies.' " DAB at 14 (quoting *Unisuper Ltd. v. News Corp.,* C.A. No. 1699–N, slip op. at 1–2 (Del. Ch. Mar. 9, 2006)). Deloitte also recognized that waiver was an appropriate remedy for an inadequate description; in pressing its own motion to compel against Klig, Deloitte stated: "As Klig's log fails to meet several of the basic requirements for establishing a privilege, the documents listed on the log should be produced." DAB at 19 (citing *Sokol Holdings, Inc. v. Dorsey & Whitney, LLP,* 2009 WL 2501542, at *31–32 (Del.Ch. Aug.5, 2009)).

Nor did I announce a blanket rule that would apply "if the Court perceives *any aspect* of a privilege log to be 'inadequate.' " DAB at 1 (emphasis added). Contrary to Deloitte's alarmist framing, I do not believe that ordering production of inadequately described documents is the appropriate remedy for every case. A party that has attempted in good faith to provide meaningful descriptions should not be penalized for falling short. An order requiring supplementation for the inadequate entries could well be appropriate. If the number of documents is limited, *in camera* review by the Court or a Special Master may be the most efficient solution.

This case, however, did not involve a party's good faith attempt to comply with Delaware law. Deloitte served a privilege log which contained virtually identical and content-less descriptions for 342 documents and which recited one of five rote descriptions for 332 of those entries (97% of its log). Deloitte made no effort to describe individual documents. Deloitte did not even bother to identify who on the log was an attorney. It takes conscious effort to render a log so devoid of content.

Deloitte's counsel knew how to prepare an adequate log. They are frequent and experienced practitioners before this Court. As discussed below, the requirements for a valid assertion of privilege have been stated repeatedly and consistently. In the *Unisuper* case, on which Deloitte itself relied, Deloitte's

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current counsel prepared the log that Chancellor Chandler deemed inadequate. The Chancellor wrote:

> The party asserting the protection of the attorney-client privilege has the burden of establishing its application. To meet this burden, defendants must include greater detail in their privilege log. Specifically, defendants must identify: (a) the date of the communication, (b) the parties to the communication (including their names and corporate positions), (c) the names of the attorneys who were parties to the communication, and (d) the subject [matter] of the communication sufficient to show why the privilege applies, as well as whether it pertains to the decision to reincorporate, the decision to adopt the board policy, or the decision to extend the board policy. With regard to this last requirement, the privilege log must show sufficient facts as to bring the identified and described document within the narrow confines of the privilege.

***6** *Id.* at 1–2 (internal quotations and footnotes omitted).

Measured by Deloitte's own authority, Deloitte's log fell woefully short. Deloitte did not provide anyone's corporate position, did not identify the parties who were attorneys, and did not provide "sufficient facts" in its rote and redundant descriptions. When Klig asked Deloitte to supplement its log, Deloitte refused. Deloitte's conduct indicates that its counsel intentionally produced chaff.

As I noted in my bench ruling, a practice of granting counsel a do-over even for this type of extreme behavior reinforces problematic incentives that already pervade the preparation of privilege logs. Lawyers know they rarely will be second-guessed by their clients for taking an expansive view of privilege and withholding borderline documents (I need not consider the potential for conscious concealment of evidence). Too frequently counsel default to a rule of invoking privilege whenever an attorney appears on a document. For there to be downside from this strategy, an adversary first must challenge the privilege calls. With all that needs doing in litigation, the opposing party may never do so. Or they may raise the issue but never follow up. Or they might follow up but not move to compel. And if the opposing party actually decides to file, the motion may be poorly pressed, and a cross-motion can muddy the waters and prompt a busy judge to declare a pox on both houses and deny all relief. If nothing else, every step takes time. With many a slip 'twixt cup and lip, the aggressive privilege call becomes second nature.

The privilege log serves as the fulcrum on which the adversary's decisions turn. The log is supposed to provide sufficient information to enable the adversary to assess the privilege claim and decide whether to mount a challenge. Vapid and vacuous descriptions interfere with the adversary's decision-making process. Just as you can't hit what you can't see, you can't challenge what the other side hasn't described. Presented with pages of inscrutable descriptions, the adversary must first undertake the burden of fighting for a usable log. This builds another round of multi-stage decisions, increasing the payoff for the party that broadly and vaguely asserts privilege.

These incentives and the resulting practices undermine Delaware's "well established policy of pretrial disclosure which is based on a rationale that a trial decision should result from a disinterested search for truth from all the available evidence rather than tactical maneuvers based on the calculated manipulation of evidence and its production." *Hoey v. Hawkins,* 332 A.2d 403, 405 (Del.1975) (quoting *Olszewski v. Howell,* 253 A.2d 77, 78 (Del.Super.1969)). "Candor and fair-dealing are, or should be, the hallmark of litigation and required attributes of those who resort to the judicial process. The rules of discovery demand no less." *E.I. DuPont de Nemours & Co. v. Florida Evergreen Foliage,* 744 A.2d 457, 461 (Del.1999).

***7** The remedies imposed by the Court play a significant role in the producing party's calculus. If the only consequence of losing a motion to compel is an order requiring the party to prepare the log it should have prepared in the first place, then a Deloitte-style log offers considerable upside without meaningful downside. If parties know that a motion to compel can result in the immediate production of inadequately described documents, then the upfront incentives change. *Cf. Willemijn Houdstermaatschaapij BV v. Apollo Computer Inc.,* 707 F.Supp. 1429, 1443 (D.Del.1989) (refusing to allow a party to supplement its log entries in responding to a motion to compel; "Before compiling its withheld document list, plaintiff could easily have ascertained the standard of particularity expected by this Court and could have met that standard. Allowing it to do so now would encourage dilatory discovery practices.").

Court of Chancery Rule 1 mandates that the rules be "construed and administered to secure the just, speedy and inexpensive determination of every proceeding." Discovery is called that for a reason. It is not called "hide the ball." By describing all of its documents with virtually identical and meaningless phrases, Deloitte deliberately deployed a strategy of obfuscation and delay. As I stated in the Discovery

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Ruling, it is a "terrible idea" to reward that type of conduct with a do-over. Every discovery dispute must be judged on its own facts and circumstances. The Discovery Ruling did not establish a rule of law for every case, but it should make clear the types of consequences that can flow from failing to comply with well-established obligations.

B. The Decisions Of The Trial Courts Do Not Conflict.

Deloitte's application turns on portraying the Discovery Ruling as conflicting with other decisions of the trial courts. *See* Supr. Ct. R. 41(b)(ii) & 42(b)(i). Deloitte takes issue with my statement that "[a]n improperly asserted claim of privilege is no claim at all." App. at 1. Deloitte also disputes the principle that an inadequate description gives rise to waiver, which in turn depends on who has the burden to establish privilege. *Id.*

Although I did not provide a citation from the bench for my statement about the effect of an improperly asserted claim of privilege, the comment was not original. Chief Judge Latchum coined the phrase. *Int'l Paper v. Fibreboard Corp.,* 63 F.R.D. 88, 94 (D.Del.1974) ("An improperly asserted claim of privilege is no claim of privilege at all."). Then Vice Chancellor, later Justice Hartnett adopted it in *Reese v. Klair,* 1985 WL 21127, at *5 (Del.Ch. Feb.20, 1985) ("An improperly asserted claim of privilege is no claim of privilege at all."). A number of subsequent cases have embraced it.[1]

Nor can I claim credit for placing the burden of proving that a privilege exists "on the party asserting the privilege." *Moyer v. Moyer,* 602 A.2d 68, 72 (Del.1992).[2] In meeting that burden,

> ***8** a bare allegation that information and documents are protected from discovery by the attorney-client privilege is insufficient without making more information available.... It is incumbent on one asserting the privilege to make a proper showing that each of the criteria [underlying the attorney-client privilege] exist[s].... A proper claim of privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality.[3]

This standard requires that a party provide "sufficient *facts* as to bring the identified and described document within the narrow confines of the privilege." *Int'l Paper,* 63 F.R.D. at 94 (emphasis in original); *accord Unisuper,* C.A. No. 1699–N, at 2 (quoted *supra* at 9–10); *Reese,* 1985 WL 21127, at *5 ("The documents must be precisely enough described to bring them within the rule....").

I also did not invent the remedy of waiver as a consequence for an inadequate assertion of privilege. The leading treatise on practice in the Court of Chancery explains that waiver may result from an inadequate privilege log:

> The importance of providing an adequately descriptive and timely privilege log cannot be overlooked. *Although the Delaware courts have sometimes allowed a party the opportunity to supplement an insufficient privilege log, at least where that party appears to have endeavored in good faith to provide an adequate description of the privileged information in the first instance, the failure to properly claim a privilege or immunity or failure to raise a privilege or immunity in a timely manner can, in appropriate circumstances, result in a waiver of the privilege.*

Wolfe & Pittenger, § 7.04, at 7–51 to –52 (emphasis added). The Delaware state and federal courts have applied this principle.[4] So have other courts.[5]

In an effort to manufacture conflict, Deloitte points to *Cephalon, Inc. v. Johns Hopkins University,* 2009 WL 2714064 (Del.Ch. Aug.18, 2009). Deloitte mistakenly contends that *Cephalon* endorsed Deloitte's anemic and unchanging descriptions. To the contrary, Vice Chancellor Parsons deemed inadequate a privilege log that "fail[ed] to provide any explanation for the claim of privilege, other than a conclusory notation, such as 'Attorney–Client privilege.' " *Id.* at *3. The absence of any description whatsoever caused him to question the propriety of the privilege assertions. He therefore ordered the producing parties to "revise their privilege logs to provide additional information," *and* to "state as to each document that it contains confidential information made 'for the purpose of facilitating the rendition of professional legal services to the client,' or provide a similar basis for the claimed privilege." *Id.* at *3 (quoting D.R.E. 502(b)(3)). He further required that "the supplemental privilege logs must be signed by an attorney in accordance with Rule 11." *Id.* Vice Chancellor Parsons made clear that "[t]o the extent Defendants are unable to comply with these directions, the documents involved must be produced." *Id.* In a footnote, he observed that "[n]o argument was made ... to the effect that Defendants had waived their claims of privilege and work product failing to supply a privilege log complying with applicable law." *Id.* at *3 n. 10.

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***9** *Cephalon* did not suggest that a claim of privilege can be adequately supported by a description reciting, *verbatim,* "[the document] contains confidential information made 'for the purpose of facilitating the rendition of professional legal services to the client.' " *Id.* at *3. Only a party searching for support for that unreasonable position could construe the decision in that fashion. What Vice Chancellor Parsons demanded was an explicit certification by counsel that each document met the requirements for privilege, including a representation that "it contain[ed] confidential information made 'for the purpose of facilitating the rendition of professional legal services to the client,' or [that there was] a similar basis for the claimed privilege." *Id.* at *3. Vice Chancellor Parsons gave no indication in Cephalon that he intended to depart from the pre-existing requirement that a party describe each document with sufficient facts to support the claim of privilege. He specifically noted that he did not consider the question of waiver because no party raised it. *Id.* at *3 n. 10. Rather than suggesting a hands-off endorsement of a canned phrase, *Cephalon* demonstrates this Court's meaningful oversight of the privilege log process.

Deloitte also argues that the Discovery Ruling was a "marked departure from the Superior Court's approach." App. at 12 (citing *Cont'l Cas. Co. v. Gen. Battery Corp.,* 1994 WL 682320 (Del.Super.Nov.16, 1994)). In making this argument, Deloitte misrepresents *Continental.* Although the Superior Court ordered the defendant to supplement its inadequate privilege log, the court noted that it was "unaware of, and the parties ha[d] not provided, any authority in which a court in this jurisdiction has ordered documents disclosed for which a claim of privilege has been made merely because a document description is insufficient." *Id.* at *2. The Court specifically stated that "[t]his ruling ... should not be construed as a reluctance to enforce such an order or a belief that it is beyond the Court's inherent powers in managing this litigation to make such a ruling." *Id.* at *2. The *Continental* court exercised its discretion to give the litigants another chance. The court did not hold that it *could not* order waiver.

Deloitte further contends that the Discovery Ruling conflicts with federal law, citing decisions that have required supplementation in lieu of waiver. As discussed, *supra,* waiver is an acceptable remedy. As the various decisions show, "[d]iscovery is subject to the exercise of this Court's sound discretion." *Emerald Partners v. Berlin,* 1994 WL 125047, at *2 (Del.Ch. Mar.30, 1994) (citing *Dann v. Chrysler Corp.,* 166 A.2d 431 (Del.Ch.1960)). How members of this Court or other courts previously have exercised their discretion under other circumstances does not establish a rule of law against waiver.

Contrary to Deloitte's sound bite, I did not announce a "one-strike-and-you'reout" rule that will apply in all future cases. Deloitte stood firm on a privilege log that, on its face, made no good faith attempt to provide document-by-document descriptions to support the privilege claims. Ordering that the inadequately described documents be produced fell within the scope of this Court's discretion. This was not a "sharp departure" from precedent or a "harsh new rule." The Discovery Ruling applied settled principles of law that needed no citation. Indeed, Deloitte and its counsel relied on those very same principles when briefing the cross-motions. It was only after they lost that the principles became frighteningly novel and unfamiliar. There is no conflict among the trial court decisions that merits interlocutory review.

C. The Discovery Ruling Did Not Determine A Substantial Issue Or Establish A Legal Right.

***10** Interlocutory review is not available unless an order determines a substantial issue and establishes a legal right. Supr. Ct. R. 42(b); *Gardinier, Inc. v. Cities Serv. Co.,* 349 A.2d 744, 745 (Del.1975). From these requirements springs the general rule that "a trial court's discovery rulings are not appealable under Rule 42, absent extraordinary circumstances."[6] Discovery is entrusted to the trial court's discretion, and the Supreme Court "will not disturb a trial court's decision regarding sanctions imposed for discovery violations absent an abuse of that discretion." *In re Rinehardt,* 575 A.2d 1079, 1082 (Del.1990); *accord Cebenka v. Upjohn Co.,* 559 A.2d 1219, 1226 (Del.1989). "Th[e] proscription against interlocutory review of discovery rulings 'does not change merely because the discovery/disclosure order implicates the attorney-client privilege.' "[7]

Deloitte acknowledges these general rules, but argues that this case is different because of my supposed "announced intent to apply a one-strike-and-you're-out rule in all future privilege disputes." App. at 9. As discussed above, this mischaracterizes my ruling. I did not announce a "broadly applicable" rule. My ruling rested on the facts of this case: Deloitte made no good faith attempt to describe documents sufficiently to allow an examination of the basis for the claim of privilege, and therefore they must disclose those documents. Like other discretionary discovery decisions, the Discovery Ruling did not determine a substantial issue or establish a legal right.

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In an effort to suggest that the Discovery Ruling concerns a substantial issue, Deloitte cries wolf: "No longer can parties in the Delaware courts—or in-house counsel in Delaware corporations around the world—feel secure that their discussions with counsel will remain confidential." App. at 10. The Discovery Ruling does not alter in any way the requirements for the attorney-client privilege, which is governed by Delaware Rule of Evidence 502. It has always been the case that any claim of privilege, no matter how well-founded, must be adequately described. Here, Deloitte's counsel produced a privilege log that facially failed the standards set out in the very authorities on which they relied. It was this tactical decision that led to the Discovery Ruling. Applying settled law on waiver does not alter the underlying scope of the attorney-client privilege, or create any uncertainty for future litigants.

The Discovery Ruling therefore does not establish a legal right. It did not determine a substantial issue. Separate and independent of the lack of any conflict among discretionary trial court determinations, these failings provide alternative bases for denying interlocutory review.

D. The Defendants' Motion For A Stay Pending Appeal

In addition to seeking interlocutory review, Deloitte for a stay of the Discovery Ruling pending appeal. Under Court of Chancery Rule 62(d), stays pending appeal are governed by Delaware Supreme Court Rule 32(a) and Article IV, Section 24 of the Constitution of the State of Delaware. Ct. Ch. R. 62(d). Under Supreme Court Rule 32(a), "[a] stay ... pending appeal may be granted or denied in the discretion of the trial court." In deciding whether to exercise its discretion to grant a stay, the Court is required:

> ***11** (1) to make a preliminary assessment of likelihood of success on the merits of the appeal; (2) to assess whether the petitioner will suffer irreparable injury if the stay is not granted; (3) to assess whether any other interested party will suffer substantial harm if the stay is granted; and (4) to determine whether the public interest will be harmed if the stay is granted.

Kirpat, 741 A.2d at 357. The *Kirpat* factors are not a checklist; they are balanced with "all of the equities involved in the case together." *Id.* at 358.

Kirpat's "likelihood of success" factor requires only that the appellant have "presented a serious legal question that raises a fair ground for litigation and thus for more deliberative investigation." *Id.* (internal quotation omitted). Because my discretionary ruling cohered with prior precedent and the principles Deloitte itself embraced at the time, there is no fair ground for further litigation. This factor weighs against a stay.

The threat of irreparable harm to Deloitte points in a different direction. Once privileged documents are produced and reviewed, the opposing party cannot later erase all memory of their contents. Where, as here, the consequences of a ruling "cannot be undone," a stay is more likely to be warranted. *Wynnefield Partners Small Cap Value L.P. v. Niagara Corp.,* 2006 WL 2521434, at *2 (Del.Ch. Aug.9, 2006).

There is some threat of harm to Klig. As long as a stay remains in place, Klig will not be able to review the documents or use them in discovery as the case moves forward. Granting a stay therefore risks furthering Deloitte's strategy of defense-by-attrition. At the same time, the case is not expedited, the parties have not pressed forward rapidly, and no trial date has been set. The harm to Klig appears limited.

The public interest is neither harmed nor helped by a stay. There is a substantial public interest in the protection of the attorney-client privilege, but that interest is balanced by equally substantial interests in the expeditious resolution of disputes and the deterrence of discovery misconduct. The public interest stands in equipoise.

Weighing these factors, I believe that the appropriate course is to grant a limited stay sufficient to enable Deloitte to pursue its application for certification of an interlocutory appeal with the Delaware Supreme Court. If the senior tribunal sees merit in the application, then it will be in a position to grant a stay. If the justices believe a shorter stay is warranted to allow them to consider the application, they can take that step. This Court's stay will therefore remain in effect for another 20 calendar days to facilitate appellate review.

III. CONCLUSION

For these reasons, I decline to certify the Discovery Ruling for interlocutory appeal. The temporary stay I ordered on August 17, 2010, shall remain in place for an additional 20 calendar days. **IT IS SO ORDERED.**

All Citations

Not Reported in A.2d, 2010 WL 3489735

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Footnotes

1 *E.g.,* *M & G Polymers USA, LLC v. Carestream Health, Inc.,* 2010 WL 1611042, at *51 n. 262 (Del.Super.Apr.21, 2010); *Williams Natural Gas Co. v. Amoco Prod. Co.,* 1991 WL 236919, at *2 (Del.Super.Nov.8, 1991); *Council of Unit Owners of Sea Colony East v. Carl M. Freeman Assocs., Inc.,* 1990 WL 161169, at *2 (Del.Super.Sept.26, 1990); *Playtex, Inc. v. Columbia Cas. Co.,* 1989 WL 5197, at *2 (Del.Super.Jan.5, 1989).

2 *Accord* *Sokol Holdings,* 2009 WL 2501542, at *6 n. 28; *PharmAthen, Inc. v. SIGA Techs., Inc.,* 2009 WL 2031793, at *4 n. 13 (Del.Ch. July 10, 2009); *Rembrandt Techs., L.P. v. Harris Corp.,* 2009 WL 402332, at *5 n. 43 (Del.Super.Feb.12, 2009); *SICPA Holdings, S.A. v. Optical Coating Lab., Inc.,* 1996 WL 636161, at *7 (Del.Ch. Oct.10, 1996); *Emerald Partners v. Berlin,* 1994 WL 125047, at * 1 (Del.Ch. Mar.30, 1994); *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co.,* 623 A.2d 1118, 1122 (Del.Super.1992); *In re Fuqua Indus., Inc. S'holders Litig.,* 1992 WL 296448, at *3 (Del.Ch. Oct.8, 1992); *Deutsch v. Cogan,* 580 A.2d 100, 107 (Del.Ch.1990); *see generally* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 7.04 (2010).

3 *Int'l Paper Co. v. Fibreboard Corp.,* 63 F.R.D. 88, 93–94 (D.Del.1974); *accord* *Sokol Holdings,* 2009 WL 2501542, at *8; *Deutsch,* 580 A.2d at 107; *Reese v. Klair,* 1985 WL 21127, at *5 (Del.Ch. Feb.20, 1985).

4 *E.g.,* *Willemijn Houdstermaatschaapi,* 707 F.Supp. at 1443 (ordering production of inadequately described documents); *Sokol Holdings,* 2009 WL 2501542, at *8 ("Sokol has waived the right to [assert privilege] by failing to update its privilege log to contain detailed enough descriptions....").

5 *E.g.,* *Lee v. State Farm Mut. Auto. Ins. Co.,* 249 F.R.D. 662, 683 (D.Colo.2008) ("The failure to [adequately describe any information withheld as privileged] results in a waiver of the claims of privilege."); *Aurora Loan Servs., Inc. v. Posner, Posner & Assocs., P. C.,* 499 F.Supp.2d 475, 479 (S.D.N.Y.2007) ("Failure to furnish an adequate privilege log is grounds for rejecting a claim of attorney client privilege."); *Rambus, Inc. v. Infineon Techs. AG,* 220 F.R.D. 264, 274 (E.D.Va.2004) ("The finding of inadequacy [of descriptions in Rambus' privilege log], particularly in light of Rambus' earlier discovery and litigation misconduct, conceptually is sufficient to warrant a finding that the privileges have been waived."); *Bowne of New York City v. AmBase Corp.,* 150 F.R.D. 465, 474 (S.D.N.Y.1993) ("[I]f the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege, his claim will be rejected."), *quoted with approval in* *United States v. Constr. Prods. Research, Inc.,* 73 F.3d 464, 473 (2d Cir.1996) (affirming order requiring disclosure of allegedly privileged documents because of an inadequate privilege log).

6 *Crowhorn v. Nationwide Mut. Ins. Co.,* 804 A.2d 1065, 2002 WL 1924787, at * 1 (Del. Aug.14, 2002) (TABLE) (citing *Pepsico, Inc. v. Pepsi–Cola Bottling Co.,* 261 A.2d 520, 520–21 (Del.1969)); *accord* *McCann v. Emgee, Inc.,* 637 A.2d 827, 1993 WL 541922, at * 1 (Del. Dec.22, 1993) (TABLE); *American Centennial Ins. Co. v. Monsanto Co.,* 582 A.2d 934, 1990 WL 168260, at *1 (Del. Aug.10, 1990) (TABLE); *Huang v. Rochen,* 550 A.2d 35, 1988 WL 117518, at *1 (Del. Oct.27, 1988) (TABLE); *Levinson v. Conlon,* 385 A.2d 717, 720 (Del.1978); *Castaldo v. Pittsburgh–Des Moines Steel Co., Inc.,* 301 A.2d 87, 87 (Del.1973); *Lummus Co. v. Air Prods. & Chems., Inc.,* 243 A.2d 718, 719 (Del.1968).

7 *Certain Underwriters at Lloyd's London v. Monsanto Co.,* 599 A.2d 412, 1991 WL 134471, at *1 (Del. June 7, 1991) (TABLE) (quoting *Rinehardt,* 575 A.2d at 1081); *accord* *Cordant Holdings Corp. v. Moore Bus. Forms, Inc.,* 682 A.2d 625, 1996 WL 415923, at *1 (Del. July 18, 1996) (TABLE); *Pepsico, Inc. v. Pepsi–Cola Bottling Co.,* 261 A.2d 520, 520–21 (Del.1969); *E.I. DuPont de Nemours & Co. v. Admiral Ins. Co.,* 1993 WL 19587, at *1–2 (Del.Super.Jan.25, 1993).

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

MECHEL BLUESTONE, INC., and Mechel Mining Oao, Plaintiffs and Counterclaim Defendants,

v.

JAMES C. JUSTICE COMPANIES, INC.; James C. Justice, II; James C. Justice, III; Jillean L. Justice; and James C. Justice II, as Trustee of the James C. Justice II Grat No. 1, and of the James C. Justice II Grat No. 2, Defendants and Counterclaimants.

C.A. No. 9218–VCL

Submitted: December 8, 2014

Decided: December 12, 2014

Attorneys and Law Firms

Jay N. Moffitt, Lauren K. Neal, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware; Mark R. Robeck, Stephen R. Freeland, Matthew P. Larson, Kelley Drye & Warren, LLP, Washington, D.C.; Emil J. Barth, Baker Botts, L.L.P., Washington, D.C.; Brian A. Glasser, Bailey & Glasser, LLP, Charleston, West Virginia; Attorneys for Plaintiffs.

Raymond J. DiCamillo, Susan M. Hannigan, Rachel E. Horn, Richards, Layton & Finger, P.A., Wilmington, Delaware; David B. Tulchin, William H. Wagener, Sullivan & Cromwell LLP, New York, New York; Attorneys for Defendants.

MEMORANDUM OPINION

LASTER, Vice Chancellor.

***1** The defendants have moved to compel the production of documents identified on the plaintiffs' privilege log. The defendants contend that the plaintiffs' initial log was so flawed, and the plaintiffs' four subsequent efforts to provide an adequate log so feckless, that the appropriate remedy is to deem the privilege waived as to all documents listed on the log. This decision deems the privilege waived as to the items where the plaintiffs fell substantially short of the well-documented and easily identified requirements for supporting a claim of privilege.

I. FACTUAL BACKGROUND

The factual background is drawn from the pleadings and submissions made in connection with the current motion to compel. The discussion does not comprise findings of fact in the post-trial sense, but rather represents how the record appears at this preliminary stage.

A. The Merger

In 2009, plaintiffs Mechel Bluestone, Inc., and Mechel Mining OAO (jointly, "Mechel") acquired entities that owned certain coal properties and associated assets in West Virginia (the "Bluestone Properties") from defendants James C. Justice Companies, Inc., James C. Justice II, James C. Justice III, Jillean L. Justice, and James C. Justice II, as Trustee of the trusts James C. Justice II GRAT No. 1 and James C. Justice II GRAT No. 2 (collectively "Justice"). Mechel acquired the properties pursuant to an Agreement and Plan of Merger dated as of March 16, 2009 (the "Merger Agreement").

Before the acquisition, to assist in determining the purchase price, Weir International, Inc. ("Weir") prepared a report estimating the base volume of coal reserves on the Bluestone Properties. Justice believed that the report understated the amount of coal reserves and argued in favor of a greater volume. To resolve the disagreement, the parties provided in the Merger Agreement that if additional coal was discovered on the Bluestone Properties within two years (the "Contingent Reserves"), then Mechel would pay Justice additional amounts (the "Contingent Payment"). The Merger Agreement called for Weir to assess the volume of any Contingent Reserves in accordance with applicable professional standards and using the methods employed in its initial report.

By letter dated September 7, 2011, Weir identified approximately 60 million tons of Contingent Reserves on the Bluestone Properties (the "Weir Letter"). Under the Merger Agreement, this volume of Contingent Reserves would equate

to a Continent Payment of approximately $165 million. Mechel disputed the determination made in the Weir Letter, contending that it failed to satisfy the relevant provisions in the Merger Agreement.

On January 2, 2014, Mechel filed this action. Count I of the complaint seeks a declaratory judgment that (i) Justice failed to satisfy its obligations under the Merger Agreement, (ii) the Weir Letter did not satisfy the Contingent Payment provisions under the Merger Agreement, and (iii) Mechel does not owe Justice any Contingent Payment. Count II asserts that Justice breached the Merger Agreement by not acting in accordance with the declarations demanded in Count I. Count III seeks a decree of specific performance compelling Justice to act in accordance with the declarations demanded in Count I. Count IV alleges that Justice committed fraud because it knew or should have known that Weir Letter provided false information about the Contingent Reserves.

***2** The parties agreed to a schedule that would bring the case to trial in May 2015. The schedule called for the parties to substantially complete their document production by August 15, 2014, to exchange privilege logs on September 12, and to take fact depositions between September 1 and December 5. Mechel advised Justice that it could not meet the August 15 deadline, and Justice agreed that Mechel could complete its production by September 12.

B. The Initial Privilege Log

On September 12, 2014, Mechel produced its initial privilege log. The 672–page document contained 6,125 entries. At the time, Mechel had produced 11,201 documents, meaning that it was withholding more than one-third of its responsive documents on grounds of privilege. Mechel did not serve a redaction log.

Mechel provided with its privilege log a list of ten organizations with thirty-nine people whom Mechel identified as attorneys or individuals otherwise involved in providing legal advice (the "Players List"). Despite the number of organizations, the Players List did not identify the clients that the organizations represented or the purposes for which they were engaged. The Players List did not distinguish attorneys from non-attorneys, except that it listed certain individuals under the names of organizations identifiable as law firms. The Players List did not identify all of the individuals on Mechel's initial privilege log, which contained approximately 830 unique names and e-mail addresses. The Players List did not even identify all of the law firms or lawyers that appeared on the log.

By letter dated September 18, 2014, Justice's counsel pointed out deficiencies in the log and asked Mechel's counsel to address them. On September 23, having not received any response, Justice moved to compel.

C. The Amended Privilege Log

After receiving the motion to compel, Mechel responded indignantly, protesting that the motion was "both premature and, at best, specious." Undercutting the sincerity of Mechel's indignation was a concession that the initial privilege log and Players List were inadequate. Mechel's counsel undertook to fix the deficiencies.

On September 26, 2014, Mechel provided Justice with an amended privilege log, an amended Players List, and a redaction log. Mechel also produced an additional 6,739 documents for a total of 32,008 pages. Because Mechel should have completed its production by September 12, the production should have consisted of entries previously identified on Mechel's privilege log. But the number of documents produced exceeded the number of documents on the initial log. Something was amiss. Yet Mechel's amended log did not cross-reference any of the produced documents by Bates number, so it was impossible to tell which documents came from where.

After reviewing Mechel's revised logs and document production, Justice concluded that there were still serious problems. By letter dated October 1, 2014, Justice identified a non-exclusive list of deficiencies, supporting each with examples:

- Mechel's privilege log continued to contain entries that lacked information about the author and recipients or did not identify the attorney whose advice was reflected in the document.
- Mechel's privilege log continued to contain entries for documents shared with third parties who were not listed on the Players List and whose role in providing legal advice was not explained.
- Many entries on the privilege log identified e-mails with attachments where it did not appear that Mechel had produced the attachments or explained why the attachments were privileged.

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***3** • Mechel's newly produced redaction log did not list the Bates number for entries produced in redacted form, making it impossible to tie Mechel's production of redacted documents to the entries on its redaction log.

• Mechel produced certain documents in "redacted" form where the documents were redacted in their entirety, except for their Bates numbers. As a practical matter, Mechel was still withholding these documents in their entirety, despite purportedly producing them in "redacted" form.

Justice asked Mechel to correct the deficiencies before Justice deposed several key witnesses during the week of October 6.

D. The Second And Third Amended Privilege Logs

On October 4, 2014, Mechel produced a second amended privilege log, a first amended redaction log, and a second amended Players List. From October 4–7, Mechel produced another 1,084 documents for a total of 25,006 additional pages. Justice received the vast majority of them on the night before the scheduled depositions. Many of the documents exhibited defects like those identified in Justice's October 1 letter.

Mechel also sought to claw back a document produced on September 26, 2014. Justice had marked the document as an exhibit during the deposition of Stanislav Ploschenko, Mechel Mining OAO's former CFO. Although Justice destroyed the document, Justice found no record of it on Mechel's original privilege log, the first amended privilege log, or the second amended privilege log. Justice asked Mechel to identify the entry that corresponded to the document. Instead, Mechel produced a third amended privilege log that added an entry for the document. Mechel did not fix any of the other deficiencies.

E. The Fourth Amended Privilege Log

On October 23, 2014, Justice's counsel filed a supplemental affidavit in support of its motion to compel (the "Wagener Affidavit" or "Wagener Supp."). Using the documents that Mechel had produced, Justice had checked the accuracy of the descriptions on its Mechel's log and evaluated whether Mechel appeared to be making valid claims of privilege. For many of the documents that Mechel had produced from the privilege log, the descriptions on the log were misleading or wrong. Many documents that Mechel produced after September 12 did not correspond to entries on the logs; they were simply produced late. Other entries where Justice had challenged Mechel's privilege claims had been re-characterized as "Non–Responsive."

On October 29, 2014, in response to the Wagener Affidavit, Mechel produced a fourth amended privilege log, a third amended redaction log, and a third amended Players List. The parties completed briefing on Justice's motion to compel, and the court held a hearing on December 8. During oral argument, Mechel's counsel conceded that the original privilege log contained errors but argued that the errors did not result from any bad faith. Justice sought a waiver of privilege as to all entries on Mechel's logs.

II. LEGAL ANALYSIS

Rule 26(b)(1) frames the scope of permissible discovery:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any documents, electronically stored information, or tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

***4** Ct. Ch. R. 26(b)(1). "[P]retrial discovery rules are to be afforded broad and liberal treatment." *Levy v. Stern,* 687 A.2d 573 (Del.1996) (TABLE). "Discovery is called that for a reason. It is not called hide the ball." *Klig v. Deloitte LLP,* 2010 WL 3489735, at *7 (Del. Ch. Sept. 7, 2010).

The burden of establishing that otherwise discoverable information is privileged rests "on the party asserting the privilege."[1]

> [A] bare allegation that information and documents are protected from discovery by ... privilege is insufficient without making more information available.... It is incumbent on one asserting the privilege to make a proper showing that each of the criteria [underlying the privilege] exist[s].... A proper claim of privilege requires a specific designation and description of the documents within its

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> scope as well as precise and certain reasons for preserving their confidentiality.[2]

A party must provide "sufficient *facts* as to bring the identified and described document within the narrow confines of the privilege." *Int'l Paper,* 63 F.R.D. at 94 (emphasis in original); *accord Reese,* 1985 WL 21127, at *5 ("The documents must be precisely enough described to bring them within the rule...."). To meet its burden to establish the requirements of privilege, a party typically prepares a privilege log. The log must identify

> (a) the date of the communication, (b) the parties to the communication (including their names and corporate positions), (c) the names of the attorneys who were parties to the communication, and (d) [a description of] the subject of the communication sufficient to show why the privilege applies, as well as [the issue to which] it pertains.... With regard to this last requirement, the privilege log must show sufficient facts as to bring the identified and described document within the narrow confines of the privilege.

Unisuper Ltd. v. News Corp., C.A. No. 1699–N, slip op. at 2 (Del. Ch. Mar. 9, 2006) (internal quotations and footnotes omitted). Experienced counsel know these requirements, and any junior associate could find a case reciting them with minimal effort.[3]

***5** When a log invokes the attorney-client privilege for items that have been shared with a third party, the party asserting the privilege must explain the role played by the third party that enables the privilege to be maintained. "In most instances, a party waives the attorney-client privilege by communicating privileged information to a third party." *In re Quest Software Inc. S'holders Litig.,* 2013 WL 3356034, at *4 (Del. Ch. July 3, 2013); *accord Ryan v. Gifford,* 2008 WL 43699, at *6 (Del. Ch. Jan. 2, 2008) ("Disclosure to outsiders has never failed to waive privilege under Delaware law."). Delaware Rule of Evidence 510(a) states that

> [a] person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged or protected matter. This rule does not apply if the disclosure itself is privileged.

D.R.E. 510(a).

Under Delaware Rule of Evidence 502(b), the privilege extends to

> confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

D.R.E. 502(b). A communication is "confidential" for purposes of the privilege "if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." D.R.E. 502(a)(2). To bring a communication shared with a third party within the ambit of the rule and sustain a claim of privilege, Mechel had to explain how the third party organization or individual was a qualified representative for purposes of Rule 502(b) or otherwise within the scope of the definition of confidentiality in Rule 502(a)(2).

If a party fails to provide an adequate description for a document, then the privilege for that document may be deemed waived.[4]

> The importance of providing an adequately descriptive and timely privilege log cannot be overlooked. Although the Delaware courts have sometimes allowed a party the opportunity to supplement an insufficient privilege log, at least where that party appears to have endeavored in good faith to provide an adequate description of the privileged information in the first instance, the failure to properly claim a privilege or immunity or failure to raise a privilege or immunity in a timely manner can, in appropriate circumstances, result in a waiver of the privilege.

Wolfe & Pittenger, § 7.04, at 7–51 to –52 (citation omitted). This is because "[a]n improperly asserted claim of privilege is no claim of privilege at all."[5]

***6** Whether to deem the privilege waived or allow the party to provide a supplemental log is a matter for case-by-case adjudication. *Emerald P'rs v. Berlin,* 1994 WL 125047, at *2 ("Discovery is subject to the exercise of this Court's sound

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discretion.") (citing *Dann v. Chrysler Corp.,* 166 A.2d 431, 439 (Del. Ch.1960)). If a party falls substantially short of the well-established requirements, then waiver is an appropriate consequence that helps dissuade parties from engaging in dilatory tactics. *See Willemijn Houdstermaatschaapij,* 707 F.Supp. at 1443; *Klig,* 2010 WL 3489735, at *5.

A. The Deficiencies

Mechel produced its initial privilege log on September 12, 2014. "Mechel candidly admit[ted] that there were issues with its original privilege log." Opp. at 1. This *mea culpa* is an understatement. The initial privilege log was strikingly bad.

The most glaring deficiency was 590 entries that contained no information other than the document date, the privilege asserted, and a description of the grounds for asserting the privilege. The entries lacked information identifying the parties to the communication or the attorney involved. Without this information, Justice had "no way to assess the propriety of the assertion of privilege." *Klig,* 2010 WL 3489735, at *2. Anyone who glanced at the log would realize that the entries were deficient.

Another obvious problem was Mechel's failure to provide an adequate Players List that identified the individuals who appeared on the log and their roles. The Players List listed thirty-nine of the approximately 830 unique names and e-mail addresses that appeared on Mechel's privilege log. It did not distinguish attorneys from non-attorneys, except that it listed certain individuals under the names of organizations identifiable as law firms. There were ten different organizations on the initial Players List, but Mechel did not describe by whom they were retained or what they were doing. The Players List did not explain how any of the other third parties who appeared on the log were involved in the provision of legal advice or why communicating with those third parties did not waive the privilege.

Another red flag was the massive scope of the log relative to the number of non-privileged documents that Mechel had produced. The initial privilege log was 672 pages long and contained 6,125 entries. As of September 12, 2014, Mechel had produced 11,201 documents, meaning that it had designated over one-third of the responsive documents as privileged. The underlying transaction was a business deal. Yet Mechel was claiming that one-third of the documents and communications relating to the transaction were legal in nature. One wonders how Mechel could ever get anything done if its personnel spend one-third of their time obtaining legal advice. Compounding the problem of the initial privilege log's sheer size was its incomprehensible structure. The 6,125 entries were not organized in chronological order. They did not appear to have been arranged in any particular order at all.

Unwittingly, Mechel may have revealed the reasons for the size of its log and the glaring omissions of basic information from nearly 600 entries. Entry number 227 contained an editorial note that stated: "[T]he signature was cut-off from the email and so the author is unknown. *To be safe, I assumed this was from an attorney*." Wagener Supp. Ex. A (emphasis added). Mechel obviously did not intend to produce this telling comment, which confirms what one can infer about how Mechel approached its log. Mechel inverted the law of privilege. Rather than believing that Mechel needed to justify its privilege assertions, Mechel assumed that any document an attorney might have touched would be privileged.

***7** As a first cut when asserting privilege, a party might well set aside any document where an attorney appears as an author or recipient, or which come from an attorney's file. But that is only the starting point for privilege analysis. Once those documents have been collected, lawyers must make judgments. In the first instance, more junior lawyers typically make initial calls about which documents might be subject to a claim of privilege. Counsel disclosed that Mechel outsourced that task to contract attorneys provided by PriceWaterhouseCoopers LLC and Huron Consulting Group.

Understandably, lawyers are concerned about making a mistake and producing a privileged document, which often leads to overdesignation. Because of this risk, and because disputes about privilege are common, the senior lawyers in the case, especially the senior Delaware lawyers, must provide guidance about how the privilege assertion process should unfold. As important, senior lawyers, including senior Delaware lawyers, must ensure that the guidance provided was followed. Preparing a privilege log with integrity requires the involvement and oversight of senior lawyers who know the applicable standards, understand the roles of the individuals involved in the communications, and can make textured judgment calls on a principled basis.

The involvement of senior practitioners appears to have been entirely lacking in this case. Mechel's lead counsel was candid about his lack of involvement. He was away when the log was produced and did not look at it until after the disputes arose. There is no indication that Delaware counsel

had any involvement in the preparation of the log. Mechel seems to have forwarded to Justice as its initial log whatever PriceWaterhouseCoopers and Huron gave Mechel.

Once Justice raised the obvious and extensive problems with Mechel's privilege log, Mechel had an opportunity to make things right. Despite its initial combative response, which asserted that Justice's motion to compel was "both premature and, at best, specious," Mechel's counsel conceded that there were problems with the log and seemed willing to cooperate. But the reality of Mechel's response fell well short and actually made things worse.

Unfortunately, Mechel's amended privilege log, amended Players List, redaction log, and attendant document production did more to obfuscate than clarify. Mechel did not explain whether the documents it was producing were from the log, nor did it cross reference them to the log. Justice properly expected that, because Mechel should have completed its document production by that point, the newly produced documents would have been entries previously identified on Mechel's log. But the volume of the documents was so large that Mechel had to be co-mingling late production with entries from its log, which turned out to be the case. Mechel's new redaction log did not provide any Bates numbers for documents produced in redacted form, so it was impossible to tie the redacted documents definitively to its redaction log. Some of the documents that Mechel claimed to be producing in redacted form were actually redacted in their entirety, with only the Bates numbers showing. The "redaction" of these documents was a farce; Mechel could just as well have continued to withhold them.

Nor did Mechel fix all of the problems with its initial privilege log. Mechel's privilege log continued to contain entries that lacked information about the author and recipients or did not identify the attorney's advice that was reflected in the document. The amended log continued to contain entries for documents shared with third parties who were not listed on the Players List and whose role in providing legal advice was not explained. And many entries on the amended log were e-mails with attachments where it did not appear that Mechel had produced the attachments or explained why the attachments were privileged.

***8** When providing its second, third, and fourth amended logs, Mechel seemed to believe that its only obligation was to address the specific items that Justice raised. In essence, Mechel's counsel tried to outsource their obligation to produce an adequate log to Justice's counsel. The specific deficiencies that Justice identified illustrated broader and systemic problems which Mechel's counsel should have addressed. Justice had no way of knowing how widespread the problems were; Justice could only cite the examples it found. Given that Mechel initially produced a facially inadequate log and subsequently provided deficient amended logs, it was reasonable for Justice to believe that the problems were endemic. That is the inference the court draws.

B. The Remedy

Mechel's approach to asserting privilege fell well short of what Rule 26 and this court's precedents require. Justice urges the court to impose the type of sanction imposed in *Klig* and order Mechel to produce all of the documents listed on its log. In *Klig,* the defendants produced a privilege log where 97% of the entries employed one of five rote descriptions and "afforded [the plaintiff] no way to assess the propriety of the assertion of privilege." 2010 WL 3489735, at *2. After the plaintiff pointed out the deficiencies, the defendants refused to correct them. *Id.* at *3. The court held that the log had been prepared in bad faith and deemed the privilege waived. *Id.* at *3–4.

Mechel's conduct could support the type of order entered in *Klig*. At the same time, unlike defense counsel in *Klig,* Mechel's counsel did acknowledge that its initial log was deficient and made some efforts to correct the situation. Because the initial log was so strikingly bad, the court could hold that the offer to do what Mechel's counsel should have done in the first place came too late, particularly when the subsequent remedial measures were so flawed. Nevertheless, because Mechel's counsel made some effort, this court will not impose the blanket waiver ordered in *Klig*. But Mechel's approach to privilege does have consequences.

1. The 590 Unidentified Entries

Privilege is deemed waived as to the 590 entries on the initial privilege log for which Mechel provided almost no pertinent information. "It takes conscious effort to render a log so devoid of content." *Klig,* 2010 WL 3489735, at *5. These entries were obviously deficient, yet Mechel waited for Justice to discover and raise the lack of critical information.

2. Documents Re–Designated As Non–Responsive

Since providing its initial log, Mechel has re-designated certain documents as non-responsive. Those documents will

be produced. By listing the documents initially on the log, Mechel's counsel represented that they were responsive. The re-designation of the documents as non-responsive is too convenient.

Under different circumstances, it may be appropriate to permit re-designation, as this court recently did in another case. *See AM Gen. Hldgs LLC v. Renco Grp., Inc.,* 2013 WL 1668627, at *3 (Del. Ch. Apr. 18, 2013). Notably, the litigant challenging the re-designation in *AM General* "offered no basis to suspect that [the party who re-designated the documents] is not acting with integrity in this regard." *Id.* Here, Justice has marshaled ample facts that call into question Mechel's good faith efforts to prepare its privilege logs and assert privilege claims with integrity.

3. Documents Produced With Everything Redacted

A party that redacts the entirety of a document, except for their Bates numbers, is not using the redaction tool in good faith. Redaction enables a party to produce a document that partially contains privileged matter. Redactions must be targeted to address only the privileged matter so that the non-privileged portion is produced. Mechel did not assert privilege in good faith when it claimed to produce documents in redacted form, but redacted the entire documents. Those documents will be produced.

4. The Operative Logs And Players List

***9** For the remaining entries, Mechel's privilege claims must rise or fall based on the information provided on the first amended privilege log, the first amended Players List, and the initial redaction log that Mechel served on September 26, 2014. This decision will refer to these documents, respectively, as the "Operative Privilege Log," the "Operative Redaction Log," and the "Operative Players List."

Mechel served additional supplemental logs after September 26, 2014, but allowing serial supplementation only "reinforces problematic incentives that already pervade the preparation of privilege logs." *Klig,* 2010 WL 3489735, at *6. Because of the obfuscatory manner in which Mechel provided its amended log and related production, the court could limit Mechel to its initial log. Permitting Mechel to rely on its amended log, Players List, and initial redaction log errs in favor of Mechel and the maintaining of privilege.

Based on the Operative Privilege Log, the Operative Redaction Log, and the Operative Players List, this decision can adjudicate the validity of the privilege claims for certain categories of entries. Adjudicating other issues will require the appointment of a special discovery master.

a. Entries Not On The Operative Logs

If an entry appears on a later log but not on the Operative Privilege Log or the Operative Redaction Log (jointly, the "Operative Logs"), then Mechel failed to assert a valid and timely claim of privilege for that document. Privilege is waived, and the document will be produced.

b. Documents Lacking An Individual From The Players List

If an entry on the Operative Logs fails to identify or reference an individual or organization from the Operative Players List, then Mechel failed to show how the entry involved a communication made for the purpose of facilitating the rendition of professional legal services to the client. Mechel failed to assert a valid and timely claim of privilege for that document. Privilege is waived, and the document will be produced.

c. Documents Shared With Third Parties

If an entry on the Operative Logs discloses that the document was shared with a third party, then Mechel had the burden of explaining the role played by the third parties in order to maintain the privilege. Mechel was obligated to provide "precise and certain reasons for preserving" the privilege as to these documents. *Int'l Paper,* 63 F.R.D at 94. If the role of the third party was not explained on or before September 26, 2014, the date when Mechel provided the Operative Logs, then Mechel failed to assert a valid and timely claim of privilege. Privilege is waived, and the document will be produced.

d. Work Product

There are entries on the Operative Logs for which Mechel has claimed work product protection. Court of Chancery Rule 26(b)(3) states that

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> ***10** a party may obtain discovery of documents, electronically stored information, and tangible things otherwise discoverable under paragraph (b)(1) of this rule and *prepared in anticipation of litigation* or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Del. Ch. Ct. R. 26(b)(3) (emphasis added). "The work product doctrine is intended to protect 'materials an attorney assembled and brought into being in anticipation of litigation.' " *Grimes v. DSC Commc'ns Corp.,* 724 A.2d 561, 569–70 (Del. Ch.1998) (quoting *Lee v. Engle,* 1995 WL 761222, at *4 (Del. Ch. Dec. 15, 1995)). As with the attorney-client privilege, "[t]he party asserting a claim of work product immunity has the burden of proof to establish that the protection applies for a specific document." Wolfe & Pittenger, § 7.01 at 7–2; *accord Wolhar v. Gen. Motors Corp.,* 712 A.2d 457, 459 (Del.Super.1997) (noting that the "initial burden of proving the existence of the work product privilege" lies with the asserting party).

During oral argument, the court asked Mechel's counsel when Mechel began anticipating litigation. Mechel's counsel represented that September 7, 2011, the date of the Weir Letter, was when Mechel began anticipating litigation. This date makes sense because Mechel's challenges to the Weir Letter form the basis for this case.

Because Mechel began anticipating litigation on September 7, 2011, Mechel cannot claim work product protection for documents prepared before that date. Any assertions of work product protection for earlier documents are overruled. If work product protection was the only basis for withholding any document dated before September 7, 2011, then those documents will be produced.

5. The Special Discovery Master

Justice has raised other credible challenges to Mechel's privilege assertions, including challenges about the accuracy of the descriptions on the Operative Logs, whether particular entries on the logs contain business advice as opposed to legal advice, and whether certain organizations were retained to provide legal advice. The well-supported inference of over-designation and Justice's illustrative examples of erroneous entries warrant the appointment of a special discovery master to adjudicate these challenges. Retired Superior Court Judge Charles H. Toliver, IV, has agreed to serve as special discovery master for this case (the "Special Discovery Master").

Within one week after the date of this decision, Mechel shall produce the documents called for by this decision. Mechel shall serve contemporaneously on Justice a combined privilege log and redaction log (the "Corrected Log") that (i) lists all entries in chronological order, (ii) identifies entries that have been produced in redacted form with the word "REDACTED," and the Bates number of the produced document, and the date of production, (iii) identifies each entry produced with the word "PRODUCED," the Bates number of the produced document, and the date of production, and (iv) highlights the names of individuals on the Corrected Log who are attorneys identified on the Operative Players List in one color and those who are non-attorneys identified on the Operative Players List in a different color.

If Justice wishes to pursue further challenges to the Operative Privilege Log, then, within two weeks after the date of this decision, Justice shall submit an opening brief making those challenges to the Special Discovery Master. Justice may identify up to 10% of the entries on the Corrected Log for review by the Special Discovery Master, who shall examine the underlying documents *in camera* and determine whether the descriptions on the privilege log were accurate and whether privilege was properly asserted. If the description was not accurate, or if privilege was not otherwise properly asserted, then the document shall be produced. If the document contains business advice, then the document will be produced. If the document contains a mix of business and legal advice, and the legal advice can be redacted, then the document will be produced in redacted form. Justice may seek leave from the Special Discovery Master to challenge additional entries on the log beyond the 10%. The Special Discovery Master may, in his discretion, review as many of the entries beyond 10% as he deems appropriate.

***11** Justice may present to the Special Discovery Master any argument that a particular advisor, such as International Mining Consultants, was not engaged to assist in providing legal advice or in creating work product, or only was doing so after a certain point in time. Justice make seek leave from the Special Discovery Master to present other issues or arguments.

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The Special Discovery Master will determine the briefing schedule for further submissions from the parties and for any hearing. The Special Discovery Master may provide instructions to the parties regarding the content of their submissions and the nature and scope of the hearing. Ideally, the Special Discovery Master will be able to provide his report and recommendation to the court on or before February 27, 2015. The Special Discovery Master may receive assistance from attorneys at his law firm, Morris James LLP. The Special Discovery Master and attorneys at his firm will be compensated at their customary hourly rates.

Mechel shall bear the expenses of the Special Discovery Master. Pursuant to Rule 37, Mechel shall bear the reasonable expenses, including attorneys' fees, that Justice incurred in connection with its review of Mechel's privilege logs, the efforts to meet and confer with Mechel, the motion to compel, and the proceedings before the Special Discovery Master.

Justice may re-depose any Mechel witness it has previously deposed who is an author or recipient of a document produced in response to this decision. The scope of the renewed deposition shall be limited to the newly produced documents and the subject matter they cover. Justice may re-depose each witness only once, at a time of its choosing that is convenient to the witness and Mechel's counsel. If Justice chooses to re-depose a witness before the proceedings before the Special Discovery Master are complete, Justice may not re-depose the witness if Mechel produces additional documents as a result of the Special Discovery Master process.

III. CONCLUSION

The motion to compel is granted in part. The parties shall proceed as directed in this decision.

All Citations

Not Reported in Atl. Rptr., 2014 WL 7011195

Footnotes

1 *Moyer v. Moyer,* 602 A.2d 68, 72 (Del.1992); *accord Sokol Hldgs, Inc. v. Dorsey & Whitney, LLP,* 2009 WL 2501542, at *6 n.28 (Del. Ch. Aug. 5, 2009) (Strine, V.C.); *PharmAthen, Inc. v. SIGA Techs., Inc.,* 2009 WL 2031793, at *4 n.13 (Del. Ch. July 10, 2009); *Rembrandt Techs., L.P. v. Harris Corp.,* 2009 WL 402332, at *5 n.43 (Del.Super. Feb. 12, 2009); *SICPA Hldgs., S.A. v. Optical Coating Lab., Inc.,* 1996 WL 636161, at *7 (Del. Ch. Oct. 10, 1996); *Emerald P'rs v. Berlin,* 1994 WL 125047, at *1 (Del. Ch. Mar. 30, 1994); *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co.,* 623 A.2d 1118, 1122 (Del.Super.1992); *In re Fuqua Indus., Inc. S'holders Litig.,* 1992 WL 296448, at *3 (Del. Ch. Oct. 8, 1992); *Deutsch v. Cogan,* 580 A.2d 100, 107 (Del. Ch.1990). *See generally* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 7.04 (2010).

2 *Int'l Paper Co. v. Fibreboard Corp.,* 63 F.R.D. 88, 93–94 (D.Del.1974); *accord Sokol Hldgs.,* 2009 WL 2501542, at *8; *Deutsch,* 580 A.2d at 107; *Reese v. Klair,* 1985 WL 21127, at *5 (Del. Ch. Feb. 20, 1985).

3 *See, e.g., Union Pac. Res. Grp., Inc. v. Pennzoil Co.,* 1997 WL 34655410, at *1 (D.Del. Aug. 12, 1997); *Cont'l Grp., Inc. v. Justice,* 536 F.Supp. 658, 664 (D.Del.1982); *Coastal Corp. v. Duncan,* 86 F.R.D. 514, 520 (D.Del.1980); *Int'l Paper,* 63 F.R.D. 93–94; *see also* Wolfe & Pittenger § 7.04, at 7–57 to –58.

4 *E.g., Willemijn Houdstermaatschaapij BV v. Apollo Computer Inc.,* 707 F.Supp. 1429, 1443 (D.Del.1989); *Sokol Hldgs,* 2009 WL 2501542, at *8 ("Sokol has waived the right to [assert privilege] by failing to update its privilege log to provide detailed enough descriptions...."); *accord Lee v. State Farm Mut. Auto. Ins. Co.,* 249 F.R.D. 662, 683 (D.Colo.2008) ("The failure to [adequately describe any information withheld as privileged] results in a waiver of the claims of privilege."); *Aurora Loan Servs., Inc. v. Posner, Posner & Assocs., P.C.,* 499 F.Supp.2d 475, 479 (S.D.N.Y.2007) ("Failure to furnish an adequate privilege log is grounds for rejecting a claim of attorney client privilege."); *Rambus, Inc. v. Infineon Techs. AG,* 220 F.R.D. 264, 274 (E.D.Va.2004) ("The finding of inadequacy [of descriptions in Rambus' privilege log], particularly in light of Rambus' earlier discovery and litigation misconduct, conceptually is sufficient to warrant a finding that the privileges have been waived."); *Bowne of New York City v. AmBase Corp.,* 150 F.R.D. 465, 474 (S.D.N.Y.1993) ("[I]f the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege, his claim will be rejected."), *quoted with approval in U.S. v. Constr. Prods. Research, Inc.,*

73 F.3d 464, 473 (2d Cir.1996) (affirming order requiring disclosure of allegedly privileged documents because of an inadequate privilege log).

5 *Int'l Paper,* 63 F.R.D. at 94; *accord M & G Polymers USA, LLC v. Carestream Health, Inc.,* 2010 WL 1611042, at *51 n.262 (Del.Super. Apr. 21, 2010); *Williams Natural Gas Co. v. Amoco Prod. Co.,* 1991 WL 236919, at *2 (Del.Super. Nov. 8, 1991); *Council of Unit Owners of Sea Colony East v. Carl M. Freeman Assocs., Inc.,* 1990 WL 161169, at *2 (Del.Super. Sept. 26, 1990); *Playtex, Inc. v. Columbia Cas. Co.,* 1989 WL 5197, at *2 (Del.Super. Jan. 5, 1989); *Reese,* 1985 WL 21127, at *5.

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EFiled: Sep 27 2023 09:22AM EDT
Transaction ID 70963892
Case No. 2018-0307-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE FACEBOOK INC. DERIVATIVE LITIGATION	CONSOLIDATED C.A. No. 2018-0307-JTL

ORDER APPOINTING DISCOVERY FACILITATOR

WHEREAS, the Court has determined that the parties and the Court will benefit from the appointment of an independent facilitator to assist with discovery in this litigation,

IT IS HEREBY ORDERED:

1. APPOINTMENT OF DISCOVERY FACILITATOR. Ryan P. Newell, Esquire, is hereby appointed as the Discovery Facilitator for this action. The Discovery Facilitator shall file in this Court a written acceptance of this appointment, and the appointment shall be effective upon the filing of the acceptance. The Discovery Facilitator shall serve at the pleasure of the Court, and the provisions of this order shall remain in effect pending further order of the Court.

2. CHARGE. The Discovery Facilitator shall take the following actions:

a. After reviewing the record regarding the discovery conducted to date, including the rulings made by the Court, the Discovery Facilitator shall meet with the parties determine what discovery still needs to occur and will assist the parties in developing a discovery plan for the completing the discovery (hereinafter collectively "Discovery Plan").

b. The Discovery Facilitator shall present the Discovery Plan to the Court in the form of a recommendation that can be implemented by the Court as an order.

c. The Discovery Facilitator shall monitor the parties' compliance with the Discovery Plan and attempt to resolve any discovery disputes raised by and between the parties relating to the Discovery Plan including, but not limited to, disputes concerning any production of documents produced or responses to interrogatories provided in accordance with the Discovery Plan.

3. SPECIFIC POWERS AND AUTHORITY. The Discovery Facilitator has the power and authority necessary to fulfill the charge set forth in this order. The Discovery Facilitator's specific authority is defined as follows:

a. The Discovery Facilitator has authority to make recommendations to the Court regarding the Discovery Plan.

b. The Discovery Facilitator has authority to communicate with the parties jointly or separately. The Discovery Facilitator has authority to consult with the Court *ex parte* (without the participation of the parties).

c. The Discovery Facilitator has authority to convene meetings of the parties for purpose of addressing discovery issues. Unless the Discovery Facilitator determines otherwise, the parties shall (i) serve a copy of any discovery

request or response on the Discovery Facilitator, (ii) include the Discovery Facilitator on any substantive correspondence including email relating to discovery, and (iii) include the Discovery Facilitator in any meet-and-confer sessions regarding discovery issues. After the meet-and-confer session, the Discovery Facilitator shall document any agreements reached by the parties and circulate the documentation of such agreements to the parties shortly after such agreements are reached.

d. The Discovery Facilitator has authority to require the parties to provide information regarding discovery issues, which the Discovery Facilitator may require to be exchanged by the parties or provided for his confidential use. The discovery-related information that the Discovery Facilitator has authority to require includes, but is not limited to, the name and, if known, the address of individuals likely to have discoverable information, along with the subjects of that information, for purposes of assessing proportionality and the basis for the computation. Additional ESI-related information that the Discovery Facilitator has authority to require includes, but is not limited to hit reports and case analytics.

e. The Discovery Facilitator has authority to file written recommendations to the Court in connection with any dispute relating to the Discovery Plan raised with the Court by the parties.

f. Notwithstanding the foregoing, the Discovery Facilitator shall not make any recommendation or resolve any issue relating to assertions of attorney-client privilege or work product protection, except that the Discovery Facilitator may make a recommendation relating to such issues if the Court requests him to do so.

4. COMPENSATION OF THE DISCOVERY FACILITATOR. The parties shall pay the reasonable compensation and reasonable out-of-pocket expenses of the Discovery Facilitator (collectively, "expenses"). The Discovery Facilitator may bill at his customary hourly rate of $935. The Discovery Facilitator may make use of associates and support staff within his firm who may bill at their customary hourly rates in the range of $400 to $625 per hour for associates and $3350 to $375 per hour for paralegals. Unless the context requires otherwise, all references in this order to the Discovery Facilitator incorporate individuals on which the Discovery Facilitator relies, including individuals within his firm or other experts and professionals.

5. PROCEDURES FOR PAYMENT. The Discovery Facilitator will provide monthly invoices to the parties. On a monthly basis, Plaintiffs and Defendants each shall make an interim payment equal to 50% of the fees and expenses incurred by the Discovery Facilitator. The Discovery Facilitator shall regularly petition the Court for approval of the fees and expenses previously paid by

the parties on an interim basis. If the Court declines to approve any amounts previously paid by the parties, then the Discovery Facilitator shall refund those amounts to the parties. Any approved amounts that the parties fail to pay may be taxed to the parties and their counsel as costs. After his role has been discharged, the Discovery Facilitator shall petition the Court for a final approval of fees and expenses paid.

6. COOPERATION. The parties and their managers, members, assignees, directors, officers, employees, attorneys and agents shall cooperate with the Discovery Facilitator in the performance of his duties.

7. EXCLUSIVE FORUM. No party to this action, and no other person acting or purporting to act as a manager, member, assignee, director, officer, employee, attorney, or agent of a party, shall institute any proceeding in any forum other than this Court challenging any action or recommendation by the Discovery Facilitator.

8. EXCULPATION, INDEMNIFICATION, AND ADVANCEMENT. The Discovery Facilitator shall have no liability to the parties or any other person for actions taken in good faith pursuant to this order. In any challenge to the Discovery Facilitator's actions, the Discovery Facilitator is presumed to have acted in good faith. The Discovery Facilitator shall be entitled to all protection, limitation

from liability, and immunity available at law or in equity to a Court-appointed Discovery Facilitator including, without limitation, all protection, limitation from liability, and immunity provided by the indemnification provisions of applicable law. Expenses, including attorneys' fees, incurred by the Discovery Facilitator in defending any civil, criminal, administrative, or investigative action, suit, or proceeding arising by reason of or in connection with the Discovery Facilitator's appointment, or the performance of his duties hereunder, shall be paid by the parties, jointly and severally, in advance of the final disposition of such action, suit, or proceeding, subject to the repayment of such amount if it shall be ultimately determined by this Court that the Discovery Facilitator is not entitled to be indemnified by the Company under applicable Delaware law.

9. FILE&SERVEXPRESS EXPENSES. Because the Discovery Facilitator is serving as an arm of the Court, he shall be entitled to access to all documents that have been filed in the Court (including documents that have been filed confidentially) without cost.

Vice Chancellor J. Travis Laster
September 27, 2023

GRANTED
EFiled: Nov 18 2016 02:55PM EST
Transaction ID 59856574
Case No. 12816-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PARTNER INVESTMENTS, L.P., a Delaware limited partnership, PFM HEALTHCARE MASTER FUND, L.P., A Cayman Islands limited partnership, and PFM HEALTHCARE PRINCIPALS FUND, L.P., a Delaware limited partnership,	:	
Plaintiffs,	:	
v.	:	C.A. No. 12816-VCL
THERANOS, INC., a Delaware corporation, ELIZABETH HOLMES, an individual, and RAMESH BALWANI, an individual, and DOES 1-10,	:	
Defendants.	:	

STIPULATION AND ORDER
APPOINTING SPECIAL DISCOVERY MASTER

IT IS HEREBY STIPULATED AND AGREED by the parties hereto, through their undersigned counsel, subject to the approval of the Court, that:

1. APPOINTMENT OF SPECIAL DISCOVERY MASTER. Pursuant Court of Chancery Rule 135, Ryan P. Newell, Esquire is hereby appointed Special Discovery Master (the "Discovery Master"). The Discovery Master shall file in this Court a written acceptance of this appointment, and the appointment shall be effective upon the filing of the acceptance. The Discovery Master shall serve at the pleasure of the Court, and the provisions of this order shall remain in effect pending further order of the Court.

2. CHARGE. The Discovery Master shall (i) work with the parties to develop a discovery plan for the case relating to requests for the production of documents, including for electronically stored information ("ESI"), and relating to interrogatories (hereinafter collectively "Discovery Plan"), (ii) present the Discovery Plan to the Court in the form of a recommendation that can be implemented by the Court as an order, (iii) oversee the parties' compliance with the Discovery Plan, (iv) hear and resolve any discovery disputes raised by and between the parties relating to the Discovery Plan including, but not limited to, disputes concerning any production of documents and/or privilege logs produced in accordance with the Discovery Plan, and (v) assist the parties in developing a case scheduling order that accommodates the Discovery Plan. In developing the Discovery Plan, the Discovery Master shall consider the materials that are relevant to the parties' claims and defenses and proportional to the needs of the case, the importance of the issues at stake, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. As part of developing the Discovery Plan, the Discovery Master shall discuss with the parties the possibility of using technology assisted review ("TAR") to handle ESI.

3. SPECIFIC POWERS AND AUTHORITY. The Discovery Master has the power and authority necessary to fulfill the charge set forth in this order. The Discovery Master's specific authority is defined as follows:

(a) The Discovery Master has authority to make determinations regarding the contents of the Discovery Plan.

(b) The Discovery Master has authority to communicate with the parties jointly or separately. The Discovery Master has authority to consult with the Court *ex parte* (without the participation of the parties).

(c) The Discovery Master has authority to convene meetings of the parties for purpose of addressing discovery issues. Unless the Discovery Master determines otherwise, the parties shall (i) serve a copy of any discovery request or response on the Discovery Master, (ii) include the Discovery Master on any substantive correspondence including email relating to discovery, and (iii) include the Discovery Master in any meet- and-confer sessions regarding discovery issues. After the meet-and-confer session, the Discovery Master shall document any agreements reached by the parties and circulate the documentation of such agreements to the parties shortly after such agreements are reached.

(d) The Discovery Master has authority to require the parties to provide information regarding discovery issues, which the Discovery Master may require to be exchanged by the parties or provided for his confidential use. The

discovery-related information that the Discovery Master has authority to require includes, but is not limited to, the name and, if known, the address of individuals likely to have discoverable information, along with the subjects of that information; for purposes of assessing proportionality, a computation of each category of damages claimed by a party and the basis for the computation. Additional ESI-related information that the Discovery Master has authority to require includes, but is not limited to hit reports and case analytics.

(e) The Discovery Master has authority to rule on the scope of the requests for the production of documents and interrogatories, including the validity of objections to such discovery.

(f) The Discovery Master has authority to address matters relating to ESI-discovery, including the methods used for gathering ESI, reviewing ESI, and producing ESI.

(g) The Discovery Master has authority to determine the procedures the parties will use to collect and identify potentially privileged documents.

(h) Except as set forth herein, the Discovery Master has discretion to determine the procedures for addressing all assigned matters.

(i) The Discovery Master has authority to recommend any sanction, including but not limited to awarding a party its expenses, awarding a party reasonable attorneys' fees, and/or contempt, against a party. The Discovery Master

may recommend any sanction against a non-party.

(j) The Discovery Master has the authority to hear any matters in accordance with paragraph 5 of this order, or that the Court may assign to the Discovery Master in accordance with the Court's rules and applicable statutes.

4. GENERAL POWERS AND AUTHORITY. In addition to the powers and authority granted expressly by this order, the Discovery Master shall possess the power and authority set forth in Court of Chancery Rules 136 through 142 and Rule 145. The Discovery Master shall have authority, but shall not be required, to petition this Court for instructions at any time or from time to time. The Discovery Master may seek to modify the terms of this order for good cause shown, including by seeking supplemental authority.

5. DISCOVERY DISPUTES. The parties shall submit all disputes arising out of the Discovery Plan to the Discovery Master in the first instance including, but not limited to, disputes concerning any production of documents and/or privilege logs produced in accordance with the Discovery Plan. The parties also reserve the right to petition the Court for review of any decisions made by the Discovery Master resolving disputes arising out of the Discovery Plan. The Discovery Master shall issue any rulings regarding (i) the scope of discovery pursuant to the Discovery Plan, including the validity of objections to requests for the production of documents, interrogatories, and the assertion of privileges, and

(ii) recommendations for the imposition of sanctions, as a final report pursuant to Court of Chancery Rule 144(a). Any exceptions to any final reports shall be briefed in accordance with Court of Chancery Rule 144(d)(2) and heard by the Court pursuant to Court of Chancery Rule 144(c). If the Court rejects the exceptions in substantial part, it shall award fees and expenses against the party who filed the exceptions.

6. COMPENSATION OF THE DISCOVERY MASTER. The parties shall pay the reasonable compensation and reasonable expenses of the Discovery Master at his customary hourly rate of $475. The Discovery Master may make use of associates and support staff within his firm who may bill in the range of $220 to $395 per hour for associates and $160 to 195 per hour for paralegals. Plaintiffs shall be responsible for paying fifty percent of the total compensation and expenses; and Defendants shall be responsible for paying fifty percent of the total compensation and expenses. Unless the context requires otherwise, all references in this order to the Discovery Master incorporate individuals on which the Discovery Master relies, including individuals within his firm or other experts and professionals.

7. PROCEDURES FOR PAYMENT. The Discovery Master will provide monthly invoices to the parties. On a monthly basis, plaintiffs and defendants each shall make an interim payment equal to 50% of the fees and expenses incurred by the Discovery Master. On a quarterly basis, the Discovery

Master shall petition the Court for approval of the fees and expenses previously paid by the parties on an interim basis. If the Court declines to approve any amounts previously paid by the parties, then the Discovery Master shall refund those amounts to the parties. Any approved amounts that the parties fail to pay may be taxed to the parties and their counsel as costs. In the event of a recovery in this action, the Discovery Master may apply to have the recovery paid into the escrow account of the Discovery Master's law firm so that any amounts due to the Discovery Master for unpaid fees and expenses can to be deducted from the proceeds.

8. COOPERATION. The parties and their managers, members, assignees, directors, officers, employees, attorneys and agents shall cooperate with the Discovery Master in the performance of his duties.

9. EXCLUSIVE FORUM. No party to this action, and no other person acting or purporting to act as a manager, member, assignees, director, officer, employee, attorney, or agent of a party, shall institute any proceeding in any forum other than this Court challenging any action, recommendation, or decision by the Discovery Master.

10. EXCULPATION, INDEMNIFICATION, AND ADVANCEMENT. The Discovery Master shall have no liability to the parties or any other person for actions taken in good faith pursuant to this order. In any challenge to the Discovery Master's actions, the Discovery Master is presumed to have acted in good faith. The

Discovery Master shall be entitled to all protection, limitation from liability, and immunity available at law or in equity to a Court-appointed Discovery Master including, without limitation, all protection, limitation from liability, and immunity provided by the indemnification provisions of applicable law. Expenses, including attorneys' fees, incurred by the Discovery Master in defending any civil, criminal, administrative, or investigative action, suit, or proceeding arising by reason of or in connection with the Discovery Master's appointment, or the performance of his duties hereunder, shall be paid by the parties, jointly and severally, in advance of the final disposition of such action, suit, or proceeding, subject to the repayment of such amount if it shall be ultimately determined by this Court that the Discovery Master is not entitled to be indemnified by the Company under applicable Delaware law.

PROCTOR HEYMAN ENERIO LLP

/s/ Patricia L. Enerio
Kurt M. Heyman (# 3054)
Patricia L. Enerio (# 3728)
Aaron M. Nelson (# 5941)
300 Delaware Avenue, Suite 200
Wilmington, DE 19801
(302) 472-7300

Attorneys for Plaintiffs

RICHARDS, LAYTON & FINGER, P.A.

/s/ Gregory P. Williams
Gregory P. Williams (# 2168)
Catherine G. Dearlove (# 3328)
Kevin M. Gallagher (# 5337)
Sarah A. Galetta (# 6157)
One Rodney Square
920 North King Street
Wilmington, DE 19801
(302) 651-7700

Attorneys for Defendants
Theranos Inc. and Elizabeth Holmes

ROSS ARONSTAM & MORITZ LLP

/s/ David E. Ross
David E. Ross (# 5228)
Benjamin Z. Grossberg (# 5615)
Anne M. Steadman (# 6221)
100 South West Street, Suite 400
Wilmington, DE 19801
(302) 576-1600

Attorneys for Defendant
Ramesh Balwani

SO ORDERED this ___ day of November, 2016

Vice Chancellor J. Travis Laster

This document constitutes a ruling of the court and should be treated as such.

Court: DE Court of Chancery Civil Action

Judge: J Travis Laster

File & Serve Transaction ID: 59853988

Current Date: Nov 18, 2016

Case Number: 12816-VCL

Case Name: CONF ON COMPLAINT - Partner Investments, L.P., et al. vs Theranos, Inc., et al.

Court Authorizer Comments:

I appreciate the parties' willingness to try involving a special discovery master early in the discovery process. Consistent with the experience of the federal courts, I am optimistic that this approach will yield benefits for this complex proceeding. Should difficulties arise, and if the parties or the special discovery master believe a conference would be helpful, please contact chambers. At an appropriate time, most likely only after the case is completed, it will be important for the parties and the special discovery master to provide candid feedback on this approach, including both its strengths and weaknesses, to help determine whether and under what circumstances a similar approach might be used in other settings.

/s/ Judge Laster, J Travis

EFiled: Apr 19 2023 04:03PM EDT
Transaction ID 69855904
Case No. N19C-12-160 MMJ CCLD

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

RIVER VALLEY INGREDIENTS, LLC, TYSON POULTRY, INC., and TYSON FARMS, INC.,	)	
Plaintiffs/Counter-Defendants,	)	
v.	)	C.A. No. N19C-12-160 MMJ CCLD
AMERICAN PROTEINS, INC., et al.,	)	
Defendants/Counter-Plaintiffs.	)	

[~~PROPOSED~~] AMENDED ORDER OF REFERENCE TO SPECIAL MASTER

Pursuant to 10 *Del. C.* § 567 and Superior Court Civil Rule 113, the Court hereby enters this Amended Order of Reference to Special Master for the purpose of assisting the Court and the parties in conducting and completing discovery in an orderly and efficient manner:

1. Ryan P. Newell is HEREBY APPOINTED Special Master *pro hac vice* to assist in discovery matters and other matters as designated by the Court that may arise in this action.

2. The Special Master shall have the duty and the power to regulate all discovery of the parties, between the parties and nonparties, and other designated matters as follows:

a) The Special Master shall have the duty and the power to resolve disputes during depositions and to resolve discovery motions

filed by the parties or non-parties. The Special Master shall have the authority to assist the Court with case management, and to hear and decide such other matters, including non-case dispositive motions, as may be assigned by the Court in accordance with the Court's rules and applicable statutes.

b) The Special Master shall have the power to take all measures which are necessary and proper for the performance of these duties.

3. The Special Master shall have the duty and authority to require at his discretion the submission of motions, briefs or reports, call conferences, hold hearings (including evidentiary hearings), establish procedures for the handling of any discovery disputes that may arise, to issue orders establishing discovery and case management dates and requiring the parties to adhere to discovery and case management dates[1] set by the Court or Special Master, and to issue Orders relating to other matters designated for his decision by the Court. The Special Master shall hear, resolve and make rulings on all disputes regarding discovery and other designated matters and, when appropriate, issue a report, recommendation and order setting forth his rulings. The Special Master shall not follow the draft ruling

[1] The trial dates and pre-trial conference, once established in a case management order, may only be amended by order of the Court.

procedure provided in Superior Court Civil Rule 122.

4. If the Special Master finds that a specific issue presented by the parties is of such fundamental importance to the progress or outcome of the case that effective case management would not be furthered by having the Special Master render a decision in the first instance, the Special Master may as a matter of discretion certify that issue to the Court for initial decision. As the final arbiter of case management, the Court may, but need not, accept the certification. If the Court denies the certification, the Special Master shall proceed to render a decision in accordance with and subject to the terms of this Order.

5. The Special Master shall be reasonably available to hear disputes, including without limitation disputes during depositions, promptly and at such times as may be convenient, at the discretion of the Special Master. Argument shall be heard by the Special Master either in person, by telephone conference or, if all parties and the Special Master agree to the use of videoconference, by videoconference. Unless determined otherwise by the Special Master, all arguments, including telephone conference arguments or videoconference arguments, shall be recorded by a court reporter to be retained by the parties. In the event a telephone conference or videoconference hearing is necessary, reasonable advance notice and an opportunity to participate in the conference shall be provided to the interested parties.

6. All hearings before the Special Master shall be held at such appropriate

location as may be designated by the Special Master, or by the parties with the Special Master's approval. The moving party shall arrange for a court reporter at all hearings and shall provide to the Special Master a copy of the transcript of the hearing promptly thereafter.

7. Prior to moving, the moving party must certify that good faith efforts have been taken to resolve the dispute without the involvement of the Court or Special Master. If the Court or Special Master finds that good faith efforts were not taken, the moving party may be ordered to pay costs.

a) In the event of a discovery dispute, prior to filing a discovery motion, counsel for the parties shall convene an oral conference with the Special Master at which the Special Master will endeavor to resolve the dispute. Only if the Special Master is unable to resolve the dispute as a result of the conference, the party raising the discovery dispute shall file a motion in accordance with the procedures established by the Special Master.

8. If the movant and all responding parties agree that the Special Master's decision on a discovery motion will be appealed to the Court regardless of the decision, the movant and all responding parties may request in writing that the Court determine whether it will hear the motion in the first instance. The Court may either

hear the motion or order that the Special Master hear the motion.

9. The Special Master may recommend that the prevailing party on a discovery motion be awarded costs, including reasonable attorneys' fees. The Court will be the final arbiter of any award of attorneys' fees.

10. The Court may in its discretion limit the number of discovery disputes that each party may submit for decision by the Special Master.

11. All decisions of the Special Master shall be in writing and shall be accompanied by supporting reasons, except that the Special Master may state at a hearing that an oral ruling, as reflected in the transcript, shall constitute the decision. All written decisions shall be filed with the Court. Exceptions to any decision made by the Special Master may be taken to the Court. A notice of exceptions and an Opening Brief in support thereof, not to exceed a total of 2,500 words that comply with the typeface requirement of Superior Court Civil Rule 107(b), together with an appendix containing the record on which the Special Master's decision was made (e.g., discovery requests, related motions and briefs, transcript of argument and the Special Master's decision) must be filed and served within seven (7) business days after the written decision, which decision shall be delivered by electronic transmission and by U.S. Mail to counsel, with one courtesy copy delivered to chambers. If a decision is reflected only in a transcript of a hearing, the time for filing of exceptions shall run from the date of the receipt of the transcript by the

excepting party's counsel. An Answering Brief, which may not exceed a total of 2,500 words that comply with the typeface requirement of Civil Rule 107(b), must be filed and served (and one courtesy copy delivered to chambers) within seven (7) business days after receipt of the Notice of Exception. The time for filing exceptions and briefs may be enlarged only by the Special Master or the Court. No reply by the moving party is permitted. Any party may request oral argument, which shall be held in the discretion of the Court.

12. Review of any order of the Special Master shall be de novo on the record unless otherwise provided by the Court's rules or by statute. If no party files a timely exception to the order, it shall become an order of the Court, effective on the day it was entered.

13. The Special Master may employ other persons to provide clerical, secretarial and research assistance. Such persons shall be under the supervision and control of the Special Master, who shall take appropriate action to insure that (where applicable) such persons preserve the confidentiality of matters submitted to the Special Master for review, including confidential, trade secret or proprietary information or information subject to a Court's protective order.

14. The Special Master shall be compensated as follows:

a) The Special Master shall be compensated at his usual hourly rate. Others assisting the Special Master shall be billed at their usual

hourly rates. The Special Master's fees shall be billed no more often than monthly, for services rendered, and he or she also shall be reimbursed for all reasonable and necessary expenses.

b) The Special Master shall send statements for services and expenses directly to counsel for the parties on a monthly basis, and shall receive payment directly from counsel for the parties within thirty (30) days of the receipt of such statements. The compensation, costs, and expenses of the Special Master shall, unless otherwise ordered by the Special Master, be allocated equally between the moving party and the responding party. In this regard, if a party engages in behavior which occasions the waste of the Special Master's time and resources, or otherwise hinders the efficient resolution of matters before the Special Master, the Special Master may recommend to the Court apportionment to that party of all or a larger portion of the Special Master's compensation, costs, and expenses. Any objections or disputes as to matters of the Special Master's compensation and/or expenses shall be presented to the Court in a timely application.

15. Upon the final disposition of this action, the full amount paid for the

services and expenses of the Special Master may be taxed as costs, either against the unsuccessful party or allocated between the parties, as the Court in its discretion shall determine.

16. The Special Master will create any "ethical walls" necessary to ensure that no one working on this assignment will have had any previous relationship representing any of the parties in this litigation.

17. The Special Master does not represent any of the parties in this action and shall have no liability to the parties or any other person for actions taken in good faith pursuant to this Order. In any challenge to the Special Master's actions, the Special Master is presumed to have acted in good faith. The Special Master shall be entitled to all protection, limitation from liability, and immunity available at law or in equity to a Court-appointed Special Master including, without limitation, all protection, limitation from liability, and immunity provided by the indemnification provisions of applicable law. Expenses, including attorneys' fees, incurred by the Special Master in defending any civil, criminal, administrative, or investigative action, suit, or proceeding arising by reason of or in connection with the Special Master's appointment, or the performance of his duties hereunder, shall be paid by the parties, jointly and severally, in advance of the final disposition of such action, suit, or proceeding, subject to the repayment of such amount if it shall be ultimately determined by this Court that the Special Master is not entitled to be indemnified by

the parties under applicable Delaware law.

18. Because the Special Master is serving as an arm of the Court, he shall be entitled to access to all documents that have been filed in the Court (including documents that have been filed confidentially) without cost.

19. In connection with this Order, the parties and counsel were made aware that the Special Master is an attorney at the same firm as a family member of the Honorable Mary M. Johnston and, in agreeing upon the appointment of the Special Master, agree that they have waived any present or future conflict arising from that relationship.

20. This Order may be amended by the Court for good cause and shall be amended to conform to any future amendments to the Superior Court Civil Rules relating to the subject matter of this Order.

IT IS SO ORDERED this 18th day of April 2023.

The Honorable Mary Miller Johnston

The Sedona Conference Journal

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The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production

The Sedona Conference

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THE SEDONA PRINCIPLES, THIRD EDITION: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION

A Project of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1)

Author:

The Sedona Conference

Drafting Team:

Anthony J. Diana
Amor A. Esteban
Joseph P. Guglielmo†
Ted S. Hiser^
Dean Kuckelman†^
Eric P. Mandel†
Timothy M. Opsitnick
Charles R. Ragan^
Dena C. Sharp
Martin T. Tully

Judicial Participant:

The Honorable Andrew J. Peck^

Team Leader and WG1 Steering Committee Liaison:

William P. Butterfield†

Copy Editor:

Susan M. McClain

† WG1 Steering Committee ^ Editorial Style Committee

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>
> *The Sedona Principles, Third Edition*, 19 SEDONA CONF. J. 1, Cmt. 5.e., 108–109 (2018).

IN MEMORIAM

The Third Edition of *The Sedona Principles* would not be a reality without the vision and efforts of two great lawyers and human beings, who are no longer with us—Richard Braman and Bill Butterfield.

Richard G. Braman (1953–2014) was the founder and first Executive Director of The Sedona Conference. Much has been written and said in the nearly three years since Richard left us, but it is undeniable that Richard's vision turned The Sedona Conference from an idea on paper into a world-renowned think tank that can move the law forward in reasoned and just ways. Richard's passion for meaningful human interaction—and dialogue not debate—guided his inspirational journey at The Sedona Conference, as well as his early careers as a practicing lawyer and even jazz club owner. He challenged convention in all the right ways, while building and sustaining personal and professional relationships. His positive impact on the profession, as well as on his family and friends, was profound.

What may be relatively unknown, however, is how Richard's vision, entrepreneurial spirit, and drive provided all the right ingredients to allow the concept of *The Sedona Principles* to grow and blossom in the first place. In the Spring of 2002, Richard was keen to take The Sedona Conference to the "next level" beyond the highly successful educational "regular season" experiences provided in the areas of Complex Litigation, Antitrust, and Intellectual Property. When presented with the idea to invite a group of people to Phoenix in the Fall of 2002 with the ambitious goal of developing principles that could help guide litigants and courts in the nascent arena of "electronic discovery," Richard did not hesitate. He instantly recognized the area as one where the magic of dialogue among interested professionals, many of whom he had never met, could well lead to the development of something worthwhile that would move the

law forward in a reasoned and just way. He dove in headfirst to build the structure of the Working Group Series to help support the effort, while also seeing the opportunity to use Working Groups across many areas in the future as a way to realize his dream of that "next level" for The Sedona Conference.

And then Richard did what many people find impossible to do: he trusted the assembled group to follow the formula of open dialogue to reach that reasoned and fair output, which was first embodied in 2003 in *The Sedona Principles*. Richard certainly challenged the group, and had his eye on the meetings and work product to ensure fealty to the core principles of The Sedona Conference. But he did not try to write the document himself, and he did not interfere with the editorial process or dictate outcomes. Instead, he relentlessly fanned the flames of active, intense, and meaningful dialogue as the document took shape. After the first public comment version of the *Principles* was distributed free of charge for the world to scrutinize, Richard did not rest, but he immediately spurred and led efforts to actively recruit new members from diverse backgrounds and perspectives to join the dialogue to refine and reshape the Principles.

Richard's unique combination of passion, vision, energy, intellect, humor, and agility were all critical to providing the safe space for the development of *The Sedona Principles* from its inception fifteen years ago through the publication of this Third Edition, and the publication of many more works by The Sedona Conference, including the marquee *The Cooperation Proclamation* which was a signature achievement for Richard.

William P. Butterfield ("Bill") (1953–2016) was renowned as a successful complex business litigation and class action lawyer. Over nearly two decades, he also achieved top recognition as a leading electronic discovery specialist—as a practitioner, a teacher, a mentor, a speaker, an author, and an expert.

Among his most coveted roles, Bill served as an ambassador of Working Group 1 of The Sedona Conference for many years, first as an active member of the Working Group, next as an appointed member of the Steering Committee, and ultimately as Vice-chair and then Chair of the Steering Committee.

Bill was an early architect of *The Cooperation Proclamation*, first published in 2008. Working side-by-side with Richard Braman, Bill and others crafted a white paper (*The Case for Cooperation*) that was both provocative and practical, and launched a "national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery." As of this writing, the *Proclamation* has been endorsed by more than 215 judges nationwide, and has served as a guidepost for lawyers and judges as they navigate discovery of electronically stored information from ever-evolving technologies. The *Proclamation* also paved the way for the acknowledgement of the importance of cooperation, as reflected in the Advisory Committee Notes to the 2015 amendments to the Federal Rules of Civil Procedure.

The fact that Bill was an early proponent of cooperation was characteristic of his exemplary life. A man of dignity, honor, kindness, humility, and grace, Bill worked tirelessly to achieve fairness and justice in the courtroom, and in the development of the law.

Bill's recognition as a leader in the electronic discovery field was unique among plaintiffs' lawyers and required tenacity, strategic thinking, exorbitant amounts of time, and very, very thick skin. And thick skin he had—for the Steering Committee struggled for years to update *The Sedona Principles*, but it was under his leadership that the goal was achieved and this publication is now a reality.

Bill's success was the result of something extraordinary among a large crowd of intellects and geeks—Bill was a man of pure grace. He let others speak first, he listened, and he considered all that he heard before he mapped the direction to be taken, and even then he offered the direction as a proposal to be considered. Bill brought to his endeavors not only his superior intellect, but also logic and his commitment to fairness and justice.

Bill's life and his tenure as Chair both completed their beautiful circles in December 2016.

With the publication of *The Sedona Principles, Third Edition*, may Bill's and Richard's voices be heard, encouraging all lawyers to be not only smart and strategic, but also thoughtful, considerate, and fair.

Jonathan M. Redgrave Ariana J. Tadler

PREFACE

Welcome to the final version of *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, a project of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). The Sedona Conference is a 501(c)(3) research and educational institute that exists to allow leading jurists, lawyers, experts, academics, and others at the cutting edge of issues in the areas of antitrust law, complex litigation, and intellectual property rights, to come together in conferences and mini-think tanks called Working Groups to engage in true dialogue—not debate—in an effort to move the law forward in a reasoned and just way.

The Sedona Principles was the first, and is still perhaps the best-known, publication in the Sedona Conference Working Group Series. As detailed in the Foreword, the genesis of *The Sedona Principles* goes back to 2002. While still in draft form, the First Edition influenced the development of the law and was cited in the landmark case of *Zubulake v. UBS Warburg*, 229 F.R.D. 422, 440 (S.D.N.Y. 2004). Throughout its 15-year evolution, *The Sedona Principles* has been recognized as a foundational guide for attorneys and judges confronting the novel challenges of eDiscovery.

But just as the Second Edition was necessitated by advances in the law and amendments to the Federal Rules of Civil Procedure in December 2006, this Third Edition has been necessitated by an even greater explosion in the volume and diversity of forms of electronically stored information, the constant evolution of technology applied to eDiscovery, and by further amendments to the Federal Rules of Civil Procedure that went into effect in December 2015. Perhaps an even more significant motivation for a Third Edition is that we have an additional ten years of experience with eDiscovery, which has refined our

analysis and sharpened some differences in outlook. This was reflected in the amount of time it took to reach consensus on a few particularly thorny issues. And by "consensus," we do not mean unanimity, but a series of compromises that the drafting team and WG1 members were willing to live with as general statements of principle, even if they may advocate for a different position in an individual case.

In a departure from past practice, we have acknowledged all the members of the drafting team together on the title page, as no distinction in rank between editors and contributors is appropriate for this work. Over the course of many years, every member of the team contributed what they could, when they could. We are particularly grateful to four members of the drafting team who volunteered to serve as a "Style Committee," smoothing out the rough edges of a document to which many people contributed: Ted Hiser, Dean Kuckelman, Judge Andrew Peck, and Charles Ragan. We are also grateful to three volunteers who stepped forward to perform a task which may not be glamorous, but is absolutely necessary for an authoritative reference work such as *The Sedona Principles, Third Edition*—checking rule, statute, and case citations for accuracy and conformance with accepted legal citation form. We thank Drew B. Howk, K. Alex Khoury, and Andrew H. Walcoff for their invaluable assistance with this task.

The current and *ex officio* members of the WG1 Steering Committee are listed at the end of the Foreword, but several former members of the WG1 Steering Committee served during the long drafting period for this publication, and they contributed to the earliest drafts and reviews: Sherry Harris, John Rosenthal, David Shonka, and Edward Wolfe.

Finally, in addition to the many members of the community that provided comments during the public comment period, we recognize the several hundred members of WG1 who took the

time to read innumerable drafts, sit through many meetings in person and online, contribute comments, point out inconsistencies, and suggest solutions to problems. Their membership makes The Sedona Conference Working Group Series publications possible and lends them the authority that only diversity and inclusiveness can provide. WG1 is only one of several Sedona Conference Working Groups engaged in producing primers, principles, guidelines, and best practices to move the law forward in the areas of antitrust, patent, data security, and cross-border litigation. If you are not already a member of The Sedona Conference Working Group Series, we urge you to consider joining and becoming part of this unique effort. More information on the Working Groups and membership may be found at https://thesedonaconference.org/join.

Craig Weinlein
Executive Director
The Sedona Conference
October 2017

FOREWORD

A History of *The Sedona Principles*

As described in the Second Edition, The Sedona Conference Working Group on Electronic Document Retention and Production (WG1), a group of attorneys and others with experience in handling electronic information in litigation, met in October 2002 for the first time to address the production of electronic information in discovery. The group was concerned about whether rules and concepts developed largely for paper discovery would be adequate to address issues of electronic discovery, and whether guidance on the issues could be expected to emerge quickly from individual court decisions. After vigorous dialogue, a set of core principles and best practice recommendations emerged for addressing the production of electronic information in litigation. These principles became known as *The Sedona Principles*.

The initial draft was published for comment in March 2003, widely disseminated through various channels to the legal community by members of WG1, and cited by the federal courts as early as May 2003. WG1 met again in October 2003 to discuss and evaluate comments and possible revisions, and to seek further input from WG1 members.

In January 2004, the First Edition of *The Sedona Principles* was published in final form. It reflected the considered comments to the initial draft, and resulting changes that were believed to enhance the document as a guide to courts, parties, and counsel. An "Annotated Version" of the First Edition was published in June 2004, showing how court decisions dovetailed with or varied from *The Sedona Principles*. A 2005 Annotated Version, incorporating cases decided in 2004 and 2005, was published in July 2005.

During the same period (2004–2005), the Advisory Committee on the Federal Rules of Civil Procedure met, evaluated, and

published for public comment a set of draft amendments to the Federal Rules, for the first time specifically addressing discovery of electronic information. The Committee held three public hearings, heard oral testimony from 74 witnesses, and received 180 written submissions. In April 2006, the U.S. Supreme Court, acting through the Rules Enabling Act, adopted the final proposals, which went into effect on December 1, 2006.

WG1 found itself at the center of the approaching 2006 amendments, and in the Fall of 2006, WG1 met and agreed to revise Principles 12 and 14, extensively redraft nearly all Comments, and add several new Comments, predominantly to reflect the changes to the Federal Rules of Civil Procedure.[1] During Winter and Spring 2007, the WG1 Steering Committee made additional changes to Principles 8 and 13, as well as further edits to the Comments.[2] In June 2007, the Second Edition of *The Sedona Principles* was published. An Annotated Version of the Second Edition followed four months later.

Over the subsequent years, as technologies evolved and issues surrounding discovery of electronic information became more complex and costly, many in WG1 expressed interest in further updates to the *Principles*. Accordingly, in 2010, a drafting team was formed to reexamine the *Principles* in light of experiences with the 2006 amendments as well as the newer technologies, and to suggest updates to Principles and the Comments. A draft was presented at the Spring 2011 WG1 meeting, but the effort stalled due to a lack of consensus. In 2012 the WG1 Steering Committee formed an ad hoc subcommittee to reexamine

1. Thomas Y. Allman, *The Sedona Principles after the Federal Amendments: The Second Edition (2007)*, THE SEDONA CONFERENCE (2007), https://thesedonaconference.org/publication/The%20Sedona%20Principles.

2. *Id*.

the *Principles*, and in 2013 the current drafting team was recruited.

In the ensuing three-plus years, drafts of the Principles and Commentaries were presented for dialogue at two meetings of WG1 in 2014. In response to significant feedback from the members, the drafting team met in person in Phoenix in December 2014, with Judge Peck participating telephonically, and after two days came out with a consensus draft of the Principles for a Third Edition. This was presented to the WG1 Steering Committee in January 2015, where feedback was provided to the drafting team, which then made additional edits during Winter 2015. A full draft of the Principles and Commentaries for a Third Edition was presented to the WG1 membership in multiple sessions at the 2015 Midyear Meeting in Texas, but nothing close to consensus emerged and it was apparent that additional changes to several key Principles, as well as related Comments, were in order. Following further work by the drafting team, three online meetings open to the entire WG1 membership were held over the Summer of 2015, during which the membership had the opportunity to provide feedback on the third draft of the Third Edition. In addition, numerous written comments were received from the membership. As a result, the issues in contention were narrowed, and the drafting team again revised several Comments. These edits were carefully considered by the WG1 Steering Committee in September 2015, particularly in regards to the Comments to Principle 6. Again, revisions were made by the drafting team in short order and presented to the WG1 membership at the 2015 Annual Meeting, where consensus seemed to be reached on all but a few contentious sections of Comments. After another round of revisions by the drafting team, a new draft was presented at the 2016 Midyear meeting, and posted on the WG1 website for all members to consider and provide input, as appropriate. Consensus was reached on nearly all issues, the drafting team produced yet another draft, and the editorial Style

Committee (comprised of three drafting team members and the judicial participant) worked long hours to harmonize the voice and style across all 14 Principles and throughout the draft. The resulting product was considered by the WG1 Steering Committee in September 2016. At that time, consensus was established, except with respect to certain language in Comment 6.b. as to which strongly-held views were presented by members who predominantly represented opposing sides in large-scale, asymmetrical litigation.

Thereafter, the WG1 Steering Committee made several attempts to resolve the remaining issue on the competing positions regarding the text of Comment 6.b. Sadly, in December 2016, William Butterfield, our dear friend and colleague, who was serving not only as the Chair of the WG1 Steering Committee, but also as the Steering Committee Liaison and Team Leader of the *Principles* project, passed away after a short illness. Following the holidays and a period of mourning, the WG1 Steering Committee met in person in January 2017, and reached consensus on the final language for Comment 6.b. that is reflected in this publication.

Public Comment

A Public Comment Version of *The Sedona Principles, Third Edition* was released to the community on March 31, 2017. All comments received prior to the June 30, 2017, deadline were given careful consideration by the drafting team in July and August 2017, resulting in several additional edits.[3] Those edits

3. A *Cover Letter to the Sedona Principles, Third Edition* has been prepared by the drafting team and includes a summary of the public comments received and the responses from the drafting team to the public comments. The Cover Letter is available online at https://thesedonaconference.org/publication/The%20Sedona%20Principles.

were then reviewed and considered by the WG1 Steering Committee in September 2017, resulting in this final version.

The Structure of *The Sedona Principles*

There are three substantive components to this document:

The first component is an Introduction that summarizes the role of *The Sedona Principles* and the main modifications made to Principles and Comments from the Second Edition to the Third Edition. Additionally, the Introduction provides guidance from the WG1 Steering Committee and the drafters on interpreting *The Sedona Principles* and related Commentaries.

The second component is The Sedona Principles, Third Edition—fourteen succinct statements that embody the consensus view of WG1 on a reasonable and balanced approach to the treatment of electronically stored information in the legal process. For reference purposes and to facilitate use of this publication, following the list of The Sedona Principles, we provide a chart cross-referencing each of the Principles (and their supporting commentary) to key issues in electronic discovery and the pertinent Federal Rules.

The third component is the detailed Commentaries to the Sedona Principles, Third Edition which expand on each Principle statement to provide analysis and guidance to the bench and bar on the key legal doctrines and issues implicated by the Principles, as well as any notable exceptions. Some Comments include illustrations to assist in defining factual boundaries for the application of the Principles. The Commentaries to the Sedona Principles, Third Edition are divided into logical groupings, and are supported by select citations and references to key primary and secondary sources and authorities.

The Third Edition has been thoroughly updated to take into account evolving views on electronic discovery over the past

decade, based upon the collective experiences of the WG1 membership in facing the myriad of practical issues that are influencing the development of the law in this area, the numerous important court decisions across the country, and, of course, the 2015 amendments to the Federal Rules Civil Procedure.

The Introduction, Principles, and Commentary are interrelated and intended to be interpreted as a cohesive document. Readers are urged to consider not only the written text of the Principles and the Commentary, but also the interpretive guidance of generally applicable considerations provided in the Introduction that apply globally to all the Principles.

Working Group 1 Steering Committee:[4]

Kevin F. Brady, Chair
Maura R. Grossman
Joseph P. Guglielmo
Dean Kuckelman
Cecil A. Lynn, III
Eric P. Mandel
Annika K. Martin
Peter Pepiton
Ronni D. Solomon
Gina M. Trimarco
Martin T. Tully
Paul D. Weiner

Ex Officio:

Thomas Y. Allman
William P. Butterfield[5]
Conor R. Crowley
Jonathan M. Redgrave
Ariana J. Tadler
Kenneth J. Withers

October 2017

4. *The Sedona Principles, Third Edition* represents the consensus view of The Sedona Conference Working Group 1, and does not necessarily represent the individual views, opinions, or positions of the undersigned, of their clients, or of any law firm, company, agency, or other entity of which they are a partner, shareholder, officer, director, or employee.

5. *See* In Memoriam, *supra*.

TABLE OF CONTENTS

INTRODUCTION 28
THE SEDONA PRINCIPLES, THIRD EDITION 51
THE SEDONA PRINCIPLES, THIRD EDITION AND THE FEDERAL RULES 54
COMMENTARIES TO THE SEDONA PRINCIPLES, THIRD EDITION 56
1. Electronically stored information is generally subject to the same preservation and discovery requirements as other relevant information.....56
Introduction.....56
Comment 1.a. The scope of discovery is generally the same for ESI as for other relevant information, but ESI can present unique preservation and discovery issues.....57
Comment 1.b. The discoverability and proliferation of ESI has increased the importance of effective information governance programs.....59
2. When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(1) and its state equivalents, which requires consideration of the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.....65
Comment 2.a. Rule 26(b)(1) demands the application of the proportionality standard

and makes proportionality an element of the scope of discovery. 65
Comment 2.b. Proportionality should apply to all aspects of the discovery of ESI. 67
Comment 2.c. Proportionality of discovery of ESI should be addressed by the parties and counsel at the Rule 26(f) meet and confer, and with the court at the Rule 16(b) scheduling conference. 67
Comment 2.d. Parties should address the full range of costs of preserving, collecting, processing, reviewing, and producing ESI. 68
Comment 2.e. Parties objecting to the production of ESI on proportionality grounds should state the basis for the objection with reasonable specificity. 69
3. As soon as practicable, parties should confer and seek to reach agreement regarding the preservation and production of electronically stored information. 71
Comment 3.a. Parties should attempt to resolve discovery issues early. 71
Comment 3.b. Cooperation among counsel can enhance the meet and confer process, reduce unnecessary delay and expense associated with non-merit issues, and foster the overriding objectives of Rule 1. 76
Comment 3.c. The early discussions should include procedural issues relating to form of production. 79

Comment 3.d. The early discussion should include issues relating to privilege claims and privilege logs for voluminous ESI. 80

Comment 3.e. Search and retrieval parameters and techniques are appropriate topics for discussion at an early meet and confer session. 83

Comment 3.f. Preservation of facts and data considered by expert witnesses is a topic appropriate for discussion at an early meet and confer session. 84

Comment 3.g. Communications with opposing counsel and the court regarding ESI should be informed and candid. 85

4. Discovery requests for electronically stored information should be as specific as possible; responses and objections to discovery should disclose the scope and limits of the production.....87

Comment 4.a. Requests for production should clearly specify what ESI is being sought. 87

Comment 4.b. Responses and objections should clearly identify the scope and limits of the production. 89

5. The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that is expected to be relevant to claims or defenses in reasonably anticipated or pending litigation. However, it is unreasonable to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant electronically stored information. 93

Comment 5.a. The preservation analysis includes two aspects: When the duty arises, and the scope of ESI that should be preserved. 93

Comment 5.b. Organizations must prepare for electronic discovery if they are to reduce cost and risk. 98

Comment 5.c. In assessing the scope of a preservation duty, as soon as practicable, parties should consider persons likely to have relevant ESI, as well as non-custodial sources of relevant ESI. 101

Comment 5.d. Parties should, in most circumstances, send notices to preserve relevant information to persons having relevant ESI or responsible for maintaining systems containing relevant ESI. 103

Comment 5.e. Preservation efforts need not be heroic or unduly burdensome.....108

Comment 5.f. Ex parte preservation orders are disfavored absent showing of necessity and, when issued, should be tailored to require only preservation of ESI relevant to the claims and defenses. 110

Comment 5.g. All ESI does not need to be "frozen." 111

Comment 5.h. Absent good cause, preservation obligations should not extend to disaster recovery storage systems. 112

Comment 5.i. Preservation efforts should include consideration of ESI that is not specific to individual custodians, including shared or orphaned data.....116

6. Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information. 118

Introduction.....118

Comment 6.a. A responding party should determine how to meet its own preservation and production obligations. 118

Comment 6.b. Responding parties should be permitted to fulfill their preservation and discovery obligations without preemptive restraint.....123

Comment 6.c. Documentation and validation of discovery processes. 126

Comment 6.d. Rule 34 inspections of electronic information systems are disfavored. 127

Comment 6.e. Use and role of discovery counsel, consultants, and vendors. 130

7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronically stored information were inadequate. 131

Comment 7.a. Process and burden of proof for resolving discovery disputes between parties. 131

Comment 7.b. Process for discovering ESI from non-parties. 132

8. The primary sources of electronically stored information to be preserved and produced should be those readily accessible in the ordinary course. Only when electronically stored

information is not available through such primary sources should parties move down a continuum of less accessible sources until the information requested to be preserved or produced is no longer proportional. 134

Comment 8.a. Scope of search for and preservation of readily accessible data. 134

Comment 8.b. Preservation and production of ESI from sources that are "not reasonably accessible" under the Federal Rules of Civil Procedure. 138

Comment 8.c. Forensic data collection. 140

Comment 8.d. Accessibility of ESI held by vendors and other non-parties. 142

9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information. 144

Comment 9.a. The scope of discovery of ESI that is deleted or otherwise not readily apparent. ...144

Comment 9.b. The preservation and production of deleted ESI. 145

10. Parties should take reasonable steps to safeguard electronically stored information, the disclosure or dissemination of which is subject to privileges, work product protections, privacy obligations, or other legally enforceable restrictions. 147

Comment 10.a. Parties should employ the provisions of Federal Rule of Evidence 502 or state analogues to mitigate the risks of

inadvertent production of attorney-client privileged and work product protected ESI. 147
Comment 10.b. Parties should be informed fully of the protections afforded by Fed. R. Evid. 502.....148
Comment 10.c. Parties should protect against waiver by inadvertent production through agreements incorporated in a Fed. R. Evid. 502(d) order.....150
Comment 10.d. Fed. R. Evid. 502 does not protect all privileges or address all privacy concerns...151
Comment 10.e. Direct access to ESI or systems should be sparingly allowed and only upon a showing of good cause.....152
Comment 10.f. Parties should be informed fully of the risks of "clawback" or "quick peek" agreements and enter such agreements only in exceptional circumstances.....153
Comment 10.g. Parties should consider using search terms and technology assisted review (TAR) for privilege reviews, along with other alternatives that may reduce privilege review burdens.....156
Comment 10.h. Parties should address and attempt to reach agreement on procedures for logging privileged and protected work product information that meet the needs of the case.....158
Comment 10.i. Counsel have ethical obligations to protect privileged and confidential information. 160

Comment 10.j. Parties should be aware of and identify personal privacy, trade secret, and confidential ESI, and properly protect such information from unlawful or inappropriate disclosure. 162

11. A responding party may satisfy its good faith obligations to preserve and produce relevant electronically stored information by using technology and processes, such as sampling, searching, or the use of selection criteria. 164

Comment 11.a. Employing technology to search for relevant ESI is reasonable, and can create cost and time savings. 164

Comment 11.b. Sampling can substantially reduce the cost of discovery. 167

Comment 11.c. Counsel should oversee the identification and collection processes. 167

12. The production of electronically stored information should be made in the form or forms in which it is ordinarily maintained or that is reasonably usable given the nature of the electronically stored information and the proportional needs of the case. 169

Comment 12.a. Special characteristics of ESI (metadata and non-apparent/undisplayed data) may be pertinent to the form in which ESI should be preserved and produced. 169

Comment 12.b. Ideally, the form or forms used for production of ESI should be agreed upon early. Absent agreement, ESI must be produced as ordinarily maintained or in a

form or forms reasonably usable to the requesting party. 171
Comment 12.b.i. To be "reasonably usable," the form of ESI need not necessarily be its native format or the form in which it is "ordinarily maintained." 174
Comment 12.b.ii. Parties should consider and understand the pros and cons of preserving and producing ESI in native format. 177
Comment 12.b.iii. Objections to unreasonable or non-proportional requests for a form or forms of production. 181
Comment 12.c. There is no requirement to label ESI to correspond to the categories in requests for production. 182
Comment 12.d. Parties need not produce the same ESI in more than one format. 184
13. The costs of preserving and producing relevant and proportionate electronically stored information ordinarily should be borne by the responding party. 187
Comment 13.a. Factors for allocating the cost of production. 187
Comment 13.b. The cost of preservation should be allocated only in extraordinary circumstances. 189
Comment 13.c. Cost allocation cannot replace reasonable limits on the scope of discovery. 190
Comment 13.d. Non-party requests must be narrowly focused to avoid mandatory cost allocation. 191

14. The breach of a duty to preserve electronically stored information may be addressed by remedial measures, sanctions, or both: remedial measures are appropriate to cure prejudice; sanctions are appropriate only if a party acted with intent to deprive another party of the use of relevant electronically stored information. 193

Comment 14.a. Historical background and the adoption of the 2015 amendment to Rule 37(e). 193

Comment 14.b. Conditions for imposition of remedial measures and sanctions. 194

Comment 14.c. Remedial measures are intended to redress prejudice. 195

Comment 14.d. Sanctions may be appropriate where the court finds an "intent to deprive." ...196

APPENDIX A: TABLE OF AUTHORITIES 199

APPENDIX B: DISCOVERY IN A WORLD OF ELECTRONIC DOCUMENTS AND DATA—2007 206

INTRODUCTION

Discovery in the World of Electronically Stored Information—A Decade Later

The Second Edition of *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* was published in June 2007—the same month the first iPhone was available to the public and during what Thomas Friedman has suggested "may be seen as one of the greatest technological inflection points in history."[6] At the time, the Sedona Conference Working Group on Electronic Document Retention and Production (WG1) was focused on addressing and clarifying what now may be well-settled fundamental issues, setting the stage for the decade to come. Much has happened since, as the volume, variety, and complexity of electronically stored information (ESI), and the velocity with which technologies have proliferated, have increased dramatically.

In that context, by 2017, the issues surrounding the production of ESI have grown in number and complexity. While WG1 has continued to publish numerous in-depth papers analyzing issues pertaining to the management and discovery of ESI, protecting privilege, using cooperation to reduce total costs of discovery, and emergent related technologies, *The Sedona Principles* had not been updated—until now.

In the interim, some hot-button issues in 2004 and 2007 essentially have become moot (such as whether metadata is even discoverable), and others have diminished in importance due to

6. Thomas L. Friedman, *Dancing in a Hurricane,* N.Y. TIMES, Nov. 19, 2016, *available at* https://www.nytimes.com/2016/11/20/opinion/sunday/dancing-in-a-hurricane.html?_r=0 (noting that during the period in and around 2007, technological developments included the explosion of Facebook, Twitter, mobile apps, big data analytics, and cloud computing. The same period saw the emergence of search, retrieval, and review methods for discovery, now known as technology assisted review.).

technological advances (such as having to restore and produce from back-up tapes). New issues and technologies—some not even fathomed in June 2007—now command our attention. Updates to *The Sedona Principles* were needed. The challenge was to create a worthy successor to The Second Edition of *The Sedona Principles* that would continue to be useful to the bench and bar.

This Introduction is intended to provide interpretive guidance on reading the Principles and Comments in the Third Edition: (1) to explain the relationship between the Principles and the Federal Rules; (2) to point out the common themes and considerations of general applicability in the Third Edition; and (3) to highlight the significant changes made to *The Sedona Principles* between the Second and Third Editions, and the terminology employed throughout.

1. The Relationship between *The Sedona Principles* and the Federal Rules of Civil Procedure

The Sedona Principles is not intended to serve as a Restatement of Law on electronic document preservation and production, nor is it intended simply to track and reflect the Federal Rules of Civil Procedure. From its inception, *The Sedona Principles* was intended to serve as best practice recommendations and principles for addressing ESI issues in disputes—whether in federal or state court, and whether during or before the commencement of litigation.

In many respects, *The Sedona Principles* aligns with many of the Federal Rules of Civil Procedure. However, that correlation does not necessarily reflect cause and effect. The core mission of The Sedona Conference is to advance the law in a reasoned and just way. In fulfilling that mission, WG1 at times has taken approaches to electronic discovery before the Federal Rules spoke to an issue, and, on other occasions, WG1 has charted a different path from the Advisory Committee on Civil Rules. There is no question that the Third Edition, like the 2007 Second Edition, is

influenced by the same evolving trends in the demands for the preservation and discovery of ESI in the legal process as have been addressed by amendments to the Federal Rules.[7] But the Third Edition differs from the Federal Rules in certain respects. For example, amended Rule 37(e) now is closer to positions WG1 historically has taken on sanctions and remedies for spoliation, as reflected in Principle 14 and the related Comments, but the two do not align fully. WG1 will continue to urge for further amendments to the Federal Rules of Civil Procedure that are more reflective of the consensus positions established in these Principles and Comments, as well as in WG1's other, more detailed, publications.

2. Common Themes and Considerations of General Applicability in *The Sedona Principles, Third Edition*

Three themes were dominant drivers leading to the 2015 Amendments to the Federal Rules of Civil Procedure: cooperation, proportionality, and increased judicial involvement. The first two also play a prominent role in *The Sedona Principles, Third Edition*.

A. Cooperation in Discovery

The Sedona Conference *Cooperation Proclamation*[8] was first published in July 2008, slightly more than a year after publication of *The Sedona Principles, Second Edition*. The stated purpose of the *Cooperation Proclamation* was to launch "a coordinated ef-

7. Notwithstanding the dynamism and scale of technological change, there are many differences between the discovery of ESI and traditional paper discovery that have remained constant, including the volume, duplicability, and persistence of ESI. *See* Appendix B, Discovery in a World of Electronic Documents and Data—2007, which addresses the constant characteristics of ESI that distinguish ESI from paper discovery.

8. The Sedona Conference, *Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009 Supp.).

fort to promote cooperation by all parties to the discovery process to achieve the goal of a 'just, speedy, and inexpensive determination of every action.'"[9] The Sedona Conference expressly sought to tie the value of cooperation in the discovery process to the stated purpose of the Federal Rules of Civil Procedure in Rule 1. The leadership of The Sedona Conference in this area contributed to the 2015 Amendment to Rule 1, establishing that parties jointly share with the court the responsibilities of securing "a just, speed, and inexpensive determination of every action."[10] The Advisory Committee Note to the 2015 amendment to Rule 1 expressly addresses the issue, stating:

> Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.[11]

WG1 has long promoted the *Cooperation Proclamation*, and the subject is addressed throughout the Third Edition, with numerous new references to cooperation. Through the drafting process of the Third Edition, WG1 has reached consensus that cooperation can, if practiced appropriately by knowledgeable and willing counsel, lead to significant efficiencies in the discovery process, and, for those reasons, cooperation between parties in addressing discovery should be encouraged.

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9. *Id.*
10. FED. R. CIV. P. 1.
11. 2015 Advisory Comm. Note to Rule 1.

B. Proportionality in Discovery

Like cooperation, proportionality is vitally important to *The Sedona Principles, Third Edition* as it is to the 2015 Rules amendments. Proportionality is addressed expressly and liberally throughout the Principles and Comments, as the concept applies to all aspects of discovery from preservation through production.

C. *Primum Noc Nocere* (First, Do No Harm)

In preparing *The Sedona Principles, Third Edition*, part of the original charter for the drafting team was *primum noc nocere*, literally translated as "first, do no harm." This Latin phrase generally is used as a warning to doctors that sometimes it may be better to refrain from taking any quick action when doing so could worsen the patient's situation. For the drafting team, the patient was *The Sedona Principles*, WG1's foundational publication. But once the drafting team began its work in earnest, it became evident that substantive additions and changes to the Principles and Commentary were essential if the Third Edition was to reflect appropriately: (1) the many new or revised WG1 publications since issuance of the Second Edition in June 2007; (2) changes in the Federal Rules and case law over that time; and (3) the impact of the rapid development and evolution of technology, processes, and methodologies. At the same time, the drafting team sought to avoid causing confusion and raising new, particularly larger, issues in the interpretation of the Principles (i.e., causing "harm"). This goal proved easier said than done.

The drafting team faced many unanticipated challenges in seeking to improve the Principles and Commentary to address the world of discovery as it now exists, while abiding by the maxim of "first, do no harm." First, as the drafting team, and then the Working Group, explored and carefully considered the

Principles and Commentary in the Second Edition, it became increasingly clear that some sections had not aged well in the face of the substantial evolution of the world of information technologies and discovery over the past decade. Second, while understanding that the Principles and Commentary are interconnected, the drafting team might make clear improvements in one Comment, only to discover during WG1 meetings that those edits raised concerns for some members in other Comments. In the end, the Third Edition of *The Sedona Principles* reflects The Sedona Conference's best efforts to do no harm, while fulfilling its mission to move the law forward in a reasoned and just way.

D. Principles as Presumptions

The world of discovery, and the law for that matter, is filled with variables and uncertainty. Rules and presumptions exist to establish reasonable expectations and guidance on legal, business, and ethical decision-making. Sometimes presumptions are expressly stated; other times they are left unsaid. In drafting *The Sedona Principles, Third Edition* a decision was made not to attempt to state every underlying presumption. These presumptions fall into three categories.

First, every Principle reflects and incorporates at least some presumptions in the form of affirmative statements. The Principles and Commentary cannot account for endless variations of factual scenarios across tens of thousands of cases and controversies presented before the federal and state courts, and should be interpreted as conveying presumptions, not absolute positions or truisms.

Second, the absence of a stated presumption in any Principle or Comment should not be interpreted as a rejection of any established legal presumption that a party is entitled to under existing rules and case law, or of any corollary right of another party to rebut that presumption.

Third, the Principles and Commentary incorporate unstated societal, legal, and ethical norms. By way of example, the Principles presume that attorneys will act within the bounds of established legal and ethical rules to which they are subject, and fulfill the duties that they owe to, *inter alia*, their clients, opposing parties and counsel, third parties, and the court.

3. The Significant Changes from the Second Edition to the Third Edition, and Terminology Employed

A. Editorial Considerations

As noted in the Preface, four members of the drafting team volunteered to serve as a "Style Committee" to review the final draft of the Third Edition. A primary objective of the Style Committee was to implement a more consistent use of language than existed in the prior editions. For example, even though many of the concepts apply to paper documents and other evidence, the Principles and Commentary are specifically written to address discovery of electronically stored information (ESI). For that reason, the term "ESI" is now used uniformly in the Third Edition where prior editions used variously "ESI," "data," "evidence," "documents," "information," etc.

Other changes in the Third Edition made for the purpose of uniformity include:

- the term "Rule" is used as a shorthand for the Federal Rules of Civil Procedure, unless otherwise specified;
- the term "responding party" is used rather than using interchangeably "responding party" and "producing party" as was done in the prior editions;
- the term "party" includes "counsel," unless the action described is typically performed by

legal counsel (e.g., meet and confer), in which case "counsel" is used;

- the term "relevant" is used to refer to information within the scope of discovery, rather than "responsive," which is used as appropriate when referring to information requested in discovery; and
- "organization" is used instead of "corporation" or "entity," because "organization" includes partnerships, government agencies, and other entities.

B. Overview of the Main Changes Between the Second and Third Editions

To assist the reader, the following is an overview of the changes between the Second and Third Editions.

Principle 1

No change was made to the Principle; however, the following changes were made to the Commentary:

- Comment 1.a. has been updated to reference the 2015 Federal Rules amendments.
- Comment 1.b. has been updated to incorporate and address the developing concepts of Information Governance.
- Former Comment 1.c. regarding preservation has been moved to Principle 5.

Principle 2

The Principle has been simplified to emphasize the fundamental purpose and import of proportionality. The specific factors considered in applying proportionality are set forth in the Commentary. Additionally, the word "balance" was selected to

better reflect the application of the proportionality factors as set forth in the amendments to Rules 26(b)(1) and 26(b)(2)(C)(iii).

The Commentary has been substantially revised and restructured:

- Former Comment 2.a. has been replaced with a new Comment 2.a. to describe the amendments to Rules 26(b)(1) and 26(b)(2)(C)(iii) with emphasis placed on proportionality.
- Comment 2.b. has been added and states that proportionality should apply to all steps in the discovery process, including preservation.
- Comment 2.c. has been added and states that proportionality should be addressed at the Rule 26(f) conference and Rule 16(b) scheduling conference. This Comment is consistent with the Advisory Committee Notes to amended Rule 26(b).
- Comment 2.d. is modified from former Comment 2.b., and the former Comment 2.d. has been deleted since it does not fit within the context of the Principle as revised.
- Comment 2.e. in the Third Edition is substantially new. The Comment cross-references other Comments addressing the accessibility of ESI. (Former Comment 2.e. has been moved under Principle 3.)

Principle 3

Principle 3 in the First Edition broke new ground in calling for early conferences between the parties to address discovery of ESI, and played a significant role in the 2006 adoption of the meet and confer obligation now in Rule 26(f)(3). The Principle

itself has been shortened in the Third Edition, but should not be interpreted as indicating any substantive change in the meaning or objectives of the Principle.

Edits have been made throughout the Commentary to Principle 3 to reflect changes to the Federal Rules in December 2015, as well as the evolution of information-generating technologies, and in the practice of electronic discovery generally over the past decade since publication of the Second Edition.

- Comment 3.a. has been modified to address discovery from non-parties, the possibility of discussions between parties about ESI issues even before litigation begins where counsel are known, and also the need for parties to discuss potential quirks about discovery from newer technologies.
- New Comment 3.b. contains the most significant change to Principle 3 from the Second Edition to the Third Edition, reflecting the impact of the 2008 Sedona *Cooperation Proclamation*.
- Comment 3.e. (regarding early discussion of search techniques) is derived from former Comment 4.c., as it more naturally relates to Principle 3 than Principle 4.
- Comment 3.g. (regarding communication with opposing counsel and the court) is derived from former Comment 2.e.

Principle 4

In the Principle, the word "clear" was replaced in the Third Edition with the word "specific" to reflect recent case law better, including more frequent invocation of Rule 26(g). The change also better conforms with the 2015 amendments to Rule 26(b) on the scope of discovery.

- Comment 4.a. has been enhanced with more specific guidance tracking the 2015 Federal Rule amendments, particularly the promotion of the proportionality principles. As with other Principles, Comment 4.a. includes discussion of how this Principle applies to subpoena requests to non-parties.
- Comment 4.b. has been modified to reflect the increased prominence of proportionality in amended Rule 26(b) and in practice, as well as the importance of Rule 26(g) and the amendment to Rule 34 regarding the specificity of objections.
- Former Comment 4.c. has been moved to Comment 3.e., as noted above.

Principle 5

The Principle has been revised in several important but non-controversial respects. First, in line with the 2015 amendment in Rule 26(b)(1) to the definition of the scope of discovery, the Principle emphasizes that the preservation duty should focus on information relevant to the claims and defenses in the matter. Second, the revised Principle reflects the clarification in case law and the 2010 Sedona Conference *Commentary on Legal Holds*[12] that the duty to preserve is triggered when a claim is reasonably anticipated or litigation is pending. Third, the Principle seeks to clarify that proportionality applies to preservation and that it is unreasonable to preserve each instance of relevant ESI.

12. The Sedona Conference, *Commentary On Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265 (2010).

While the basic structure of the Commentary remains unchanged from the Second Edition, some headings have been revised to provide better signpost guidance to the reader, and the text has been modified to provide better clarity and reflect changes over the past decade.

- Comment 5.a. has been amplified to reflect the two-part nature of the preservation duty—a trigger, and then proper scoping of the legal hold. This Comment also reemphasizes that duplicative instances of identical ESI need not be preserved, and in keeping with the *Commentary on Legal Holds* and recent case law, proportionality applies to preservation determinations. New paragraphs have been added to address preservation by non-parties in response to a Rule 45 subpoena, and the special preservation issues that may arise with social media sources and other newer information-generating technologies.
- Comment 5.b. has been updated to reference The Sedona Conference *Commentary on Information Governance*.[13] While the concept that an organization may wish to prepare for electronic discovery to reduce costs and risk is carried over from the Second Edition, it is emphasized that information governance programs are discretionary, and the absence of such a program should not be considered in determining whether an organization has met its preservation obligation.

13. The Sedona Conference, *Commentary on Information Governance*, 15 SEDONA CONF. J. 125 (2014).

- Comment 5.b. also notes that advances in backup technologies mean that organizations may not be dependent on hard-to-access backup tapes. However, in light of strong support from the WG1 membership, illustrations from earlier editions about backup media have been carried forward to preserve guidance in those situations where it is appropriate.
- Comments 5.c. and 5.d. have been revised to reflect the teachings from The Sedona Conference *Commentary on Legal Holds*.

Principle 6

No change was made to the Principle itself. The Commentary, however, has been rewritten substantially, and several Comments reordered.

- Comment 6.a. has been revised completely to explain the reasoning behind the Principle, i.e., why responding parties are best situated as opposed to how they should respond.
- Comment 6.b. has been replaced with new guidance addressing the logical extension of the Principle that responding parties should be permitted to proceed in fulfilling their obligations on their own, taking appropriate note of The Sedona Conference's position on supporting meaningful cooperation in discovery when considering the scope and application of this Principle.
- Comment 6.c. contains elements of former Comment 6.e. addressing documentation and validation, but has been expanded to address

all discovery processes rather than just ESI collection. Former Comment 6.c. has been moved to Comment 6.d.

- Comment 6.d. includes revisions to former Comment 6.c. addressing Rule 34 inspections. The title of the Comment has been updated to clarify intent, and the text has been updated and expanded.
- Comment 6.e. combines former Comment 6.d. and Comment 6.f., and has been updated substantially to reflect the development of the role of specialized counsel for electronic discovery, as well as the expanded use of consultants and vendors over the past decade. Former Comment 6.e. has been moved to and revised in Comment 6.c.

Principle 7

No changes have been made to Principle 7, and only minor changes have been made to the Commentary.

- Comment 7.a. includes an expanded title description, and has been revised to clarify that the term "inadequate" means the failure to take reasonable steps to identify, collect, and produce the requested information.

Principle 8

Principle 8 has been updated substantially to reflect the changes over the last decade in how ESI is maintained—both inside and outside the organization, including the quickly diminishing role of backup tapes, and the growing role of cloud computing and multiple storage devices. The revised language of the Principle also reflects the blurring of the line previously drawn between active and inactive data. The changes

acknowledge the expanding data mobility, and that there now may be multiple, readily accessible copies of relevant ESI within the possession, custody, or control of a party that exist along a continuum from ESI that is easily accessible from a variety of sources, to ESI that is nearly impossible to obtain, but can be produced using extreme means and resources.

The Principle and its Commentary establish a new process for addressing the preservation and production of unique, relevant ESI, starting with the primary and most readily available sources, and only moving down the continuum to secondary and less readily available sources, as necessary, until it is no longer reasonable or proportionate to the needs of the case. The Principle thus shifts the focus from what is or is not "reasonably accessible" ESI to the primary and most *readily* accessible sources of relevant ESI, consistent with The Sedona Conference *Commentary on Proportionality in Electronic Discovery*.[14] Principle 8 expressly applies these proportionality concepts to preservation of ESI.

- Updated Comment 8.a. describes the new framework, considering potential sources of discoverable ESI as existing along a continuum starting with ESI that is "readily accessible" and used in the ordinary course.
- Comment 8.b. has been revised completely to address the operation of the "not reasonably accessible" exception under Rule 26(b)(2)(B), and how it is distinguished from the concept of "readily accessible" under this Principle, as

14. The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 141 (2017).

well as the application of the proportionality factors under amended Rule 26(b)(1).

- Comment 8.c. continues to address the issue of forensic data collection, but has been updated significantly, with illustrations added to provide guidance on when forensic collections would or would not be necessary or appropriate.
- Comment 8.d. has been updated to discuss the challenges of determining possession, custody, or control in the preservation and production of ESI held by vendors and other non-parties, with reference to the Sedona Conference *Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control."*[15]

Principle 9

The Principle has not been changed; the Commentary has been updated.

- Comment 9.a. is amended to incorporate additional categories of ESI that are not readily apparent. Comment 9.a. also includes a discussion of the need to consider proportionality factors in considering whether to preserve or produce such forms of ESI. Finally, the illustrations have been updated to include additional references to the form of production.

15. The Sedona Conference, *Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* 17 SEDONA CONF. J. 467 (2016).

- Comment 9.b. has been amended to remove the cross-reference to Principle 8 and Comment 8.d. pertaining to forensic collection.

Principle 10

The Principle has been updated in three important respects: First, the Principle is directed to "parties" (rather than simply "responding parties") because all parties—including parties who receive information in discovery—have obligations with respect to privileged and protected information. Second, the Principle has been modified to refer specifically to privacy obligations because of the increasing importance of privacy in the United States and abroad. Third, "other legally enforceable restrictions" has been added to account for ESI that may be subject to contractual non-disclosure agreements or other restrictions.

The Commentary has been revised substantially and enhanced (five Comments have become ten). Most important, Comments 10.a.—10.d. provide guidance with respect to Federal Rule of Evidence 502 (enacted in 2008), and the broad protections available under its subsection (d).

- New Comment 10.d. cautions that Rule 502 only applies to attorney-client privilege and work product protections, and should not be mistaken as a panacea for other protected or restricted information.
- Comment 10.e. replaces former Comment 10.b. and warns that direct access to ESI or systems should be allowed sparingly and only upon a showing of good cause.
- Comment 10.f. addresses issues partially covered in former Comment 10.d. (namely, the risks associated with "clawback" or "quick

peek" agreements), notes that a Rule 502(d) order does not eliminate all risks associated with "quick peek" agreements, and cautions that a "quick peek" agreement should only be entered in limited circumstances and after assessing pertinent risks.

- New Comment 10.g. provides guidance on how newer technologies (including technology assisted review (TAR)) may be used to facilitate privilege reviews. Similarly, new Comment 10.h. urges that parties attempt to reach agreement on procedures for logging privileged or protected work product information in a manner that meets the needs of the case.
- New Comment 10.i. addresses counsel's ethical duties to protect confidential and privileged information, which, as manifested by the 2012 amendments to the ABA Model Rules of Professional Conduct, have become more acute with the evolution and explosion of ESI.
- Finally, new Comment 10.j. encourages parties to be aware of and identify ESI that is subject to personal privacy, trade secret, and confidentiality obligations.

Principle 11

The Principle has been revised to substitute this language, "using technology and processes, such as sampling, searching, or the use of selection criteria," for the prior, "using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data reasonably likely to contain relevant information."

- Comments 11.a. and 11.b. have been updated to incorporate recent Sedona commentaries, including those on search and retrieval, and proportionality; to reflect the updates to Principle 6 and its related Comments; and to include references to recent case law and literature on search and retrieval methodology.
- Consistent with new Comment 10.i. on recent enhancements to ethical obligations, new Comment 11.c. explains that counsel should oversee the identification and collection processes, even if technologies or specialized vendors are used.

Principle 12

Principle 12 and its associated Commentary have been revised substantially from the Second Edition. In 2007, the focus was on the possibility of having to produce certain metadata that would enable "the receiving party to have *the same ability* to access, search, and display the information as the producing party" where appropriate to the ESI and the needs of the case. (Emphasis added.) In the Third Edition, the Principle has been revised to eliminate the prefatory language about party agreement or court order, and to provide that ESI should be produced "in the form or forms in which it is ordinarily maintained or that is *reasonably usable* given the nature of the ESI and the proportional needs of the case." (Emphasis added.) This change reflects the emphasis placed on proportionality in the 2015 amendments to the Federal Rules, and recognizes that some ESI relevant to a matter may reside in an enormously complex system, of which only some ESI and some metadata is relevant to the case or needed to render the ESI produced reasonably usable.

The Commentary has been revised substantially as well, in part to reflect that the proper functioning of many search, retrieval, and review platforms developed since 2007 depend on various metadata fields being available, and the tactical disparity that can exist if a requesting party is deprived of metadata necessary to use sophisticated technologies in handling and reviewing large ESI productions.

- Comment 12.a. explains at length the different kinds of metadata and not readily apparent, user-created information that may be associated with ESI in its native format.
- Comment 12.b., like Comment 3.c., suggests that the form or forms for production be discussed and agreed upon early in a case, urges that parties not demand forms of production for which they have no practical need, notes that in a majority of instances so-called TIFF+ productions are "reasonably usable," and provides guidance on factors parties and courts should consider in determining appropriate forms of production. The subparts within Comment 12.b. point out that "reasonably usable" is not synonymous with native format, that parties should understand and consider the pros and cons of native production, and that responding parties may be subject to repeat productions and added costs if they unilaterally choose a form of production later found to be not reasonably usable.
- New Comment 12.c. addresses an issue under Rule 34(b)(2)(E) that has arisen in several cases—namely whether ESI when produced must be labeled to correspond to the categories

in requests—and explains why there should be no such requirement.

- Comment 12.d. addresses the same subject as in the Second Edition, but has been expanded to address the additional requirements for responses set forth in the 2015 amendments to Rule 34(b)(2)(C), and provides illustrations concerning how a party may avoid having to produce in more than one format.

Principle 13

Principle 13 has been simplified to recognize that the costs of "preserving and producing" (rather than "retrieving and reviewing") "relevant and proportionate" ESI should be borne by the responding party.

The Commentary has been revised substantially. Across all Comments, the term "cost allocation" is used, rather than "cost shifting," consistent with amended Rule 26(c)(1)(B).

- Comment 13.a. is updated to reflect the amended Federal Rules' treatment of cost allocation and its interplay with the proportionality analysis under amended Rule 26(b)(1).
- New Comment 13.b. explains that cost allocation may apply to preservation, but only in extraordinary circumstances.
- Comment 13.c. urges that cost allocation not be used as an excuse to permit discovery beyond that permitted under amended Rule 26(b)(1).
- Finally, as with Comments to other Principles, new Comment 13.d. addresses the need to focus non-party requests under Rule 45 narrowly to avoid mandatory cost allocation. This

Comment also notes that relationships between parties and certain third-parties may cause a court to be less likely to allocate costs.

Principle 14

Principle 14 has been revised to reflect evolving case law and the 2015 amendment to Rule 37(e), and to state that remedial measures, sanctions, or both may be awarded for a breach of a duty to preserve relevant ESI—depending on the degree of prejudice and whether the spoliating party acted with intent to deprive another party of the use of relevant ESI. The revised Principle is not intended to reflect a substantial departure from the basic tenets of the Second Edition.

Because the Principle is intended to provide guidance in state as well as federal courts, and to move the law forward (rather than serve as a restatement), the Commentary varies in certain respects from amended Rule 37(e). Key aspects of the Commentary include the following:

- Comment 14.a. replaces prior Comment 14.a. and provides the historical context for changes to Rule 37(e) from the Second Edition to the 2015 Rule amendment.
- Comment 14.b. is revised to reflect the change in focus from degrees of culpability to the conditions for the imposition of either remedial measures or sanctions.
- Comment 14.c. has been updated. As one example, Comment 14.c. discusses prejudice required to warrant remedial measures and includes an illustration as to how the timeliness of a challenge may bear on prejudice.
- Comment 14.d., like amended Rule 37(e), states that sanctions may be appropriate where

> the court finds an intent to deprive, but, unlike the amended Rule, concludes that sanctions also may be appropriate for an "incompetent spoliator"—one who intends to deprive the other party of ESI, but fails to eliminate it completely.

THE SEDONA PRINCIPLES, THIRD EDITION

1. Electronically stored information is generally subject to the same preservation and discovery requirements as other relevant information.

2. When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(1) and its state equivalents, which requires consideration of the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

3. As soon as practicable, parties should confer and seek to reach agreement regarding the preservation and production of electronically stored information.

4. Discovery requests for electronically stored information should be as specific as possible; responses and objections to discovery should disclose the scope and limits of the production.

5. The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that is expected to be relevant to claims or defenses in reasonably anticipated or pending litigation. However, it is unreasonable to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant electronically stored information.

6. Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.

7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronically stored information were inadequate.

8. The primary sources of electronically stored information to be preserved and produced should be those readily accessible in the ordinary course. Only when electronically stored information is not available through such primary sources should parties move down a continuum of less accessible sources until the information requested to be preserved or produced is no longer proportional.

9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information.

10. Parties should take reasonable steps to safeguard electronically stored information, the disclosure or dissemination of which is subject to privileges, work product protections, privacy obligations, or other legally enforceable restrictions.

11. A responding party may satisfy its good faith obligations to preserve and produce relevant electronically stored information by using technology and processes, such as sampling, searching, or the use of selection criteria.

12. The production of electronically stored information should be made in the form or forms in which it is ordinarily maintained or that is reasonably usable given the nature of the electronically stored information and the proportional needs of the case.

13. The costs of preserving and producing relevant and proportionate electronically stored information ordinarily should be borne by the responding party.

14. The breach of a duty to preserve electronically stored information may be addressed by remedial measures, sanctions, or both: remedial measures are appropriate to cure prejudice; sanctions are appropriate only if a party acted with intent to deprive another party of the use of relevant electronically stored information.

THE SEDONA PRINCIPLES, THIRD EDITION
AND THE FEDERAL RULES

Topic of Discussion	**Sedona Principle**	**Federal Rules of Civil Procedure**[16] *(Dec 2015)*
Discovery Scope	Principles 1, 2, 5, 6, 8, 9, 11	Rule 26(b)(1); Rule 16(b)(3)(B)(ii)
Preservation Obligations	Principles 1, 3, 5, 6, 8, 9, 12	Rule 26(f)(2) & (3); Rule 16(b)(3)(B)(iii)
Form of Preservation	Principle 12	n/a
Metadata	Principle 12	n/a
Form of Production	Principles 3, 4, 12	Rule 26(f)(3); Rule 34(b)
Meet & Confer	Principle 3	Rule 26(f)
Initial Disclosures	Principle 3	Rule 26(a)(1)
Preservation Orders	Principle 5	n/a
Discovery Requests & Responses	Principles 4, 6	Rule 26(d)(2); Rule 34
Tiered Production	Principle 8	Rule 26(b)(2)(B)
Cost Shifting	Principle 13	Rule 26(b)(2)(B); Rule 26(c)
Proportionality Limits	Principle 2 & *passim*	Rule 26(b)(1)
Identity of Unsearched Sources	Principle 4	Rule 26(b)(2)(B); Rule 34(b)(2)(C)

16. Unless otherwise noted.

Topic of Discussion	**Sedona Principle**	**Federal Rules of Civil Procedure**[16] *(Dec 2015)*
Protecting Privilege & Avoiding Waiver	Principles 3, 10	Rule 26(b)(2)(5); Federal Rule of Evidence 502
Spoliation Remedial Measures & Sanctions	Principle 14	Rule 37(e)
Cooperation	Principles 3, 6 & *passim*	*See* Rule 1, 2015 Advisory Committee Note
Non-party Discovery	Principles 3, 5, 7, 13	Rule 45
Search & Retrieval	Principles 3, 10, 11	n/a

COMMENTARIES TO
THE SEDONA PRINCIPLES, THIRD EDITION

1. Electronically stored information is generally subject to the same preservation and discovery requirements as other relevant information.

Introduction

Whether dealing with electronically stored information (ESI) or paper copies, the scope of discovery in federal court is non-privileged matter that is relevant to the claims and defenses in the case,[17] and proportional to the needs of the case.[18] But, as explained in the Introduction, ESI has become so pervasive that the volume of ESI involved in most cases dwarfs the volume of any paper records. This makes ESI the driving force behind the scope of preservation and discovery requirements in many cases, and behind the litigation-related aspects of many effective information governance programs.

17. The 2015 amendments to Rule 26(b)(1) address the common misperception that the scope of discovery extends beyond relevance if the requested discovery is likely to "lead to the discovery of admissible evidence." *See* COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT OF JUDICIAL CONF. TO CHIEF JUSTICE, app. B-10 (Sept. 2014) ("that phrase was never intended to have that purpose"); 1946 Advisory Comm. Note to Rule 26 ("admissibility at trial should not be the test as to whether the information sought is within the scope of proper [deposition] examination"). Some state court rules broaden the scope of discovery from "claims and defenses" to "the subject matter involved in the pending litigation." *E.g.,* ALASKA CIV. R. 26(b)(1).

18. Rule 26(b)(1). *See* Principle 2 regarding proportionality.

Comment 1.a. ***The scope of discovery is generally the same for ESI as for other relevant information, but ESI can present unique preservation and discovery issues.***

The Federal Rules of Civil Procedure were amended in 2006 "to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents."[19] This clarification ended the argument that discovery only applied to information that had been intentionally created or viewed by human users—to the exclusion of metadata and other system information generated automatically by computers. Thus, ESI is generally subject to the same "relevant to the claims and defenses" scope of discovery that governs paper records. But ESI presents special issues in at least three areas, as explained below.

First, some court rules are expressly limited to ESI. For example, Rule 26(b)(2)(B) provides "specific limitations" on ESI "that the party identifies as not reasonably accessible because of undue burden or cost." *See* Comment 8.b. Another example is Rule 34, which governs the form of production for ESI. *See* Principle 12. Other Rules that specifically refer to ESI include 16(b)(3)(B)(iii) (scheduling conferences), 26(a)(1) (initial disclosures), 26(f) (pretrial conference), 37 (sanctions), and 45 (subpoenas).[20] Some state rules also are expressly limited to ESI.[21]

Second, some court rules are not expressly limited to ESI, but are more significant for ESI than for paper records. For example,

19. 2006 Advisory Comm. Note to Rule 34. The Note also points out that references in the Rules to "documents" "should be interpreted to include electronically stored information as circumstances warrant." *Id.*

20. Rule 45(a)(1)(A)(iii) explicitly includes ESI within the types of information that may be demanded.

21. *E.g.*, TEX. R. CIV. P. 196.4.

Rule 26(b)(1) now explicitly limits the scope of discovery to information that is both relevant and "proportional to the needs of the case." The Rule specifies the factors to determine proportionality: "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery out-weighs its likely benefit."[22] Although this "proportionality" analysis applies to both paper records and ESI, the volume and complexity of ESI, along with the various burdens and technical implications of different ESI formats, generally makes these limitations on scope of discovery much more significant for ESI than for paper records. Many state rules, local rules, and pilot projects also adopt these and further limitations to the scope of discovery.[23] Similarly, the rules regarding privilege and work product do not expressly differentiate between paper records and ESI, but as explained in Principle 10, ESI presents unique risks and opportunities for

22. The 2015 amendments to Rule 26 moved these proportionality concepts from 26(b)(2)(C) to 26(b)(1), to restore proportionality "to [its] original place in defining the scope of discovery," specifically "as an express component of the scope of discovery," and "again reflect[] the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management." In doing so, the Advisory Committee also noted that, in 2000, Rule 26(b)(1) had been amended to add a specific cross-reference to the proportionality provisions then in subdivision (b)(2), because "'the Committee ha[d] been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated.'" 2015 Advisory Comm. Note to Rule 26(b)(1).

23. *See, e.g.*, Seventh Circuit Electronic Discovery Pilot Program, *Model Standing Order* (Rev. May 11, 2011), *available at* http://www.discoverypilot.com/sites/default/files/StandingOrde8_10.pdf; Seventh Circuit Electronic Discovery Pilot Program, *Principles Relating to the Discovery of Electronically Stored Information*, Principle 2.04(d) (Rev. Aug. 1, 2010), *available at* http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf.

dealing with these issues. The duty to preserve ESI implicates special considerations, as explained in Principle 5. And pretrial conferences are "particularly important with respect to ESI."[24] *See* Principle 3 regarding early preservation and production conferences.

Third, the volume of ESI that is created and distributed within and among organizations is growing exponentially. As explained in Comment 1.b., the discoverability and proliferation of ESI means that organizations can benefit even more from effective information governance programs that reduce the cost and risk of meeting discovery obligations.

Comment 1.b. ***The discoverability and proliferation of ESI has increased the importance of effective information governance programs.***

"Information Governance" means "an organization's coordinated, inter-disciplinary approach to satisfying information compliance requirements and managing information risks while optimizing value."[25] As such, Information Governance ("IG") encompasses and seeks to reconcile the various legal and compliance requirements and risks addressed by different information-focused disciplines, such as records and information management, data privacy, information security and protection, compliance, data governance, data storage and archiving, and electronic discovery. Legal and compliance requirements include the "retention" requirements of statutes or regulations, the "privacy" requirements (e.g., HIPAA or HiTech), and the

24. 2006 Advisory Comm. Note to Rule 26(f).

25. *See* The Sedona Conference, *Commentary on Information Governance*, 15 SEDONA CONF. J. 125, 126 (2014).

"preservation" requirements once litigation is reasonably anticipated.[26] Ideally, IG programs should help meet regulatory retention requirements (e.g., Sarbanes Oxley), meet preservation requirements once litigation is reasonably anticipated, and meet the business needs of the organization.

There is often a direct correlation between an organization's IG program and the ease with which it can search for, identify, and produce information. A well-executed IG program can improve efficiency at all levels in an organization by assuring the right information is readily available to the people who need it when they need it. IG programs are also the keystone of information security and privacy. The Sedona Conference *Commentary on Information Governance* (the "Sedona IG Commentary")[27] includes a comprehensive description of these major components of IG programs. This Comment is focused on the importance of IG to an organization's ability to meet its discovery obligations.

To find ESI, protect it, and access and produce it, an organization must know (or be able to readily find out) what relevant ESI it has and where it keeps it. Ideally, the organization can determine who has access to the ESI and be confident that the ESI is "clean" and not corrupted. To do this, an organization should strive toward managing or governing its ESI from creation to disposition.

The scope and vigor of an organization's IG program can directly affect its ability to find and produce ESI relevant to the claims and defenses in litigation. However, attaining "perfect" IG over all of an organization's ESI is extremely difficult—if not impossible—to achieve, given the sheer amount of ESI at issue,

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26. *See* The Sedona Conference, *Commentary On Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265 (2010).

27. 15 SEDONA CONF. J. 125 (2014).

its exponential rate of growth, and the ever-expanding means and locations for the storage and transmission of ESI. Moreover, despite the compelling logic of IG for many organizations, adopting such a program is neither a legal nor a business imperative. Accordingly, an organization's compliance with discovery obligations cannot be judged by the state or lack of its IG program. Rather, the point is simply that—all things being equal—an organization with a comprehensive IG program will manage its litigation more easily and less expensively than an organization with a less comprehensive program.

In many organizations, retention is still frequently accomplished through the use of detailed records retention schedules tailored to records series created by employees in specific business units. Because these schedules were created when hard-copy records were the norm, they tended to be extremely granular; today, with ESI being the predominant form of organizational information, organizations are increasingly willing to consider alternative approaches for managing ESI, including collapsing and simplifying categories of ESI records into larger retention buckets, tailoring retention schedules to fit specific business units, and adopting automated approaches to categorizing and disposing of ESI, all in order to mitigate organizational risk and increase efficiency. As emphasized in the Sedona IG Commentary, IG programs should encourage not only retention of ESI, but also the effective, timely, and consistent disposal of ESI that no longer needs to be retained or preserved.[28] The

28. Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005) ("'Document retention policies,' which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.").

requirements, benefits, and risks should be balanced. For example, the rotation cycle for backups[29] should balance the likelihood and business value of restoring the data for business purposes against the potential cost and risk of preservation and review if the tapes contain unique information that is both relevant and proportional in some later-filed litigation.[30] Further, it may be appropriate to use technology to limit the size of email accounts,[31] or limit how long email can be retained without some action by the record owner. As explained in Principle 5, issuing legal holds and taking other reasonable steps may be required to prevent deletion of relevant ESI once a duty to preserve is created by pending or anticipated litigation, or by some regulatory investigations. An effective IG program may also include audits to determine whether the policies are being followed.

An IG program is more effective if it addresses ESI created by all of the information technologies used by employees of the organization. New technologies that represent novel preservation and discovery challenges are always being developed and adopted,[32] which means that effective IG programs must continually adapt.

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29. Similar issues can be presented by "versioning," "recycle bins," and "trash."

30. This balancing may result in organizations keeping backups only as long as it would reasonably take the organization to interrupt the rotation period in response to a disaster. *See* Comment 5.h.

31. Mailbox limitations can lead to more problems than solutions; for example, if employees subvert the purpose of the limitations by moving emails to storage locations that are even more difficult to manage (e.g., PSTs). This is an example of why organizations must not only communicate what the IG policy is, but why it is important to follow the policy.

32. Just as email was once "new," more recent entrants include instant messaging, cloud computing, mobile devices, social media, and text messages.

Ideally, before allowing or adopting new technology, in addition to addressing the typical privacy and security issues, organizations should ask: (1) what is the business value of the technology; (2) what are the costs and risks created by the technology; and (3) how can the costs and risks be mitigated?

Costs and risks may increase if the technology makes it more difficult to preserve or collect relevant ESI for litigation. For example, mobile devices that are not synchronized with the organization's servers may require physical collection of the mobile device to meet preservation or discovery obligations if there is unique, relevant ESI on the device that the IT or legal group cannot collect from the organization's servers. This may be even more of a problem for texts, which can "roll off" the phone as memory is used up.[33] Review cost for texts can also be exponentially higher because the texts are more difficult to sort by subject or author, and because of the shorthand that is frequently used in text messages. Notwithstanding the presence of such ESI on the device, it may not be necessary to image the device if the costs, burdens, and other issues associated with imaging the device outweigh the benefits of retrieving unique, relevant ESI from the device. Indeed, wholesale text message retention is regularly disproportionate for both sides of the litigation, e.g., in a wage and hour class action where employees use text messaging on their personal devices for work. Content management and collaboration applications can result in unmanaged ESI because there may not be any clear "data-owner" who is responsible for managing and deleting the ESI at the appropriate time.

33. In addition to storage constraints, how a user or an organization has configured the device settings also may determine how long texts are retained. As such, further (and potentially manual) steps may need to be taken to modify the settings to avoid automated deletion. Additionally, organizations should consider the risks attendant to losing, replacing, and upgrading mobile devices.

Similarly, consumer-oriented file sharing and synchronization services may result in over-retention (and lack of a "data-owner") of the transferred data that remains in the service after the transfer—even if the organization otherwise properly manages the ESI in its possession. Simply knowing where employees are able to store ESI can reduce the time and expense of meeting preservation and discovery obligations. *See* Principle 5 regarding legal holds.

2. When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(1) and its state equivalents, which requires consideration of the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Comment 2.a. ***Rule 26(b)(1) demands the application of the proportionality standard and makes proportionality an element of the scope of discovery.***

Although commentators, including many jurists, have emphasized the use of the proportionality standard—embodied in the Federal Rules of Civil Procedure since 1983—to manage the costs and burdens of the preservation and discovery of ESI while concurrently meeting the requirements of the litigation, parties have not consistently applied the standard to evaluate and manage discovery. This inconsistency led to the 2015 amendment to Rule 26(b), specifically, moving the proportionality factors from Rule 26(b)(2) ("Limitations on Frequency and Extent") to Rule 26(b)(1) ("Scope of Discovery"). By moving proportionality into the definition of the scope of discovery, the Rule reinforces that proportionality is on a par with relevance when negotiating and formulating preservation and discovery plans, propounding and responding to discovery requests, staging and scheduling productions, and negotiating and adjudicating discovery disputes. As explained by the Advisory Committee: "This change reinforces the Rule 26(g) obligation of the

parties to consider these factors in making discovery requests, responses, or objections."[34]

Rule 26(b)(1) specifies the factors to determine proportionality:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs the benefit.

The proportionality standard is a balancing test that requires consideration of more than just "the amount in controversy."[35] Instead, all of the factors should be weighed to determine whether the burden or expense of the proposed discovery outweighs the benefit. For example, the "importance of the issues at stake in the action" not only applies to the import of the issues to the immediate parties, but also may require addressing broader issues related to legal, statutory, regulatory, and public policy issues embodied in legislation or regulations. As another example, if the proposed discovery is not likely to be important

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34. 2015 Advisory Comm. Note to Rule 26(b)(1); *see also* JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY, 6 (Dec. 31, 2015), https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf ("Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality . . . .").

35. *See* 2015 Advisory Comm. Note to Rule 26(b)(1) ("It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors.").

in resolving the issues, the scope of discovery may be narrower, even if the monetary amount in controversy is significant. Thus, weighing all of the factors may result in discovery that is broader or narrower than the scope would be if the amount in controversy were the only consideration. Accordingly, parties should consider all of the proportionality factors when propounding and responding to discovery requests, negotiating the scope and form of the production of ESI, and moving to compel and responding to motions to compel discovery.[36]

Comment 2.b. ***Proportionality should apply to all aspects of the discovery of ESI.***

Proportionality should be considered and applied by the court and parties to all aspects of the discovery and production of ESI including: preservation; searches for likely relevant ESI; reviews for relevancy, privilege, and confidentiality; preparation of privilege logs; the staging, form(s), and scheduling of production; and data delivery specifications. The proportionality factors may also impact cost allocation. *See* Principle 13.

Comment 2.c. ***Proportionality of discovery of ESI should be addressed by the parties and counsel at the Rule 26(f) meet and confer, and with the court at the Rule 16(b) scheduling conference.***

Issues regarding proportionality should be addressed at the Rule 26(f) conference. Parties should be prepared to provide accurate information regarding the anticipated burdens and ben-

36. *See* Hon. Elizabeth J. Laporte & Jonathan M. Redgrave, *A Practical Guide for Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV. 19 (2015) (proposing a "proportionality matrix" to analyze and apply proportionality).

efits of preserving, retrieving, processing, reviewing, and producing ESI that is likely to be or contain information relevant to the claims and defenses in the case, to the extent they assert that these steps are disproportionate. Because the "importance of the discovery in resolving the issues" can be a key factor in the balancing of burden and benefit, a fruitful discussion also requires a clear statement of the claims and defenses. Similarly, because notice pleading does not require plaintiffs to specify their damage claim, parties should be prepared to discuss and explain the likely range of damages, and any non-monetary stakes, to the extent they claim these factors are important to the proportionality analysis.

The parties and the court should be aware that discussions held early in the action are limited by the information available to the parties, and that proportionality may be revisited as the action evolves. The parties should summarize their discussions of proportionality and, where different, their respective analyses of the proportionality considerations in the parties' report to the court, and be prepared to discuss any significant proportionality issues at the Rule 16(b) conference with the court.

Comment 2.d. ***Parties should address the full range of costs of preserving, collecting, processing, reviewing, and producing ESI.***

Evaluating the need to produce ESI requires that a balance be struck between the burdens and need for ESI, taking into account the technological feasibility and realistic costs involved.

Discovery burdens should be proportional to the amount in controversy and the nature of the case, including consideration of the importance of issues at stake in the litigation. *See* Comment 2.a. In fact, Rule 26(g)(1)(B)(iii) requires counsel to certify that discovery requests are proportional. If proportionality is not observed, discovery costs may prevent the just, speedy, and inexpensive determination of litigation as Rule 1 contemplates.

Costs cannot be calculated solely in terms of the expense of computer technicians to retrieve the ESI, but must factor in other litigation costs, including the accessibility of the ESI, the interruption and disruption of routine business processes and IG practices, and the costs of reviewing the ESI. These burdens on information technology personnel and the resources required to review ESI for relevance, privilege, confidentiality, and privacy should be considered in any calculus of whether to allow discovery, and, if so, under what terms. In addition, the non-monetary costs (such as the invasion of privacy rights, risks to business and legal confidences, and risks to privileges) should be considered.

Comment 2.e. ***Parties objecting to the production of ESI on proportionality grounds should state the basis for the objection with reasonable specificity.***

Moving the proportionality requirement to the scope of discovery provisions in Rule 26(b)(1) emphasizes that discovery that is not proportional to the needs of the case is objectionable as outside the permitted scope of discovery. Further, a "proportionality" objection under Rule 26(b)(1) is different from a "not reasonably accessible" objection under Rule 26(b)(2)(B), even though some of the same cost and burden considerations apply. In the latter case, the court may order the discovery to go forward, notwithstanding the costs and burdens; in the former, if the balance of factors tips against the discovery being proportional to the needs of the case, the discovery requested is impermissible because it is beyond the scope of discovery. *See* Comment 2.a.[37] Also, proportionality is not limited to the burden of

37. *See* Comment 8.b. for a full discussion of the Rule 26(b)(2)(B) limitation and not reasonably accessible sources of ESI.

accessing ESI—it may include the burden of collecting, reviewing, hosting, and producing the ESI.

Rule 34(b)(2)(B) requires that objections should state "with specificity the grounds for objecting." A balance should be struck between a summary, "boilerplate" proportionality objection and an unreasonably detailed and overly burdensome description of why the requested discovery is disproportionate. The objecting party should state the grounds for asserting that the request lacks proportionality based on the applicable proportionality considerations, and why the costs and burdens of the requested discovery outweigh the likely benefits of the discovery sought, with sufficient specificity to permit the requesting party to understand the basis of the objection. *See* Comment 4.b. The court and the requesting party should recognize that a highly detailed articulation of the objection and each of the proportionality standard considerations is not necessary to provide reasonable notice of the assertion of, and the basis for, the objection.

For a discussion of the limits of preservation efforts, including those for ESI that is not reasonably accessible, but is reasonably likely to contain relevant information, see Principle 5. For a discussion of backup tapes, see Principle 8. For a discussion of cost allocation in discovery, see Principle 13.

3. As soon as practicable, parties should confer and seek to reach agreement regarding the preservation and production of electronically stored information.

Comment 3.a. Parties should attempt to resolve discovery issues early.

Early discussion of all discovery issues, including the overall scope of discovery, preservation, and production of ESI, should reduce misunderstandings, disputes, and the need for court intervention. Doing so is consistent with Rule 1, which states that the Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." This Principle applies to party discovery, as well as requests under Rule 45 to obtain information from non-parties.

Moreover, the Federal Rules (since 2006), most district courts, and an increasing number of state court rules require that at the outset of a matter parties consider, discuss, and attempt to agree upon what ESI, if any, will be the subject of discovery, and issues that may attend such discovery.

In particular, Rule 26(f) requires parties to discuss issues about discovery of ESI and to develop a proposed discovery plan. The 2006 Advisory Committee Notes to Rule 26(f) observe that the particular ESI issues to be discussed depend on the circumstances of the case, and that early identification of issues about preservation and production of ESI may lead to creative solutions that avoid unnecessary delay and expense on matters unrelated to the merits of the litigation. Issues the Advisory Committee specifically suggested for possible discussion included the sources of relevant ESI, preservation issues, whether any relevant ESI is not reasonably accessible, issues relating to the assertions of privilege or of protection as trial preparation materials, and the form or forms in which ESI should be produced.

Experience with Rule 26(f) since the 2006 amendment has led counsel to consider an expanded list of topics to discuss during the meet and confer to develop a discovery plan. Thus, some of the issues that parties may seek to resolve early in an action include: (i) the scope of relevance as defined by the claims and defenses; (ii) the identification of data sources that will be subject to preservation and discovery; (iii) the relevant time period; (iv) the identities of particular individuals likely to have relevant ESI; (v) the form or forms of preservation and production (*see* Comment 3.c.); (vi) the types of metadata to be preserved and/or produced; (vii) the identification of any sources of information that are not reasonably accessible because of undue burden or cost, such as backup media and legacy data; (viii) the potential use of search technology and other methods of reducing the volume of ESI to be preserved or produced; (ix) issues related to assertions of privilege and inadvertent production of privileged documents (*see* Comment 3.d. and Principle 10); and (x) issues related to confidential or privacy information that may require special treatment or protection during and after production.

In 2015, the Federal Rules were further amended to provide that a request to produce documents may be delivered more than 21 days after the summons and complaint are served, a change that was expressly designed to facilitate early discussions even prior to the Rule 26(f) conference, and possibly produce requests that are more focused and tied to the claims, defenses, and realities of available information. (Delivery does not count as service, which is considered to occur at the 26(f) conference.)[38]

38. Rule 26(d)(2) and 2015 Advisory Comm. Note.

The 2006 Advisory Committee Note to Rule 26(f) stated that the parties' discussion should pay particular attention to achieving a balance between competing needs to preserve relevant information and to continue critical routine operations, "with the goal of agreeing on reasonable preservation steps." Practice under Rule 26(f) and the 2015 Advisory Committee Notes about the proportionality amendments (discussed elsewhere; *see* Principle 2 and related commentary above) strongly suggest that a meaningful meet and confer is not a single event—much less a simple exchange of emails—but rather an iterative process that may involve multiple sessions, particularly in a complex case. For example, the 2015 Advisory Committee Notes point out that "parties may begin discovery without a full appreciation of the factors that bear on proportionality"; the requesting party may have little information about the complexity of the responding party's systems, or the burdens and expense imposed by the request. Conversely, the responding party may have little information about the importance of the discovery to the issues in the case, or inadequate information about where relevant information may be located. These uncertainties should be addressed in the Rule 26(f) context, and remaining disputes brought to the attention of the court for resolution.

Best practices include agreements in writing to guide the parties and, as necessary, inform the court.

> *Illustration i.* In the circumstance of an ongoing preservation obligation and in light of the complexity of decisions that must be made regarding the overall preservation obligation, the parties should discuss maintaining select data on a live server or other device and agree upon a process for later review and production. For example, parties should discuss whether all drafts and versions of relevant documents must be preserved in addition to a final version. Additionally, parties should

discuss how to manage dynamic databases where data is routinely overwritten.

Illustration ii. Plaintiffs in a lawsuit involving allegations of securities fraud against multiple defendants seeking extensive damages request preservation of ESI from all defendants. The defendants, most of whom are large investment banks and other financial institutions, respond that preservation obligations need to be tailored so that they are defined, manageable, and cost-effective while also preserving evidence that is truly needed for the resolution of the dispute. The parties meet and confer upon a protocol for preserving existing data, including preserving select (not all) backup tapes, certain archived data, and select legacy systems; distributing retention notices (and updates); creating a limited number of mirror images of select computer hard drives; undertaking measures to collect relevant data; and distributing a questionnaire regarding electronic data systems. The defendants assess the costs and burdens involved in the various proposed steps and reach agreement on the scope and limitations of the obligations. The protocol averts disputes regarding the scope of preservation and production, avoids motion practice, and provides assurance as to the expected preservation efforts.

Discovery from Non-parties: An obligation to discuss ESI issues as early as practicable and in good faith also applies to non-parties from whom information is sought under Rule 45. Parties considering seeking discovery from non-parties should be mindful of their duty to take reasonable steps to avoid undue burden or expense on the person subpoenaed, and the court's concomitant duty to impose appropriate sanctions for failure to

do so.[39] Accordingly, the party seeking non-party discovery should endeavor to enter discussions as soon as reasonably feasible to address the scope of preservation, to reduce the burden on non-parties as well as uncertainty, and to prevent wasteful and expensive over-preservation.

Pre-litigation discussions about ESI issues: Independent of any requirement imposed by court rule, if litigation involving identifiable adversaries is reasonably anticipated, practitioners should consider engaging in early discussions regarding the preservation of potentially relevant ESI even before litigation is filed. While doing so is not a requirement, parties may find significant value in reaching early agreement delineating the potential scope of preservation, thus reducing the volume and variety of ESI to be preserved. That said, until claims are filed, it may be difficult to assess the scope of relevant material to be preserved.[40]

Newer and evolving technologies: In preparing for meaningful early discussions about data sources that should be subject to preservation and discovery, counsel should be mindful of the ever-evolving number and variety of information-generating technologies and repositories (e.g., instant messaging, text messaging, social media, smartphones, tablets, mobile applications, and the emerging Internet of Things). The sources of ESI relevant in a particular case will vary depending on the circumstances of the case and technologies the parties have used. Counsel should be cognizant of reasonableness and proportionality considerations, and not indulge in speculative assumptions about where relevant information could be found. In this

39. Rule 45(d)(1).

40. *See* Rule 26(b)(1); The Sedona Conference, *Commentary on Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265 (2010).

regard, counsel may consider eliminating from preservation and discovery certain data sources.

Comment 3.b. ***Cooperation among counsel can enhance the meet and confer process, reduce unnecessary delay and expense associated with non-merit issues, and foster the overriding objectives of Rule 1.***

In 2008, one year after the publication of the Second Edition of *The Sedona Principles*, The Sedona Conference *Cooperation Proclamation* was released.[41] In the *Cooperation Proclamation*, The Sedona Conference set forth its position that: (1) "Cooperation in Discovery is Consistent with Zealous Advocacy," and (2) "Cooperative Discovery is Required by the Civil Rules."

Some practitioners originally questioned whether cooperation was required by the Rules, but, shortly after issuance of the *Cooperation Proclamation*, courts and rule-makers began to call on parties and counsel to address electronic discovery issues in a cooperative or collaborative manner.[42] To date, more than 200 judges have endorsed the *Cooperation Proclamation*, and several courts have issued guidelines that incorporate cooperation principles.[43] Indeed, some courts have urged that parties cooperatively discuss the full range of potential ESI issues, including

41. The Sedona Conference, *Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009 Supp.).

42. *See, e.g.*, Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 363 (D. Md. 2008) (endorsing The Sedona Conference *Cooperation Proclamation* and explaining how cooperation is consistent with the attorney's obligation to the courts).

43. *See, e.g.*, Seventh Circuit Electronic Discovery Pilot Program, *Principles Relating to the Discovery of Electronically Stored Information*, Principle 1.02 (Rev. Aug. 1, 2010), *available at* http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf; United States District Court for the Northern District of California, *Guidelines for the Discovery of Electronic Information*,

metadata that may be relevant and should be preserved and produced, and the selection and implementation of procedures, methodologies, and technologies used in fulfilling discovery obligations.

This position, that parties should address discovery issues cooperatively, has been given greater force with the December 2015 amendment to Rule 1, which now emphasizes the role of "the court and parties" to construe, administer, and employ the Rules "to secure the just, speedy, and inexpensive determination of every action and proceeding."[44]

This concept of cooperation, however, does not mean that attorneys should not be advocates in the discovery process. Rather, they should advocate their client's positions within the parameters of the applicable rules.[45] If the parties are unable to reach a full agreement, they may present their remaining dispute to the court for resolution at a scheduling or pretrial conference, or by motion.[46] In advocating ESI issues and choosing issues to take to the court, counsel should always attempt to resolve potential disputes where feasible, recognizing the risks of asserting a non-meritorious position—including sanctions under Rule 26(g) and potentially losing credibility with the court.

Guideline 1.02 (Rev. Dec. 1, 2015), *available at* http://cand.uscourts.gov/filelibrary/1117/ESI_Guidelines-12-1-2015.pdf.

44. *See also* 2015 Advisory Comm. Note to Rule 1 ("[D]iscussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay.").

45. *See* 2015 Advisory Comm. Note to Rule 1 ("Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.").

46. *See* The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 346–48 (2009 Supp.).

Finally, cooperation is fundamentally a voluntary endeavor that requires the development and maintenance of trust between two or more parties, and a relatively equal and balanced exchange of non-protected information. If both requesting and responding parties voluntarily cooperate to evaluate the appropriate procedures, methodologies, and technologies to be employed in a case, both may potentially achieve significant monetary savings and non-monetary efficiencies. Moreover, in some circumstances a party may effectively immunize itself from the risk of facing "discovery on discovery" by cooperatively working to reach agreement on key ESI issues. Conversely, the failure to engage in meaningful discussions about ESI discovery can lead to expensive motion practice, which may lead to undesirable court orders.[47]

47. *See, e.g.*, Burnett v. Ford Motor Co., No. 3:13-cv-14207, 2015 WL 4137847, at *8 (S.D.W. Va. July 8, 2015) (discussing the *Cooperation Proclamation*, stating that "cooperation in a transparent discovery process is the path to efficient, cost-effective litigation," and ordering Rule 30(b)(6) deposition on, among other topics, details regarding the document search defendant had performed); Ruiz-Bueno v. Scott, No. 2:12-cv-0809, 2013 WL 6055402 (S.D. Ohio Nov. 15, 2013) (ordering answers to interrogatories about search methods and noting that, where information is shared (which had not happened in the case), it changes the nature of the dispute from whether the requesting party is entitled to find out how the producing party went about retrieving information to whether that effort was reasonable); Romero v. Allstate Ins., 271 F.R.D. 96, 109–10 (E.D. Pa. 2010) (relying upon The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339 (2009 Supp.), and ordering the parties to confer and come to agreement on future search terms, custodians, date ranges, and other essentials to a search methodology, but not requiring disclosure of procedures used during the prior 8 ½ years); *cf.* DeGeer v. Gillis, 755 F. Supp. 2d 909 (N.D. Ill. 2010) (failure to cooperate considered in third-party, cost-shifting context).

Comment 3.c. The early discussions should include procedural issues relating to form of production.

Rule 26(f) calls for an early discussion of form of production issues. Rule 34 sets forth a more detailed explanation of the ways in which parties should request and respond to requests seeking production or inspection of ESI (*see* Principle 4), and, as noted above, Rule 26(d)(2) was added in 2015 to permit the delivery of early requests to produce, which can then be discussed in the Rule 26(f) context.

At the outset, requesting parties should have sufficient technical knowledge of production options so that they can make an educated and reasonable request. These should be discussed at the Rule 26(f) conference and included in any Rule 34(a) requests. Likewise, responding parties should be prepared to address form of production issues at the Rule 26(f) conference. All parties should inform themselves as to the forms in which their own data is stored, and, for complex systems, the export options available. Additionally, parties should discuss the related issue of data delivery specifications in relation to the form of production, e.g., necessary and appropriate metadata fields, load files, text extraction, redactions, de-duplication, and exception handling. These discussions can result in an agreed upon protocol governing the production of ESI and avoid downstream misunderstandings or disputes.

With respect to requests and responses, Rule 34(b) provides that a request may specify the form or forms in which ESI is to be produced. If objection is made to the requested form or forms, both parties should discuss and attempt to agree on a form that is reasonably usable for the requesting party, yet not unduly burdensome to the producing party. *See* Principle 12. If no form was specified in the request, the responding party must state the form or forms it intends to use.

If a request does not specify the form or forms for producing ESI, and absent agreement of the parties or court order, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. A party need not produce the same ESI in more than one form. However, parties should account for the fact that different types or categories of data may be stored in different forms, thus allowing for the production of different types of data in different forms. In particular, special consideration should be given to the manner in which relevant structured data (e.g., databases), information on social media, or information stored with cloud service providers or on mobile devices may be produced.

Significantly, the 2006 Committee Note to Rule 34 makes clear that the option to produce in a "reasonably usable form" does not mean that a responding party, once the duty to preserve attaches (*see* Principle 5), is free to convert ESI from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. More particularly, a producing party may not remove or significantly degrade the electronic searching features of information as it is usually maintained. Parties will need to carefully consider the ways in which they preserve and produce documents to ensure that they will be able to realize Rule 34's goal of a fair and reasonable approach to the form of production.

For a more detailed discussion of the metadata issue, see Principle 12.

Comment 3.d. ***The early discussion should include issues relating to privilege claims and privilege logs for voluminous ESI.***

In litigations or investigations with a large volume of relevant, non-duplicative paper documents and ESI, the volume of

privileged information may be correspondingly large. The applicable Rule states the following:

> When a party withholds information otherwise discoverable by claiming that information is privileged or subject to protection as trial preparation material, the party must:
>
> i. expressly make the claim; and
> ii. describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.[48]

Traditionally, parties have complied with this Rule by producing a privilege log with separate entries for each document, containing objective information about the document (such as author, addressee, and Bates number) as well as a field that describes the basis for the privilege claim. Even if there are relatively few privileged documents, preparing and reviewing a privilege log can be extremely time-consuming. Often, the privilege log is of marginal utility. The immense volume of ESI now subject to discovery exacerbates the problem.

One solution that parties may consider is to agree at the outset to accept privilege logs that will initially classify categories or groups of withheld documents, while providing that any ultimate adjudication of privilege claims, if challenged, may be made on the basis of a document-by-document review if review by category proves insufficient. The basis for this approach is the 1993 Advisory Committee Note to Rule 26(b), which states the following:

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48. Rule 26(b)(5)(A).

> The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.[49]

An agreement at the outset of litigation to log privileged documents by category, and which provides for a full and fair defense of individual privilege claims if challenged, will reduce motion practice regarding log deficiencies and other procedural challenges that are becoming more common given the huge volume of ESI at issue. A categorical log may provide sufficient information for the requesting party (and perhaps the court or a third party) to assess the validity of the privilege claims asserted as to each category of documents.[50]

In addition, the parties may wish to consider stipulating that certain categories of documents are presumptively privileged (such as documents prepared, sent, or received by attorneys who represent a party for specific purposes). Such documents would be withheld preliminarily subject to requests for further analysis or review to ensure that the privilege applies and has not been waived. Further, parties should consider agreeing to classes of privileged documents that do not need to be preserved or listed on a log because there is no expectation that they would be discoverable. One example of such a category would

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49. 1993 Advisory Comm. Note to Rule 26(b); *see also* FED. R. EVID. 502.

50. *See* John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19 (2009).

be communications among a trial team after the litigation begins.

Last, and as discussed in greater detail in Principle 10, to reduce the burdens associated with potential inadvertent disclosure of privileged materials, the parties should consider asking the court to enter an order as contemplated by Federal Rule of Evidence 502(d).

For a more detailed discussion of privilege issues including Federal Rule of Evidence 502, see Principle 10.

Comment 3.e. ***Search and retrieval parameters and techniques are appropriate topics for discussion at an early meet and confer session.***

It usually is not feasible, and may not even be possible, for most litigants to collect and review all relevant data from their computer systems. The extraordinary effort required to do so could cripple many organizations. Yet, without appropriate guidelines, if any data is omitted from a production, an organization may be accused of withholding data that should have been produced and, if that data is not preserved, of spoliation.

Unnecessary controversy over peripheral discovery issues often can be avoided if the parties discuss early the scope of relevance, the costs of preserving and collecting relevant data from various sources, and approaches that may be used to assist in the search or retrieval of relevant information. Accordingly, and consistent with the Federal Rules and best practices, parties should be prepared to discuss the sources of ESI that have been identified as containing relevant information as well as the steps that have been taken to search for, retrieve, and produce such information.

For a more detailed discussion of these issues, see Comment 5.b., and Principles 6, 8, and 11.

Comment 3.f. ***Preservation of facts and data considered by expert witnesses is a topic appropriate for discussion at an early meet and confer session.***

The obligation to preserve and produce may apply to some expert witness materials.

An earlier version of *The Sedona Principles* suggested that the duty to preserve and produce might extend to drafts of expert witness reports, and that the early discussions therefore should address expert witness issues.[51] A 2010 rule amendment reduced some of those concerns, but the subject of experts is still appropriate for early discussion.

The 1993 amendments to Rule 26(a)(2)(B) required the disclosure of all "information considered by the [expert] in forming the [expert's] opinion." Under this standard, the failure to preserve information could lead to sanctions and the exclusion of testimony.

In 2010, Rule 26(a)(2) and Rule 26(b)(4) were amended to eliminate what the Advisory Committee described as repeatedly reported undesirable effects, including inquiry into communications between counsel and expert, retention of dual experts—one consultative and the other to testify, and additional costs. In particular, Rule 26(a)(2) was amended to provide that disclosure include all "facts or data considered by the witness in forming" opinions, the intent being to avoid inquiry into communications between counsel and the expert. At the same time, the Advisory Committee emphasized that "facts or data" should be interpreted broadly to include all material of a factual

51. *See The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, THE SEDONA CONFERENCE, Comment 3.d., at 24 (2d ed. 2007), https://thesedonaconference.org/publication/The%20Sedona%20Principles.

nature considered by the expert, regardless of its source. A corollary amendment was made to Rule 26(b)(4) providing work product protection to draft reports of experts disclosed under Rule 26(a)(2)(A), the intent being to allow counsel to interact with experts without fear of exposing those drafts and communications to searching discovery.[52] To avoid the potential for dispute, and recognizing that the issue usually will affect both parties, the best course is for the parties to confer about what expert witness materials need to be preserved and exchanged in accordance with Rule 26(a)(2)(B). If an agreement cannot be reached, counsel should propose a sensible solution to the court early, rather than risk later accusations of evidence spoliation or failure to produce.

Comment 3.g. ***Communications with opposing counsel and the court regarding ESI should be informed and candid.***

The efficacy of "meet and confers," or other types of communications, depends upon the parties' candor, diligence, and reasonableness. A party should accurately represent the complexities and attendant costs and burdens of preservation and production as well as relevance and need for production. Unsubstantiated or excessive cost estimates will reduce the party's credibility, as will vague statements regarding relevance. Further, a responding party should be prepared to present opposing counsel and the court with a reasonable plan for the preservation and production of relevant ESI. In the face of a credible and specific concern that relevant ESI is not being preserved, parties who do not present the court with a reasonable plan for preservation may cause the court to err on the side of protecting the integrity of the data collection process and require unnecessary preservation.

52. *See* 2010 Advisory Comm. Note to Rule 26(b)(4).

Often, neither counsel nor the court will have sufficient technical knowledge to understand the systems at issue. In preparing for court conferences or meet and confer conferences, counsel may need to consult with their clients' information technology departments or consultants regarding the technical issues involved in data preservation. Indeed, because of the continuing evolution, proliferation, and complexity of information generating and storage systems, several courts encourage counsel to bring their client's technical experts to Rule 16(b) and Rule 26(f) conferences, so that erroneous assumptions and understandings about ESI functionality, including export options, costs, and time estimates, can be dealt with intelligently and early, rather than sidetracking the discovery plan or, worse, leading to costly motion practice. In turn, as appropriate or as deemed necessary, organizations should devote sufficient resources to make complex technical issues comprehensible to their counsel. Similarly, counsel representing individuals should devote sufficient resources to understand and make comprehensible any complex technical issues regarding the systems or applications that contain relevant ESI, e.g., text messages on mobile devices. When providing affidavits or testimony to opposing counsel or the court on these issues, counsel should be careful to ensure that the presentations, affidavits, or testimony are not only accurate but also comprehensible to lay individuals with less technical knowledge.

4. Discovery requests for electronically stored information should be as specific as possible; responses and objections to discovery should disclose the scope and limits of the production.

Comment 4.a. Requests for production should clearly specify what ESI is being sought.

A requesting party that seeks production of ESI should, to the greatest extent practicable, clearly and specifically indicate each item or category of electronic information it seeks. Discovery requests should avoid boilerplate definitions, definitions of common words, or demands for all email, databases, word processing files, or whatever other ESI the requesting party can generally describe. Instead, the request should target particular ESI that the requesting party contends is relevant to the claims or defenses and proportionate to the needs of the case.[53] In many cases, a requesting party may not know the details of another party's systems and applications, but to the extent a requesting party knows about specific ESI it seeks, it should request that information. Towards this end, counsel for a requesting party may find that the client has knowledge of the opposing party's information systems, and can help specify target sources of relevant information.

By tailoring requests to identified relevant individuals and topics, requesting parties can avoid blanket, burdensome requests for ESI that invite blanket objections and judicial intervention. Courts recognize that Rule 26(g) makes the imposition of an appropriate sanction mandatory if a discovery request is interposed for an improper purpose.[54]

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53. *See* Mancia v. Mayflower Textile Servs., 253 F.R.D. 354, 364 (D. Md. 2008).

54. *See* Heller v. City of Dallas, 303 F.R.D. 466 (N.D. Tex. 2014); The Sedona Conference, *Commentary on Achieving Quality in the E-Discovery Process*, 15

Rule 26(d)(2) was amended in 2015 to provide that, more than 21 days after the summons and complaint are served, a request to produce documents under Rule 34 may be delivered. *See* Comment 3a. This is intended to allow a more meaningful Rule 26(f) conference.

The requesting party should also identify the specific form or forms in which the ESI should be produced, recognizing that different types or categories of information may be stored in different forms, thus allowing for the preservation and/or production of one set of data in a particular form and a distinct set of data in a different form. *See* Principle 12 for considerations in assessing ESI forms. The requesting party also should specify technical details, such as particular fields or types of metadata sought, and be prepared to explain its preferences in a meet and confer. In federal cases, the subject of form of production must be discussed at the Rule 26(f) conference, and the parties' views and proposals must be included in the parties' discovery plan or in an ESI protocol or stipulation.[55] An early discussion of the potential form or forms of production (including the types of metadata to be produced) will facilitate planning for preservation and identify any disputes that a court may have to resolve. If agreement is reached, it should be embodied in a Rule 16(b) scheduling order. If agreement is not reached, the parties' respective positions can be presented to the court. *See* Principle 12, and Comments 3.a. and 4.b.

SEDONA CONF. J. 265 (2013); FED. R. CIV. P. 26(g)(1)(B) (an attorney or unrepresented party who signs a discovery request or response thereby "certifies that to the best of that person's knowledge, information, and belief formed after a reasonable inquiry," the request is not interposed for an improper purpose and is neither unreasonable nor unduly burdensome); *see also Mancia,* 253 F.R.D. at 360 (Rule 26(g) requires "approaching the process properly . . . in accordance with the letter and spirit of the discovery rules.").

55. Rule 26(f)(3)(C).

For non-party discovery, the party issuing the subpoena may indicate the form or forms in which production is to be made, and the non-party subject to the subpoena has the same rights and obligations in regard to form of production as parties.[56] Similar to the duty that Rule 26(g) imposes on parties when they serve Rule 34 requests for production, the party issuing a subpoena "must take reasonable steps to avoid imposing undue burden or expense" on the subpoenaed party, and the court is required to enforce this duty and impose an appropriate sanction on a party or attorney who fails to comply.[57]

For a more detailed discussion of the process and advantages related to a particular form of production, including a discussion of the role of metadata, see Principle 12 and its Comments, and Comment 3.d.

Comment 4.b. Responses and objections should clearly identify the scope and limits of the production.

A response to a request to produce ESI must state for each item or category requested whether the inspection will be permitted as requested. If a responding party has objections to part or the whole of a request, it must state clearly and specifically the grounds for each objection, state whether any ESI is being withheld as to any part or the whole of each request, and permit inspection of the rest. Specifically, the 2015 amendments to Rule 34(b)(2)(B) added requirements that objections must "state with specificity the grounds for objecting to the request, including the reasons." Rule 34(b)(2)(C) now states that "[a]n objection must state whether any responsive materials are being withheld on the basis of that objection."[58] If a responding party contends that

56. Rules 45(a)(1)(C) and 45(e)(1)(B)–(C).

57. Rule 45(d)(1).

58. *See also* 2015 Advisory Comm. Note to Rule 34.

a request is overbroad in part but appropriate in other parts, the response should comply with the parts that are not overbroad. The response should also indicate the extent to which production of relevant ESI will be limited because of undue burden or cost of production efforts, or restricted. But, "[t]he producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection."[59]

If the responding party objects to the form or forms of ESI production requested, it should state the form or forms it proposes for production, and be prepared to discuss at a meet and confer session. As one example, in the case of a proprietary database, it may not be necessary to produce in native format, as the requesting party may not have the software necessary to use or review the information; in such instances, a discussion at a meet and confer of extraction and production options (including relevant metadata fields) would be appropriate. The 2006 Advisory Committee Note to Rule 34(b) warns that a responding party that

> responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form.

That Note also makes it clear that, where the responding party objects to the form specified in a discovery request or the requesting party is not satisfied with the form of production

59. 2015 Advisory Comm. Note to Rule 34.

specified in the discovery response, the parties "must meet and confer . . . before the responding party can file a motion to compel." *See* Principle 12 regarding appropriate forms of production.

As with requests, courts recognize that Rule 26(g) makes the imposition of an appropriate sanction mandatory if a discovery response or objection is interposed for an improper purpose. In the *Mancia* case, discussed in Comment 4.a., the court also instructed that the responding party would bear the burden of demonstrating "a particularized factual basis to support any claim of excessive burden or expense," and also noted that the process of negotiating requests for production should be engaged in cooperatively by counsel, which did not mean a party needed to abandon a meritorious position.[60]

It is neither reasonable nor feasible for a party to search or produce information from every electronic source that might contain information relevant to every issue in the litigation, nor is a party required to do so. In many cases, by applying the concept that discovery should be proportionate to the needs of the case, it may be reasonable to limit initial searches to sources such as email messages and other information from the accounts of key witnesses in the litigation, for the same reasons that it has been regarded as reasonable to limit searches for paper documents to the files of key individuals. Likewise, it should be appropriate, absent unusual circumstances, to limit review for production to those sources most likely to contain non-duplicative relevant information (such as active files used by key employees). *See* Principle 8. Responding parties are best situated to evaluate the appropriate procedures, methodologies, and technologies for reviewing their own ESI. *See* Principle 6.

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60. Mancia v. Mayflower Textile Servs., 253 F.R.D. 354, 364–65 (D. Md. 2008).

In cases governed by the Federal Rules, a producing party that does not intend to produce relevant ESI from sources identified as not reasonably accessible because of undue burden or cost must identify those sources to the requesting party.[61] Absent local rule or a court order, this Rule does not require the specificity of a traditional privilege log, nor does it require the listing of electronic information systems or storage devices that have not been identified as a source of non-duplicative, relevant information. If the parties do not reach agreement during a meet and confer process on whether ESI is not reasonably accessible, the requesting party may move to compel;[62] the responding party then must establish the burdens associated with producing the ESI; and the court for good cause may order the production, subject to proportionality principles and the possibility of cost allocation.[63]

61. *See* FED. R. CIV. P. 26(b)(2)(B) and 34(b)(2)(C).

62. The 2006 Advisory Committee Note to Rule 26(b)(2)(B) instructs that the parties must meet and confer before bringing a motion.

63. *See* The Sedona Conference, *Cooperation Proclamation: Resources for the Judiciary*, THE SEDONA CONFERENCE, Sect. IV.8.1.1, at 33 (Dec. 2014 Public Comment Version), https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Cooperation%20Proclamation%3A%20Resources%20for%20the%20Judiciary.

5. The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that is expected to be relevant to claims or defenses in reasonably anticipated or pending litigation. However, it is unreasonable to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant electronically stored information.

Comment 5.a. ***The preservation analysis includes two aspects: When the duty arises, and the scope of ESI that should be preserved.***

The common law duty to preserve evidence clearly extends to ESI. Indeed, the vast majority of information upon which businesses and individuals operate today is generated electronically, and much of this information is never printed to paper. Therefore, parties must take reasonable steps to preserve ESI when litigation or government investigation is pending or reasonably anticipated.

The preservation obligation necessarily involves two related questions: (1) when does the duty to preserve attach, and (2) what information, including relevant ESI, must be preserved.[64]

The first inquiry remains unchanged from prior practice—the duty arises when litigation is commenced or earlier, when there is a reasonable anticipation of litigation or an investigation, e.g., where there is a credible threat of litigation.[65] Parties

64. *See generally* The Sedona Conference, *Commentary on Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265 (2010).

65. *See id.* at 271 ("[T]here are circumstances when the threat of litigation is not credible, and it would be unreasonable to anticipate litigation based on that threat."); *see also* 18 U.S.C. § 1519 (destruction, alteration, or falsification of records with the intent to obstruct a federal investigation of any matter, or

should exercise good faith in evaluating the facts and circumstances known to them, and a party who is considering bringing a claim should realize that the duty may be triggered earlier for it than for the opposing party.[66]

The need to recognize when the duty to preserve has been triggered may be more important with respect to those electronic information systems that quickly delete or overwrite data in the ordinary course of operations.

The second inquiry presents a much greater challenge with respect to ESI than with paper documents. The obligation to preserve relevant evidence is generally understood to require that the producing party make reasonable and good faith efforts to identify and preserve the information that is identified as relevant to the claims or defenses in the matter. Consistent with the generally applicable principles of proportionality, a party need only preserve unique instances of such relevant ESI. That is, a party need not preserve multiple or duplicative copies of the same relevant ESI.

Satisfying this obligation must be balanced against the right of an organization to continue to manage its ESI in the organization's best interest, even though some ESI is necessarily overwritten on a routine basis by various computer systems. If such overwriting is incidental to the operation of the systems—as opposed to a deliberate attempt to destroy evidence in anticipation of or in connection with an investigation or litigation—it should generally be permitted to continue after the commencement of litigation, unless the overwriting destroys discoverable ESI that is not available from other accessible sources.

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in relation to the contemplation of any such matter, shall be fined, imprisoned not more than 20 years, or both).

66. *See, e.g.*, Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311 (Fed. Cir. 2011); Hynix Semiconductor Inc. v. Rambus Inc., 645 F.3d 1336 (Fed. Cir. 2011).

Just as organizations need not preserve every shred of paper, they also need not preserve every email or electronic document. To require such broad preservation would cripple organizations that almost always are involved in litigation, and make discovery even more costly and time-consuming. A reasonable balance must be struck between (1) an organization's duty to preserve relevant and discoverable evidence, and (2) an organization's need, in good faith, to continue operations.[67]

Earlier editions of *The Sedona Principles* stated "it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant ESI." That statement was intended in part to address some early cases that put in question whether parties were obligated to preserve and produce information on backup tapes. In recent years, business continuation and disaster recovery technologies have advanced, and some organizations address these important needs with dual, mirrored live systems on which information may be readily available, thereby reducing concerns about backup tapes. The change in this edition is intended to emphasize two things: As before, at most, unique instances of relevant information should be preserved—not each and every duplicative instance—and, as the 2015 amendments to the Federal Rules emphasize, all discovery must be proportional to the needs of the case. Accordingly, principles of proportionality should be applied when the costs and burdens of preserving large amounts of ESI may be disproportionate to the needs of the case, and even the sole copy of an ESI item

67. *See* 2015 Advisory Comm. Note to Rule 37(e) ("As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information . . . ."); *see also* The Sedona Conference, *Commentary on Legal Holds: The Trigger & The Process*, Guideline 7, 11 SEDONA CONF. J. 265 (2010).

need not be preserved if doing so would be disproportionate to the needs of the case.

> *Illustration i*. L Corporation ("L Corp.") routinely backs up its email system to tape every day and recycles the backup tapes after two weeks. L Corp. receives a discovery request relating to a product liability claim against L Corp. arising out of the design of products sold one year ago. L Corp. promptly and appropriately notifies all employees involved in the design, manufacture, and sale of the product to save all ESI relating to the issues in the litigation, and the legal department takes reasonable steps to ensure that all relevant ESI in fact has been preserved. L Corp. continues its policy of recycling backup tapes while the litigation is pending. Absent awareness of a reasonable likelihood that specific unique and relevant ESI is contained only on a backup tape, there is no violation of preservation obligations because the corporation has an appropriate policy in place and the backup tapes are reasonably considered to be redundant of the data saved by other means.

Preservation obligations may expand, or contract, as the contours of claims and defenses are clarified during the pendency of a matter.[68] If the scope of the claims or defenses expands, parties may need to increase their preservation efforts, which may require them to amend their preservation notices. Conversely, when the scope of claims or defenses contracts, the party preserving the information will have an interest in modifying its preservation efforts and notices so that it may resume normal information management procedures for information that is no longer relevant to the claims or defenses. It may choose to do so

68. *See, e.g.*, Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331 (E.D. Pa. 2012).

unilaterally, but doing so may carry some risk, as several courts have faulted parties that make unilateral electronic discovery decisions. A safer course of action is for the parties to engage in a meaningful discussion consistent with the cooperation principles (discussed under Principle 3), recognize the competing needs to preserve relevant information and to continue routine operations for managing information that is not needed for litigation or investigation,[69] and agree how the preservation efforts and notices may be scaled back.[70]

Preservation by non-party in response to Rule 45 subpoena: Case law concerning the preservation obligations of a subpoenaed non-party in litigation is not well defined. Some courts have noted that the issuance of a subpoena creates a duty to preserve.[71] However, since Rule 45 imposes duties on the requesting party and the court to shield a non-party from undue burden and expense,[72] there may be some question whether an overbroad subpoena creates a duty to preserve. A good practice for a requesting party that receives an objection to the breadth of a subpoena is to engage the non-party in good faith discussions about the scope of the subpoena, sources of potentially responsive ESI, and the costs of preserving and producing relevant ESI. *See* Principle 3.

Preservation of social media and other newer ESI sources: Preservation of social media and other newer ESI sources may present technical challenges and raise evidentiary issues. For example, social media data is often hosted remotely with third parties, is

69. *See* 2006 Advisory Comm. Note to Rule 26.

70. *See* Rule 1 and 2015 Advisory Comm. Note.

71. *See, e.g.*, The Sedona Conference, *Commentary on Non-Party Production & Rule 45 Subpoenas*, 9 SEDONA CONF. J. 197, 199 (2008) (referencing *In re* Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060 (N.D. Cal. 2006)).

72. Rule 45(d)(1).

dynamic and collaborative by nature, may include several different data types, and is often accessed through unique interfaces. Due to these characteristics and because some social media may be subject to the restrictions of the Stored Communications Act,[73] traditional preservation and collection protocols may be a poor fit. Moreover, social media sites and other mobile applications can shut down, terminate an account, and delete content. Similarly, mobile devices can present special preservation challenges. For these reasons, to the extent that these ESI sources are relevant to the claims and defenses in an action, parties should address and seek to reach agreement early in the case about preservation and collection of social media and other newer ESI sources.[74]

For a discussion of the duty to preserve ESI on sources identified as not reasonably accessible because of undue burden or cost, see The Sedona Conference Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible.[75]

Comment 5.b. Organizations must prepare for electronic discovery if they are to reduce cost and risk.

While the main purpose of computer systems is to assist the organization in its business activities, the need to respond to discovery in litigation is a fact of life for many organizations.

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73. *See* 18 U.S.C. §§ 2701–2712 (1986). For example, an individual may participate in a group social media account, but not "own it," and therefore may not be in a position to tell the cloud service provider to save it, even though it may be relevant to claims and defenses.

74. *See* The Sedona Conference, *Primer on Social Media*, 14 SEDONA CONF. J. 191, 226 (2013).

75. 10 SEDONA CONF. J. 281 (2009).

Preparing in advance for electronic discovery demands can greatly ease the burdens and risk of inaccuracy inherent in efforts to prepare for initial disclosures and meet and confer sessions once litigation begins. Depending on the size, sophistication, and litigation profile, as discussed in Comment 1.b, an effective information governance (IG) program can substantially enhance an organization's ability to address electronic discovery issues.[76] For example, an organization with a modestly mature IG program will be better prepared to identify sources of potentially relevant information, because it likely will have developed indices of its core information generating systems and applications, including key metadata fields, system stewards, output options, and metrics for preserving and producing that can aid the meet and confer discussion. The organization may also know what information is subject to regulatory or contractual obligations and constraints, and how it is stored, as well as information that is subject to confidentiality or privacy demands and security requirements. The organization may also have an inventory of existing legal holds and know whether information relevant to the claims and defenses in a new matter is already being preserved for another. There is no obligation for an organization to adopt an IG program, however compelling the arguments in favor may be, and the absence of such a program should not be considered in determining whether an organization has met its preservation obligations.

In addition, the accessibility of information and the costs of responding to requests for discovery of information contained in computer systems can best be controlled if the organization takes steps to prepare and educate personnel of pertinent disci-

76. *See* The Sedona Conference, *Commentary on Information Governance*, 15 SEDONA CONF. J. 125, 140–42 (2014).

plines including legal and IT staff, records management personnel, managers, and users of information systems about the potential demands of litigation. This is not to suggest that every organization should invest in litigation support technologies, although some may choose to do so; however, organizations with an extensive litigation docket and sufficient financial means may wish to consider a mix of personnel, processes, and technology that may be appropriate to manage projected litigation and discovery needs.

Such steps include instituting defined policies and procedures for issuing and monitoring legal hold notices where appropriate, preserving and producing information relevant to the claims and defenses, and establishing processes to preserve, collect, review, and produce information that may be relevant or required for initial mandatory disclosures. To the extent such policies and procedures are adopted, organizations should provide training regarding them.

> *Illustration i*. Med Corporation manufactures pharmaceutical products. Med has established a three-week rotation for system backups. One of Med's products, LIT, is observed to cause serious adverse reactions in a number of patients, and the FDA orders it withdrawn from the market. Anticipating the potential for claims relating to LIT, Med's legal department collects all potentially relevant information from employees. The litigation response system helps Med identify and quickly move to preserve all potentially relevant data, including email, user files, corporate and clinical trial databases, shared network areas, public folders, and other repositories. Med also puts in place processes to capture newly created potentially relevant data. The process results in rel-

evant data being collected on a special litigation database server that is independent of normal system operations and backups.

Eight months later, a class action is filed against Med for LIT injuries. Plaintiff's counsel obtains an ex parte order requiring Med to save all of its backup tapes, to refrain from using any auto-deletion functions on email and other data pending discovery, and to refrain from reformatting hard drives of—or reassigning hard drives from—employees involved in any way with LIT. Med's Information Systems department estimates that complying with the order will cost at least $150,000 per month, including the cost of new tapes, reconfiguration of backup procedures and tape storage, purchase and installation of additional hard drive space for accumulating email and file data, and special processing of hard drives when computers are upgraded or employees leave the company or are transferred.

Med promptly moves for relief from the order, demonstrating through its documented data collection process that the relevant data has been preserved, and that the requested modifications of its systems are unnecessary due to the preservation efforts already in place. The court withdraws its order and Med is able to defend the litigation without impact on normal operations of its computer systems or excessive electronic discovery costs.

Comment 5.c. ***In assessing the scope of a preservation duty, as soon as practicable, parties should consider persons likely to have relevant***

ESI, as well as non-custodial sources of relevant ESI.

Parties should define the scope of their preservation obligations as soon as practicable after the duty to preserve arises. The duties of preservation apply equally to plaintiffs as to defendants in litigation.[77]

For organizations, identifying and preserving relevant ESI will normally require input from legal staff who understand the claims and defenses in the case, from employees involved in the transaction or event that caused the lawsuit, and from information technology or records management personnel with a good understanding of where and how the organization stores relevant ESI. Failure to initiate reasonable preservation protocols as soon as practicable may increase the risk of arguments that relevant information was not preserved.

The duty to comply with a preservation obligation is an affirmative duty. The scope of what is necessary will vary widely between and even within organizations depending upon the nature of the claims and defenses, and the information at issue. The law requires reasonable and good faith steps to preserve once the duty is triggered, not perfection.[78]

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77. *See, e.g.*, Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311 (Fed. Cir. 2011); Hynix Semiconductor Inc. v. Rambus Inc., 645 F.3d 1336 (Fed. Cir. 2011).

78. *See* Federal Housing Finance Agency v. HSBC North America Holdings Inc., No. 11 Civ., 2014 WL 584300, at *2 (S.D.N.Y. Feb. 14, 2014) ("Parties in litigation are required to be diligent and to act in good faith in producing documents in discovery. The production of documents in litigation such as this is a herculean undertaking, requiring an army of personnel and the production of an extraordinary volume of documents. Clients pay counsel vast sums of money in the course of this undertaking, both to produce documents and to review documents received from others. Despite the commitment of these resources, no one could or should expect perfection from this process. All that can be legitimately expected is a good faith, diligent commitment to

Based on the information available to the organization about the credible threat of litigation or investigation, the organization should assess the persons likely to have relevant information, and the sources of non-custodial relevant information (such as structured systems and databases, and other non-custodial sources such as collaboration tools, social media, and those referenced in Comment 5.i.). In making the preservation decisions, organizations should carefully consider likely future discovery demands for relevant ESI to avoid needless repetitive steps to capture data again in the future.[79]

Organizations should consider documenting the key decisions made in the preservation process, and the reasons for any exceptions to an organization's standard protocols for preservation.

Necessarily, initial decisions may have to be made on the basis of imperfect knowledge about the claims and defenses. For that reason, so long as the preservation decisions are made on the basis of reasonable belief and good faith, a party should not be faulted with the benefit of hindsight if claims are modified or expanded, requiring an adjustment of the preservation obligations.

Comment 5.d. ***Parties should, in most circumstances, send notices to preserve relevant information to persons having relevant ESI or***

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produce all responsive documents uncovered when following the protocols to which the parties have agreed, or which a court has ordered."); Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010) ("Courts cannot and do not expect that any party can meet a standard of perfection" regarding electronic discovery.).

79. *See* The Sedona Conference, *Commentary on Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265, 280–82 (2010); The Sedona Conference, *Database Principles Addressing the Preservation and Production of Databases and Database Information in Civil Litigation*, 15 SEDONA CONF. J. 171 (2014).

responsible for maintaining systems containing relevant ESI.

Once a preservation obligation is triggered, as discussed in Comment 5.a., a party should take reasonable steps to communicate to appropriate persons the need to preserve information that is relevant to the claims and defenses and proportional to the needs of the case.[80]

Usually this communication will take the form of a "legal hold notice." The legal hold notice should be sent to persons responsible for preserving information relevant to claims or defenses in that litigation or investigation. This usually includes persons with knowledge of the underlying facts of the matter, since they are likely to generate, receive, and maintain relevant information. The list also may include the persons responsible for maintaining and operating relevant computer systems, files, or databases, including application teams or administrators, as well as those who can assist with certain steps such as suspending auto-deletion policies for certain custodians, backup, or archiving systems that may fall within the scope of the preservation obligation.

The legal hold notice does not need to reach all employees; however, it should be reasonable and reach those individuals likely to maintain information relevant to the claims or defenses in the litigation or to the investigation and which will be needed in discovery.[81]

In some circumstances sending a legal hold notice will not be necessary, e.g., where all potentially relevant information is already secured. In other, rare circumstances, sending a legal hold notice may be inadvisable, e.g., where a notice might tip a

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80. *See* Rule 26(b)(1); The Sedona Conference, *Commentary on Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265, 271–74 (2010).

81. *See id.* at 279–80.

potential target and cause him to delete the only instances of relevant information.[82]

While the form and content of the notice may vary widely depending upon the circumstances, the notice need not provide a detailed list of all information to retain. Instead, it should describe the types of information that must be preserved, with enough detail to allow the recipient to implement the hold. The notice should state that ESI, as well as paper, is subject to preservation.[83]

In circumstances where issuing a legal hold notice is appropriate, such a notice is most effective when the organization focuses on identifying and notifying key custodians and data stewards most likely to have relevant ESI[84] that the ESI must be preserved, and when the notice:

a) communicates in a manner that assists persons in taking actions that are, in good faith, intended to be effective;
b) is in an appropriate form, which may be written, and may be sent by email;
c) provides information on how preservation is to be undertaken, and/or identifies individual(s) who can answer questions about preservation;
d) includes a mechanism for the recipient to acknowledge that the notice had been received, read, and understood;
e) addresses features of relevant information systems that may make preservation of potentially discoverable information more complex (e.g., auto delete functionality that should be suspended, or small sections of elaborate accounting or operational databases);

82. *See id.* at 283–84.

83. *See id.* at 282–83 (Guideline 8).

84. *See id.* at 270, 277.

f) is periodically reviewed and amended when necessary; and

g) is followed up by periodic reminder notices, so the legal hold stays fresh in the minds of the recipients.

The notice need not demand preservation of all ESI, only the ESI that falls within the preservation obligation. When a notice to preserve is overbroad, it may cause added information management costs and lead to confusion later on, but an overbroad notice should not be treated by courts or opposing counsel as expanding the scope of the preservation obligation; it is the claims and defenses that define the scope of the preservation obligation, not the notice that may be issued.

> *Illustration i*. In response to a product liability claim, alleging that injuries resulted due to a design defect in a safety mechanism part of the new product, a company issues a hold instructing those responsible for the design and production of the new product to preserve all information about it. Even if the hold is broader than necessary to the claims concerning the safety mechanism, it would be inappropriate to fault the organization later for failing to preserve all information about all aspects of the new product, its design, and production.[85]

Additionally, the preservation obligation, except in extreme circumstances, should not require the complete suspension of normal document management policies, including the routine destruction and deletion of records. Rather, normal document management policies may continue with respect to non-relevant information.

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85. *See* Blue Sky Travel & Tours v. Al Tayyar, 606 Fed. App'x. 689 (4th Cir. 2015).

Communications should be accomplished in a manner reasonably designed to provide prominent notice to the recipients. Depending on the scope and duration of the litigation, it may be advisable to send reminders on some regular basis (e.g., quarterly), and it may be necessary to amend the hold if the claims and defenses change. Defensibility also can be increased if the legal team meets with the recipients of the legal hold to confirm that the proper individuals are subject to the hold, and to make sure that those individuals understand and can comply with the preservation obligations. When preservation obligations apply to documents and ESI spanning a significant or continuing time period, organizations should analyze whether special steps are needed to preserve unique, relevant ESI stored on outdated or retired systems.

> *Illustration ii*. Pursuant to its procedures for litigation response, upon receipt of notice of the claim, the organization identifies the departments and employees involved in the dispute. Those individuals who are reasonably likely to control or manage relevant ESI are notified via email of the dispute and are asked to take steps to preserve that ESI, as described in the notice. The notice identifies a contact person in legal who can address questions regarding preservation duties. The notice is also distributed to information technology and records management liaisons, who work with legal counsel to identify other relevant ESI, if any. The organization has taken reasonable steps to implement the legal hold.

Parties should also consider whether some preservation notice should be sent to third parties, such as contractors or vendors, including those that provide information technology services. This concern arises out of Rule 34, which frames a party's obligation in terms of its possession, custody, or control of doc-

uments. For example, many lawsuits involve work done by contractors that are hired by the organization, and that maintain relevant ESI outside the organization's IT systems. Depending on the jurisdiction, the organization's preservation obligations may extend to that ESI that is outside the organization's possession. In recent years, the trend to store electronic information with offsite cloud service providers has resulted in court decisions holding that a party contracting with a cloud service provider still has control over its data stored in the cloud. In most of these arrangements, the organization can preserve relevant ESI just as if the ESI was still on its own servers. But if the arrangement requires some assistance from the cloud service provider to preserve ESI, the organization should establish in the original contracting documents or service level agreement clear lines of communication and procedures for instituting a timely legal hold over information relevant to claims and defenses.[86] The fact that some cloud service providers have their own tools for preserving ESI does not mean that organizations should abandon their own tried and tested preservation methods in favor of the method marketed by the cloud service provider.

Comment 5.e. Preservation efforts need not be heroic or unduly burdensome.

The preservation obligation for ESI does not impose heroic or unduly burdensome requirements on parties. Rather, the obligation to preserve normally requires reasonable and good faith efforts. As discussed in Comment 3.a., the identification of data sources that may be subject to preservation and production should be discussed among the parties early in the case. If the parties are unable to agree on the scope of preservation, they

86. *See generally* The Sedona Conference, *Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* 17 SEDONA CONF. J. 467 (2016).

should raise the issue with the court at the Rule 16(b) conference. *See also* Comment 4.b.

An obligation to undertake extraordinary efforts should be imposed only when a court, after consideration of proportionality principles, determines that there is a substantial likelihood that the ESI exists; that it is directly relevant to a claim or defense and would not remain in existence absent intervention; that the ESI (or its substantial equivalent) cannot be found in another, more accessible data source; and that its preservation is likely to materially advance the resolution of the litigation in a just, efficient, and relatively inexpensive manner.[87]

> *Illustration i*. A requesting party seeks an order, over objection, that backup tapes created during a relevant period should be preserved and restored, and information from them produced. It develops sufficient proof to raise the likelihood that substantial amounts of deleted information directly relevant to the claims in the action existed in the time frame covered by the backup tapes. Before ruling on the merits of the request, the court should consider having the producing party restore and search a sample of the tapes to determine the likelihood that relevant and discoverable ESI, not otherwise available, can be recovered and that doing so is proportional to the needs of the case. If recovery of information from the backup tapes is ordered, the court should consider whether further use of sampling techniques would minimize the burdens on the producing party, and whether any of the costs of the recovery should be allocated among the parties.

87. *See* Rule 1; Comment 5.f.

Comment 5.f. ***Ex parte preservation orders are disfavored absent showing of necessity and, when issued, should be tailored to require only preservation of ESI relevant to the claims and defenses.***

In general, courts should not issue a preservation order over objection unless the party requesting such an order demonstrates its necessity, which may require an evidentiary hearing in some circumstances. Because all litigants are obligated to preserve relevant information in their possession, custody, or control, a party seeking a preservation order must first demonstrate a real danger of evidence destruction, the lack of any other available remedy, and that a preservation order is an appropriate exercise of the court's discretion and is tailored to require only preservation of information relevant to the claims and defenses. Such orders violate the principle that responding parties are responsible for preserving and producing their own ESI. *See* Principle 6. More generally, preservation orders should rarely be issued over objection, and only after a full and fair opportunity to present evidence and argument. This is particularly important when dealing with ESI that may be transitory, not reasonably accessible, or not susceptible to reasonable preservation measures. The 2006 Advisory Committee Note to Rule 26(f) instructs that "the requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances."

Usually, neither the party seeking a preservation order nor the court will have a thorough understanding of the other party's computer systems, the ESI that is available, or the mechanisms in place to preserve that ESI. For example, in the early years of electronic discovery, courts sometimes believed that

backup tapes were inexpensive and that preservation of tapes was not burdensome. However, restoration from backup tapes could be expensive; in recent years, backup systems and technologies vary greatly, and have evolved significantly. In addition, unnecessary retention of backup tapes can undermine an organization's IG programs by creating a cache of unknown data that complicates the organization's discovery obligations in later cases. Without information about the specifics of the backup system in use, it is difficult to determine what steps are reasonable and proportional to meet the needs of the case.

That said, jointly stipulated preservation orders may aid the discovery process and reduce costs by defining the specific contours of the parties' preservation obligations—i.e., both information sources that are to be preserved, and information sources that need not be preserved. Before any preservation order is issued, the parties should meet and confer to discuss the scope and parameters of the preservation obligation. Whether agreed to or ordered over objection, preservation orders should be narrowly tailored to require preservation of ESI that is nonduplicative, proportional, and relevant to the claims or defenses in the case, without unduly interfering with the normal functioning of the affected party's operations and activities, including the operation of electronic information systems.

Comment 5.g. All ESI does not need to be "frozen."

A party's preservation obligation does not require "freezing" of all ESI, including all email. Parties need not preserve "every shred of paper, every e-mail or electronic document, and every backup tape,"[88] nor do they have to go to extraordinary measures to preserve "all" potentially relevant ESI. *See* Comment 5.e.

88. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

Civil litigation should not be approached as if information systems were crime scenes that justify forensic investigation at every opportunity to identify and preserve every detail. Theoretically, a party could preserve the contents of wastebaskets and trash bins for evidence of statements or conduct. Yet, the burdens and costs of those acts are apparent and no one would argue that this is required. There should be a similar application of reasonableness to preservation of ESI.

Even though it may technically be possible to capture vast amounts of ESI during preservation efforts, usually this can be done only at great cost. ESI is maintained in a wide variety of formats, locations, and structures. Many copies of the same ESI may exist in active storage, backup, or archives. Computer systems manage data dynamically, meaning that the ESI is constantly being cached, rewritten, moved, and copied. For example, a word processing program usually will save a backup copy of an open document into a temporary file every few minutes, overwriting the previous backup copy. In this context, imposing an absolute requirement to preserve all ESI would require shutting down computer systems and making copies of data on each fixed disk drive, as well as other media that normally are used by the system. Costs of litigation would routinely approach or exceed the amount in controversy. In the ordinary course, therefore, the preservation obligation should be limited to those steps reasonably necessary to secure ESI for the fair and just resolution of the matter in dispute.

Comment 5.h. ***Absent good cause, preservation obligations should not extend to disaster recovery storage systems.***

Several early cases addressing electronic discovery issues involved whether or not parties were obligated to produce ESI on backup tapes, and if so, which side should bear the cost. In re-

cent years, business continuation and disaster recovery technologies have advanced. Today, some organizations address these important needs with dual, mirrored live systems on which ESI may be readily available. The Comments that follow address those situations where backup tapes still are used, but many of the concepts apply to other disaster recovery technologies as well.

Absent good cause, preservation obligations should not extend to disaster recovery backup tapes created in the ordinary course of business. In many organizations backup tapes exist so that ESI that is lost due to system failures or through disasters such as fires or tornadoes can be restored. Thus, by definition, their contents are duplicative of the contents of active computer systems at a specific point in time, and employing proper preservation procedures with respect to the active system should render preservation of backup tapes on a going-forward basis redundant and unnecessary. Moreover, when utilized pursuant to a backup policy, backup tapes generally are not retained for substantial periods of time, but periodically rotated and overwritten every 15 or 30 days. For that reason, requiring that information on backup tapes be preserved would require the time-consuming and costly process of altering backup systems, exchanging backup tapes, purchasing new tapes or hardware, and storing the tapes removed from the normal rotation.

In some organizations, however, the concepts of backup and archive are not clearly separated; in such an organization, backup tapes may be retained for a relatively long-time period, and files on them may be accessed routinely for retrieval. Backup tapes also may be retained for long periods out of concern for compliance with record retention laws. While such

practices are not considered a best practice,[89] under these circumstances, the stored backup tapes may be deemed "reasonably accessible," or may contain the only remaining copy of relevant ESI. In such circumstances, whether the ESI on the backups is subject to discovery should be determined by the usual proportionality principles. Parties that use backup tapes for archival or preservation purposes should be aware that these practices may lead to substantially higher costs for evidence preservation and production in connection with litigation. Parties seeking to preserve ESI for organizational purposes or litigation should consider employing means other than traditional disaster recovery backup tapes.

> *Illustration i*. Pursuant to an information technology management plan, once each day a party routinely copies all ESI on its systems and retains, for a short period of time, the resulting backup tape for the purpose of reconstruction in the event of an accidental erasure, disaster, or system malfunction. A requesting party seeks an order requiring the responding party to preserve, and to cease reuse of, all existing backup tapes pending discovery in the case. Complying would impose significant expenses and burdens on the responding party, which are documented in factual submissions. No credible evidence is shown establishing the likelihood that, absent the requested order, the responding party will not produce all relevant ESI during discovery. The responding party should be permitted to continue the routine recycling of backup tapes in light of the expense, burden,

89. *See The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age*, THE SEDONA CONFERENCE, 20–22 (2d ed. 2007), https://thesedonaconference.org/publication/Managing%20Information%20%2526%20Records.

> and potential complexity of restoration and search of the backup tapes.

Finally, if it is unclear whether there is a reasonable likelihood that non-duplicative, relevant ESI is contained on backup tapes, as part of the proportionality analysis, the parties and/or the court may consider the use of sampling to better understand the nature and relevance of the ESI at issue. Depending on the circumstances of the case, sampling may establish that there is very little, if any, unique, relevant information on the tapes, and that there is no need for the tapes to be preserved or restored. Similarly, sampling may establish that it is reasonable to preserve and restore only certain intervals of available tapes to satisfy the party's good faith compliance with its preservation and production obligations.

> *Illustration ii*. A requesting party seeks an order, over objection, that backup tapes created during a relevant period should be preserved and restored. It develops sufficient proof to raise the likelihood that substantial amounts of deleted but relevant ESI existed in the time frame covered by the backup tapes. Before ruling on the merits of the request, the court should consider having the responding party restore and search a sample of the tapes to determine the likelihood that relevant and discoverable ESI, not otherwise available, can be recovered and that it is worthwhile to do so. If recovery of ESI from the backup tapes is ordered, the court should consider whether further use of sampling techniques would minimize the burdens on the responding party, and whether any of the costs of the recovery should be allocated among the parties.

According to the Report of the Civil Rules Advisory Committee presenting the 2006 amendments to the Federal Rules,

disaster recovery tapes, which are "intended for disaster recovery purposes that are often not indexed, organized, or susceptible to electronic searching," are identified as sources that may not reasonably be accessible and therefore are not subject to initial production absent a court order.[90] However, a party will need to disclose backup tapes that it determines are not reasonably accessible if it has a reasonable, good faith belief that relevant, non-duplicative data reside on those tapes; and, therefore, absent proportionality considerations, the Rule assumes the preservation of such backup tapes.

Comment 5.i. ***Preservation efforts should include consideration of ESI that is not specific to individual custodians, including shared or orphaned data.***

An organization's networks or intranet may contain shared areas (such as public folders, discussion databases, and shared network folders) that are not regarded as belonging to any specific employee. Similarly, there may be no one "owner" of the ESI for collaborative workspace areas within the organization. Such areas should be considered in the preservation analysis to determine if they contain relevant ESI proportional to the needs of the case and, if so, reasonable steps should be taken to preserve the relevant ESI. *See* Comment 5.d.[91]

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90. *See* SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, app. C-42 (Sept. 2005), *available at* http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2005.

91. *See generally* The Sedona Conference, *Commentary on Inactive Information Sources*, THE SEDONA CONFERENCE (July 2009 Public Comment Version), https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Commentary%20on%20Inactive%20Information%20Sources.

If an organization maintains archival data on tapes or other offline media not accessible to end users of computer systems, steps should be taken promptly to determine whether those archival media are reasonably likely to contain relevant ESI not also present as active data on the organization's systems. These steps may include notifying persons responsible for managing archival systems to retain tapes or other media as appropriate.

6. Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.

Introduction

Principle 6 recognizes that a responding party is best situated to preserve, search, and produce its own ESI. Principle 6 is grounded in reason, common sense, procedural rules, and common law, and is premised on each party fulfilling its discovery obligations without direction from the court or opposing counsel, and eschewing "discovery on discovery," unless a specific deficiency is shown in a party's production.

Comment 6.a. ***A responding party should determine how to meet its own preservation and production obligations.***

There are least four bases for this Principle.

First, the case law and the procedural court rules provide that discovery should take place without court intervention, with each party fulfilling its discovery obligations without direction from the court or opposing counsel.[92] These obligations

92. *See* Rule 26(a) (mandatory initial disclosures), Rule 34(b)(2) (parties directed to respond to requests for documents or ESI), Rule 33(b)(1)(A) (parties directed to respond to interrogatories), and Rule 36(a)(3) (parties directed to respond to requests for admissions); Dynamo Holdings Ltd. P'ship v. Comm'r, No. 2685-11, 2014 WL 4636526, at *3 (U.S. Tax Ct. Sept. 17, 2014) ("And although it is a proper role of the Court to supervise the discovery process and intervene when it is abused by the parties, the Court is not normally in the business of dictating to parties the process that they should use when responding to discovery."); Diepenhorst v. City of Battle Creek, No. 1:05-CV-734, 2006 WL 1851243, at *3 (W.D. Mich. June 30, 2006) (The "discovery process is designed to be extrajudicial, and relies upon the responding party to search his records to produce the requested data."); *see also* Hon. James C. Francis IV, *Judicial Modesty: The Case for Jurist Restraint in the New*

include the duty of the party who has possession, custody, or control[93] of ESI that is relevant to the claims and defenses in the case to take reasonable steps to preserve ESI that is within the scope of discovery. *See* Principle 5. Those discovery obligations also include the duty to use reasonable efforts to locate and produce ESI responsive to the opposing party's requests and within the scope of discovery. To enforce these responsibilities, the attorney's signature on a discovery response "certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information . . . responsive to the discovery demand" and has made "reasonable inquiry into the factual basis of his response."[94]

To meet its preservation and production obligations, the responding party must make a myriad of determinations necessary to identify, preserve, collect, process, analyze, review, and produce relevant and discoverable ESI for each case. The lack of uniformity and varying degrees of complexity in organizations and their information systems often require a very specific, in-depth understanding of how that party handles its own information. Additionally, determining what is relevant and proportional under the circumstances for each matter often requires a highly fact-specific inquiry.[95] Thus, the responding party—not the court or requesting party—is both tasked with making those

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Electronic Age, LAW TECH. NEWS (Feb. 2013) (No Federal Rule "has given judges the authority . . . to dictate to the parties how or where to search for documents.").

93. *See* The Sedona Conference, *Commentary on Rule 34 and 45 "Possession, Custody, Or Control,"* 17 SEDONA CONF. J. 467 (2016).

94. 1983 Advisory Comm. Note to Rule 26(g); *see id*. ("If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse.").

95. *See, e.g.*, Chin v. Port Auth., 685 F.3d 135, 162 (2d Cir. 2012).

determinations and generally in a better position to make those decisions.

Because of the dynamic nature of litigation, the analysis cannot be reduced to a generalized checklist of reasonable steps for every party to take in every action.[96] Instead, the responding party must make decisions on what is required to meet its preservation and production obligations based on direct input from those inside the organization who create, receive, and store their own information (i.e., individual custodians), and those who implement and maintain the organization's information systems (e.g., applications administrators). Rarely will a court or opposing party have direct access to the specific knowledge required to make those decisions. Moreover, some of these decisions, especially those relating to preservation, often must be made before a responding party can confer with the opposing party or seek court guidance. Thus, a responding party, not the court or requesting party, is generally best situated to determine and implement appropriate procedures, methodologies, and technologies.

Second, courts have affirmed that a responding party is best situated to determine which procedures, methodologies, and technologies are appropriate for preserving and producing its own ESI, often specifically citing this Principle with approval. This has become even more clear in the years since the original publication of *The Sedona Principles*.[97]

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96. *Id*.

97. *See, e.g.*, Hyles v. New York City, 10 Civ. 3119, 2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016); Rio Tinto PLC v. Vale S.A., 2015 WL 872294 (S.D.N.Y. Mar. 2, 2015); Dynamo Holdings Ltd. P'Ship v. Comm'r, No. 2685-11, 2014 WL 4636526 (Tax Ct. Sept. 17, 2014) ("[T]he Court is not normally in the business of dictating to parties the process that they should use when responding to discovery."); Kleen Prods, LLC v. Packaging Corp. of Am., No. 10 C 5711, 2012 WL 4498465, at *5 (N.D. Ill. Sept. 28, 2012) (observing that under Sedona

Third, deference regarding the selection and implementation of the discovery process should be given to the party that will incur the costs. In the vast majority of cases, each party bears the costs associated with preservation and production of its own ESI, and the risks (including potential curative measures or sanctions) for failing to comply with those obligations. *See* Principle 13 regarding costs, and Principle 14 regarding remedial measures and sanctions. As one court stated: "I am a believer of principle 6 of Sedona, and I'm not just because it's Sedona, but I think the people who are producing the records, producing the documents, are in a better position to know, since they have to do the work, spend the money, spend the time, they know their people, they know their material . . . ."[98] There are many options available to a responding party in evaluating and selecting how best to meet its preservation and discovery obligations, and it should be permitted to elect how best to allocate

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Principle 6 "[r]esponding parties are best situated to evaluate the procedures, methodologies, and techniques appropriate for preserving and producing their own electronically stored information"); Ford Motor Co. v. Edgewood Props., Inc., 257 F.R.D. 418, 427 (D.N.J. 2009) ("The Sedona Principles wisely state that it is, in fact, the producing party who is [in] the best position to determine the method by which they will collect documents. . . . [A]bsent an agreement or timely objection, the choice is clearly within the producing party's sound discretion.") (citing The Sedona Conference, *Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 204 (2007)); Little Hocking Water Assn., Inc. v. E.I. DuPont de Nemours & Co., No. 2:09-cv-1081, 2013 WL 608154, at *9 (S.D. Ohio Feb. 19, 2013) (responding party "is in the best position to identify . . . potentially responsive information"); Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 628 (D. Colo. 2007) ("[I]in the typical case, '[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronic data and documents.'").

98. Kleen Prods. LLC et al v. International Paper et al, Civ. No. 1:10-cv-05711, Doc. 319, Ex. A, at 6667–68 (N.D. Ill. May 17, 2012) (Tr. of Proceedings before the Hon. Nan Nolan).

its resources and incur the costs required to comply with its obligations.

Fourth, the explosive proliferation of ESI, and regulations for some specific types of ESI, have led many organizations to develop information governance (IG) programs that often include customized, proprietary structured-data, document management, and archiving systems.[99] Those systems and applications are often expansive, include extremely complex and dynamic structured-data systems, and are focused on the mission of running the day-to-day business. [100] Additionally, larger organizations and frequent litigants, regardless of size, are developing or expanding their IG programs to include litigation readiness planning to minimize the impact on the business while still permitting the organization to meet its preservation and discovery obligations. Because litigation readiness often focuses on an entire portfolio of litigation, demands to use specific procedures, methodologies, or technologies for preserving and producing ESI in individual cases may impose an unreasonable burden on the organization's IG program that outweighs any resulting benefit for those cases. In short, those organizations have better knowledge of, access to, and control of the information at issue in a particular litigation, as well as the potential impact to their information systems and governance.

99. *See* Comment 1.b.; *see also* The Sedona Conference, *Commentary on Information Governance,* 15 SEDONA CONF. J. 125 (2014).

100. *See* The Sedona Conference, *Database Principles Addressing the Preservation and Production of Databases and Database Information in Civil Litigation*, 15 SEDONA CONF. J. 171 (2014).

Comment 6.b. Responding parties should be permitted to fulfill their preservation and discovery obligations without preemptive restraint.

There are many ways to manage ESI, and many ways in which the responding party may comply with its discovery obligations. Because the responding party generally is best situated to evaluate, select, and implement the procedures, methodologies, and technologies appropriate to meet its preservation and discovery obligations, there should be no preemptive restraint[101] placed on a responding party that chooses to proceed on its own with determining how best to fulfill its preservation and discovery obligations. Thus, as a general matter, neither a requesting party nor the court should prescribe or detail the steps that a responding party must take to meet its discovery obligations, and there should be no discovery on discovery, absent an agreement between the parties, or specific, tangible, evidence-based indicia (versus general allegations of deficiencies or mere "speculation") of a material failure by the responding party to meet its obligations.[102] A requesting party has the burden of proving a specific discovery deficiency in the responding

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101. This is analogous to the First Amendment precept of no "prior restraint," i.e., just as speech cannot normally be restrained in advance, a requesting party should not normally be able to restrain the responding party's discovery process to prevent an anticipated, but uncertain, future harm.

102. *See, e.g.*, *In re* Ford Motor Co., 345 F.3d 1315, 1317 (11th Cir. 2003) (vacating order for discovery of certain databases where no finding of "some non-compliance with discovery rules by Ford"); Koninklijke Philips N.V. v. Hunt Control Sys., Inc., No. 11-cv-03684, 2014 WL 1494517, at *4 (D.N.J. Apr. 16, 2014) (moving party failed to show a "material deficiency" in the responding party's electronic discovery process); Freedman v. Weatherford Int'l, No. 12 Civ. 2121, 2014 WL 4547039 (S.D.N.Y. Sept. 12, 2014) (request for "discovery on discovery" denied for failure in absence of factual basis to find original production deficient); Larsen v. Coldwell Banker Real Estate Corp., No. SACV 10-00401, 2012 WL 359466, at *7 (C.D. Cal. Feb. 2, 2012) (denying

party's production. *See* Principle 7 ("The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronically stored information were inadequate."). *See also* discussion *infra* regarding potential benefits of cooperation.

Just as a requesting party does not have a right to dictate the processes, methodologies, or technologies to be used by a responding party in fulfilling its preservation or discovery obligations under the Federal Rules or these Principles, the corollary is that a responding party has no right to demand a requesting party actively assist the responding party with evaluating and selecting the procedures, methodologies, and technologies for meeting the responding party's preservation and production obligations. For example, a responding party cannot unilaterally demand the requesting party submit proposed search terms and a list of custodians against which to run the search terms, or use the requesting party's reluctance to provide search terms as a shield to defend its own inadequate search terms. Conversely, a requesting party that refuses to participate in good faith discus-

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discovery on discovery where plaintiff's "isolated examples cited" of alleged deficiencies "fail[ed] to demonstrate that Defendants have not reasonably and in good faith produced the documents required"); Orillaneda v. French Culinary Inst., No. 07 Civ. 3206, 2011 WL 4375365, at *7–8 (S.D.N.Y. Sept. 19, 2011) (plaintiff not entitled to conduct discovery about defendant's document production without "specific statements" to prove deficiency instead of relying on "generalities"); Steuben Foods, Inc. v. Country Gourmet Foods, LLC, No. 08-CV-561S, 2011 WL 1549450 (W.D.N.Y. 2011); Hubbard v. Potter, 247 F.R.D. 27, 31 (D.D.C. 2008) (denying discovery on discovery because of only a "theoretical possibility" that additional electronic documents may exist); Memory Corp. v. Kent. Oil Tech., No. C04-03843, 2007 WL 832937 (N.D. Cal. Mar. 19, 2007); *In re* Honeywell Int'l. Inc. Sec. Litig., 230 F.R.D. 293 (S.D.N.Y. 2003).

sions with a responding party may weaken its ability to challenge the processes, methodologies, or technologies selected by the responding party.

Rule 1 requires parties to employ the Rules "to secure the just, speedy, and inexpensive determination of every action and proceeding." Additionally, requesting and responding parties share the mutual obligation to meet and confer in good faith to discuss the preservation and production of ESI, as required by Rule 26 and its state equivalents.[103]

In addition to what is required by those Rules, it is generally in the best interests of the responding party to engage in meaningful cooperation with opposing parties to attempt to reduce the costs and risk associated with the preservation and production of ESI. If both requesting and responding parties voluntarily elect to cooperatively evaluate and agree upon the appropriate procedures, methodologies, and technologies to be employed in the case, both may potentially achieve significant monetary savings and non-monetary efficiencies.[104] *See also* Principle 3.

In addition, there may be circumstances where a requesting party may legitimately claim to have relevant, equal, or superior knowledge of certain aspects of the responding party's business operations, information systems, or potential procedures for

103. Rule 26(f)(3)(C) requires the parties to confer on and prepare a discovery plan that addresses "any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced." *See also* Principle 12. While the 2015 Advisory Committee Note to Rule 1 encourages "cooperative and proportional use of procedure," it also specifically states that "[t]his amendment does not create a new or independent source of sanctions."

104. *See* The Sedona Conference, *Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009 Supp.).

preserving and producing relevant ESI within the scope of discovery from the responding party's systems.[105] In those situations, if the requesting party is engaging in meaningful cooperation by providing specific information on such issues, the responding party should consider the information the requesting party provides in evaluating the preservation steps and production that is proportional and relevant.

If the parties reach agreement on preservation and production after thorough dialogue about the ESI likely to be proportional and relevant, the responding party has greatly reduced or even eliminated the risk of satellite motion practice or sanctions. But, short of actual agreement, the responding party bears the ultimate responsibility for the adequacy of meeting its preservation obligations. A responding party's obligations under Rule 26(f) to meet and confer in good faith does not trump its right to evaluate unilaterally and select the procedures, methodologies, and technologies appropriate for preserving and producing its own ESI. Those rights should be challenged only where a requesting party demonstrates to the court a specific deficiency in the responding party's discovery productions.

Comment 6.c. Documentation and validation of discovery processes.

Responding parties and their counsel should consider what documentation of their discovery process (i.e., preservation, collection, review, and production) is appropriate to the needs of the particular case. Such documentation may include a description of what is being preserved; the processes and validation

105. For example, a former employee may be highly knowledgeable about the organization's information systems or an employer may have a greater understanding of the technology behind an individual plaintiff's social media accounts.

procedures employed to preserve, collect, and prepare the materials for production; and the steps taken to ensure the integrity of the information throughout the process. Since *The Sedona Principles* was first published, applications have been developed to automate the legal hold issuance, tracking, and documentation processes, as well as some collections. Having documentation can help respond to legitimate challenges (*see* Comment 6.b.)—even those made years later—to the processes employed, avoid overlooking ESI that should be collected, and avoid collecting ESI that is neither relevant nor responsive to the matter at issue. Organizations should endeavor to revise their standardized documentation and validation procedures as appropriate, e.g., when the organization introduces new technologies to store or create ESI, including some technologies that create new types of ESI.

Parties may voluntarily agree to produce or exchange documentation of their discovery processes, but should do so only after due consideration of privilege and work product issues (*see* Principle 10). Absent such a voluntary agreement, however, parties should not be required to produce documentation of their discovery processes unless there has been a showing of a specific deficiency in their discovery processes (*see* Comment 6.b.), and, even then, the production requirement is subject to the normal protections afforded by the attorney-client privilege or the work product doctrine.

Comment 6.d. ***Rule 34 inspections of electronic information systems are disfavored.***

Courts have repeatedly found that Rule 34 does not create a routine right of direct access to an opposing party's electronic

information system.[106] Inspection of an opposing party's computer system under Rule 34 and state equivalents is the exception and not the rule for discovery of ESI. In the majority of cases, the issues in litigation relate to the informational content of the data stored on computer systems, not the actual operations of the systems; and, as noted above, the obligation to produce relevant content lies with the responding party. Unless the requesting party can prove that the actual operation of a particular system is at issue in the litigation, if the responding party provides the informational content of the data, there is no need or justification for direct inspection of the responding party's computer systems.

Direct access to an opposing party's computer systems under a Rule 34 inspection also presents possible concerns such as:

a) revealing trade secrets;
b) revealing other highly confidential or private information, such as personnel evaluations and payroll information, properly private to individual employees;
c) revealing confidential attorney-client or work-product communications;
d) unreasonably disrupting the ongoing business;
e) endangering the stability of operating systems, software applications, and electronic files if certain procedures or software are used inappropriately; and

106. *See, e.g.*, SEC v. Strauss, No. 09 Civ. 4150, 2009 WL 3459204, at *12 n.8 (S.D.N.Y. Oct. 28, 2009) ("There is a general reluctance to allow a party to access its adversary's *own* database directly. The Advisory Committee Notes to the 2006 amendments to Rule 34 explain that Rule 34(a) is not meant to 'create a routine right of direct access to a party's electronic information system' and advises that courts 'guard against undue intrusiveness resulting from inspecting or testing such systems.' Thus, courts have declined to find an automatic entitlement to access an adversary's database." (citing cases) (emphasis in original)).

f) placing a responding party's computing systems at risk of a data security breach.

Further, Rule 34 inspections of ESI are likely to be particularly ineffective. The typical production, in which the responding party identifies and produces responsive information, allows the party with the greatest knowledge of the computer systems to search and utilize the systems to produce responsive information. A Rule 34 inspection, in contrast, requires persons unfamiliar with the party's recordkeeping systems, hardware, and software to attempt to manipulate the systems. Not only is such a process disruptive, it is less likely to be fruitful. In most cases, responding parties will be able to argue persuasively that its production of relevant ESI from computer systems and databases was sufficient to discharge its discovery obligations.

To justify the onsite inspection of a responding party's computer systems, a requesting party must demonstrate that there is a substantial need to discover information about the computer system and programs used (as opposed to the data stored on that system) and that there is no reasonable alternative to an onsite inspection. Any inspection procedure should: (1) be documented in an agreed-upon (and/or court-ordered) protocol; (2) recognize the rights of non-parties, such as employees, patients, and other entities; and (3) be narrowly restricted to protect confidential and personally identifiable information and system integrity as well as to avoid giving the discovering party access to information unrelated to the litigation. Further, courts that have allowed access generally have required that the inspection be performed by a qualified consultant or vendor, and that no information obtained through the inspection be produced until the responding party has had a fair opportunity to review that information.

Comment 6.e. Use and role of discovery counsel, consultants, and vendors.

Responding parties may consider retaining specialized discovery counsel, consultants, and/or vendors to assist in preserving and producing ESI. Due to the complexity of electronic discovery, many organizations rely on discovery counsel, consultants, and vendors to provide a variety of services, including discovery planning, data collection, specialized data processing, and forensic analysis. The use of specialized discovery counsel has increased significantly in recent years, and such specialized counsel and non-attorney consultants can be of great assistance to parties and courts in providing technical expertise and experience with the preservation, collection, review, and production of ESI. Parties should carefully consider the experience and expertise of potential consultants or vendors before their selection, as standards for non-attorney experts and consultants in this field still have not been fully developed. Discovery counsel, consultants, and vendors offer a variety of software and services to assist with the electronic discovery process; and a party's evaluation of software and services should include the defensibility of the process in the litigation context, the cost, and the experience of the discovery counsel, consultant, or vendor, including its project management and process controls, as applicable. Ultimate responsibility for ensuring the preservation, collection, processing, review, and production of ESI rests with the responding party and its counsel, not with any non-party consultant or vendor.[107]

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107. *See* ABA MODEL RULES OF PROF'L CONDUCT R. 5.1 and R. 5.3; Cal. St. Bar Standing Comm. On Prof'l Resp. & Cond., Formal Op. No. 2015-193, at 5–6 (June 30, 2015), *available at* http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202015-193%20%5B11-0004%5D%20(06-30-15)%20-%20FINAL.pdf; Comment 10.k.

7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronically stored information were inadequate.

Comment 7.a. Process and burden of proof for resolving discovery disputes between parties.

A party that receives a request for production of ESI may object to some or all of the request, or may produce information that the requesting party deems inadequate or non-responsive. This may prompt the requesting party to consider filing a motion to compel production. In cases governed by the Federal Rules of Civil Procedure, such a motion would be filed under Rule 37(a), which requires the moving party to certify that good faith efforts have been made to resolve the dispute before resorting to the court.[108]

On a motion to compel, the moving party must demonstrate that the discovery response was inadequate and that additional steps are warranted. On such a motion, a court should consider: Sedona Principle 2 and the proportionality limits of Rule 26(b)(1); how the moving party can meet its burden without the need for extensive discovery about the responding party's efforts to respond to the discovery request; and that, consistent with Principle 6, the responding party is in the best position to determine the appropriate methods for preserving, retrieving, reviewing, and producing ESI.

Further, Rule 26(b)(2)(B) establishes a procedure to resolve disputes regarding discovery from sources the responding party has identified as "not reasonably accessible" because of "undue burden or cost." *See* Comment 2.c. So, too, Rule 26(c)

108. Rule 37(a)(1).

establishes a procedure for obtaining a protective order to relieve a responding party from "undue burden or expense," or, as amended in 2015, to allocate costs. Under either Rule, the burden is on the responding party to establish the grounds for limiting discovery.

Comment 7.b. Process for discovering ESI from non-parties.

ESI also may be secured from non-parties by service of a subpoena or other process authorized by the relevant court procedures. Requesting parties must be sensitive to the burdens that such discovery places on non-parties. A party issuing the subpoena may indicate the form or forms in which production is to be made, and the non-party subject to the subpoena generally has the same rights and obligations in regard to production as parties. One major exception is that there is no requirement to meet and discuss preservation or other key topics. Parties issuing and responding to subpoenas can avail themselves of such an opportunity informally, a best practice that should be followed in most cases. *See* Comment 3.a.

Rule 45(d)(1) provides that the issuing party must "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and requires the court to protect persons from undue burden and expense associated with subpoena compliance.[109] Excessively broad ESI production requests on non-parties can also lead to sanctions and liability under federal statutes protecting the privacy of electronic communications.[110]

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109. 1991 Advisory Comm. Note to Rule 45.

110. *See* Theofel v. Farey-Jones, 359 F.3d 1066 (9th Cir. 2003) (service of an overbroad, "patently unlawful" subpoena on a party's ISP, which led to the disclosure of private and privileged communications, violated the Stored

Equally important, Rule 45(d)(2)(B)(ii) provides that, if objection is made to a subpoena, an order to compel production "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Courts balance the cost, burden, and need for discovery from non-parties when considering whether to quash or modify the discovery sought, or to shift some or all of the costs associated with requests for production of ESI.[111] For cost-shifting standards on non-party subpoenas, *see* Comment 13.c.

Communications Act, 18 U.S.C. § 2701 *et seq.*, and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030).

111. *See* Braxton v. Farmer's Ins. Group, 209 F.R.D. 651, 653 (N.D. Ala. 2002) (court quashed non-party subpoena for documents and ESI from insurance agents where the requesting party could not show that production by the insurance company that employed the agents would be inadequate).

8. The primary sources of electronically stored information to be preserved and produced should be those readily accessible in the ordinary course. Only when electronically stored information is not available through such primary sources should parties move down a continuum of less accessible sources until the information requested to be preserved or produced is no longer proportional.

Comment 8.a. Scope of search for and preservation of readily accessible data.

The scope of the sources a responding party must search for relevant ESI to be preserved and ultimately produced need only be reasonable and proportional. Depending on the case and the parties involved, relevant ESI may be on a wide variety of sources, such as local and network computers, laptop and desktop computers, servers, mobile devices, portable storage devices, database systems, document management systems, business intelligence platforms, network attached storage, cloud-based storage and information sharing systems and services, archives, backup systems, voicemail systems, video monitoring systems, etc. In considering where to search for and preserve relevant ESI, *The Sedona Principles* first and second editions focused on the delineation of "active" data sources as opposed to disaster recovery backup tapes and other sources of ESI that were not reasonably accessible. However, the continually evolving landscape of information technology has made this distinction less important.

This revised Principle addresses a new framework, considering potential sources of discoverable information as existing along a continuum: starting with ESI that is readily accessible (that is, easily and quickly available and used in the ordinary course); then continuing through a variety of sources that are less accessible because of increasing burden or cost, or that are

largely duplicative of more accessible sources; and ending with sources that clearly are not readily accessible and for which the cost of preservation and production is not proportional to the matter at hand.[112]

The 2015 amendments to Rule 26 elevate proportionality analysis, requiring parties to apply proportionality when considering data sources other than primary sources. The primary sources of information for the responding party should be those that are routinely accessed in the ordinary course through ordinary means. Once those primary sources are exhausted, the responding party arrives at a "phase gate" or "decision gate," where it must consider whether additional, unique, and discoverable ESI exists within less readily accessible sources and, if so, whether the preservation and potential production of that information through extraordinary means is consistent with the proportionality requirement of Rule 26(b)(1).[113] The responding party then continues through a series of phase gates until such time as it concludes that it has reasonably met its obligations with respect to preservation or production, or that further efforts are not proportional to the matter.[114]

In considering the preservation and production of ESI (including all necessary steps in between) along the continuum, it is neither feasible nor reasonable to require litigants to canvas all potential sources of ESI in discharging their preservation obligations and responding to discovery requests. Many locations or sources will contain duplicative or redundant information,

112. The "readily accessible" continuum is intended to comprehend both the increased emphasis on proportionality under amended Rule 26(b)(1) and the deeper analyses of data sources that are claimed to be not reasonably accessible under Rule 26(b)(2)(B).

113. *See also* Principle 2; The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 141 (2017).

114. *See id.*; Rules 26(b)(2)(B) and 26(c).

and others may contain ephemeral data or massive and disproportionate volumes of information clearly not relevant to the claims and defenses in the case.

Parties and courts must exercise judgment, made upon reasonable inquiry and in good faith, about the potential sources of discoverable information subject to preservation and production obligations. The appropriate standard should be to search sources that are most likely to contain relevant ESI and take reasonable steps to preserve such information. If the responding party is aware (or reasonably should be aware) that specific discoverable ESI can be obtained only from a single source, that ESI, or the source on which it is located, should be preserved for possible review and production, absent agreement of the parties or court order. On the other hand, mere suspicion that a source may contain discoverable, but duplicative ESI is not sufficient to require preservation of that source "just in case."

Preservation or production from sources that are asserted to be not readily accessible should be required only on a showing of good cause (including a demonstration that the discovery is proportional), with the requesting party bearing the burden to show good cause on an appropriate motion. However, a party may not deliberately make information less accessible for the primary purpose of avoiding responding to proper discovery requests in general. Such actions, particularly when undertaken specifically for a known case, cannot be countenanced, and should be subject to appropriate deterrent and/or remedial measures by the court.[115]

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115. *See, e.g.*, Orbit One Commc'ns, Inc. v. Numerex Corp., 271 F.R.D. 429, 437 (S.D.N.Y. 2010); Scalera v. Electrograph Sys., Inc., 262 F.R.D. 162, 175 (E.D.N.Y. 2009); Treppel v. Biovail Corp., 233 F.R.D. 363, 372 n. 4 (S.D.N.Y. 2006) ("[P]ermitting the downgrading of data to a less accessible form—which systematically hinders future discovery by making the recovery of information more costly and burdensome—is a violation of the preservation

For a discussion on locating and recovering deleted, shadowed, fragmented, or residual ESI, see Principle 9.

> *Illustration i.* A party seeking relevant emails demands a search of backup tapes (used for disaster recovery purposes) for any relevant materials. No showing of special need or justification is made for the search, and the responding party took reasonable steps to preserve relevant emails in primary systems, including Exchange or Domino servers and active archives, by timely implementing a legal hold. The request should be denied.
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> *Illustration ii.* A party seeking relevant emails demands a search of backup tapes (used for disaster recovery purposes). A showing is made that the emails sought are highly relevant, were removed from primary sources after the duty to preserve attached, and are now only available on disaster recovery media. Absent exceptional circumstances, the request should be granted, at least for a sample of the backup tapes.
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> *Illustration iii.* After interviewing key custodians and searching its primary email systems, a responding party concludes that a large volume of discoverable emails is available in near-line email archives, as well as on individual custodian hard drives, and on older, legacy backup tapes. While the near-line email archive system is not technically "active data," relevant emails can be obtained through ordinary means with little additional

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obligation."); Quinby v. WestLB AG, 245 F.R.D. 94, 111 (S.D.N.Y. 2006) (holding the responding party should bear the greater costs of production caused by its downgrading of data); Kara A. Schiermeyer, *The Artful Dodger: Responding Parties' Ability to Avoid Electronic Discovery Costs Under 26(b)(2)(b) and 26(b)(2)(c) and the Preservation Obligation*, 42 CREIGHTON L. REV. 227 (2009) (discussing *Treppel* and *Quinby* and arguing that downgrading form of ESI should be considered spoliation).

> burden or expense. The responding party should consider either searching the email archives to locate and preserve the discoverable information or, alternatively, searching custodian hard drives or removable media for the discoverable information. Only after completing the preservation of materials in one of these manners should the responding party consider the proportionality of obtaining any additional discoverable information from the other source or backup tape system.

Comment 8.b. ***Preservation and production of ESI from sources that are "not reasonably accessible" under the Federal Rules of Civil Procedure.***

The Federal Rules of Civil Procedure limit the obligation to search and produce from sources of relevant ESI that are not reasonably accessible due to undue burden or cost. This limitation in Rule 26(b)(2)(B) is related to, but distinct from, the concept of proportionality. ESI that is not proportional to the needs of the case is not within the scope of discovery under Rule 26(b)(1). Even for ESI that *is* proportional to the needs of the case, a party may assert that the ESI is "not reasonably accessible."

"Not reasonably accessible" was founded on a paradigm where there was "active data" and "inactive data," and special technology and resources were required to access "inactive data." Active Data, for example, is information residing on the direct access storage media (disk drives or servers) that is readily visible to the operating system and/or application software with which it was created, and is immediately accessible to users or administrators without restoration or reconstruction.

The 2006 Advisory Committee Notes give as examples of ESI that are not reasonably accessible: "backup tapes" intended for

disaster recovery purposes that are often not indexed, organized, or susceptible to electronic searching; legacy data that remains from obsolete systems and is unintelligible on the successor systems; data that was "deleted" but remains in fragmented form requiring a modern version of computer forensics to restore and retrieve; and databases that were designed to create certain information in certain ways and that cannot readily create very different kinds or forms of information. But as information technology has evolved, the concept of "not reasonably accessible" must evolve. The cost and effort to attain what is asserted to be "not reasonably accessible" will depend on a particular party's existing technologies and resources—not the best available in the market. In 2016, fewer enterprises rely upon backup tapes and other such "inactive data" systems that were more prevalent in 2006. Moreover, multiple copies of ESI may exist in multiple systems, many of which are both reasonably and readily accessible.

Rule 26(b)(2)(B) requires the responding party to identify by category or type any sources of relevant ESI that it has identified as "not reasonably accessible." Specifically, under Rule 26(b)(2), if a party has determined that the only source of some proportional and relevant ESI is one that is not reasonably accessible, then it may be required to preserve that source,[116] disclose it (with enough information so the other side can understand what is at issue), be ready to demonstrate why production of information is unduly burdensome or costly, and, if possible,

116. *See* 2006 Advisory Comm. Note to Rule 26(b)(2) ("A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case.").

discuss these issues at the initial Rule 26(f) meet and confer sessions. This provision should not be read to require a list of all sources of ESI that are not searched, nor does it require a listing of sources a party has reasonably determined, in good faith, are inaccessible and do not contain non-duplicative relevant ESI.

If the parties are unable to reach agreement as to the accessibility of specific sources of ESI or the need to restore those sources for purposes of the dispute at issue, a motion to compel or for a protective order may be brought. *See* Comment 2.c. Proportionality may also dictate that costs are allocated to the requesting party when the burden to preserve or produce ESI is disproportionate to the needs of the case.

For discussion of the use of cost shifting in electronic discovery, see Principle 13.

Comment 8.c. Forensic data collection.

"Forensic" data collection, also known as creating a "forensic copy," "bit-stream image," or "mirror image," refers to the creation of an exact copy of an entire physical storage media (hard drive, CD-ROM, DVD-ROM, tape, etc.), including all active and residual data and unallocated or slack space on the media.[117]

Forensic data collection requires intrusive access to desktop, server, laptop, or other hard drives or media storage devices, and is sometimes appropriate when key employees leave employment under suspicious circumstances, or if theft or misappropriation of trade secrets or confidential information may be involved. However, making a forensic copy of computers is only the first step of an expensive, complex, and difficult process

117. *See The Sedona Conference Glossary: E-Discovery & Digital Information Management (Fourth Edition)*, 15 SEDONA CONF. J. 305, 328 (2014) (defining "Forensic Copy").

of data analysis that can divert litigation into side issues and satellite disputes involving the interpretation of potentially ambiguous forensic evidence. While creating a forensic copy clearly is appropriate in some circumstances, particularly when there is unique ESI that can only be found—or an issue that can only be resolved—through a forensic examination of the system, including logs, registry keys, and tables, it should not be required unless circumstances specifically warrant the additional cost and burden and there is no less burdensome option available. When ordered, it should be accompanied by an appropriate protocol or other protective measures that take into account any applicable privacy rights and privileges, as well as the need to avoid copying ESI that is not relevant. *See* Comment 6.d. In some cases, it may be necessary, as an anticipatory matter, to meet certain preservation obligations by making or retaining copies of archival media or taking such steps as imaging the computer hard drives of departing employees. Such copies may best preserve all relevant ESI. If the parties anticipate such a need, the topic of forensic-level preservation and review should be addressed at the initial meet and confer sessions.

> *Illustration i.* After a key employee leaves X Company ("X Co.") to work for a competitor, a suspiciously similar competitive product suddenly emerges from the new company. X Co. produces credible testimony that the former employee bragged about sending confidential design specifications to his new company computer, copying the data to a thumb drive, and deleting the data from the original source so that the evidence of mischief would never be found. The court properly orders that, given the circumstances of the case, the requesting party has demonstrated the need to obtain a mirror image of the computer's hard drive. If the defendant is not willing to undertake the expense of hiring its own reputable

data recovery expert to produce all available relevant data, inspection of the computer's contents by an expert appointed by the court or working on behalf of X Co. may be justified, subject to appropriate orders to preserve privacy, to protect data, and to prevent production of unrelated or privileged material. Under a showing of special need, with appropriate orders of protection, efforts to restore ESI also could be ordered.

Illustration ii. A small group of staff employees of Y Company ("Y Co.") file a proposed wage and hour class action asserting that Y Co. failed to pay overtime. The employees demand that Y Co. make forensic mirror image copies of their hard drives, as well as the hard drives of all proposed class members, to ensure that system metadata can be extracted to prove the hours that employees were logged into their computers. Y Co. can demonstrate that it maintains readily accessible system logs that record the same information, and it is willing to produce some or all of such logs to the plaintiffs. The employees' demand for a preservation order should be rejected.

Comment 8.d. Accessibility of ESI held by vendors and other non-parties.

The scope of discovery and the duty to preserve and produce information extends to relevant and proportional ESI under the custody or control of a party, including information that a non-party such as a cloud service provider, an information technology service provider, or a data processing contractor may possess. Many parties store large volumes of data with cloud service providers, outsource all or part of their information technology systems, or share data with third parties for processing or for other business purposes. In contracting for such services, parties should consider how they will comply with

their obligations to preserve and collect ESI for litigation. If such provisions are not within the scope of contractual agreements, costs may escalate and necessary services, including access to relevant data, may be unavailable when needed. Consistent with the notion that a party should not convert ESI into a less useable format (*see* Principle 12), parties should not move ESI to vendors for the purpose of making the ESI less accessible for litigation. Parties also need to consider whether preservation notices should be sent to non-parties, such as cloud providers, contractors, and vendors, when litigation commences, particularly because such non-parties otherwise may not be aware of litigation or attendant preservation obligations.

For a discussion of the challenges facing responding parties regarding potential obligations to preserve and produce ESI not in their physical possession, see The Sedona Conference Commentary on Rule 34 and 45 "Possession, Custody, or Control."[118]

118. 17 SEDONA CONF. J. 467 (2016).

9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information.

Comment 9.a. ***The scope of discovery of ESI that is deleted or otherwise not readily apparent.***

This Principle recognizes that the burden of preserving, reviewing, or producing deleted, shadowed, fragmented, or residual ESI, or ESI that is otherwise not readily apparent, is normally outweighed by any resulting benefit. This ESI can include system data, transient and ephemeral data, unique computer artifacts (e.g., registry entries and log files), or data from emerging technologies. However, where there is some special need for this ESI, parties should be prepared to discuss how that need can be met without unnecessarily increasing costs. In those matters, the requesting party should articulate good cause for preservation and production, including the importance of the ESI in resolving the claims and defenses in the case, or in making other relevant ESI usable. The responding party should understand what ESI is available and the burden or expense of preserving, collecting, and producing that ESI. Both parties should consider and apply all of the pertinent proportionality factors. *See* Principles 2 and 5.

> *Illustration i.* Plaintiff claims that she is entitled to a commission on a transaction based upon an email allegedly sent by the defendant's president. Defendant asserts that there is no record of the email being sent in its email system or the logs of its internet activity, and that plaintiff's copy of the email is not authentic. In these circumstances, it is appropriate to require preservation, review, and production not only of the content of the questioned email, but also of the email itself in its native or near native form, containing the header information

and application metadata, which can play a crucial role in determining whether the questioned message is authentic.

Illustration ii. Plaintiff alleges that the defendant engaged in billing fraud by overcharging for hourly work done, some of which allegedly was for another client. The plaintiff presents two materially different versions of the same invoice, indicating that the invoice has been altered. In this case, discovery of overwritten drafts, edits, and deleted versions of the invoices may be appropriate, and production in native format also may be appropriate.

Comment 9.b. The preservation and production of deleted ESI.

Deleted data may at one time have been a "useful" document generated in the ordinary course of business that had value to the organization, although that value may have expired. However, this historic fact alone does not justify the retrieval and review of deleted data. Case law indicates that only exceptional cases turn on "deleted" or "discarded" information (whether paper or electronic). Employees and organizations properly and routinely delete or destroy documents and ESI that no longer have business value, so long as the information was not subject to regulatory, investigatory, or litigation preservation obligations when deleted or destroyed.

Accordingly, as a general rule and absent special circumstances, organizations should not be required to preserve deleted ESI in connection with litigation. While most computer systems will have a plethora of deleted data that in theory could be "mined," there should not be a routine obligation for preservation and discovery of deleted data. If deleted data is not ac-

cessed by employees in the ordinary course of business, presumptively there is no reason to require the routine preservation of such data. The relevance, at best, will be marginal in most cases, while the burdens involved usually will be great. In exceptional cases, however, there may be good cause for targeted preservation of deleted and residual data. Examples of such exceptional cases may include a failure to preserve by a custodian, or cases resulting from a data breach or malware infection.

Parties should communicate early about the possible relevance of deleted ESI in order to avoid costly and unnecessary preservation on the one hand, or claims of spoliation on the other.

10. Parties should take reasonable steps to safeguard electronically stored information, the disclosure or dissemination of which is subject to privileges, work product protections, privacy obligations, or other legally enforceable restrictions.

Comment 10.a. ***Parties should employ the provisions of Federal Rule of Evidence 502 or state analogues to mitigate the risks of inadvertent production of attorney-client privileged and work product protected ESI.***

The volume and form of ESI productions have substantially increased the burdens and costs of privilege and confidentiality reviews and the risks of inadvertent production of privileged and work product protected information. Examples abound of the burdens of reviewing massive quantities of text files, metadata, and email strings for potentially privileged and protected information, and the burdens of preparing privilege logs that meet varying judicial requirements. Moreover, the risk of waiver from inadvertent productions of privileged and protected information has led many parties to employ very costly, attorney-intensive privilege review procedures. The adoption of Federal Rule of Evidence 502 and state law equivalents provides parties and counsel with opportunities to manage costs and burdens creatively and responsibly, and concurrently reduce the risks that inadvertent disclosures of attorney-client written communications and work product will result in waiving the privilege or protection of the disclosed ESI, or in broader subject matter waiver.[119]

119. *See* The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, Appendix F, Federal Rule 502—State Law Analogues, at 199 (2016).

Comment 10.b. Parties should be informed fully of the protections afforded by Fed. R. Evid. 502.

Rule 502 provides a standard approach in federal courts for adjudicating inadvertent waiver of attorney-client privilege and work-product protection; as well as specific protections against waiver in a federal proceeding or before a federal office or agency and, where specific conditions are met, in other federal and state proceedings. In addition to agreements the parties can reach to protect privilege, parties should encourage the court to enter a Rule 502 order to benefit from the significant protections offered by the Rule.

Rule 502 provides the following protections:

- Rule 502(a) limits waiver by inadvertent disclosure of the information actually disclosed, and restricts broader subject matter waiver to instances where the disclosure is intentional, the disclosed and undisclosed information concern the same subject matter, and the disclosed and undisclosed information ought in fairness be considered together.
- Rule 502(b) precludes waiver for inadvertent disclosures where the privilege holder takes "reasonable steps" to prevent disclosure and promptly takes "reasonable steps" to avoid or remedy the inadvertent disclosure including, where applicable, following the procedures in Fed. R. Civ. P. 26(b)(5)(B).[120]

120. The Advisory Committee Note to Evidence Rule 502(b) lists a non-exclusive set of "reasonable steps" that may be considered by the court when deciding whether the production was inadvertent: the reasonableness of precautions taken; time taken to rectify the error; scope of discovery and extent

- Rule 502(c) provides that a disclosure made in state proceedings does not constitute a waiver in federal proceedings if either the disclosure (i) would not be a waiver under Rule 502 in a federal proceeding, or (ii) is not a waiver in the state in which the disclosure occurred.
- Rule 502(d) provides that non-waiver provisions in an order entered in a federal proceeding preclude waiver of the disclosed information in any other federal or state proceeding.
- Rule 502(e) states that parties' confidentiality agreements that preclude or limit waiver are binding only upon the parties unless incorporated in a court order under Rule 502(d).
- Rule 502(f) provides that Rule 502 is binding in state court proceedings even where, pursuant

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of the disclosure; number of documents reviewed and produced; time constraints for the production; depending on the circumstances, the use of advanced analytical software applications and linguistic tools in screening for privilege and work product; and whether prior to the litigation, the responding party had implemented an efficient system of records management, including the use of privilege designations. The Advisory Committee Note further instructs that the steps taken must be evaluated in the context of "the overriding issue of fairness."

Rule 502(b) adopts the "intermediate" approach to addressing waiver and supplants the "strict" approach (disclosure always results in waiver of protection of the disclosed materials and subject matter waiver) and the "lenient" approach (disclosure never results in waiver). For discussions of approaches to waiver in federal courts prior to Rule 502(b), *see, e.g., Hopson v. Mayor of Baltimore*, 232 F.R.D. 228, 235–36 (D. Md. 2005) and *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 257–58 (D. Md. 2008) ("Victor Stanley I").

to Fed. R. Evid. 501, state law governs substantive privileges and work product protection.

Parties must also be informed fully about applicable laws and rules in state court actions and administrative proceedings that do not provide the same protections against waiver as Rule 502. In states where analogues have not been adopted, parties nonetheless may seek to enter agreements and move the court to incorporate the agreements into a court order to reduce the risk of waiver.

Comment 10.c. ***Parties should protect against waiver by inadvertent production through agreements incorporated in a Fed. R. Evid. 502(d) order.***

Rule 502(b) establishes a uniform approach in the federal courts to determine whether an inadvertent production results in waiver, and if so, the scope of the waiver. However, the burden of asserting and proving inadvertence lies with the responding party and that burden can require substantial effort and documentation. Moreover, given the multiple factors to be considered and the discretion of courts in weighing the factors and the evidence presented, both waiver and its scope remain uncertain.

Parties can reduce the burdens and eliminate many of these uncertainties by asking the court to enter a Rule 502(d) order. An effective Rule 502(d) order need not be complex and can simply provide that: (a) the production of privileged or work-product protected documents, including ESI, is not a waiver, whether the production is inadvertent or otherwise, in the particular case or in any other federal or state proceeding, and (b) nothing contained in the order limits a party's right to conduct

a review for relevance and the segregation of privileged information and work product material prior to production.[121]

An agreement can be reached at the parties' Fed. R. Civ. P. 26(f) conference, incorporated into the parties' discovery plan, and presented to the court to be entered as part of the Fed. R. Civ. P. 16(b) scheduling order. Pursuant to Rule 502(d), the incorporation of the agreement in a court order ensures that nonwaiver provisions apply in all other federal and state proceedings. To the extent that an agreement is not reached, a proposed agreement and either opposition or alternatives can be presented to the court at the Rule16(b) conference. The court may enter the order in its proposed or a modified form or enter a Rule 502(d) order on its own.

Comment 10.d. ***Fed. R. Evid. 502 does not protect all privileges or address all privacy concerns.***

Rule 502 is not a panacea; its protections are limited in scope and effect. First, Rule 502 limits itself to "disclosure of a communication or information covered by the attorney-client privilege or work-product protection"—it does not apply to other privileges and protections that might be waived by inadvertent disclosure. Second, Rule 502 is limited to "a federal proceeding or to a federal office or agency." With approximately ninety percent of cases in state rather than federal court, Rule 502's protections are of little value to the vast majority of litigants appearing before a state court without an equivalent rule or a Rule 502(d) order in an earlier federal matter. Third, despite Rule 502(c) and (f), the power of a state court to bind other state courts or federal courts has not been addressed by the United States Supreme Court. Fourth, Rule 502 does not protect a party from the nega-

121. *See* The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, Appendix E, Model Rule 502(d) Order, at 198 (2016).

tive impact of the disclosure of information that is subject to privacy and data protection obligations. Fifth, Rule 502 cannot erase inadvertently disclosed information from the mind of the requesting party.

Thus, while a Rule 502(d) order can be valuable—and should be obtained when and where available—parties cannot rely solely upon Rule 502 to protect all their interests in maintaining client confidentiality (*see* Comment 10.i.), other privileged communications (e.g., marital, priest-penitent, or psychiatrist), or personal information subject to privacy and data protection rights (e.g., personally identifiable information, personal health information, financial information, and student information).

Comment 10.e. ***Direct access to ESI or systems should be sparingly allowed and only upon a showing of good cause.***

Special issues may arise with any request for direct access to ESI or to computer devices or systems on which it resides. Protective orders should be in place to guard against any release of proprietary, confidential, or personally identifiable ESI accessible to the adversary or its expert. Indeed, the widespread adoption of state and federal privacy laws (as well as the application of foreign data protection laws) demands protective orders and procedures that provide adequate personal privacy safeguards and meet applicable statutory and common law legal standards. Similar concerns exist regarding the potential disclosure of attorney-client privileged or work product information that may occur during such an inspection, notwithstanding Rule 502. *See* Comments 6.d. and 10.b. Thus, even with a protective order in place, court-ordered inspections of computer systems should be used sparingly. Such orders should be narrowly tailored to the circumstances, accompanied by a sufficient protective order,

and usually should provide that either a special master or a neutral forensic examiner undertake the inspection. *See* Comment 6.d.

Comment 10.f. ***Parties should be informed fully of the risks of "clawback" or "quick peek" agreements and enter such agreements only in exceptional circumstances.***

The volume of ESI productions and the burdens and costs of privilege reviews have increased interest in production subject to "clawback" or "quick peek" agreements. In a "quick peek" arrangement, ESI is produced to the opposing party before or without a full review for privilege, confidentiality, or privacy. The key element in entering a "quick peek" agreement is for the parties to establish stringent guidelines and restrictions to prevent waiver of privilege and confidentiality, including the ability to "claw back." The intended effect of the agreement is that, if the requesting party finds ESI that appears to be privileged or protected, the responding party can "claw back" the ESI without having waived privilege or protection.[122]

"Quick peek" agreements should not be entered lightly and should have the voluntary consent of the producing party. Courts should not compel or indirectly leverage a party to enter a "quick peek" agreement.[123] Parties, in all circumstances,

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122. If the agreement is entered by the court in a federal proceeding and comports with the provisions of Rule 502(d), the non-waiver provisions are enforceable in other federal and state proceedings.

123. *See In re* Dow Corning Corp., 261 F.3d 280, 284 (2d Cir. 2001) ("[C]ompelled disclosure of privileged attorney-client communications absent waiver or an applicable exception, is contrary to well-established precedent" and "we have found no authority . . . that holds that imposition of a protective order . . . permits a court to order disclosure of privileged attorney-client communications."); Murphy Oil USA, Inc. v. Fluor Daniel, Inc., No. Civ. A. 99-3564, 2002 WL 246439, at *7 (E.D. La. Feb. 19, 2002) (noting that the court

should undertake an independent evaluation of the risks and benefits of entering a "quick peek" agreement.

A Rule 502(d) order, or its state equivalent, provides substantial protection against a finding of privilege waiver in another proceeding but does not eliminate all risks associated with a "quick peek" agreement.[124] Notwithstanding those protections and potential efficiencies and cost-savings, risks and limitations make "quick peek" agreements and productions ill-advised for most cases. First, once privileged or work product protected information is disclosed to an opposing party, the knowledge obtained cannot be erased from their minds. Second, the disclosure of privileged and work product protected information is contrary to fundamental tenets of the privilege pertaining to the scrupulous protection of the confidentiality of the information. Third, disclosure to an opposing party may increase the possibility that the opposing party will move to compel the production of claimed privileged or work product protected information on the grounds that the privilege does not apply. Fourth, if the proceeding is in a state court without a Rule 502(d) equivalent, the "quick peek" agreement will be enforceable only between the parties in that proceeding. Accordingly, a finding of waiver, regardless of whether the "quick peek" agreement was an entered order, is more likely in proceedings in another state or in a federal proceeding in which the privileged information

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cannot compel the disclosure of privileged communications in clawback arrangements).

124. If the action is pending in a state jurisdiction without a Rule 502(d) equivalent, the party must be aware that another jurisdiction might determine that the disclosure of privileged information was voluntary and the privilege waived. Moreover, subject matter waiver might be found if another court finds that fairness requires the disclosure of other privileged or work product protected documents pertaining to the same subject matter. Incorporating the "quick peek" agreement in a court order might reduce, but cannot eliminate, these risks.

may be relevant. Fifth, if the production encompasses personal privacy information subject to domestic or foreign statutory regulatory protection, the disclosure of information to an opposing party may result in liability or penalties, whether or not a protective order is entered and the "quick peek" agreement permits withholding the information prior to final production.[125] Sixth, Rule 502(d) does not protect trade secrets and other commercially or personally sensitive information. A protective order may reduce the risk of unauthorized disclosures by opposing counsel but cannot eliminate the risk. Furthermore, "quick peek" productions may include confidential information that is not relevant and not otherwise subject to production, and the disclosure of the information could cause commercial or personal harm to the responding party.

If a party and its counsel conclude that a "quick peek" production is necessary or preferred on the grounds of cost, burden, or time, the following steps should be followed. First, counsel should ensure that the party is fully aware of the risks of disclosure of privileged, personal, and confidential information; the potential of waiver; the importance of the entry of a Rule 502(d) order; and the heightened risks absent a Rule 502(d) order or its state equivalent. Second, the party must approve the agreement prior to its entry. Third, a Rule 502(d) order or its state equivalent should be entered and should incorporate or reference the provisions of the agreement. Fourth, to the extent feasible, parties should assess the likelihood of the disclosure of privileged and work product protected information, the potential significance of the disclosed information in the proceeding, whether

125. For further information, *see* The Sedona Conference, *Practical In-House Approaches for Cross-Border Discovery & Data Protection*, 17 SEDONA CONF. J. 397 (2016); The Sedona Conference, *Commentary on Privacy and Information Security: Principles and Guidelines for Lawyers, Law Firms, and Other Legal Service Providers*, 17 SEDONA CONF. J. 1 (2016).

personal privacy information subject to domestic or foreign statutory or regulatory protection might be disclosed,[126] and whether trade secret and commercially or personally sensitive information might be disclosed.[127]

It is inadvisable for a fully-informed party to enter a "quick peek" agreement unless either the risks of disclosure of privileged and work-product protected information, as well as commercially and personally sensitive information, are non-existent or minimal, or the discovery deadline cannot otherwise be met—thereby risking sanctions for non-compliance—and alternative methods to protect against disclosure are not available.

Comment 10.g. ***Parties should consider using search terms and technology assisted review (TAR) for privilege reviews, along with other alternatives that may reduce privilege review burdens.***

Search terms or TAR may be helpful as part of a privilege review process to identify probable privileged ESI and, in some instances, to withhold that ESI without further privilege review, either because an agreement with opposing counsel so provides or because the confidence level in the process is sufficient to minimize inadvertent production. In addition, search terms or TAR may be used to help create privilege logs or, where agreements can be reached, avoid logging the privileged ESI. S*ee* Comment 10.h.

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126. To the extent that personal privacy information might be disclosed, specific protocols should be adopted to search for and withhold or redact the information.

127. Parties should negotiate and enter protective orders and cross-reference the order in the "quick peek" agreement.

If search terms or TAR are used, particularly in proceedings where agreements either have not been reached or are not incorporated in a Rule 502(d) court order or a state equivalent, parties should consider the following procedures to avoid inadvertent disclosure:

- engage persons or entities with appropriate skill and experience in developing search terms or applying TAR;
- test and re-test samples to verify that the search terms used or TAR protocol has a reasonably acceptable degree of probability of identifying privileged or protected information;
- to the extent that manual reviews of identified potentially privileged or protected information are employed, ensure that junior or contract attorneys or paralegals are properly trained and that closer or questionable calls are referred to more senior attorneys for final determination;
- develop and apply quality assurance protocols;
- fully document the procedures, protocols, and material decisions, actions, and results (preferably in a non-privileged form), and the development, sampling, testing, and quality assurance to support the reasonableness of the review; and
- enter protective orders to ensure non-waiver and return of privileged information, and to prevent the inappropriate dissemination of personally identifiable information and trade

secret and highly confidential commercial information.

Parties should also consider alternative methods and protections that reduce privilege review burdens and expedite production, such as:

- whether a staged production or the use of sampling, including limiting the scope of logging privileged or protected ESI to the staged or sample set, can be used to meet the production demands and schedule;
- whether to propose categories of information that are highly likely to be privileged or protected and can be excluded from production;
- whether to move for a protective order to secure additional time to conduct a reasonable privilege review of the entire production set or subsets identified as probable sources of privileged and protected information; and
- whether to prepare a list of in-house and outside attorneys who communicated on legal issues that are relevant to the claims and defenses in the case, and the employees that interacted with those attorneys.

Comment 10.h. ***Parties should address and attempt to reach agreement on procedures for logging privileged and protected work product information that meet the needs of the case.***

Fed. R. Civ. P. 26(b)(5)(A)(ii) provides that where a party has withheld otherwise discoverable information on the grounds of privilege or work-product protection, the party must:

> describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Logging large volumes of withheld ESI is often costly, burdensome, time-consuming, and disproportionate to the needs of the case.[128] In addition, logging ESI such as email strings and attachments is difficult and lacks any uniform standard. Reviewing, redacting, and logging metadata or embedded information similarly can be a significant and undue burden. Moreover, the precise type and amount of information required to meet the general standard set forth in Rule 26(b)(5)(A)(ii) varies among courts, and frequently fails to provide sufficient information for a requesting party to assess the claimed privilege.

Parties should reduce these burdens by addressing privilege logging procedures and the scope and content of privilege logs at the Rule 26(f) conference, and seek to reach an agreement that may be incorporated in a Rule 16(b) scheduling order. If agreement is not reached, the parties may present their respective positions to the court at the Rule 16(b) scheduling—or later—conference.

In seeking agreement on privilege logging, parties may consider:

- agreeing that some types of privileged ESI need not be logged fully, e.g., communications among members of the trial team or between

128. *See* 1993 Advisory Comm. Note to Rule 26(b)(5) (detailed privilege logs "may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories").

client and counsel regarding the matter after initiation of the proceeding;

- logging by categories as opposed to document-by-document logging;
- specifying the content of logs, e.g., limit to objective information downloaded from ESI metadata; and
- specifying the protocol and format for logging specific types of ESI such as email chains, e.g., logging only the last in time email in a chain or the email in the chain that includes all recipients of all the emails in the chain.

Comment 10.i. Counsel have ethical obligations to protect privileged and confidential information.

Rule 1.1 of the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) states that a lawyer shall provide "competent representation to a client" which requires the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[129] Comment 8 to the Rule, as amended by the ABA in 2012, states in pertinent part: "To maintain the requisite knowledge and skill a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ."

In the context of protecting the privileged ESI, attorneys should have knowledge of the applicable substantive law of privilege, the provisions of Federal Rules of Evidence 501 and 502 and state equivalents, the client's computer systems, any

129. The ABA Model Rules and their commentary are *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

search technologies employed to identify potentially privileged or protected information, and the risks of disclosure in employing technologies or alternatives to full privilege reviews, e.g., "clawback" agreements. Counsel who do not possess the requisite technological knowledge and skills should consult with appropriate experts.

Pursuant to Rule 1.6 of the Model Rules, lawyers have an ethical duty to maintain the confidences of their client and must "not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b) [of Rule 1.6]." Rule 1.6(c) expressly requires counsel to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." These duties require counsel not only to prevent disclosures of privileged and protected information, but also to inform the client fully of risks arising in the discovery and production of ESI and the protections offered by Fed. R. Evid. 502. Counsel should be mindful that these duties extend to all client confidences, including confidential matter learned during the course of the engagement, and undertake appropriate measures to ensure that ESI reflecting or containing those confidences are not disclosed absent informed client consent.

Rule 1.15 of the Model Rules requires attorneys to ensure the safekeeping of their client's property, which includes their documents and ESI. ESI that is privileged or subject to work product protections is outside the scope of discovery under Fed. R. Civ. P. 26(b)(1), and producing privileged or protected ESI could be deemed a breach of the duty of safekeeping.

Lawyers also have a duty to supervise junior attorneys, staff, and vendors. *See* Model Rules 5.1 and 5.3. The duty encompasses appropriate training and oversight of junior attorneys,

including contract attorneys who review ESI and make initial decisions regarding privilege and confidentiality, and staff who are assigned to conduct privilege reviews. The duty also requires counsel to supervise the preparation and execution of search terms and the selection and implementation of review tools used by vendors or the client's information technology professionals.

Comment 10.j. ***Parties should be aware of and identify personal privacy, trade secret, and confidential ESI, and properly protect such information from unlawful or inappropriate disclosure.***

Electronic information systems contain significant amounts of ESI that may be subject to trade secret, confidentiality, or privacy considerations. Examples of such information include proprietary business information such as formulas, business methods, sales strategies, marketing and forecasting projections, and customer and employee personal data (e.g., social security and credit card numbers, employee and patient health data, and customer financial records).

Privacy rights related to personal data may extend to customers, employees, and non-parties. Ample protections for such information during discovery are available through a Rule 26(c) protective order or by party agreement. In negotiating protection for such information, counsel should consider the scope of the applicable privacy rights, as defined in the operative contract or rule of law, including whether such scope includes a judicial process exception. When potential discovery of ESI located outside of the United States is involved, counsel should

pay attention to the foreign data protection and blocking statutes.[130] To address appropriate protection for trade secrets and other confidential commercial information in the United States, the parties and counsel should discuss at the Rule 26(f) conference, or a state equivalent, a suitable protective order providing that such information "not be revealed or be revealed only in a specified way," as authorized by Rule 26(c)(1)(G). The protective order may specify the qualifications of persons authorized to see protected ESI; procedures for the use and treatment of protected ESI during depositions, at trial, and in court filings (e.g., filing under seal); and the destruction or return of protected ESI at the conclusion of the action.

Redactions or other actions necessary to protect private, personal information to meet required safeguards can be costly and time-consuming. The parties should address and attempt to resolve such issues at the Rule 26(f) conference. For example, parties may agree to exclude from production categories of private, personal information that are only marginally relevant to the claims and defenses or are cumulative of other produced information.

130. *See* The Sedona Conference, *Practical In-House Approaches for Cross-Border Discovery & Data Protection*, 17 SEDONA CONF. J. 397 (2016); The Sedona Conference, *Commentary on Privacy and Information Security: Principles and Guidelines for Lawyers, Law Firms, and Other Legal Service Providers*, 17 SEDONA CONF. J. 1 (2016).

11. A responding party may satisfy its good faith obligations to preserve and produce relevant electronically stored information by using technology and processes, such as sampling, searching, or the use of selection criteria.

Comment 11.a. Employing technology to search for relevant ESI is reasonable, and can create cost and time savings.

Using a manual process to find relevant ESI may be infeasible or unwarranted in cases with complex data systems or large volumes of ESI. Using search methods—based on a combination of technology and process to help search for, preserve, retrieve, and produce relevant ESI—can result in cost and time savings, and should be viewed as reasonable, valuable, and often a practical necessity.[131]

For example, ESI may be found in broad groupings based on the "container" and not the "content," such as in an email "inbox" or "outbox," on a hard drive or mobile device, or on a shared drive or web server. Such unstructured or semi-structured data may not be stored in a manner conducive to identifying relevant ESI.

Success in using any search method based upon a combination of technology and process will be enhanced by a well thought out process with substantial human input on the front end, a basic understanding of the search methodology, including any potential limitations and risks, and an evaluation of how the technology would interface with the data source to be searched. The choice of a specific search method will depend on

131. For additional information, *see* The Sedona Conference, *Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 15 SEDONA CONF. J. 217 (2014).

the specific legal context in which it is employed.[132] Before employing a search technology, the responding party should perform due diligence on alternative information retrieval products or services, understand any potential limitations in capabilities, and test the technology(ies) against a data sample. Due to characteristics of human language, the various types of ESI searched, and the various ways organizations store ESI, the use of search tools does not guarantee that all relevant ESI will be identified in large data collections; but that is not, and never has been, the standard—reasonableness and proportionality is the standard. Moreover, different search methods may produce differing results, subject to a measure of statistical variation inherent in the science of information retrieval. The differences in search methodology, and the limits on the technology, also may hinder uses in different legal contexts. Search methods usually involve an iterative approach that modifies the search parameters based on the results of the searches, and different search methodologies may be applied to different data sources. Absent an agreement on the search methods to be used, parties should be prepared to explain their choice of search methods, especially if there are perceived deficiencies in the identification and preservation efforts or production. *See* Principles 6 and 7. Documenting the search methods, execution, and results may help answer questions from opposing counsel or a court. To meet a party's discovery obligations, and a legal counsel's ethical obligations, any

132. For example, some tools may work well in some contexts, but not so well in others. Antitrust investigations and litigation often involve broad allegations relating to marketing and competition. In such matters, technology assisted review may be more time- and cost-effective in culling relevant information than more traditional search terms. Conversely, in a technical case involving a specific patent design, search terms may be a perfectly adequate and cost-effective approach.

search methodology and process employed must be calculated to yield relevant information.

> *Illustration i.* The relevant custodians each have 2 to 8 GB of ESI on their hard drives. The responding party, using a forensically sound process, collects those user-created files and has a third-party vendor process and index them and place them in a review platform. Rather than review every user-created file, the responding party reaches agreement with the requesting party on a series of search terms that capture the key concepts relevant to the claims and defenses, including restrictions for the relevant time frame. The responding party then reviews this subset to cull out (and log) privileged matter and confirm the relevance of other ESI for production. The responding party has satisfied its obligation to identify and produce relevant ESI.

Courts should encourage and promote the use of technology and processes to search, preserve, collect, review, and produce ESI to ensure that the costs and burdens associated with the preservation, collection, review, and production of responsive ESI is proportional to the needs of the case.[133]

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133. *See* The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 141 (2017) ("Principle 2: Discovery should focus on the needs of the case and generally be obtained from the most convenient, least burdensome, and least expensive sources."); Maura R. Grossman & Gordon V. Cormack, *Comments on "The Implication of Rule 26(g) on the Use of Technology-Assisted Review,"* 7 FED. CTS. L. REV. 285 (2014); Bennett B. Borden & Jason R. Baron, *Finding the Signal in the Noise: Information Governance, Analytics and the Future of Legal Practice*, 20 RICH. J.L. & TECH. 7 (2014); George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10 (2007).

Comment 11.b. Sampling can substantially reduce the cost of discovery.

Parties should consider using sampling techniques to narrow the burden of searching voluminous ESI. For example, employing a search methodology on a sample in a data source could reveal that a very low percentage of files in that data source contain relevant ESI. This may weigh heavily against a need to search that source further, or it may be a factor in a cost allocation analysis. Such techniques also may reveal substantial redundancy among sources (e.g., duplicate ESI is found in multiple locations) such that it is reasonable for the organization to preserve and produce ESI from only one of the sources.[134]

Comment 11.c. Counsel should oversee the identification and collection processes.

Depending on the nature of the sources of ESI and the application of proportionality principles, both manual and automated procedures for collection may be appropriate in some situations. Whether manual or automated, the procedures must be directed and overseen by legal counsel to assure compliance with discovery and ethical obligations. *See* Comment 10.i.

Manual collection may be performed by the document authors or custodians themselves, by litigation support or information services personnel, or by others. In a manual collection, the items may be copied or transmitted by the end-user, or by using tools designed for forensically sound collections, and under a defined written protocol designed to preserve relevant

134. *See* The Sedona Conference, *Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 15 SEDONA CONF. J. 217 (2014); The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 141, cmt. 4.c., at 165 (2017) (use of sampling to demonstrate the rate of responsive information in a source as an aid in determining whether the source is sufficiently important to warrant discovery).

metadata. Self-collections by custodians may give rise to questions regarding the accuracy and completeness of collections if directions and oversight by legal counsel or forensics experts are poor or non-existent.

Automated or computer-assisted collection involves using computerized processes to collect ESI meeting certain criteria, such as search terms, file and message dates, or folder locations. Automated collection can be integrated with an overall electronic data archiving or retention system, or it can be implemented using technology specifically designated to retrieve information on a case-by-case basis. Regardless of the method chosen, consistency across the processes including any de-duplication techniques can help ensure that responsive ESI is collected and produced.

12. The production of electronically stored information should be made in the form or forms in which it is ordinarily maintained or that is reasonably usable given the nature of the electronically stored information and the proportional needs of the case.

Comment 12.a. Special characteristics of ESI (metadata and non-apparent/undisplayed data) may be pertinent to the form in which ESI should be preserved and produced.

The forms of ESI are more varied and complex than paper.[135] ESI is fundamentally different from paper information in that it is dynamic, created and stored in different forms, and has a substantial amount of metadata and other non-apparent or undisplayed data associated with it. Because of these differences, as well as others, the preservation and production of ESI can raise distinct legal and practical issues.

An electronic document or file usually includes not only the visible information but also hidden text, formatting codes, formulae, and other information associated with the file. These many types of ancillary information are often lumped together as "metadata," although there are some important distinctions between different types of metadata.[136] Two of the most common distinctions are between "application" metadata and "system" metadata. *Application metadata* is created as a function of the application software used to create the document or file.

135. *See The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, THE SEDONA CONFERENCE, Introduction, at 1 (2d ed. 2007), https://thesedonaconference.org/publication/The%20Sedona%20Principles.

136. *See generally The Sedona Conference Glossary: E-Discovery & Digital Information Management (Fourth Edition)*, 15 SEDONA CONF. J. 305, 330, 339, 357, 361 (2014) (containing definitions of "Metadata," "User Created Metadata," "System Generated Metadata," and "Hidden Files or Data").

Common application metadata instructs the computer how to display the document (e.g., the proper fonts, spacing, size, and color). Other application metadata may reflect modifications to the document, such as prior edits or editorial comments. This metadata is embedded in the file it describes and moves with the file when it is moved or copied. *System metadata* reflects information the user or the organization's information management system creates, sometimes automatically. Such information may, for example, track the title of the document, the identification of the computer that created it, the assigned data owner, and other document "profile" information, such as file creation and modification dates. System metadata generally is not embedded within the file it describes, but is stored externally on the organization's information management system.

Depending on the circumstances and needs of the case, a particular piece of metadata may be critical or completely irrelevant. Accordingly, counsel should consider the data types that are relevant to the claims or defenses, what metadata associated with those data types may be relevant or may play a functional role in the use of the relevant ESI, and whether that metadata should be preserved, requested, or produced.

Aside from potentially bearing upon the merits of the case, metadata also may play a functional role in the usability of ESI. For example, system metadata may allow for the quick and efficient sorting of files by virtue of the dates or other information captured in metadata. Application metadata may be critical to allow the functioning of routines within the file, such as the coding that makes documents display in a certain way to the user. Additionally, both system and application metadata may be valuable when using technology platforms for searching, culling, and analyzing large volumes of ESI.

In addition to application and system metadata, some ESI in its "native format" will contain "user created data" that may not

be apparent on the face of the document when printed, such as formulae and comments in spreadsheets, speaker notes in presentation files, or "tracked changes" in word processing files.[137] This typically undisplayed, non-apparent, user created data may be stored in a variety of manners within a native format file.

A native format file contains application metadata that may not always be contextually accurate. For example, when a Microsoft Word document is created, the computer on which that document is saved may automatically assign the document an "author" based on the information stored on that computer. That document subsequently may be used as a template by other persons, but the original "author" information may not change. Thus, subsequent iterations of the document may carry as an "author" a person with no knowledge of the document's content. Similarly, if a Microsoft Word document is created on one machine, and transferred to and saved to a second machine without being altered, the copy on the second machine (erroneously) will show the date the document was saved to the second machine as the date created. Consequently, care should be taken when handling native format files, and their accompanying metadata and other non-apparent data, to avoid any inadvertent alteration.

Comment 12.b. ***Ideally, the form or forms used for production of ESI should be agreed upon early. Absent agreement, ESI must be produced as***

137. *See The Sedona Conference Glossary: E-Discovery & Digital Information Management (Fourth Edition)*, 15 SEDONA CONF. J. 305, 341 (2014) ("Native Format: Electronic documents have an associated file structure defined by the original creating application. This file structure is referred to as the native format of the document.").

ordinarily maintained or in a form or forms reasonably usable to the requesting party.

In amending Rule 34(b) in 2006 to accommodate the expanding use and production of ESI, the Advisory Committee encouraged parties to reach agreement on the various form or forms of production, given that different types of data may serve different purposes and the potential need for native format production and metadata may vary. The default forms of production appropriate to paper discovery did not always have direct equivalents in electronic discovery, but the Rule 1 goals should be the same—to encourage forms of production that would facilitate the orderly, efficient, and cost-effective production of ESI and which allow the requesting party to meaningfully analyze, search, and display the produced electronic data.[138]

Absent agreement, ESI must be produced in the form in which it is ordinarily maintained or in a form that is reasonably usable to the requesting party.[139] Typically, a requesting party does not need ESI produced in its native format in order to access, cull, analyze, search, and display the ESI. Indeed, the most common way to produce ESI for more than a decade has been to create a static electronic image in Tagged Image File Format (TIFF) or Adobe Portable Document (PDF) file format, to place the extracted text from the document into a text file, and to place the selected metadata and other non-apparent data into one or more separate load files.[140] This form is frequently referred to as the production of "TIFF, Text and Load Files" or "TIFF+". With

138. *See* Comment 3.c.; Rules 1 and 26(f).

139. *See* Principle 4 regarding using Rule 34 requests and responses to specify forms of production.

140. *See The Sedona Conference Glossary: E-Discovery & Digital Information Management (Fourth Edition)*, 15 SEDONA CONF. J. 305, 323, 337, 341, 347, 359 (2014) (containing definitions of "Electronic Image," "Load File," "Native Format," "TIFF," and "Portable Document File (PDF)").

production in this format, the requesting party may reassemble the components in a fashion compatible with a chosen review platform, so that the produced data can be text-searched and sorted or filtered based on available metadata fields.

Parties should not demand forms of production, including native files and metadata fields, for which they have no practical use or that do not materially aid in the discovery process. For example, it may be excessive for a party to demand that ESI be produced in native format when the evidence needed to prove the claims and defenses of the parties is found on the face of the documents, and the information contained in the text and load Files will allow the requesting party to organize and search the documents. Indeed, even with technological advances, in the majority of instances, TIFF+ is a "reasonably usable" form of production for most purposes and types of ESI under Rule 34(b)(2)(E)(ii). Accordingly, requesting parties should avoid demanding a form of production, such as all ESI to be produced in native format, unless they have a demonstrably reasonable need for that form of production and the necessary technology, skills, and resources available to make reasonable use of and to protect the ESI.[141] Conversely, responding parties should not seek to produce ESI in a form or forms that inhibit the ability of the requesting party to use advanced technology reasonably required to access, cull, analyze, search, and display the information. Finally, all sides should bear in mind that both requests and responses to discovery are bounded by Rule 26(g) obligations.

In sum, when selecting the form or forms of production of ESI—when requesting production, when responding to requests for production, when meeting and conferring under Rule

141. *See* Comment 12.b.ii. for further commentary regarding technical and practical issues related to the selection of the form or forms of production depending on the file types, and issues related to native file and TIFF+ production.

26(f)(3), and when participating in Rule 16(b) scheduling conferences—parties and the court should consider: (a) the forms most likely to provide the information needed to establish the relevant facts related to the parties' claims and defenses; (b) the need to receive ESI in particular formats in order to functionally access, cull, analyze, search, and display the information produced; (c) whether the information sought is reasonably accessible in the forms requested; (d) the relative value, and potential challenges created, by responding with ESI in the requested format(s); and (e) the requesting party's own ability to effectively manage, reasonably use, and protect the information in the forms requested.

Comment 12.b.i. ***To be "reasonably usable," the form of ESI need not necessarily be its native format or the form in which it is "ordinarily maintained."***

Principle 12 of the Second Edition of *The Sedona Principles* moved beyond restating the then-current Rule 34(b) by asserting that parties should also take into account "the need to produce reasonably accessible metadata that will enable the receiving party to have *the same* ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case."[142] It was understood by the drafters at the time, however, that the standard was not for the requesting party to literally have the *same ability* to "access, search and display" the information in the ordinary course (which may have required a

142. *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, THE SEDONA CONFERENCE, Principle 12, at 60 (2d ed. 2007), https://thesedonaconference.org/publication/The%20Sedona%20Principles (emphasis added).

significant investment in time, money, and proprietary resources), but the *same ability* to "access, search and display" the information in the context of prosecuting and defending the claims and defenses at issue in the litigation. Since the publication of the Second Edition, there have been significant developments in technology and the case law which may require a further nuanced approach to the formats for the production of ESI in certain cases, and which also underscore that it may not be practical or even possible to provide a requesting party with "the same" ability as the responding party to access, search, and display information. Indeed, parties' desire or ability to use the various tools that have been and will be developed can vary as much as the evolving technologies themselves.

The touchstone remains, under Rule 34(b)(2)(E), that a requesting party is entitled to the production of ESI as it is ordinarily maintained or in a form that is reasonably usable for purposes of efficiently prosecuting or defending the claims and defenses involved in the matter. Consequently, the Third Edition of Principle 12 eliminates the phrase "the same ability," and instead emphasizes that the parties should follow the Federal Rules and seek to reach agreement for the production of ESI as "ordinarily maintained or in a reasonably usable form or forms" that provide the requesting party a functionally adequate ability to access, cull, analyze, search, and display the ESI, as may be appropriate given its nature and the proportional needs of the case. *See* Comment 3.c. In some cases, this will mean that the production format provides the requesting party with the same ability to access, cull, analyze, search, and display the ESI as the responding party has in prosecuting or defending the matter (which may differ from how a responding party can access or search its own data in the ordinary course of conducting its business), but that is not a requirement.

The form in which ESI is "ordinarily maintained" may not be conducive to efficient production, and a requesting party may not want or need ESI to be produced as "ordinarily maintained" as it may not be reasonably usable or functional to access, cull, analyze, search, and display the ESI. For example, emails are generally not produced in their true "native" format as they are "ordinarily maintained," but instead they are commonly transformed into an alternative, reasonably usable electronic format. More specifically, the native format for Outlook and Lotus Notes emails are not the MSG and NSF file types, respectively, but instead the emails have been taken from their native email application format and exported into those standard formats that contain the message, any attachments, and the pertinent application metadata as well as miscellaneous non-apparent data. Similarly, producing relevant database materials in their true native format may not be reasonably feasible, and the cost and effort required to produce them in native format may not be proportional to the needs of the case.[143]

While, as noted above, courts repeatedly have found under the facts presented that, in the context of Rule 34(b)(2)(E)(ii), a TIFF+ production is reasonably usable, the 2006 Advisory Committee Note to Rule 34(b) warns that "[i]f the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature." For this reason, some courts have ruled that production of static electronic images without text and load files is not reasonably usable and is therefore impermissible under Rule 34(b)(2)(E)(ii).

143. For further information on these specific issues, *see* The Sedona Conference, *Database Principles Addressing the Preservation and Production of Databases and Database Information in Civil Litigation*, 15 SEDONA CONF. J. 171 (2014).

As an alternative to producing ESI in a reasonably usable form, Rule 34(b)(2)(E)(ii) allows production in the forms in which the ESI is ordinarily maintained. The form in which ESI is "ordinarily maintained" also is not necessarily synonymous with the form in which it was created. There are occasions when legitimate business considerations involve the migration or transfer of ESI to other applications or systems.[144] For example, customer information may routinely be gathered by an organization from internet-based forms, and then stored in a relational database for further business use before any litigation-related obligations attach. The information in Microsoft Word documents, such as memoranda or correspondence, later may be transferred into static electronic images for long-term storage and retrieval. Likewise, some organizations do not keep electronically-created documents in their original format, but instead routinely transfer the content of the documents into a formal records management database system. In such cases, the form in which the ESI is maintained understandably varies from that in which it was obtained or created, but producing ESI in that form nevertheless meets the "ordinarily maintained" requirement of Rule 34(b)(2)(E)(ii).

Comment 12.b.ii. Parties should consider and understand the pros and cons of preserving and producing ESI in native format.

Depending on the circumstances of the particular matter, it may be appropriate to produce certain types of ESI, such as

144. *See The Sedona Conference Glossary: E-Discovery & Digital Information Management (Fourth Edition)*, 15 SEDONA CONF. J. 305, 341 (2014) (Native Format: "Because viewing or searching documents in the native format may require the original application (for example, viewing a Microsoft Word document may require the Microsoft Word application), documents may be converted to a neutral format as part of the record acquisition or archive process.").

spreadsheet files (e.g., Microsoft Excel), portable database files (e.g., Microsoft Access), audio/video files (e.g., WAV, JPG, GIF, MPG, MP3, DMG, etc.), and, on occasion, even presentation files (e.g., Microsoft PowerPoint) in native format. This is because a TIFF+ production of these types of ESI may not provide the requesting party relevant aspects of the ESI in a reasonably usable format. Or, for example, if there is a reasonable question regarding the authenticity of the underlying file, a forensic examination of the file (or even the underlying data source[145]) may be necessary. Thus, a format that may be reasonable for most of the production (e.g., TIFF+) may not be reasonable for a certain subset of files or even specific files.

Disadvantages to native production may include technological challenges such as the ability or inability to redact ESI effectively in its native format, and issues regarding the application of page-level Bates numbering as opposed to document-level Bates or control numbers that can be assigned and maintained for ESI produced in native format. Additionally, suitable applications for accessing, searching, and displaying native format are not always accessible to requesting parties, who may also lack the equipment or expertise required to use such applications.[146] Parties should further weigh the potential burdens and offsetting efficiencies that can come from the production of ESI in native format.

For example, in the digital age, the ease with which ESI can be copied and moved has raised concerns about the security of

145. *See* Principle 9.

146. As one commentator has observed: "One reason for the alternative production in a reasonably usable form is to prevent a party from using native format as a kind of non-production because the opposing party may not have the ability to read the ESI in its native format. The opposing party may not have access to the application in which the ESI was created." Ralph C. Losey, *Hash: The New Bates Stamp*, 12 J. TECH. L. & POL. 1, 21 n.78 (June 2007).

productions of large volumes of native format files in litigation. Just as responding parties are obligated to take reasonable steps that are proportional to the needs of the case to find and produce requested information within the scope of discovery under Rule 26(b)(1), a requesting party should take reasonable steps to secure the information they requested and received. This includes investing in appropriate physical, technical, and human security necessary to meet the obligations the requesting party inherits upon taking possession of that information.[147]

Another risk that requesting parties must consider is whether or not they have the necessary technical competence to manage large volumes of native format ESI. Counsel who lack the technical competence to handle ESI in its native format without risking spoliation or inadvertent disclosure of client confidences should either obtain professional assistance or decline the representation.[148]

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147. *See generally* The Sedona Conference, *Commentary on Privacy and Information Security: Principles and Guidelines for Lawyers, Law Firms, and Other Legal Service Providers*, 17 SEDONA CONF. J. 1 (2016). ESI productions in civil litigations can be ripe targets for corporate espionage and data breach as they may contain trade secrets and other proprietary business information; highly sensitive and private medical, health, financial, religious, sexual preference, and other personal information; or information about third parties subject to contractual confidentiality agreements. Not only may this ESI be subject to U.S. data privacy obligations, but as ESI is collected from beyond the borders of the United States, these productions may include information that involves the data privacy and protection rights of non-U.S. data subjects. A requesting party inherits the data privacy and protection obligations that come with the ESI it receives, including the responsibilities that arise from the loss of that information.

148. *See* Cal. St. Bar Standing Comm. on Prof'l Resp. & Cond., Formal Op. No. 2015-193 (June 30, 2015) (identifying nine skills relating to electronic discovery that every attorney should be able to handle, alone or in association with competent co-counsel); *see also* ABA MODEL RULES OF PROF'L CONDUCT R. 1.1, cmt. 8. *See* Comment 10.i.

Aside from production, parties should also consider the most desirable form in which to preserve relevant ESI within the scope of discovery. Preservation of ESI in native format pending agreements or decisions on the ultimate form of production may be beneficial. The failure to preserve and produce metadata or other non-apparent information contained within a native file may deprive the responding party of the opportunity later to contest the authenticity of the document if that data would be material to that determination. Similarly, subject to proportionality considerations, responding parties may wish to consider taking extraordinary preservation measures (e.g., preserving hard drives or system logs), pending agreements or decisions on the scope and form of production, when it is reasonably foreseeable that system-generated metadata[149] contains unique evidence that likely is material to the claims and defenses involved in the matter. Again, parties ideally should address such preservation issues early on in the matter as part of their required Rule 26(f) discovery planning conference; or, if unable to reach agreement, it should be brought to the court's attention in the Rule 16(b) scheduling conference or later status conference.[150]

> *Illustration i.* Plaintiff seeks the production of native format files from defendant, asserting that to prepare its case most cost-effectively and efficiently, it plans to utilize advanced technology that works best if it has native format files. Defendant asserts that it cannot redact the native format files adequately prior to production, and

149. *See The Sedona Conference Glossary: E-Discovery & Digital Information Management (Fourth Edition)*, 15 SEDONA CONF. J. 305, 357 (2014) (containing definition of "System-Generated Metadata").

150. *See* Principles 3 and 5 for more in-depth discussions regarding preservation of ESI. *See also* 2006 Advisory Comm. Note to Rule 34 (regarding retaining the original source of ESI that is subject to a duty to preserve and not degrading ESI subject to preservation and production obligations).

insists on responding with only TIFF, text, and load Files, with the images and text redacted as appropriate. Assuming that the defendant is correct in that it cannot redact native format files but has no other objection to native format production, as an alternative, defendant can produce native format files for all documents that have no redactions. For ESI with redactions, excluding spreadsheets, defendant can produce redacted TIFF images, accompanied by redacted text, and full metadata, including all non-redacted hidden elements in fields. For spreadsheets with redactions, the parties should meet and confer on the possibility of manually removing any protected content, and saving the spreadsheet as a new document for production, noting the fields removed.

Illustration ii. Plaintiff alleges that the defendant engaged in a fraud regarding software development. The plaintiff seeks a preliminary order permitting direct access to the hard drives of the software engineers involved and demonstrates that the computer program sold by defendant appears to incorporate plaintiff's source code. In this case, production of the source code in native format may be appropriate, as well as targeted forensic examination of the hard drives concerning the development of the source code. The court may condition production on terms appropriate to protect recognized legitimate intellectual property, business, and privacy interests of the defendant and its employees.

Comment 12.b.iii. Objections to unreasonable or non-proportional requests for a form or forms of production.

As discussed in Principle 2, all discovery is subject to relevancy and proportionality considerations. Thus, a responding

party that believes that a production request is unreasonable, not relevant, or not proportional may object to the requested form or forms of production, state the alternative form or forms that it intends to use, meet and confer in an effort to resolve the matter, and, if they are unable to do so, seek a protective order under Rule 26(c). *See* Comment 4.b. A responding party should not simply refuse to produce ESI in the form or forms requested, unilaterally produce in a form or forms that it prefers, or produce in forms that are not "reasonably usable" or as "ordinarily maintained." If it does so, it may well have difficulty invoking protection under Rule 34(b)(2)(E)(iii) and arguing that it need not produce the same information a second time. *See* Comment 12.d.

Comment 12.c. ***There is no requirement to label ESI to correspond to the categories in requests for production.***

Rule 34(b)(2)(E) begins with this preamble: "Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information," and goes on to state in subpart (i) that "[a] party must produce *documents* as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request."[151] Subparts (ii) and (iii) then go on to discuss ESI, providing that, among other forms, ESI can be produced in reasonably usable form or forms.

The preamble's mention of both documents and ESI has led to some confusion as to whether the labeling requirement in subpart (i) applies to ESI. There is no indication that the Advisory Committee on Civil Rules intended such a result. As explained below, there are at least four reasons why the better

151. Rule 34(b)(2)(E)(i) (emphasis added).

view is that subpart (i) only applies to documents other than ESI, and subparts (ii) and (iii) apply only to ESI.

First, when Rule 34(b) was amended in 2006 to state how ESI was to be produced, the preamble did not include the phrase "documents or electronically stored information," and instead said simply, "Unless the parties otherwise agree, or the court otherwise orders," even though, like the current version of Rule 34(b)(2)(E), subpart (i) addressed "documents" and subparts (ii) and (iii) addressed "electronically stored information." The 2007 amendments added "documents or electronically stored information" to the preamble, but those amendments were part of a project to conform style throughout the Rules, and nothing in the Advisory Committee Notes to the 2007 amendments suggests a substantive change from 2006 was intended. Second, the preamble uses the words "documents *or* electronically stored information" in the disjunctive—suggesting that the requirements of (i), (ii), and (iii) do not all apply to both documents *and* ESI, and the language of the subparts is straightforward in addressing *documents* in (i), and *ESI* in (ii) and (iii). Third, with large scale ESI productions, it would be burdensome to label every produced file "to correspond to the categories of the request," and there is little guidance as to how a party is to produce ESI as "kept in the usual course of business." Finally, the production of common metadata and source fields in a load file[152] should suffice to permit the requesting party to sort and filter materials using standard review software to determine how the materials were "kept in the usual course of business."

152. Most service providers have a list of approximately 30 common metadata and source fields that they include with productions. *See, e.g.*, LTPI Model Stipulated Production Specifications, LEGAL TECHNOLOGY PROFESSIONALS INSTITUTE, *available at* https://www.legaltechpi.org/Resource-ESI-Stipulations (last visited Feb. 14, 2017).

Accordingly, in line with several courts,[153] subpart (i) should not be interpreted to apply to ESI.

Comment 12.d. Parties need not produce the same ESI in more than one format.

Provided that the forms of production are as "ordinarily maintained" or "reasonably usable," a party is not required to produce the same information in both hard copy and electronic format, or in both native format and another electronic format, such as TIFF+.[154] A responding party should first identify the form(s) in which it proposes to produce ESI pursuant to Rule 34(b)(2)(D), or risk that the requesting party can show that the chosen form is not reasonably usable and have the court order a further, more usable production. In addition, the 2015 Advisory Committee Notes to amended Rule 34(b)(2)(C) make clear that a responding party should specifically alert other parties if requested ESI—such as metadata—is objected to and withheld, and thereby facilitate an informed discussion of the objection.

> *Illustration i.* After failing to address the issue of production in their Rule 26(f) conference, a requesting party indiscriminately demands that ESI be produced as "maintained in the ordinary course of business." The responding party timely objects to producing any ESI in native format and states that production of all ESI will be made through PDF or TIFF images with load files containing electronically searchable text and selected

153. *See, e.g.*, Kissing Camels Surgery Ctr., LLC v. Centura Health Corp., No. 12-cv-03012, 2016 WL 277721, at *3–4 (D. Colo. Jan. 22, 2016); National Jewish Health v. WedbMD Health Servs. Grp., 305 F.R.D. 247, 253 (D. Colo. 2014); Anderson Living Trust v. WPX Energy Prod. LLC, 298 F.R.D. 514, 520–27 (D.N.M. 2014).

154. Rule 34(b)(2)(E)(iii).

application metadata. *The requesting party does not respond to the objection or request to meet and confer on the topic.* Subsequently, the responding party produces emails and ESI in a PDF or TIFF format, and spreadsheets in native format, all accompanied by a load file including the searchable text and selected metadata for each item of ESI. This production satisfies Rule 34(b) because the production is in reasonably usable form, e.g., electronically searchable and paired with essential metadata, and there was no timely objection. If the requesting party moves to compel production in an additional form, for example in native format, the court should reject the request pursuant to Rule 34(b)(2)(E)(iii).

Illustration ii. After failing to address the form of production in their Rule 26(f) conference, a requesting party indiscriminately demands that ESI be produced in native format. The responding party timely objects to responding with all documents in native format and states that production instead will be made through PDF or TIFF images with load files containing electronically searchable text and limited application metadata selected by the responding party. In response, the requesting party calls for a meet and confer on the topic. During the meet and confer, the requesting party narrows its request for native format production of certain non-privileged documents, such as spreadsheets and presentation files, offering to allow for any such privileged documents with redactions to be produced in a TIFF+ format. The requesting party also asks for inclusion of some additional metadata fields in the load files associated with TIFF+ productions that will assist the requesting party's use of commonly-used technology assisted

review tools. Without agreeing to the narrowed request or seeking intervention by the court, the responding party proceeds on its own to produce emails, spreadsheets, and other ESI in TIFF+ format, including the searchable text and selected metadata for each item of ESI. This production of ESI fails to satisfy the goals of Principle 12. In making a unilateral decision about the form of production, the responding party failed to honor its Rule 26(f) and Rule 34 responsibilities to meet and confer in a reasonably cooperative manner in an effort either to resolve the issue or to present it to the court. On a motion to compel after the unilateral production, the court should consider, among other factors, whether or not the TIFF+ production was in a form reasonably usable by the requesting party for access, culling, analysis, search, and display of the information, given the nature of the information and the needs of the case. If the court were to conclude that the production was not in reasonably usable form, the court, subject to proportionality considerations, may order reproduction of the requested native format files and the additional metadata fields.

13. The costs of preserving and producing relevant and proportionate electronically stored information ordinarily should be borne by the responding party.

Comment 13.a. Factors for allocating the cost of production.

The ordinary and predictable costs of discovery, including preservation (addressed below in Comment 13.b.) and production, are borne fairly by the responding party. However, Rule 26 has long empowered courts to allocate costs in appropriate circumstances.[155]

Consideration of cost allocation traditionally has been and continues to be at the discretion of the court. Rule 26(c)(1) has long authorized orders to protect against "undue burden or expense." Rule 26(c)(1)(B) now expressly provides for entry of protective orders that allocate expenses for discovery. The 2015 Advisory Committee Note to this new provision observes, however, that cost shifting should not become a common practice and that "[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding."[156] Moreover, the party seeking cost allocation typically bears the burden to show that allocation is appropriate.

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155. Consistent with the reference in Rule 26(c)(1)(B) to "the allocation of expenses," this Principle uses "cost allocation" as shorthand for situations where some of the costs are "shared" by the parties and situations where all of the costs are "shifted" to the requesting party. This Principle is limited to the allocation of costs related to the preservation or production of ESI, even though the cost allocation in Rule 26(c) has broader applications.

156. 2015 Advisory Comm. Note to Rule 26(c)(1)(B). The Advisory Committee Note also explains: "Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority."

If the result of the proportionality analysis clearly demonstrates that the requested discovery is appropriately proportional, the discovery should be allowed with the presumption that costs will not be allocated among the parties. Conversely, if the result of the proportionality analysis clearly demonstrates that the requested discovery is not proportional, and the request is not within the permissible scope of discovery, the request should be denied and cost allocation would not apply. If, however, the result of the proportionality analysis is not clear cut, the court has discretion to allocate some or all of the costs to the requesting party. *See* Principle 8. Cost allocation, however, should not be used as a shortcut to resolve difficult proportionality analyses or to "buy" arguably disproportionate discovery. *See* Comment 13.c.

Factors to be considered in the context of allocating costs for the production of ESI overlap with the proportionality factors in Rule 26(b)(1) and include:

1) the extent to which the request is specifically tailored to discover relevant information;
2) the availability of such information from other sources, including testimony, requests for admission, interrogatories, and other discovery responses;
3) the importance of the issues at stake in the litigation;
4) the total cost of production, compared to the amount in controversy;
5) the total cost of production, compared to the resources available to each party; and
6) the relative ability of each party to control costs and its incentive to do so.

Thus, while certain of these factors also may bear on the court's proportionality analysis, the factors listed above are intended to be weighed separately in the unique circumstance of determining whether cost allocation is appropriate.

Comment 13.b. The cost of preservation should be allocated only in extraordinary circumstances.

Just as the costs of production ordinarily are borne by the responding party, the ordinary and predictable costs of preservation typically are borne by the preserving party, subject to application of proportionality principles. In the rare circumstance where the requesting party makes specific preservation demands and complying with those demands would require extensive and costly efforts or resources, cost allocation may be appropriate.

Cost allocation should not be used to expand preservation obligations beyond what is proportionate to the needs of the case. Courts should discourage burdensome preservation demands that have little or no reasonable prospect of producing material assistance to the fact finder. *See* Comment 5.e.

As with the costs of production, the party seeking to allocate the cost of preservation bears the burden of persuasion. That burden of persuasion may be satisfied more readily at various stages in the case, including after discovery has closed and summary judgment motions have been adjudicated, when information that was preserved but has not been produced is less likely to be requested or produced. For example, where a case has been disposed of by the trial court and is awaiting resolution of an appeal and the responding party desires to stop preserving potentially relevant ESI that was not reviewed by the requesting party, cost allocation may be appropriate if the requesting party insists that the ESI be preserved during the pendency of the appeal.

Comment 13.c. Cost allocation cannot replace reasonable limits on the scope of discovery.

Allocating the costs of extraordinary ESI discovery efforts should not be used as an alternative to sustaining a responding party's objection to undertaking such efforts in the first place. Instead, extraordinary discovery efforts should be required only where the requesting party demonstrates substantial need or justification, and cost allocation may be a condition of allowing such discovery efforts to proceed.

> *Illustration i.* A requesting party demands that the responding party preserve, restore, and produce ESI from a backup tape. The requesting party produces some evidence that relevant ESI, not available elsewhere, may exist on the tape. The ESI, not being reasonably accessible, is costly to acquire, and the responding party seeks a protective order conditioning its production upon payment of costs. Absent proof that the responding party intentionally has deleted ESI that is relevant to the issues in the case to avoid discovery obligations, the court should order the requesting party to pay at least a portion of the costs.
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> *Illustration ii.* A requesting party demands that the responding party preserve, restore, and produce ESI about a topic in dispute from backup media. The requesting party produces evidence that important relevant ESI, not available elsewhere, is likely to exist on the media. The ESI is reasonably accessible but is somewhat burdensome to acquire, and the responding party seeks a protective order conditioning its production upon payment of costs. The protective order should be denied.

Comment 13.d. Non-party requests must be narrowly focused to avoid mandatory cost allocation.

Since 1991, Rule 45 has required persons issuing subpoenas to take reasonable steps to avoid imposing undue burdens or expense on the subpoenaed person and, if objection is made, any order to compel production "must protect [the subpoenaed person] from significant expense." The 1991 Advisory Committee Note to Rule 45 explains as follows:

> A non-party required to produce documents or materials is protected against significant expense resulting from involuntary assistance to the court . . . . The court is not required to fix the costs in advance of production, although this will often be the most satisfactory accommodation to protect the party seeking discovery from excessive costs. In some instances, it may be preferable to leave uncertain costs to be determined after the materials have been produced, provided that the risk of uncertainty is fully disclosed to the discovering party.

In support of this proposition, the Advisory Committee cited a 1982 Ninth Circuit decision in a case where non-parties produced more than six million documents, and the costs of non-party discovery exceeded $2 million. In light of the potentially significant burdens associated with non-party discovery, parties seeking information from non-parties have a substantial interest in narrowly tailoring requests to avoid a greater likelihood that a court may impose cost allocation. Indeed, parties seeking information from non-parties should be prepared to address these issues at informal meet and confer discussions to determine if disputes can be resolved by agreement instead of court rulings on a motion to quash or a motion to compel. *See* Comment 3.a.

The nature of the relationship between the non-party and parties to the litigation also may bear on cost allocation. If, for example, a party's accountant, payroll processing company, or another contracted entity is subject to a subpoena, the court may be less likely to allocate costs than for a non-party that has no affiliation or relationship with the parties in the case.[157]

157. *See* FED. R. CIV. P. 45(d)(2)(B)(ii) (protection not mandatory for a party's officer); Chevron Corp. v. Donziger, 11 Civ. 0691, 2013 WL 1087236, at *32–33 (S.D.N.Y. March 15, 2013); *see also* The Sedona Conference, *Commentary on Rule 34 and Rule 45 "Possession, Custody or Control,"* 17 SEDONA CONF. J. 467 (2016).

14. The breach of a duty to preserve electronically stored information may be addressed by remedial measures, sanctions, or both: remedial measures are appropriate to cure prejudice; sanctions are appropriate only if a party acted with intent to deprive another party of the use of relevant electronically stored information.

Comment 14.a. Historical background and the adoption of the 2015 amendment to Rule 37(e).

Case law concerning spoliation sanctions has evolved substantially in recent years. A circuit split had emerged on the issue of whether a court could impose spoliation sanctions for the negligent loss of relevant ESI, or whether a showing of bad faith was required.[158] The December 2015 amendment of Rule 37(e) was intended to resolve this circuit split, and provides that consequences for failure to preserve ESI are available only upon a finding that the ESI should have been preserved, the party failed to take reasonable steps to preserve the ESI, and the relevant ESI cannot be restored or replaced.

Principle 14 has long recognized that there must be a sufficient level of culpability to support the imposition of spoliation sanctions, and that unintentional spoliation resulting in prejudice more appropriately may be addressed through remedial measures. Having clarified that unintentional destruction of relevant ESI is not sufficient to trigger the imposition of spoliation sanctions, Rule 37(e) now is aligned in that respect with

158. 2015 Advisory Comm. Note to Rule 37(e) ("Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough."); *see* Victor Stanley v Creative Pipe, 269 F.R.D. 497, 523–37 (D. Md. 2010).

The Sedona Principles.[159] The concepts of this Principle 14 should apply in all relevant litigation contexts, including in state courts that do not have procedural rules to the contrary.[160]

Comment 14.b. Conditions for imposition of remedial measures and sanctions.

Neither remedial measures nor sanctions for failure to preserve relevant ESI are available under Rule 37(e) unless all of the following conditions are met: (1) the ESI should have been preserved in the anticipation or conduct of litigation; (2) the ESI is lost because a party failed to take reasonable steps to preserve it; and (3) the ESI cannot be restored or replaced through additional discovery. Accordingly, no remedy is available if a party had no duty to preserve the ESI, or if the relevant ESI is still available, or if the relevant ESI was lost despite the party having taken reasonable steps to preserve it.

If a court concludes that the party failed to take reasonable steps to preserve the ESI, the court must consider whether the ESI can be restored or replaced by other means. If the ESI cannot be restored or replaced, the court may continue its analysis to determine whether remedial measures or sanctions may be appropriate.

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159. Rule 37 does not use the term "sanctions." Instead, the 2015 Advisory Committee Note explains that the consequences authorized under Rule 37(e)(2) when there is an intent to deprive are "very severe measures to address or deter failures to preserve electronically stored information." Principle 14 uses "sanctions" as shorthand for these and other "severe measures" to address or deter failures to preserve ESI.

160. Rule 37(e) expressly addresses only ESI, and not tangible things or hard copy documents. Common law and state laws about the loss or destruction of potential evidence may conflict with Rule 37(e)'s approach to claims about the loss of ESI. This Principle addresses only the loss of ESI, and differs in one respect from Rule 37(e). That *difference* is discussed in Comment 14.d.

Under Rule 37(e)(1), remedial measures are available upon a finding of prejudice (*see* Comment 14.c.), whereas Rule 37(e)(2) clarifies that spoliation sanctions are available only upon a finding of intent to deprive another party of the use of the irretrievably lost information that cannot be replaced through additional discovery or other means. *See* Comment 14.d. Remedial measures and spoliation sanctions are described in further detail below.

Comment 14.c. Remedial measures are intended to redress prejudice.

Upon a finding of prejudice, a court may direct a party that has lost relevant ESI to undertake remedial measures no greater than necessary to redress the prejudice and place the requesting party in the position it would have been in if the lost, relevant ESI had been produced. Remedial measures may include orders for additional discovery or allocation of costs or attorneys' fees, and other measures traditionally employed by courts. Remedial measures should not be applied as a substitute for sanctions, the purpose of which is to punish undesired behavior; the application of remedial measures should not be limited, however, such that the party that has lost relevant ESI is in a better position than it would have been in had the lost relevant ESI been produced to the requesting party.

Determining whether the loss of relevant information results in prejudice requires an evaluation of whether the lost information is irretrievable or can be replaced, and whether the lost information is both unique and important to the litigation. Destruction of relevant but duplicative information, for example, is not prejudicial.

Rule 37(e) does not identify which party bears the burden of proving prejudice and instead, according to the 2015 Advisory Committee Note, leaves the parties to make their respective showings and the court, to its discretion. A party deprived of

relevant information, however, likely faces a quandary when attempting to establish the prejudice that is a prerequisite to imposition of remedial measures, given the absence of the spoliated information.

In addition, the timeliness of a challenge to production failures also may bear on prejudice, or the lack of it. Since their inception, *The Sedona Principles* have urged an early constructive dialogue between parties regarding preservation obligations and expectations. The Federal Rules and many state counterparts also have adopted disclosure requirements as well as the presumption of early dialogue on issues relating to ESI. A corollary to these early discussions is that untimely challenges to production failures may not provide a basis for relief.

> *Illustration i.* A requesting party does not object when ESI is produced without metadata. Shortly before trial, it files a motion for sanctions and requests an adverse inference instruction based on the failure to produce metadata. Having not raised the issue earlier, the party waived the right to seek metadata or sanctions.

Comment 14.d. ***Sanctions may be appropriate where the court finds an "intent to deprive."***

Sanctions are available only upon a finding of intent to deprive another party of the use of the irretrievably lost information that cannot be replaced through additional discovery or other means. Adoption of the "intent to deprive" standard is intended to establish a uniform standard for addressing failure to preserve relevant ESI and is consistent with the historic roots of the duty to preserve and the desire to avoid the sometimes-inconsistent standards for "intentional destruction." A finding of intent to deprive is also consistent with the premise of an adverse inference instruction, which assumes that a party's intentional loss or destruction of evidence gives rise to a reasonable

inference that the evidence was unfavorable to the party responsible for its loss or destruction.

This Principle differs from amended Rule 37(e)(2) in one respect—the "incompetent spoliator." Although the Rule requires a finding of irretrievable loss before a court may impose remedial measures or sanctions, this Principle recognizes that remedial measures or some form of sanctions (e.g., paying a fine to the court) may be appropriate to defer future behaviors where there was an intent to deprive but ultimately no irretrievable loss.

> *Illustration i.* Two days after a party is scheduled to turn over the laptop of a key executive, the executive runs a program called "Evidence Eliminator" on the laptop resulting in the loss of relevant ESI to the prejudice of the requesting party. The requesting party provides the court with forensic evidence establishing the foregoing facts. The court finds an intent to deprive the requesting party of the use of relevant ESI on the laptop. The court may order both remedial measures and sanctions against the responding party and, if appropriate, the key executive individually.
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> *Illustration ii.* The same facts as set forth in *Illustration i* above; however, through advanced forensic technology, the ESI erased by the "Evidence Eliminator" software is restored in full or in large part. Under the concepts of this Principle 14 (but not Rule 37(e)), the court may elect to order remedial measures and sanctions against the responding party and, if appropriate, the key executive, including payment of the requesting party's reasonable

expenses (including attorneys' fees) incurred in recovering the wiped data and litigating the issue.[161]

Illustration iii. The requesting party asks for relevant ESI from the company-issued laptop of a key former executive. The responding party advises that the laptop was subject to a litigation hold and preserved for more than a year, after which the company installed a new archiving system. The responding party contends that in-house counsel was consulted about the laptop by the IT department during the transfer to the new archiving system and that in-house counsel directed that the data on the laptop's hard drive be imaged and stored to the company's server before the laptop was reissued. The company ultimately acknowledges its inability to locate the laptop data on its servers or backup tapes. The court finds that the laptop included relevant, irreplaceable ESI but that the responding party did not delete the ESI on the executive's hard drive with the intent to deprive the requesting party of the relevant ESI. The court therefore orders that the responding party pay the requesting party's attorneys' fees incurred in litigating the issue, but should not issue spoliation sanctions.

161. *See* CAT3, LLC v. Black Lineage, 14 Civ. 5511, 2016 WL 154116 (S.D.N.Y. Jan. 12, 2016).

APPENDIX A: TABLE OF AUTHORITIES

Federal Cases

Anderson Living Trust v. WPX Energy Prod. LLC, 298 F.R.D. 514 (D.N.M. 2014) 184

Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) 61

Blue Sky Travel & Tours v. Al Tayyar, 606 Fed. App'x. 689 (4th Cir. 2015) 106

Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331 (E.D. Pa. 2012) 96

Braxton v. Farmer's Ins. Group, 209 F.R.D. 651 (N.D. Ala. 2002) 133

Burnett v. Ford Motor Co., No. 3:13-cv-14207, 2015 WL 4137847 (S.D.W. Va. July 8, 2015) 78

Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614 (D. Colo. 2007) 121

CAT3, LLC v. Black Lineage, 14 Civ. 5511, 2016 WL 154116 (S.D.N.Y. Jan. 12, 2016) 198

Chevron Corp. v. Donziger, 11 Civ. 0691, 2013 WL 1087236 (S.D.N.Y. March 15, 2013) 192

Chin v. Port Auth., 685 F.3d 135 (2d Cir. 2012) 119, 120

DeGeer v. Gillis, 755 F. Supp. 2d 909 (N.D. Ill. 2010) 78

Diepenhorst v. City of Battle Creek, No. 1:05-CV-734, 2006 WL 1851243 (W.D. Mich. June 30, 2006) 118

Dynamo Holdings Ltd. P'ship v. Comm'r, No. 2685-11, 2014 WL 4636526 (U.S. Tax Ct. Sept. 17, 2014) 118, 120

Federal Housing Finance Agency v. HSBC North America Holdings Inc., No. 11 Civ., 2014 WL 584300 (S.D.N.Y. Feb. 14, 2014) 102

Ford Motor Co. v. Edgewood Props., Inc., 257 F.R.D. 418 (D.N.J. 2009) 121

Freedman v. Weatherford Int'l, No. 12 Civ. 2121, 2014 WL 4547039 (S.D.N.Y. Sept. 12, 2014) 123

Heller v. City of Dallas, 303 F.R.D. 466 (N.D. Tex. 2014) 87

Hopson v. Mayor of Baltimore, 232 F.R.D. 228 (D. Md. 2005) 149

Hubbard v. Potter, 247 F.R.D. 27 (D.D.C. 2008) 124

Hyles v. New York City, 10 Civ. 3119, 2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016) 120

Hynix Semiconductor Inc. v. Rambus Inc., 645 F.3d 1336 (Fed. Cir. 2011) 94, 102

In re Dow Corning Corp., 261 F.3d 280 (2d Cir. 2001) 153

In re Ford Motor Co., 345 F.3d 1315 (11th Cir. 2003)..... 123

In re Honeywell Int'l. Inc. Sec. Litig., 230 F.R.D. 293 (S.D.N.Y. 2003)..... 124

In re Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060 (N.D. Cal. 2006) 97

Kissing Camels Surgery Ctr., LLC v. Centura Health Corp., No. 12-cv-03012, 2016 WL 277721 (D. Colo. Jan. 22, 2016) 184

Kleen Prods, LLC v. Packaging Corp. of Am., No. 10 C 5711, 2012 WL 4498465 (N.D. Ill. Sept. 28, 2012)..... 120

Kleen Prods. LLC et al v. International Paper et al, Civ. No. 1:10-cv-05711, Doc. 319, Ex. A (N.D. Ill. May 17, 2012) (Tr. of Proceedings before the Hon. Nan Nolan) 121

Koninklijke Philips N.V. v. Hunt Control Sys., Inc., No. 11-cv-03684, 2014 WL 1494517 (D.N.J. Apr. 16, 2014) 123

Larsen v. Coldwell Banker Real Estate Corp., No. SACV 10-00401, 2012 WL 359466 (C.D. Cal. Feb. 2, 2012) 123

Little Hocking Water Assn., Inc. v. E.I. DuPont de Nemours & Co., No. 2:09-cv-1081, 2013 WL 608154 (S.D. Ohio Feb. 19, 2013) 121

Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354 (D. Md. 2008) 76, 87, 88, 91

Memory Corp. v. Kent. Oil Tech., No. C04-03843, 2007 WL 832937 (N.D. Cal. Mar. 19, 2007) 124

Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311 (Fed. Cir. 2011) 94, 102

Murphy Oil USA, Inc. v. Fluor Daniel, Inc., No. Civ. A. 99-3564, 2002 WL 246439 (E.D. La. Feb. 19, 2002) 153

National Jewish Health v. WedbMD Health Servs. Grp., 305 F.R.D. 247 (D. Colo. 2014) 184

Orbit One Commc'ns, Inc. v. Numerex Corp., 271 F.R.D. 429 (S.D.N.Y. 2010) 136

Orillaneda v. French Culinary Inst., No. 07 Civ. 3206, 2011 WL 4375365 (S.D.N.Y. Sept. 19, 2011) 124

Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456 (S.D.N.Y. 2010) 103

Quinby v. WestLB AG, 245 F.R.D. 94 (S.D.N.Y. 2006)..... 137

Rio Tinto PLC v. Vale S.A., 2015 WL 872294 (S.D.N.Y. Mar. 2, 2015) 120

Romero v. Allstate Ins., 271 F.R.D. 96 (E.D. Pa. 2010)..... 78

Ruiz-Bueno v. Scott, No. 2:12-cv-0809, 2013 WL 6055402 (S.D. Ohio Nov. 15, 2013) 78
Scalera v. Electrograph Sys., Inc., 262 F.R.D. 162 (E.D.N.Y. 2009) 136
SEC v. Strauss, No. 09 Civ. 4150, 2009 WL 3459204 (S.D.N.Y. Oct. 28, 2009) 128
Steuben Foods, Inc. v. Country Gourmet Foods, LLC, No. 08-CV-561S, 2011 WL 1549450 (W.D.N.Y. 2011) 124
Theofel v. Farey-Jones, 359 F.3d 1066 (9th Cir. 2003) 132
Treppel v. Biovail Corp., 233 F.R.D. 363 (S.D.N.Y. 2006) 136
Victor Stanley v Creative Pipe, 269 F.R.D. 497 (D. Md. 2010) 193
Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008) 149
Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003) 111

Constitutional Provisions

U.S. CONST. amend. I 123

Statutes

18 U.S.C. § 1519 93
18 U.S.C. §§ 2701–2712 98
ABA MODEL RULES OF PROF'L CONDUCT 160
ABA MODEL RULES OF PROF'L CONDUCT R. 1.1 179
ABA MODEL RULES OF PROF'L CONDUCT R. 5.1 130
ABA MODEL RULES OF PROF'L CONDUCT R. 5.3 130
Cal. St. Bar Standing Comm. On Prof'l Resp. & Cond., Formal Op. No. 2015-193 (June 30, 2015) 130, 179
Computer Fraud and Abuse Act, 18 U.S.C. § 1030 133
Stored Communications Act, 18 U.S.C. § 2701 *et seq.* 133

Federal Rules

FED. R. CIV. P. 1 ..... 31, 97
FED. R. CIV. P. 26(a) 118
FED. R. CIV. P. 26(b)(1) 56, 75, 104, 135
FED. R. CIV. P. 26(b)(2)(B) 92, 135
FED. R. CIV. P. 26(b)(5)(A) 81
FED. R. CIV. P. 26(c) 135
FED. R. CIV. P. 26(c)(1)(B) 187
FED. R. CIV. P. 26(d)(2) 72

FED. R. CIV. P. 26(f) 172
FED. R. CIV. P. 26(f)(3)(C) 88, 125
FED. R. CIV. P. 26(g)(1)(B) 88
FED. R. CIV. P. 33(b)(1)(A) 118
FED. R. CIV. P. 34 172
FED. R. CIV. P. 34(b)(2) 118
FED. R. CIV. P. 34(b)(2)(C) 92
FED. R. CIV. P. 34(b)(2)(E)(i) 182
FED. R. CIV. P. 34(b)(2)(E)(iii) 184
FED. R. CIV. P. 36(a)(3) 118
FED. R. CIV. P. 37 194
FED. R. CIV. P. 37(a)(1) 131
FED. R. CIV. P. 37(e) 194
FED. R. CIV. P. 45(a)(1)(A)(iii) 57
FED. R. CIV. P. 45(a)(1)(C) 89
FED. R. CIV. P. 45(d)(1) 75, 89, 97
FED. R. CIV. P. 45(d)(2)(B)(ii) 192
FED. R. CIV. P. 45(e)(1)(B) 89
FED. R. CIV. P. 45(e)(1)(C) 89
FED. R. EVID. 502 82

Advisory Committee Notes

1946 Advisory Comm. Note to FED. R. CIV. P. 26 56
1983 Advisory Comm. Note to FED. R. CIV. P. 26(g) 119
1991 Advisory Comm. Note to FED. R. CIV. P. 45 132
1993 Advisory Comm. Note to FED. R. CIV. P. 26(b) 82
1993 Advisory Comm. Note to FED. R. CIV. P. 26(b)(5) 159
2006 Advisory Comm. Note to FED. R. CIV. P. 26 97
2006 Advisory Comm. Note to FED. R. CIV. P. 26(b)(2) 139
2006 Advisory Comm. Note to FED. R. CIV. P. 26(b)(2)(B) 92
2006 Advisory Comm. Note to FED. R. CIV. P. 26(f) 59
2006 Advisory Comm. Note to FED. R. CIV. P. 34 ..... 57, 128, 180
2010 Advisory Comm. Note to FED. R. CIV. P. 26(b)(4) 85
2015 Advisory Comm. Note to FED. R. CIV. P. 1 ..... 31, 77, 97, 125

2015 Advisory Comm. Note to FED. R. CIV. P. 26(b)(1) 58, 66
2015 Advisory Comm. Note to FED. R. CIV. P. 26(c)(1)(B) 187
2015 Advisory Comm. Note to FED. R. CIV. P. 26(d)(2) 72
2015 Advisory Comm. Note to FED. R. CIV. P. 34 ..... 89, 90
2015 Advisory Comm. Note to FED. R. CIV. P. 37 194
2015 Advisory Comm. Note to FED. R. CIV. P. 37(e) 95, 193
Advisory Comm. Note to FED. R. EVID. 502(b) 148

State Rules

ALASKA CIV. R. 26(b)(1) 56
TEX. R. CIV. P. 196.4 57

The Sedona Conference Publications

T*he Sedona Conference Glossary: E-Discovery & Digital Information Management (Fourth Edition)*, 15 SEDONA CONF. J. 305 (2014) ..... passim
The Sedona Conference, *Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 15 SEDONA CONF. J. 217 (2014) 164, 167
The Sedona Conference, *Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189 (2007) 121
The Sedona Conference, *Commentary on Achieving Quality in the E-Discovery Process*, 15 SEDONA CONF. J. 265 (2013) 88
The Sedona Conference, *Commentary on Inactive Information Sources*, THE SEDONA CONFERENCE (July 2009 Public Comment Version) 116
The Sedona Conference, *Commentary on Information Governance*, 15 SEDONA CONF. J. 125 (2014) ..... passim
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APPENDIX B: DISCOVERY IN A WORLD OF ELECTRONIC DOCUMENTS AND DATA—2007[162]

How is Discovery of Electronically Stored Information Different from Discovery of Paper Documents?

The answer to the question—"why and how is electronic discovery different?"—lies in the subtle, but sometimes profound, ways in which electronic documents present unique opportunities and problems for document production. Magistrate Judge Nan Nolan noted some of these differences in *Byers v. Illinois State Police,* 53 Fed. R. Serv. 3d 740, No. 99 C 8105, 2002 WL 1264004 (N.D. Ill. May 31, 2002):

> Computer files, including e-mails, are discoverable. . . . However, the Court is not persuaded by the plaintiffs' attempt to equate traditional paper-based discovery with the discovery of e-mail files. . . . Chief among these differences is the sheer volume of electronic information. E-mails have replaced other forms of communication besides just paper-based communication. Many informal messages that were previously relayed by telephone or at the water cooler are now sent via e-mail. Additionally, computers have the ability to capture several copies (or drafts) of the same e-mail, thus multiplying the volume of documents. All of these

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162. Excerpted and adapted from the Introduction to the Second Edition of *The Sedona Principles* (2007) with permission from The Sedona Conference. As noted in the Introduction to *The Sedona Principles, Third Edition,* technology has moved quickly, and some of the points in this Appendix may seem quaint as well as outdated. For one new to electronic discovery, however, the points should provide a helpful orientation to the differences from past experience. The editors have changed citation styles within this excerpt for purposes of consistency and clarity. Footnote numbering in this excerpt does not reflect the original numbering.

> e-mails must be scanned for both relevance and privilege. Also, unlike most paper-based discovery, archived e-mails typically lack a coherent filing system. Moreover, dated archival systems commonly store information on magnetic tapes which have become obsolete. Thus, parties incur additional costs in translating the data from the tapes into useable form.

Id. at *31–33.

The qualitative and quantitative differences between producing paper documents and electronic information can be grouped into the following six broad categories.

A. Volume and Duplicability

There is substantially more electronically stored information than paper documents, and electronically stored information is created and replicated at much greater rates than paper documents.

The dramatic increase in e-mail usage and electronic file generation poses particular problems for large data producers, both public and private. A single large corporation can generate and receive millions of emails and electronic files each day. A very high percentage of information essential to the operation of public and private enterprises is stored in electronic format and never printed to paper. Not surprisingly, the proliferation of the use of electronically stored information has resulted in vast information accumulations. While a few thousand paper documents are enough to fill a file cabinet, a single computer tape or disk drive the size of a small book can hold the equivalent of millions of printed pages. Organizations often accumulate thousands of such tapes as data is stored, transmitted, copied, replicated, backed up, and archived.

Electronic information is subject to rapid and large-scale user-created and automated replication without degradation of the data. Email provides a good example. Email users frequently send the same email to many recipients. These recipients, in turn, often forward the message, and so on. At the same time, email software and the systems used to transmit the messages automatically create multiple copies as the messages are sent and resent. Similarly, other business applications are designed to periodically and automatically make copies of data. Examples of these include web pages that are automatically saved as cache files and file data that is routinely backed up to protect against inadvertent deletion or system failure.[163]

B. Persistence

Electronically stored information is more difficult to dispose of than paper documents. A shredded paper document is essentially irretrievable.[164] Likewise, a paper document that has been discarded and taken off the premises for disposal as trash is generally considered to be beyond recovery. Disposal of electronically stored information is another matter altogether. The term "deleted" is misleading in the context of electronic data, because it does not equate to "destroyed." Ordinarily, "deleting" a file

163. Neither the users who created the data nor information technology personnel are necessarily aware of the existence and locations of the copies. For instance, a word processing file may reside concurrently on an individual's hard drive, in a network-shared folder, as an attachment to an email, on a backup tape, in an internet cache, and on portable media such as a CD or floppy disk. Furthermore, the location of particular electronic files typically is determined not by their substantive content, but by the software with which they were created, making organized retention and review of those documents difficult.

164. Modern technology, however, has made recovery at least a theoretical possibility. *See* Douglas Heingartner, *Back Together Again*, N.Y. TIMES, July 17, 2003, at G1 (describing technology that can reconstruct cross-shredded paper documents).

does not actually erase the 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. This persistence of electronic data compounds the rate at which electronic data accumulates and creates an entire subset of electronically stored information that exists unknown to most individuals with ostensible custody and ostensible control over it.

C. Dynamic, Changeable Content

Computer information, unlike paper, has content that is designed to change over time even without human intervention. Examples include: workflow systems that automatically update files and transfer data from one location to another; backup applications that move data from one storage area to another to function properly; web pages that are constantly updated with information fed from other applications; and email systems that reorganize and purge data automatically. As a result, unlike paper documents, much electronically stored information is not fixed in a final form.

More generally, electronically stored information is more easily and more thoroughly changeable than paper documents. Electronically stored information can be modified in numerous ways that are sometimes difficult to detect without computer forensic techniques. Moreover, the act of merely accessing or moving electronic data can change it. For example, booting up a computer may alter data contained on it. Simply moving a word processing file from one location to another may change creation or modification dates found in the metadata. In addition, earlier drafts of documents may be retained without the user's knowledge.

D. Metadata

A large amount of electronically stored information, unlike paper, is associated with or contains information that is not readily apparent on the screen view of the file. This additional information is usually known as "metadata." Metadata includes information about the document or file that is recorded by the computer to assist in storing and retrieving the document or file. The information may also be useful for system administration as it reflects data regarding the generation, handling, transfer, and storage of the document or file within the computer system. Much metadata is not normally accessible to the computer user.

There are many examples of metadata. Such information includes file designation, create and edit dates, authorship, comments, and edit history. Indeed, electronic files may contain hundreds or even thousands of pieces of such information. For instance, email has its own metadata elements that include, among about 1,200 or more properties, such information as the dates that mail was sent, received, replied to or forwarded, blind carbon copy ("bcc") information, and sender address book information. Typical word processing documents not only include prior changes and edits but also hidden codes that determine such features as paragraphing, font, and line spacing. The ability to recall inadvertently deleted information is another familiar function, as is tracking of creation and modification dates.

Similarly, electronically created spreadsheets may contain calculations that are not visible in a printed version or hidden columns that can only be viewed by accessing the spreadsheet in its "native" application, that is, the software application used to create or record the information. Internet documents contain hidden data that allow for the transmission of information between an internet user's computer and the server on which the internet document is located. So-called "meta-tags" allow search engines to locate websites responsive to specified search

criteria. "Cookies" are text files placed on a computer (sometimes without user knowledge) that can, among other things, track usage and transmit information back to the cookie's originator.[165]

Generally, the metadata associated with files used by most people today (such as Microsoft Office™ documents) is known as "application metadata." This metadata is embedded in the file it describes and moves with the file when it is moved or copied. On the other hand, "system metadata" is not embedded within the file it describes but stored externally. System metadata is used by the computer's file system to track file locations and store information about each file's name, size, creation, modification, and usage.

Understanding when metadata is relevant and needs to be preserved and produced represents one of the biggest challenges in electronic discovery. Sometimes metadata is needed to authenticate a disputed document or to establish facts material to a dispute, such as when a file was accessed in a suit involving theft of trade secrets. In most cases, however, the metadata will have no material evidentiary value—it does not matter when a document was printed, or who typed the revisions, or what edits were made before the document was circulated. There is also the real danger that information recorded by the computer as application metadata may be inaccurate. For example, when a new employee uses a word processing program to create a memorandum by using a memorandum template created by a former employee, the metadata for the new memorandum may

165. There is much confusion over the use of terms, and distinctions between application and system metadata can be confusing. *See* Craig Ball, *Understanding Metadata: Knowing Metadata's Different Forms and Evidentiary Significance Is Now an Essential Skill for Litigators*, 13 LAW TECH. NEWS 36 (Jan. 2006).

incorrectly identify the former employee as the author. However, the proper use of metadata in litigation may be able to provide substantial benefit by facilitating more effective and efficient searching and retrieval of electronically stored information.

E. Environment-Dependence and Obsolescence

Electronic data, unlike paper data, may be incomprehensible when separated from its environment.[166] For example, the information in a database may be incomprehensible when removed from the structure in which it was created. If the raw data (without the underlying structure) in a database is produced, it will appear as merely a long list of undefined numbers. To make sense of the data, a viewer needs the context, including labels, columns, report formats, and similar information. Report formats, in particular, allow understandable, useable information to be produced without producing the entire database. Similarly, stripping metadata and embedded data from the data files such as spreadsheets can substantially impair the functionality of the file and the accuracy of the production as a fair representation of the file as kept and used in the ordinary course of business.

Also, it is not unusual for an organization to undergo several migrations of data to different platforms within a few years. Because of rapid changes in computer technology, neither the personnel familiar with the obsolete systems nor the technological infrastructure necessary to restore the out-of-date systems may be available when this "legacy" data needs to be accessed. In a perfect world, electronically stored information that has contin-

166. In addition, passwords, encryption, and other security features can limit the ability of users to access electronic documents.

uing value for business purposes or litigation would be converted for use in successor systems, and all other data would be discarded. In reality, such migrations are rarely flawless.

F. Dispersion and Searchability

While a user's paper documents will often be consolidated in a handful of boxes or filing cabinets, the user's electronically stored information may reside in numerous locations—desktop hard drives, laptop computers, network servers, floppy disks, flash drives, CD-ROMs, DVDs, and backup tapes. Many of these electronic documents may be identical backup copies or archive copies. However, some documents may be earlier versions drafted by that user or by other users who can access those documents through a shared electronic environment.

Consequently, it may be more difficult to determine the provenance of electronically stored information than paper documents. The ease of transmitting electronic data and the routine modification and multi-user editing process may obscure the origin, completeness, or accuracy of a document. Electronic files are often stored in shared network folders that may have departmental or functional designations rather than author information. In addition, there is growing use of collaborative software that allows for group editing of electronic data, making authorship determination more difficult. Finally, while electronically stored information may be stored on a location, such as a local hard drive, it is likely that such documents may also be found on high-capacity, undifferentiated backup tapes, or on network servers—not under the custodianship of an individual who may have "created" the document.

While the dispersed nature of electronically stored information complicates discovery, the fact that many forms of electronically stored information and media can be searched quickly and accurately by automated methods provides new efficiencies and economies. In many instances, software is able to

search through far greater volumes of these types of electronically stored information than human beings could review manually.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THERMO FISHER SCIENTIFIC PSG CORPORATION, Plaintiff and Counterclaim-Defendant, v. ARRANTA BIO MA, LLC, Defendant and Counterclaim-Plaintiff.	)	C.A. No. 2022-0608-NAC

ORDER GRANTING IN PART DEFENDANT'S RENEWED MOTION TO COMPEL

WHEREAS:

1. This matter involves bifurcated litigation, a portion of which relating to certain non-compete claims between Plaintiff and Defendant has been expedited. I held trial on the expedited portion of the action on December 15 and 16, 2022. The non-expedited portion of the litigation is set for trial in mid-September 2023.

2. On November 7, 2022, Defendant filed a motion to compel based on, among other things, multiple deficiencies in Plaintiff's privilege log. Plaintiff elected to stand on its log and filed its opposition on November 11, 2022. Defendant filed its reply on November 14, 2022.

3. I heard argument on November 15, 2022, and entered an order that evening granting Defendant's motion in part. Although troubled by the many

categories of deficiencies identified by Defendant, I declined to enter a broader production ruling at that time based on the arguments presented.

4. On November 20, 2022, Plaintiff filed a motion for reargument of my November 15 order. In connection with the motion for reargument, Plaintiff submitted a revised log. I directed that Defendant file any opposition by noon on Wednesday, November 23, 2022, the day before Thanksgiving. I then issued a letter decision on Monday, November 28, 2022, largely denying the motion for reargument. I found several aspects of the revised log concerning. For purposes of this order, however, I note only that the November 15 order directed the production of documents underlying approximately 560 log entries. Plaintiff's revised log voluntarily dropped nearly 20% of those entries. As I noted at the time, "[i]f that is meant to be comforting, it is not. That error rate is, if anything, eyebrow-raising at this stage." D.I. 171 at 8.

5. Plaintiff produced the documents required by the November 15 order on the evening of November 29, 2022.

6. With the benefit of the newly produced documents, Defendant filed a Renewed Motion To Compel Relating To Plaintiff's Wrongful Privilege Designations on December 6, 2022, and an amended version of the motion on December 8, 2022 (the "Motion"). On December 12, 2022, Plaintiff filed its opposition to the Motion.

7. I heard argument on the Motion on December 14, 2022. As a result of my ever-increasing concerns with Plaintiff's log, at the conclusion of argument I directed Plaintiff to submit for *in camera* review 100 documents of Defendant's choosing from the remaining entries on Plaintiff's log which were not the subject of my November 15 production order.[1]

8. I have completed my *in camera* review and am prepared to rule on Defendant's Motion.

NOW, THEREFORE, the Court having carefully considered the Motion papers and oral argument on the Motion, and having conducted an *in camera* review of 100 documents following argument, IT IS HEREBY ORDRED, this 18th day of January 2023, as follows:

1. In withholding otherwise responsive documents on the basis of privilege, the party claiming privilege—Plaintiff in this instance—bears the burden to show why and in what way the information requested is privileged. *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992). Plaintiff must "provide 'precise and certain reasons'" why privilege applies for each document over which privilege is claimed.

[1] References to entries on Plaintiff's log refer to those entries included in the revised log submitted by Plaintiff in connection with its motion for reargument filed on November 20, 2022. In its revised log, Plaintiff identifies documents by document number using the following format: "Patheon-Priv-[Document Number]." For ease of reading, when referencing documents included on Plaintiff's log, I omit "Patheon-Priv" and instead refer to such documents with the form "Entry [Document Number]."

Mechel Bluestone, Inc. v. James C. Justice Cos., Inc., 2014 WL 7011195, at *9 (Del. Ch. Dec. 12, 2014) (quoting *Int'l Paper Co. v. Fireboard Corp.*, 63 F.R.D. 88, 93 (D. Del. 1974)); *accord Sokol Holdings, Inc. v. Dorsey & Whitney, LLP*, 2009 WL 2501542, at *8 (Del. Ch. Aug. 5, 2009); *Deutsch v. Cogan*, 580 A.2d 100, 107 (Del. Ch. 1990); *Reese v. Klair*, 1985 WL 21127, at *5 (Del. Ch. Feb. 20, 1985). The requirements for preparing a satisfactory log under Delaware law are "readily established and easily available." *Klig v. Deloitte LLP*, 2010 WL 3489735, at *5 (Del. Ch. Sept. 7, 2010) (TRANSCRIPT). They are even discussed in this court's Guidelines for Persons Litigating in the Court of Chancery.

2. Defendant argues that Plaintiff's privilege log is deficient for three principal reasons. First, Defendant claims that it has presented ample evidence that Plaintiff severely over-designated information as privileged and/or the subject of work product protection. Defendant argues that, on the basis of such egregious over-designation, Plaintiff improperly withheld vast swathes of responsive information from production. Second, Defendant claims that Plaintiff either wrongfully withheld purportedly privileged documents instead of producing redacted versions or grossly over-redacted documents that contained only some privileged information. Third, Defendant asserts that Plaintiff's log descriptions are so generic and formulaic that Defendant is not able to make any meaningful determinations as to whether

individual documents are properly withheld or the appropriate subject of challenge. Furthermore, Defendant asserts that the log's descriptions are materially inaccurate.

3. On the basis of these broad deficiencies, Defendant asks that I enter an order directing Plaintiff to produce, without redaction, all of the documents identified on Plaintiff's privilege log. At the outset, I note that I approach any such request for relief with a great deal of hesitancy and caution. I also recognize, however, that hiding non-privileged information on a privilege log poses a risk of severe prejudice to the party subjected to discovery abuse. It is therefore incumbent on me to consider Defendant's assertions carefully and, if appropriate, award the relief requested.

4. The risks of prejudice are further compounded in this litigation for two reasons. First, this is expedited litigation. Participation in expedited litigation—particularly complex expedited litigation of the sort that routinely occurs in this Court—requires that parties take extra care in preparing logs correctly in the first instance. This is because there is often insufficient time for parties to fix mistakes. A party may otherwise decide to prepare a slap-dash log in expedited litigation because the party expects that there will be no consequence. That is not, and cannot, be the rule. *See Pfizer Inc. v. Amgen Fremont Inc.*, C.A. No. 10667-VCL, Tr. at 19:8-22 (Del. Ch. July 10, 2015) ("I think waiver is the appropriate consequence. We have very sophisticated law firms. We have very sophisticated clients. We have

people who are used to working on expedited schedules. We have people who understand the implications."); *see also Klig*, 2010 WL 3489735, at *6 ("[A] practice of granting counsel a do-over even for this type of extreme behavior reinforces problematic incentives that already pervade the preparation of privilege logs.").

5. Second, the expedited portion of this action concerns the negotiation and interpretation of contract terms. As a result, it can be expected that a great number of responsive documents will nominally involve in-house counsel. Both sides had teams working on the issues that led to this dispute, and some members of those teams were lawyers. Care must be taken, then, to determine whether the involvement of a lawyer in a communication has truly rendered the communication the proper subject of a claim of privilege or work product protection. Not every communication where a lawyer is copied warrants the assertion of privilege.

6. Defendant's complaints about Plaintiff's log are not new. Defendant's November 7 motion to compel asserted that (1) approximately 95% of Plaintiff's nearly 2,000 log entries repeated one of three generic phrases as the purported topic of the communication, (2) nearly 80% of Plaintiff's log entries were entirely withheld from production (rather than redacted), and (3) over a third of the documents that Plaintiff withheld entirely failed to identify any particular attorney whatsoever as being involved in the communication. Defendant requested at that

time that I find Plaintiff's entire log deficient. I have, however, approached that relief with caution, to be imposed only if truly warranted.

7. Instead, in my initial ruling, I focused on Plaintiff's failure to identify any attorney at all for a great many of its log entries and directed Plaintiff to produce those documents to Defendant. In doing so, I cited this Court's ruling in *Stilwell Associates, L.P. v. HopFed Bancorp, Inc.*, which articulated the risk posed by such entries and why it is that we require a party withholding an otherwise responsive document to name an attorney (or, at a minimum, describe why an attorney cannot be identified after reasonable efforts):

> When you don't list an attorney for a document, that is not a good-faith log. If there's one thing that you have to have for attorney-client privilege or work product doctrine, it's an attorney. Now, you could be passing along an attorney's advice. That is theoretically possible. But there still has to be an attorney. It is simply too easy—and there's a lot of law on this, particularly in the Third Circuit's *Teleglobe* decision—it is too easy and too convenient for clients just to claim that whatever their communications between themselves happened to be involved attorney advice, to give credit to log entries that simply don't list anyone. So I am requiring those items to be produced.

C.A. No. 2017-0343-JTL, Tr. at 118:8–22 (Del. Ch. Aug. 28, 2017) (TRANSCRIPT); *see also Pfizer, Inc. v. Amgen Fremont Inc.*, C.A. No. 10667-VCL, Tr. at 23:19–24 (Del. Ch. July 10, 2015) ("As to the items on [the privilege log] where there's no lawyer listed, [privilege] is waived. Your log has to state why you think a lawyer was involved in it. . . . You actually have to suggest who the lawyer is."); *Navient Sols., LLC, et al. v. Conduent Educ. Servs., LLC*, C.A. No. 2019-0316-

JTL, Tr. at 87:6–18 (Del. Ch. Dec. 5, 2019) ("[Y]ou had an obligation to explain and justify your assertion of privilege. . . . But in a setting where there's no attorney on the document, you've got to give some indication as to why this document is privileged.").

8. As I explained in my November 28 letter decision, a party that is unable to identify the attorney involved is not without options:

> To be clear, if the attorney involved for a log entry truly cannot be identified after diligent inquiry, the party seeking to withhold the document on privilege or work-product grounds is not out of options—far from it. There are many ways that a party could still seek to satisfy its burden. For example, at a minimum, the party could set forth the identifying information it does have for the log entry and the reason why no further detail can be provided. But to do none of this—as Plaintiff chose to do here—fails to meet even the most basic logging requirements.

D.I. 171 at 7 n.19.

9. Having many log entries that do not identify an attorney is a red flag indicative of larger problems. That turned out to be very true here.

10. With the production of previously withheld documents now in hand, Defendant filed its renewed motion to compel. Defendant provided multiple examples of documents that Plaintiff had improperly withheld on the basis of privilege and which Plaintiff had improperly described on its log. Defendant

demonstrated how information improperly withheld was material—not tangential—to Defendant's development of its case.[2]

11. Based on the arguments presented by Defendant at the December 14 hearing on its renewed motion to compel, I could probably have granted Defendant's requested relief then. However, given that the remaining documents on Plaintiff's log clearly identified a lawyer as being involved, that we were then less than 24 hours before trial, and, frankly, my continued reluctance to grant the broad relief sought by Defendant, I declined to do so. Instead, I directed that Plaintiff submit for *in camera* review 100 documents of Defendant's choosing from the remaining entries on Plaintiff's log which were not the subject of my November 15 production order.

12. Having carefully reviewed the documents submitted for *in camera* review, I am satisfied that Defendant's renewed motion to compel must be granted, at least in part, for the reasons I explain below.

[2] Plaintiff's arguments in response to Defendant's renewed motion did not alleviate my concerns. Plaintiff, for example, suggested that I should have no concern over entry 1710 on its log. That entry referenced "[n]otes reflecting legal advice" from counsel "regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher" and gave a date of April 23, 2022. As it turns out, entry 1710 is actually a OneNote file from a key executive of Plaintiff that contains 63 different documents—57 emails and 6 sets of meeting notes. How could someone describe in good faith a OneNote file containing 63 different documents as a single document?

13. First, approximately 60% of the documents contained in the sample set are not privileged at all. I will provide some examples:

a. Entries 173 and 177 were each withheld in their entirety on privilege grounds and described as "[e]mail providing confidential information for the purpose of obtaining legal advice from counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." Neither of these documents is privileged. Entry 173 is a brief cover email from a non-lawyer attaching a draft agreement (this entry does not include a copy of the draft agreement itself). Entry 177 is a cover email from a non-lawyer attaching slides for discussion (similarly, this entry does not include a copy of the draft slides themselves).

b. Entry 375 is an email chain with all internal Plaintiff communications redacted on privilege grounds. The document was described as an "[e]mail reflecting confidential attorney-client communications from counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher[.]" In fact, the redacted information just reflects two non-privileged cover emails.

c. Entry 505 is an email chain reflecting twelve internal Plaintiff emails. It was entirely withheld on privilege grounds, with the description that it is an "[e]mail reflecting confidential attorney-client communications

from counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." The document is, in reality, just a series of non-privileged business discussions by business-persons concerning the supply agreement negotiations. *See, e.g.*, *In re Facebook, Inc.*, 2016 WL 7235222, at *2-3 (Del. Ch. Dec. 12, 2016) (nonlawyer's lists and analyses of deal terms "do not contain legal advice").

d. Entry 508 is the same as Entry 505 (described above), except that it includes two more non-privileged internal Plaintiff emails in the chain. The document was also withheld entirely on privilege grounds, but this time the description was varied slightly, to call it an "[e]mail providing confidential information for the purpose of obtaining legal advice from counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." Once again, however, the chain simply reflects business discussions by business people.

e. Entry 521 is a chain of three emails that was withheld entirely on privilege grounds and described as an "[e]mail providing confidential information for the purpose of obtaining legal advice from counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." The email chain is plainly a business discussion.

f. Entry 670 is a chain of two emails that was withheld entirely on privilege grounds and described as an "[e]mail containing legal advice from counsel regarding the termination of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." The first email in the chain is from a lawyer, but it summarizes his negotiation earlier that day with Defendant's representative. The email chain is a non-privileged business discussion. *See, e.g., Int'l Paper Co.*, 63 F.R.D. at 93 ("[P]rivilege [does not] apply to an attorney who is acting as a business agent of a party.").

g. Entry 756 is an email chain in which seven emails among Plaintiff's in-house counsel are entirely redacted on privilege grounds, with the description "[e]mail reflecting legal advice from counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." The redacted emails are simply a series of logistics emails about finalizing the agreement. They do not "reflect[] legal advice" and are not privileged.

h. Similarly, entry 761 unthinkingly redacts an email from an in-house lawyer concerning what amounts to a logistics heads-up regarding a meeting invite to a non-lawyer. It is described as an "[e]mail requesting confidential information for the purpose of rendering legal advice from counsel regarding negotiation of the supply agreement with Arranta to

manufacture plasmids for Thermo Fisher." The redacted text is not privileged, and the description—as generic as it is—does not remotely fit the redaction.

i. Entry 911 reflects a series of four internal Plaintiff emails, the text of which is entirely redacted on privilege grounds. The log provides the following description: "Email requesting confidential information for the purpose of rendering legal advice from counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." In reality, the redacted text reflects a non-privileged discussion of individuals' availability to discuss finalization of the supply agreement. The description, once again, does not remotely fit the redactions.[3]

j. Entry 946 was entirely withheld on privilege grounds, with the description: "Email seeking legal advice from counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." The document is an email from a business person discussing business topics. It is a summary of the agreement's terms and requests final approval from various executives. It is not an "[e]mail seeking legal advice[,]" and it is not privileged.

[3] A similar improper example of Plaintiff's assertion of privilege is entry 408, which is solely a non-privileged Webex meeting invitation. It is withheld as privileged with the description: "Email providing confidential information for the purpose of obtaining legal advice from counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher."

k. Entry 962 is the same as entry 946 (described above), but with the addition of an email reply from a non-lawyer with the single word, "Approved." The document was withheld entirely on privilege grounds. Bizarrely, the description for this entry—although still generic—is different from the description for entry 946. Entry 962 is described as an "[e]mail reflecting confidential attorney-client communications to counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." Like entry 946, it is not privileged, and its description does not match the document.

l. Entry 963 was withheld entirely on privilege grounds and described as an "[e]mail reflecting confidential attorney-client communications from counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." In reality, it is a series of emails between in-house counsel trying to figure out how to insert a signed signature page into the PDF execution version of the agreement.

m. Entry 1291 was withheld entirely on privilege grounds and described as an "[e]mail providing confidential information for the purpose of obtaining legal advice from counsel regarding the acquisition of Arranta by Recipharm." In fact, it is a non-lawyer pasting Recipharm's financials into an

email and then just saying that Recipharm is a competitor. It is a businessperson making a non-privileged observation.

n. Entry 1397 is an email withheld entirely on privilege grounds with the description: "Email seeking legal advice of counsel regarding the termination of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." In reality, it is just a non-privileged cover email.

o. Entry 1572 is an email in which the text of the internal Plaintiff email is entirely redacted on privilege grounds. The description states: "Email reflecting confidential attorney-client communications to counsel regarding the termination of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." In fact, the redacted text is essentially another logistics email from a non-lawyer and reveals nothing privileged.[4]

14. The evidence presented by Defendant, coupled with my *in camera* review, strongly indicates that Plaintiff repeatedly and unthinkingly claimed privilege over non-privileged communications simply due to the presence of a lawyer in preparing its log. That is improper: "The presence of a lawyer does not

[4] Entry 1573 is the attachment to entry 1572 (described above) and appears to be the version of the termination letter that Plaintiff shared with Defendant. It is withheld entirely on privilege grounds and is described as a "letter reflecting confidential attorney-client communications to counsel regarding the termination of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher."

transform a non-privileged communication into a privileged one[.]"*Titan Inv. Fund II, LP v. Freedom Mortg. Corp.*, 2011 WL 532011, at *3 (Del. Super. Feb. 2, 2011). This problem was greatly compounded by the generic and inaccurate descriptions associated with the documents, which necessarily made any challenge to specific entries on Plaintiff's log unnecessarily difficult. *See Klig*, 2010 WL 3489735, at *6 ("Vapid and vacuous descriptions interfere with the adversary's decision-making process. Just as you can't hit what you can't see, you can't challenge what the other side hasn't described.").

15. Second, even in the minority of documents that do properly contain privileged or work-product information, Plaintiff has withheld the document entirely or grossly over-redacted it in the majority of cases. *See MPEG LA, L.L.C. v. Dell Glob. B.V.*, 2013 WL 6628782, at *2 (Del. Ch. Dec. 9, 2013) ("[T]he communication will be considered privileged only if the legal aspects predominate."). I provide some examples:

a. Entry 440 is a chain of three emails that Plaintiff withheld entirely, with the generic description: "Email providing confidential information for the purpose of obtaining legal advice from counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." Upon review, I find that while a line of text in the last email

in the chain could be redacted, the rest of the email chain reflects a non-lawyer reporting on non-privileged business matters to executives.

b. Entry 598 reflects a chain of four emails that Plaintiff withheld entirely, with the generic description: "Email reflecting confidential attorney-client communications to counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." I find that while a line in the initial email in the chain could arguably be redacted, the rest of the email chain reflects non-privileged communications.

c. Entry 624 reflects a chain of four emails, with the text of three redacted entirely on privilege grounds. The generic description provides: "Email stating planned request for legal advice regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." It appears that Plaintiff redacted the text because an email refers simply to an individual having scheduled a meeting with lawyers the following day. The redacted text, however, reflects no privileged information. Instead, it is a discussion of business terms between non-lawyers.

d. Entry 697 is a chain of nine emails that is entirely withheld on privilege grounds, with the generic description: "Email providing confidential information for the purpose of obtaining legal advice from counsel regarding termination of the supply agreement with Arranta to

manufacture plasmids for Thermo Fisher." Almost all of the email chain reflects non-privileged reporting on business negotiations and discussion of business terms.

e. Entry 737 is a chain of seven emails that is entirely withheld on privilege grounds, with the generic description: "Email containing legal advice from counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." Six of the seven emails in the chain are between Plaintiff and Defendant, and one line in the last email in the chain could have been redacted.

f. Entry 746 is a lengthy email chain that begins with a series of emails between Plaintiff and Defendant. The last six emails in the chain are solely internal Plaintiff emails. The text of those six emails is entirely redacted on privilege grounds, with the generic description: "Email reflecting confidential attorney-client communications from counsel." Nearly all of the redacted text, however, reflects non-privileged reports on business negotiations and discussions of business terms. It is striking that the lawyer who authored much of the text that Plaintiff redacted states, within that same redacted text, that during the course of the negotiation, he informed Defendant's representatives that he is "acting as management not legal counsel on this[.]"

g. Entry 871 reflects the complete redaction of the text of three emails on privilege grounds, with the generic description: "Email containing legal advice from counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." Although some of the text could be redacted, Plaintiff chose to redact plainly non-privileged business discussions between non-lawyers. The document is another example of Plaintiff's indiscriminate approach to asserting privilege over internal communications.

h. Entry 1417 is a chain of four emails that is entirely withheld on privilege grounds, with the generic description: "Email providing confidential information for the purpose of obtaining legal advice from counsel regarding the termination of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." Although three lines could have been redacted, the remainder of the chain reflects non-privileged business communications concerning financial modeling of various scenarios.

i. Entry 1634 was entirely withheld on privilege grounds, with the generic description: "Email providing confidential information for the purpose of obtaining legal advice from counsel regarding the termination of the supply agreement with Arranta to manufacture plasmids for Thermo

Fisher." Although five lines could have been redacted, most of the email reflects notes of a non-privileged business discussion.

16. Third, Plaintiff's log descriptions are overly generic and repetitive. Worse, however, is that those generic descriptions still misdescribe the document in approximately 80% of cases in the sample set. "An improperly asserted claim of privilege is no claim of privilege at all." *International Paper*, 63 F.R.D. at 94; *accord, e.g.*, *Williams Nat. Gas Co. v. Amoco Prod. Co.*, 1991 WL 236919, at *3 (Del. Super. Ct. Nov. 8, 1991) (1974). A court can order production where the descriptions are so repetitive as to be meaningless. *E.g.*, *In re Oxbow Carbon LLC Unitholder Litig.*, 2017 WL 959396, at *6 (Del. Ch. Mar. 13, 2017) (ordering waiver where "repetitive descriptions fall substantially short of Delaware's well-established requirements") (citation omitted). Examples follow:

a. Entry 1060 is withheld entirely on privilege grounds, with the generic description: "Email seeking legal advice to counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." Besides not being privileged, it is an email from a non-lawyer to senior executives prodding them to respond and authorize Plaintiff to sign the supply agreement. It is decidedly not an "[e]mail seeking legal advice[.]"

b. Entry 1115 is a slide deck that was entirely withheld as privileged, with the generic description: "Presentation providing confidential information for the purpose of obtaining legal advice from counsel regarding negotiation of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." The document is dated December 18, 2020, months after the parties executed the supply agreement, and the redacted text concerns the termination provisions of the supply agreement. The description is therefore both generic and misleading.

c. Entry 1627 is a chain of two emails that is entirely withheld on privilege and work-product grounds, with the generic description: "Email providing confidential information for the purpose of obtaining legal advice from counsel regarding the termination of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." The email chain simply involves a question from a non-lawyer, that is answered by another non-lawyer, about whether a customer can be informed of the Arranta supply agreement's termination. There is no privileged or work-product information in the document.

d. Entry 1656 is redacted on privilege grounds, with the generic description: "Email stating planned request for legal advice from counsel regarding the termination of the supply agreement with Arranta to

manufacture plasmids for Thermo Fisher." Even setting aside that one email contains only the text "fyi," which Plaintiff apparently decided was sufficiently privileged to justify redaction, the description bears only a faint resemblance to the content of the correspondence.

e. Entry 1855 is redacted, with the generic description: "Email reflecting legal advice from counsel regarding the termination of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." The redacted text, which is non-privileged, refers to a non-lawyer's recollection of notes of a meeting with Defendant, not "legal advice from counsel[.]"

f. Entry 1950 is withheld entirely on privilege grounds, with the generic description: "Email providing confidential information for the purpose of obtaining legal advice from counsel regarding the termination of the supply agreement with Arranta to manufacture plasmids for Thermo Fisher." The document, however, is a non-privileged email discussing business matters and circulating a slide deck to a host of non-lawyers, and some lawyers, in advance of a meeting. The description seems to bear little relationship to the real nature of the document and, in any event, gives entirely insufficient understanding of the document for log purposes.

17. As noted earlier, Defendant asserts that Plaintiff's log reflects nearly wholesale use of generic descriptions of the sort identified in the examples above. I

agree. It is as though, in preparing the descriptions, reviewers quickly constructed their descriptions using three "drop-down" menus containing a very limited set of pre-filled words and phrases. Indeed, my *in camera* review has left me with the distinct impression that the log was produced to Defendant after only a hasty first-level pass through the documents by junior associates or, perhaps, contract reviewers, with no meaningful second-level review undertaken by those junior attorneys, much less the meaningful involvement by senior attorneys that this court expects. Plaintiff's privilege and work product calls, and associated log entries, are what one might expect to see at a law firm following a quick first pass through collected documents that hit on search terms. The expectation, then, would be that attorneys with more experience or understanding of the facts would undertake a second-level (and perhaps third-level) review to make individualized privilege and work-product calls and redactions and to craft appropriate document descriptions. Then a senior Delaware attorney would weigh in on the difficult calls. That does not appear to have happened here. And, if it did, that would be even more concerning.

18. The problems with Plaintiff's log are so pervasive that I could—and arguably should—grant Defendant's request for relief as to the entirety of Plaintiff's log.

19. My review of the *in camera* documents, however, suggests that, following Plaintiff's delivery of the April 15, 2022 termination letter in this action, the number of logged documents that reflect actual privileged communications or work-product rises significantly. This is not unexpected, given that the parties essentially ceased business discussions and shifted to a pre-litigation footing following the delivery of the letter.

20. To be clear, this does not mean that the log is not still riddled with errors based on the *in camera* documents I have reviewed for this time period. However, before I make a conclusion as to appropriate relief for the time-period commencing March 31, 2022 (approximately two weeks before the termination letter was sent to Arranta), I will review a further sample set of 30 randomly selected documents for the period following the date on which the termination letter was sent to Arranta (*i.e.*, after April 15, 2022). The parties are directed to agree on a random selection of documents other than draft complaint and regulatory filings, and Plaintiff shall send them to me within five business days for my review.

21. As to the remainder of Plaintiff's log entries—*i.e.*, the log entries for the period up to March 31, 2022—Plaintiff is directed to produce those documents, without redaction, to Defendant within two business days.

22. Finally, I note that Defendant's renewed motion asked that I direct Plaintiff to produce all responsive communications between Kevin Sullivan and

Foley Hoag. To extent this aspect of the motion still needs a ruling, I deny the request. Plaintiff identified Foley Hoag in its September 29 interrogatory responses as outside counsel that was retained for the drafting of the termination letter and the May 2 letter. Plaintiff states that Defendant did not then mention Foley Hoag when subsequently negotiating custodians and search terms and that Foley Hoag documents were not captured in Plaintiff's search pursuant to the negotiated search terms. On this dispute, I agree with Plaintiff. Parties make choices during litigation. There are of course circumstances where the outcome could be different, but I do not find a basis to revisit this aspect of discovery here.

23. The Motion is GRANTED in part, DENIED in part, and HELD IN ABEYANCE in part pending my additional *in camera* review.

/s/ Nathan A. Cook
Vice Chancellor Nathan A. Cook