

APPENDIX A

DISCOVERY GUIDELINES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

GUIDELINE 1: CONDUCT OF DISCOVERY

- a. The purpose of these Guidelines is to facilitate the just, speedy, and inexpensive conduct of discovery in civil cases before the Court, and these Guidelines will be construed and administered accordingly, with respect to all attorneys, parties, and non-parties involved in discovery of civil cases before the Court. Fed R. Civ. P. 26 requires that discovery be relevant to any party's claim or defense; proportional to what is at issue in a case; and not excessively burdensome or expensive as compared to the likely benefit of obtaining the discovery being sought.

The parties and counsel have an obligation to cooperate in planning and conducting discovery to tailor the discovery to ensure that it meets these objectives. Counsel have a duty to confer early and throughout the case as needed to ensure that discovery is planned and conducted consistent with these requirements and, where necessary, make adjustments and modifications in discovery as needed.

During the course of their consultation, counsel are encouraged to think creatively and to make proposals to one another about alternatives or modifications to the discovery otherwise permitted that would permit discovery to be completed in a more just, speedy, inexpensive way. By way of illustration only, such alternatives could include different or additional deadlines for the filing of motions or the completion of all or part of discovery; accelerated exchanges of disclosures, additional data or descriptions of the parties' claims and defenses; sampling techniques; and substantial limitations on, or even the elimination of, depositions, coupled with alternative methods of exchanging or obtaining factual information or the equivalent of deposition testimony.

The parties and their counsel are encouraged to submit to the Court for approval their agreements to expand or limit discovery. If, however, counsel are unable to reach agreement on a discovery plan that substantially modifies the normal course of discovery, and either side believes that the Court's assistance would be helpful in framing or implementing such a plan, then the Court will make itself available with reasonable promptness, in response to a brief, written request for a discovery management conference that identifies the issues for consideration.

- b. Counsel are expected to have read the Federal Rules of Civil Procedure, Local Rules of the Court, these Guidelines, and, with respect to discovery of electronically stored information ("ESI"), the Suggested Protocol for Discovery of ESI, posted on the Court's website, www.mdd.uscourts.gov. Compliance with these Guidelines will be considered by the Court in resolving discovery disputes, including whether sanctions should be awarded pursuant to Fed. R. Civ. P. 37, or the Court's inherent powers.

- c. Attorneys are expected to behave professionally and with courtesy towards all involved in the discovery process, including but not limited to opposing counsel, parties and non-parties. This includes cooperation and civil conduct in an adversary system. Cooperation and civility include, at a minimum, being open to, and reasonably available for, discussion of legitimate differences in order to achieve the just, speedy, and inexpensive resolution of the action and every proceeding. Cooperation and communication can reduce the costs of discovery, and they are an obligation of counsel.
- d. All discovery requests, responses and objections are governed by the requirements of Fed. R. Civ. P. 26(g) and counsel and parties are expected to be familiar with the requirements of the Rule.
- e. Whenever possible, attorneys are expected to communicate with each other in good faith throughout the discovery process to resolve disputes without the need for intervention by the Court, and should do so promptly after becoming aware of the grounds for the dispute. In the event that such good faith efforts are unsuccessful, an unresolved dispute should be brought to the Court's attention promptly after efforts to resolve it have been unsuccessful. A failure to do so may result in a determination by the Court that the dispute must be rejected as untimely. Counsel may bring the unresolved dispute to the Court's attention by filing a letter, in lieu of a written motion, that briefly describes the dispute, unless otherwise directed by the Court.
- f. Upon being notified by the parties of the unresolved discovery dispute, the Court will promptly schedule a conference call with counsel, or initiate other expedited procedures, to consider and resolve the discovery dispute. If the Court determines that the issue is too complicated to resolve informally, it may set an expedited briefing schedule to ensure that the dispute can be resolved promptly.
- g. To the extent that any part of these Guidelines conflicts with any Local Rule of the Court, or an order of the Court in a particular case, then the conflicting rule or order should be considered to be governing.

GUIDELINE 2: STIPULATIONS SETTING DISCOVERY DEADLINES

Subject to approval by the Court, attorneys are encouraged to enter into written discovery stipulations to supplement the Court's scheduling order. During the scheduling process, the Court will consider requests to impose milestone dates for motions, such as spoliation motions, and motions *in limine* (including *Daubert* motions) that do not normally otherwise have automatically-imposed deadlines. The Court encourages parties to submit to the Court for approval joint suggestions made pursuant to the Suggested Protocol for Discovery of ESI.

GUIDELINE 3: EXPERT WITNESSES

- a. Unless counsel agree that each party will pay its own experts, the party taking an expert

witness's deposition ordinarily pays the expert's fees for the time spent in deposition and related travel. *See* L.R. 104.11.a. Accordingly, counsel for the party that designated the expert witness should try to assure that the fee charged by the expert to the party taking the deposition is fair and reasonable. In the event a dispute arises as to the reasonableness or other aspects of an expert's fee, counsel should promptly confer and attempt in good faith to resolve the dispute without the involvement of the Court. If counsel are unsuccessful, the expert's deposition should proceed on the date noted, unless the Court orders otherwise, and the dispute respecting payment should be brought to the Court's attention promptly. The factors that may be considered in determining whether a fee is reasonable include, but are not limited to: (1) the expert's area of expertise; (2) the expert's education and training; (3) the fee being charged to the party who designated the expert; and (4) the fees ordinarily charged by the expert for non-litigation services, such as office consultations with patients or clients.

- b. Recognizing that a treating physician may be considered both a fact witness and an expert, the Court has chosen to impose a specific limitation on the fee a treating physician may charge to either party. It is implicit in L.R. 104.11.b, which requires counsel to estimate the hours of deposition time required, that the physician may charge a fee for the entire time he or she reserved in accordance with the estimate, even if counsel conclude the deposition early. Further, unless the physician received notice at least two business days in advance of a cancellation, the physician is entitled to be paid for any time reserved that cannot reasonably be filled. Every effort should be made to schedule depositions at a time convenient for the witness, and to use videotaped or other visually recorded *de bene esse* depositions rather than requiring the physician's presence at trial. Note that this Discovery Guideline does not limit the reasonable fee a treating physician may charge if required to testify in Court.
- c. The parties are encouraged not to designate multiple experts on the same or similar topics.
- d. Guideline 4.d is applicable to expert witness depositions.

GUIDELINE 4: SCHEDULING DEPOSITIONS

- a. Attorneys are expected to make a good faith effort to coordinate deposition dates with opposing counsel, parties, and non-party deponents, before noting a deposition.
- b. Before agreeing to a deposition date, an attorney is expected to attempt to clear the date with his/her client if the client is a deponent, or wishes to attend the deposition, and with any witnesses the attorney agrees to attempt to produce at the deposition without the need to have the witness served with a subpoena.
- c. An agreed-upon deposition date is presumptively binding. An attorney seeking to change an agreed-upon date has a duty to coordinate a new date before changing the agreed date.

Noncompliance with Guideline 4.d may rebut the presumption contained herein.

- d. If an attorney making a good faith effort to coordinate deposition dates under Guideline 4.a anticipates requesting that the deponent produce ESI at the deposition, that anticipated request should be disclosed to the opposing counsel, parties, and non-party deponents at the time of the Guideline 4.a coordination effort, or as soon thereafter as it becomes anticipated. At a minimum, the discovering/requesting party should describe the scope and form of ESI that will be requested. Counsel are encouraged to review and, if applicable, comply with the Suggested Protocol For Discovery Of ESI.
- e. Upon reasonable request, and where reasonably practicable, in order to expedite the deposition questioning, a deponent should produce documents including ESI, properly requested in a notice of deposition and accompanying subpoena, if any, a reasonable time prior to the deposition. Noncompliance with a reasonable and timely request for production of such documents prior to a deposition may be considered by the Court in a motion or request made pursuant to Fed. R. Civ. P. 30(d)(1) to determine whether additional time is needed to fairly examine the deponent or if the deponent, another person, or any other circumstance has impeded or delayed the examination.

GUIDELINE 5: DESIGNATION BY AN ORGANIZATION OF SOMEONE TO TESTIFY ON ITS BEHALF

- a. **Requested Areas of Testimony.** A notice or subpoena to an entity, association or other organization should accurately and concisely identify the designated area(s) of requested testimony, giving due regard to the nature, business, size and complexity of the entity being asked to testify. The notice or subpoena should ask the recipient to provide the name(s) of the designated person(s) and the areas that each person will testify to by a reasonable date before the deposition is scheduled to begin.
- b. **Designating the Best Person to Testify for the Organization.** An entity, association or other organization responding to a deposition notice or subpoena should make a diligent inquiry to determine what individual(s) is (are) best suited to testify.
- c. **More Than One Person May Be Necessary.** When it appears that more than one individual should be designated to testify without duplication on the designated area(s) of inquiry, each such individual should be identified, a reasonable period of time before the date of the deposition, as a designated witness along with a description of the area(s) to which he or she will testify.

GUIDELINE 6: DEPOSITION QUESTIONING, OBJECTIONS AND PROCEDURE

- a. An attorney should not intentionally ask a witness a question that misstates or mischaracterizes the witness's previous answer.

- b. During the taking of a deposition, it is presumptively improper for an attorney to make objections which are not consistent with Fed. R. Civ. P. 30 (c)(2). Objections should be stated as simply, concisely and non-argumentatively as possible to avoid coaching or making suggestions to the deponent, and to minimize interruptions in the questioning of the deponent (for example: “objection, leading;” “objection, asked and answered;” “objection, compound question;” “objection, form”). If an attorney desires to make an objection for the record during the taking of a deposition that reasonably could have the effect of coaching or suggesting to the deponent how to answer, then the deponent, at the request of any of the attorneys present, or, at the request of a party if unrepresented by an attorney, should be excused from the deposition during the making of the objection.
- c. An attorney should not repeatedly ask the same or substantially identical question of a deponent if the question already has been asked and fully and responsively answered by the deponent. Upon objection by counsel for the deponent, or by the deponent if unrepresented, it is presumptively improper for an attorney to continue to ask the same or substantially identical question of a witness unless the previous answer was evasive or incomplete.
- d. It is presumptively improper to instruct a witness not to answer a question during the taking of a deposition unless under the circumstances permitted by Fed. R. Civ. P. 30(c)(2). However, it is also presumptively improper to ask questions clearly beyond the scope of discovery permitted by Fed. R. Civ. P. 26(b)(1), particularly of a personal nature, and continuing to do so after objection shall be evidence that the deposition is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent or party, which is prohibited by Fed. R. Civ. P. 30(d)(3).
- e. If requested to supply an explanation as to the basis for an objection, the objecting attorney should do so, consistent with Guideline 6(b) above.
- f. While the interrogation of the deponent is in progress, neither an attorney nor the deponent should initiate a private conversation except for the purpose of determining whether a privilege should be asserted. To do so otherwise is presumptively improper.
- g. During breaks in the taking of a deposition, no one should discuss with the deponent the substance of the prior testimony given by the deponent during the deposition. Counsel for the deponent may discuss with the deponent at such time whether a privilege should be asserted or otherwise engage in discussion not regarding the substance of the witness’s prior testimony.
- h. Unless otherwise ordered by the Court, the following persons may, without advance notice, attend a deposition: individual parties; a representative of non-individual parties; and expert witnesses of parties. Except for the persons identified above, counsel should notify other parties not later than seven (7) days before the taking of a deposition if counsel desires to have a non-party present during a deposition. If the parties are unable to agree to the attendance of this person, then the person shall not be entitled to attend the

deposition unless the party desiring to have the person attend obtains a Court order permitting him/her to do so. Unless ordered by the Court, however, a dispute regarding who may attend a deposition should not be grounds for delaying the deposition. All persons present during the taking of a deposition should be identified on the record before the deposition begins. Other than the deponent, counsel representing a party or unrepresented party, persons attending a deposition may not ask or answer questions during, or otherwise participate in the process of, the deposition.

- i. Except for the person recording the deposition in accordance with Fed. R. Civ. P. 30(b), during the taking of a deposition no one may record the testimony without the consent of the deponent and all parties in attendance, unless otherwise ordered by the Court.

GUIDELINE 7: ASSERTIONS OF PRIVILEGE AT DEPOSITIONS

When a claim of privilege is asserted during a deposition, and information is not provided on the basis of such assertion:

- a. In accordance with Fed. R. Civ. P. 26(b)(5), the person asserting the privilege should identify during the deposition the nature of the privilege (including work product) that is being claimed.
- b. After a claim of privilege has been asserted, the person seeking disclosure should have reasonable latitude during the deposition to question the witness to establish other relevant information concerning the assertion of privilege, including: (i) the applicability of the particular privilege being asserted; (ii) any circumstances that, under Fed. R. Evid. 502, may demonstrate that a prior disclosure was or was not permitted without waiver of the privilege; (iii) any circumstances that may constitute an exception to the assertion of the privilege; and (iv) any circumstances which may result in the privilege having been waived.
- c. In accordance with Fed. R. Civ. P. 26(b)(5), the party asserting the privilege, in providing the foregoing information, should not be required to reveal the information that is itself privileged or protected from disclosure.

GUIDELINE 8: MAKING A RECORD OF IMPROPER CONDUCT DURING A DEPOSITION

Upon request of any attorney, party unrepresented by an attorney, or the deponent if unrepresented by an attorney, the person recording the deposition in accordance with Fed. R. Civ. P. 30(b) should enter on the record a description by the requesting person of conduct of any attorney, party, or person attending the deposition which violates these guidelines, the Federal Rules of Civil Procedure, or the Local Rules of the Court.

GUIDELINE 9: DELAY IN RESPONDING TO DISCOVERY REQUESTS

a. Interrogatories, Requests for Production of Documents, and Requests for Admission of Facts and Genuineness of Documents

The Federal Rules of Civil Procedure designate the time prescribed for responding to Interrogatories, Requests for Production of Documents, and Requests for Admission of Facts and Genuineness of Documents. Nothing contained in these guidelines modifies the time limits prescribed by the Federal Rules of Civil Procedure. Attorneys should make good faith efforts to respond to discovery requests within the time prescribed by those rules.

Absent exigent circumstances, attorneys seeking additional time to respond to discovery requests should contact opposing counsel as soon as practical after receipt of the discovery request, but not later than three (3) days before the response is due. In multiple party cases, the attorney wanting additional time should contact the attorney for the party propounding the discovery.

A request for additional time which does not conflict with a scheduling deadline imposed by the Federal Rules of Civil Procedure, the Local Rules of the Court, or a Court order should not be unreasonably refused. If a request for additional time is granted, the requesting party should promptly prepare a writing which memorializes the agreement, which shall be served on all parties but need not be submitted to the Court for approval.

Unless otherwise provided by the Local Rules of the Court, no stipulation that modifies a Court-imposed deadline shall be deemed effective unless and until the Court approves the stipulation.

b. Depositions

Unless otherwise ordered by the Court or agreed upon by the parties, fourteen (14) days notice should be deemed to be “reasonable notice” within the meaning of Fed. R. Civ. P. 30(b)(1), for the noting of depositions.

GUIDELINE 10: INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS, ANSWERS TO INTERROGATORIES, AND WRITTEN RESPONSES TO DOCUMENT REQUESTS

- a. A party may object to an interrogatory, document request, or part thereof, while simultaneously providing partial or incomplete answers to the request. If a partial or incomplete answer is provided, the answering party shall state that the answer is partial or incomplete.
- b. No part of an interrogatory or document request should be left unanswered merely because an objection is interposed to another part of the interrogatory or document request.

- c. In cases where a party is represented by more than one attorney of record, no discovery motion, response or opposition should be filed unless a senior attorney of record has read the contents of the motion and any supporting memorandum and exhibits.
- d. In accordance with Fed. R. Civ. P. 26(b)(5), where a claim of privilege is asserted objecting to any interrogatory, document request, or part thereof, and information is not provided on the basis of such assertion:
 - i. The party asserting the privilege shall, in the objection to the interrogatory, document request, or part thereof, identify with specificity the nature of the privilege (including work product) that is being claimed;
 - ii. The following information should be provided in the objection, if known or reasonably available, unless divulging such information would cause disclosure of the allegedly privileged information:
 - a. For oral communications:
 - (i) the name of the person making the communication and the names of persons present while the communication was made, and, where not apparent, the relationship of the persons present to the person making the communication;
 - (ii) the date and place of the communication; and
 - (iii) the general subject matter of the communication.
 - b. For documents:
 - (i) the type of document;
 - (ii) the general subject matter of the document;
 - (iii) the date of the document; and
 - (iv) such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and, where not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other.
 - iii. The above information should be provided separately for each document for which privilege/protection is asserted, unless doing so would be excessively burdensome or expensive. In such instances, the party asserting

privilege/protection should particularize why providing separate designations would be excessively burdensome or expensive, and then may identify by categories the voluminous documents or communications for which privilege/protection is asserted, providing the above information for each category. A party may only designate documents as privileged/protected by category if each document (1) is within the privilege/protection claimed, and (2) shares common characteristics such as sender, receiver, author, or specific subject matter. Where only part of a document or communication is privileged/protected, the unprivileged/unprotected portion should be disclosed if otherwise discoverable and within the scope of the discovery request.

- iv. Reasonably promptly after receiving the information contained in Guideline 10.d.ii., the party seeking disclosure should notify the party from whom disclosure is sought of any deficiencies in the particularization of the basis for any privilege/protection asserted, including any “category designations” under Guideline 10.d.iii. Once done, the party from whom disclosure was sought shall, with reasonable promptness, provide sufficient factual information, including by affidavit, to establish the factual basis for each claim of privilege or protection that has been claimed. Failure to do so may result in a determination by the Court that the party asserting the privilege or work product protection has failed to particularize it as required by Fed. R. Civ. P. 26(b)(5), resulting in the waiver of any privilege/protection that has been claimed.
- v. The parties are encouraged to confer and reach agreement regarding how to assert privilege/protection claims with respect to Email “chains” or “strings,” and if unable to do so, to bring to the attention of the Court their disagreement for prompt resolution.
- e. If a party asserts in response to an interrogatory, request for production of documents, or request for admission of facts, that electronically stored information is not reasonably accessible because of undue burden or cost, within the meaning of Fed. R. Civ. P. 26(b)(2)(B), or otherwise asserts that requested discovery is unduly burdensome or expensive, the party making that assertion is expected to disclose, promptly and with particularity, the facts on which it relies to support that contention.
- f. In addition to paper copies, parties are encouraged to exchange discovery requests and responses in a commonly-accepted word processing format, if requested, in order to reduce the clerical effort required to prepare responses and motions.