**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**IN RE:** **Administrative Order 96-36**

**ADOPTION OF DISCOVERY PRACTICES HANDBOOK AS APPENDIX TO LOCAL RULES**

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The attached Discovery Practices Handbook was prepared by the Federal Courts Committee of the Dade County Bar Association for the guidance of the members of the Bar. The Court's Advisory Committee on Rules and Procedures has recommended that the Discovery Practices Handbook be adopted as a published appendix to the Local General Rules. Upon consideration of this recommendation, it is hereby

**ORDERED** as follows:

1. This Order and the Discovery Practices Handbook, in the form attached to this Order, shall be published as an appendix to the Local General Rules.

2. The practices set forth in the Discovery Practices Handbook shall not have the force of law, but may be looked to by practitioners for guidance in conducting discovery in this District.

3. In the event of any conflict between the provisions of the Discovery Practices Handbook and applicable case, rule, or statutory law, counsel should look first to the applicable authority to determine proper discovery practice.

4. No provision of the Discovery Practices Handbook shall limit the discretion of a District or Magistrate Judge to provide for different practices in cases before that Judge.

**DONE AND ORDERED** in Chambers at the United States Federal Building and Courthouse, 299 East Broward Boulevard, Fort Lauderdale, Florida this 27 day of June, 1996.

NORMAN C. ROETTGER
CHIEF UNITED STATES DISTRICT JUDGE

cc: Honorable Gerald B. Tjoflat, Chief Judge,
United States Court of Appeals for the Eleventh Circuit
All Southern District Judges and Magistrate Judges
Norman E. Zoller, Circuit Executive, Eleventh Circuit
All members of the Advisory Committee on Rules and Procedures
Brian F. Spector, Chair, Advisory Committee on Rules & Procedures
Roberto Martinez, Chair, Dade County Bar Association Federal Courts Committee
Maxine M. Long, Chair, Discovery Practice Handbook Subcommittee
Carlos Juenke, Court Administrator/Clerk of Court
Library
Daily Business Review

# DISCOVERY PRACTICES HANDBOOK
# U.S. DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

## I. DISCOVERY IN GENERAL

### A. Courtesy And Cooperation Among Counsel.

(1) *Courtesy.* Discovery in this District is normally practiced with a spirit of cooperation and civility. Local lawyers and the Court are proud of the courteous practice that has been traditional in the Southern District. Courtesy suggests that a telephone call is appropriate before taking action that might be avoided by agreement of counsel.

(2) *Scheduling.* A lawyer shall normally attempt to accommodate the calendars of opposing lawyers in scheduling discovery.

(3) *Stipulations.* The parties may stipulate in writing to modify any practice or procedure governing discovery, except that the parties may not make stipulations extending the time to answer interrogatories, extending the time to produce documents, and extending the time by a request for admissions must be answered where the stipulation would interfere with any time set for completion of discovery, for hearing a motion, or for trial. Stipulations that would so interfere may be made only with court approval. See FED.R.CIV.P. 29.

(4) *Withdrawal of Motions.* If counsel are able to resolve their differences after a discovery motion or response is filed, the moving party should file a notice of withdrawal of the motion to avoid unnecessary judicial labor.

(5) *Mandatory Disclosure.* The disclosure requirements imposed by FED.R.CIV.P. 26(a)(1)-(4), and the early discovery moratorium imposed by FED.R.CIV.P. 26(d), are not applicable to civil proceedings in the Southern District of Florida, except as otherwise ordered by a judge of the Court in a particular case or except pursuant to written stipulation of all affected parties, subject to Court approval. See Local General Rule 26.1.A, Southern District of Florida. Local General Rule 16.1, Southern District of Florida, provides for limited self-disclosure.

### B. Filing Of Discovery Materials.

(1) *General Rule.* In accordance with Local General Rule 26.1.B, Southern District of Florida, discovery materials shall not be filed with the Court as a matter of course. Discovery documents may later be filed if necessary in presentation and consideration of a motion to compel, a motion for protective order, a motion for summary judgment, a motion for injunctive relief, or other similar proceedings.

(2) *Court-Ordered Filing of Discovery Materials.* In circumstances involving trade secret information or other categories of information, the Court may order that discovery be filed with the Court in order to preserve the integrity of the information. However, such practice is only permitted after the Court has determined, upon timely motion, that filing with the Court is necessary to safeguard the interests jeopardized by the normal discovery process. When such situations arise, counsel are encouraged to formulate agreements governing discovery that minimize the judicial role in administering routine discovery matters.

(3) *Filings Under Seal.* Documents and things may be filed under seal, whereupon the Clerk of the Court will treat the material filed as confidential. Submissions to be treated in this manner should be clearly marked "Filed Under Seal," and a Notice of Filing Under Seal should be served on all other counsel.

**C. Supplementing Answers.** The Federal Rules of Civil Procedure expressly provide that in many instances a party is under a duty to supplement or correct a prior disclosure or response to include information thereafter acquired. See Rule 26(e). A party may not, by placing supplementation language at the beginning

of its discovery request, expand the obligations of another under the Federal Rules of Civil Procedure.

**D. Timeliness And Sanctions.**

(1) *Timeliness of Discovery Responses.* The Federal Rules of Civil Procedure set forth explicit time limits for responses to discovery requests. Those are the dates by which a lawyer should respond; counsel should not await a Court order. If a lawyer cannot answer on time, an extension of time should first be sought from opposing counsel. If unable to resolve the matter informally, counsel should move for an extension of time in which to respond, and inform opposing counsel so that, in the meantime, no unnecessary motion to compel a response will be filed. See Local General Rule 26.1.I, Southern District of Florida, requiring a certificate that counsel have conferred before seeking judicial relief.

(2) *Extensions of Time.* Motions for extension of time within which to respond to discovery should be filed sparingly and only when counsel are unable informally to resolve the matter with opposing counsel. Counsel should be aware that the mere filing of a motion for an extension of time in which to respond does not, absent an order of the Court, extend the deadline for responding to discovery requests. See Local General Rule 7.1.A.3, Southern District of Florida.

(3) *Objections.* When objections are made to discovery requests, all grounds for the objections must be specifically stated. When objections are untimely made, they are waived. See Local General Rule 26.1.G.6.a.

(4) *Sanctions.* Because lawyers are expected to respond when the Federal Rules of Civil Procedure require, Rule 37 provides that if an opposing lawyer must go to court to make the recalcitrant party answer, the moving party may be awarded counsel fees incurred in compelling the discovery. Rule 37 is enforced in this District. Further, if a Court order is obtained compelling discovery, unexcused failure to provide a timely response is treated by the Court with the gravity it deserves; willful violation of a Court order is always serious and may be treated as contempt.

(5) *Stays or Limitation of Discovery.* Normally, the pendency of a motion to dismiss or motion for summary judgment will not justify a unilateral motion to stay discovery pending a ruling on the dispositive motion. Such motions for stay are generally denied except where a specific showing of prejudice or burdensomeness is made, or where a statute dictates that a stay is appropriate or mandatory. See, e.g. 15 U.S.C. § 77z-1(b)(1), the Private Securities Litigation Reform Act of 1995. This policy also applies when a case is referred to court annexed mediation under Local General Rule 16.2. Where a motion to dismiss for lack of personal jurisdiction has been filed pursuant to Rule 12(b)(2), discovery may be limited to jurisdictional facts by court order.

**E. Completion Of Discovery.**

(1) *Discovery Completion.* Local General Rule 16.1.A sets discovery completion dates for differentiated case management tracks. The judges may have individual methods extending the deadline, however, each judge follows the rule that the completion date means that all discovery must be completed by that date. For example, interrogatories must be served more than thirty days prior to the completion date to permit the opposing party to respond. Untimely discovery requests are subject to objection on that basis. Counsel may, by agreement, conduct discovery after the formal completion date but should not rely upon the Court to resolve discovery disputes arising after the discovery completion date. Likewise, counsel should not rely upon the Court to permit use of untimely discovery materials at trial.

(2) *Extension of Time for Discovery Completion.* Occasionally, the Court will allow additional discovery upon motion, but counsel should not rely on obtaining an extension. When allowed, an extension is normally made only upon written motion showing good cause for the extension of discovery (including due diligence in the pursuit of discovery prior to completion date) and specifying the additional discovery needed and its purposes. Motions for extension of discovery time are treated with special disfavor if filed after the discovery completion date and will normally be granted only if it clearly appears that any scheduled trial will not have to be continued as a result of the extension.

## II. DEPOSITIONS

### A. General Policy And Practice.

(1) *Scheduling.* A courteous lawyer is normally expected to accommodate the schedules of opposing lawyers. In doing so, the attorney can either pre-arrange a deposition, or notice the deposition while at the same time indicating a willingness to be reasonable about any necessary rescheduling. Local General Rule 26.1.J. requires at least five (5) working days' notice in writing to every other party and to the deponent (if a non-party) for a deposition in this State, and ten (10) working days' notice for an out-of-state deposition. Noncompliance obviates the need for protective Order.

Notwithstanding the foregoing, in accordance with Rule FED.R.CIV.P. 32(a)(3), no deposition shall be used against a party who, having received less than eleven (11) calendar days' notice of a deposition as computed under FED.R.CIV.P. Rule 6(a), has promptly upon receiving such notice filed a motion for protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

(2) *Persons Who May Attend Depositions.* As a general proposition, pretrial discovery in civil matters must take place in public unless compelling reasons exist for denying the public access to the proceedings. Each lawyer may ordinarily be accompanied at the deposition by one representative of each client and one or more experts. If witness sequestration is desired, a court order entered prior to the deposition is required. Lawyers may also be accompanied by records custodians, paralegals, secretaries, and the like, even though they may be called as technical witnesses on such questions as chain of custody or the foundation for the business record rule, or other technical matters. While more than one lawyer for each party may attend, only one should question the witness or make objections, absent contrary agreement.

(3) *Persons Designated and Produced in Response to Rule 30(b)(6) Notice.* In responding to a properly drawn notice for the taking of a deposition pursuant to FED.R.CIV.P. 30(b)(6), it is the duty and responsibility of the organization to whom such notice is given, and its counsel, to designate and produce at the deposition those witnesses who shall testify, concerning subjects or matters known or reasonably available to the organization as described in the notice. It is inappropriate and improper in such circumstances to produce a single witness who only has knowledge concerning one or more of the topics specified in the notice but not all of them.

### B. Objections.

(1) *Objections to the Form of Questions.* FED.R.CIV.P. 32(d)(3)(B) provides that an objection to the form of a question is waived unless made during the deposition. Many lawyers make such objections simply by stating "I object to the form of the question." This normally

suffices because it is usually apparent that the objection is directed to "leading" or to an insufficient or inaccurate foundation. The interrogating lawyer has a right to ask the objecting party to be more specific in his objection, however, so that the problem with the question, if any, can be understood and, if possible, cured, as the rule contemplates.

(2) *Instruction that a Witness Not Answer.* Instructing a witness not to answer is greatly disfavored by the Court, and is a practice which one should use only in an appropriate extraordinary situation, usually involving privilege (see the section of this Handbook concerning the invocation of privilege below). Rule 30(d)(1) of the Federal Rules of Civil Procedure set forth the permissible circumstances for such an instruction. In most circumstances, if a question is objectionable, a lawyer should simply object in the proper manner and allow the answer to be given subject to the objection. A lawyer who improperly instructs a witness not to answer runs a serious risk that the lawyer and/or the client may be subject to substantial monetary sanctions, including the cost of reconvening the deposition (travel expenses, attorneys' fees, court reporter fees, witness fees, and the like) in order to obtain the answers to such questions. See also Local General Rule 30.1.

(3) *Other Restrictions on Deposition Conduct.* FED.R.CIV.P. 30(d)(1) and Local General Rule 30.1, particularly the local rule, focus on proper and improper conduct by counsel at depositions. Counsel should not attempt to prompt answers by the use of "suggestive", "argumentative," or "speaking" objections; off the record conferences between counsel and witness are inappropriate; instructions not to answer are limited; and witnesses should be treated with courtesy. Those conducting depositions under the rules of this district should take careful note of the provisions of Local General Rule 30.1, entitled "Sanctions for Abusive Deposition Conduct."

**C. Production Of Documents At Depositions.**

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

(2) *Option to Adjourn or Proceed.* If requested documents which are discoverable are not produced prior to the deposition, the party noticing the deposition may either adjourn the deposition until after such documents are produced or, may proceed without waiving the right to have access to the documents before finally concluding the deposition.

(3) *Subpoena for Deposition Duces Tecum.* A non-party can be compelled to make discovery in an action only by means of a Rule 45 subpoena. Parties to litigation open themselves to broad discovery practices encompassed in FED.R.CIV.P. 30(b)(5) and 34.

FED.R.CIV.P. 45(a) states in relevant part that:

> (1) Every subpoena shall (A) state the name of the court from which it is issued; and (B) state the title of the action, the name of the court in which it is pending, and its civil action number; and . . . (2). . . A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken.

Consequently, a subpoena for the deposition of a non-party, in a lawsuit pending in the Southern District of Florida, that is scheduled to take place in the

Northern District of Florida, should be headed with a Northern District of Florida caption.

Additionally, if the non-party recipient of a Rule 45(a)(2) subpoena for deposition or production of documents, seeks relief from court pertaining to the subpoena, the motion seeking such relief must be filed in the district in which the deposition is to take place. Leaving no doubt about the drafter's intentions when revising the rule, the Commentary to Rule 45(a)(2), states as follows:

> Pursuant to Paragraph (a)(2), a subpoena for a deposition must still issue from the court in which the deposition or production would be compelled. Accordingly, a motion to quash such a subpoena if it overbears the limits of the subpoena power must, as under the previous rule, be presented to the court for the district in which the deposition would occur.

Commentary to 1991 Amendment to FED.R.CIV.P. 45.

**D. Non-Stenographic Recording Of Depositions.**

(1) *Videotape Depositions.* Videotape depositions and recordation by other non-stenographic means may be taken by parties without first having to obtain permission from the Court or agreement from counsel. FED.R.CIV.P. 30(b)(2). With prior notice to the deponent and other parties, any party may designate another method to record the deponent=s testimony in addition to the method specified by the person taking the deposition and the notice or cross-notice of deposition shall state the method by which the testimony shall be recorded. FED.R.CIV.P. 30(b)(3).

The following procedures are commonly followed when the deposition is recorded by a nonstenographic means:

a. If the deposition of the witness is recorded on videotape or other non-stenographic means, the testimony of the witness does not have to be recorded by a certified stenographic reporter and transcribed in the usual manner, unless such transcripts are to be offered to the Court. See FED.R.CIV.P. 30(b) and 32(c).

b. Prior to the taking of any deposition, the witness shall be first duly sworn by an officer authorized to administer oaths, before whom the deposition is being taken. If the deposition is recorded other than stenographically, the officer designated by FED.R.CIV.P. 28, shall state on the record (a) the officer's name and business address, (b) the date, time and place of the deposition, (c) the deponent's name, (d) administer the oath, and (e) identify all parties present. Items (a) through (c) must be repeated at the beginning of each unit of recorded tape or other recording medium. See FED.R.CIV.P. 30 (b)(4).

c. If any objections are made, the objections shall be ruled upon by the Court on the basis of the stenographic transcript, and if any questions or answers are stricken by the Court, the videotape and sound recording must be edited to reflect the deletions so that it will conform in all respects to the Court's rulings.

d. The videographer shall certify the correctness and completeness of the recording, orally and visually at the conclusion of the deposition, just as would the stenographic reporter certifying a typed record of a deposition.

e. Copies of the videotape recording shall be made at the expense of any parties requesting them.

f. The original of the videotape recording shall be kept by the party requesting the videotape deposition

and shall be preserved intact. Therefore, any editing to conform with Court rulings shall be effected through use of a copy of the original videotape recording, which shall be retained by the videographer/court reporter.

g. The party presenting the videotape deposition at trial is responsible for the expeditious and efficient presentation of the testimony and is expected to see that it conforms in every respect possible to the usual procedure for the presentation of witnesses. See FED.R.CIV.P. 32(a)(3).

h. A transcript of the deposition (if any) as filed or modified (as the case may be) shall constitute the official record of the deposition for purposes of trial and appeal.

i. Any other party may, if it so desires, arrange for its own private stenographic transcription or electronic recording at its own expense, which expense will not be taxed as court costs except upon showing of some extraordinary reason.

j. Some of the procedures described herein are in addition to, not in lieu of, the portions of the Federal Rules of Civil Procedure pertaining to the recordation, transcription, signing, certification, and filing of written depositions.

(2) *Telephone Depositions.* Telephone depositions or depositions by other remote electronic means may be taken either by stipulation or on motion and order. A deposition is deemed taken in the district and at the place where the deponent is to answer. FED.R.CIV.P. 30(b)(7).

a. The deponent must swear or affirm an oath before a person authorized to administer oaths in that district and at the place where the deposition is taken, i.e. the witness may not be sworn telephonically.

b. Speakers must identify themselves whenever necessary for clarity of the record.

c. The court reporter should be at the deponent's location.

**E. Depositions Of Experts.** A party may depose any person who has been identified as an expert whose opinions may be presented at trial. FED.R.CIV.P. 26(b)(4)(A). However, Local General Rule 26.1.F.(1)(c) provides that an expert's deposition may not be conducted until after the expert summary or report required by Local General Rule 16.1.K. is provided.

**F. Sanctions.** Local General Rule 30.1 prohibits abusive conduct during deposition and provides both monetary and procedural sanctions for such conduct. Prohibited conduct includes "coaching" of witness, improper instructions not to answer, and off-the-record conferences except for the purpose of determining whether to assert a privilege.

## III. PRODUCTION OF DOCUMENTS

**A. Preparation And Interpretation Of Requests For Documents.**

(1) *Formulating Requests for Documents.* A request for documents, whether a request for production or a subpoena duces tecum, should be clear, concise and reasonably particularized. For example, a request for "each and every document supporting your claim" is objectionably broad in most cases.

(2) *Use of Form Requests.* Attorneys requesting documents shall review any form request or subpoena to ascertain that it is applicable to the facts and contentions of the particular case. A "boilerplate" request or subpoena not

directed to the facts of the particular case should not be used.

(3) *Reading and Interpreting Requests for Documents.* A request for documents or subpoena duces tecum shall be read or interpreted reasonably in the recognition that the attorney serving it generally does not have knowledge of the documents being sought and the attorney receiving the request or subpoena generally does have such knowledge or can obtain it from the client. Counsel should be mindful in producing documents that such things as notes, clips, and other attachments to documents as kept in the normal course of business should also be produced.

(4) *Oral Requests for Production of Documents.* As a practical matter, many lawyers produce or exchange documents upon informal request, often confirmed by letter. Naturally, a lawyer's word once given, that a document will be produced, is the lawyer's bond and should be timely kept. Requests for production of documents may be made on the record at depositions. Depending upon the form in which they are made, however, informal requests may not support a motion to compel.

(5) *Objections.* Absent compelling circumstances, failure to assert objections to a request for production within the time period for a response constitutes a waiver of grounds for objection, and will preclude a party from asserting the objection in a response to a motion to compel. Objections should be specific, not generalized. See Local General Rule 26.1.G.6.a.

**B. Procedures Governing Manner Of Production.**

(1) *Production of Documents.* When documents are being produced (unless the case is a massive one) the following general guidelines, which may be varied to suit the needs of each case, are normally followed:

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

b. Manner of Production. All of the documents should be made available simultaneously, and the inspecting attorney or paralegal can determine the order in which to look at the documents. While the inspection is in progress, the inspecting person shall also have the right to review again any documents which have already been examined during the inspection.

The producing party has an obligation to explain the general scheme of record-keeping to the inspecting party. The objective is to acquaint the inspecting party generally with how and where the documents are maintained. The documents should be identified with specific paragraphs of a request for production where practicable, unless the producing party exercises its option under FED.R.CIV.P. 34(b) to produce documents as they are kept in the usual course of business. Generally, when documents are produced individually, each specific document should be identified with a paragraph of the request. When documents are produced in categories or in bulk, some reasonable effort should be made to identify certain groups of the produced documents with particular paragraphs of the request or to provide some meaningful description of the documents produced. The producing party is not obligated to rearrange or reorganize the documents.

Obviously, whatever comfort and normal trappings of civilization that are reasonably available should be offered to the inspecting party.

c. Listing or Marking. Local General Rule 16.1.B mandates that documents produced at the initial Scheduling Conference "must either be marked or be accompanied by an accurate list." The parties also may want to use some means of listing or marking all

documents produced in the litigation so that produced documents can later be differentiated from those which have not been produced. For a relatively few documents, a listing prepared by the inspecting attorney (which should be exchanged with opposing counsel) may be appropriate; when more documents are involved, the inspecting attorney may want to stamp or mark each document with a sequential number. The producing party should allow such stamping to be done so long as marking the document does not materially interfere with the intended use of the document. Such documents which would be materially altered by stamping (e.g., promissory notes) should be listed rather than marked.

d. Copying. "Copies" includes photocopies and electronic imaging. While copies are often prepared by the producing party for the inspecting party as a matter of convenience or accommodation, the inspecting party has the right to insist on seeing originals and the right to make direct photocopies or images from the originals.

The copying of documents will generally be the responsibility of the inspecting party, but the producing party must render reasonable assistance and cooperation. In the routine case with a manageable number of documents the producing party should allow its personnel and its copying or imaging equipment to be used with the understanding that the inspecting party will pay reasonable charges. The best procedure is for documents to be delivered to an independent copying service, which can number and, if desired by a party, image the documents at the time photocopies are made. The cost of this procedure shall be borne by the party seeking the discovery, but if an extra copy is made for the party producing the documents, that party shall bear that portion of the cost.

e. Later Inspection. Whether the inspecting party may inspect the documents again at a later date (after having completed the entire initial inspection) must be determined on a case-by-case basis.

f. Privilege. Objections to the production of documents based on generalized claims of privilege will be rejected. A claim of privilege must be supported by a statement of particulars sufficient to enable the Court to assess its validity. For a more detailed discussion of the invocation of privilege see the section of this handbook dealing with privilege.

g. General. In most situations the lawyers should be able to reach agreement based upon considerations of reasonableness, convenience and common sense. Since the Discovery Rules contemplate that the lawyers and parties will act reasonably in carrying out the objectives of the Rules, the Court can be expected to deal sternly with a lawyer or party who acts unreasonably to thwart these objectives.

## IV. INTERROGATORIES

### A. Preparing And Answering Interrogatories.

(1) *Informal Requests.* Whenever possible, counsel should try to exchange information informally. The results of such exchanges, to the extent relevant, may then be made of record by requests for admissions.

(2) *Scope of Interrogatories.* The Court will be guided in each case by the limitations stated in FED.R.CIV.P. 26(b)(1) and Local General Rule 26.1.G, Southern District of Florida. Interrogatories initially are restricted to those seeking names of witnesses with knowledge or information relevant to the subject matter of the action, the nature and substance of such knowledge, the computation of each category of damage alleged and the existence, custodian, location and general description of relevant documents, including pertinent insurance

agreements, other physical evidence, or information of a similar nature, and the names of expert witnesses and the substance of their opinions. Counsel's signature on interrogatories constitutes a certification of compliance with those limitations. See FED.R.CIV.P. 26(g)(2). Interrogatories should be brief, simple, particularized and capable of being understood by jurors when read in conjunction with the answer.

(3) *Responses.* FED.R.CIV.P. 33(a) requires the respondent to furnish whatever information is available, even if other requested information is lacking. When in doubt about the meaning of an interrogatory, the responding party should give it a reasonable interpretation (which may be specified in the response) and answer it so as to disclose rather than deny information. If an answer is made by reference to a document, it should be attached or identified and made available for inspection. See FED.R.CIV.P. 33(d).

(4) *Objections.* Absent compelling circumstances, failure to assert objections to an interrogatory within the time period for answers constitutes a waiver and will preclude a party from asserting the objection in a response to a motion to compel. Objections should be specific, not generalized.

(5) *Objections Based on Privilege.* Objections based on generalized claims of privilege will be rejected. A claim of privilege must be supported by a statement of particulars sufficient to enable the Court to assess its validity. For a more detailed discussion of the invocation of privilege, see the section of this handbook dealing with privilege.

(6) *Number of Interrogatories.* Local General Rule 26.1.G.1, Southern District of Florida, does not limit the number of interrogatories that may be propounded. If a party considers the number or breadth of interrogatories to be burdensome in the context of a particular case, that party may move for a protective order.

(7) *Form Interrogatories.* There are certain kinds of cases which lend themselves to interrogatories which may be markedly similar from case to case, such as employment discrimination and maritime cargo damage suits, for example, or diversity actions in which form interrogatories have been approved by state law. Aside from such cases the use of "form" interrogatories is ordinarily inappropriate. Interrogatories should be carefully reviewed to make certain that they are tailored to the individual case.

(8) *Reference to Deposition or Document.* Since a party is entitled to discovery both by deposition and interrogatories, it is ordinarily insufficient to answer an interrogatory by saying something such as "see deposition of Jane Smith," or "see insurance claim." There are a number of reasons for this. For example, a corporation may be required to give its official corporate response even though one of its high-ranking officers has been deposed, since the testimony of an officer may not necessarily represent the full corporate answer. Similarly, a reference to a single document is not necessarily a full answer, and the information in the document -- unlike the interrogatory answer -- is not ordinarily set forth under oath.

In some circumstances, it may be appropriate for a party to answer a complex interrogatory by saying something such as "Acme Roofing Company adopts as its answer to this interrogatory the deposition testimony of Jane Smith, its President, shown on pages 127-135 of the deposition transcript." When a party has already fully answered an interrogatory question in the course of a previous deposition, the deposition may be used carefully and in good faith. However, counsel are reminded that for purposes of discovery sanctions, "an evasive or incomplete answer is to be treated as a failure to answer." See FED.R.CIV.P. 37(a)(3).

(9) *"List All Documents."* Interrogatories should be reasonably particularized. For example, an interrogatory such as "Identify each and every document upon which you rely in support of your claim in Count Two" may well be objectionably broad in an antitrust case, though it may be appropriate in a suit upon a note or under the Truth-in-Lending Act. While there is no bright-line test, common sense and good faith usually suggest whether such a question is proper.

(10) *Federal Rule of Civil Procedure 33(d).* FED.R.CIV.P. 33(d) allows a party in very limited circumstances to produce documents in lieu of answering interrogatories. To avoid abuses of Rule 33(d), the party wishing to respond to interrogatories in the manner contemplated by Rule 33(d) should observe the following practice:

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

2. Make its records available in a reasonable manner (i.e., with tables, chairs, lighting, air conditioning or heat if possible, and the like) during normal business hours, or, in lieu of agreement on that, from 89:00 a.m. to 5:00 p.m., Monday through Friday.

3. Make available any computerized information or summaries thereof which it has.

4. Provide any relevant compilations, abstracts or summaries either in its custody or reasonably obtainable by it, not prepared in anticipation of litigation. If it has any documents even arguably subject to this clause but which it declines to produce for some reason, it shall call the circumstances to the attention of the parties who may move to compel.

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

(11) *Answers to Expert Interrogatories.* The Southern District of Florida has adopted a formal procedure by which expert witness reports and summaries are exchanged 90 days before the pretrial conference (or the calendar call, if no pretrial conference is to be held.) See Local General Rule 16.1.K. No deposition of an expert may be taken until the expert summary or report has been provided. See Local General Rule 26.1.F.1.c. However, initial interrogatories seeking the names of expert witnesses and the substance of their opinions may still be served. See Local General Rule 26.1.G.2.

## V. PRIVILEGE

### A. Invocation Of Privilege During Deposition.

(1) *Procedure for Invocation of Privilege.* Where a claim of privilege is asserted during a deposition and information is not provided on the basis of such assertion:

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

(b) The following information shall be provided during the deposition at the time the privilege is asserted, if sought, unless divulgence of such information would cause disclosure of privileged

information:

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

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

(2) general subject matter of the document;

(3) the date of the document;

(4) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author, addressee, and any other recipient of the document, and, where not apparent, the relationship of the author, addressee, and any other recipient to each other;

(ii) For oral communications:

(1) 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 making the communication;

(2) the date and place of communication;

(3) the general subject matter of the communication.

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

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

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

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

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

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

**B. Invocation Of Privilege In Other Discovery**. Where a claim of privilege is asserted in responding or objecting to other discovery devices, including interrogatories, requests for documents and requests for admissions, and information is not provided on the basis of such assertion, the ground rules set forth above shall also apply. Local General Rule 26.1.G.6(b), Southern District of Florida. The attorney seeking disclosure of the information withheld may, for the purpose of determining whether to move to compel disclosure, serve interrogatories or notice the depositions of appropriate witnesses to establish other relevant information concerning the assertion of the privilege, including (a) the applicability of the privilege being asserted, (b) circumstances which may constitute an exception to the assertion of the privilege, (c) circumstances which may result in the privilege having been waived, and (d) circumstances which may overcome a claim of qualified privilege.

**C. Exception For Fifth Amendment Privileges**. Nothing in this section is intended to urge or suggest that a party or witness should provide information that might waive the constitutional privilege against self-incrimination. Failure to follow the procedures set forth in this section shall not be deemed to effect a waiver of any such privilege.

## VI. MOTIONS TO COMPEL OR FOR A PROTECTIVE ORDER

A. *Reference to Local General Rules 26.1.H and 26.1.I.* The procedures and guidelines governing the filing of motions to compel or for protective order are set forth in Local General Rule 26.1, Southern District of Florida. Prior to filing such a motion, counsel is required to confer with opposing counsel and both must make a good faith effort to resolve the dispute by agreement. If no conference occurs, counsel for movant must specify in the required certificate what reasonable efforts were made to contact opposing counsel.

B. *Effect of Filing a Motion for a Protective Order.* In addition to the procedures and guidelines governing the filing of motions for a protective order, counsel should be aware that the mere filing of a motion for a protective order does not, absent an order of the Court granting the motion, excuse the moving party from complying with the discovery requested or scheduled. For example, a motion for protective order will not prevent a deposition from occurring; only a court order granting the motion will accomplish this.